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Deborah J. Cantrell

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DEBORAH J. CANTRELL[†]

ABSTRACT

Fundamentally, cause lawyers engage in their work to make social change. Scholars of cause lawyering have generated a robust and rich literature considering important issues, such as what kinds of advocacy strategies best generate social change and what features of the relationship between cause client and cause lawyer are critical to an engaged and mutual relationship. But, the literature has neglected a key aspect of the cause lawyer and client relationship: whether the particular kind of loyalty that exists as between them hinders or helps in achieving social change. This Article fills that void. It first illuminates the particular features of the kind of loyalty that is expected between cause lawyers and their clients, including features such as a mutually engaged relationship and a strict conception of friends and enemies. Labeling that loyalty as "hyper-loyalty," this Article scrutinizes whether the extreme fidelity required by hyper-loyalty helps produce actual social change. Drawing on multiple fields, including negotiation and cognitive psychology, this Article demonstrates that hyper-loyalty impedes social change by limiting the range of relationships that can be explored as sites for problem solving. The Article offers a way forward, suggesting that hyper-loyalty be replaced by relational loyalty. The three key features of relational loyalty are: constructing the architecture of social change so that it is a connected web of relationships instead of dyadic and oppositional; approaching that web of relationships with curiosity instead of advocacy; and responding with compassion to all contained in the web of relationships. This Article argues that relational loyalty inculcates a helpful dynamism in relationships, which both preserves mutual engagement between cause lawyer and cause client, while also creating unexpected opportunities to craft innovative strategies or pathways to social change.

INTRODUCTION

Imagine the following two attorneys: an anti-poverty cause lawyer[1] who is bilingual and works in a community in which most residents are

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† Associate Professor, University of Colorado Law School. Special thanks to the interdisciplinary group of scholars hosted by Fordham Law School who gave me detailed feedback, especially Russ Pearce, Amy Uelmen, Ian Weinstein, and Judy Povilus. Thanks also to Clare Huntington, Nestor Davidson, Emma Leheny, Howard Lesnick, Erik Pitchal, Jacob Rukeyser, and workshop colleagues at Colorado Law and University of Georgia Law School.

1. The term "cause lawyer" was coined by Austin Sarat and Stuart Scheingold, and replaced the phrase "public interest lawyer." *See* AUSTIN SARAT & STUART SCHENIGOLD, *Cause Lawyering and the Reproduction of Professional Authority, An Introduction, in* CAUSE LAWYERING: POLITICAL

recent immigrants and a government official who spent a couple of years working as a staff attorney at a legal aid office before moving into private practice, and ultimately being appointed to her current high-level position in the state's social services agency. Both the advocate and the government official went to the same elite law school. Both have shared professional connections. The advocate has been hearing from community members that the local government benefits office is refusing to provide supplemental nutritional assistance applications in any language other than English. When the advocate hears that the government official is holding a series of town hall meetings in the area, the advocate makes plans to attend to raise the issue of language accessibility. The advocate remarks to her colleagues how frustrating it is to see a very smart person like the government official working "for the enemy."[2] The advocate notes that even though she thinks the official's own legal aid background could be very helpful in problem-solving related to a particular issue, the advocate just cannot trust anyone who now works for the government. The advocate concludes that she had heard that the official was a nice person, which she had no reason to disbelieve, but she felt uninspired to try and forge any relationship with the official. The advocate planned to attend the meeting not with any belief that there would be a useful exchange between the participants, but because the advocate felt it was necessary to show the government official that the local community was strong and committed to opposing the agency's inappropriate behavior.

The vignette highlights a common feature of social change advocacy—that participants, including cause lawyers, identify strongly with their side of the issue and distrust—with a similar intensity—participants on the other side. In fact, this Article argues that such hyper-loyalty is considered a core condition and baseline requirement of the relationship between cause lawyer and cause client. In shorthand, it is part of the DNA of how a cause lawyer works.[3] That hyper-loyalty is laudable in many ways. It creates an expectation that the relationship between cause lawyer and cause client will carry over time and over multiple advocacy

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COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3–5 (Austin Sarat & Stuart Scheingold eds., Oxford Univ. Press 1998). The concept of cause lawyering differentiates between a lawyer who essentially is agnostic about who are her clients or what kind of outcome her clients may be seeking, and lawyers who commit to a particular kind of substantive work or a particular category of clients because the lawyer is committed to some broader set of social or political principles. *See* AUSTIN SARAT & STUART A. SCHEINGOLD, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 3–4 (Austin Sarat & Stuart A. Scheingold eds., Stanford Univ. Press 2006); *see also* Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to Be Competent in Public Advocacy*, 30 HAMLINE L. REV. 568, 569–71 (2007) (providing a definition of "cause lawyer").

2. This vignette is based on many similar conversations that I heard during my own time as a public interest lawyer.

3. Nestor Davidson helpfully suggested the DNA metaphor.

efforts, and is not a one-off relationship of short duration.[4] The cause lawyer and client are in the struggle together.[5] It creates an expectation that the cause lawyer and the cause client fundamentally agree on at least some components of a "just" society. The cause lawyer and client *believe* in the struggle.[6] In its best form, it also forges a relationship that is mutual, reciprocal, and in which both cause lawyer and cause client understand and trust each other to bring relevant expertise to the advocacy work.[7] The cause lawyer and client are both *soldiers* in the struggle.[8]

Cause lawyers and cause lawyering scholars have focused intensively on the above features of the lawyer–client relationship, and the role of hyper-loyalty in fostering those features. However, they have done so while neglecting the central point of the cause lawyer-cause client relationship—to make actual social change. The unexamined assumption in the existing scholarship is that hyper-loyalty increases the possibilities for effective social change. This Article fills the unpropitious void in the scholarship by critically examining hyper-loyalty. It scrutinizes the assumed truth that because hyper-loyalty makes the cause lawyer and cause client feel better and stronger about their relationship, the relationship, in turn, helps the cause lawyer and cause client actually achieve social change.

This Article comes to a conclusion that may surprise many—that hyper-loyalty creates more potential to impede social change work than to assist such work. In particular, this Article identifies a particularly problematic consequence of hyper-loyalty, noted in the vignette above, which is that it encourages cause lawyers and cause clients to identify others either as friends or enemies, and to hold steadfast to that dichotomy. Drawing on a range of literature, including work on cognitive heuristics and biases, negotiation theory, and scholarship about intentional relationships in social movements, this Article demonstrates several ways in which hyper-loyalty impedes the flexibility needed to effect social change.

To avoid the negative consequences of hyper-loyalty, this Article re-envisions what it means for cause lawyers and cause clients to be loyal to each other. This Article recognizes the important starting contribution the existing literature made by insisting that the cause lawyer and the cause client must understand each other both as bringing expertise to the relationship, and that the relationship must be mutually engaged and re-

4. *See generally* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 298–302 (1996) (describing several multi-pronged campaigns for which Bellow was the cause lawyer).

5. *See id.* at 302–03 (describing Bellow's own experiences as a cause lawyer).

6. *See id.* at 300.

7. *See id.* at 302–04 (describing the respectful relationship necessary for effective cause lawyering).

8. *See id.* at 300–04.

spectful. However, this Article then calls on cause lawyers and clients to create a more relational form of loyalty to each other, not by bringing distance to their own relationship but instead by situating their relationship within a larger web of relationships of participants engaged on an issue. The notion of a web of relationships, rather than hyper-loyalty's dyadic contest with friends on one side and enemies on the other, creates space for both cause lawyers and cause clients to expand the realm of participants with whom a connection may be explored. Whereas hyper-loyalty views exploring relationships across the line as disloyalty, relational loyalty understands exploration of the web of relationships as a method of fostering new, and at times unexpected, but useful, collaborators for social change.

This Article adds two additional key components to relational loyalty. First, drawing particularly on negotiation literature, relational loyalty calls on participants to approach others in the web of relationships with curiosity, not advocacy. The softening of a stance from advocate to inquirer is designed to create a more expansive dialogue, which, like the web itself, should bring forward new and possibly unexpected, but useful, information. Next, relational loyalty calls on participants to approach others in the web of relationships with compassion. This Article sharply distinguishes between compassion and acquiescence or capitulation. Compassion is not silence or the whitewashing of injustice. But the calling out of injustice need not happen only in righteous anger. It can happen more productively from a compassionate stance that looks for opportunity in the particular situation with particular people.

In Part I, this Article traces the development of hyper-loyalty as a core component of the relationship between cause lawyer and client. Then, it describes the legitimate concerns about how to build a respectful and mutual relationship between cause lawyers, who regularly come from elite backgrounds, and cause clients, who regularly come from underserved or underrepresented communities. It also describes the positive features of hyper-loyalty as a way of communicating and cementing trust between disparate participants, as a way of expressing mutual respect and acknowledging mutual expertise. Part II turns to the harmful aspect of hyper-loyalty detailing the ways in which it impedes cause lawyers and clients from achieving actual social change. Part III builds out the components of relational loyalty, including reframing participants as being situated within a web of relationships and approaching all with curiosity and compassion. Part IV acknowledges and addresses some potential concerns about moving from hyper-loyalty to a relational loyalty.

