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# THE LAWYER AS CATALYST OF SOCIAL CHANGE

James E. Moliterno\*

## INTRODUCTION

Elsewhere I have said that lawyers may have an important disadvantage in the role of public official.<sup>1</sup> But as challengers to perceived injustice, as catalysts of social change, lawyers may have a special role advantage.<sup>2</sup> Undoubtedly, it seems, this is one of the lawyer's roles in a modern democratic society, be it a well-established one or an emerging one.

There is a difference in training and mindset between common-law and civil-law lawyers in this regard.<sup>3</sup> Common-law lawyers recognize that their work in court helps shape the law. Every argument they make that is accepted by a court makes a bit of precedent. It makes law. In routine cases, just a bit; in cases of wider application, a great deal. Civil-law lawyers, by contrast, think of their court work as the application of existing law, not law making. The code and parliament are supreme, and decisions of courts make no law beyond the parties. As a result, common-law lawyers think differently from civil law lawyers. Common-law lawyers are participants in law making. We think of the great social change cases, the *Brown v. Boards*<sup>4</sup> and the *Roe v. Wades*<sup>5</sup> and the *Gideon v. Wainwrights*<sup>6</sup> and so on, as being attributable to both the deciding courts and the winning parties' lawyers. Common-law lawyers understand that their arguments

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1. James E. Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. (forthcoming 2009) (on file with author).

2. I do not mean to suggest that lawyers have an advantage in this role over all others. History shows that professors of a wide range of religious beliefs may also have special advantages. Lawyers, the religious, and perhaps some other groups possess different advantages for this work.

3. A narrower distinction may really be between lawyers in systems with judicial supremacy and those in systems with parliamentary supremacy. For purposes of this essay, the common law/civil law dichotomy sufficiently highlights the distinction.

4. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

5. 410 U.S. 113 (1973).

6. 372 U.S. 335 (1963).

make law, and in some cases, social change. Rare is the U.S. law school dean's welcoming speech or the J.D. commencement address that does not include a stirring, evocative plea to the new members of the common-law legal profession to change the world.<sup>7</sup> In common-law systems, even typical lawyers have a direct line to change through law making. Common-law lawyers correctly perceive themselves as potential agents of social change.

Consider N. Hill, a common-law lawyer who changed the course of consumer protection. Who, you ask? Perhaps a protégé of Ralph Nader. Not quite. More of a precursor than a protégé. Hill's client came to him having taken a drug that had been mislabeled, and she was injured by taking the drug.<sup>8</sup> However, because the druggist had not failed in the exercise of due care, Hill did not bring an action against that person.<sup>9</sup> Instead, he brought an action against the drug bottler, claiming he had done so carelessly. But when Hill met his new client, it was 1849 and the clear rule of law imposed no duty on a remote maker or vendor of a product to protect an eventual consumer of the product such as Hill's client.<sup>10</sup> Hill, however, won his case for his injured client because the state's highest court created a modest exception to the general privity of contract rule for cases in which the injury was caused by a product that was a thing of danger.<sup>11</sup> This was a narrow exception. Courts for the next sixty-plus years struggled with what would be a dangerous instrumentality fitting within the rule's exception, until Benjamin Cardozo clarified that the exception was no exception at all, but was actually the creation of a tort duty "when the consequences of negligence may be foreseen."<sup>12</sup> No longer would the liability of remote vendors be confined to things of danger. Instead, Buicks and other products that caused injuries would produce a duty on the part of their makers and sellers when the danger was reasonably foreseeable.

But look back to what Hill had said sixty-plus years before on behalf of his drug-injured client. He asked the court to create liability without regard to privity of contract when the harmful "consequences of the act . . . would be likely to follow and might be easily foreseen."<sup>13</sup> He suggested that this liability would be confined to those cases in which the "consequences [were] so proximate as to be expected or readily foreseen."<sup>14</sup>

What an amazing lawyer. He "got it" almost seventy years before Cardozo explained it. By doing nothing more than representing his client in a routine product injury case, he charted a course, a long one, toward a new

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7. See two examples excerpted in JAMES E. MOLITERNO & FREDERIC I. LEDERER, AN INTRODUCTION TO LAW, LAW STUDY, AND THE LAWYER'S ROLE 4–11 (2d ed. 2004).

8. *Thomas v. Winchester*, 6 N.Y. 396, 396–97 (1852).

9. *Id.*

10. *Id.* at 407–08.

11. *Id.* at 410–11.

12. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

13. *Thomas*, 6 N.Y. at 402 (emphasis omitted).

14. *Id.* (emphasis omitted).

level of consumer protection. He changed the law. He changed the course of consumer protection. He changed the way makers and sellers would behave. He made social change within the role of lawyer as common-law lawyers do.

But this essay is not about Hill or Thurgood Marshall, or Catherine MacKinnon or Richard Posner or Louis Brandeis, or countless other lawyers famous and not, who have made enormous social change through their law work. These law giants made their social change through litigation, proposal of new legislation, and creating new modes of legal analysis—all fairly traditional lawyer role activities (even if their mode of performing those traditional tasks broke contemporary molds). This essay is about law-trained people who have been social change forces through methods of the social activist and not exclusively of the lawyer. The Naders and Gandhis, the lawyers in Pakistan who marched against the suspension of the courts by General Pervez Musharraf in 2007, or those who entered the election board to demand publication of vote results from Robert Mugabe's government in 2008. Are lawyers especially well-suited to act in these outside-the-traditional-lawyer-role, social change modes?

Obviously, lawyers, and especially common-law lawyers, are powerfully positioned to be agents of social change. At the center of the traditional lawyer role, representing clients in courts, lawyers are given a monopoly on the enterprise by unauthorized practice of law (UPL) laws. But might the same lawyer qualities, natures, and tendencies also distinguish lawyers as agents of social change outside the traditional lawyer role? That is the topic of this essay.

#### I. THE LAWYER: A PUBLIC OFFICIAL WEAKNESS

Elsewhere, I have suggested that the lawyer's role is not well-suited to being a lawmaker or public official.<sup>15</sup> Lawyers do have many skills that lend themselves to the public official role, but skills and talents aside, the lawyer's role is a poor fit with that of the public official. The lawyer's work and training are client-centered. Client goals are paramount, with only modest constraints imposed by the countervailing interests of others or the public generally. Not so the public official, who is a specially empowered good citizen, one who places the public interest first.

Within only very loose constraints, lawyers seek the private good of their clients and disregard the interests of the public. That is our role. If our client wants something lawful that harms another, even that does injustice to another, we seek our client's goal. If our client wants something lawful that harms the public good, we seek our client's goal. The lawyer is not generally a broad, public-good seeker. Only in gross instances of harm to the public good is the lawyer permitted under ethical norms to betray her client's interests (revealing information to prevent very serious future harm,

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15. Moliterno, *supra* note 1.

for example). Our ethical norms and the lawyer's accepted, modern role exalt advancing client goals to the detriment of others.

This is mere description and, in this essay's context, no criticism of lawyers. This is what lawyers do. In some measure, it is what lawyers have done for centuries,<sup>16</sup> although the client-centered role may only have been the dominant one for the past fifty years. It is what makes lawyers lawyers, and what makes lawyers useful. We advance our clients' good over that of others, even when the result might be unjust, and we advance our clients' good over the public good except in rare and extreme instances.

This one central aspect of the lawyer role, the lawyer ethos, may be a terrible disadvantage to the lawyer's capacity to do public office effectively. Lawyers advance the interests of clients for a fee, and, within very broad ranges, lawyers represent the interests of clients, without regard for the public good or the legitimate competing interests of others or the public generally. It is no shame on a lawyer to represent the interests of a client effectively and to undermine the interests of others for the gain of their client. That is the perfectly legitimate role of the lawyer in representation. No one questions the propriety of a lawyer who advances her client's interests at the expense of others. While this role may be a poor fit with a public official's, it fits hand in glove with the attributes of social change agent.

What is the role of lawyer then?

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>17</sup>

Henry Lord Brougham's classic rendition of the lawyer's advocacy role is surely overstated and subject to exception and criticism. It has more often been criticized than praised by academic writers. But nonetheless, even discounted for its exaggeration, it makes clear that lawyers are primarily interested in advancing their clients' lawful aims, and all other interests are a distant second.<sup>18</sup> Brougham's zealous approach to advocacy

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16. See Joseph G. Baldwin, *The Bench and the Bar*, reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 113 (Dennis R. Nolan ed., 1980).

17. TRIAL OF QUEEN CAROLINE: PART II, at 3 (New York, James Cockcroft & Co. 1874); see also Fred C. Zacharias & Bruce A. Green, "Anything Rather Than a Deliberate and Well-Considered Opinion"—Henry Lord Brougham, *Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221, 1221 (2006).

18. See generally Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2–3 (2005) (observing that Brougham's 1820 declaration "that 'an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client' . . . remains emblematic of a conception that is arguably the 'dominant' one among United States lawyers").

served him well in a role he embraced outside the ordinary lawyer's role of representing clients. Brougham was himself an active and effective social change agent.<sup>19</sup>

More modernly, we have rules that permit a lawyer to withdraw when the client's course is highly repugnant (this rule does not require it, and the rationale for this rule is as much to ensure the client will get a lawyer who can advance his interests with zeal rather than one who is conflicted about the representation).<sup>20</sup>

A more tailored than Brougham's, but nonetheless strong statement of the lawyer's client-centered duty was given by former American Bar Association (ABA) President, Justice Lewis F. Powell, Jr. Writing in the case that at long last struck down citizenship requirements as a lawyer qualification, he said,

Lawyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country. In such representation, the duty of the lawyer, subject to his role as an "officer of the court," is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.<sup>21</sup>

Justice Powell is no Lord Brougham. He might not agree with Brougham's extreme view of the lawyer properly pursuing a client's ends to the extent of "involving his country in confusion";<sup>22</sup> but Powell regards a lawyer representing a client to the harm of his own country as being "in his honored and traditional role."<sup>23</sup>

Despite talk of public service obligations, the organized bar has never embraced an ethic of more-than-optional public service for lawyers.<sup>24</sup> Neither has it embraced justice as a lawyer's primary goal, despite William Simon's persuasive argument that it is the lawyer's primary goal.<sup>25</sup> The legal profession was embarrassed by Monroe Freedman's candor when he asserted that the criminal defense lawyer's duty was to argue even false

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19. Monroe H. Freedman, *Henry Lord Brougham—Advocating at the Edge for Human Rights*, 36 HOFSTRA L. REV. 311 (2007) (recounting many of Brougham's social change missions, especially his antislavery work).

20. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2008).

21. *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973).

22. TRIAL OF QUEEN CAROLINE, *supra* note 17, at 3.

23. *In re Griffiths*, 413 U.S. at 724 n.4.

24. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008); B. George Ballman, Jr., *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?*, 7 GEO. J. LEGAL ETHICS 1139, 1141–46 (1994).

25. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 2 (1998).

inferences for his client.<sup>26</sup> But Freedman and Simon both described what they saw: a profession whose members were animated by the adversary excuse and their role as partisans.

Perhaps no more lasting description of the lawyer's role exists than Justice Oliver Wendell Holmes's "The Path of the Law."<sup>27</sup> In this speech, Holmes explains that a lawyer sells her ability to predict the consequences of proposed and past conduct by the client, Holmes's "bad man."<sup>28</sup> The bad man, every lawyer's client for Holmes, cares nothing of the consequences of his actions to the public good, but only of the consequences he will likely reap at the hands of public officials.<sup>29</sup> The lawyer's role for Holmes is to provide expert predictions of those consequences, and not to decline to serve the client if the client's actions will harm others or the public<sup>30</sup> but rather to guide the client in his evaluation of the personal consequences of his actions, consequences imposed by public officials either in the form of prosecution or by courts as a result of private litigation.<sup>31</sup>

Holmes taught us that lawyers represent "the bad man,"<sup>32</sup> or one who cares only for his own good and the consequences that may be taken by public agencies (criminal prosecution, administrative consequences, or orders of court at the instance of private plaintiffs) as a result of his actions. Lawyers, Holmes said, do not calculate the niceties of justice or the public interest against those of the client.<sup>33</sup> Rather, Holmes said essentially that lawyers sell their expertise and judgment about official consequences to their clients.<sup>34</sup>

Lawyers are partisans. There is nothing shameful in that. It is what makes lawyers lawyers in some sense. A lawyer's role is to advance the lawful interests of her client, without regard for whether those interests harm the interest of others (they most often do), nor whether those interests are at odds with more general notions of the public's interest.

Good lawyers are partisans in this sense. This is not an attribute from which professional (as opposed to popular) approbation comes. It is what distinguishes lawyers, especially American lawyers. In our adversarial justice system, despite contrary-sounding happy talk in bar function after-

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26. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966); see also William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 30-34; William H. Simon, "Thinking Like a Lawyer" About Ethical Questions, 27 HOFSTRA L. REV. 1, 2 (1998) (asserting that, while Freedman "was insistent on confronting hard questions, he also was emphatic in affirming simple answers").

27. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

28. *Id.*

29. *Id.*

30. *Id.*

31. David Luban's "morally activist lawyer" stands in perhaps the starkest contrast to Justice Oliver Wendell Holmes's description. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, at xxii (1988).

32. Holmes, *supra* note 27, at 461.

33. *Id.* at 460-61.

34. *Id.* at 461-62.

dinner speeches, the lawyer's proper role is to advocate for her client while the other party's lawyer advocates for hers, all before an impartial judge. Whether we are correct or not, our justice system operates on the premise that pitting sides against one another produces justice. This believed-in result is what we rely on in describing a lawyer's role morality. The lawyer who properly plays her role within a moral system is moral, even if particular acts might offend notions of general morality.

Of course the lawyer's pursuit of client aims has limits. The goals sought and the means undertaken must themselves be lawful. At least they must be supported by nonfrivolous arguments. We do not require the lawyer to objectively or subjectively believe that the client's positions will prevail. We ask only that the lawyer have nonfrivolous support.<sup>35</sup>

The lawyer's role does permit a lawyer to withdraw from representing a client when the client's goals are repulsive to the lawyer,<sup>36</sup> and generally insulates the lawyer from a requirement of agreeing with a client's political, social, or moral views or activities.<sup>37</sup> But we counsel lawyers not to take such a position lightly, and we base our support for that "limit" as much on the worry that a client will not receive adequate representation from a repulsed lawyer.<sup>38</sup> Instead, we take professional pride in the lawyer who represents the unpopular client without regard to the lawyer's own views.<sup>39</sup> The profession prides itself on the ethic of separation from a client's moral position. So this "limit" is hardly one at all.

Even in the "kinder, gentler" world of the transactional lawyer, lawyers are meant to take sides. In this setting, they may often represent clients whose interests may be served by compromise and accommodations, but even the extensive literature on cooperative negotiation emphasizes that it is the client's interests that must be faithfully pursued.<sup>40</sup> The creative, cooperative lawyer may find that her client's interests can be advanced while another party's interests are advanced as well, but that creative lawyer is not motivated by a desire or duty to advance another's interests. It is only when this alignment advances the client's interests that pursuing it is desirable. And where the interests of the client part from another's interests, the lawyer invariably and properly becomes a distributive

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35. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008).

36. *Id.* R. 1.16(b)(4).

37. *Id.* R. 1.2(b).

38. Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 214, 215–35 (David Luban ed., 1983).

39. Witness the legion of books telling Clarence Darrow's storied career, for example, *ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM* (Arthur Weinberg ed., 1989). For general support of this proposition, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1066 (1976).

40. See generally John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 *OHIO ST. J. ON DISP. RESOL.* 619 (2007); Ted Schneyer, *The Organized Bar and the Collaborative Bar Movement: A Study in Professional Change*, 50 *ARIZ. L. REV.* 289 (2008).



bargainer, extracting a dollar for her client from her bargaining opponent's client.<sup>41</sup> As they should, lawyers advance the only loosely limited interests of their clients, not the interests of justice nor the public interests.

As a public official, the public interest is supreme. “[L]egislators must be genuinely oriented toward enacting laws that are in the *common* good or *public* interest . . . .”<sup>42</sup> The public official's role is that of an exalted citizen with special public authority, one who puts the public's interest first and who possesses the power to execute on that priority. To the extent that, as a lawyer, a public official might favor the interests of the lawyer-officials or former clients, or expected future clients, or the clients of the lawyer's former law firm, that lawyer would be acting as a lawyer at the expense of the proper service as a public official.

## II. WHAT MAKES AN EFFECTIVE SOCIAL CHANGE AGENT?

Social movement leaders are “strategic decision-makers who inspire and organize others to participate in social movements.”<sup>43</sup> Theorists have expounded different approaches to explaining leadership in social movements. For instance, one theory focuses on the double role of social movement leaders; that a leader must “function both within the movement as a ‘mobilizer,’ inspiring participants,” and “outside the movement as an ‘articulator,’ linking the movement to the larger society.”<sup>44</sup> The lawyer's forensic skills and role in representing client interests seem naturally associated with the role as an articulator. Another theory of leadership contends that leaders attain authority because “followers willingly cede agency to their leaders.”<sup>45</sup>

Collective behavior theorists contend that leaders “create the impetus for movements by providing examples of action, directing action, and defining problems and proposing solutions.”<sup>46</sup> Lawyers are regularly expected to define the problem, consider solutions, and provide strategies for action.

Simple characteristics of successful leaders match those of lawyers. Social movement leaders tend to be “highly educated.”<sup>47</sup> Social movement leaders also generally “come from the educated middle and upper classes,”

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41. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 41–55 (2d ed. 1991).

42. Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2127 (2007) (book review) (quoting BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 250 (2006)).

43. Aldon D. Morris & Suzanne Staggenborg, *Leadership in Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 171, 171 (David A. Snow et al. eds., 2004).

44. *Id.* at 172 (quoting Joseph R. Gusfield, *Functional Areas of Leadership in Social Movements*, 7 SOC. Q. 137, 140 (1966)).

45. *Id.* (citing ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (1962)).

46. *Id.* at 173 (citing KURT LANG & GLADYS ENGEL LANG, *COLLECTIVE DYNAMICS* (1961)).

47. *Id.* at 174.

a quality nonrepresentative of the usual movement base.<sup>48</sup> This quality is partially due to the fact that “privileged class backgrounds provide leaders with financial resources, flexible schedules and social contacts often unavailable” to the majority.<sup>49</sup> But it is education that is “the key resource that social movement leaders derive from their . . . backgrounds,” and “educational capital is crucial” even for those leaders who come from the poor and working-class community.<sup>50</sup>

Social movement leaders tend to be highly educated because this is necessary to perform the “myriad of intellectual tasks” required for success.<sup>51</sup> Such a wide range of tasks parallels those performed by lawyers, as does the flexibility of mind for which legal education is well-known training; specifically, social movement leaders frame grievances and formulate ideologies, debate, interface with media, write, orate, devise strategies, and engage in dialogue with internal and external elites.<sup>52</sup> Through formal and advanced education, such as law school, social leaders acquire advanced “reading, writing, speaking and analytical skills” necessary for such tasks.<sup>53</sup> Social movement leaders “tend to major in social sciences, humanities and arts,” which are “highly relevant” because they “constitute a ‘science of human action.’”<sup>54</sup>

How do social change agents generate change and what is necessary for a social movement to emerge and succeed? The “key ingredients for the emergence of social movements . . . includ[e] political and cultural opportunities, organizational bases, material and human resources, precipitating events, threats, grievances, and collective action frames,” and leaders are instrumental in converting these “conditions for mobilization into actual social movements.”<sup>55</sup> For instance, leaders must be able to utilize “preexisting bases” and to recognize “political and cultural opportunities.”<sup>56</sup> Take Mahatma Gandhi’s initial days in South Africa as an example. In the beginning, Gandhi used the infrastructure of British government and the Indian Congress as a base when he initiated the Natal Indian Congress as the focal point of the Indian rights movement. Moreover, he used the opportunity of the disenfranchisement bill to unite and motivate the Indians in South Africa to act, whether they were Muslim, Hindu, or Christian.

