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THE MORAL COMPLEXITY OF CAUSE LAWYERS WITHIN THE STATE

*David Luban**

INTRODUCTION

Douglas NeJaime's *Cause Lawyers Inside the State*¹ is a significant contribution to our understanding of cause lawyers. Most basically, NeJaime calls attention to a remarkably neglected topic: cause lawyers who work in the state rather than in public interest firms, law school clinics, or other non-governmental organizations (NGOs). His analysis undermines a narrative that students of cause lawyering too often presuppose: that to be a cause lawyer means standing outside the state, and usually in opposition to it. Almost by definition, a "cause" exists because the dominant institutions of society have failed to represent the interests and ideas of some subgroup, at least in its own eyes; and government is the most dominant of dominant institutions. Causes therefore draw their energy from the desire to change the direction the state has taken. Cause lawyers are a nuisance to the state, and they mean to be a nuisance. It comes as a surprise, then, that they would actually be invited to become insiders; that is, no doubt, the main reason that cause lawyering within the state has attracted insufficient previous attention.

Of course, there are causes and there are causes: lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights is a cause, but so is the Race for the Cure and promoting classical music in public schools. The latter two will hardly ever stand in opposition to government. I take it that NeJaime's focus is on politically controversial causes, and that will be my focus as well.

NeJaime provides a compelling analysis of the major ways in which cause lawyers can operate within the state to further their cause. His scholarship is comprehensive and first-rate. He considers cause lawyers working for a variety of causes—not only LGBTQ rights, but also disability rights, civil rights and affirmative action, feminist causes, and conservative causes.

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1. 81 FORDHAM L. REV. 649 (2012).

The paper raises fascinating questions about how to reconcile the lawyers' two identities, as cause lawyers and as government lawyers. Putting the question melodramatically (and with apologies to Tolkien): What happens to a cause lawyer when he or she decides to use the Ring of Power? Can she still remain a cause lawyer, or does it transform her, or even—keeping Tolkien's Ring in mind—devour her?

NeJaime's paper does not focus directly on the Defense of Marriage Act² (DOMA), the subject of this Symposium. Clearly, the most dramatic moment in the DOMA litigation was the government's reversal of its decision to defend DOMA in court. As NeJaime points out, the announcement came from Attorney General Eric Holder,³ not from anyone in the government who could be identified as an LGBTQ cause lawyer. No doubt the Attorney General's announcement came from the appropriate level of government, given the significance of the reversal—but it also took off the table a potential accusation by DOMA supporters that the government had been captured or commandeered by LGBTQ movement activists. Still, until the inside story of the decision making is told, we will not actually know the extent to which activists were involved in the decision.

For that reason, I too am not going to focus on DOMA, but rather on NeJaime's broader topic. My comments will not be critical: I think NeJaime's article is beautifully done, and I do not disagree with it. Rather, I want to expand a bit on some of the issues it raises. In Part I of this response I offer some conjectures about whether some causes and modes of lawyering are more amenable than others to working inside the government. These conjectures may help to guide future investigations of cause lawyering within government—whether those investigations aim to confirm or falsify them. Part II more directly poses the “Tolkien question” about whether cause lawyers have reason to be wary of the Ring of Power. It too is largely conjectural; I offer the conjectures in a spirit of inquiry.

I. TWO IMPORTANT DISTINCTIONS

To think through the way that cause lawyers can work in government while retaining, in some important sense, their identity as cause lawyers, it will be useful to draw some familiar distinctions. The first has to do with the nature of the cause itself; specifically, whether it is “radical” or “reformist.” The second is a long-standing typology that encompasses certain ways of pursuing causes: by delivering individual legal services, by “impact” litigation or lobbying, and by subordinating lawyering to

2. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

3. See Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives 2 (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

movement organizing.⁴ These may be labeled the *service*, *law reform*, and *organizing* models of cause lawyering.⁵ My conjecture is that law reform-oriented lawyers are more likely candidates for working within government (except perhaps at the local level) than either service providers or organizers. As I now argue, that does not mean that radical lawyers cannot work in government, but government service will almost certainly transform the way their radicalism expresses itself.