I. THE ROLE OF LOYALTY IN CAUSE LAWYERING

Scholars of cause lawyering, and cause lawyers themselves, take as an important truth that loyalty is a key feature of the relationship between

cause lawyers and their clients. In contrast to much for-profit lawyering, cause lawyering brings with it robust notions of solidarity between client and lawyer.[9] The proposition is that there is more solidarity between the cause lawyer and client because both of them understand their work together to be situated within a larger interest in social change. As Gary Bellow articulated the relationship, it is a "politicized orientation" with "the legal work . . . done in service to both individuals and larger, more collectively oriented goals."[10] Independent of their legal relationship, the lawyer and client are loyal to each other because of their shared commitment to their cause, whatever it may be. Their "cause loyalty" is stronger than the typical professional loyalty between lawyer and client. It is hyper-loyalty.

That hyper-loyalty is the expected norm in cause work is not surprising. Most cause lawyers, and many cause clients, are committed to "doing the work" in a long-term way.[11] They form long-term relationships with each other, and even though there may be individual changes over time between particular lawyers or clients, there is a strong level of general continuity between the cause lawyering shop and the lay advocacy community. For a historical example, think of the cause lawyers at California Rural Legal Aid who worked closely with Cesar Chavez and the United Farm Workers Union on several advocacy efforts.[12]

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9. *See* Bellow, *supra* note 4, at 302 (noting the importance of "mutuality" in the relationship between client and cause lawyer); *see also* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982) (calling for "counter-hegemonic" legal practice in which goal is to forge "authentic" political collaborative between client and cause lawyer); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1384–85 (2009). *See generally* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) (highlighting the story of a Black South African village and the methods of the "outsiders" who worked with them to empower resistance as a model for change-oriented lawyering); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social* Change, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (articulating a social change plan to aid immigrant workers as a whole, instead of individual clients only); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1995) (defining the critical criteria for empowering organizational advocacy); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (New York Univ. Press 2001) (explaining the environmental justice movement); Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007) (suggesting the benefit to community lawyering of a more collaborative relationship among lawyers, clients, and third-parties such as interpreters); Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007) (discussing progressive public interest lawyers in the context of one campaign involving immigrant labor).

10. Bellow, *supra* note 4, at 300.

11. However, the privatization of *pro bono* legal work has somewhat altered that dynamic as private law firms have built out books of business focused on providing free legal services often related to cause lawyering. Because of very practical business concerns about conflicts of interest with paying clients, private firms often pick one or two causes on which to focus, pairing in a long-term way with one of two non-profit cause lawyering shops. *See generally* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

12. *See* Bellow, *supra* note 4, at 298.

Additionally, a constitutive part of social change, or cause, work is that cause advocates are pushing against the status quo. In order to mobilize a collective for action, there must be some sense that there is one group pushing for change and one group content with the status quo—in other words, some sense of "us" and "them."[13] The existing cause lawyering literature has focused heavily on what cause lawyers must do to ensure that there is a strong sense of "us" between cause lawyers and cause clients. The Article turns now to those particular features of hyper-loyalty.

A. The Ideal of Hyper-Loyalty

The ideal features of hyper-loyalty are straightforward. Lawyers and clients are equal and "co-eminent practitioners" in their work towards social change.[14] Clients are "not just sources of information on the problems they face, but [also are] active partners in working collectively to solve those problems."[15] Lawyers and clients both are careful to view each other as a "whole person,"[16] not as "cardboard"[17] cut-outs of what a lawyer or client is expected to be under mainstream views of the legal profession. Hyper-loyalty, however, is not an "oversentimentalized" sense of relationship.[18] As Gary Bellow has described it: "I surely influenced and argued with those I served, often loudly and long. But I, in turn, was influenced and argued with as well, and felt justified in asserting my views only because I also felt open to being overruled or outvoted."[19]

While hyper-loyalty can be between an individual lawyer and an individual client, it can also be between multiple lawyers and multiple clients or communities.[20] Nonetheless, it is dyadic in that it understands the core commitment to be between the lawyer(s) and the client(s)/community. While both lawyers and clients may look for opportunistic alliances with others, those alliances should neither weaken, nor necessarily expand, the hyper-loyalty that exists in the dyad.[21] By defini-

13. *See, e.g.*, ALBERTO MELUCCI, *The Process of Collective Identity*, *in* SOCIAL MOVEMENTS AND CULTURE: SOCIAL MOVEMENTS, PROTEST, CONTENTION 47–49 (H. Johnston & B. Klandermans eds., 1995) (noting that a collective must distinguish between itself and others in order to act and mobilize).

14. LOPEZ, *supra* note 9, at 29.

15. Piomelli, *supra* note 9, at 1385.

16. For an early, yet still very prescient, description of lawyers not seeing the client as a "whole person," see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 21 (1975).

17. The phrase "cardboard clients" comes from Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 103–04 (2010).

18. Bellow, *supra* note 4, at 303.

19. *Id.* at 302–03.

20. In fact, some scholars insist that the better version of cause loyalty is between lawyers and communities, and that cause lawyers should be wary of individualized lawyer–client relationships. *See, e.g.*, Ashar, *supra* note 9, at 1880, 1921–24.

21. *See, e.g.*, Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 404–05 (2004) (providing an example of an

tion and by action, hyper-loyalty presumes there are others or groups of others to whom loyalty is not owed, and to whom displays of affinity are not permitted.

Interestingly, hyper-loyalty can come about directly as discussed above, but also indirectly as discussed below.

B. Two Indirect Routes to Hyper-Loyalty

The ideal of hyper-loyalty discussed above is a direct and intentional commitment to a relationship in which the cause lawyer and cause client stand together against others. Hyper-loyalty is in place because both lawyer and client desire their relationship to have that feature. However, a cause relationship can also indirectly become infused with hyper-loyalty. As described more fully below, that indirect infusion results from a cause lawyer compensating for other concerns about how she is in relationship with her client. Nonetheless, whether infused directly or indirectly, the consequence of hyper-loyalty is the same—cause lawyers and cause clients hold fierce notions of "us" and "them."

The first indirect route to hyper-loyalty comes from cause scholars' and lawyers' long-expressed worry that, historically and currently, the legal profession is predominantly populated by members of the elite.[22] As a result, lawyers from elite backgrounds have dominated cause lawyering. As one scholar articulated the concern: "There are . . . significant dangers when middle class lawyers get intimately involved in the task of organizing the poor. More articulate, better educated, aggressive by nature and training, some lawyers tend to dominate newly formed groups, even when they try not to . . . ."[23] Thus, there has been a sustained nervousness about whether cause lawyers, even with their good intentions, are capable of establishing and maintaining a mutual and reciprocal relationship with their clients.

The seminal critique of cause lawyers captured by elite culture is Gerald Lopez's *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*.[24] Lopez coined the phrase "regnant lawyer" to

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environmental justice lawyer and low-income community thinking through whether to form an alliance with yuppie neighborhoods that also might be affected).

22. For an example of historical, socioeconomic information, see generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (Russell Sage Foundation, 1982). For socioeconomic information about newer members of the legal profession, see generally RONIT DINOVITZER ET AL., AFTER THE JD 20 (NALP Foundation & American Bar Foundation 2004) (noting that "newly admitted lawyers come generally from relatively privileged socioeconomic backgrounds."); Richard Sander & Jane Yakowitz, *The Secret of My Success: How Status, Prestige and School Performance Shape Legal Careers* 11, Brooklyn Law School, Legal Studies Paper No. 207; 5th Annual Conference on Empirical Legal Studies Paper; UCLA School of Law Research Paper No. 10-26 (2010) (analyzing data from the *After the JD* study), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640058.

23. Ruth M. Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1024 (1994).

24. LOPEZ, *supra* note 9.

describe those lawyers, cause or otherwise, who understand themselves as experts in charge of lay clients and who presume that lay clients bring no useful skills to the advocacy question at hand.[25] For Lopez,

> [Regnant lawyering] imposes unjustifiably limited relations between those working against subordination and those strategies available to wage the fight. It does not permit anyone in the fight, whether lay or professional, to experience others as part of a working team. And it almost laughs off anyone who wants to regard others as co-eminent practitioners.[26]

The regnant cause lawyer is disloyal to the client by failing to "express the highest regard for a client's understanding of his own situation . . . ."[27] Furthermore, the regnant cause lawyer is disloyal to a client or community of clients by failing to understand that everyone has an inherent ability to lawyer in the sense of having "built-in, problem-solving, domination-fighting capacit[ies]."[28]

For Lopez, the antidote to regnant lawyering is rebellious lawyering against subordination—what I have called the ideal of hyper-loyalty. As Lopes articulates it:

> [L]awyers must know how to work with, not just on behalf of, subordinated people. They must know how to collaborate with other professional and lay allies rather than ignore the help that these other problem-solvers may provide in any situation. . . . And, at least as importantly, they must open themselves to being educated by the subordinated and their allies about the traditions and experiences of subordinated life.[29]

From a commitment to rebellious lawyering, Lopez crafts a kind of hyper-loyalty between lawyer and client that requires the lawyer to constrain herself to ensure that the client is not subordinated within the lawyer–client relationship. Lopez's goal is to encourage cause lawyers to "nurture sensibilities and skills compatible with a collective fight for social change,"[30] implying mutual and reciprocal relationships between lawyer and client.