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48. *Id.* (citing CRANE BRINTON, *THE ANATOMY OF REVOLUTION* (1952); RICHARD FLACKS, *YOUTH AND SOCIAL CHANGE* (1971); ANTHONY OBERSCHALL, *SOCIAL CONFLICT AND SOCIAL MOVEMENTS* (1973)).

49. *Id.* at 175.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (citations omitted).

55. *Id.* at 178.

56. *Id.*

Leaders must “offer frames, tactics, and organizational vehicles” in order to mobilize action.<sup>57</sup> Framing resonates with the methods by which lawyers organize and present an argument; particularly, “[f]raming specifies the unjust conditions,” or lists the grievances, and then determines “appropriate strategies and tactics to achieve the desired ends.”<sup>58</sup>

### III. THE GOOD FIT BETWEEN THE LAWYER’S ROLE AND THAT OF SOCIAL CHANGE AGENT

All of the attributes of the lawyer that we have been told for centuries make them good public servants also make them good social changers. Leadership qualities, forensic ability, talent for reasoning, knowledge of the legal system—all of these aid the work of the social changer.

But the same role attributes that seem to disadvantage lawyers in the public official role may distinguish them in being catalysts for social change. The social changer’s single-minded pursuit of a goal fits the lawyer’s training and temperament. We think of social changers as advancing the public interest, but in truth, we think this when we happen to agree with the social changer’s view of the public good. Social changers pursue a cause, which may advance the public good or not. Surely the social changer believes what she does advances the public good, but it is the cause and her belief in it that counts to the social changer and the varying views of its public good are left for history to evaluate. I use three examples of law-trained social change agents in this essay: Gandhi, Ralph Nader, and Phyllis Schlafly. I doubt that many readers would agree that the results of all three of these social change agents advanced the public interest. Being viewed as advancing the public interest is not the goal of a social change agent. Nor is it the goal of a lawyer advocating for a client.

#### A. *Criticisms of Social Change Agents*

Contemporaneous critics of social change agents are not hard to find. But such critics do not deter the social change agent any more than they deter a lawyer’s advocacy. The British authorities in India articulated an argument that Gandhi’s efforts were contrary to the public’s interest in stability and order and the British view of civilized rule. Nader’s attacks on business could be argued to have diminished American business’s competitive advantages, costing jobs and creating havoc in abandoned factory towns from which business departed for less regulated climes.

Nader and his views were the targets of significant criticisms from car manufacturers, business leaders, economists, and others. The criticisms included economic concerns, such as the claim that cars like the Corvair could not have these safety problems, because the insurance companies

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57. *Id.* at 180.

58. *Id.* at 183.

would not permit it.<sup>59</sup> Auto industry leaders such as Henry Ford II asserted that the industry had “always built cars just as safe as they possibly can be.”<sup>60</sup> Ford further cautioned that the federal government should “consider carefully the problems they would pass along to the auto industry if they passed an irrational law which conceivably could upset the economy of the country.”<sup>61</sup> Like Ford, Frederic G. Donner, the then-chairman of General Motors (GM) described Nader’s criticisms of the Corvair as “unreasonable” and reminded audiences “that laws establishing standards would not in themselves solve the problem.”<sup>62</sup>

Political and other business leaders also criticized Nader. For example, Michigan Governor George Romney argued that the prosperity of the country was closely linked with that of the auto industry.<sup>63</sup> William Murphy, chairman of the Business Council, opined that “[t]his country is on a safety kick. It is a fad, on the order of the Hula Hoop. We are going through a cycle of over-emphasis on safety.”<sup>64</sup>

One economist, Roger Leroy Miller, leveled a variety of criticisms at Nader and other safety advocates.<sup>65</sup> Among other critiques, Miller pointed out that the inevitable result of increased safety requirements would be higher car prices.<sup>66</sup> Miller argued that as the price of new cars would rise, the demand for used cars would also rise, leading to an increased number of used cars on the road.<sup>67</sup> Those used cars will lack the new safety features, and, as a result, “[t]he increase in the age of cars being driven may decrease safety as much as new-car safety features increase it.”<sup>68</sup> Miller also asserted that there were less costly ways for society to increase road safety than new safety features on cars, for example, “[m]odification or removal of roadside hazards.”<sup>69</sup> Pointing toward the high proportion of fatal accidents caused by drunken drivers, Miller queried “[w]hy should the many who seek to purchase the services of automobile transportation end up paying for increased safety in order to prevent fatalities involving the few drunken drivers?”<sup>70</sup>

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59. *Safety: Critic Raps Foreign Cars, Too*, L.A. TIMES, Apr. 17, 1966, at J4.

60. *Id.* (internal quotation marks omitted).

61. *Id.* (internal quotation marks omitted).

62. David W. Chute, *GM Advances Introduction of '67 Models to Help Sales*, WASH. POST, May 21, 1966, at E6 (quoting G.M. Board Chairman Frederic G. Donner) (internal quotation marks omitted).

63. *Ford Lashes Unsafe-Auto Allegations*, WASH. POST., Apr. 16, 1966, at A1.

64. *One Book that Shook the Business World*, N.Y. TIMES, Jan. 18, 1970, at 244 (quoting William Murphy) (internal quotation marks omitted).

65. See Roger Leroy Miller, *The Economic and Social Hazards of Improving Auto Safety*, L.A. TIMES, Mar. 31, 1974, at 13.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

In *Regulation and the Natural Progress of Opulence*,<sup>71</sup> Sam Peltzman describes what is now called the “Peltzman Effect.” Peltzman criticizes Nader’s advocacy of increased safety standards for motor vehicles as being counterproductive. Peltzman noted that before the Department of Transportation created the National Highway Traffic Safety Administration (NHTSA), which in turn created the Motor Vehicle Safety Standards (MVSS), the rate of traffic fatalities was already decreasing.<sup>72</sup>

Peltzman argued that Nader had in fact created a more dangerous environment. The claim was that the increased safety standards to which cars are built would instill drivers with a false sense of security.<sup>73</sup> Rather than driving more safely, motorists would feel “the car will save me” and engage in increasingly risky behavior. Peltzman argued that higher standards would actually *increase* traffic accidents and fatalities as people rely more and more on the car and less on driving behavior.

Similarly, it is often wondered why Gandhi, considered by many to be the “strongest symbol of non-violence in the 20th century,” never received the Nobel Peace Prize.<sup>74</sup> Among the criticisms that some members of the Nobel Committee raised about Gandhi was that he was not consistently a pacifist.<sup>75</sup> Gandhi had, at times, suggested that “if there was no other way of securing justice from Pakistan and if Pakistan persistently refused to see its proved error and continued to minimise it, the Indian Union Government would have to go to war against it.”<sup>76</sup> Although Gandhi was quick to note that if the Indian government took that course, then he would not himself have a place in that “new order,” some still criticized these sorts of statements as dangerous and inconsistent with his stated principles.<sup>77</sup> In addition, some on the Nobel Committee were worried that not only was Gandhi an inconsistent pacifist, but that he also should have known that some of the campaigns he spearheaded stood a real possibility of “degenerat[ing] into violence and terror.”<sup>78</sup> Some on the Nobel Committee also were critical of Gandhi’s nationalist tendencies, noting that all of Gandhi’s “struggle in South Africa was on behalf of the Indians only, and not of the blacks whose living conditions were even worse.”<sup>79</sup> One member of the Nobel Committee noted in his diary that while Gandhi “is the greatest personality among the nominees—plenty of good things could be said about him—we should remember that he is not only an apostle for peace; he is first and foremost a patriot,”<sup>80</sup> a serious criticism in the Nobel context.

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71. SAM PELTZMAN, *REGULATION AND THE NATURAL PROGRESS OF OPULENCE* (2005).

72. *Id.* at 7–8.

73. *Id.* at 6.

74. Øyvind Tønnesson, *Mahatma Gandhi, the Missing Laureate*, NOBELPRIZE.ORG, Dec. 1, 1999, [http://nobelprize.org/nobel\\_prizes/peace/articles/gandhi/index.html](http://nobelprize.org/nobel_prizes/peace/articles/gandhi/index.html).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (internal quotation marks omitted).

80. *Id.* (internal quotation marks omitted).

There were other criticisms of Gandhi, some of which are rendered in the book, *Gandhi and His Critics*.<sup>81</sup> One criticism of Gandhi was that he was an “apologist for the caste system.”<sup>82</sup> This was a criticism often leveled by the British to undermine Gandhi based on Gandhi’s opposition to an affirmative-action-like plan in 1932. Gandhi’s opposition to this plan was based on its attempt to set up separate electorates for the lower classes.