A. *Radical vs. Law Reform*

As I will use the terms, a radical cause is one that advances a wholesale restructuring of existing institutions, while the law reform cause does not, or at least not necessarily. It might be thought that being a cause lawyer automatically lends itself to reform rather than radicalism, because it requires using the mechanisms of the law, which are inherently conservative. As Lenin wrote with his characteristic venom, “[L]awyers . . . are the most reactionary of people.”⁶ A law student himself until he was expelled from the university for his politics, Lenin had the movement-activist’s innate suspicion of lawyers: “Lawyers should be kept well in hand and made to toe the line, for there is no telling what dirty tricks this intellectualist scum will be up to.”⁷ (Lenin feared that “[e]ven a smart liberal lawyer” representing Bolsheviks arrested for political crimes might try to mollify the judges by describing socialism in anodyne terms or—heaven forbid!—asserting that in reality the movement is peaceful.)⁸

One might also think that government service filters out the most radical of lawyers, who would not be appointed and in any case would not find it attractive. That is almost certainly true of radical opponents of state power. But in fact there are notable examples of radical lawyers who entered government service not to dismantle the state like Lenin, but to redirect it in startling ways. One might begin by focusing on lawyers on the right during the administration of President George W. Bush. Some of the most prominent of these lawyers, such as David Addington and John Yoo, wished to promote a radically pro-executive-power ideological agenda.⁹ Or consider former United Nations Ambassador John Bolton, who was famously quoted as saying that “[t]he Secretariat building in New York has

4. I am taking this typology from Gary Bellow, as described in *Lawyers for a Political Movement: California Rural Legal Assistance*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 22, 23–26 (Philip B. Heymann & Lance Liebman eds., 1988).

5. *Id.*

6. Letter from Vladimir Lenin to Y. D. Stasova (Jan. 19, 1905), in 8 *LENIN COLLECTED WORKS* 66–70 (Bernard Isaacs & Isidor Lasker trans., 1962), available at <http://www.marxists.org/archive/lenin/works/1905/jan/19.htm>.

7. *Id.*

8. *Id.*

9. See generally CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY* (2007).

38 stories. If it lost ten stories, it wouldn't make a bit of difference."¹⁰ The Reagan Administration appointed several prominent lawyers to its agencies precisely because they shared the Administration's ideological opposition to the agencies' missions. These included opponents of government-funded legal services (William Harvey, Clark Durant) nominated to the board of the Legal Services Corporation (LSC).¹¹ Others among the best known were William Bradford Reynolds, heading the Justice Department's Civil Rights division (and a critic of court-ordered busing and affirmative action), and Anne Gorsuch Burford, heading the Environmental Protection Agency.¹² (A conservative friend of mine, who shall remain anonymous, told me in 1981 that he had been offered a human rights job in the Reagan State Department, which he turned down because he does not believe in human rights. He was told "That's why we want you.")

Of course, these observations fit together with the anecdote with which NeJaime begins his paper, about the Department of Justice's ideological screening of appointees so that movement-conservative lawyers would end up in civil rights enforcement. The idea was to rechannel enforcement efforts away from racial minorities toward upholding the rights of conservative Christians.

In the past few decades, it has been much easier for right radicals to get into government than left radicals. But it was not always so. In its earliest days, LSC had left radicals like Edgar and Jean Cahn and Clinton Bamberger.¹³ When LSC was criticized for "advocacy of the contentions of one side of an economic struggle," Bamberger (the first head of LSC) commented that that is the best one-line definition he had ever heard of the War on Poverty.¹⁴ To be sure, these lawyers were not radical by the lights of May 1968 anarchist euphoria, but they envisioned a wholesale restructuring of American capitalism to eliminate poverty, and that qualifies as "radical" in the sense I defined above. They were certainly radical in the comprehensiveness of their vision. The same might be said of New Deal lawyers.¹⁵ NeJaime also mentions public defenders, and in my own experience public defender work often attracts people with a very radical

10. Anne Applebaum, *Defending Bolton*, WASH. POST, Mar. 9, 2005, at A21. I have been unable to locate the origin of Bolton's famous 1994 quote.

11. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 31 (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf>; see also DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 300 (1988) and sources cited therein.

12. See Patricia Sullivan, *Anne Gorsuch Burford, 62, Dies; Reagan EPA Director*, WASH. POST, July 22, 2004, at B6 (noting that "Republicans and Democrats alike accused Ms. Burford of dismantling her agency rather than directing it to aggressively protect the environment").