However, his consistent and thorough portrayal of most cause lawyers as regnant lawyers raises the risk that a lawyer who is trying to be rebellious will be so concerned about subordinating the client or client community that the lawyer will forego a mutual relationship for one in

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25. *Id.* at 24 (listing characteristics of a regnant lawyer).
26. *Id.* at 29.
27. *Id.* at 61.
28. *Id.* at 8.
29. Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608 (1989).
30. LOPEZ, *supra* note 9, at 38.

which the lawyer is intentionally, and well-meaningly, subservient.[31] In other words, the hyper-loyalty displayed by the rebellious, yet cautious lawyer, causes her to recede in the relationship.

That is an understandable response by a cause lawyer who takes Lopez's critique seriously, and who is aware of the demographics of privilege within the legal profession.[32] Because it remains true that most lawyers come from elite socioeconomic backgrounds, a self-reflective cause lawyer would rightly be mindful that her elite background would have generated life experiences that may not match up with those of her "subordinated" clients. After reading Lopez, the cause lawyer would also be mindful of the way in which her legal education privileged a particular kind of analysis—thinking like a lawyer—which may prime her to see her client's issues through a limited problem-solving lens.[33] Thus, in an effort to make sure her regnant tendencies are kept in check, the cause lawyer intentionally restrains the ways in which she participates with her client so as not unintentionally to dominate the relationship.

The mutually engaged and reciprocal relationship coming from Gary Bellow's vision of hyper-loyalty is, in some ways, turned on its head, even though a version of hyper-loyalty is maintained. Under the above indirect route to hyper-loyalty, the cause lawyer is motivated to draw clear lines between "us" and "them" as a way to double check her own regnant tendencies. Keeping a forceful distance from "them," the non-subordinated, the elite, eases the cause lawyer's concerns that she might be trumping her clients in some way.

There is an even stronger version of indirect hyper-loyalty as a response to the risks of regnant lawyering. It is reflected by arguments of some cause lawyers that they should overtly embrace a model in which

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31. I am not the first scholar to suggest that Lopez portrays cause lawyers in an unnecessarily bleak way. *See* Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213, 215 (1993).

32. DINOVITZER ET AL., *supra* note 22, at 20 (NALP Foundation for Law Career Research and Education, Overland Park, KS, & American Bar Foundation, Chicago, IL 2004) (noting that "newly admitted lawyers come generally from relatively privileged socioeconomic backgrounds"); *see also* Sander & Yakowitz, *supra,* note 22, at 9–11.

33. LOPEZ, *supra* note 9, at 4–5 (describing his own experience at Harvard Law School); *see also* STUART SCHEINGOLD & AUSTIN SARAT, *Beating the Odds: Cause Lawyering and Legal Education, in* SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 51, 60–71 (Stanford Univ. Press 2004); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1931–36 (2002) (discussing the shift from the case method to the clinical method of teaching and the benefits of the clinical approach); CHRIS GOODRICH, ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL 245–55 (1st. ed. 1991) (describing the author's first experience in a clinical learning environment); ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 53–54 (Routledge 1992); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87–90 (Carnegie Foundation 2007); Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 487–90 (2011) (exploring the disconnect between attorneys and clients due to the current state of legal education).

lawyers must be subservient to "the people."[34] Under that view, "[o]rganized masses of people, not lawyers, play the critical roles [in social change], and the significant victories (or losses) occur outside the sphere of law. The more that lawyers try to implement social change directly, the more inimical their impact."[35] Under this model of lawyer loyalty as subservience, the risk of the regnant lawyering *always* is the reality of lawyering. That is because lawyers are too versed in a "rights" framing of social order, and that framing derives from and depends on the power-maintaining legal system.[36] Lawyers must step aside and subordinate rights "to the goal of building an authentic and unalienated political consciousness."[37] It is through political awareness and action that "the people" will create social change.[38]

Just as Lopez allowed for the possibility of a mutual and reciprocal relationship between his rebellious lawyer and her client, so, too, do the above lawyers. They call for cause lawyers to "seek to develop a relationship of genuine equality and mutual respect" with clients.[39] But, they remain extremely nervous about the fact that lawyers are sanguine that social change can happen through the power-maintaining legal system, and their nervousness comes through. For example, there has been blunt criticism of the development of federally funded legal aid as creating merely a "poverty industry" for legal professionals.[40] Given the warnings about lawyers' capture by the legal system, a cause lawyer committed to social change by political organizing will want to avoid lawyer domination. The risk-averse way to do so is to understand the hyper-loyalty she owes to her client as being unidirectional—that she is in service to, or subservient to, her client.

As with the cause lawyer worried about being a regnant lawyer, this variant on indirect hyper-loyalty calls on a cause lawyer to have a strong sense of "them" as a way of protecting cause clients. Thus, hyper-loyalty comes from an inward focus that is concerned about creating a kind of relationship between cause lawyer and cause client that protects the cause client. In this setting, hyper-loyalty is less focused outwardly on

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34. *See* Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 21–22 (1984) [hereinafter Bachmann, *Lawyers, Law, and Social Change*]; *see also* Steve Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*, 34 N.Y.U. REV. L. & SOC. CHANGE 499, 545–49 (2010) [hereinafter Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*]; Gabel & Harris, *supra* note 9, at 375–79 (1982).

35. Bachmann, *Lawyers, Law, and Social Change*, *supra* note 34, at 4.

36. *See* Gabel & Harris, *supra* note 9, at 375 ("But the great weakness of a rights-oriented legal practice is that it does not address itself to a central precondition for building a sustained political movement—that of overcoming the psychological conditions upon which both the power of the legal system and the power of social hierarchy in general rest.").

37. *Id.*

38. *See* Bachmann, *Lawyers, Law, and Social Change*, *supra* note 34, at 6.

39. Gabel & Harris, *supra* note 9, at 376.

40. Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*, *supra* note 34, at 548–49 (quoting then-Congresswoman Edith Green using the phrase "poverty industry").

concerns about whether the kind of cause relationship created produces good advocacy or social change.

It is a deep irony that the very elite training received by many cause lawyers actually can reinforce some of the forces that produce unidirectional hyper-loyalty. At the same time that a cause lawyer may commit to loyalty as service/subservience out of worry that she needs to keep her elitist legal training in check, that same notion of lawyer loyalty as service is embraced deeply by traditional, elitist legal training.[41] It is as if a peculiar feedback loop is created in which the cause lawyer reflects and worries about her elitist training, chooses a conservative course of behavior in response to that self-reflection, and that conservative course of behavior is then reinforced by the very elitist training the lawyer was trying to avoid.

That odd feedback loop can be seen by looking at Daniel Markovits's recent endorsement of lawyer loyalty as service, crafting it in terms of a lawyer's fidelity to her client.[42] For Markovits, fidelity calls on a lawyer to be "self-effacing" so that the "lawyer becomes able to work continually as a mouthpiece for her client."[43] Further, the purpose of the lawyer's self-effacement is rooted ultimately in goals of political legitimacy and democratic participation.[44] In other words, a lawyer is a faithful mouthpiece for her client as a way of ensuring that the client is able to genuinely and fully participate in the democratic processes of which the adversary legal system is a part.[45] The lawyer breaches that fidelity, and that commitment to the client's full democratic participation, if the lawyer substitutes her own value judgments for those of the client.[46]

The Markovits lawyer is anything but a rebellious lawyer. Markovits valorizes the adversary legal system as the place in which all kinds of disputes, including those related to social justice, are well resolved.[47] For Markovits, the good lawyer focuses her work in the legal

41. A few prominent defenses of lawyer loyalty as service are: Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 101–04 (2003); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 129–33 (President and Fellows of Harvard College 1993); TIM DARE, THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (Ashgate, 2009); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (Princeton Univ. Press, 2010). For a helpful comparison of the differences between several loyalty as service models, see Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 505–21 (2011). Other defenses of the standard conception of lawyering include Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L. J. 1545 (1995), and MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (Matthew Bender, 2004).

42. MARKOVITS, *supra* note 41, at 90–99, 171–211.

43. *Id.* at 93.

44. *Id.* at ch. 8.

45. *Id.* at 184–190.

46. *Id.* at 185.

