LAWYERS AND THE "MYTH OF RIGHTS" IN CIVIL RIGHTS AND POVERTY PRACTICE

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I. INTRODUCTION

Are civil rights and poverty lawyers single-minded and politically naive rights crusaders, as critics from the left sometimes argue? Are they the radical left brigade of American politics, as critics from the right often charge? These empirical questions lie at the heart of controversies about the limitations of litigation as a vehicle for social reform and about the future of legal services for the poor. Drawing upon empirical research on civil rights and poverty lawyers, this article asserts that neither characterization of civil rights and poverty lawyers is accurate. One might better describe the lawyers in this study as engaged political strategists than as myopic technicians. However, their work is more full-service lawyering than revolutionary politics. Activist lawyers recently have drawn fire from all directions.[1] Two persistent criticisms from the left are that lawyers fail to understand, or refuse to acknowledge, the limitations of litigation and that they divert resources from more promising strategies. One early and comprehensive critique of legal rights activities, Stuart Scheingold's *The Politics of Rights*

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[1] Much of the early commentary on public interest litigation was favorable. *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 192-221 (1978); RICHARD KLUGER, SIMPLE JUSTICE (1976); JOSEPH SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971); FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959); Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession — The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Jonathan Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCIENCE REV. 50 (1976); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); John Denvir, *Toward a Political Theory of Public Interest Law Litigation*, 54 N. C. L. REV. 1133 (1976); Owen M. Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); George W. Spicer, *The Federal Judiciary and Political Change in the South*, 26 J. POL. 154 (1964); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

(1974), argued that activist lawyers embrace a simplistic view of the interplay between litigation and social movements.[2] He asserted that lawyers generally adopt the "myth of rights," a view that judicial declarations directly produce change, rather than a more realistic "politics of rights" orientation, according to which judgments are merely political assets to be used strategically in other arenas.[3] More recently, Gerald Rosenberg has asserted that courts "act as 'flypaper' for social reformers who succumb to the 'lure of litigation' " rather than pursuing more effective legislative alternatives.[4] This attraction to litigation is problematic, critics argue, because litigation discourages client initiatives,[5] di-

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[2] STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (1974) ("Legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach to a complex social process — an approach that grossly exaggerates the role that lawyers and litigation can play in a strategy for change"). For other similar arguments, *see* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 3 (1992)[hereinafter LOPEZ, REBELLIOUS LAWYERING] (arguing that activist lawyers tend to rely uncritically on familiar legal approaches, particularly litigation); ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 213 (1982) ("Contemporary environmentalists . . . turn to the courts almost reflexively"); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 110 (1995) (civil rights litigators "believe the myth of their own success").

[3] *See* SCHEINGOLD, *supra* note 2, at 6-7 ("The political approach . . . prompts us to approach rights as skeptics. Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated goals of public policy and, on the other, as political resources of unknown value in the hands of those who want to alter the course of public policy. The direct linking of rights, remedies, and change that characterizes the *myth of rights* must, in sum, be exchanged for a more complex framework, the *politics of rights*, which takes into account the contingent character of rights in the American system.").

[4] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 341 (1991); *see also* HANDLER, *supra* note 1, at 30 (arguing that public interest lawyers generally are not prepared to address long-term and complex problems through lobbying).

[5] *See* Anthony Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) (arguing that lawyers encourage poor clients to rely passively on lawyers)[hereinafter Alfieri, *Antinomies of Poverty Law*]; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (arguing that lawyers' interpretive practices cast clients as powerless and dependent)[hereinafter Alfieri, *Reconstructive Poverty Law Practice*]; Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991) (calling for "an ethic of resistance" to lawyers' dominance in poverty law practice); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989) (describing one civil rights lawyer's "rebellious" practice, which emphasized the clients' skills and knowledge); Lucie E. White, *Mobilization on the Margins of a Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 545 (1987-88) (arguing that welfare lawyers typically "subordinate their clients' perceptions of need to the lawyers' own agendas for reform"); Lucie E. White, *Subordination, Rhetorical Sur-*

verts resources away from more effective strategies,[6] and leaves larger social change undone.[7] From the right, critics often assert that civil rights and poverty

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vival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1 (1990) (demonstrating how legal institutions can oppress already disadvantaged clients); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699. *See generally* LOPEZ, *supra* note 2.

[6] *See, e.g.*, MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 200 (1986) ("[L]egal tactics not only absorb scarce resources that could be used for popular mobilization . . [but also] make it difficult to develop broadly based, multi-issue grass-roots associations of sustained allegiance"); ROSENBERG, *supra* note 4, at 339 ("[N]ot only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts."); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 85 (1993) ("[M]inorities could . . . choose to forego a reliance on judicial review . . . and concentrate their efforts to advance minority interests in overtly political branches of governments"); WASBY, *supra* note 2, at 110 (civil rights organizations focus on "issues like school desegregation that are more nearly subject to remedy by litigation, instead of attacking redistributive problems which may be more important for the people they believe they serve"); White, *supra* note 5, at 742 ("Litigation may falsely raise in the community the expectation that appeal to 'the law' can somehow give it power" and "the community may put its energy into litigation instead of into the much more difficult work of organizing itself"); *see also* LOPEZ, *supra* note 2, at 3 (the legal aid and civil rights lawyers he observed in East Los Angeles in the sixties were inclined to pursue litigation at the expense of community organizing and public education); Derrick Bell, *The Supreme Court 1984 Term Foreword— The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 24 (1986) ("[R]eal progress can come only through tactics other than litigation"); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 384 n. 182 (1978) ("Unless public interest lawyers find ways of pursuing shorter term legal gains without encouraging dependency and blunting both individual and organized client initiatives to deal with their own problems, they will substantially undermine the possibility of the sorts of political activity essential to any long term resolution of the inequities that burden their clients"); Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 5, 9 (1985) ("[L]egal means of resolving problems should be avoided whenever possible, for they tend to reinforce the client's experience of powerlessness.").

[7] *See, e.g.*, Roy L. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 879 (1988); Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Alan D. Freeman, *Anti-Discrimination Law: A Critical Review*, in THE POLITICS OF LAW 96 (David Kairys ed., 1983); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of*

lawyers are all too politically sophisticated and engaged and that they pursue systemic reform at the expense of providing basic legal services to poor individuals.[8] Some argue that lawyers inappropriately allocate scarce legal resources to further their own conceptions of the general welfare rather than poor people's self-defined needs.[9]

Several recent empirical studies of public interest lawyers address some of these charges from the left; they question whether lawyers actually expect judicial decisions to produce social change and whether they pursue litigation at the expense of other strategies. In his study of the pay equity movement, Michael McCann observed that litigation sometimes bolstered clients' organizing efforts and that movement lawyers often used litigation strategically in combination

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Legal Change, 9 LAW & SOC'Y REV. 95, 123 (1974) ("rules tend to favor older, culturally dominant interests").

[8] *See, e.g.*, 141 CONG. REC. S14524 (1995) (daily ed.) (statement of Sen. Inhofe) (the Legal Services Corporation "has turned into an agency that is trying to reshape the political and legal and social fabric of America"); *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before the Subcomm. on Commerce, Justice, State and Judiciary of the House Appropriations Comm.*, 104th Cong. pt.9, 129, 130 (1996) (statement of Rep. Dan Burton) (LSC lawyers are pursuing a "radical Agenda"); CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES (1992) (arguing that legal services programs should focus exclusively on providing legal services to poor individuals and eschew all law reform goals); Richard Brookhiser, *Another Round, Legal Services Corp.*, 35 NAT'L REV. 36 (1983) (quoting James Kilpatrick as observing that the organization "is heavily influenced by ideological activists" who "see their role as a remaking of society"); Rael Jean Isaac, *War on the Poor: Criticism of the Legal Services Corporation*, 47 NAT'L REV. 32, 32 (1995) (legal services programs "are designed to implement the philosophy of an elite corps of Sixties-style radicals (Green Berets of the Left, as one critic has termed them) who use the poor as tools, and then leave them behind as victims"); Stephen Moore, *Not-so-radical Republicans: Why the GOP Budget Failed — and How it Might Succeed*, 30 REASON 24 (July 1998) ("The Legal Services Corporation still receives $200 million a year to finance leftist legal activists dedicated to undermining the free market agenda"); Hilary Stout, *Legal Services, The Agency that Wouldn't Die, Looks Like it May Survive the Age of Gingrich*, WALL ST. J., July 21, 1995, at A12 (quoting Rep. Robert Dornan: "Legal services functions like a queen bee who sends out little liberal worker bees everywhere to drive the radical agenda in this country").

Donald Horowitz and Nathan Glazer have argued that activist lawyers lure judges into policy making roles for which they are ill-suited and unaccountable. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104, 119-21 (1975); *see also* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 718-23 (1978) (arguing that separation of powers principles require federal courts to exercise restraint in ordering relief against state officials).

[9] *See, e.g.*, Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982) (the poor have rights to access to the courts, which should take priority over social welfare goals).

with other tactics.[10] McCann and Helena Silverstein found that lawyers in the animal rights and pay equity movements contributed to movement reform goals and used the legal system cautiously.[11] Susan Olson showed how clients in the disability rights movement retained control over strategy and employed a model of "flexible lawyering" involving a variety of tactics.[12]

This Article considers another category of cause lawyers: civil rights and poverty lawyers. Without assessing the general validity of the criticisms outlined above,[13] this article considers just two questions that bear on these critiques: (1) What strategies did these lawyers pursue?; and (2) What did they believe they were accomplishing? Drawing on sixty-nine interviews, this article concludes that the lawyers in this study were more politically sophisticated than their detractors from the left often suggest and perhaps as politically engaged as their critics from the right fear. This article does not attempt to evaluate the efficacy of the strategies these lawyers selected. It examines only lawyers' reports about the tasks they performed for clients and their perceptions about the value of that work and how it related to their clients' goals.

Part II of this Article describes the research design. Part III assesses how litigation relates to other tactics that lawyers and their clients employed and what these lawyers believed their work accomplished. It shows that lawyers employed litigation tactically while recognizing its limitations. It also demonstrates that these lawyers evaluated their work according to whether clients achieved beneficial results (both direct and indirect) rather than whether they obtained favorable precedents. Part IV suggests that lawyers' tactical choices may reflect the institutional attributes of the practice settings in which they worked as well as their views about the efficacy of alternative strategies.

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[10] *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

[11] Helena Silverstein & Michael W. McCann, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL AND PROFESSIONAL COMMITMENTS (Austin Sarat & Stuart A. Scheingold eds., 1998).

[12] SUSAN OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS (1984) (arguing that a new, more effective style of public interest litigation has emerged in recent years featuring greater client involvement, advocacy in nonjudicial political arenas, and a focus on immediate remedies rather constitutional precedents); *see also* Neal Milner, *Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups*, 8 LAW & POL'Y 105 (1986) (showing how other ideologies competed with the myth of rights among members of the mental patient liberation movement).

[13] It is possible, for example, that criticisms that might fairly have been leveled against civil rights and poverty lawyers of the seventies and eighties are no longer accurate today. Activist lawyers may have become less invested in achieving new judicial declarations of rights as courts have become less willing to issue them. *See infra* note 166. Consequently, appellate rule change may now constitute a practice specialty within poverty and civil rights practice.

II. THE RESEARCH DESIGN

The study consisted of interviews with sixty-nine lawyers in Chicago in 1993 and 1994.[14] I derived the sample by asking the directors of thirty-one organizations that focused on civil rights and urban poverty issues to identify lawyers with whom they worked. From that group of 103 lawyers, I randomly selected eighty, sixty-nine of whom participated in interviews. These lawyers worked in a variety of practice settings, including legal services programs, civil rights advocacy organizations, law school clinics, small firms that focused primarily on civil rights work, grass-roots organizations, private firms not primarily devoted to civil rights, and government agencies.[15] These lawyers' work included various types of individual service and social reform advocacy, legislative and administrative lobbying, and business planning work.[16] Their clients were primarily individuals, organizations, and plaintiff classes.[17]

In semi-structured interviews, I asked each of the lawyers to discuss three matters on which they had worked in the past two years. With respect to each of these matters, I asked the lawyers to describe the type of client, the tasks they performed for the client, their roles in selecting strategies, factors influencing their strategy choices, sources of payment for the work, whether their clients had achieved their objectives, and what they believed the work had accomplished.[18] The interviews lasted from fifty minutes to two hours.

Several limitations of this study prevent it from supporting broad claims about civil rights and poverty lawyers' strategies and sophistication.[19] First, it draws

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[14] The gender and racial composition of the sample is shown in tbs. 1-2, app. at 64.

[15] *See infra* tbl. 3, app. at 64.

[16] *See infra* tbl. 5, app. at 65.

[17] *See infra* tbl. 4, app. at 65.

[18] Elsewhere I have used data from this study to evaluate claims that civil rights and poverty lawyers dominate their clients. *See* Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996). I also have described the distinctive role that lawyers play in planning projects: that is, projects where lawyers advise, negotiate, and structure arrangements unrelated to any existing claim or dispute. Ann Southworth, *Business Planning for the Destitute? Lawyers As Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121.

[19] For other empirical research on the work and aspirations of civil rights and poverty lawyers, see JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION (1982) (tracing the evolution of ideas of equal justice in Chicago's legal assistance organizations); MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 145-63 (1994) (studying practice norms in one small firm specializing in civil rights plaintiffs' litigation and criminal defense work); EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 144-74 (1986) (describing the working lives of lawyers in two Legal Services programs); WASBY, *supra* note 2, at xvii (drawing from interviews with forty-one lawyers for civil rights organizations to examine unplanned aspects of civil rights litigation); Mark Kessler, *The Politics of Legal Representation: The Influence of Local Politics on the Behavior of Poverty Lawyers*, 8 LAW & POL'Y 149 (1986) (reporting on interviews with 9 legal services lawyers, results of a questionnaire, and interviews

exclusively from lawyers' own reports and thus offers only a partial account of their work and views. The lawyers' faulty perception or memory or desire to influence the politics of funding for legal services to the poor may have distorted their answers.[20] Even as to the primary issue addressed in this article — how lawyers viewed their work — the lawyers may have shaped their answers to conform to what they thought they should say rather than what they actually believed. Second, I did not attempt to separate the work of social reform activists and more service oriented lawyers because that distinction is so elusive. For example, lawyers whose clients were individuals sometimes indicated that they believed that their work would benefit large groups of people. Other lawyers whose clients were groups or organizations expressed no social reform commitment at all.[21] Yet one might expect lawyers' strategy choices and assessments of the value of their work to vary according to whether they sought primarily to serve individual clients' needs or to empower groups of poor people.[22] Third, my

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with 16 individuals representing organizations that interacted with the program to assess political influence on case selection and strategy); John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in SARAT & SCHEINGOLD, *supra* note 11, at 181 (describing the work of 29 lawyers in Pittsburgh); Carrie Menkel-Meadow & Robert Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL'Y Q. 237 (1983) (examining resource allocation decisions by 23 legal services lawyers); Stuart A. Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in SARAT & SCHEINGOLD, *supra* note 11, at 118 (studying twenty-five Seattle lawyers who identify with the National Lawyers Guild); Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in SCHEINGOLD & SARAT, *supra* note 11, at 201 (analyzing the work and ideologies of "socially committed" lawyers in several small private firms).