Interestingly, Gandhi was accused by Hindu leaders of being too concerned with the plight of the lower classes. So, in this case, Gandhi was criticized from two sides at once. Gandhi was very critical of the treatment of the lower classes. In this, Gandhi broke with Hindu tradition and angered many traditional Hindus.<sup>83</sup> Gandhi became consistently more critical of the caste system as time went on. He moved from agreeing with it in principle, to wanting to simplify it and get rid of the numerous subcastes, to finally advocating wholesale abolishment of it.<sup>84</sup>

Gandhi was also criticized for being disingenuous regarding race discrimination. Proponents of this claim usually point to Gandhi’s time in South Africa. The argument is that, since Gandhi did not take up the cause of the black population during this period, he was not really against racism in general.<sup>85</sup> It should not be surprising that Gandhi focused his efforts on racism against Indians. Given the immense challenge of fighting racism at all in the early 1900s, Gandhi chose to limit his efforts. Gandhi attempted to fight the battle in which he had a chance of success. Evidence does show that later movements against racism in a more general sense received inspiration and encouragement from Gandhi’s early, more limited efforts.<sup>86</sup> But he was nonetheless subject to this claim that he was not acting in the public interests during his work in South Africa.

Gandhi’s stance regarding the partition of India has also received criticism. Gandhi did not believe in the partition. Gandhi believed that India had worked hard for centuries to unify both Hindus and Muslims and that the partition would nullify all this work. Gandhi and his Indian National Congress took insufficient steps to assuage Muslim fears of repression in a unified India, and the remarks of some Hindus likely fueled those fears.<sup>87</sup> To the critics this is the key failure; Gandhi opposed the two-nation solution without articulating a way in which a single nation could work.

Gandhi even said, “I know no non-violent method of compelling the obedience of eight crores of Muslims to the will of the rest of India, however powerful a majority the rest may represent.”<sup>88</sup> Statements like this

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81. B. R. NANDA, *GANDHI AND HIS CRITICS* (1985).

82. *Id.* at 18.

83. *Id.* at 18–26.

84. *Id.* at 26.

85. *Id.* at 27.

86. *Id.* at 31.

87. *Id.* at 85, 93–95.

88. *Id.* at 94.

frightened Muslims and increased tensions. Gandhi's advocacy of majority rule and democracy inflamed Muslim fears.

Gandhi's commitment to nonviolence produced claims that he was a fascist sympathizer and thus acting counter to the public interest. According to the critics, Gandhi was in no way nonviolent until he was about fifty. Gandhi did have a military record, serving in the Zulu rebellion, Boer War, and World War I. Critics point to this as evidence that Gandhi was in no way committed to nonviolence. Some of these same critics, however, point to Gandhi's "Quit India" movement in 1942 as evidence that he was blinded by nonviolence and even accuse him of fascist sympathies because he would not condone violence against Axis powers.<sup>89</sup> Rather than see his development toward nonviolence as a progression of life views, critics claimed he was either blinded by ideology or must be sympathizing with the Nazis.

Recognizing the capacity to argue about the public good served by social changers' efforts does not diminish their efforts any more than arguments about the value of a client's identified good diminish his lawyer's efforts on behalf of that client. Each pursues the goal without regard to others' doubts about the goal's value. It is enough that the social changer believes in the goal. The lawyer need not even believe in the client's good, but need only be able to say that it is not an unlawful goal, nor one within the very narrow range of goals that so impinges the safety or well-being of others to be outside the wide range of proper targets of a lawyer's efforts.

Perhaps few would agree that the public good was advanced by goals sought by all three social change agents used as examples in this essay. But that is the lot of lawyers: they advance goals of clients with only modest regard for public good and even more modest concern about the opinion of others regarding the value of the goals they seek.

In one respect, the social change agent might be seen as a poor fit with the role of lawyer, but this objection would be overblown. Lawyers are not responsible for the moral positions of their clients, and indeed, lawyers are protected from connection to their clients by the rules and norms of the legal profession.<sup>90</sup> Obviously social change agents are connected to the moral positions of their clients. But although lawyers are protected from sharing the goals and attributes of their clients, nothing in the rules and norms of the legal profession requires them to be so separated. Cause lawyers are explicitly connected to their clients, seeking as they do clients who could represent the very goals the cause lawyers wish to advance. And probably far more lawyers than cause lawyers eventually settle into law practices in which they share the goals of their clients.<sup>91</sup> Whether the lawyers initially share the clients' goals or learn to love them does not

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89. *Id.* at 115.

90. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2008).

91. Stuart A. Scheingold, *Essay for the In-Print Symposium on The Myth of Moral Justice*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 47, 51 (2006).

matter for this purpose. The point is that there is no disconnect between good lawyers sharing the goals of their clients and social change agents sharing the goals of those they seek to benefit.

The argument has been made that lawyers would effect greater social change if they concentrated their efforts outside the lawyer's traditional role.<sup>92</sup> Cause lawyers use their "legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic or, indeed, legal."<sup>93</sup> The use of litigation as a chief means of effecting social change has been criticized for various reasons, perhaps most notably for its narrowing of options and focus for the social movement and for its tendency to produce co-opted members of the movement.<sup>94</sup> But in any event, whether more effective inside the traditional lawyer role or outside it, the law-trained have special talents for social change leadership.

### B. Three Examples: Gandhi, Nader, and Schlafly

I am not suggesting that, because three famously effective social change agents were lawyers, lawyers are better suited to this role than nonlawyers. I could as easily have chosen three religious leaders and claimed that those three meant that religious leaders are better suited than others to perform this role. And perhaps they are, just as lawyers possess some role advantage. Perhaps it would be harder to find three engineers who were leaders of social movements. These three pieces of data would not make much of an empirical impression, I agree. My point in using these examples is to show the mesh between the skills and training and mindset of lawyers generally and the attributes of social change agents generally. These examples are meant as illustrations, not proof.

#### 1. Gandhi

Gandhi briefly attended Samaldas College, located in the port city of Bhavnagar, but Gandhi was disappointed with Samaldas College and desired to travel to England for his education.<sup>95</sup> Gandhi's father wished him to be a lawyer.<sup>96</sup>

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92. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 265, 338–43 (1991); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3 (1980); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 478 (1981); Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 635–36 (1982). But see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 938, 940–41 (2007).

93. STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 3 (2004) (citing LUBAN, *supra* note 31).

94. See Lobel, *supra* note 92.

95. Stephen Hay, *Between Two Worlds: Gandhi's First Impressions of British Culture*, 3 MOD. ASIAN STUD. 305, 317 (1969).

96. *Id.* at 312.



Disappointed with education in India, he focused on attaining his legal education in England. For practical reasons, Gandhi knew that practicing law in British-ruled India was “impossible without a knowledge of English” for the reason that the “codes of law, although translated into the main languages of India, were all in English.”<sup>97</sup> According to the interviewer, Gandhi also stated frankly, in an interview with *The Vegetarian*, that he had gone to England as a law student “due to ambition, the desire for status, and the hope of improving [my] economic position by joining a lucrative profession.”<sup>98</sup> Gandhi was driven to go to England for personal reasons as well. Gandhi thought to himself, “If I go to England not only shall I become a barrister (of whom I used to think a great deal), but I shall be able to see England, the land of philosophers and poets.”<sup>99</sup>

Gandhi’s early petitions were not for independence, but for equal treatment of Indians as British subjects. In his autobiography, Gandhi wrote that the “colour prejudice that [he] saw in South Africa was . . . quite contrary to British traditions,” and that in those days he “believed that British rule was on the whole beneficial.”<sup>100</sup> It was not until some years later that Gandhi considered British rule in India as an evil, and eventually, Gandhi espoused a “total rejection of the West.”<sup>101</sup>

On November 6, 1888 he joined the Inner Temple and later, in 1889, Gandhi decided to take the Matriculation Examination of the University of London as a private candidate.<sup>102</sup> Although the London Matriculation “meant a good deal of labour,” Gandhi “wished to have the satisfaction of taking a difficult examination.”<sup>103</sup>

Gandhi fulfilled the requirements of the Inner Temple, eating the requisite number of meals per term. But he did not eat meat or fish, and he was a much sought dinner companion: because he would not drink the wine, there was more for his fortunate dinner companions to enjoy.<sup>104</sup> Gandhi “knew that Bar Examinations did not require much study.”<sup>105</sup> The bar examination included two examinations, one in Roman Law and the other in Common Law.<sup>106</sup> Becoming a barrister could be achieved “by a short and relatively easy course of study, combined with a few formal appearances at one of the Inns of Court.”<sup>107</sup>

Gandhi, however, took his studies seriously and actually “spent much money in buying the prescribed text books” rather than “cramming” like

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97. *Id.*

98. CHANDRAN D. S. DEVANESEN, *THE MAKING OF THE MAHATMA* 147 (1969).

99. Hay, *supra* note 95, at 311 (citing Gandhi’s interview with *The Vegetarian*).

100. MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY OR THE STORY OF MY EXPERIMENTS WITH TRUTH* 142–43 (Mahadev Haribhai Desai trans., 1996) (1927).

101. YOGESH CHADHA, *GANDHI: A LIFE* 160 (1997).

102. J. M. UPADHYAYA, *MAHATMA GANDHI AS A STUDENT* 75–76 (1965).

103. *Id.* at 76.

104. *Id.* at 75–76.

105. GANDHI, *supra* note 100, at 46.

106. UPADHYAYA, *supra* note 102, at 76.

107. KATHRYN TIDRICK, *GANDHI: A POLITICAL AND SPIRITUAL LIFE* 2 (2006).

other students.<sup>108</sup> Gandhi prepared for the bar examinations by “working his way through the prescribed texts.”<sup>109</sup> These texts included the Common Law of England, Snell’s *Equity*, White and Tudor’s *Leading Cases*, William and Edward’s *Real Property*, and Goodeve’s *Personal Property*.<sup>110</sup> In these texts, Gandhi became acquainted with the law and “displayed . . . a relish for arguing things out,” and some of what he later claimed to be “‘scientific’ reasoning about ethical and religious matters owed more to the legal reasoning he encountered in such texts as Snell’s *Equity*.”<sup>111</sup> Gandhi passed the bar examination at the age of twenty-two and on June 10, 1891, was called to the bar and enrolled in the High Court on the 11th.<sup>112</sup> He left for home the next day.<sup>113</sup>

During his stay in England, Gandhi was also influenced by social and economic changes. Gandhi came into contact with the Irish discontent, and he would apply “its lessons in India.”<sup>114</sup> Gandhi also came in close contact with the English poor and the labor movements, and Gandhi’s “perception of the inequality of man [was] heightened by years spent in London.”<sup>115</sup> As with many law students and lawyers, his perspective was broadened by the experience of his study.