13. The Cahns were pioneers of the legal services movement as well as of clinical legal education, and their article *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) was in many ways the master plan for LSC.

14. Bellow, *supra* note 4, at 31.

15. See generally PETER H. IRONS, THE NEW DEAL LAWYERS (1982).

critique of U.S. criminal justice, particularly on race issues. But of course public defenders are government employees only in the formal sense—their day-to-day mission is to fight the government.

Now, what may be true is that radical lawyers pursue their visionary aims through incremental, one-step-at-a-time, we’ll-settle-for-what-we-can-get reforms. This is almost certainly true of environmental cause lawyers. Anyone who has seriously studied climate change realizes that economic and social institutions will have to be utterly transformed to deal with the crisis—but environmentalist lawyers can and do still pursue much more bite-sized aims.

And, returning to the subject of this Symposium, surely the same is true of many LGBTQ cause lawyers. No doubt many envision a society that is no longer heteronormative (if I may use this bit of theorists’ jargon), but they use the law to pursue goals, like the legality of same-sex marriage, that some in their own movement reject because it puts undue emphasis on a heteronormative institution. So one question worth pursuing in further study of the phenomenon of cause lawyers in government is whether different issues arise when the cause lawyer in government is attached to a radical or a law-reform cause. The question is whether radical cause lawyers need to mask or transform their commitments—in a sense, to live with a certain degree of bad faith—in a way that the law reformer does not.

B. The Varieties of Cause Lawyering

Let us next turn to the other typology, among cause lawyers involved in service-provision, law reform, and political organizing. A cause lawyer might devote her efforts to providing individualized legal services—and such a lawyer could conceivably leverage a leadership position into enough prominence to enter government service. But the role in government will be very different from the high-level lawyers we have been considering so far. Generally, legal services providers make their impact on the local level, which suggests that if they enter government it will most likely be local government.¹⁶

For decades, proponents of law reform have voiced suspicion of individual service provision as something akin to handing out band-aids rather than addressing the root causes of social problems.¹⁷ In my view,

16. The reason that legal services lawyers make their impact at the local level is that Congress has prohibited legal services-funded lawyers from high-impact work like filing class actions, engaging in lobbying, or taking on any number of controversial issues. See Omnibus Consolidated Receptions and Appropriations Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321-50 to -56 (1996) (especially section 504).

17. As one experienced legal aid lawyer notes, “From the very beginning, the critical debate regarding Legal Aid has been whether its purpose is to advocate for systemic reform to address issues of poverty, or to apply a ‘band-aid approach’ that addresses individual needs on a case-by-case basis without challenging systemic causes of those needs—namely injustice and poverty.” Jose R. Padilla, *California Rural Legal Assistance: The Struggles and Continued Survival of a Poverty Law Practice*, 30 CHICANO-LATINO L. REV. 163, 166 (2011); see also JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION (1982).

this is not always a fair criticism, but both sides of the argument are deeply felt: service providers may be moved by compassion for individuals in trouble, and they see virtue in a career devoted to helping people in trouble on a face-to-face, retail basis. The critic wants to make a lasting difference for a lot of people, and thinks that band-aids do not do that and, worse, legitimize the system. Among the latter group, the more important distinction is between lawyers who pursue legal reform through impact litigation or lobbying and those who subordinate legal work to the needs of political organizing.

The organizing approach was taken by Gary Bellow when he headed California Rural Legal Assistance (CRLA) in the 1960s.¹⁸ Bellow and his colleagues soon concluded that the most important thing they could do for their farm-worker clients—more important than filing lawsuits or even winning test cases—was boost Cesar Chavez’s efforts to organize the United Farm Workers.¹⁹ That sometimes meant foregoing an opportunity at impact litigation, because it would deflect attention from the union to the courtrooms and demobilize workers. In Bellow’s words, “The worst thing a lawyer can do—from my perspective—is to take an issue that could be won by political organization and win it in the courts.”²⁰ Instead, legal tactics were chosen for their impact on union organizing and morale. A losing lawsuit pursued intelligently might help the union. For example, in one suit Bellow and his colleagues took depositions from tyrannical foremen in the field.²¹ The lawsuit failed, but the tactic was a terrific organizing success because it allowed farm workers to see “their” champions taking the all-powerful adversary down a peg.²²

