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Symposium Introduction

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SYMPOSIUM INTRODUCTION

*Ellen Yaroshefsky**

Many lawyers who advise, counsel, and otherwise participate in social justice organizations are called “movement lawyers.” They work with organizations such as Black Lives Matter, Make the Road, the Community Justice Project, the Center for Constitutional Rights, workers’ rights collectives, and loosely-organized community groups to use the law to effect social change. This work builds upon the long history of lawyers involved in social justice who have developed models of lawyering often known as community lawyering, political lawyering, or empowerment lawyering. Law and organizing is a richly developed field of study and practice.¹

Fundamental to movement lawyering is the acknowledgment that these lawyers do not necessarily represent clearly defined client entities. Many groups are not organized along hierarchical or other lines. They often intentionally avoid such categorization. A “client” may be an idea, not an entity. Occupy Wall Street, Earth First, or Black Lives Matter are ideas, not entities.² The lawyers working with these groups may provide

* Professor and Director of the Monroe H. Freedman Institute for Legal Ethics. I thank all of the participants of the Roundtable. This Symposium issue owes its success to their diligence. Everyone was committed to in depth exploration of the issues and production of materials that would be useful to the larger community. The participants are listed at the end of this introduction. I am especially indebted to Purvi Shah for her inspired leadership in this work and to the Freedman Social Justice Fellows and the Freedman Institute coordinator, Deborah Grattan. The Fellows are: Mehrin Bahkt, Sandra Beaubrun, Sarah Beechay, Anique Cato, Michael Guttentag, Samantha Holloway, Henderson Hui, Victoria Hypolite, Seema Rambaran, and Zoila Sanchez. Special thanks to Gowri Krishna, Associate Professor of Law, New York Law School, the reporter for the Roundtable, whose detailed contributions enriched this symposium issue.

1. See Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PENN. J. L. & SOC. CHANGE 25, 33-39 (2011) (discussing the various models, courses, and literature about law and organizing).

2. See BLACK LIVES MATTER, <https://blacklivesmatter.com> (last visited Nov. 10, 2018); EARTH FIRST!, <http://earthfirst.org> (last visited Nov. 10, 2018); OCCUPYWALLSTREET, <http://occupywallst.org> (last visited Nov. 10, 2018); see also Glen Craig, *What is Occupy Wall Street and Should You Care?*, FREE FROM BROKE (July 24, 2014) <http://freefrombroke.com/what-is-occupy-wall-street-and-should-you-care>.

advice to many individuals who identify with the group, and the lawyer must work with the understanding that these movements are ill-defined and certainly not entities in any traditional sense. The classic legal ethics issue, “Who is the Client?,” is one that challenges movement lawyers and because there often is no clear structure, the lawyer must engage to define roles, provide clarity, and do so in a collaborative manner.

In much of this work, the lawyer intentionally plays a background role, in order to empower individuals and community groups. The lawyer helps to demystify the law so that the law may be used as one of many tools to effectuate change. As Purvi Shah, the founder of Law for Black Lives³ and current director of the Movement Law Lab⁴ posits, what distinguishes movement lawyering from past progressive lawyers is that it focuses upon empowerment and self-determination where lawyers seek to transfer their “skills, knowledge and power” to others with the understanding that change is a collective process.⁵ Movement lawyers understand the value of “collectivizing issues rather than traditional methods of atomizing and individualizing issues.”⁶ Movement lawyers engage in conscious dialogue with individuals and groups to help people understand the qualitative difference between improving only the individual’s circumstances from improving the situation for “everyone else.”⁷

Although it may often seem that movement lawyering has a great deal in common with lawyering by the former generations of public interest, civil rights, and civil liberties lawyers, there are important distinctions in approaches and perspectives. A key concept in most movement lawyering is “centering” the issues on the client or cause, not upon more traditional notions of lawyer counseling, advocacy, management, and control of a matter.

Lawyers traditionally often refer to aspects of their role as “decision making authority” but even the term of “authority” belies the very notion of cooperation that undergirds the idea of lawyers for movements. Classic issues that are viewed as clearly within the lawyer’s authority

3. L. FOR BLACK LIVES, <http://www.law4blacklives.org> (last visited Nov. 10, 2018).

4. MOVEMENT L. LAB, <https://movementlawlab.org> (last visited Nov. 10, 2018).

5. Purvi Shah, Transcript of the Movement Lawyering Roundtable (on file with author). An inspiration for “movement lawyering” was Professor Arthur Kinoy, who called himself a People’s Lawyer and trained generations of law students to follow that path. As one of the founders of the Center for Constitutional Rights, Kinoy’s approach foreshadowed much of that adopted by the Center for Constitutional Rights and other movement lawyers and organizations. *Id.* See generally ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER (1983). Kinoy worked in the tradition of the founder of movement lawyering.