[20] Legal services lawyers in the study, for example, might have been reluctant to report any work that would violate regulatory and statutory restrictions. *See infra* note 48. That possibility, however, suggests that this article may underestimate rather than overestimate the range of strategies pursued by lawyers in this study.

[21] For similar reasons, Paul Burstein included individual cases as well as class actions and suits on behalf of organizations in his study of how minorities and women use federal equal opportunity laws in their pursuit of equal treatment. *See* Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1208 (1991).

[22] It was possible to identify two categories of matters in which lawyers clearly hoped to benefit large groups: class actions and lawsuits on behalf of membership or advocacy organizations. *See* section IV below.

For sources exploring the tensions between individual service and collective approaches, *see* Breger, *supra* note 9; Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HAST. L.J. 947 (1992). For attempts to reconcile these approaches, see Robert D. Dinerstein, *Meditation on the Theoretics of Practice*, 43 HAST. L.J. 971, 987-88 (1992); Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1 (1984); Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123, 134-37 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*,

questions about what lawyers believed their work had accomplished did not require lawyers to evaluate the various components of their work independently. As to "multi-pronged" strategies, therefore, I generally could not discern the relative importance of the different strategies employed. Finally, this study focuses on only one city with its own particular history.[23] Conclusions one might fairly draw about Chicago's civil rights and poverty lawyers might not apply to such lawyers in other cities.[24]

Despite these limitations, however, the interview data described in this Article should help us understand civil rights and poverty lawyers' roles and aspirations. Even if these lawyers' descriptions of the tasks they performed for their clients are not unassailable proof of what they actually did, they are at least some evidence bearing on the charge that activist lawyers and their clients emphasize litigation and forego other strategies. Moreover, these lawyers' and observations about their work and accomplishments may help explain when and why lawyers and clients employ litigation. In addition, the data may reveal how their strategy choices relate, if at all, to their understanding of client objectives. Lawyers' own accounts of their work may be the best available information about whether lawyers adopt the "myth of rights" or the "politics of rights" perspective — whether they expect favorable judicial decisions to translate directly into beneficial social change, or whether they expect judicial decisions to operate as political assets in other arenas. Finally, lawyers' own assessments of their work provide a different, and perhaps more relevant, benchmark against which to measure lawyers' efficacy than do the inflated public claims that lawyers sometimes

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37 U.C.L.A. L. REV. 1101 (1990); *see also* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L. J. 1529, 1538-39 (1995) (arguing against any distinction between service and impact work and insisting that "literally every Legal Services case can be of service to identified clients *and* contribute to an attack on situations or practices that disadvantage a larger number of poor persons").

[23] For background information on the history of civil rights in Chicago, *see* ALAN B. ANDERSON & GEORGE W. PICKERING, CONFRONTING THE COLOR LINE: THE BROKEN PROMISE OF THE CIVIL RIGHTS MOVEMENT IN CHICAGO (1986); PIERRE CLAVEL & WIM WIEWEL, HAROLD WASHINGTON AND THE NEIGHBORHOODS: PROGRESSIVE CITY GOVERNMENT IN CHICAGO, 1983-1987 (1991); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960 (1983).

[24] For example, Chicago has a long history of effective community organizing and community development work. *See* ROBERT FISHER, LET THE PEOPLE DECIDE: NEIGHBORHOOD ORGANIZING IN AMERICA 176 (1994) (describing Saul Alinsky's community organizing methods in Chicago); CLAVEL & WIEWEL, *supra* note 23, at 1 (during his tenure as mayor from 1983 to 1987, Harold Washington reoriented the City's economic development policy away from downtown real estate development and toward investments in outlying neighborhoods and gave community-based organizations significant roles in creating and implementing city policy); NEAL R. PEIRCE & CAROL F. STEINBACH, CORRECTIVE CAPITALISM: THE RISE OF AMERICA'S COMMUNITY DEVELOPMENT CORPORATIONS 16 (1987) (in the 1980s, threatened lawsuits under the 1977 Community Reinvestment Act helped persuade banks to provide capital for Chicago community development).

make in other contexts.[25]

III. LAWYER SOPHISTICATION AND THE POLITICS OF LITIGATION

This paper will show that lawyers in this study generally appreciated the difference between judicially prescribed rights and real power. Most lawyers who used litigation did not believe that it would produce favorable results directly except in situations where such an expectation was reasonable. Rather, they generally looked for litigation to influence their clients' relationships with other parties in more subtle ways, by shaping the circumstances under which their clients negotiated for better outcomes. On the other hand, the tactics these lawyers said they employed were all ordinary lawyering activities — skills commonly used by lawyers on behalf of better-heeled clients.

This Part makes four claims regarding the tactics and political sophistication of the lawyers in this study. First, very few of these lawyers reported pursuing litigation alone. Most said that they employed litigation in combination with other strategies and often invested significant effort in those other strategies. Second, these lawyers expressed little interest in obtaining favorable precedents. In evaluating their work, they referred primarily to direct and indirect outcomes they believed they had secured for their clients. Third, the lawyers in this study indicated that they were aware of litigation's limitations. Finally, many of these lawyers reported that they engaged in overtly political strategies, seeking to create alliances with government officials, private entities, and other interest groups, and finding ways to contain their opponents' political power.

A. *Test Case Reform vs. Multi-Pronged, Outcome-Oriented Strategies*

Gerald Rosenberg rests his critique of liberal reform litigation upon his conclusion that courts "seldom produce significant social reform."[26] Many social scientists agree that courts alone generally cannot produce significant social change.[27] However, his critique of reform litigation and of the activists who pur-

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[25] *See* Malcolm Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 1993 LAW & SOC. INQ. 745, 748 (1993) (arguing that Gerald Rosenberg unfairly represents lawyers' declarations "uttered in the heat of battle" as the courts' goals); Peter H. Schuck, *Book Review: Public Law Litigation and Social Change*, 102 YALE L.J. 1763, 1771 (1993) ("Rosenberg's measure of court effectiveness appears to give excessive weight to whether litigation advances the avowed agendas of public interest litigators and too little weight to more modest, but still significant, reform goals . . .").

[26] ROSENBERG, *supra* note 4, at 341.

[27] *See, e.g.*, THEODORE L. BECKER & MALCOLM M. FEELEY, THE IMPACT OF SUPREME COURT DECISIONS (2d ed. 1973); KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971); HANDLER, *supra* note 1; HOROWITZ, *supra* note 8, at 27; CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984); Samuel Krislov, et al., COMPLIANCE AND THE LAW: A MULTI-DISCIPLINARY APPROACH (1972); G. ALAN TARR, JUDICIAL IMPACT AND THE STATE SUPREME COURTS (1977); FREDERICK M. WIRT, THE POLITICS OF SOUTHERN INEQUALITY: LAW AND SOCIAL CHANGE IN A MISSISSIPPI COUNTY (1970);

sue it does not consider how litigation might complement rather than displace other strategies and how activists might use litigation to influence other processes.[28] If lawyers and other activists view judicial and other legal and social processes as interrelated, and if they employ litigation and other strategies tactically and sometimes simultaneously, Rosenberg's indictment of activist lawyers may be unfair.

Very few lawyers in this study reported they sought to secure their clients' objectives through litigation alone. Most of these lawyers pursued a variety of strategies, including some involving no litigation. Where they used litigation, they often pursued other strategies simultaneously with the expectation that those tactics would reinforce one another. The skills they employed were ones that are routinely used on behalf of wealthier clients and corporations, even though many of these skills were not strictly "legal."[29]

Many of the 197 matters described by lawyers in this sample did not involve litigation at all; projects in which litigation or administrative advocacy was a component comprised only 141 — or about seventy-one percent — of matters in this study.[30] Forty-one of the matters in this study were primarily planning projects in which lawyers advised, negotiated, structured, and documented ar-

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Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969 (1979); James Croyle, *The Impact of Judge Made Products Liability Policies*, 13 LAW & SOC'Y REV. 949 (1979); Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

For arguments that social change requires support, or at least acquiescence, from more than one branch of government and from others responsible for implementing the change, *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970 (1982); MCCANN, *supra* note 10; Casper, *supra* note 1.

[28] *See, e.g.*, Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQ. 715, 729 (1993) (Rosenberg "discounts the many ways that litigation can complement as well as compete with other movement tactics"); Schuck, *supra* note 25, at 1771 ("Rosenberg . . . neglects the repetitive, dialogic nature of the interactions between courts, legislatures, agencies, and other social processes, as well as the political synergy that some litigation engenders"); David Schultz & Stephen Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 7 J.L. & POL'Y 63 (1996) ("The Court need not prove a necessary cause in every case in order to conclude that the Court is, to some extent, an effective agent of social change").

[29] *See* Robert W. Gordon, *A Perspective From the United States*, in ESSAYS IN THE HISTORY OF CANADIAN LAW 425, 426 (Carol Wilton ed., 1990) (comparing distinctively "legal" services — "representing clients in courts, predicting judicial decisions and interpreting statutes and regulations, and drafting and planning to obtain favourable and avoid unpleasant legal consequences" — with Canadian business lawyers' much more expansive role).

[30] In 137 matters, litigation or administrative advocacy was a major component of the work. *See infra* tbl. 5, app. at 65. Another 4 matters, all of them planning projects, included a minor litigation component. *Id.*

rangements unrelated to any existing claim or dispute.[31] In another thirteen matters, lawyers worked on legislative and lobbying projects involving no litigation.[32]

In only twenty-three percent of all matters described by lawyers in this study, thirty-four percent of matters involving litigation,[33] and twenty-five percent of matters that might be distinguished as social reform litigation,[34] did the lawyers report that they pursued litigation strategies alone. Most litigation-only strategies involved a problem as to which social scientists would predict that courts could deliver direct benefits:[35] where litigants sought to resolve individual disputes,[36] where they sought state approval of a status change,[37] or where they requested a

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[31] For further elaboration on how these planning projects differed from advocacy work, *see* Southworth, *Business Planning for the Destitute*, *supra* note 18.

[32] *See infra* tbl. 5, app. at 65.

[33] *See infra* tbl. 6, app. at 66.

[34] As noted above, the distinction between law reform work and client service is notoriously difficult to draw. For purposes of this claim, law reform work included all matters involving litigation to reform institutions, to change rules governing welfare benefits, and to redraw legislative districts. It also includes all class actions not already included in the foregoing categories.

For sources describing various law reform litigation strategies, *See generally,* on civil rights, JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 22-23 (1978); ALDON MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT (1984); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); Robert Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 215-18 (1976); Stephen L. Wasby, *The Multi-Faceted Elephant: Litigator Perspectives on Planned Litigation for Social Change* 15 CAP. U. L. REV. 143, 144 (1986); on children's rights, ROBERT MNOOKIN, IN THE INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1985); on church-state relations, SORAUF, *supra* note 1; on mental health rights, Milner, *supra* note 12; Neal Milner, *The Right to Refuse Treatment: Four Case Studies of Legal Mobilization*, 21 LAW & SOC'Y REV. 447 (1987); Nikolas Rose, *Unreasonable Rights: Mental Illness and the Limits of the Law*, 12 J. LAW & SOC'Y 199 (1985); on poverty, MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-73 (1993); Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973); Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (1988); on the women's movement, KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS (1978); JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION (1975); JOYCE GELB & MARIAN LIEF PALLEY, WOMEN AND PUBLIC POLICIES (1982).

[35] *See* HANDLER, *supra* note 1, at 22-25 (describing conditions under which judicial remedies are most effective).

[36] *See* SCHEINGOLD, *supra* note 2, at 118 ("[C]ourts are ordinarily both willing and able to act effectively on behalf of the individual litigant").

[37] *See* Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 699 (1983) (presenting an array of issues as to which citizens mobilize the law, including, at the "mandatory" end of the continuum, matters in which citizens need state approval of formal status changes).

simple rule change requiring little bureaucratic discretion and little judicial oversight.[38] Ten of these litigation-only matters were individual damages and injunctive claims.[39] Eight suits involved divorce, political asylum, deportation, and bankruptcy.[40] The remaining litigation-only matters included individual benefits claims, suits to obtain simple rule changes in welfare benefits,[41] and matters in which the lawyer represented the clients as *defendants* in eviction or abuse and neglect proceedings.[42] In most of these litigation-only matters, the strategies pursued were reasonably well-suited to delivering immediate relief for clients.[43] Indeed, in some of these matters, foregoing simple legal remedies in favor of more complex collective strategies would have raised serious questions under prevailing ethics doctrine.[44]

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[38] *See* HANDLER, *supra* note 1, at 201-202, 209 ("The optimal situation is where the problem can be solved (i.e., the benefits distributed) on the basis of a rule change").

[39] Interview with attorneys no. 1, matter 2 [hereinafter Int. 1,2]; 24,2; 24,3; 38,1; 43,2; 44,2; 61,1; 61,3; 63,2; 63,3. To maintain confidentiality, citations to interviews refer to interview numbers rather than attorneys' names. All interviews were conducted in Chicago, Illinois between June 18, 1993 and October 11, 1994. For an index of these lawyers by interview number, gender, race, practice setting, and law school attended, see tbl. 18, app. at 70.

[40] Ints. 5,2; 40,3; 42,1; 42,2; 42,3; 47,1; 47,3; 51,3.

[41] Ints. 9,2; 19,3; 25,3; 33,1; 33,3.

[42] Ints. 34,1; 34,2; 37,2; 37,3; 47,2; 68,3.

[43] It is possible that in some of these matters, more complex strategies would have yielded both immediate benefits for clients and long-term gains for a client community. *See* Tremblay, *supra* note 22, at 955 (arguing that instances where more political strategies produce immediate rewards "are the exception" and that "political practice generally defers present benefits in return for promises of long-term reward"). My data were not rich enough nor my practice experience deep enough to allow me to assess whether these lawyers had missed opportunities to pursue short-term gains and long-term rewards simultaneously.

[44] These codes require the lawyer to ensure that neither the lawyer's interests (including ideological commitments) nor third parties' interests influence the lawyer's representation of the client. *See* Model Code of Professional Responsibility EC 5-1 (1981) ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client") (footnote omitted); Model Rules of Professional Conduct Rule 1.7 (b) (1983) ("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 consents after consultation . . . ")

Many commentators have questioned the professional codes' strong emphasis on client control, particularly as applied to public interest lawyers. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 317-40 (1988) (arguing that lawyers may sometimes be morally justified in manipulating clients on behalf of a cause where the cause is just and sufficiently weighty and where the lawyer and client are political comrades);

In sixty-six percent of matters involving litigation, lawyers used at least one other strategy in combination with litigation.[45] Those strategies included lobbying for beneficial legislation and regulations, communicating with the press, organizing grass-roots campaigns and training clients seeking to influence the implementation of government policies, training other lawyers and defendants, and building coalitions and bargaining with other interest groups.[46]

These multi-pronged strategies varied greatly in complexity. On one end of the spectrum were projects that included just two closely related components. In seven matters, for example, seeking publicity was the only other component of a project that was primarily litigation.[47] In eleven other matters, handled by legal services lawyers, who are severely restricted by regulations on the types of work they may perform,[48] the only other component of the project was legislation de-

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Bellow & Kettleson, *supra* note 6, at 342 (arguing that "distinctive characteristics" of law practice for disadvantaged clients subject them to ethical obligations that are different from those of lawyers representing more powerful clients); Kevin C. McMunigal, *Of Causes and Clients: Two Tales of* Roe v. Wade, 47 HAST. L.J. 779, 819 (1996) ("conventional norms of legal ethics doctrine underestimate and inadequately respond to [forces impelling public interest lawyers to pursue collective goals] in reform litigation"); *but see* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 178 (1990) ("A rule that permits otherwise unacceptable manipulation in the service of what the lawyer believes to be a good cause will open the door to a dreary range of client abuse"); Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805 (1971) (arguing that public interest lawyers should treat clients as individuals to whom they are accountable rather than as tickets to court).