Gandhi, after leaving England, went to Bombay to begin his legal practice and to begin his study of Indian law. Unfortunately, Gandhi’s studies of English and Roman law “had given him no . . . practical experience of the conduct of cases in court.”<sup>116</sup> His complaints with his legal education are less and less familiar today but ring in the ears of seasoned legal educators. Gandhi became overwhelmed at his first court appearance, and as a result, Gandhi returned the fee and told his client he could not continue the case.<sup>117</sup>

In 1893, Gandhi took a position in South Africa. Gandhi joined a firm representing Dada Abdulla & Co., shipowners and traders, in an ongoing lawsuit to collect on a promissory note totaling £40,000.<sup>118</sup> Gandhi wrote that the case was intricate and contained “numerous points of fact and law,” and that “[b]oth parties had engaged the best attorneys and counsel,” from which he “had a fine opportunity of studying their work.”<sup>119</sup>

Gandhi’s work in South Africa gave him “true knowledge of legal practice,” and through his experience there, he “gained confidence that [he]

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108. UPADHYAYA, *supra* note 102, at 76.

109. TIDRICK, *supra* note 107, at 4.

110. UPADHYAYA, *supra* note 102, at 78.

111. TIDRICK, *supra* note 107, at 4.

112. UPADHYAYA, *supra* note 102, at 77.

113. *Id.*

114. DEVANESEN, *supra* note 98, at 163–64.

115. *Id.* at 155.

116. CHADHA, *supra* note 101, at 44.

117. *Id.* at 45.

118. *Id.* at 48–49.

119. GANDHI, *supra* note 100, at 110.

should not after all fail as a lawyer.”<sup>120</sup> After Gandhi joined the case, he “saw that the facts of Dada Abdulla’s case made it very strong” and that “the law was bound to be on his side,” but he also concluded that if litigation persisted then it would “ruin the plaintiff and the defendant.”<sup>121</sup> At that point, Gandhi advised that the case move for arbitration, which resulted in a settlement that “delighted” his client.<sup>122</sup>

At the conclusion of this case, Gandhi received advice that he took to heart for the rest of his legal and social action career, particularly, that if one takes “care of the facts of a case, the law will take care of itself.”<sup>123</sup> Gandhi, from that point on, would meticulously gather facts from which to present his arguments, inside and outside his lawyer’s role.

Throughout Gandhi’s life, there are numerous instances where his legal education and lawyer’s mindset or experience were essential to his role as a leader for social change. Gandhi pursued his goal of equal rights and independence as a lawyer pursues a client’s interests. His work would follow the pattern of a lawyer presenting a client’s case; particularly, Gandhi would research the facts and the law and then present those facts alongside arguments to the community, government officials, and organizations. This tie between his legal education and the sense of a lawyer representing a client’s interests, and his work for Indian rights and independence is seen at the onset of his days in South Africa.

The Indian population faced widespread racial discrimination in South Africa, and, during the years that Gandhi was living there, “numerous restrictions were placed on Indians.”<sup>124</sup> In the first few days of Gandhi’s stay in South Africa, Gandhi came in close encounter with the inequities and prejudices against Indians. Once,

he was thrown out from the first class railway compartment for which he had purchased a ticket; his baggage was dumped on the platform. A white passenger had him removed from the railway carriage because of the color of his skin. From that moment on, Gandhi vowed to combat discriminatory laws.<sup>125</sup>

In the beginning, Gandhi, as recorded in his diary, was “merely a witness and a victim of these wrongs,” and it was from this that he “awoke to a sense of [his] duty.”<sup>126</sup> Gandhi, however, “did nothing beyond talking on the subject with the Indians in Pretoria,” because he decided that to “look after the firm’s case and to take up the question of Indian grievances at the same time would be to ruin both.”<sup>127</sup>

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120. *Id.* at 109.

121. *Id.* at 111.

122. CHADHA, *supra* note 101, at 63.

123. GANDHI, *supra* note 100, at 110.

124. CHADHA, *supra* note 101, at 51.

125. K. L. Seshagiri Rao, *Practitioners of Hindu Law: Ancient and Modern*, 66 FORDHAM L. REV. 1185, 1192 (1998).

126. CHADHA, *supra* note 101, at 64.

127. *Id.*

Soon enough, however, he called a meeting of Indians and appealed to the people to form an “association to make representations to the authorities about the hardships suffered by the Indian settlers.”<sup>128</sup> He “offered to place at its disposal as much of his time and service as possible.”<sup>129</sup> Gandhi, on that day, “made a deep impression” among the Indians in South Africa, and as a result, he was “instrumental” in the founding of the Natal Indian Congress, from which he would “conduct his future struggle for Indian rights.”<sup>130</sup>

From that moment on, Gandhi would continuously seek out redress for injustices done to the Indians in South Africa; he had “found a cause which absorbed him completely.”<sup>131</sup> Gandhi did continue his legal practice, but he wanted his practice as a lawyer to remain a “subordinate occupation,” as it was “necessary that [he] should concentrate on public work.”<sup>132</sup>

Gandhi’s “approach to community work was that of a lawyer,” in that he would take up a cause, do extensive research and fact gathering, then present his findings and arguments to the governments and the public as if presenting a case in the court of law.<sup>133</sup>

For instance, Gandhi’s association with Indians in Pretoria led him to confront the “disability laws” in the Transvaal.<sup>134</sup> These laws, particularly the proposal for Indian disenfranchisement, gained Gandhi’s immediate interest. Gandhi, in response, started a petition to the Natal Government, and he “took considerable pains over drawing up this petition.”<sup>135</sup> Gandhi “read all the literature available on the subject,” and gathered specific instances of harm and other facts.<sup>136</sup> Gandhi intended to make a “careful, unbiased study.”<sup>137</sup> Gandhi spent weeks writing and his work resulted, in 1896, in the Green Pamphlet, also known as *The Grievances of the British Indians of South Africa*, and originally over 10,000 copies were printed and sent to newspapers and prominent Indians.<sup>138</sup>

Within the petition, Gandhi “argued that [the Indians] had a right to the franchise in Natal.”<sup>139</sup> The “Green Pamphlet was in fact a summary of the several petitions, memorials, circulars and leaflets [Gandhi] had issued to the authorities in Natal, London and Calcutta,” and it “detailed the sufferings of the Indians in Natal.”<sup>140</sup> It included discussion and examples “on the injustice[s] of the pass system, the three-pound tax, restrictions in

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128. *Id.* at 57.

129. *Id.*

130. *Id.* at 57, 66.

131. DEVANESEN, *supra* note 98, at 276.

132. GANDHI, *supra* note 100, at 123.

133. CHADHA, *supra* note 101, at 68.

134. *Id.* at 61.

135. GANDHI, *supra* note 100, at 119.

136. *Id.*

137. CHADHA, *supra* note 101, at 69.

138. *Id.*

139. GANDHI, *supra* note 100, at 119.

140. CHADHA, *supra* note 101, at 70.

the purchase of property, and other inequities.”<sup>141</sup> Gandhi showed “impressive industry and great forensic skill as he marshaled all the facts of the Indian case.”<sup>142</sup> The arguments within the pamphlet were received both positively and negatively, but were clear and well supported. As written in the *Natal Mercury* newspaper, the petition “ma[d]e a very good case from [the Indian’s] point of view.”<sup>143</sup>

Gandhi’s legal education particularly prepared him for his work on the Green Pamphlet. He used his lawyering skills to gather the facts and to use those facts in reasoned arguments supporting his cause. In his autobiography, Gandhi even referred to his work on the Indian grievances in South Africa as a “case.”<sup>144</sup>

Similarly, another cause that Gandhi took up was that of the indentured Indian laborers. In 1894, the Natal Government sought to impose an annual tax of £25 on the indentured Indians, and in response, Gandhi lead and “organized a fierce campaign against this tax.”<sup>145</sup>

Gandhi was not in all ways enamored with lawyers. He became disillusioned with the law system and the purpose and use of attorneys. Gandhi began to feel as if the Indians were “fighting a losing battle against a rising tide of racial prejudice,” and he became weary of the law courts.<sup>146</sup> In his book *Hind Swaraj*, Gandhi said that lawyers are “glad when men have disputes,” and even “manufacture them,” and the “greatest injury” done by lawyers in South Africa and India is that “they have tightened the English grip.”<sup>147</sup> Yet, if Gandhi had not been a lawyer himself, “his usefulness in Natal would have been severely limited,” because his education and legal background “gave him status in the eyes of the whites” and prepared him for his cause.<sup>148</sup> Eventually, Gandhi would give up his law practice to focus more on his community work. But he did that work as a lawyer would pursue a client’s cause.

Upon Gandhi’s return to India, he would become central to India’s movement for independence and to other social movements. Gandhi would push for a better and a free government as well as combating the “stinking dens” that were Indian cities and confronting the caste system and the wealthy who “extracted their wealth from the poor,” and all the while Gandhi would condemn violence as a tool for freedom.<sup>149</sup> Throughout all of these struggles, Gandhi’s legal education and experience gave him the skills to achieve change.

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141. *Id.* at 71.

142. DEVANESEN, *supra* note 98, at 275.

143. CHADHA, *supra* note 101, at 65.

144. GANDHI, *supra* note 100, at 217.

145. *Id.* at 131.