6. Shah, *supra* note 5.

7. *Id.*

become ones for movement lawyers where clients decide, often in consultation with the lawyers. For example, in legal ethics rules and unless otherwise agreed, the client's decision-making authority in civil cases is confined to the terms of settlement.⁸ Lawyers are encouraged to communicate effectively with the clients about other matters, but it is not the centerpiece of the rules regarding decision-making.⁹ This is but one of the many differences between language and approach employed by movement lawyers.

Even in classic litigation, movement lawyers “center” decision making on the clients, meaning that clients control the course of the case. For example, in the New York City stop-and-frisk case, *Floyd v. City of New York*, movement lawyers at the Center for Constitutional Rights successfully litigated a case against the municipality for constitutional and civil rights violations by the police.¹⁰ Partnering not only with the named clients, but with community groups whose significant organizing efforts were responsible for the evidence gathering that led to positive results, the lawyers turned to these constituencies to ask for suggested remedies for judicial enforcement by a court monitor. The clients convened a two-day long community meeting to discuss proposed remedies. The lawyers participated in that summit, but the community suggestions prevailed. The organizer's demands of community involvement in enforcement were implemented by the court. One fundamental lesson is that litigation is not an end in itself but can strengthen a movement for social change.¹¹

This Roundtable was inspired by years of consultation with various movement lawyers about a range of ethical, strategic, and tactical concerns. Lawyers for movement groups face a range of knotty ethical and tactical issues that are not readily addressed by the Rules of Professional Conduct that govern the lawyer's conduct.¹²

8. See MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. (AM. BAR ASS'N 2018).

9. See *id.*

10. *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 658-67 (S.D.N.Y. 2013).

11. JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003) (describing the significant organizing role that litigation plays, even where lawyers know that the cases will be lost in court); DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (discussing three distinct causes and movements and how citizen action and organizing shaped constitutional law, which includes marriage equality, the right to bear arms, and Guantanamo and the war on terror).

12. Each state has its own version of the Model Rules of Professional Conduct. California followed a somewhat unique perspective on ethics issues in its Business and Professional Code but recently adopted a version of the Model Rules. See Joyce E. Cutler, *California Adopts Modified ABA Model Rules (1)*, BLOOMBERG NEWS (May 11, 2018), <https://www.bna.com/california-adopts-modified-n73014476007>. Many of the Rules throughout the U.S. are the same or similar. A lawyer reviewing this Symposium and its case studies should review the particular version of Rules in that

This convening of selected movement lawyers and legal ethicists was a unique opportunity to discuss significant, difficult, and often recurring legal ethics issues. It was the first of its kind.

The day began with an overview of movement lawyering by Purvi Shah. Her talk framed the day's discussion. Her provocative essay that amplifies her talk begins this Symposium.¹³ Shah directs the national Movement Law Lab and, for the last fifteen years, has worked with a small group of lawyers around the country to develop methodologies to train lawyers on social change, to popularize the concept of movement lawyering, and to build communities of practice where lawyers are encouraged to think deeply about our role in social change. She challenged the participants to address "ethics writ large"—the moral compass for lawyering—and not solely particular ethics rules-based issues.¹⁴ Her challenge to think broadly began with data about the current crisis in our democracy, the lack of legal representation for marginalized individuals and communities, and the profession's failures to address broader concern about social justice. In her essay, she asks: "So what is to blame for our profession's failure to acknowledge its responsibility to address the human suffering we are witnessing on a massive scale?"¹⁵ She then seeks to provide solutions.

Shah offers her perspective about the goals of movement lawyering beginning with the values that movements and their lawyers seek to impart. Collective action, empowerment, and self-determination are the key concepts. She implores us to develop a new code of ethics—the North Star—that is less of a code than fundamental principles of professional responsibility for the profession: "Dignity: honoring the self-determination of our clients;" "Integrity: an obligation to respond to moments of great injustice;" "Collectivity: a commitment to use law to aggregate people with similar problems versus atomize them;" "Collaboration: a commitment to working with other types of change-makers to address oppression."¹⁶

After Shah's talk, the Roundtable then delved into Case Studies that were developed by the lawyer participants from various client representations. Each involves thorny ethical and tactical issues. The premise for the Roundtable was to confront situations where lawyers often find resolution of the ethical issues to be unclear and difficult under the existing Model Rules of Professional Conduct. In some cases,

lawyer's jurisdiction.

13. Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 HOFSTRA L. REV. 11 (2018).

14. *Id.* at 15.

15. *Id.* at 13.

16. *Id.* at 16.

the Rules impede social justice and the lawyers were asked to address what changes in those Rules would enhance best practices in movement lawyering.

Each case study was partnered by a movement lawyer and a legal ethicist. The movement lawyer presenter for each case study was asked to address questions such as “How did you deal with the issues? What was most difficult? What were the considerations? What ethics rules/provisions did you find to be helpful/troubling?” The legal ethicist then responded to the issues, addressing the history and context of the ethics rules and professional concerns that are implicated, and what, if anything, needs change so as not to impede social justice and movement lawyering. Wide ranging discussion followed for each case study.

The case studies reported in this Volume and the excellent detailed commentary by legal ethicists present unique and often overlapping ethical issues that in Rules-based terminology include client identity, maintaining attorney-client confidentiality, client counseling and decision making, conflicts of interest, unauthorized practice of law, and various financial concerns such as fee sharing, third-party payments, and gifts to clients, among many others.

The first case study, *Movement Groups With Flat Innovative Governance Structures*, by Meena Jagannath and Sameer Ashar, confronts the problems of lawyers working with an organization that is an idea or a mobilization rather than a formal, traditional organization.¹⁷ Black Lives Matter and Occupy Wall Street are classic examples. The models are not hierarchical but are “horizontal, leader-full structures or network models.”¹⁸ It may be that the group is philosophically disinclined to barriers to participation in working groups. They may work through committees that include lawyers. Or the “organization” may be a rapid response network where formal relationships cannot be quickly established, or it is a mobilization that has not yet crystallized into an organization that has a membership structure and the capacity to enter into contract with lawyers. Lawyers and non-lawyers may consider themselves as participants of the groups.

This case study set the stage for examination of the classic questions in professional responsibility. It asks:

- Who is the client and who can speak for the organization?
- How can lawyers participate in a legal working group if some of the members of the group are non-lawyers?

17. Meena Jagannath & Sameer Ashar, *Case Study 1: Movement Groups with Flat, Innovative Governance Structures*, 47 HOFSTRA L. REV. 19 (2018).

18. *Id.* at 19.

- What if those non-lawyers are holding themselves out to the public as part of the legal working group and giving “quasi-legal” advice?
- Can legal advice be given to someone with nothing more than apparent authority to liaise or coordinate with a different working group within the network?

The case study then examines confidentiality and conflicts issues and the unauthorized practice of law.

It makes a significant contribution in setting forth goals of lawyering for movement groups. These are to: establish equality between lawyer and client; respect and nurture creative organizing, organizational, and network structures; understand the aims of the movement formations that have developed such structures; facilitate organizing and service to advance the movement; protect individuals, entities, and networks from liability for legal or ethical violations; protect third parties who may be involved in movement activities; avoid demobilizing movements; democratize legal information; and build relationships. With those goals in mind, the case study commentary sets forth strategies to accomplish these goals to comport with the profession’s Model Rules of Professional Conduct.

In *Case Study 2: Advising Grassroots Organizations*, former clinical professor Marci Seville and Professor Bruce Green present a range of difficult issues in advising and representing grassroots organizations.¹⁹ These organizations may be more traditionally organized than the mobilization and network movement groups described in Case Study One. The organization in this case study is a worker’s center comprised of non-lawyer organizers. Some of them represent individuals at administrative hearings pursuant to a statute authorizing representation by lay persons. In the context of such representation, the organizers may sometimes engage in conduct related to the administrative hearing that may run afoul of the often-uncertain laws about the unauthorized practice of law (“UPL”). The case study provides a detailed analysis of UPL rules and makes suggestions as to how the lawyers may best advise the organizers. This study then examines and provides detailed suggestions as to how to preserve confidentiality and privilege in the presence of non-lawyers. Finally, it discusses various concerns in publicizing a lawsuit.