[45] *See infra* tbl. 6, app. at 66.

[46] *See infra* tbl. 7, app. at 66.

[47] *See infra* tbl. 6, app. at 66. Because publicity arguably is not an independent strategy, table 6 breaks out separately matters in which publicity was the only other strategy employed. *See infra* tbl. 6, app. at 66.

[48] *See, e.g.*, 42 U.S.C. § 2996a(7) (1994) (forbidding legal assistance attorneys from participating in political activities such as voter registration); § 2996(b)(5) (forbidding legal assistance attorneys from participating in or encouraging public demonstrations, picketing, boycotts, or strikes); § 2996f(a)(b) (forbidding staff attorneys from participating in specified off-duty political activities); *see also* 42 U.S.C. § 2996e(d)(1)(4) (1994) (forbidding "Legal Services Corporation ("LSC") funds from being used to advocate or oppose ballot measures, initiatives, or referenda); § 2996f(a)(5)(A) (forbidding LSC funds from being used to influence executive orders, administrative regulations, or legislation unless necessary to represent a client); § 2996f(b)(6) (forbidding LSC funds from being used to provide training programs to advocate or encourage public policies or political activities).

In 1995 and 1996, after this study, Congress imposed further restrictions on how LSC funds could be used. The fiscal year 1995 appropriations bill prohibits LSC grantees from representing illegal aliens and from lobbying. *See* Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, § 403(b)(1). The 1996 restrictions prohibit grantees from using non-LSC funds for certain types of activities, including class action suits and lobbying, and they prohibit LSC from funding any legal service provider "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State

signed to accomplish the same rule change sought through litigation.[49] However, in thirty-nine percent of matters involving litigation, lawyers worked on at least three strategies simultaneously. Some of these projects were truly comprehensive campaigns. One lawyer in a grass-roots clinic, for example, described a program designed to prevent the deterioration of marginal neighborhoods by saving poorly maintained buildings before they became irredeemable. Community groups received a computer and software with public information about the buildings in the neighborhood, including data about water lines, utility problems, building code violations, and property tax assessments. The lawyers offered a dazzling array of services to these community groups: they prepared a manual describing landlord-tenant law, defended tenants in eviction proceedings, coordinated enforcement actions with city prosecutors, and persuaded adjacent property owners to testify in housing code proceedings. They also assisted these clients in organizing rent withholdings, seeking to persuade city officials to use housing fines to pay for receivers of problem buildings, lobbying for legislation regarding lead poisoning and eviction standards, contacting aldermen regarding buildings in their districts, and advising banks about how to improve their records under the Community Reinvestment Act by investing in building repairs. The lawyer said that his organization essentially had become "general counsel" to several community groups and that they provided "a total package" of services.[50]

Another lawyer represented nine hundred families in a subsidized housing complex who sought to use federal subsidies to purchase, rehabilitate and manage their housing. The lawyer helped the tenants devise a plan and submit it to the Department of Housing and Urban Devlopment ("HUD"). He advised his clients on various issues regarding ownership and control of the project and he negotiated and drafted agreements with the various parties to the deal. When HUD delayed action on the plan for two years, the lawyer represented the tenants in a class action suit designed to pressure HUD to approve the plan.[51]

The director of a grass-roots clinic, also a lawyer, used a variety of strategies directed toward preventing lead poisoning. The director, along with other members of his organization, participated in meetings with parents to educate them about medical and legal issues regarding lead poisoning. They also negotiated with the Chicago Housing Authority to remove lead paint from public housing, assisted in drafting state legislative amendments and a local ordinance, and met

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welfare system." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321.

[49] *See* Ints. 12,3; 20,1; 22,1; 22,2; 30,3; 40,1; 40,2; 48,2; 49,2; 50,3; 56,1. At the time this study was conducted, Legal Services attorneys were forbidden by statute from lobbying unless necessary to represent the client. *See* 42 U.S.C. § 2996f(a)(5)(A). These restrictions on lobbying have since been replaced by a complete prohibition. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504, *supra* note 48.

[50] Int. 23.

[51] Int. 27.

regularly with city health officials about the city's inspection program.[52]

A lawyer who represented a couple who had suffered racial discrimination in residential mortgage lending filed both a lawsuit against the bank and objections with the Federal Reserve Board to the acquisition of more banks by the defendant bank's holding company. In addition, the lawyer trained bank employees on fair lending practices, assisted with a public television documentary on lending discrimination, and worked with community groups to encourage the defendant bank and other offending lending institutions to adopt fair lending practices.[53]

LEGISLATIVE LOBBYING. Lobbying was the most prominent of the non-litigation tasks that lawyers reported pursuing in conjunction with litigation.[54] Fifty-one of one hundred and thirty-seven litigation matters involved lobbying for favorable legislation or regulations or seeking to block detrimental legislation or regulations, mostly on state and local matters.[55] Legal service lawyers handled twenty-three of these fifty-one matters.[56]

PUBLICITY. Lawyers in thirty-three matters indicated that they spoke with the press about matters on which they were working. Some of these lawyers indicated that they had simply responded to press inquiries regarding litigation they handled, but others suggested that they had employed publicity strategically to educate the public,[57] to mobilize client groups,[58] and to create leverage in negotiations.[59] Several also indicated that they sometimes refrained from using public-

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[52] Int. 7.

[53] Int. 32.

[54] *See infra* tbl. 7, app. at 66.

[55] Thirty-six of these matters involved work on state legislation or regulations, and another eight involved local ordinances and regulations. In only thirteen matters did lawyers report working on federal legislation or implementing regulations.

[56] The high representation of legal services lawyers in these litigation/lobbying matters is consistent with their high representation in purely legislative matters. Legal services lawyers handled 6 of the 13 legislative matters described by lawyers in this study. *See infra* tbl. 13, app. at 70.

[57] Ints. 43 (lawyer who handled civil prosecutions of hate crimes sought publicity for one case in which a jury returned a $475,000 verdict to put prospective defendants on notice about the price for such conduct); 59 (he was "making some progress" in getting the press to see the issues as he did); Int. 59 (he "relied on the press" to get his organization's message out to the community); Int. 69 (publicity was crucial for "conditioning the public into believing that there should be a [Latino] congressional district" and for making judges receptive to legal arguments in favor of such a district).

[58] *See, e.g.*, Int. 45 (sought publicity to help mobilize client-tenants).

[59] Ints. 24 (lawyer who sought to persuade the Department of Housing and Urban Development ("HUD") to approve a tenant ownership plan for a public housing project observed that "hav[ing] the public looking at [HUD], particularly right before an election, was helpful" in preventing the Department from "torpedo[ing] the project" through delay); 45 (lawyer sought publicity for his landlord-tenant case to increase the client's leverage in the litigation); 53 (lawyer sought publicity to create public pressure against the eviction of her clients); 54 (lawyer used the media to exert pressure on public officials to change their policies).

ity where they were uncertain whether the publicity would be entirely favorable[60] or where they feared alienating an adversary.[61]

COMMUNITY ORGANIZING AND EDUCATION. In twenty of one hundred thirty-seven litigation matters, lawyers indicated that they had assisted in community organizing and education activities.[62] In several matters, lawyers enlisted clients' help in litigation and lobbying campaigns.[63] A lawyer who prosecuted a suit to require a landowner to clean up a noxious dump site in a poor community said that she had "packed the courtroom" with residents who were prepared to testify.[64] In zoning proceedings on behalf of a church that sought to shelter homeless people without acquiring a special zoning variance, the lawyer encouraged his client to gather signatures from every pastor in town.[65] A lawyer who worked on redistricting litigation encouraged community members to express their views to their congressmen, who, in turn, might influence the negotiations.[66] Another lawyer helped clients prepare to testify in congressional hearings on HUD tenant ownership initiatives.[67] Lawyers also trained clients about their legal rights and political processes[68] and, in three matters, participated directly in community organizing.[69]

SEEKING TO INFLUENCE GOVERNMENT POLICY IMPLEMENTATION. In twenty matters, lawyers said that they sought to persuade government officials to take positions that would assist their clients.[70] Lawyers worked with their clients to influence policies regarding the prosecution of housing code violations,[71] lead paint abatement,[72] custody and child support issues,[73] housing for poor mentally ill residents,[74] child welfare,[75] domestic violence,[76] paternity registration,[77] transfers of

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[60] Ints. 30, 59.

[61] Int. 60.

[62] *See infra* tbl. 7, app. at 66.

[63] Ints. 1, 10, 12, 27, 45, 51.

[64] Int. 10.

[65] Int. 1 ("I think the fact that . . . every member of the Zoning Board was a member of one of those churches whose pastor had signed the petition had some impact on the outcome of this controversy.").

[66] Int. 51.

[67] Int. 27.

[68] Ints. 15, 18, 23, 26, 27, 28, 35.

[69] Ints. 7, 28, 32.

[70] *See infra* tbl. 7, app. at 66.

[71] Ints. 23,1; 45,1.

[72] Ints. 11,3; 28,2; 53,1.

[73] Int. 55.

[74] Int. 58,3.

[75] Ints. 37,1; 66,2; 66,3.

[76] Int. 28,3 (noting that they had helped persuade one alderman "to yell at the police commander" about the failure to treat domestic violence calls seriously, which prompted the police department to issue new guidelines on how the police should respond).

[77] Int. 66,1.

public housing tenants,[78] and approvals of bank mergers.[79] One lawyer who sought HUD approval for his clients' tenant ownership plan for a public housing project persuaded local politicians and officials to "mau-mau" HUD for approval.[80] Most of the policies these lawyers sought to influence involved state and local matters, and their work sometimes focused on informal processes rather than formal procedures.[81]

TRAINING OTHERS. In seven matters, lawyers said that they had trained others about the law.[82] Lawyers sought to leverage resources by training other lawyers in their substantive areas of expertise,[83] but they also trained defendants about how to comply with anti-discrimination laws.[84]

The multifaceted nature of the litigation projects described by lawyers in this study indicates that these lawyers were not interested in knowing what litigation alone could accomplish. Rather, they generally expected that they would be more successful in securing clients' objectives if they worked in several arenas simultaneously. The prominence of the litigation and lobbying combination in this study also casts doubt on Rosenberg's premise that courts deflect the energies of naive lawyers and prevent them from pursuing more promising legislative strategies.[85] Like lawyers in many other practice areas, these lawyers applied

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[78] Int. 12,1.

[79] Int. 32,2.

[80] *See* TOM WOLFE, RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS 97 (1970) (using "mau-mauing" to mean pressuring local bureaucrats).

[81] *See, e.g.*, Ints. 3,1 (sought to make human rights violation procedures more "user friendly" and to persuade state prosecutors to pursue family status discrimination claims); 3,7 (coaxed City housing department officials to channel fines for housing code violations back into a program for hiring receivers); 7,2 (tried to convince City to apply for HUD funding for a program that would benefit his clients); 23,1; 28,2 (lobbied city and state officials to give higher enforcement priority to laws benefitting their client constituencies); 50,2 (worked with city officials to develop a strategy for preventing the spread of tuberculosis among homeless people); 66,3 (tried to persuade child welfare case workers to take personal responsibility for decisions about whether parental visits should be supervised); 59,1&2 (lawyer who was handling several large class actions against the state was constantly conferring with government officials inside and outside the affected bureaucracies about budgetary matters and various other aspects of the cases).

[82] *See infra* tbl. 7, app. at 66.

[83] Ints. 11,1; 44,1; 56,2; 59,1.

[84] Ints. 3,1 (training realtors and rental agents about laws against housing discrimination); 32,2 (training defendant bank employees on fair lending laws); 32,3 (training housing developer employees about fair housing laws as part of consent decree in housing discrimination lawsuit).

[85] *See* ROSENBERG, *supra* note 4, at 343. For descriptions of how other activist lawyers have used litigative and legislative strategies simultaneously, see Harold A. MacDougal, *Lawyering and the Public Interest in the 1990s*, 60 FORDHAM L. REV. 1 (1991); Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1014-15 (1997).

These data also suggest that recently enacted prohibitions on lobbying by legal services lawyers will significantly change these lawyers' practices. *See* Omnibus Consolidated Rescissions and Appropriations Act 504, *supra* note 48 (prohibiting all lobbying by recip-

a broad range of skills to their clients' needs, including some skills that were not narrowly juridical.[86] Moreover, like their corporate counterparts, civil rights and poverty lawyers often worked toward systemic remedy rather than individual redress.[87] These findings are consistent with Handler's observation that social re-

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ients of Legal Services Corporation funds).

[86] *See* KENNETH MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK (1985) (white collar criminal defense lawyers employ and supervise investigators, learn the details of the case, advocate the client's innocence to discourage prosecution, attempt to impede the government's investigation, and, if necessary, advocate the client's interests at the time of sentencing); MARK C. SUCHMAN, ON THE ROLE OF LAW FIRMS IN THE STRUCTURATION OF SILICON VALLEY 16 (Institute for Legal Studies Working Paper No. 11-7, 1994) (Silicon Valley lawyers "served as dealmakers, as counselors, as gatekeepers, as proselytizers, and as matchmakers"); Lawrence M. Friedman et al., *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L. J. 555, 559-563 (1989) (lawyers serving Silicon Valley companies offer " 'full-service' advice," access to capital, and "legal engineer[ing]"); Gordon, *supra* note 29, at 426 ("One striking fact emphasized in most of the papers [in this collection on lawyers and business in Canada] is that the social role of lawyers in and around business enterprises has hardly been confined to . . . distinctively 'legal' services" and instead reveals lawyers as promoters of business enterprise, middlemen with access to venture capital, advisors to investors, directors and managers of businesses, architects of public policy, and intermediaries and lobbyists before legislative and administrative bodies); Robert E. Rosen, *The Inside Counsel Movement: Professional Judgment and Organizational Representation*, 64 IND. L. J. 479, 504 (1989) (inside counsel in large corporations perform legal work, manage outside counsel, and "organize, monitor, and audit corporate operations"); Manual A. Utset, *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer*, 74 ORE. L. REV. 275 (1995) (lawyers involved in structuring initial public offerings engineer transaction costs, produce information necessary for valuing shares, translate the information into acceptable market language, and ensure that regulatory requirements are met); *see also* R.W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875 322 (1994) (English railway entrepreneurs relied upon lawyers to guide them "through the pitfalls of company promotion, capitalization, and incorporation," to "pacif[y] landowners" and acquire railway land, to "cope with the legal backlash against monopolistic commercial practices, local tax-gouging, and with a tidal wave of personal injury lawsuits," and "to resolve the bewildering tangle of legal problems inevitably generated by their enterprises").