One of the canonical pieces in the cause-lawyering literature is Stephen Wexler’s *Practicing Law for Poor People*,²³ which argued that the only form of poor people’s practice that is not self-indulgent is practice that subordinates itself to poverty organizing. “Poverty will not be stopped by people who are not poor,” Wexler writes.²⁴ “If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.”²⁵ Wexler’s was a very militant argument, and he drew some quite militant conclusions from it, which he freely admitted “violate[] some of the basic tenets of the profession.”²⁶ In a particularly poignant example, he suggests that a lawyer might deliberately fail to solve a personal problem of a poor

18. See generally Bellow, *supra* note 4.

19. *Id.* at 24.

20. *Id.*

21. *Id.*

22. I heard this story from Gary Bellow.

23. 79 YALE L.J. 1049 (1970).

24. *Id.* at 1053.

25. *Id.*

26. *Id.*

client who happens to be a good organizer because in the lawyer's judgment solving it would distract her from organizing.²⁷

NeJaime's paper acknowledges quite candidly that a lawyer in government service will seldom, if ever, be able to practice law with "movement" organizing or—more generally—movement politics as the aim. Even if government is not the adversary of the movement, it nevertheless needs to stay one step removed from overt partisanship on behalf of any movement. Government has many constituencies, and if it orients itself to just one of them it ceases to be democratic and pluralist, and instead veers in a dangerously ideological direction, one step removed from single-party repression.

Government service in a pluralist democracy is therefore much more amenable to a cause lawyer who has pursued a law reform agenda: for such a lawyer, who may have been laboring upstream for decades trying to budge government on important issues, government service is a dream come true, because now she has her hands on the levers.

II. CONFLICTS

I now turn to the question of whether government service may—or should—disable the lawyer as a cause lawyer. There are certainly no conflicts of interest involved in the major modes of action NeJaime has analyzed. These include, first, an antidiscrimination LGBTQ cause lawyer who can now, from within the government, press to make sure that his or her own agency does not discriminate. Second, a cause lawyer can help set the agenda of the government agency in a way that lines up with the movement's objectives—for example, by bumping issues of LGBTQ rights from the bottom of the agenda nearer to the top. That seems entirely legitimate, a routine part of pluralist democracy. Third, the cause lawyer can provide avenues of access between movement people and government officials. In none of these cases does government service mean that the cause lawyer must in any sense abandon the cause.

But it is not always so easy to use the Ring of Power without answering to its own imperatives. Let me call attention to four sources of tension between cause lawyering and government lawyering.

First, cause lawyers may now have to defend government positions that they dislike, or at least speak evasively about them in public fora. They may press their own convictions in deliberations with their colleagues, but they will not always prevail. At that point, their obligations as government lawyers take precedence over their movement convictions—or, if they find that priority unacceptable, they may have to leave the government. To take a prominent example, it has been widely reported that State Department Legal Adviser Harold Hongju Koh has lost arguments about national security policy to more hawkish members of the Obama Administration;

27. *Id.* at 1054.

but, willingly or not, he has defended the hawkish policies in high profile speeches and opinions.²⁸

Second, the cause lawyer in government may even end up formulating policies that, in her former life, would have made her hold her nose. This is a different and deeper matter than being forced to publicly defend decisions that the cause lawyer disagrees with. It is one thing to be outvoted but then to have to present a public face representing the administration you belong to. It is quite another to formulate policies that, for political reasons, end up so far removed from your own convictions that in private life you would have regarded them as a betrayal. The “problem of dirty hands”²⁹ is endemic in government. The philosopher Avishai Margalit has argued persuasively that to achieve important ends one may have to accept bad compromises, so long as they are not rotten compromises, by which Margalit means “an agreement to establish or maintain an inhuman regime.”³⁰ Suppose the cause lawyer goes along with Margalit. It follows that the lawyer may have to accept bad compromises in policy making that he or she would denounce as a movement lawyer. Not only will government lawyers have to defend these compromises, they will do so knowing that they themselves were involved in formulating the noisome policies.