47. *Id.* at 190–99.

system because it is a place in which members of society can receive justice.[48] She is effective only to the extent she shows a kind of loyalty to her client that is unidirectional, and not mutual or reciprocal. The feedback loop is triggered for the well-intentioned, but cautious, rebellious lawyer when she tries to subordinate herself to her client out of worries about being a regnant lawyer, only to have such subordination magnified by traditional conceptions of the role a regnant lawyer ought to play.

Worrying about lawyer domination is the second indirect route to hyper-loyalty. In the second variation, the worry is that cause lawyers will understand their true loyalty to be to the cause, and thus view their clients as one of several pieces of an advocacy strategy to be deployed. As a result, clients become pawns, not empowered individuals.[49] Scholars have listed several negative consequences they believe result from such instrumental cause loyalty. Those include:

- Disempowering client communities, and disabling their potential for political activism and leadership;[50]
- Dismissiveness of clients' true narratives;[51] and
- Presumptuousness about law as an effective tool for social change.[52]

Of course, there also exists a more benign form of hyper-loyalty focused on the cause. It understands there are clients who are as committed to the cause as are the lawyers. The clients affirmatively wish to be agents in a larger strategy for social change, and do not view themselves as being used by the lawyers. In fact, the clients understand themselves to be equally situated with the lawyers and fully push back if they disagree with the way in which the lawyers want to portray or use them as the face of the cause.[53]

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48. Markovits situates the legal adversary system within a larger political system that must be understood as legitimate. *Id.* at 173–76 The adversary system is one part of the practical, applied way in which a democratic government can ensure its political legitimacy. *Id.* at 176–184.

49. *See* Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 130 (2009) (summarizing critiques of cause lawyers, including their ascendancy over clients); *see also* Thomas M. Hilbink, *You Know the Type: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 680–81 (2004) (discussing the lawyer's role in the category of cause lawyer Hilbink labels "elite/vanguard").

50. *See* Ashar, *supra* note 9, at 1918–20; Quigley, *supra* note 9, at 464–66; *see also* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1055 (1970).

51. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 27–29 (1990); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2111 (1991).

52. For a thoughtful summary of the debate, see Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, 36 FORDHAM URB. L.J. 603, 606–07 (2009); *see also* Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11, 19 (2003) (discussing how lawyers believed litigation could be used to establish a constitutional right to live).

53. I, and other cause lawyers, have understood that such clients exist and are sought after by cause lawyers. *See generally* Cantrell, supra note 1. *See also* Bellow, *supra* note 4, at 302–04.

Nonetheless, because of the loud volume of the warnings about dominating cause lawyers, a well-intentioned cause lawyer may respond by standing back—either by tempering her own commitment to the cause or by assuming that it is more important to the client to focus on individual client interests if and when those interests should be in tension with larger cause goals. Thus, should the client raise individual interests, the well-intentioned cause lawyer would not try to persuade the client that she should set individual interests aside for cause interests. To do so would be to start down the slippery slope of lawyer domination. As with the first indirect route to hyper-loyalty, the result for such a conscientious cause lawyer is still hyper-loyalty, but a unidirectional, subservient version that runs from the lawyer to the client.[54]

Taking the above descriptions of hyper-loyalty, it is important to next more carefully examine a set of assumptions underlying hyper-loyalty. The following section turns to that inquiry.

C. The Assumptions Underlying Hyper-Loyalty

Whatever the route to hyper-loyalty, one of its key goals is supposed to be to assist cause lawyers and clients *to achieve* social change. Built into that goal are two assumptions. First, that there is a particular kind of relationship between cause lawyer and client that best facilitates and coordinates their shared social change efforts. It is one in which cause lawyers and clients are mutually engaged, with each acknowledging their own and the other's strengths and weaknesses. Second, that the shared relationship between cause lawyer and client excludes the "other side," whatever or whoever that may be at any particular time. In other words, that social change advocacy is most effective when cause lawyers and clients delineate clearly and firmly who is a friend and who is an enemy.

The first assumption about the internal relationship between cause lawyer and client is the one on which scholars and cause lawyers have focused, and from which the ideal of hyper-loyalty was developed.[55] It is not surprising that if one compares descriptions of mutually engaged and reciprocal relationships to those without such features, there is unanimous agreement that participants are more satisfied with mutually engaged relationships.[56] Scholars still fuss around the edges of what constitutes effective mutual engagement. For example, arguing that under-

54. I do want to be clear that cause clients can interrupt both forms of unidirectional, subservient hyper-loyalty. A cause client steeped in the ideal of hyper-loyalty, expecting her lawyer to engage with her in the ways that Gary Bellow has articulated, could call out her cause lawyer's subservient behavior and insist upon a mutual and reciprocal relationship. Note, however, that the cause relationship is still infused with hyper-loyalty, just an ideal form, not an indirect form. The key feature of hyper-loyalty still exists in the relationship—that both cause client and cause lawyer have strong and unyielding notions of "us" and "them."

55. *See supra* note 9 and accompanying text.

56. *Id.*

standing features of particular contexts is critical when a cause lawyer assesses how to remain "client-centered" in her work.[57] Or, that cause lawyers should focus more fully on situating legal work within "movements of resistance," which might, themselves, lead with non-litigation strategies.[58] Or, that cause lawyers have paid insufficient attention to the role of language in building or breaching cause loyalty with a client.[59] Or, finally, that cause lawyers cannot truly establish hyper-loyalty unless their work is also tied to community organizing.[60] None of the fussing, however, suggests any fault with the basic premise that mutual engagement is better than unilateral engagement.

Notice, however, that the strong endorsement of the benefits of a mutually engaged and reciprocal relationship does make problematic the version of hyper-loyalty arising out of a well-intentioned subservience of a cause lawyer to her client. Critically, subservient hyper-loyalty deprives both cause lawyer and client from the benefits of a robust conversation. In social change work, at any given moment reasonable people may disagree about the best strategy going forward. Cause lawyers may disagree with each other, cause clients may disagree with cause lawyers, and cause clients may disagree with each other. Those disagreements arise from many sources—differences in background, differences in training, differences in specialized knowledge, differences in prior experience on a related issue, differences in cognitive biases. Further, at any given moment, different people may have relevant expertise. For one decision-making moment, it may be that the client is the one with specialized knowledge, but in the next decision-making moment, it may be the lawyer. Subservient hyper-loyalty deprives the group of an important source of information and experience. Further, as Gary Bellow forthrightly noted, "Only a conception of clients as much weaker and manipulable . . . dictates a level of subservience that leaves the lawyer without her own vision and stake in the outcomes being pursued."[61]

Turning now to the second assumption about the necessity of identifying friends and foes. Upon critical examination, the assumption's flaws surface. First consider a key feature of social change work. The work requires cause advocates to regularly reassess strategies and to use multiple advocacy methods.[62] In one moment, litigation may lead; in another,

57. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 374 (2006).

58. Ashar, *supra* note 9, at 1879.

59. Ahmad, *supra* note 9, at 1045–46.

60. Quigley, *supra* note 9, at 456.

61. Bellow, *supra* note 4, at 304. For an assertive argument in favor of using strong persuasion with individual clients in a criminal defense setting, see Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 481–81 (2007).

62. *See* Cummings & Rhode, *supra* note 52, at 603; Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 372–73 (2009); Marc L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 568-69 (2011).

legislative lobbying; in another, community organizing. Further, seldom is it the case that only one advocacy method is in play at a time.[63] Most often, cause advocates utilize multiple methods at the same time.[64]

As a result, the "who," that is the "other side," is not static. While litigation may have a technical plaintiff and defendant, cause litigation generally has interested ancillary parties. As litigation develops, ancillary parties may change from being supporters to opponents. Take some of the recent education litigation as an example. In one lawsuit, challenging school conditions in California, filed by the ACLU of Southern California, ancillary supporters included teachers and their union.[65] However, the ACLU of Southern California then alienated teachers and their unions in a related lawsuit it filed challenging the way in which a school district implemented teacher lay-offs.[66]

Similarly, legislative work can result in groups who have had competing interests coming together either to push for or oppose a particular piece of legislation, even though the groups otherwise generally oppose each other's missions. That same dynamic can come into play in community organizing. Thus, as a practical matter, understanding who one's friends and enemies are is a fluid and dynamic process. But, robust notions of loyalty between cause lawyers and clients create conditions that encourage static notions of relationships. That, in turn, reduces the nimbleness necessary for cause lawyers and clients to perceive and pursue opportunities for social change. I more fully describe the problem in the next section.

II. THE HARMS OF HYPER-LOYALTY.

There are two helpful vantage points from which to consider the harms that can flow from cause loyalty. One vantage point relates to theories about decision making and problem solving. That vantage point helps illuminate the ways in which cause lawyers and cause clients may be subject to common decision-making errors because of the way hyper-loyalty frames the decision-making processes. The other vantage point relates to intentional choices available to cause lawyers and cause clients about the ways in which they might helpfully choose to be in relationship

63. There has been a steady and long critique of cause lawyers as too focused on litigation. *See* White, *supra* note 9, at 742. *See generally* LOPEZ, *supra* note 9. For a thoughtful summary of the debate, see generally Cummings & Rhode, *supra* note 52.