[87] *See* JOHN P. HEINZ ET AL., THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICY MAKING 98-103 (1993) (describing the range of tasks performed by Washington representatives, including monitoring changes in rules, regulations, or laws, drafting legislation or rules, providing written information to officials, mobilizing grass-roots support, testifying at official proceedings, developing policy positions or strategies, and commenting for the press); RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 161 (1995) ("In opposing [most New Deal legislation], corporate lawyers clearly acted as a capitalist vanguard: they displayed a remarkable degree of cooperation, effectively mobilized bar committees to provide professional support for their actions, participated in the activities of the American Liberty League, and invoked a combination of professional rhetoric, populist zeal, and utilitarian arguments in trying to represent the interests of their corporate clients"); David Sugarman, *Lawyers and Business in England,*

form advocacy "is not restricted to courts; it takes place wherever important decisions are made affecting the interests of client groups — in all branches and levels of government, in the media, in the private sector."[88] They also resonate with Susan Olson's argument that a "new style" of public interest litigation has emerged in recent years — a model of "flexible lawyering" — in which lawyers "meld political and legal strategies."[89] As one experienced litigator in my study observed in characteristic fashion:

> One of the things that I've learned . . . is how it's all of one piece. Litigation is supporting your legislation, your community group work is supporting both of them, and you need many arrows in your quiver. . . . [T]hey all . . . enhance each other.[90]

B. *Precedents vs. Direct Remedies and Indirect Results*

When asked what their work had accomplished, the lawyers in this study rarely mentioned court rulings; in only 15 of 137 matters involving litigation did lawyers even cite a judicial holding as an accomplishment.[91] Rather, they generally referred to the results of the work, including both direct benefits and "indirect" results.[92] Not surprisingly, there were significant correlations between the

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1750 to 1950, in WILTON, ESSAYS IN THE HISTORY OF CANADIAN LAW, *supra* note 29, at 437, 452, 458 (English solicitors played an important role in "naturalizing and sanctifying the limited liability company" by presenting evidence to legislative committees that the country as a whole would benefit from such policies, and solicitors protected England's wealthiest urban landowners against legislation that would have restructured landownership by submitting evidence to parliament and waging a publicity campaign against the proposed legislation in *The Times*); Carol Wilton, *Introduction: Beyond the Law — Lawyers and Business in Canada, 1830 to 1930*, in ESSAYS IN THE HISTORY OF CANADIAN LAW, *supra* note 29, at 1 ("The political services that [Canadian] lawyers could perform for their clients and business constituents . . . went well beyond the advocacy of specific and limited measures. Legal interests often dominated both legislative and executive functions and in various ways worked collectively as well as individually to reorder social and economic structures in the interest of the business ethic and business values").

[88] HANDLER, *supra* note 1, at 3.

[89] OLSON, *supra* note 12, at 5, 7.

[90] Int. 64.

[91] *See infra* tbl. 8, app. at 67.

[92] This distinction comes from HANDLER, *supra* note 1, at 209, but it is similar to Galanter's distinction between "special effects" and "general effects." *See* Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 124-27 (Keith O. Boyum & Lynn Mather, eds. 1983) ("special effects" refers to "changes in the behavior of the specific actors who are the subjects (or targets) of the application or enforcement of the law," whereas "general effects" are "effects of the communication of information by or about the forum's action and of the response to that information"); *Cf.* James P. Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, in COMPLIANCE AND THE LAW: A MULTI-DISCIPLINARY APPROACH 99, 100-102 (1972) (describing a typology of outcomes of Supreme Court decisions, including "specific implementation," hierarchical control, political impact, and social consequences").

types of strategies lawyers pursued and the types of benefits they reported.[93]

The most common direct results cited by lawyers in matters involving litigation were recovering money or some other immediate benefit for the client, changing an individual defendant's behavior, influencing a defendant institution's operation, and increasing the client's formal political power.[94] The most commonly cited indirect benefits were creating leverage in negotiations, influencing legislative processes, educating the public, educating and/or mobilizing clients, and publicly vindicating the clients' position.[95] These interviews did not specifically ask lawyers to distinguish between benefits that furthered their clients' goals and benefits that might accrue to the public and third-parties.[96]

1. Precedents as Political Assets

In eleven percent of litigation matters in this study, lawyers indicated that they believed that court declarations of entitlement were among the achievements of their work. Even as to these matters, however, the lawyers generally described precedents in strategic terms.[97] Several lawyers indicated that precedents would define the contours of a new statute,[98] or accomplish simple rule changes in statutory benefit schemes.[99] Others said that favorable precedents would discourage conduct that would harm their clients or people those clients served[100] or help to mobilize constituencies.[101] All but one of the precedents that

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[93] *See infra* Part IIIB4.

[94] *See infra* Table 8, app. at 67.

[95] *Id.*

[96] All interviews included a question about whether clients had achieved their objectives. The subsequent question, "What do *you* believe the work accomplished?," allowed lawyers to comment on the work's broader significance, if any. None of the questions directly inquired about whether these lawyers faced conflicts between cause and client, such as those described in Part IIIC below. Some lawyers in this study may have used this ambiguity to avoid discussing how their accomplishments furthered their own political commitments rather than clients' goals. However, it is also at least plausible that these lawyers believed that all of these reported benefits, including vindicating principles, educating the public, and changing institutions, furthered their clients' own goals and not just lawyers' judgments about the public good.

[97] In an additional 13 matters, the lawyers said that favorable judicial decisions had vindicated their clients' position. *See infra* Part IIIB2 below. I distinguish claims that precedents themselves were valuable from claims that judicial decisions had vindicated the clients' position because the latter emphasizes the moral dimension of judicial decisions.

[98] Ints. 13,1; 15,1.

[99] Ints. 33,1; 33,3; 44,3; 56,3.

[100] Ints. 1,2 (decision upholding client church's right to shelter homeless people without obtaining a special use permit would discourage zoning authorities from prosecuting other churches that sought to provide shelter); 43,3 (decision upholding the constitutionality of a hate crime statute would discourage such challenges to validity of prosecutions under the statute); 45,3 (judicial ruling that Chicago's landlord-tenant protections applied to unwritten leases would help Chicago tenants protect themselves from retaliatory evic-

lawyers described as accomplishments of their work involved issues of statutory interpretation rather than constitutional right.[102] The lawyers in this study generally were not engaged in efforts to advance their clients' interests by establishing favorable constitutional precedents.[103]

2. Direct Results

Lawyers reported that their work had helped clients recover money in sixteen matters.[104] In twenty-seven matters, lawyers reported that the work had produced some other direct and immediate benefit for the client, such as allowing them to keep or improve their housing, enabling them to obtain status changes, or helping them gain access to social services.[105] In nine matters, lawyers reported that the projects had changed or would change individual defendants' behavior.[106]

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tions); 61,2 (ruling against a real estate company that had asserted that it was entitled to discriminate at the request of a client would discourage realtors from asserting this right in the future); 66,1 (state supreme court decision overturning adverse appellate ruling would remove license for state officials to take children from their parents where there was no finding of abuse or neglect).

[101] Ints. 1,2 (ruling that churches could shelter homeless without obtaining special use permits encouraged participation in programs benefitting homeless people); 18,1 (ruling that Illinois citizens had right to obtain information necessary to participate effectively in land use decisions had increased participation in local land use planning).

[102] Peter Schuck has argued that "[s]ocial reform through statutory interpretation has a distinctive dynamic that produces its own patterns of cause and consequence" and should be distinguished from efforts to achieve new constitutional interpretations. *See* Schuck, *supra* note 25, at 1770. For a case study of the crucial role administrative agencies play in implementing statutes, *see* R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

[103] Only one of the matters as to which lawyers reported that a precedent was one of their accomplishments involved a constitutional claim, and in that case the client sought to *defend* the constitutionality of the statute.

[104] Eleven of these were individual damages actions for employment discrimination, lending discrimination, fraud, hate crimes, constitutional violations by police officers, and black lung claims. (Ints. 10,2; 22,2; 24,2; 27,2; 32,2; 38,1; 43,1; 43,2; 51,1; 54,2; 61,2). One was a suit for divorce and child support. (Int. 55, 3) Three were individual benefits claims (Ints. 9,2; 24,2; 25,3), and another was an action to enforce child support laws. (Int. 56,2).

[105] *See , e.g.*, Ints. 9,2; 10,3; 15,1; 27,1; 28,2; 45,1; 47,2; 53,1; 58,3 (work had helped clients keep their housing, improve housing conditions, build new housing, or secure physical improvements in their neighborhoods); 40,3; 42,1; 42,2; 42,3; 47,1; 51,3 (clients had obtained needed changes in legal status: divorces, formal custody arrangements for a child, the legal right to remain in the United States, or bankruptcy); 64,3 (work had helped his clients obtain social services they needed to secure good jobs); 32,1 (work had helped keep police protection in place until his clients could decide how to respond to racial hostility in the neighborhood where they had just moved); 37,1; 50,1; 66;2 (work had caused the state to return their clients' children to them).

[106] Ints. 3,3 (litigation stopped landlord's pattern of sexually harassing tenants); 10,1 (brought defendant to justice and deterred him from committing further fraud); 12,3

These actions were primarily hate crimes prosecutions, consumer fraud actions, and landlord-tenant suits.[107]

In nearly twenty-five percent of litigation matters, lawyers said that the project had influenced the operation of a government bureaucracy, private corporation, or other organization. In many of these matters, lawyers claimed that they had already improved the challenged program or institution.[108] In others, they reported that their work had created pressure for such improvements.[109] In three

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(threats to pursue litigation or legislative strategy have discouraged administrative law judges from discriminating against African-Americans in social security disability cases); 28,3 (court's issuance of protective order has caused abusive husband to stop hitting his wife); 34,1 (in eviction action by landlord, tenant's counterclaim for harassment and retaliatory eviction educated landlord about law governing his relations with tenants); 35,1, 43,1, 43,2 ($1.2 million, $475K, and $1.2 million verdicts would create powerful financial deterrents to hate crimes); 51,1 (judgment would deter defendant from committing fraud and penalize him for past fraud).

[107] Ints. 3,3, 10,1, 34,1; 35,1; 43,1; 43,2; 51,2.

[108] *E.g.*, Int. 20,2 (led state to close several bad programs and to redesign the social services delivery system for teen parents); 22,2 (prompted employer to discharge offending employees); 26,2 (led to demise of the union's corrupt leadership and to an influx of minorities); 29,3 (changed the relationship between the local Democratic party and the African-American community); 30,1 (forced state to accelerate its program for moving mentally retarded wards out of nursing homes and to enlarge the number of community-based placements); 32,3 (led offending company to implement policies discouraging racial discrimination); 39,1 (improved conditions in INS confinement); 48,1 (improved conditions in Cook County jail); 48,3 (improved mental health care in county jail); 50,1 (caused child welfare bureaucrats to return hundreds of children to their parents); 50,3 (radically improved social services for teen parents who are wards of the state); 57, 2 (improved city's building inspection program); 59,2 (improved state's mental health system in certain limited respects); 59,3 (forced a change in leadership of a state psychiatric hospital; "There's a guy running it now who's pretty good."); 60,1 (improved educational programs in Cook County jail); 61,1 (forced a change in employment practices at the Federal Bureau of Investigation); 64,1 (created a mechanism to make the child support enforcement system more accountable to prospective recipients); 64,2 (changed state agency's computer system to reduce child support enforcement delays); 69,1; 69,2 (created procedures ensuring that children with poor English skills receive equal educational opportunities).

[109] Ints. 7,2 (his client's meetings with city officials about their lead paint inspection program "maintained pressure on a rigid bureaucracy that is prone to corruption."); 15,3 (put city on notice that clients believe that defendants were selectively enforcing occupancy standards against Latinos); 29,3 (showed Democratic Party that they could not assume that local African-American community would cooperate); 39,1 (improved conditions in INS confinement, even in facilities as to which the parties have not yet reached a settlement); 44,2 (educated Chicago Housing Authority ("CHA") regarding the constitutional rights of employees); 45,1 (has put HUD on notice regarding the conditions in the building); 56,3 (has laid the groundwork for requiring the Department of Public Aid to stop collecting overpayments at the administrative level); 58,3 (alerted defendants that they must respect civil rights); 59,1 (created a "structure of accountability" for the state's treatment of children in psychiatric institutions); 64,2 (prompted agency officials to begin

matters, lawyers reported that large judgments against defendant institutions would deter them from discriminating in the future,[110] and, in another three matters, lawyers said that the litigation had sensitized government officials about problems affecting their clients.[111] Several lawyers cited as one of their accomplishments that defendants were talking to outside experts about how to reform an institution.[112] In three additional redistricting matters, lawyers reported that their work had helped their clients gain formal political power.[113]

3. Indirect Results

Joel Handler and others have observed that the "indirect effects" of litigation may sometimes be more important than direct results.[114] Litigation may create leverage helping clients obtain resources[115] and prevail in other fora.[116] It may also yield even less immediate benefits, such as educating the public about the work of the client organization,[117] mobilizing grass-roots campaigns,[118] and legiti-

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improving child support enforcement system because "they know we're watching"); 67,1 (has shown CHA and HUD that they need to reach out to Latinos to redress severe racial imbalance in public housing).

For a discussion of how litigation influences administrators' willingness to change institutions and to internalize new standards, see Denvir, *supra* note 1, at 1134-35; Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 656-91 (1993).

[110] Ints. 1,2 (security firm has learned that it can no longer discriminate, even at the request of its clients); 32,3 ("I've got to believe that everyone in the [defendant realty] company is being very careful about how they conduct business"); 61,2 (a huge judgment against the realtor ensures that defendant "will never discriminate against anyone again").

[111] Ints. 46,2 (educated agency employees about first amendment issues); 66,2 (helped educate the Department of Children and Family Services case workers about how poverty affects families); 67,1 (made CHA and HUD officials much more aware of the under representation of Latinos in public housing).

[112] Ints. 20,2; 30,3.

[113] Ints. 51,2; 57,1; 69,1.

[114] HANDLER, *supra* note 1, at 210; *see also* Galanter, *Radiating Effects*, *supra* note 92, at 135 (arguing that "most of the courts' effects are remote and indirect").

[115] See HANDLER, *supra* note 1, at 209; SCHEINGOLD, *supra* note 2, at 136-40; *see also* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1267 (discussing how structural decrees influence legislative budgetary processes).

[116] *See* HANDLER, *supra* note 1, at 212-14, 219-20; BECKER & FEELEY, *supra* note 27, at 225 (describing Carl Friedrich's "law of anticipated reactions," according to which the Supreme Court's impact includes the ways in which legislators, executives and policymakers anticipate the Court's responses).