Case Study 3: Movement Lawyers and Community Organizers in Litigation: Issues of Finances and Collaboration by Baher Azmy and Professor Paul R. Tremblay examines the often thorny issues of lawyers

19. Bruce Green & Marci Seville, *Case Study 2: Advising Grassroots Organizations*, 47 HOFSTRA L. REV. 33 (2018).

who desire to offer financial assistance to the community groups they represent.²⁰ Some legal organizations that work in a collaborative fashion with groups of indigent clients have significant cash reserves and would like to assist those groups in organizing efforts and other forms of financial support. The lawyers may have obtained significant attorneys' fees in class actions lawsuits and desire to help the organizations who assisted in various ways in the lawsuit. In this case study, the legal organization represents a refugee group in a lawsuit. It settles the lawsuit and now desires to help the organization financially. This study asks: May a tax-exempt nonprofit law firm provide its client with financial assistance to help the client achieve its goals?

It provides a detailed analysis of Rule of Professional Conduct 1.8(e) that permits only limited financial assistance to clients and says the Rule "might strike many as an absurd restriction on a lawyer's generosity."²¹ It provides a detailed analysis of the Rule's operation and explores how the organization might assist the clients with financial needs. The study then addresses another concern that arises when considering financial assistance—conflicts of interest.

This study then considers a different scenario about issues that arise when working with more traditional lawyers. It examines a situation where the movement lawyers work with an organization that is a well-funded nationally known organization (called PJP) and is represented by counsel. PJP lawyers are not movement lawyers and they operate more traditionally than the clients desire. The movement lawyers believe that PJP is not adequately serving the clients' interests. This case scenario asks whether the movement lawyers may recommend that the organization change counsel, and, if replacing PJP is not a viable resolution or does not happen for some reason, how should movement lawyers best work with the PJP counsel? It provides practical advice for movement lawyers working with more traditional ones.

The fourth case study, *Lawyer for a Coalition of Organizations with an Informal, Unofficial Coordinator* was prepared by Clinical Professor Michael Haber and Professor Scott Cummings.²² Difficult and ongoing concerns arise when lawyers counsel and represent groups that work in coalitions and the lawyers are also requested to advise, counsel and prepare documents on behalf of the coalition itself. The coalition often does not have an organizational structure other than an unofficial

20. Paul R. Tremblay & Baher Azmy, *Case Study 3: Movement Lawyers and Community Organizers in Litigation: Issues of Finances and Collaboration*, 47 HOFSTRA L. REV. 43 (2018).

21. See MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2018).

22. Scott Cummings & Michael Haber, *Case Study 4: Lawyer for a Coalition of Organizations With an Informal Unofficial Coordinator*, 47 HOFSTRA L. REV. 61 (2018).

coordinator. This case study addresses these issues in the context of a law school clinic that works with a statewide non-profit housing advocacy organization. The nonprofit, with assistance from the clinic, organizes a statewide coalition. The clinic advises members of the coalition and prepares documents on behalf of the coalition. The clinic anticipates the “who is the client” issue and identifies conflicts of interest. It enters into retainer agreements, but conflicts develop later on. This case study asks what should have been done to clarify the role of the Clinic and address the conflicts of interest. It provides useful guidance for lawyers who work in such roles.

The fifth case study, *Coalitions and Campaigns: A Workers’ Rights Policy Campaign*, written by Sarah Leberstein and Professor Susan Carle, addresses the complicated issues that arise in coalition work when the lawyer is on the staff of a national workers organization that joins the coalition.²³ The context for this case study is a legislative campaign where one organization starts the campaign and later invites other allies or potential allies to join it. Once again, the organizations and the campaign itself have a loose structure. It illustrates the tensions that may develop between local grassroots and national organizations and the need for lawyers to urge movement organizations to develop reasonable systems for decision-making and accountability. This case study raises difficult questions about which of the many types of creative work movement lawyers do constitute “the practice of law” for purposes of legal ethics analysis. This study explores the tension between the need for legal ethics rules to provide appropriate safeguards to clients and the potential for application of those rules in an overbroad manner that risks constraining the potential creativity of movement lawyers as they strive for new and more effective ways of proceeding in partnership with other movement actors to achieve their goals.

In the final case study, *Working with Traditional Lawyers*, Professor Kate Cruse and Mary Yanik delve into the thorny issues that arise when movement lawyers for community organizations seek to assist members who have more traditional lawyers.²⁴ This case study first examines a community organization that runs an accompaniment program for the high risk “check in” appointments with Immigration and Customs Enforcement (“ICE”). The case study explains why lawyers are essential to that process. The movement lawyer who assists in accompaniment knows that the person is also represented by a more

23. Susan D. Carle & Sarah Leberstein, *Case Study 5: Coalitions and Campaigns: A Workers’ Right Policy Campaign*, 47 HOFSTRA L. REV 77 (2018).