64. *See* Gordon, *supra* note 9, at 443–44; Quigley, *supra* note 9 at 466–70; Ashar, *supra* note 9, at 1922, 1924–25; Cantrell, *supra* note 1, at 574–75.

65. For background on the case, the settlement, and the first year's enforcement, see generally BROOKS M. ALLEN, ACLU FOUNDATION FOR S. CAL., THE WILLIAMS V. CALIFORNIA SETTLEMENT: THE FIRST YEAR OF IMPLEMENTATION (2005), http://www.decentschools.org/settlement/WilliamsReportWeb2005.pdf.

66. *See California Litigation*, ACCESS QUALITY EDUCATION, http://www.schoolfunding.info/states/ca/lit_ca.php3 (last visited June 14, 2012) (discussing *Reed v. California*).

with others, but which they forgo because of their commitments to hyper-loyalty. I will take each vantage point in turn.

A. The Role of Cognitive Biases and Loyalty

Starting first with well-known information about cognitive heuristics and bias. As is now well established, a notable feature of the way in which we make decisions is our use of heuristics and biases, or "rules of thumb," to quickly process information.[67] As has also been thoroughly demonstrated, those heuristics and biases can both help and impede accurate decision making.[68] Cause lawyers and cause clients are as prone to cognitive bias as are any other decision makers. However, within the cause lawyering relationship, those biases are triggered in particular ways because the cause lawyer and cause client hold strong notions of loyalty between themselves.

Consider one of the well-known biases: representativeness. The representativeness bias posits that when people are asked to determine how similar one thing is to another, they do so based on their own assessments of resemblance rather than on more accurate probability assessments.[69] For example, if I see a very thin person and an average-weight person both running on a path, I may assume that the thin runner is a long-distance runner and the average-weight person is not. That is because the thin runner resembles marathon runners I have seen during the Olympic Games, whereas the average-weight person does not. My assumption is based on how close the thin runner comes to my own representative image of marathon runners, not based on the mathematical probability that across all thin and average-weight runners it is more likely that thin runners are long-distance runners.[70]

Now consider cause lawyers and clients. Assume a low-income community in which a brownfield is situated. The community members have formed a neighborhood environmental justice group, which is being represented by an environmental justice lawyer. Recently, some yuppies have begun moving into the neighborhood and fixing up properties. The environmental justice group and its lawyer are considering whether to invite the yuppies to join the group.[71] In this case, the environmental

67. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 19–23 (Yale Univ. Press 2008). The literature on cognitive heuristics and biases is long and rich. My description of the field in this Article necessarily will be short and summary. I will rely on a few sources to situate and support my summary, and readers who are interested in undertaking a more thorough-going investigation of the field are encouraged to review the bibliographies included in my source materials.

68. DANIEL KAHNEMAN, THINKING FAST AND SLOW 10–13 (Farrar, Straus & Giroux 2011).

69. THALER & SUNSTEIN, *supra* note 67, at 26–277, 30–31; *see also* KAHNEMAN, *supra* note 68, at 149–53; PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 217–19 (Oxford Univ. Press 2010).

70. For other examples, see THALER & SUNSTEIN, *supra* note 67, at 26–31.

71. The beginning of this fact pattern comes from Piomelli, *supra* note 21, at 401–02.

justice lawyer worked with a different neighborhood group the year before and had the experience of a few more-resourced neighbors moving in and co-opting the community group. From the lawyer's perspective, the more-resourced neighbors then derailed the group's advocacy efforts. Through the force of the representativeness bias, the lawyer is certain that the current group of yuppies will have the same negative impact on this second neighborhood group. He sees a resemblance between the two groups, and focuses on that resemblance rather than on a more accurate assessment of the likelihood that the two yuppie groups will behave similarly. The cause lawyer's worries are magnified because of the hyper-loyalty that he feels towards the community group and its cause. His hyper-loyalty makes him focus on his concerns to such an extent that he is rigid in his opposition to the yuppies, even in the face of facts that suggest these yuppies are not like the others.

Further, the lawyer's certainty may not be checked by members of the neighborhood group because of their own sense of hyper-loyalty with the cause lawyer. Assume a mutual and reciprocal relationship between the environmental justice lawyers and members of the neighborhood group so that the lawyer is not carrying the day because he is bullying group members. The conversations between the lawyer and group members about the yuppies are engaged and fully participatory. Nonetheless, group members feel hyper-loyalty to the lawyer and believe in the lawyer's hyper-loyalty to them. That strong sense of loyalty means that they give the benefit of the doubt to the lawyer. If the lawyer feels so strongly about the yuppies, then there must be something there—whether that "there" is based on cognitive bias or not.

Thinking about the above challenge in a slightly expanded form, it is a challenge about the utility of stock stories.[72] Stock stories are the narrative version of the representativeness bias.[73] Based on our lived experiences, we create standardized narratives for what will transpire given a certain set of facts. Gerald Lopez gives the example of the stock story of "hailing a cab in Manhattan." He describes it as follows:

> Walk outside to a street where cabs pass frequently, stand at the edge of the sidewalk, wave to an unoccupied cab coming in your direction, the cab (perhaps swerving radically to get there—it's Manhattan) picks you up, tell the cabbie the destination, cabbie takes you (most likely on an "entertaining" ride and hopefully by the most direct route) there, pay (and tip or be castigated by) cabbie.[74]

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72. *See* Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 4–11 (2005); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3–9 (1984).

73. *See, e.g.*, BREST & KRIEGER, *supra* note 69, at 219–22.

74. Lopez, *supra* note 72, at 6.

Like all other cognitive heuristics, stock stories are both useful and lead to error. For example, in the cab stock story, when one travels to another location and presumes that the same stock story will apply, one might find oneself stranded without a cab. For example, in smaller locations where the stock story for that area is phoning a specific request for a cab.

Thinking through the use of stock stories in lawyering, scholars have noted the risk of a lawyer imposing her own stock stories on the facts rather than taking time to understand fully the perspectives of the client.[75] Notice how that concern interacts with hyper-loyalty to increase the chances that cognitive bias will occur. It is not only lawyers who are subject to stock stories, so are clients. But, a diligent cause lawyer aware of the risk that she may deploy her stock stories in a way that trumps her clients' concerns, might be inclined to dismiss her own stock stories. Then, the diligent and loyal cause lawyer will focus on finding her clients' narrative, and her hyper-loyalty to her clients can cause her to fail to subject the clients' narrative to the same scrutiny as she applied to her own narrative. The result is that the lawyer fails to discover her clients' erroneously-deployed stock story. Thus, the cause lawyer and client each erroneously assess their situation because of the strength of hyper-loyalty.

In writing about lawyer problem-solving, Linda Krieger and Paul Brest have comprehensively catalogued the range of cognitive biases and heuristics that impact lawyers and have noted that de-biasing efforts are "largely ineffectual."[76] As they consider the role of a lawyer as a "cognitive counselor," they worry that client-centered models of lawyering, while very respectful of client autonomy and participation, lead lawyers and clients to fall more easily to cognitive biases.[77] Given the ineffectiveness of other de-biasing techniques, Krieger and Brest hold out the most hope if lawyers fully engage their clients, yet also maintain some distance.[78] Presumably, they would also recommend the corollary to clients as a way for clients to navigate their lawyers' cognitive biases. Translating the Krieger/Brest recommendation into relevant terms for this Article, they would likely be skeptical that hyper-loyalty leads to effective decision-making, and would recommend to cause lawyers and

75. *See id.* at 11–14; *see also* Stephen Ellmann et al., *Narrative Theory and Narrative Practice*, *in* LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 139–42 (Thomson Reuters 2009); Carolyn Grose, *A Persistent Critique: Constructing Clients Stories*, 12 CLINICAL L. REV. 329, 330–332 (2006); Angela Harris, *Bad Subjects: The Practice of Theory and the Constitution of Legal Identity in Legal Culture*, 9 CARDOZO WOMEN'S L.J. 515, 522–23 (2003) (discussing how legal projects "undertaken in the name of equality and respect silence those voices" of subalterns, or socioeconomic outliers); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2110–11, 2118–19 (1991) (discussing the competing narratives of clients and lawyers in poverty law).

76. BREST & KRIEGER, *supra* note 69, at 523–25.

77. *Id.* at 523–33.