[117] *See* HANDLER, *supra* note 1, at 214-16; MCCANN, *supra* note 10, at 58; Denvir, *supra* note 1, at 1135, 1137-38 (1976); Joel B. Grossman & Austin Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 LAW & SOC'Y REV. 321 (1975); John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212 (1977).

mizing clients' goals.[119] Scholars in the "dispute-centered" or "decentered" tradition have shown how citizens and officials use judicial decisions in framing demands upon one another. They emphasize how court rulings influence "perceptions of when and how particular values are realistically actionable as claims of legal right."[120] In this study, various forms of indirect results played prominently in lawyers' motivations for litigating.

CREATING LEVERAGE IN NEGOTIATIONS. Several lawyers in the sample said that they had employed litigation to influence other political processes.[121] One used litigation to pressure HUD to approve a proposal by tenants to purchase and manage a Section 8 housing project.[122] In another, litigation allowed the client to avoid having a building demolished while it arranged financing to rehabilitate the property.[123] A lawyer who handled redistricting litigation said that suits were one way to "make the other side more responsive" in negotiations.[124] A community organization used litigation to keep the Chicago schools open despite lack of funding until the legislature could react.[125] In four matters, lawyers indicated that their work had favorably influenced legislative processes,[126] and, in another

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[118] *See* HANDLER, *supra* note 1, at 219-20; McCann, *supra* note 28, at 734; Denvir, *supra* note 1, at 1143-46; Comment, *supra* note 1, at 1087; Wexler, *supra* note 1, at 1053-56; White, *Mobilization*, *supra* note 5, at 538; *see also* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 590 (1986) (asserting that rights claims "can express political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social and political movement").

[119] HANDLER, *supra* note 1, at 216-19; SCHEINGOLD, *supra* note 2, at 136-37; SORAUF, *supra* note 1, at 92; Neil Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1039 (1992); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988).

[120] McCann, *supra* note 28, at 732; *see also* JOHN BRIGHAM, THE CULT OF THE COURT 208 (1987) ("It is not the authority of the [Court] to compel but rather the institution's capacity to provide new ways of understanding political prospects that channel human action according to dictates coming from the Court"); Galanter, *supra* note 92, at 126 (judicial decisions "work through the transmission and reception of information rather than by concrete imposition of controls").

[121] *See infra* tbl. 8, app. at 67. Using litigation to obtain leverage in negotiations is different from gaining leverage from a favorable precedent. *See* HANDLER, *supra* note 1, at 212-14. Compare discussion in Part IIIB1 above.

[122] Int. 27,1.

[123] Int. 36,1.

[124] Int. 26,1.

[125] The lawyer acknowledged that the legal theory upon which they sued was weak, and he marveled at the judge's courage in granting several stays until the legislature could act. *See* Int. 62,1.

[126] *See* Ints. 22,1 (noting that litigation helped defeat legislation which would have imposed an absolute deadline on civil rights claims); 62,1 (stating that we "fought the delaying action long enough to prod the Assembly into acting" to keep the schools open despite the budgetary shortfall); 62,3 (defended school reform legislation in litigation and, when the court struck down one portion of the statute, helped broker an agreement regarding how the legislation should be amended); 64,2 ("I don't think it would be on the

four, lawyers reported that litigation had caused the state to devote greater resources to the problem identified in the litigation.[127]

4. Educating the public, mobilizing clients, and legitimizing values and goals

In 24 matters, lawyers reported that their work had helped educate the public.[128] In many of these matters, lawyers said that their work helped draw attention to social problems — e.g., poverty,[129] homelessness,[130] lending discrimination,[131] housing discrimination,[132] lead poisoning in low-income housing,[133] health risks in homeless shelters,[134] and hate crimes.[135] Several lawyers said that their work would educate influential people[136] or inform low-income communities affected by defendants' misconduct.[137] In eleven matters, lawyers indicated that their work helped educate and/or mobilize clients.[138]

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state agenda . . . except for the litigation").

For sources analyzing how litigation influences legislation, see RICHARD F. ELMORE & MILBREY WALLIN MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM (1982) (showing how the *Serrano* decisions set the terms of the debate in the California legislature about school finance reform but failed to resolve how wealth neutrality should be implemented); Denvir, *supra* note 1, 1139-42 (litigation often catalyzes legislative reform). *See also* MCCANN, *supra* note 6, at 168-69 (reform groups' emphasis on legal rights causes "policy judgments [to be] abstracted from concerns for minimizing overall costs, mobilizing resources to pay for such costs, or any collective policy formulation at all").

[127] *See* Ints. 19,1; 50,1; 50,2; 59,3.

[128] *See infra* Table 8, app. at 67.

[129] *See* Int. 68,1.

[130] *See* Int. 1,1.

[131] *See* Int. 32,2.

[132] *See* Int. 32,1 (stating that "[W]e raised the level of discussion in [the village where a black family who purchased a home met violent threats and widespread hostility] as to what type of community they are.").

[133] *See* Ints. 1,3; 53,1.

[134] *See* Int. 50,2.

[135] *See* Ints. 32,1; 35,1; 43,2.

[136] *See, e.g.*, Int. 11 (elite lawyers who represent juveniles in discretionary transfer hearings often change their attitudes as they "get to know the kids and this other world," and the work indirectly educates other "people who are in power — who sit next to policy makers at benefit dinners").

[137] *See* Ints. 10,1; 10,2.

[138] *See infra* Table 8, app. at 67. *See, e.g.*, Int. 18,1 (clients' successful effort to halt the siting of an incinerator in their neighborhood made them "feel they could win" and substantially increased citizen participation in village meetings); Int. 26,1 (clients in redistricting litigation "[might] have come to appreciate their political muscle"); 29,1 (clients had gained an appreciation for the importance of approaching the redistricting process with adequate resources); 23,3 (tenants had formed an association, developed a much clearer understanding of their rights, and become much more prepared to assert them); 23,3 (brought tenants and community organizations to work together to fight the deterioration of their neighborhoods and taught them that such multi-faceted strategies could be

In thirteen matters, lawyers indicated that their work helped vindicate a principle or the client's position.[139] These matters included discrimination claims and hate crimes prosecutions, where lawyers said successful prosecution lent legitimacy to the plaintiffs' claims that they were treated unfairly.[140]

These lawyers' responses about what they believed they had accomplished do not answer whether these lawyers fairly described the results of their work or whether the benefits they reported actually were consistent with their clients' goals.[141] However, they do tell us something about how these lawyers evaluated their contributions. They suggest that these lawyers did not place much stock in judicial rulings themselves but rather looked primarily to direct and indirect benefits secured.

5. Strategy choices and types of benefits achieved

Not surprisingly, several correlations appeared in the data between the types of strategies chosen and the types of benefits reported by lawyers. In matters in which litigation was the only strategy, lawyers were no more or less likely to report that their clients achieved all or some of their objectives than were lawyers in matters involving more than one strategy.[142] But there were differences in lawyers' assessments of what *types* of benefits they achieved according to the types of strategies pursued. Among matters in which lawyers indicated that they achieved favorable precedents, obtained money for clients, or vindicated a client's position, litigation-only strategies were disproportionately represented.[143]

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effective).

[139] *See* Ints. 1,1; 15,2; 22,2; 29,2; 38,1; 38,3; 43,1; 43,2; 44,2; 47,3; 61,2; 61,3; 67,3.

Some studies of legal mobilization have found that plaintiffs usually seek to use the law for concrete reasons rather than to achieve justice. *See* Richard O. Lempert, *Mobilizing Private Law: An Introductory Essay*, 11 L. & SOC'Y REV. 173, 181-82 (1976); Leon H. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 L. & SOC'Y REV. 401, 413 (1975); Eric H. Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1138 (1975); Frances Kahn Zemans, *Coercion to Restitution: Criminal Processing of Civil Disputes*, 2 LAW & POL'Y Q. 81 (1980). However, there is also some evidence that discrimination claims are more likely than most other types of claims to be motivated by the claimant's desire for vindication. *See* Mayhew, *supra*, at 413.

[140] *Cf.* Crenshaw, *supra* note 7, at 1364-66 (arguing that African-Americans' assertions of their rights constitute important challenges to racism and may be the only politically feasible means available for prodding society to live up to its rhetorical commitments to equal opportunity).

[141] *See supra* note 96.

[142] In 63 percent of the matters in which lawyers pursued multi-pronged litigation strategies, they reported that their clients had achieved all or some of their objectives, as compared to 64 percent of matters in which lawyers pursued litigation-only strategies.

[143] Seven of 15 matters in which lawyers reported that a precedent was one of the accomplishments of the litigation involved litigation only. Eight of the 15 matters in which lawyers reported that the client obtained money as a result of the litigation involved litigation-only strategies. Seven of 13 matters in which lawyers reported that the work had

Conversely, in litigation-only matters, lawyers rarely reported that their work helped their clients obtain direct benefits other than money, educated the public about a social problem, or educated or mobilized a client constituency.[144] Multidimensional litigation projects comprised a large proportion of the matters in which lawyers reported that the work produced other direct benefits for the client, educated the public, educated or organized a client constituency, or influenced how an institution or bureaucracy operated. Lawyers whose work did not involve litigation predictably did not report judicial precedents as accomplishments of their work. In planning matters, lawyers typically reported that their work helped a client build or improve housing, create an institution, or enhance an organization's operation.[145] Lawyers who worked on legislative or lobbying projects often said that their work had improved the substance of legislation or regulations and/or educated the public and policy-makers.

C. *Limitations of Litigation Strategies*

Some leftist critics of civil rights and poverty lawyers question the very idea that lawyers can contribute to progressive social change. They worry about the distribution of power between lawyer and client,[146] disincentives for lawyers to defer to their clients' preferences,[147] and psychological costs to clients of working with professionals.[148] Critics also question whether formal legal change ever significantly alters social and institutional arrangements where political momentum does not already support such change.[149] They assert that legal strategies le-

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vindicated a client's claim were litigation-only strategies.

[144] Only one of the 23 matters in which lawyers reported that their work had helped educate the public about a problem involved a litigation-only strategy. Two were litigation/publicity strategies. In only two of nine matters in which lawyers reported that their work had helped change the defendant's behavior and in only eight of the 33 matters in which lawyers reported that their work had changed an institution did the lawyers pursue litigation alone. In only one of 11 matters in which lawyers indicated that the work had helped educate and/or organize clients had the lawyer pursued litigation alone, and in that matter the client had been a defendant.

[145] For further description of what these lawyers believed they were contributing to their clients' projects, *see* Southworth, *Business Planning*, *supra* note 18, at 1142-47.

[146] *See supra* note 5.

[147] *See* HANDLER, *supra* note 1, at 25; LOPEZ, *supra* note 2, at 25; Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 5; Bellow & Kettleson, *supra* note 6, at 341; Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NAT'L LEGAL AID & DEFENDER ASS'N BRIEFCASE 106, 108 (1977); Cahn & Cahn, *supra* note 1, at 1035-36; White, *Subordination*, *supra* note 5.

[148] *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

[149] *See* KATZ, *supra* note 19, at 195-96; ROSENBERG, *supra* note 4, at 336-43; HARRY P. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW 273-91 (1975); Comment, *supra* note 1, at 1077; Galanter, *supra* note 7, at 37-38, 151; Philip Selznick, *Social Advocacy and the Legal Profession in the United States*, 19 JURID. REV. 113, 125 (1974).

gitimate unjust social and political arrangements by narrowly defining the range of remediable grievances and emphasizing individual disputes over systemic injustice.[150]

This study did not gather the evidence to assess the soundness of these lawyers' visions of social change or the reliability of their political instincts. Nor does it allow one to determine whether these lawyers developed coherent and consistent views about the strengths and limitations of their methods. Nevertheless, the lawyers in the sample collectively expressed many of the critics' reservations. This section considers piecemeal evidence that these lawyers may have pursued litigation despite their understanding of its risks and shortcomings rather than because of any failure to appreciate those drawbacks.

Several lawyers in this study commented on temptations to substitute their own definitions of client interests for their clients'. When asked whether her clients achieved their objectives, one lawyer responded: "If you never really have objectives defined by the clients, it's sort of easy — or hard — to answer that question truthfully."[151] The same lawyer, commenting on representing mentally ill people threatened with eviction, observed that she and her colleagues tended to interpret clients' interests "narrowly":

> Sometimes the client gets to stay in their [sic] housing. Is it peaceful? No. Is it affordable housing with people who are tolerant of difference? No. They're not homeless, so I guess if you define the objective that way — to avoid homelessness, to avoid being evicted — [our clients achieved their objectives].[152]

Other lawyers remarked on the temptation to speak for class members without attempting to discern their goals and preferences.[153] However, many of these

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[150] *See supra* note 7. *See also* Wendy Brown, *Rights and Identity in Late Modernity: Revisiting the 'Jewish Question,'* in AUSTIN SARAT & THOMAS R. KEARNS, IDENTITIES, POLITICS, AND RIGHTS 85, 118 (1995) (Rights discourse in liberal capitalist culture "converts social problems into matters of individualized, dehistoricized injury and entitlement, into matters in which there is no harm if there is no agent and no tangibly violated subject"); Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, in SARAT & KEARNS, IDENTITIES, POLITICS, AND RIGHTS, *supra*, at 271, 305 (describing a program for managing spousal violence in a small town in Hawaii, and observing that because it "is founded on rights, it is inevitably individualizing, reinforcing the idea that the woman alone is responsible, that the assault she suffers is the result of her actions, not because she belongs to a class of permitted objects of violence").

[151] *Id.*

[152] Int. 58.

[153] *See, e.g.*, Ints. 48 (stating that "[T]here is a real danger . . . for the attorneys to become the clients); 69 ("It is critical . . . that we're actually speaking for [the community].").

For more thorough analyses of this problem, see Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1 (1993) (showing that traditional ideas of client autonomy do not translate easily to class action representation and proposing a conception of fairness to govern lawyers' negotiations on behalf of a class); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (analyzing con-

lawyers also spoke about the difficulty of discerning clients' own preferences and interests, particularly when clients were groups or plaintiff classes.[154] A lawyer, who worked with African-American union members to increase their power in the union, said that he did not know whether his clients had achieved their objectives because his clients' held many different objectives.[155] Another lawyer said that he thought he understood his clients' interests at the start of the litigation but that those interests changed.[156]

Several lawyers in this study indicated that they believed litigation imposed psychological costs on their clients.[157] However, several lawyers also observed that litigation sometimes bolstered their clients' confidence. A lawyer who represented a domestic abuse victim observed that her client seemed to have gained assurance simply by telling her husband in court that she did not want him back because he had beaten her too many times.[158] A lawyer who represented hate crime victims said that his clients often "viewed the process of standing up for their rights as a part of the process of recovering from the attack,"[159] and another lawyer said that testifying in court helped hate crime victims "reassert control over their lives."[160] A lawyer for another victim of a racially motivated

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flicts of interest in institutional reform litigation and lawyers' disincentives to expose such conflicts); Stephen C. Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1114-15 (1980) (noting that institutional reform litigators hold "the power to define the 'interest' of the groups they represent; so long as their articulation of that interest does not strike the court as entirely bizarre, it is likely to be sanctioned by class certification"). For articles proposing changes in fee structures to encourage lawyers to pursue the interests of class members, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 53 U. CHI. L. REV. 1, 41-61 (1991). *See also* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S.C. L. REV. 353 (1988) (examining how class actions reflect the private attorney general model and demonstrating that it is an imperfect alternative to government enforcement activity).