24. Katherine R. Kruse & Mary Yanik, *Case Study 6: Working with Traditional Lawyers*, 47 HOFSTRA L. REV 91 (2018).

traditional immigration lawyer. This study explains how such dual representation is possible. Effective communication and clarity of roles among lawyers is essential and this case study addresses the ethical and most effective course of action.

It then examines a deeper tension between the perspectives of movement lawyers and more traditional ones. In this scenario, the organization is engaged in collective action to change immigration policy and practice and its movement lawyer agrees to assist an undocumented person who has been charged with a crime and is represented by counsel. The movement lawyer and the organization may have goals and a proposed course of action that differs from the criminal defense lawyer. This case study examines these significant difficulties, especially where charges are lodged against the movement lawyer for undue influence and manipulation. It discusses the path toward effective client assessment of risk and benefits. It concludes by highlighting that “the strategies of social movement rely on building collaborations, partnering with diverse constituencies, amplifying the voices of those affected by social justice, and grounding advocacy of the needs of those they seek to serve.”²⁵

These case studies and the *Movement Lawyering Ethics Symposium* seek to address recurrent issues in a manner that is helpful to lawyers in similar situations. It is hoped that the overview and these case studies will provide guidance as lawyers seek to navigate difficult ethical and tactical issues in representing community and movement organizations. We also hope that it will provide useful materials for legal ethicists who seek to reform ethics rules so that the Rules of Professional Conduct enhance, rather than impede, such representations. Finally, the bibliographies at the end of the Case Studies compile materials for those who seek to gain greater understanding of the history and current views of movement lawyering.²⁶

25. *Id.* at 98.

26. Susan D. Carle, *Selected Historical Bibliography on African American Women's Activism (Focusing on 1880 to 1920)*, 47 HOFSTRA L. REV. 117 (2018); Purvi Shah, Ctr. for Const. Rts., *Movement Lawyering Reading Guide*, 47 HOFSTRA L. REV. 99 (Ellen Yaroshefsky ed.) (2018).

Workshop participants were: Professor Sameer Ashar, Clinical Professor of Law and Co-Director of the UC Irvine Immigrant Rights Clinic at University of California, Irvine; Baher Azmy, Legal Director at Center for Constitutional Rights; Professor Susan Carle, Professor of Law at American University, Washington College of Law; Professor Scott Cummings, Robert Henigson Professor of Legal Ethics at UCLA Law; King Downing, Director of Mass Defense at National Lawyers Guild; Sienna Fontaine, Co-Legal Director at Make the Road New York; Professor Bruce Green, Louis Stein Chair of Law; Director, Stein Center for Law and Ethics at Fordham University School of Law; Professor Michael Haber, Associate Clinical Professor of Law and Attorney-in-Charge, Community & Economic Development Clinic at Maurice A. Deane School of Law, Hofstra University; Meena Jagannath, Co-founder at Community Justice Project, Inc.; Professor Gowri

Krishna, Associate Professor at New York Law School; Professor Kate Kruse, Professor of Law, Associate Dean of Experiential Education and Curriculum at Mitchell Hamline School of Law, Hamline University; Sarah Leberstein, Associate Director, Stein Center for Law and Ethics at Fordham University School of Law; Professor Theo Liebmann, Clinical Professor of Law and Director of Clinical Programs at Maurice A. Deane School of Law, Hofstra University; Professor Jennifer (JJ) Rosenbaum, Global Labor Justice Project and Lecturer at Harvard Law School; Angel Reyes, Community Organizer with LatinoJustice; Professor Marci Seville, Professor Emerita, Director, Women's Employment Rights Clinic (1993-2015), Golden Gate University School of Law; Purvi Shah, Founder & Executive Director at Movement Law Lab, Co-Founder & Advisory Board Member of Law For Black Lives; Marbre Stahly-Butts, Co-Director (Partnership) at Black Lives Matter/Law for Black Lives; Professor Paul Tremblay, Clinical Professor of Law at Boston College Law School; Chris Williams, Workers' Law Office, P.C.; Mary Yanik, Staff Attorney and Liman Fellow at New Orleans Workers' Center for Racial Justice and National Guestworker Alliance; Professor Ellen Yaroshefsky, Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at Maurice A. Deane School of Law, Hofstra University.