78. *Id.* at 526, 533.

clients that they reconsider whether hyper-loyalty helps to create actual social change.[79]

B. Relational Choices of Cause Lawyers and Cause Clients

Now consider the kinds of intentional choices that cause lawyers and cause clients might make about their relationships with others, and whether hyper-loyalty impedes some helpful relationships from forming. This Article considers two possible constellations. The first is a calculated, instrumental choice by the cause lawyer and client to join with one another because of an opportunistic and strategic assessment that such a relationship will move the cause interest forward. Often, the strategic relationship relates to a particular issue or project. The next is a choice about relational advocacy—that the cause lawyer and client pay attention to advocacy choices that are designed to build community more broadly. While the examples are not exhaustive of intentional relational choices, they do represent common choices available to cause lawyers and clients.

Starting with instrumental choices, an easy example is the earlier one of an environmental justice neighborhood group joining with their new yuppie neighbors. The groups are considering the collaboration because of geographic coincidence: the two sets of neighbors now share a location and the location presents a problem. As noted before, cognitive biases may influence whether the groups even will consider collaborating, but they still may make an intentional choice to join together on the particular environmental issue related to their shared living space. Because of any number of perceived differences the groups have about each other, one would expect that group collaboration would develop cautiously and with concerns about whether the other group can truly be trusted.

Under the best circumstances, group members would approach the collaboration with inquisitiveness and openness.[80] Members would approach differences of opinion not as moments of irresolvable conflict, but as opportunities for reflective consideration and expression.[81] Imagining the ultimate ideal, the instrumental collaboration would lay the foundation for an inclusive, long-term relationship, one that might even lead to the dissolution of much of the sense of difference between groups. For example, through learning about each other while working on the environmental justice issue, community members might also discover that their neighborhood lacks an early childhood education pro-

79. I more fully consider what relational loyalty might look like in Part IV.

80. For this description, I am drawing upon the methodology created in the book by DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 25, 43 (Viking 1999). Under their methodology, the key is for discussants to shift focus to a "learning stance," in which each side approaches a conversation curious about the other side's "story." *Id.*

81. *Id.* at 200.

gram (ECEP) within easy commuting distance and that is affordable. The group might discover that some of their members would be interested in developing a home-based ECEP that they would staff and run. The environmental justice lawyer is able to connect the group to a community economic development lawyer who will provide free legal services to get the ECEP up and running, and then connect the group to another *pro bono* lawyer who will provide ongoing advice on maintaining a non-profit.[82] Then, when one of ECEP staffers mentions to a parent that she took an interesting class at the local YMCA on children's nutrition, that prompts the parent to organize a neighborhood kids gardening project, using open spaces between sidewalks and the roadway. The neighborhoods share the produce.[83] Under the best circumstances, the instrumental relationship is only the first node in an ever-expanding web of relationships.

The challenge that hyper-cause loyalty presents to those best circumstances is that it structurally maintains separation between the two groups, thereby reducing the possibility that an expanding web of relationships can occur. The environmental justice lawyer and the community group have already formed a relationship with strong expectations about loyalty, not only loyalty *to* each other but also loyalty together *against* others. Hyper-loyalty serves as a way of protecting the lawyer–client relationship, but it also builds out firm distinctions between insiders and outsiders, friends and enemies. That then means the cause lawyer and cause client can be disinclined to work robustly across lines for fear of being seen as disloyal. As Gary Bellow has noted, "some of the most complex tensions" in cause work come when the cause lawyer or client tries to work with other decision makers or power holders.[84] Further, when the relationship being contemplated by cause lawyer and cause client has a very instrumental purpose, hyper-loyalty can heighten the sense of "otherness" because the starting reason for contemplating an alliance is already very limited. Thus, the groups come into the collaboration having framed it as a one-time, limited engagement with each other. The protective shell created by hyper-loyalty might show itself in a myriad of subtle ways. The cause lawyer interrupting a meeting of the two groups when the conversation strays away from the environmental justice topic by saying, "Let's keep on topic everyone." The neighborhood group and the yuppies each having their own group names with

82. My hypothetical is based in part on a real non-profit based in New Haven, Connecticut, and called All Our Kin, which has received free legal support services, including non-profit advising through Yale Law School's clinical program. *See* ALL OUR KIN, http://www.allourkin.org/index.php (last visited Dec. 19, 2012).

83. This part of the hypothetical is based on the many youth urban garden projects going on across the country. *See, e.g.*, DENVER URBAN GARDENS, http://dug.org/ (last visited Dec. 19, 2012); THE BERKELEY COMMUNITY GARDENING COLLABORATIVE, http://www.ecologycenter.org/bcgc/ (last visited Dec. 19, 2012).

84. Bellow, *supra* note 4, at 304–06.

both being used in public communications instead of creating a shared name. And so on.

Of course, the challenge above is neither immutable nor preordained, as this Article will explore more fully in the next section. Group members and their lawyers assuredly could craft a shared relationship that is inquisitive and open, and that handles conflicts and difficult conversations as opportunities, not threats. My point here is that hyper-loyalty makes that harder, not impossible.

Consider now whether the disinclination to form an expanding web of relationships dissipates if the cause lawyer and cause client are committed to advocacy that includes community building. Examples of that kind of work include legal work in service of union organizing,[85] and legal work in service of organizing of a particular, or in a particular, community.[86] Key to law and organizing[87] is a commitment to the collective as a source of empowerment and power.[88] Thus, at the outset, cause lawyers and cause clients involved in law and organizing understand themselves to be in relationship through a collective, and through connections with others. Because of that commitment to relationship building, one might expect that hyper-loyalty would not hinder as much a cause lawyer or cause client seeing the potential of building relationships in unexpected directions. But, when one surveys descriptions of relationship building in the law and organizing literature, one finds fairly stark descriptions of friends and enemies, or "us" and "the other side." In other words, what counts as "community building" has very strict boundaries; the "us" might be larger, but there definitively is a "them" who should not be trusted.

For example, in a wonderfully detailed and descriptive recounting of law and organizing work with restaurant workers in New York City, Sameer M. Ashar describes workers, organizers, and lawyers ("us") moving forward against restaurant employers, federal courts, highly visible individuals who either owned local restaurants targeted by the workers or were the head of corporate restaurant chains, and local and state government officials ("the other side").[89] However, over the course of

85. *See* Emily Rae Woods, *Ned Burke: Labor Union Lawyer (In House)*, *in* BEYOND THE BIG FIRM 159–66 (Alan B. Morrison & Diane T. Chin, eds., Aspen Publishers 2007) (describing the career path of an in-house union lawyer and his commitment to core union organizing goals).

86. *See* Gordon, *supra* note 9, at 428–30; Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460–65 (2001); Ashar, *supra* note 9, at 1879–80.

87. I am using this phrase loosely to refer to any kind of cause work in which organizing plays a key role, even though there are often differences in focus, and sometimes tension, between union organizing and other community organizing. *See e.g.*, Gordon, *supra* note 9, at 423–27 (criticizing unions for being focused only on bargaining for better contracts and for collaborating with business); Ashar, *supra* note 9, at 1891–93 (noting the rise of community-organized workers centers in response to the neglect of those workers by traditional unions).

88. *See* Quigley, *supra* note 9, at 455.

89. *See* Ashar, *supra* note 9, at 1889, 1898–99, 1911.

the description of the advocacy campaign, people in one category never move into the other.[90]

Similarly, in another stimulating article about creating a workers' center for immigrant workers in Long Island, the "other side" includes the following descriptions. Existing unions, with whom immigrant workers had mixed results, were described as "do[ing] nothing" for the workers.[91] Employees of federal and state labor-related agencies are described as "often systematically block[ing] claims made by immigrants, effectively preventing these claims from being addressed by the proper authorities . . . allow[ing] them to act as keepers of the gates, turning personal animosity against immigrants into policy."[92] Further, workers who came to the center for help would not receive legal services until they were "willing to fight collectively" and participate in the center's larger organizing campaign, creating the possibility that a worker could turn from insider to outsider if she decided against organizing work.[93] Again, outsiders do not become insiders over the course of the story, and the implied message from the strongly negative descriptions is that outsiders are irredeemable.[94]

Of course, when organizing a community, one reasonably needs to prioritize efforts. Organizing does not happen because of a magic community-building wand; it takes hard, sustained, persevering work. As one organizer describes it, community building includes, "consistent frustration . . . with its petty disputes, confusion, personality problems and the like."[95] It makes sense to figure out which folks can stand together most easily to start and then to move outward from there. It also makes sense to tie closely the use of scarce legal resources to larger goals of community building to ensure that individual work is coordinated with group goals. What hyper-loyalty does to that reasonable process of prioritizing, however, is to make more rigid and impermeable what should be a more fluid sense of who the community is.

For example, when a worker chooses not to participate in organizing, the lens of cause loyalty too quickly views the worker's decision as betrayal. The rationale might go something like this: "The rest of us have come together and have been putting in time and effort to make safer

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90. There is a necessary caveat to my conclusion. I am drawing it from a description that necessarily truncates a much larger, more nuanced, lived history of an advocacy campaign. Any advocacy campaign may very well have included moments of building unexpected relationships that did not make it into the description. I am not trying to create a "cardboard" cut-out of law and organizing, to borrow Kate Kruse's phrase. But, I am trying to highlight how much descriptions of that work refer to features I have identified as belonging to hyper-loyalty.