[154] *See, e.g.*, Ints. 26, 54, 63.

[155] *See* Int. 26,2 (some sought to become known in the industry, some sought to bring more minorities into the union, and others were pursuing more personal objectives).

[156] *See* Int. 54,2.

[157] *See* Ints. 43,1 (lawyer advised client that he must be prepared to relive the experience of his racial assault if he decided to litigate for damages); 47,3 (client who sought divorce from abusive husband found the process extremely difficult); 58,3 (in defending evictions of mentally ill tenants, "getting [clients] to acknowledge their mental illness, which is required if you're going to use a civil rights defense on the basis of handicap," is often very difficult). *See also* Int. 11,3 (noting that lead poisoning litigation would subject parents to "difficult questions about [their] children's history").

[158] *See* Int. 47,3.

[159] Int. 43,2.

[160] Int. 67,3. Describing an incident in which thugs beat her client unconscious when he accidentally took the wrong bus into an unfamiliar white neighborhood, she observed:

assault said that having an all white jury return a $475,000 verdict in his client's favor helped "restore [the client's] faith in the community."[161]

Many lawyers in this study acknowledged that the legal system rarely provided adequate remedies for their clients. Several commented on how courts had become less willing to find and enforce civil rights.[162] One lawyer observed that courts have become "less interested if not outright hostile to civil rights issues,"[163] and another said that she and her legal services colleagues were "losing lawsuits, much more than we ever did ten years ago."[164] A lawyer who had worked on civil rights and poverty issues for 28 years observed that "in the 1970s . . . we had a much greater sense of . . . impact litigation being an instrument for change than we do now."[165] Another said that when he first began working on employment discrimination issues in the 1970s, he and other plaintiffs' lawyers "asked for the moon and got it," but that they now had to look for opportunities to compromise.[166] Several others discussed the expense of litigation[167] and the difficulty of enforcing judgments against resistant defendants.[168] Lawyers who represented discrimination victims said that racial discrimination

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[W]hen he finally was able to be in court and could tell what had happened to him, he broke down and started crying. His wife said [that] during this whole ordeal, she had never seen him finally let go. And . . . as embarrassing as it may have been to him, she thought it was a positive thing for him to . . . have this catharsis. *Id.*

[161] Int. 43,1.

[162] *See, e.g.*, Int. 20, 30, 35, 65, 67, 69.

[163] Int. 67.

[164] Int. 20.

[165] Int. 30.

[166] Int. 65. These observations are consistent with the views of most commentators on civil rights and poverty litigation. *See, e.g.*, WASBY, *supra* note 2 (asserting that courts have become much less willing to expand civil rights and that the relationships among affected interests are much less stable than ever before); Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2133-34 (1994) ("Any efforts undertaken by legal services attorneys to redistribute wealth, whether by legislation or litigation, are bound to meet with continued and increasing political and judicial resistance.").

[167] *See* Ints. 11, 61, 69.

[168] *See* Ints. 10, 27, 67. For scholarly analyses of aspects of this problem, *see* DOLBEARE & HAMMOND, *supra* note 27, at 148-49 (describing factors that allowed power holders in one midwestern state to avoid implementing the Supreme Court's school prayer decisions of 1962 and 1963); ROSENBERG, *supra* note 4, at 15-21 (asserting that courts "lack powerful tools to force implementation" of their decisions and that strong opposition often renders judicial declarations useless); SCHEINGOLD, *supra* note 2, at 117-18 (noting "the judiciary's modest reservoir of coercive resources"); WASBY, *supra* note 2, at 109 ("Litigators' habit of incrementally attacking only one aspect of a problem at a time allows opponents to adopt one fall-back position after another"); Michael J. Klarman, *Civil Rights Law: Who Made it and How Much Did It Matter?*, 83 GEO. L.J. (433, 449 (1994) ("low-level discretion in the application of legal standards posed a pervasive obstacle to the enforcement of judicial civil rights decisions"); *Note, Interrogation in New Haven: The Impact of Miranda*, 76 YALE L J. 1521 (1967) (finding that police officers only partially complied with the requirements of *Miranda vs. Arizona* (1966)).

had become subtler and harder to prove,[169] and that discrimination victims never accomplished all of their objectives through litigation.[170] A lawyer who represented a plaintiff class in a race discrimination suit against a federal agency observed that his clients "could only achieve remedies where we could prevail in a lawsuit," and that those remedies were inadequate to redress the pervasive discrimination that had impaired their careers.[171] Three lawyers observed that their clients wanted apologies above all, but that they could not obtain them.[172]

Critical legal scholars argue that litigation confines advocates to arguments about the applicability of legal rules which may themselves be unfair or form part of a larger scheme of rules and institutions stacked against their clients.[173] Many of the lawyers in this study commented on injustices of existing law and social institutions. A lawyer who helped establish a highly successful system for litigating black lung claims observed that the significant portion of the law governing black lung litigation was basically unfair.[174] Describing her work for women charged with abuse and neglect by Chicago's Department of Family Services, another lawyer said that even when her clients prevailed, they remained extremely vulnerable to intervention by the Department because they were poor and black.[175] A lawyer who successfully handled dozens of police brutality cases observed that his work had not changed police department policies that allowed the misconduct to continue.[176] Describing her successful challenge to a Chicago Housing Authority ("CHA") policy of unilaterally transferring tenants whose relatives were charged with crimes, a lawyer observed that her work failed to prevent the CHA from changing its lease to make its right of unilateral transfer explicit: "[W]e have not empowered these people. [They] are more vulnerable than ever."[177]

Critics sometimes urge that the all or nothing stakes of litigation discourage negotiated compromises, which may be necessary to protect clients' long-term

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[169] *See* Ints. 26, 32, 44, 61, 63.

[170] *See* Ints. 1, 3, 24, 61.

[171] Int. 61. He also observed that the suit would not change the discriminatory views of agency personnel: "[A]s we've told our client, you're dreaming to think that a consent decree is going to change human nature. . . . The [agency] [is] like almost any employer . . . ; certain things are embedded in them." *Id.*

[172] *See* Ints. 1,2; 3,1; 24,3. One lawyer noted that his client, a victim of employment discrimination, was particularly troubled by the part of the settlement agreement in which the defendant asserted that it had done nothing wrong; "[t]hat hit him kind of hard." Int. 1.

[173] *See supra* note 7.

[174] *See* Int. 27. He also observed, however, that "the nice thing about the black lung statute is that it's the only circumstance other than . . . Workmen's Comp where the employer utilizes a person's body, utilizes their labor, and uses it up and has to pay for the shortening of that person's life." *Id.*

[175] *See* Int. 37.

[176] *See* Int. 24,2.

[177] Int. 12,1.

interests.[178] Many lawyers in the study observed that their clients needed to walk a fine line between asserting their rights and preserving essential relationships.[179] One lawyer who represented an African-American organization in redistricting litigation noted that his client could not afford to alienate powerful players in the community:

> [A]s a lawyer often . . . you . . . say, "Oh, well, look, there's the legal issue and I think you can win on the legal issue." But . . .[the client was] an organization that's very heavily involved in the inner-city urban environment. In order to do that and get certain operations going and funded . . . , you can't upset people who are in power, because, if you do that, it's going to cut off your life-line.[180]

Another lawyer who represented an Hispanic organization in redistricting litigation said that it was crucial that his client and other constituencies "be prepared to compromise" to reach a negotiated agreement because if the issue were decided by a judge "all bets [would be] off."[181] Describing his work on redistricting litigation for African-American community groups, another lawyer said that his clients always worried about their "unstable positions" in society and, therefore, tended to be less confrontational than he.[182] A lawyer who prosecuted hate crimes noted that she generally tried to work with state law enforcement officials rather than to embarrass them in the press because her clients needed allies.[183]

Indeed, concerns about the limitations of litigation sometimes prompted these lawyers' searches for alternative strategies. For example, one lawyer, who had helped conceive a "neighborhood intervention project" to avert the deterioration of several targeted neighborhoods,[184] said that she became disillusioned with litigating building code violations against landlords because such litigation often led courts to order tenants to vacate the buildings.[185] A lawyer who was look-

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[178] *See* Dinerstein, *supra* note 22, at 987-88; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984); Tremblay, *A Tragic View of Poverty Law Practice*, *supra* note 22, at 134-37; *see also* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1905 (1997) ("The experience of litigation may be too brutal and polarizing to serve the purpose of encouraging particular parties to join together in exploring normative commitments through interpretation.").

[179] *See, e.g.*, Ints. 19, 57, 63, 66, 69.

[180] Int. 57.

[181] Int. 69.

[182] Int. 26.

[183] *See* Int. 35,3.

[184] *See supra* note 50 and accompanying text.

[185] Int. 3 ("By the time tenants got up enough steam to call us and complain about it, it was almost too late."). *See also* Int. 23 (describing a case that had "left a strong impression" where the landlord was violating numerous building code provisions but was able to achieve her object of evicting welfare recipients because the building had become legally uninhabitable).

ing for an alternative to representing mentally ill clients in eviction cases observed that "the problem with this area of advocacy is that we're just fighting over . . . an inadequate stock of affordable housing."[186]

Some lawyers sought to enforce legal rights, not because they believed such an approach would transform their clients' circumstances, but because it was the best of the alternatives available to their clients.[187] They perceived that asserting legal rights might confer power on clients who lacked other types of political resources.[188] One lawyer observed that making it easier to establish eligibility for public assistance was "an improvement" over the status quo "given the political reality that we wouldn't . . . increase grants."[189] Another said that "there wasn't much downside" to litigating to keep the public schools open despite a budgetary crisis: "[t]hat was the only shot we had; the legislature wasn't going to do it."[190] A legal services lawyer observed of a combined litigation and legislative effort to force a city to address the spread of tuberculosis in homeless shelters: "[y]ou know you could lose, but you do it because you think its valuable to do and you hope you win."[191] A lawyer who filed a lawsuit to improve conditions in INS confinement observed that they already had tried using publicity to gain public support and thereby put pressure on the INS to improve conditions, but that this approach had failed: "[litigation] was really all that was left for these people. It's not as if they have a real strong political pull . . . . "[192]

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[186] Int. 58,3.

[187] *See* DOLBEARE, *supra* note 27, at 68; Crenshaw, *supra* note 7, at 1385; Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

[188] *See* E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975) ("The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless."); Matthew Diller, *Law and Equality: Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1427 (1995) (observing that litigation provides "a means of presenting claims as legal entitlements, rather than as toothless political aspirations"); LEMPERT, *supra* note 139, at 186 ("[t]he availability of law and the ability to use law may give substantial power to the relatively weak"); McCann, *supra* note 28, at 740 n. 56 ("legal tactics can be important to keep challenge alive at some level and to help in some actionable if limited regard in reshaping the overall opportunity structure in ways that may encourage eventual escalation of conflict"); Austin Sarat, *Going To Court: Access, Autonomy, and the Contradictions of Liberal Legality*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 97, 110 (David Kairys ed., 3d ed. 1998) ("Citizens disempowered in the political process may be able to employ legal institutions as arenas of struggle"); Zemans, *supra* note 37, at 701 ("Law is of course not the panacea of the powerless, but by its very nature it does lend legitimacy and the power of the state to whomever has the ability and willingness to use it").

[189] Int. 58,1.

[190] Int. 62,1.

[191] Int. 50,2.

[192] Int. 39,1.

These lawyers' qualified views about litigation's efficacy suggest a standard different from the one proposed by Gerald Rosenberg for assessing what lawyers and their clients can accomplish through the courts. These lawyers pursued litigation, not because they believed it was an effective strategy for accomplishing social change, but because it might, under the right circumstances, produce benefits for their clients. Sometimes the lawyers believed litigation would accomplish an individual client's immediate goals and nothing more.[193] In other cases, lawyers believed that litigation would improve the "strategic landscape" in which their clients bargained for better outcomes.[194] These lawyers understood that litigation would achieve far more limited results than social reform litigation's early champions had hoped.[195]

D. *Finding Allies "In An Age of Complexity"*

Far from failing to consider how their legal skills related to their clients' political goals, many lawyers in this study said that they were directly involved in helping their clients find and cultivate relationships with potential allies, including government officials, private entities, and other interest groups. Several of these lawyers indicated that they expected political alignments to influence their clients' prospects for translating tactical victories into real gains. The lawyers who employed these more overtly political strategies embraced a concept of politics broader than the rights-oriented views often attributed to civil rights and poverty lawyers.[196]

Much of the literature on cause lawyering assumes government's adversarial role.[197] Critics from the right often characterize activist lawyers as enemies of

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[193] Sometimes the clients' goals were quite modest. Several lawyers indicated that their clients simply wanted to recover money rather than to establish any legal principle. *See* Ints. 10,2; 22,2; 24,2; 27,2; 32,2; 38,1; 54,2; 55,3. *See also* Schultz & Gottlieb, *supra* note 28, at 85 (noting that some litigants may want nothing more than to have their case heard, while others "may wish to overturn a particular law without intending to restructure social policy across the nation").

[194] *See* MCCANN, *supra* note 10, at 734. *See also* Galanter, *Radiating Effects*, *supra* note 92, at 123 ("courts not only resolve disputes, they prevent them, mobilize them, displace them, and transform them").

[195] This finding is consistent with Mathew Diller's observation that "most poverty lawyers are skeptical of the original core premise of the legal services program — that legal representation can play a major role in ending poverty in America . . . [M]ost contemporary lawyers have much more sober assessments of its potential." Diller, *supra* note 188, at 1418. *See also* Sturm, *supra* note 109, at 654 (Rosenberg's assessment of the role of institutional reform litigation "depends on applying a somewhat utopian standard of success").

[196] *See supra* notes 2-7 and accompanying text.

[197] *See* HANDLER, *supra* note 1, at 3 (observing that "[m]ost of the activity of law-reform lawyers is directed against the government"); SARAT & SCHEINGOLD, *supra* note 11, at 41 ("the political edge of cause lawyering tends to embroil the profession in conflicts with the state and with a wide variety of vested interests").

the state.[198] However, lawyers in this study reported that they struck varied, and not always adversarial, stances with respect to state actors. They often sought to work with government officials, particularly at the state and local levels. In planning work, lawyers sought government (and private) resources for their clients' projects.[199] In litigation, only about 57 percent of the matters in this study involved litigation against the government; 63 in which the government was the defendant and 17 in which the government was the plaintiff. The other 43 percent of matters involved different opponents: e.g., employers, landlords, unions, contractors, landowners, real estate companies, banks, and individuals, and sometimes, more cooperative relationships between lawyers and the state.

In some of these matters, government officials participated as formal allies of civil rights lawyers and their clients. In twelve matters, individual complaints became "governmentalized"[200] when government officials decided to prosecute.[201] In other cases, the state lent authority to the client's position without formally aligning itself with the client in litigation.[202] In eight matters, lawyers said that

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[198] *See* ROWLEY, *supra* note 8, at 172-73 (describing rancor generated by "class action and other suits targeted [by legal services lawyers] systematically against government agencies"); STUMPF, *supra* note 149, at 281-91 (describing as "the dominant American attitude" that legal services programs focus primarily on attacking government programs and that the government should not subsidize lawyers who sue the state).