146. DEVANESEN, *supra* note 98, at 280.

147. CHADHA, *supra* note 101, at 163.

148. DEVANESEN, *supra* note 98, at 280.

149. CHADHA, *supra* note 101, at 213.

For instance, Gandhi attacked the system of indentured servitude while in India. Gandhi viewed the system as nothing more than a “system of ‘semi-slavery.’”<sup>150</sup> It was this cause, in support of the tenants and the indigo planters in Champaran, that was Gandhi’s “first conspicuous entry on to the political stage in India.”<sup>151</sup> In 1917, Gandhi traveled to Champaran to see the hardships faced by the indigo planters and to meet with the lawyers who commonly represented the peasants in court.<sup>152</sup> Again, Gandhi’s disillusionment with the law became apparent after he and the indigo planters concluded that they “should stop going to law courts,” because “[t]aking such cases to the courts does little good.”<sup>153</sup>

As a result, Gandhi began a “fact-finding mission,” in order to understand the plight of the peasants and to investigate the mistreatments.<sup>154</sup> Depositions by over ten thousand peasants were written down and notes made on other evidence, and Gandhi made sure that the evidence was sound by having every peasant “cross-examined.”<sup>155</sup>

In much the same manner, he pursued the interests of the “ryots [peasants]”<sup>156</sup> fighting the tinkathia (tenant-cultivation) system.<sup>157</sup>

And then as well, he pursued the interests of the textile workers in Ahmedabad.<sup>158</sup> Although Gandhi decided to pursue the mill workers’ interests through civil disobedience and personal hunger, he again took to the cause of the mill workers in the best traditions of a lawyer pursuing a client’s interests. Gandhi placed the interests of the mill workers above his own. Gandhi continued with the cause despite personal harm through hunger and the threats of imprisonment for causing civil unrest. Gandhi also pursued the mill workers’ interests through multiple ways. Gandhi pushed for arbitration, urged the mill workers to strike, sent petitions to government officials, and finally, urged more civil disobedience. Gandhi kept the mill workers’ goals in sight while also using all possible means to achieve those goals.

Gandhi pursued Indian independence as a lawyer pursuing justice for a client. By this point, Gandhi’s campaign included the presentation of injustice and arguments for relief. By the onset of his push for Indian independence, Gandhi’s plan of noncooperation had “taken a definite shape,” which was “a strategy whereby a systematic war would be waged against the government.”<sup>159</sup> Gandhi first “proposed the return of decorations and honours awarded by the British, the withdrawal of children

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150. *Id.* at 218.

151. *Id.* at 219.

152. *Id.* at 219–20.

153. *Id.* at 220 (internal quotations omitted).

154. *Id.*

155. *Id.* at 223.

156. *Id.* at 224.

157. *Id.* at 225.

158. *Id.* at 226.

159. *Id.* at 246.

and students from government-supported schools and colleges, the boycott of law courts by lawyers and litigants, and the boycott of elections to new legislative councils,” and that “government officials would be asked to leave their offices, and soldiers would be called upon to lay down their arms,” as well as a “massive refusal to pay taxes.”<sup>160</sup> Gandhi announced that this period of noncooperation would commence on August 1, 1920.<sup>161</sup> Soon after, Gandhi persuaded the Congress in Calcutta to accept the policy of noncooperation with “self-rule as its goal” by using “peaceful and legitimate means.”<sup>162</sup> By this point, Gandhi was “touring the country extensively” and “addressing mammoth meetings.”<sup>163</sup> Gandhi also kept writing letters to the Viceroy demanding that the freedom of speech, freedom of association, and freedom of the press be restored as well as the release of innocent people from jail.<sup>164</sup> The campaign was that of a creative, problem-solving lawyer, pursuing multiple strategies on behalf of a client.

## 2. Nader

Ralph Nader was born in Winsted, Connecticut on February 27, 1934.<sup>165</sup> Civic awareness started at a young age for Nader. Even when he was still in grade school, his father “would institute discussions of current events, politics, and civic consciousness” with Nader and his siblings.<sup>166</sup> Nader attended Princeton University, and despite his professors’ urgings that he pursue a Ph.D., upon graduation Nader enrolled in Harvard Law School to pursue his childhood dream of becoming a lawyer.<sup>167</sup>

Nader felt that there was an “overall mental narrowness and moral complacency” about Harvard.<sup>168</sup> As opposed to the “model student” he had been at Princeton, at Harvard Nader developed a habit of cutting classes, “disappear[ing] for days at a time,” and becoming “increasingly antisocial.”<sup>169</sup> Although Nader may have been a less than ideal student while at Harvard, he did start to develop his keen interest in writing (and writing about social issues) as a member and editor of the *Harvard Law School Record*.<sup>170</sup> In the *Record*, a student newspaper, Nader wrote articles “criticizing capital punishment,” an even more ambitious “6,000-word article about the plight of the Native Americans,” and a still “longer article about Puerto Rico’s commonwealth status.”<sup>171</sup> Elected president of the

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160. *Id.* at 246–47.

161. *Id.* at 248.

162. *Id.* at 249 (internal quotation marks omitted).

163. *Id.* at 251.

164. *Id.* at 257.

165. PATRICIA CRONIN MARCELLO, RALPH NADER: A BIOGRAPHY 2–3 (2004).

166. *Id.* at 4.

167. *Id.* at 1, 8.

168. *Id.* at 9–10.

169. *Id.* at 10.

170. *Id.* at 11.

171. *Id.*

*Record*, Nader tried to push the *Record* to being a full investigative journal.<sup>172</sup> Even though his effort to move the *Record* in his desired direction failed (leading Nader to resign his position), Nader continued to “write muckraking articles of shorter length.”<sup>173</sup>

His time at Harvard did expose Nader to concepts and materials that would prove crucial to his early, post-J.D. social change career. Most critical for Nader was an article he read in the *Harvard Law Review* titled *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*.<sup>174</sup> Nader pursued the topic while in law school and, during his last year, “auto safety became Nader’s main course of study.”<sup>175</sup> Nader also developed a relationship with the dean emeritus of Harvard Law School, Roscoe Pound.<sup>176</sup> Pound’s legal realist approach to the law suited Nader well, and can be seen clearly in Nader’s later work: “He brought in all kinds of data from all the social sciences. The law writ large, that was the province of Roscoe Pound . . . .”<sup>177</sup>

For his first several years after law school, Nader pursued a range of endeavors.<sup>178</sup> Nader did a short stint as an army cook, traveled to Cuba where he attended a press conference given by Castro, “traveled to Scandinavia to learn more about ombudsmen,” traveled to Russia and Africa, and lectured on government at the University of Hartford.<sup>179</sup> Throughout much of this time, Nader worked at the small law office of George Athanson on matters such as “divorces, trusts, bankruptcy, [and] personal injury.”<sup>180</sup> Nader’s remarks about his experience at the Athanson law practice suggest the emphasis that Nader would later place on pursuing social causes where he could have a real demonstrable effect: “This was real people seeking genuine justice.”<sup>181</sup> Routine law practice. Nader’s career continued in this somewhat haphazard manner until, in 1964, he received a call from Daniel Patrick Moynihan that would “signal[] a dramatic and propelling change of life” for Nader.<sup>182</sup>

Moynihan hired Nader at a rate of fifty dollars per day to write a report on the subject of auto safety.<sup>183</sup> Nader would eventually produce a 234-

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172. *Id.*

173. *Id.*

174. *Id.*; see also Harold A. Katz, Comment, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956).

175. MARCELLO, *supra* note 165, at 12.

176. JUSTIN MARTIN, NADER: CRUSADER, SPOILER, ICON 28 (2002).

177. *Id.* (quoting Ralph Nader) (internal quotation marks omitted).

178. MARCELLO, *supra* note 165, at 12–13.

179. *Id.*

180. MARTIN, *supra* note 176, at 33.

181. *Id.*; see also MARCELLO, *supra* note 165, at 30 (“Nader preferred to work within the legislative system on issues where he could save more human lives because the number of people killed in Vietnam was far less than those killed on highways, and those fatalities included women and children.”).

182. MARCELLO, *supra* note 165, at 13.

183. *Id.* at 15–16.



page report.<sup>184</sup> Also in 1964, Nader signed an agreement to write a book on auto safety.<sup>185</sup> This book would be published on November 30, 1965, under the title *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile*.<sup>186</sup> While *Unsafe at Any Speed* is best remembered for targeting and eviscerating the sales of the Chevrolet Corvair, most relevant here is the manner in which Nader approached this project as a lawyer might.<sup>187</sup> He conducted both extensive original research and synthesized the work of others.<sup>188</sup> As would be expected from a nontechnical lawyer writing a book on a technical subject, his synthesis focused on the work of auto safety specialists with greater technical expertise than his own.<sup>189</sup>

Besides Nader's research and synthesis, the structure of *Unsafe at Any Speed* was strengthened by his training as a lawyer. In law school, Nader learned the rhetorical force of opening an argument with a particularly poignant example. In this case, Nader's first book opened by detailing the flaws of the Corvair:

[W]ith the Corvair's center of gravity and high roll couple of the suspension, body lean becomes a considerable force acting to tuck both wheels under in a cornering attitude. This results in loss of adhesion because of lowered tire surface contact. The sudden breakaway which has been experienced by every Corvair driver comes when a slight irregularity in the surface destroys the small amount of adhesion remaining.<sup>190</sup>

Having grabbed the reader's attention, just as a good trial lawyer might, Nader proceeded to lay out his case in an organized fashion, with each chapter dealing with a discrete topic.<sup>191</sup> One chapter dealt with pollution, one with the failures of the car engineers, another with the excessive emphasis the car industry placed on style, etc.<sup>192</sup> In closing *Unsafe at Any Speed*, Nader moved from these specific areas about the industry to a more holistic discussion of the problems with the nation's and the car industry's approach to safety overall.<sup>193</sup> Nader would have become familiar with this method of analysis (detailing the specifics and then synthesizing them into an overarching argument) in his legal training. Lastly, Nader concluded

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184. *Id.* at 16.