91. Gordon, *supra* note 9, at 413.

92. *Id.* at 420.

93. *Id.* at 443–44.

94. *See supra* notes 91–93. I add the same caveat to this description that I noted about the organizing campaign for restaurant workers.

95. Quigley, *supra* note 9, at 458 (quoting community organizer Ron Chisom).

workplaces for all of us. If you are not willing to put in the same time and effort as the rest of us, then that must mean you do not support our goals. If you do not support our goals, you stand against us." Hyper-loyalty prefers to understand the world as friends and enemies, thereby diminishing the chance that "friends" will understand the declining worker to have been motivated by a myriad of other possible benign reasons such as fear, or uncertainty about what organizing entails, or exhaustion from a too-long workday. The risk, then, is that the declining worker is left out of further conversations or efforts even though her worries may very well be able to be assuaged, and she could be eventually brought into the organizing work.[96] So, too, the employer labeled an "enemy," remains an enemy, even if further conversation would have revealed productive possibilities for engagement.

If current expressions of hyper-loyalty are too rigid, then what might a more expansive version of loyalty look like, and how would it increase the relationality that this Article has argued is so critical to effective social change work? It is to those questions that the next section turns.

III. RELATIONAL LOYALTY

First, relational loyalty does not mean lessening a lawyer's duty of confidentiality.[97] A cause lawyer and client, or client group, will still share information with each other forthrightly and freely, with clients assured that their communications will not be disclosed to others without their consent. Further, given that what the cause lawyer says to her clients may be as sensitive as what the clients say to the cause lawyer, a careful cause lawyer will take time with her clients to talk through various consequences to the clients and the cause of the clients disclosing the lawyer's communications.[98] The idea of relational loyalty is not to create a less-trusting relationship between cause lawyer and client; it is to create for both lawyer and client a more expansive web of relationships within which to create social change.

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96. Here I want to be careful not to caricature organizing work. I fully acknowledge that a key component of all good organizing training is working through community members' reluctances and worries about organizing. I am not trying to suggest that an organizer could not, or would not, engage with a reluctant worker to try and convince her to join in the organizing efforts. My suggestion is more modest—that hyper-loyalty mutes those efforts.

97. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.6 (2010), ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .").

98. Recall that Rule 1.6 obligates the lawyer to preserve confidences, but does not place a similar obligation on a client. Similarly, the evidentiary privilege between attorney and client is held by the client, and an unaware client can easily waive the privilege unintentionally. Arthur Best, EVIDENCE 198 (7th ed. 2009) (noting that the attorney-client privilege is waived if a client inadvertently reveals a private communication had with an attorney without acting reasonably to prevent disclosure or taking prompt remedial steps).

A. A Web of Relationships

Actively looking for and creating a web of relationships requires cause lawyers and clients to concentrate more on the situations in which they are working than on the dispositions of the people involved. In other words, cause lawyers and clients must be prepared to examine all others in ways other than constitutively as friends or enemies. Drawing on the work of situationist scholars, the current patterned thinking of cause advocates and clients is to view those who are like-minded as good people, and those who are not as bad people, and to reject the possibility that specific features of the situation are the reason that someone is like-minded or not.[99] As noted earlier, hyper-loyalty exacerbates cognitive biases, like attributions to disposition as opposed to situation. But, actively looking to create an expansive web of relationships pushes cause lawyers and clients to consider the situation as creating behavior.

For example, a cause lawyer and her clients who are looking to change the pace at which local government benefits offices process applications might consider the role played by specific situations faced by department line employees in causing application delays instead of vilifying those line employees as elites who hate poor people. Paying attention to the situation may reveal factors that encourage building a connection with another. Maybe several department line employees share the same interviewing space, which creates pressure to move through applicant interviews quickly and curtly. Understanding the line employees to be connected in the web of relationships could result in efforts to create an expanded workspace, which may then give line employees more time with applicants.[100]

A powerful historical example of this kind of relational advocacy is Martin Luther King, Jr.'s work to build a "beloved community."[101] King repeatedly reminded advocates that maintaining a generalized hostile stance against all non-Black community members would fail to bring about long-term, steadfast social change.[102] As King noted in his *Letter*

99. For a thorough-going introduction to situationism, see generally Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

100. Having been a poverty lawyer, I know very well that my example can be pressed. What state agency really has the extra space contemplated by my hypothetical? If an agency had such space, why would it agree to give more over to benefits offices than to other needs? I agree that there are challenges to my hypothetical, but notice how many of the objections start from the presumption that the state's actors could never be believed to behave in a way conducive to anti-poverty work. Those objections start from the same dispositionist presumption that this Article asserts is unhelpful.

101. *See* MARTIN LUTHER KING, JR., *The Power of Nonviolence*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 12 (James M. Washington ed., 1986) [hereafter A TESTAMENT OF HOPE].

102. *See, e.g.*, MARTIN LUTHER KING, JR., *Nonviolence and Racial Justice*, *in* A TESTAMENT OF HOPE, *supra* note 101, at 7 ("A second point is that nonviolent resistance does not seek to defeat or humiliate the opponent, but to win his friendship and understanding."); *id.* at 10 ("In your struggle for justice, let your oppressor know that you are not attempting to defeat or humiliate him, or even to pay him back for injustices that he has heaped upon you. Let him know that you are merely seeking

From a Birmingham Jail, "I am cognizant of the interrelatedness of all communities and states. . . . We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly."[103] King's commitment to a beloved community stemmed from his theological understandings,[104] but it also allowed him to apprehend that greater social change was possible when one understood that people who acted badly in certain situations could still change their behaviors when pressed into other situations.[105] A relational sense of cause loyalty would mean that when a cause lawyer or cause client suggests building an unexpected relationship, she would not be considered disloyal, but would be understood as exploring whether there

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justice for him as well as yourself. Let him know that the festering sore of segregation debilitates the white man as well as the Negro."); *id.* at 14 ("God grant that as men and women all over the world struggle against evil systems they will struggle with love in their hearts, with understanding good will. *Agape* says you must go on with wise restraint and calm reasonableness but you must keep moving. We have a great opportunity in America to build here a great nation, a nation where all men live together as brothers and respect the dignity and worth of all human personality.")

103. *Id.* at 290

104. *See* MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., chs. 3–4 (Clayborne Carson ed., 1998) (describing his introduction to nonviolence through Mohandas Gandhi, the influence of Reinhold Niebuhr, and his work with Dr. Edgar Brightman and Dr. L. Harold DeWolf). *See generally* KENNETH L. SMITH & IRA G. ZEPP, JR., SEARCH FOR THE BELOVED COMMUNITY: THE THINKING OF MARTIN LUTHER KING, JR. 11 (Judson Press 1974).

I also want to note here examples of "beloved communities" coming from other religious traditions. For example, Buddhism contains the concept of "dependent arising"—an account of interconnectedness between all things. *See* HUSTON SMITH & PHILIP NOVAK, BUDDHISM: A CONCISE INTRODUCTION 61 (2003). Judaism contains a moral obligation to "deem all of another's concerns as weighty as one's own." LENN E. GOODMAN, LOVE THY NEIGHBOR AS THYSELF 13 (2008). In the Catholic tradition, the Focolare Movement is based on the "spirituality of unity," which calls on a person to be a "gift for the other." Donald W. Mitchell, The Spirituality of Unity: A Gift for Our Times, Remarks at Fordham Law School (April 5, 2011) (manuscript on file with author); *see also* CHIARA LUBICH, ESSENTIAL WRITINGS 3 (Michel Vandeleene ed., 2007) (through the spirituality of unity, people are trying to become "the seeds of a new people that promotes a world of greater solidarity especially with the poorest and weakest, a world more united"); *id.*, at 280–81 (living a "culture of giving . . . could seem difficult, arduous, or heroic, [b]ut it is not, because the human person, made in the image of God who is love, finds fulfillment precisely in loving, in giving"). *See generally* THOMAS MASTERS & AMY UELMEN, FOCOLARE: LIVING A SPIRITUALITY OF UNITY IN THE UNITED STATES (2011) (describing US applications and projects). *See generally*, Deborah J. Cantrell, *What's Love Got to Do with It?: Contemporary Lessons on Lawyerly Advocacy from the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296 (2010) (discussing across multiple religious traditions the concept of "love of neighbor" and applying it as a lawyerly value).