[199] *See, e.g.*, Int. 4 (helped client learn how to qualify to participate in Mayor's plan for revitalizing a certain neighborhood); 6,2 (negotiated with the Department of Housing and Urban Development ("HUD") for agreement whereby his client's not-for-profit housing development organization would receive priority to buy homes that HUD had foreclosed upon); 6,3 (negotiated with city to provide housing counselors as part of a "housing intervention program" designed to enable economically marginal homeowners to keep their housing); 7,2 (persuaded City to apply for HUD funding for demonstration project benefitting clients); 13,2 (contacted City officials on client's behalf to learn how client organization could qualify for City subsidy); 23,2 (persuaded City to use fines from housing court for receiverships for dilapidated buildings).

[200] *See* Galanter, *Why the Haves Come Out Ahead*, *supra* note 7, at 142 (we "governmentalize" individualized grievances by "using the criminal law or the administrative process to make it the responsibility of a public officer to press claims that would be unmanageable in the hands of private grievants").

[201] *See, e.g.*, Ints. 3,3 (HUD intervened in private housing discrimination claim); Int. 10,1, 10,2; 10,3 (city prosecuted defendants under consumer fraud ordinance); 15,1 (lawyers asked HUD to prosecute claims of discrimination based on family status); 23,1 (client allowed to intervene in city's prosecution of housing code violations in housing court); 23,3 (attorney worked with city on litigation campaign against slumlord); 28,2 (client intervened in state proceeding to enforce laws governing lead paint); 35,2 (lawyers consulted with U.S. Attorney's Office regarding whether state would criminally prosecute hate crimes); 53,1 (lawyer coordinated private litigation with city's prosecution of violations of lead paint ordinance); 54,2 (HUD participated in private suit challenging defendant landlord's prepayment of Section 8 housing mortgages); 61,2 (HUD would intervene on plaintiff's behalf in housing discrimination case).

[202] *See, e.g.*, Ints. 32,2 (Federal Reserve Board denied defendant bank's application to purchase other banks upon client's showing that defendant participated in racially dis-

they worked informally with government officials on policies affecting their clients or client constituencies.[203] Lawyers trained government prosecutors about the laws affecting their clients,[204] and sometimes government officials invited them to participate in improving government programs and procedures.[205]

Several lawyers said that the government was the defendant in litigation but that the government officials involved were receptive to the purposes of the lawsuit.[206] One lawyer observed that it had been "very pleasant" to learn that the new director of the defendant agency did not wish to contest the lawsuit.[207] Another lawyer reported that it reluctantly named as a defendant, at the court's insistence, a local government entity that indicated its willingness to cooperate with the plaintiffs in a suit against other government defendants.[208] In several institutional reform matters, lawyers reported that their clients and a government defendant agreed on the appointment of experts who would help assess liability and devise remedies.[209] Several lawyers in this study said that they felt obliged to help government defendants solve problems where those defendants did not disagree with plaintiffs about the relevant legal principle, but found it difficult to develop effective solutions.[210] Several observed that it was crucial to find allies

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criminatory lending practices); 62,1 (school board officials sought an outside group to take the lead in litigation presenting a legal theory the school board itself found politically unpalatable).

[203] *See* Int. 3,1 (lawyer was pushing the State to make human rights violation procedures more "user friendly" and to encourage state prosecutors to pursue family status discrimination claims); Ints. 3,2; 7,2 (lawyers sought to persuade City housing department officials to channel fines for housing code violations back into a program for hiring receiver); Int. 7,2 (lawyer sought to persuade City to apply for HUD funding for a program that would benefit his clients); Int. 50,2 (lawyer was working with city officials to develop a strategy to prevent the spread of tuberculosis among homeless people); Int. 59,1,2&3 (lawyer who was handling several large class actions against the state said that he was constantly in touch with government officials inside and outside the affected bureaucracies about budgetary matters and various other aspects of the cases).

[204] *See* Ints. 15,1 (lawyer trained HUD investigators regarding laws governing discrimination against families with children); 35,2 (lawyer trained assistant state's attorneys about how to prosecute hate crimes).

[205] *See* Ints. 15,1 (state invited lawyer to comment on its regulations and adopted his suggestions); 48,1 (Illinois State's Attorney's office invited lawyer to participate in drafting grievance procedures regarding conditions in Cook County jail); 57,3 (on behalf of his nonprofit clients, lawyer helped state develop regulations regarding nonprofit service providers' obligations to report alleged sexual abuse by their employees); 65,1 (general counsel of state agency invited lawyer to help redesign state program).

[206] *See, e.g.*, Ints. 20,2; 65,1. For sources discussing how government agencies use litigation to help them navigate political barriers, see HOROWITZ, *supra* note 8, 27, at 146-49; Diver, *supra* note 27, at 87; Horowitz, *supra* note 115, at 1294-95.

[207] Int. 20,1.

[208] *See* Int. 60,1.

[209] *See* Ints. 20,2; 30,1; 59,1; 60,1; 63,1.

[210] In a suit challenging Illinois' child welfare system, one lawyer observed that orders from the top of the state's bureaucracy had not significantly improved the system. Int. 59.

inside offending bureaucracies.[211]

In eleven matters in this study, lawyers directly represented the state, represented organizations that had assumed state functions, or took the state's position in litigation on behalf of private parties.[212] One lawyer worked in the City's corporation counsel's office, where she prosecuted consumer protection suits in low-income communities.[213] Several clients were not-for-profit organizations that had entered into contracts with the state to perform governmental services.[214] In another three matters, lawyers defended the constitutionality of legislation that benefitted their clients.[215] In one case, the client advocacy organization took the lead in asserting a position that the school board privately supported but found politically unpalatable.[216] In another matter, a lawyer reported that his client's interests were so closely aligned with the state's that the government was, in effect, his client.[217]

Several lawyers in this sample reported that they sought to build coalitions with other client groups and private entities to further their clients' goals or to contain the political power of their adversaries.[218] A lawyer who sought to create a due process right for tenants in foreclosed properties explained how real

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"It's very easy to beat up on people in court" but "[t]he truth is, nobody knows how to do this." *Id.* He saw it as part of his job to "help them figure out how to do it." *Id.* In a suit against the City over delays in processing employment discrimination claims, another lawyer said that the defendants had become "more comfortable talking to us and saying, 'look there's this problem here; how do we solve that?' " Int. 65. Another lawyer reported that, when she first graduated from law school, "the government was the enemy" but "now the best thing . . . is to try to work with the local government." Int. 3.

[211] Some scholars argue that finding allies within bureaucracies helps activists achieve reforms where institutional change otherwise would be impossible. *See* HANDLER, *supra* note 1, at 196-97; Sturm, *supra* note 109, at 683. *See also* ROSENBERG, *supra* note 4, at 36 (courts can produce significant social reform when "administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind").

[212] *See* Ints. 4,1; 6,1; 10,1; 10,2; 10,3; 26,1; 43,3; 62,2; 66,1; 66,2; 67,2.

[213] *See* Int. 10,1 (prosecuting woman who defrauded individuals who sought green cards); 10,2 (prosecuting contractors in low-income neighborhoods who failed to complete work); 10,3 (prosecuting landowner who dumped hazardous materials on his property in a poor neighborhood).

[214] *See, e.g.*, Ints. 4,1 (negotiated on behalf of tenant organization to assume management of the public housing project in which tenants lived); 6,1 (helped client housing organization contract to take over city's program for distributing abandoned buildings to not-for-profit service organizations); 67,2 (advised schools' councils — organizations of parents and community leaders charged with managing Chicago schools under decentralization plan).

[215] Ints. 26,1 (defending state's position in redistricting litigation); 43,3 (defending state bias violence statute against constitutional challenge); 62,2 (defending school reform legislation in suit by adversely affected principals).

[216] *See* Int. 66,1.

[217] *See* Int. 66,2.

[218] *See* Ints. 3, 11, 20, 29, 43, 49, 51, 57, 58, 59, 65.

estate interests led the legislative effort to establish these rights because they recognized that existing procedures were unconstitutional.[219] A lawyer who represented an organization of African-American firefighters seeking influence within the union said that he tried to help his clients assess various strategies, including building alliances with other groups in the union. Another lawyer observed, "You can't afford not to build coalitions anymore."[220] The counsel for a community organization that sought to influence the redistricting process said that he was always looking for "ways to make the other side more responsive."[221]

These lawyers' heavy reliance on overtly political strategies, such as creating alliances, negotiating agreements, attempting to contain opponents' political power, and working with government officials when doing so benefitted clients, is inconsistent with the view that lawyers fail to recognize the political dimensions of lawyering.

IV. Institutional Context and Strategy Choices

Although this research was not designed to test what factors might influence lawyers' orientations toward the politics of litigation, it does support the view that lawyers' strategy choices may vary according to the institutional attributes of their work settings: e.g., their clients, resource constraints, and regulatory restrictions.[222] It also suggests that lawyers' strategies do not vary significantly by race, gender, or legal education.[223] This section identifies several differences in the strategies that lawyers reported pursuing according to practice settings where they worked and speculates about aspects of these lawyers' practices which may influence strategy choices.

Litigation-only strategies comprised relatively large proportions of the work of lawyers in civil rights firms, legal services, and law school clinics; they constituted 44 percent, 35 percent, and 36 percent of these lawyers' work respectively.[224] In contrast, litigation-only strategies were very rare in the work of lawyers who practiced in advocacy organizations and grass-roots clinics; they comprised only nine percent and zero percent of these lawyers' work respectively.[225] Conversely, multi-dimensional litigation projects, legislative projects,

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[219] *See* Int. 49,2.

[220] Int. 3.

[221] Int. 26,1.

[222] *See* Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 179 (Robert L. Nelson et al. eds, 1992) (calling for research on the "arenas" in which lawyers develop professional norms, particularly their workplaces).

[223] *See infra* tbls. 9-11, app. at 67.

[224] *See infra* tbl. 13, app. at 70.

[225] *Id.* This finding is consistent with McCann & Silverstein's assertion that "staff activists" — lawyers who function as movement leaders and organizers — may use litigation more strategically than "staff technicians" — lawyers "motivated less by the desire

and planning work comprised 78 percent, 84 percent, and 100 percent of the work described by lawyers in private firms, advocacy organizations, and grass-roots clinics respectively, as compared with 44 percent for lawyers in civil rights firms, 60 percent for lawyers in legal services programs,[226] and 59 percent of lawyers in law school clinics.[227] Lawyers in civil rights firms, advocacy organizations, and grass-roots clinics handled sixteen of twenty matters involving community organizing or client training.

Differences in the types of clients in these different practice settings may help explain these distinctions in strategies by practice setting. Lawyers in civil rights firms, legal services programs, and law school clinics served relatively high proportions of individuals.[228] Individual clients consumed 72 percent of all litigation-only services described by lawyers in this study.[229] Many of these individual clients could benefit from litigation-only strategies,[230] and some of them had no choice but to litigate — e.g., where they sought formal status changes, such as divorce or bankruptcy, or where they were defendants in criminal proceedings or eviction actions. Moreover, many of these individual clients had no prospect of, or interest in, changing institutional structures or maintaining relationships with their litigation opponents. The only relevant question for some of these clients was whether their disputes could be resolved on relatively favorable terms. Organizational clients, who consumed only 7 percent of the litigation-only services but 23 percent of multi-dimensional litigation strategies and 90 percent of planning services,[231] were served primarily by lawyers in private firms and advocacy organizations.[232] Only 4 percent of these clients were served by lawyers in legal services programs and law school clinics.[233]

Miscellaneous additional factors might also help explain differences in the types of strategies these lawyers pursued by practice setting. Regulatory restrictions on lobbying and community organizing discourage legal services lawyers

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for social change than by fulfillment of technical functions." Silverstein & McCann, *supra* note 11, at 279-81. Lawyers in this study who worked in advocacy organizations and grass-roots clinics may generally have been more likely than other lawyers in the sample to see themselves as movement activists.

[226] If one were to exclude multi-dimensional projects in which the only other component was legislative advocacy designed to accomplish the same rule change sought through litigation, this number would drop to 39 percent. *See supra* notes 48-49 and accompanying text.

[227] *See infra* tbl. 13, App. at 70.

[228] *See infra* tbl. 14, App. at 71.

[229] *See infra* tbl. 15, App. at 72.

[230] *See supra* notes 24-28 and accompanying text.

[231] *See infra* tbl. 15, App. at 72.

[232] *See infra* tbl. 14, App. at 72.

[233] *See infra* tbl. 14, at 71. Alan Houseman argues that most legal services programs are not "structured to maximize group representation or empowerment of groups through such representation." Alan W. Houseman, *Political Lessons: Legal Services for the Poor — A Commentary*, 83 GEO. L.J. 1669, 1686 (1995).

from undertaking more comprehensive strategies.[234] Although some critics claim that legal services lawyers routinely flout statutory prohibitions on lobbying,[235] no such evidence surfaced in this study. In fact, several legal services lawyers in the sample indicated that these statutory and regulatory restrictions strongly influenced their strategy choices.[236] Lawyers in civil rights firms, which depend heavily on attorneys' fee awards to support their work, may be inclined to focus on litigation strategies for which they can obtain such compensation.[237] Indeed, across practice categories, multi-dimensional approaches were much less common where lawyers depended upon clients for fees.[238] Moreover, as suggested above, the discrimination claims that often serve as the basis of such practices are particularly well-suited for litigation remedies and may be particularly difficult to redress through other available means.[239] On the other hand, foundations, which historically assisted in supporting advocacy organizations, have reduced their funding for litigation campaigns in recent years and increased their support for grass-roots projects.[240] Advocacy organizations and grass-roots clinics may emphasize multi-dimensional litigation strategies and nonlitigation work to attract foundation support.[241] Lawyers in law school clinics may sometimes focus narrowly on litigation — particularly discrete, simple litigation — to further clinics' primary pedagogic goal: teaching students litigation skills.

Thus, institutional attributes and client characteristics, perhaps as much as differences in the political sophistication of the lawyers, may explain why some lawyers pursue litigation more single-mindedly than others.[242]

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[234] *See supra* note 48.

[235] *See* ROWLEY, *supra* note 8, at 173.

[236] *See* Int. 22. One lawyer said that the restrictions were "always on [his] mind." *Id.* (observing that restrictions on community organizing were "crippling.")

[237] *See* Int. 61 (explaining that the firm's finances were always precarious and that recovering fees under fee-shifting statutes when they prevailed was like "pulling teeth;" "We do this kind of work out of political conviction. We'd have to be nuts to do it to make a living."). *Id.*

[238] *See infra* tbl. 17, App. at 73.

[239] *See supra* notes 104, 139-140 and accompanying text.

[240] *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 52-53 (1989); Lynn Walker, *The Role of Foundations in Helping to Reach the Civil Rights Goals of the 1980's*, 37 RUTGERS L. REV. 1055 (1985).

[241] *See* Int. 3. One lawyer in my sample observed that she and her colleagues try to build coalitions because "foundations have . . . given the impression that they like to see coalitions and that they like to see organizations working together . . . and they like to see grassroots support."