185. MARTIN, *supra* note 176, at 41.

186. *Id.* at 45.

187. MARCELLO, *supra* note 165, at 19–20 (noting that, by December of 1965, a mere one month after Nader published *Unsafe at Any Speed*, “registrations for the Chevrolet Corvair dropped 42 percent from the same month the year before”).

188. MARTIN, *supra* note 176, at 42.

189. *Id.*

190. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE 13 (1965).

191. *See id. passim.*

192. *Id. passim.*

193. *See id.* at 232–94.

with a call to move toward some specific proposals for a solution to the problem he had just described.<sup>194</sup>

Nader expanded his focus from the auto industry to become a general consumer advocate over the course of the late 1960s and 1970s.<sup>195</sup> In 1967 Nader took on the meat packing industry,<sup>196</sup> and, in 1968, the working conditions of coal miners<sup>197</sup> and the fishing industry.<sup>198</sup> Nader called for “safer natural gas pipelines” starting in 1966,<sup>199</sup> he took on the poultry industry,<sup>200</sup> and he testified before the Senate on various issues including “the dangers of X rays and how they were used differently for African Americans than for whites” because of the belief “that the extra dosage was required for X rays to penetrate darker skin.”<sup>201</sup> Nader did not leave the car industry behind, though: he called for investigating GM under antitrust laws, criticized the door catches of Rolls Royce,<sup>202</sup> and at one point called the Volkswagen “the most hazardous car currently in use in significant numbers in the United States.”<sup>203</sup> He fought about the problems that faced ordinary people, as he had done in his immediate post-J.D. law practice.

In addition to the role Nader’s legal training played in the manner in which Nader crafted his arguments, that training also proved useful in organizing certain aspects of his movement, mobilizing young people to support his causes, and providing leadership to the varied consumer protection arenas that he entered. Among the best known of Nader’s early activities is his leadership of “Nader’s Raiders.”<sup>204</sup> Nader’s Raiders were first created in 1968.<sup>205</sup> Their first project would target the Federal Trade Commission (FTC) because of its perceived laxity in protecting consumers: “Ample evidence suggested that the FTC was extremely deferential to the corporations it was supposed to police.”<sup>206</sup> Nader himself was particularly critical of the FTC’s conflicts of interest, remarking that “[t]he wolf’s been hired by the sheep.”<sup>207</sup> In 1968, Nader’s Raiders consisted of seven “student sleuths,” who had the responsibility for doing extensive research into the FTC.<sup>208</sup>

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194. *Id.* at 295–346.

195. MARCELLO, *supra* note 165, at 36.

196. *Id.* at 34 (“[Nader] reported that enough meat for 30 million people a year was not adequately inspected . . .”).

197. *Id.* at 37.

198. *Id.*

199. *Id.*

200. *Id.* at 38.

201. *Id.*

202. *Id.* at 37.

203. *Id.* at 39 (internal quotation marks omitted).

204. *See generally id.* at 41–53; MARTIN, *supra* note 176, at 75–89.

205. MARCELLO, *supra* note 165, at 43.

206. MARTIN, *supra* note 176, at 77 (quoting Ralph Nader) (internal quotation marks omitted).

207. *Id.* (quoting Ralph Nader) (internal quotation marks omitted).

208. *Id.* at 77–79.

While Nader's views may have been radical in some regards, the style of his approach to his consumer activism was not radical. Nader's Raiders exemplify this:

[They were] a group of well-groomed, supremely educated, and altogether serious young people. They burned neither bras nor draft cards, certainly did not demonstrate, riot, loot, or worse. They didn't even smoke pot. Instead, they were in the midst of a meticulous investigation of a specialized government agency that had abdicated its responsibility to consumers.<sup>209</sup>

The group sounds a bit like a small, boutique law firm. Nader's Raiders would move on to other issues beyond the FTC in the years to come, including food safety, the mining industry, air pollution, deceptive advertising, corporate accountability, and occupational injury.<sup>210</sup>

Nader used his legal training to form, motivate, and provide leadership to groups other than Nader's Raiders. Probably among the more unusual and better known of these groups are the "Maiden Muckrakers."<sup>211</sup> This group was formed in 1969 after Nader spoke at Miss Porter's School in Connecticut, a "sedate" finishing school for teenage girls.<sup>212</sup> Nader's speech motivated a group of recent graduates from the school and one of their teachers to spend the summer of 1969 investigating various aspects of the nursing home industry.<sup>213</sup> The Maiden Muckrakers would ask questions such as "'Should people be making a profit taking care of frail or elderly people?'"<sup>214</sup> In addition to the Maiden Muckrakers, Nader provided motivation and leadership to a fresh attack on GM dubbed "Campaign GM."<sup>215</sup> The campaign was led by two Harvard law graduates, Geoffrey Cowan and Philip Moore.<sup>216</sup> In 1970 Nader held a press conference at which he announced that he supported the campaign, but that he would not be directly involved.<sup>217</sup> Campaign GM sought to have GM include certain resolutions on the annual proxy statement sent to each shareholder.<sup>218</sup> When GM refused to do so, Campaign GM filed a complaint with the Securities and Exchange Commission (SEC) to force GM to include the resolutions, and eventually Campaign GM won a significant victory when the SEC ordered GM to include revised versions of some of the resolutions in the company's proxy statement.<sup>219</sup> Throughout this period one sees that among Nader's most important qualities was his ability to provide leadership, motivation, and direction to a range of motivated groups. Nader

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209. *Id.* at 79–80.

210. MARCELLO, *supra* note 165, at 49.

211. *Id.* at 57.

212. *Id.* at 56–57.

213. *Id.* at 57.

214. *Id.* (quoting a Maiden Muckraker).

215. *Id.* at 58–59.

216. *Id.* at 58.

217. *Id.* at 59.

218. *Id.* at 60.

219. *Id.*

provided the overall vision for these groups, while allowing other persons from different walks of life to take the lead on the groundwork. His legal training aided him in his endeavors to motivate others and to provide leadership and vision to these various projects.

Nader not only motivated the groups that he personally led or was involved in, but also motivated others. Throughout the zenith of his popularity (the late 1960s and 1970s), Nader was making about \$250,000 annually from his speeches, current writings, and royalties.<sup>220</sup> Nader funneled these funds into the various groups he had founded and causes he supported.<sup>221</sup> Along similar lines, in 1970, Nader settled an invasion of privacy suit against GM for \$425,000, which he used to back “a new legal firm and labeled it the Public Interest Research Group.”<sup>222</sup>

Nader was not only successful at motivation and fundraising for his causes, but he was also a “marionette master when it came to the press.”<sup>223</sup> Among the reasons for this was that Nader effectively “cast himself as an indefatigable advocate, grave, selfless, working away while the innocent citizenry sleeps.”<sup>224</sup>

Nader’s success as a social change agent stems from many lessons he learned in law school. These include the way he constructed and organized his arguments, his ability to lead and to motivate others, and his skills at working and even manipulating the press. Also not to be discounted, in his legal training, Nader learned to think critically and approach different issues at the same time, and to handle different responsibilities at the same time as well.

### 3. Schlafly

Phyllis Schlafly’s lawyer-connected social activism is a special and most interesting example because of the timing of her career. She was a social activist before studying law. But the effect of her law study can be seen in the changes in her tactics and success as a social activist. There is good reason to believe that training in the law enhanced her success.

Phyllis Schlafly was born Phyllis Stewart on August 15, 1924, in St. Louis, Missouri.<sup>225</sup> Directly after high school, Schlafly attended Maryville College with a four-year scholarship.<sup>226</sup> But, she found Maryville “not challenging enough”; therefore, she decided to attend Washington University in St. Louis, and, in order to pay for her education, she also worked full-time at a St. Louis Ordinance Plant.<sup>227</sup> After graduating from

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220. MARTIN, *supra* note 176, at 139–40.

221. *Id.* at 140–41.

222. MARCELLO, *supra* note 165, at 62.

223. MARTIN, *supra* note 176, at 145.

224. *Id.*

225. DONALD T. CRITCHLOW, *PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN’S CRUSADE* 19 (2005).

226. *Id.* at 22.

227. *Id.* at 22–23.

Washington University, Schlafly entered Radcliffe on a fellowship, and, in seven months, she completed a master's degree in political science.<sup>228</sup> In 1945, she went to work for a conservative think tank, which is now known as the American Enterprise Institute, and, a year later, she also assisted in the ousting of a New Deal Democrat from his St. Louis House of Representatives seat.<sup>229</sup>

Phyllis Stewart became Phyllis Schlafly in 1949 when she married Fred Schlafly, a Harvard-educated lawyer.<sup>230</sup> The Schlaflys would have six children together, and Schlafly would one day comment that her marriage and her family are her "No. 1 career."<sup>231</sup> In 1952, Schlafly ran for Congress, and although she won the Republican primary in St. Louis, she lost the general election.<sup>232</sup> Over the next couple of years, Schlafly would become a "Republican activist of note," in that she was an Eisenhower delegate to the 1956 national convention, president of the Illinois Federation of Republican Women, prominent in Daughters of the American Revolution, and she also testified before the Senate Foreign Relations Committee against the Nuclear Test-Ban Treaty.<sup>233</sup> Schlafly actively sought to turn the GOP to the right, and would publish books, articles, and editorials advocating conservative policies. For instance, Schlafly's *A Choice Not an Echo*, published in 1964, sold over three million copies.<sup>234</sup> In this book, Schlafly presented a conservative platform and devoted a part of it to "the ultraconservative Goldwater" as candidate for the GOP nomination for President.<sup>235</sup> Despite achieving some measure of prominence, Phyllis Schlafly failed to advance her own political career. In 1967, she ran unsuccessfully for the presidency of the National Federation of Republican Women, and in 1970, she also ran unsuccessfully for an Illinois congressional seat.<sup>236</sup>

In 1975, at the age of fifty-one, Phyllis Schlafly entered law school at Washington University.<sup>237</sup> She took the standard first-year courses in Contracts, Property, Torts, and Constitutional Law, and in her second year, she won the prize as the best student in Administrative Law, and she graduated twenty-seventh in her class of 186.<sup>238</sup> During her time in law school and afterward, Schlafly would become the "most prominent

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228. ANTHONY ARTHUR & JOHN BROESAMLE, *TWELVE GREAT CLASHES THAT SHAPED MODERN AMERICA: FROM GERONIMO TO GEORGE W. BUSH* 258 (2006).