Third, the government lawyer—especially in the executive branch—is no longer entitled to push deeply one-sided interpretations of the law, because of the faithful execution obligation which transmits from the President to executive branch lawyers.³¹ The lawyer writing legal opinions for the executive branch has shifted roles from an advocate to an advisor, and the advisor’s role requires (in the words of the American Bar Association Model Rules of Professional Conduct Rule 2.1) independent professional judgment and candid advice.³² One of the failings of the Bush Administration’s Office of Legal Counsel (OLC) was the way that it aggressively pressed to build extreme legal positions into the fabric of the law by embedding them in OLC opinions.³³

28. See generally DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012) (describing Koh’s role in Obama national security deliberations); Paul Starobin, Op-Ed., *A Moral Flip-Flop*, N.Y. TIMES, Aug. 7, 2011, at SR5 (criticizing Koh for reversing his own long-standing positions); Carrie Johnson, *Human Rights Defender Now Fights For U.S. Policy*, NPR (June 28, 2011), <http://www.npr.org/2011/06/28/137454984/human-rights-defender-now-fights-for-u-s-policy>.

29. See, e.g., Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. L. 160 (1973).

30. AVISHAI MARGALIT, *ON COMPROMISES AND ROTTEN COMPROMISES* 2 (2010).

31. Under Article II, Section 3, Clause 5 of the Constitution, the President must “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3, cl. 5. I discuss its application to government lawyers in “*That the Laws Be Faithfully Executed*”: *The Perils of the Government Legal Advisor*, 38 OHIO N.U. L. REV. (forthcoming).

32. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002).

33. I have discussed this problem in several places. See *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 11–14 (2009) (statement of David Luban, Professor of Law, Georgetown University Law Center);

Fourth, lawyers may find it hard to return to cause lawyering after leaving government service. For one thing, ethics rules and statutes limit their capacity to take adverse positions to their former client, and that might prove quite restrictive unless the work the lawyers did for the government was unrelated to the cause.³⁴ Confidentiality rules may prevent her even from talking about what she did in government, and they clearly forbid her from “us[ing] information relating to the representation to the disadvantage of the former client.”³⁵ Over and above the ethics rules, the work of government lawyers may be classified. But perhaps more important than either of these formal bars, a former government lawyer may develop personal loyalties to colleagues still in government, or loyalty to the administration that appointed her. For all these reasons, she may be deeply reluctant to take on the adversarial role that cause lawyering so often demands.

It does not have to be so. Some former government lawyers become vociferous critics of their own administration’s policies after they leave; although the best-known examples are not movement lawyers returning to the movement, there is no reason why a cause lawyer could not adopt that role as well.

On the other hand, the cause lawyer’s comrades in the movement may no longer welcome her back into the fold. The bad compromises she helped engineer, the public defenses of the administration’s positions, and her unwillingness to criticize them, hang over her; her friends in the movement may find her stay in government disappointing or worse. This, too, does not have to happen; and when it does it is sad, ironic, and perhaps deeply unfair. Yet perhaps, given the pervasiveness of bad compromises in government, it is inevitable. I regard it as a kind of paradox built into the very concept of compromise.³⁶ Commitment to a cause means commitment to seeing its goals realized. A compromise is simultaneously a partial realization and a partial abandonment of one’s goals. Purists within the movement focus on the abandonment; the engineer of the compromise focuses on the achievement. Both have a point. Cause lawyering within government therefore stands on a kind of moral knife-edge, and NeJaime’s paper invites us to think in concrete terms about how lawyers negotiate the

DAVID LUBAN, *The Torture Lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY 162 (2007); David Luban, *Liberalism, Torture, and the Ticking Bomb*, in THE TORTURE DEBATE IN AMERICA 35 (Karen J. Greenberg ed., 2006); David Luban, *Tales of Terror: Lessons for Lawyers from the ‘War on Terrorism,’* in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 56 (Kieran Tranter et al. eds., 2010).

34. See MODEL RULES OF PROF’L CONDUCT R. 1.9 (2002) (discussing former client conflicts); *id.* at R. 1.11 (discussing former government lawyers); see also 18 U.S.C. § 207 (2006 & Supp. V 2011) (discussing a statutory bar to former officers, employees, and elected officials).

35. MODEL RULES OF PROF’L CONDUCT R. 1.9.

36. See David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 414–16 (1985).

demands of their own career commitments in a situation at once so promising and so difficult.