[242] *Cf.* MCCANN, *supra* note 10, at 13 ("Liberal legal reform action often is modest in design and impact, to be sure. However, this generally is due to the limited resources and strategic opportunities for defiant action available to movement activists as much as to fatal flaws in their understanding of their situation.").

V. CONCLUSION

The lawyers is this study were neither the myopic litigators sometimes portrayed by critics on the left nor the independent social radicals of the right's common caricature. These activist lawyers were not obsessed with judicial rule change. Rather, they used litigation as part of an arsenal of strategies for securing favorable direct and indirect benefits for clients. These findings call into question two premises of much of the scholarly commentary on law and social change: 1) that activist lawyers emphasize legal rights strategies at the expense of other more promising political tactics; and 2) that they are politically naive. The interviews suggest that civil rights and poverty lawyers may select strategies with an eye toward desired outcomes, and that they, like lawyers who represent corporations, generally understand that their work relates to other political and social processes even if they prefer to deny the political dimensions of their work.[243] These lawyers' frequent references to the benefits their strategies produced for clients or constituencies also cast doubt on the occasional charge from the political right that activist lawyers pursue independent social change agendas without reference to their clients' needs.

However, the more refined portrait of civil rights and poverty lawyers' work and aspirations offered here hardly answers the concerns of critics from either the left or the right. Showing that these lawyers did not invest heavily in court imposed rule change does not resolve the questions as to whether they were truly sophisticated strategists: whether they were using available skills and resources wisely;[244] whether they anticipated the costs and long-term conse-

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[243] *See* SHAMIR, *supra* note 87, at 171 (describing how elite corporate lawyers sought to preserve their "professional claim of objective and neutral expertise" in the face of the New Deal's "dejudicialization of the legal system"); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 4-5 (1988) (highlighting political aspects of corporate lawyers' counseling roles and lamenting that these lawyers too often portray themselves as "value-neutral technicians"); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) ("Mainstream lawyers have long aspired to see their work as apolitical — as not involving choices for which they have substantive responsibility or which legitimate public concern or regulation"); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) (criticizing the Psychological Vision of lawyering, which focuses primarily on lawyer-client relations, and arguing in favor of a Political Vision, which confronts "the ways in which the pursuit of clients' goals compromises and restricts the ability of others to pursue their goals").

[244] For arguments that poverty lawyers and civil rights lawyers should redirect resources, *see* Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L. J. 1633, 1646-48 (1995) (asserting that many poverty lawyers "embrace a conception of politics as a particular type of rule-oriented, rights-defining, or policy-focused activity captured in terms such as 'impact litigation' or 'legislative and administrative advocacy' " and urging lawyers to devote greater attention and resources to "the political possibilities inherent in day-to-day interactions with clients, judges, officials, and adversaries"); John O. Calmore, *Spatial*

quences of the strategies they selected;[245] whether they were sensitive to the constraints and opportunities of particular contexts;[246] and whether their work furthered any coherent vision of social change.[247]

Similarly, those who argue that lawyers for the poor should focus on individual client service and not broader "political" goals will find cause for worry in this study. These data suggest that, absent restrictions on their work, resourceful civil rights and poverty lawyers, like lawyers for wealthy and powerful clients, will, to serve their clients' goals, employ an array of strategies designed to influence various legal, political, and social processes. Those tactics will include not

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Equality and the Kerner Commission Report: A Back-To-The-Future Essay, 71 N.C. L. REV. 1487, 1513 (1993) (stating that activists should focus on "targeting housing production, rehabilitation, and preservation in communities of color" and on national class action lawsuits designed to equalize housing accommodations in HUD-assisted, public, and subsidized housing programs under Title VIII (42 U.S.C. § 3604(b) (1988)); Alan W. Houseman, *Political Lessons: Legal Services for the Poor — A Commentary*, 83 GEO. L. J. 1669, 1686, 1695 (1995) (asserting that legal services programs should represent more community organizations and assist in economic development efforts).

[245] For examples of analyses of unanticipated consequences of law reform strategies, *see* Gary Peller, *Frontier of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758, 797 (1990) (citing evidence that public school integration led to the loss of a class of black educators); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 36 (1985) (arguing that the strategy of giving welfare recipients clearly defined rights and limiting field level discretion backfired when conservatives took control); E. Douglass Williams & Richard H. Sander, *The Prospects for "Putting America to Work" in the Inner City*, 81 GEO L.J. 2003, 2056 (1993) (asserting that current employment discrimination doctrine, by discouraging employers from using tests and credentials as bases for employment decisions, pushes them to rely on interviews, where statistical discrimination and prejudice may be far more pervasive).

[246] *See* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.- C.L. L. REV. 297, 305 (1996) ("The process of linking strategy to political vision always requires adaptation and a detailed understanding of particular contexts for its effectiveness"); Joel F. Handler, *"Constructing the Political Spectacle": Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 969-972 (1990) (arguing that legal rights sometimes contribute to social change when social movement groups appropriate rights talk to change expectations and mobilize support, but emphasizing that context is crucial); Sturm, *supra* note 109, at 645 (arguing that the likely success of litigation varies by "the political context surrounding the institutions subject to litigation and the potential for mobilizing other forms of effective advocacy").

[247] *See* Bellow & Charn, *supra* note 244, at 304-305 (arguing that many political lawyers "have embraced a far too constricted definition of both the possible and desirable in law-oriented interventions than is, in fact, dictated by the rightward turn of national and local politics" and lamenting the "flight from politics and from daily engagement, bargaining, and compromise"); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 727 (1994) (asserting that deconstruction politics has no chance against an opposition that "has belief systems, meta-narratives that allow theories of power, of action" and urging postmodernism to present "an alternative vision").

only informal dispute resolution and litigation, but also more explicitly political strategies. Their efforts might include trying to build institutions and securing systemic change as well as seeking to obtain immediate relief for aggrieved individuals.

APPENDIX

TABLES 1-3
CHARACTERISTICS OF LAWYERS IN STUDY

TABLE 1

Gender	*N*	%
Male	39	57
Female	30	43

TABLE 2

Race	*N*	%
White	61	88
African-American	7	10
Hispanic	1	1

TABLE 3

Practice Settings	*N*	%
Civil Rights Firm	6	9
Other Private Firm	19	27.5
Legal Services	19	27.5
Legal Advocacy Org.	11	16
Law School Clinic	8	12
Grass-roots Clinic	5	7
City Government	1	1

TABLES 4-17
CHARACTERISTICS OF CLIENTS AND WORK PERFORMED

TABLE 4
TYPES OF CLIENTS

Types of Clients	Number of Matters	%
Individual(s)	80	41
Plaintiff class	36	18
Organization	64	32
Coalition	3	2
Municipal Government	6	3
No identifiable Client	8	4

TABLE 5
TYPES OF WORK BY PRIMARY TASK PERFORMED

Types of Matters**	Number of Matters	%
Litigating/Admin. Adv.	137	69
Legis./ lobbying	13	7
Planning	41	21
Political Organizing	1	0.5
Other	5	2.5

** Some of these matters involved more than one of these activities. This chart reflects the primary types of work as described by the lawyers.

TABLE 6
PROJECTS INVOLVING LITIGATION/COMPLEXITY OF STRATEGY

Types of Strategy	Number of Matters	%
Litigation only	46	34
Litigation/publicity	7	5
Multi-pronged	84	61

TABLE 7
PROJECTS INVOLVING LITIGATION/OTHER STRATEGIES PURSUED

Other strategies	Number of Matters	%
Lobbying	51	37
Communicating with press	33	24
Organizing grass-roots campaigns and training clients	20	15
Seeking to influence the implementation of govt. pol.	20	15
Training other lawyers and defendants	7	5
Building coalitions and bargaining with other interest groups	6	4

TABLE 8
TYPES OF BENEFITS REPORTED IN MATTERS INVOLVING LITIGATION

Types of Benefits	Number of Matters	% of Litigation Matters
Precedent	15	11
Money	16	12
Other immediate benefit	27	20
Changed indiv. def(s).	9	7
Changed institution	34	25
Increased client's formal political power	3	2
Educated public	24	18
Educ/mobil. constituency	11	8
Vindicated client's position	13	9
Influenced legislature	4	3
Increased resources for problem	4	3
Too early to tell	14	10
Nothing	8	6

TABLE 9
TYPES OF STRATEGY BY RACE OF LAWYER (PERCENTAGES)

	Litigation			Legis.	Planning	Organ.	Other	Total
	Single	Lit./pub.	Multi					
White	39 (22)	7 (4)	73 (42)	12 (7)	38 (22)	0 (0)	5 (3)	174 (100)
Black	6 (28.5)	0 (0)	10 (47.5)	1 (5)	3 (14)	1 (5)	0 (0)	21 (100)
Latino	1 (50)	0 (0)	1 (50)	0 (0)	0 (0)	0 (0)	0 (0)	2 (100)

TABLE 10
TYPES OF STRATEGY BY GENDER OF LAWYER (PERCENTAGES)

	Litigation			Legis.	Planning	Organ.	Other	Total
	Lit. only	Lit./pub.	Multi					
male	23 (21)	5 (4.5)	50 (45.5)	4 (3.5)	27 (24.5)	0 (0)	1 (1)	110 (100)
female	23 (26.5)	2 (2.2)	34 (39)	9 (10.3)	14 (16)	1 (1)	4 (5)	87 (100)

TABLE 11
TYPES OF STRATEGY BY LAW SCHOOL ATTENDED (PERCENTAGES)

	Elite	Prestige	Regional	Local	Total
Lit. Only	9 (20)	8 (17)	21 (46)	8 (17)	46 (100)
Lit./pub.	3 (43)	1 (14)	2 (29)	1 (14)	7 (100)
Multi.	12 (14)	26 (31)	27 (32)	19 (23)	84 (100)
Planning	11 (27)	6 (15)	5 (12)	19 (46)	41 (100)
Legis.	1 (8)	1 (8)	9 (69)	2 (15)	13 (100)
Other	0 (0)	4 (80)	0 (0)	1 (20)	5 (100)

TABLE 12
TYPES OF STRATEGY
BY YEARS IN CIVIL RIGHTS/POVERTY PRACTICE (PERCENTAGES)

	Less than one year	1-2 yrs.	3-5 yrs.	6-10 yrs.	11-15 yrs.	16-20 yrs.	21-25 yrs.	+25 yrs.	Total
Lit.Only	2 (4)	3 (7)	9 (20)	5 (11)	5 (11)	6 (13)	7 (15)	4 (9)	46
Multi	0 (0)	4 (5)	16 (19)	17 (20)	18 (21)	9 (11)	8 (10)	11 (13)	84
Legis.	1 (7.5)	0 (0)	1 (7.5)	6 (46)	4 (30.5)	1 (7.5)	0 (0)	0 (0)	13
Planning	3 (7)	1 (2.5)	9 (22)	13 (32)	10 (24)	1 (25)	0 (0)	4 (10)	41
Other	1 (20)	0 (0)	1 (20)	0 (0)	0 (0)	3 (60)	0 (0)	0 (0)	5

TABLE 13
TYPES OF STRATEGY BY PRACTICE SETTING (PERCENTAGES)

	Litigation			Legis.	Planning	Organ.	Other	Total
	Lit. only	Lit./pub.	Multi.					
Civ. rts. firm	8 (44.5)	2 (11.1)	6 (33.3)	0 (0)	2 (11.1)	0 (0)	0 (0)	18 (100)
Other firm	8 (16)	1 (2)	10 (20)	1 (2)	28 (56)	0 (0)	2 (4)	50 (100)
Legal services	19 (33)	2 (3.5)	27 (47)	6 (10.5)	0 (0)	1 (2)	2 (4)	57 (100)
Adv./ec dev. org..	3 (9.4)	2 (6.3)	19 (59.3)	1 (3)	7 (22)	0 (0)	0 (0)	32 (100)
Law school clinic	8 (36)	0 (0)	11 (50)	2 (9)	0 (0)	0 (0)	1 (5)	22 (100)
Grass-roots clinic	0 (0)	0 (0)	8 (53)	3 (20)	4 (27)	0 (0)	0 (0)	15 (100)
City govt.	0 (0)	0 (0)	3 (100)	0 (0)	0 (0)	0 (0)	0 (0)	3 (100)

TABLE 14
TYPE OF CLIENT BY PRACTICE SETTING (PERCENTAGES)

	Indiv.	Class	Organ.	Coalition	Govt.	None	Total
Civ. rts. firm	10 (55.5)	2 (11.1)	6 (33.3)	0 (0)	0 (0)	0 (0)	18 (99.9)
Other firm	7 (14)	2 (4)	38 (74)	0 (0)	3 (6)	1 (2)	51 (100)
Legal services org.	32 (57)	21 (37)	2 (4)	0 (0)	0 (0)	1 (2)	56 (100)
Adv. Org.	11 (34)	7 (22)	14 (44)	0 (0)	0 (0)	0 (0)	32 (100)
Law school clinic	13 (62)	3 (14)	0 (0)	1 (5)	0 (0)	4 (19)	21 (100)
Grass-roots clinic	6 (40)	1 (7)	4 (27)	2 (13)	0 (0)	2 (13)	15 (100)
City govt.	0 (0)	0 (0)	0 (0)	0 (0)	3 (100)	0 (0)	3 (100)

TABLE 15
TYPE OF STRATEGY BY TYPE OF CLIENT (PERCENTAGES)

	Indiv.	Class	Organ.	Coalition	Govt.	None	Total
Lit. only	33 (72)	9 (19.5)	3 (6.5)	0 (0)	0 (0)	1 (2)	46 (100)
Multi	34 (40)	25 (30)	19 (23)	0 (0)	4 (5)	2 (2)	84 (100)
Planning	1 (2.5)	0 (0)	37 (90)	0 (0)	1 (2.5)	2 (5)	41 (100)
Legis.	5 (38.5)	0 (0)	4 (31)	3 (23)	0 (0)	1 (7.5)	13 (100)
Other	2 (40)	0 (0)	0 (0)	0 (0)	1 (20)	2 (40)	5 (100)

TABLE 16
TYPE OF CLIENT BY TYPE OF STRATEGY (PERCENTAGES)

	Litigation			Legis.	Planning	Org.	Other	Total
	Lit. only	Lit./pub.	Multi					
Ind.	33 (41)	6 (7)	34 (43)	4 (5)	1 (1)	0 (0)	2 (3)	80 (100)
Class	9 (25)	2 (6)	25 (69)	0 (0)	0 (0)	0 (0)	0 (0)	36 (100)
Org.	3 (4.5)	0 (0)	19 (29.5)	4 (6)	37 (58)	1 (2)	0 (0)	64 (100)

TABLE 17
TYPES OF STRATEGY
BY LAWYER'S FINANCIAL DEPENDENCE ON CLIENTS (PERCENTAGES)

	Litigation			Legis.	Planning	Organ.	Other	Total
	Lit. only	Lit./Pub.	Multi					
Fees paid	9 (28)	1 (3)	6 (18)	0 (0)	16 (48)	0 (0)	1 (3)	33 (100)
No fees paid	37 (22.5)	6 (3.5)	78 (47.5)	13 (8)	25 (15.2)	1 (0.6)	4 (2.4)	164 (99.7)