229. *Id.* at 261.

230. *Id.* at 262.

231. *Id.* (quoting Phyllis Schlafly) (internal quotation marks omitted).

232. *Id.*

233. *Id.* at 266–67.

234. *Id.* at 267.

235. *Id.*

236. *Id.* at 267–68.

237. CRTICHLow, *supra* note 225, at 239.

238. *Id.*

opponent of modern feminism” and a “major spokesperson for a powerful conservative movement.”<sup>239</sup>

Phyllis Schlafly’s greatest success would be outside of campaign politics. Her work advocating social issues and her “pro-family” platform would lead to her greatest accomplishments. In 1967, she began publishing the *Phyllis Schlafly Report* in order to spread her views, and in 1975, she formed the Eagle Forum as a competitor to the National Federation of Republican Women.<sup>240</sup>

Phyllis Schlafly would maintain her focus on the cold war, foreign relations, and weaponry until 1972, at which point Schlafly would become focused on sinking the Equal Rights Amendment (ERA). Until Schlafly entered the arena, the ERA seemed set to become incorporated into the U.S. Constitution. In 1970, the ERA passed the House 350 to 15 and again in 1971 by a similar margin; then, in 1972, the Senate passed the ERA 84 to 8.<sup>241</sup> Three-quarters of the states also needed to approve the amendment, and this had to be done by March 22, 1979, in order to meet the seven-year deadline set by Congress.<sup>242</sup> By the end of 1972, twenty-two states had already ratified the ERA, and by 1973, thirty states had ratified the amendment.<sup>243</sup> During this period, Phyllis Schlafly responded initially to the ERA with indifference, stating, “I’m not interested in [the] ERA,” and that she “figured [the] ERA was something between innocuous and mildly helpful.”<sup>244</sup> Her views on the ERA changed quickly in the early 1970s. She concluded, after reading the amendment, that the ERA would “encourage divorce, abortion, and homosexuality.”<sup>245</sup> But, by 1977, the ERA had already been ratified by thirty-five states, only three states short of the necessary total for ratification.<sup>246</sup> Therefore, Schlafly would have to line up thirteen states against the ERA in order to prevent the ratification.

In October of 1972, Schlafly founded STOP ERA, which she organized hierarchically and assumed full control of decision making.<sup>247</sup> In 1972, Schlafly also published *What’s Wrong with “Equal Rights” for Women*.<sup>248</sup> Schlafly didn’t hesitate; she presented her arguments against the ERA on TV, in debates, via direct mail, and through the *Phyllis Schlafly Report*.<sup>249</sup> After 1975, Schlafly also utilized the *Eagle Forum Newsletter* to vocalize her position.<sup>250</sup> Schlafly viewed the ERA as “radical, unnecessary, and a threat to legal rights of women and the American family,” and in response,

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239. *Id.* at 12.

240. ARTHUR & BROESAMLE, *supra* note 228, at 267–68.

241. *Id.* at 269.

242. *Id.*

243. *Id.* at 270, 275.

244. *Id.* at 271 (quoting Phyllis Schlafly) (internal quotation marks omitted).

245. *Id.*

246. *Id.* at 275.

247. *Id.* at 272.

248. CRITCHLOW, *supra* note 225, at 212.

249. ARTHUR & BROESAMLE, *supra* note 228, at 272.

250. *See id.*

she “mobilized tens of thousands of women across the nation to block the proposed twenty-seventh amendment.”<sup>251</sup>

During this period, especially during the time that Schlafly was in law school and directly after she graduated, her arguments took a decidedly “legal” turn. She presented arguments against the ERA that focused on court unpredictability. Her writing initiated action in those fearing the unpredictability of the courts’ reaction to the ERA; particularly, she brought concerns that the ERA would allow homosexuals to marry, create a constitutional right to abortion, and would make women liable to the draft.<sup>252</sup> By these “scare tactics,” Schlafly tapped into a conservative base in America, but she was still very much the “underdog” until 1980.<sup>253</sup> Schlafly was taking on an amendment that had not only been popular, but supported by Congress and the President. Moreover, her supporters were not “establish[ed]” and her movement consisted of people who were “less educated, older, religious, . . . traditionalist,” and they were more conservative, like herself, than the Republican Party at the time.<sup>254</sup>

Schlafly’s arguments against the ERA centered around “unforeseen consequences” that would occur when “activist courts began to interpret the amendment”; specifically, she made the point that there is “no way for anyone to say positively how the [U.S.] Supreme Court will apply the ERA to conscription, combat duty, alimony, child support, wife support, divorce, homosexuality, public restrooms, separate gym classes and athletic teams, single sex education, sexual crimes, and prostitution.”<sup>255</sup> Not only did she present arguments about the consequences of the law, Schlafly also argued that the “amendment was also unnecessary,” because of the protections afforded women in the Equal Pay Act, Title VII of the Civil Rights Act, the Equal Employment Opportunity Act, and Title IX of the Education Amendments Act.<sup>256</sup>

By painting the ERA as antifamily, Schlafly connected to the conservative base that would eventually move the GOP to the right. Schlafly found, utilized and embodied a “grassroots reaction against feminism, legalized abortion, ERA, and the ban on prayer in school.”<sup>257</sup>

Schlafly’s movement was successful.<sup>258</sup> After 1977, not a single state ratified the ERA for the reason that STOP ERA had “stoked enough opposition and kept enough people neutral so that casting a vote for the amendment in some states had become too hazardous to a legislator’s

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251. CRITCHLOW, *supra* note 225, at 12.

252. ARTHUR & BROESAMLE, *supra* note 228, at 273.

253. *Id.* at 278.

254. *Id.*

255. CRITCHLOW, *supra* note 225, at 225 (quoting letter from Olive Spann to an Alabama State Legislator (Mar. 10, 1975)).

256. *Id.* at 225–26.

257. *Id.* at 214.

258. For a thorough discussion of the Equal Rights Amendment ratification process, emphasizing Phyllis Schlafly’s role, see DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 63–80 (1989).

political career.”<sup>259</sup> Then, in 1980, after years of Schlafly’s “energetic lobbying,” the GOP and its presidential nominee, Ronald Reagan, suddenly decided not to endorse the ERA.<sup>260</sup> Reagan expressed a commitment to the conservative agenda espoused by Schlafly, which “assured him of the support of the newly mobilized Christian Right and traditionalist women.”<sup>261</sup> In 1980, Schlafly stated that “STOP ERA had become part of a larger pro-family movement” and that it was critical to Reagan’s campaign.<sup>262</sup>

Although Schlafly never was able to succeed in a political career, after her victory with sinking the ERA, she remained active in presenting her political and social agenda. Schlafly focused on campaigns against freezing nuclear weapons, against pornography, against sex education, and against feminism.<sup>263</sup> She also waged campaigns against the liberal welfare state, bureaucracy, and judicial activism.<sup>264</sup> For instance, in 1984, Schlafly opposed the Balanced Budget Amendment and the call for a federal constitutional convention, termed the “Con Con,” proposed by the Reagan administration.<sup>265</sup> Schlafly wrote that the “Con Con [w]as playing Russian roulette with the U.S. Constitution,” in that the convention would open up the Constitution to liberal changes, such as repealing the Second Amendment.<sup>266</sup> Schlafly organized a resistance, with the slogan “Can the Con Con,” and she presented arguments, which sought to protect the Constitution and keep it off the bargaining table and out of the hands of the media, political factions, and special interest groups.<sup>267</sup> She targeted the last four remaining states and published articles, held debates, and approached officials, and as a result, the convention resolution was defeated by 1988.<sup>268</sup> Recently, Schlafly has entered campaigns in Massachusetts after the Massachusetts Supreme Court legalized same-sex marriages and in 2004 she published a book to rally a grassroots campaign against judicial activism.<sup>269</sup>

Schlafly’s success as a social activist is not only attributable to her legal education. Before entering law school, Schlafly had attained a master’s degree in political science, had been active in politics, and had already published books and articles.<sup>270</sup> But, her career in social and political activism took off about the time of her entrance into law school. Moreover, her arguments against the ERA and the Con Con focused on judicial

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259. ARTHUR & BROESAMLE, *supra* note 228, at 279.

260. *Id.* at 278.

261. CRITCHLOW, *supra* note 225, at 265.

262. *Id.* at 267.

263. ARTHUR & BROESAMLE, *supra* note 228, at 279–80.

264. CRITCHLOW, *supra* note 225, at 13.

265. *Id.* at 283–84.

266. *Id.*

267. *Id.* at 284.

268. *Id.* at 284–85.

269. *Id.* at 300–01.

270. *See supra* notes 221–35 and accompanying text.



activism and threats to the Constitution and legal rights. Her legal education contributed to her ability to not only begin a social movement, but also to present clear legal and constitutional arguments against the ERA.

#### CONCLUSION

Among the roles to be usefully served in modern democracies, lawyers can effectively be agents of social change. The mindset of client representation lends itself to organizing and advocating for a cause despite suggestions that the cause is not in the public interest. The talents commonly displayed by lawyers and their training place the law-trained at a comparative advantage for leadership roles in social change movements.