105. This situationist account of Dr. King comes from Jon Hanson, *Martin Luther King, Jr.'s Situationism*, THE SITUATIONIST BLOG, http://thesituationist.wordpress.com/2008/01/20/1661/ (Jan. 22, 2007). Of course, changed behavior can come either voluntarily or coercively. Coerced social change comes with the worry that the bad behavior has not been eliminated, but redirected into a less obvious, but equally nefarious, channel. *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011) (giving a detailed historical account of civil rights advocacy strategies that led to disparate impact, including strategic choices about the potential for driving discrimination underground if civil rights agendas were crammed down on employers). It may also be the case that some "bad" behavior is unconscious. *See, e.g.*, Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC'L PSYCH. 272 (1993) (one of the early studies capturing the effects of nonconscious or implicit bias). Dr. Banaji is a leading researcher on implicit bias and is part of a larger group of researchers focused on that topic. *See* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/backgroundinformation.html (last visited Apr. 8, 2011). I address those concerns in more detail in Section V.

is a moment to expand helpfully the web of relationships needed to create social change.[106]

B. An Approach of Curiosity

A related feature of relational loyalty is that cause lawyers and cause clients would approach other actors/participants with curiosity and not with animosity or with an advocacy agenda to start. This feature comes directly from the negotiation field.[107] As one set of researchers has observed, "[c]hanges in attitudes and behavior rarely come about because of arguments, facts, and attempts to persuade."[108] Instead, starting from a genuine "stance of curiosity" allows each conversant to focus truly on listening to the other side.[109]

For example, curiosity requires participants to inquire about the other's intentions, and not presume them.[110] That can be key in cause work given the propensity to frame a setting as "us" and "them," and the resulting propensity to presume bad intentions on the part of "them."[111] Curiosity also requires participants to be conscious about the ways in which they frame questions so that a question is not a cross-examination or an advocacy statement, but is a genuine inquiry: i.e., asking the agency person, "What would make it easier for a benefits worker to be able to have enough time for an initial interview?" instead of stating, in disguised question form, "You would agree, wouldn't you, that benefits workers must have more time for initial interviews?"[112] Finally, curiosity calls on participants to separate acknowledging points made by the other

106. For an example of unexpected transnational labor collaboration spurred by the adoption of new international law, see generally Tamara Kay, *Legal Transnationalism: The Relationship Between Transnational Social Movement Building and International Law*, 36 L. & SOC'L INQUIRY 419 (2011). I also understand the social change model of building a web of relationships to share as its distant cousin theories of democratic constitutionalism in which change advocates, courts, and legislators are all in relationship to each other in a dynamic contest over norms. *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381–87 (2007); *see also* Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) (arguing that Supreme Court dissents are an example of "demosprudence," which understands there to be a relationship of dialogue between the "lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law"). Democratic constitutionalism remains a distant cousin to my approach in large part because it implicitly understands membership in any of the groups as impermeable. One is a member of the legal elite *or* a social movement, and one cannot, or does not, cross over.

107. *See* STONE, PATTON & HEEN, *supra* note 80, at 167–83.

108. *Id.* at 137.

109. *Id.* at 166–68; *see generally* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (asserting that cultural beliefs are resistant to change and positing that change might be assisted by creating the most robust marketplace of culturally-related positions); Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 3 (2011) (introducing the idea of "relational self-interest" as a way of bridging differences and seeing another's perspective).

110. *See* STONE, PATTON & HEEN, *supra* note 80, at 48–50.

111. *Id.* at 46 ("The conclusions we draw about intentions based on the impact of others' actions on us are rarely charitable.").

112. *See id.* at 172–77 for further examples.

side from agreeing with the other side.[113] Thus, a participant understands that she can acknowledge a challenge presented by the other side without agreeing with the conclusion the other side reaches based on the challenge.

For cause lawyers and clients who understand themselves as engaged in an important advocacy campaign for social change, stepping back from an advocacy stance can be challenging. The point of the work, after all, is to convince others to change. The worry is that taking a stance, other than as an advocate, might easily be misconstrued as giving in, or as signaling weakness. Hyper-loyalty feeds in to the idea that an advocacy stance is the way in which one signals strong solidarity with one's cause client, or one's cause lawyer. Imbuing loyalty with a sense of curiosity towards the other helps to move it towards a way of engaging with others that ultimately permits more effective advocacy.

C. An Approach of Compassion

A final feature of relational loyalty is cultivating compassion. It is certainly consonant with building a web of relationships and approaching others with curiosity. By compassion, I mean a willingness to try actively to understand another's position or conduct without vilifying the position or the person. Further, compassion requires a participant to meet hostility or other negative reactions with a reaction designed to de-escalate—although de-escalation does not mean capitulation.[114]

Compassion does not require agreeing with, or excusing another's position or conduct. A humorous vignette by noted insight meditation expert Sharon Salzberg helps illustrate the point. Salzburg describes a rickshaw trip to the train station in Kolkata (Calcutta) India in which a person tried to assault her from the street. She avoided being pulled from the rickshaw, and when she recounted the event to her teacher, he exclaimed that "with all of the lovingkindness in [her] heart," she should have taken her umbrella "and hit that man over the head with it."[115] As Salzburg goes on to explain, compassion requires one to live with "sympathy for all living beings," which allows a person "to name injustice without hesitation, and to act strongly, *with all the skill at our disposal*."[116] I emphasize the final component because what often constitutes "naming injustice" in social change work is expressing righteous anger—a response that emphasizes divides and differences between people or

113. *Id.* at 180-83.

114. *See* Deborah J. Cantrell, *Can Compassionate Practice Also Be Good Legal Practice?: Answers from the Lives of Buddhist Lawyers*, 12 RUTGERS J. L. & RELIGION 1, 73–74 (2010) (noting the critical role compassion plays for Buddhist lawyers and that a key feature of compassion is understanding, not avoiding conflict or capitulating to demands).

115. SHARON SALZBERG, LOVINGKINDNESS: THE REVOLUTIONARY ART OF HAPPINESS 131 (Shambhala Publications, Inc. 1995).

116. *Id.* at 131–32 (emphasis added).

groups. In contrast, when using the skill of compassionate response, injustice is still identified clearly and forthrightly, but with an eye towards identifying the myriad of conditions on which the particular situation depends so that opportunities for change might be identified.[117]

When compassion is joined with curiosity, participants increase their capacity to comprehensively and accurately map out the full contours of the situation for which a solution must be crafted.[118] That comprehensive map is more likely to illuminate unexpected ways forward than is a map created by participants who only distrust and dislike each other. Of course, the fact of creating a more comprehensive map of the situation does not itself guarantee that participants will find a solution. Creating a comprehensive map comes at the beginning of the process, and there will still be hard work ahead. During that hard work, it is likely that participants will have to rejigger their map many times as the situation develops and changes. Each time, that rejiggering will benefit from compassion, curiosity, and an effort to build out a web of relationships.

IV. IS THIS A RISKY UTOPIAN VISION OF CAUSE LAWYERING?

The foundational principles of this Article insist that social change is more likely to happen, or happens more thoroughly, when advocates work to build a web of relationships, and approach all others with curiosity and compassion. Those engaged in social change work may worry that the risks of failure presented by the approach are too high and the consequences too grave. More particularly, those skeptical of the approach may worry on a few related fronts. First, that the approach places elite cause lawyers in a position in which it is too easy for them to be coopted by the existing legal and political systems. Relatedly, that power dynamics in our society are structured in an intractable way that precludes building true relationships between those with power and those without. Finally, that social change work requires there to be a group that understands itself to have a grievance against others outside the group. Thus, a sense of "otherness" is a necessary precursor to social change work. The Article takes up each of those worries in turn.

Recall the earlier discussion of rebellious lawyering and its concern that predominantly elite cause lawyers are unable to step back and empower their clients to take the lead in developing and implementing an advocacy strategy.[119] If cause lawyers are affirmatively to build a web of

117. *See id.*

118. A training technique built from the combination of curiosity and compassion is "parallel universes." Created by Susan Bryant and Jean Koh Peters, the technique calls on the lawyer to create several parallel universes in which a different reason explains the client's conduct in each universe. In that way, a lawyer is reminded that any given outcome generally has multiple explanations or contexts. *See generally* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

119. *See* discussion *infra* Part I.B.

relationships, the worry is that they will focus on building relationships within the existing legal and political systems. As one activist described it, lawyers:

> [A]re trained to understand and be comfortable with the system even when they criticize it. Almost all lawyers, including community lawyers, want to succeed in the system. They want money, power, political advantage, respect or whatever their individual dreams are. Therefore, confronting the system or raising hell makes the lawyer very uncomfortable because it is not how the lawyer was trained to deal with the system, and the lawyer, without realizing it, is challenged individually because the lawyer is part of the system.[120]

Even benignly, elite cause lawyers who are conscientious about not dominating clients may subtly or unconsciously signal to clients that the best way for the clients to use the lawyer is to work within the system and to leave the lawyer out of those activities designed to challenge the system.[121] Given that the point of building a web of relationships is to accelerate the possibility of change, it is a bad consequence indeed if building the web results instead in the cooptation of social change and the reinforcement of the status quo.[122]

There are several countervailing efforts that cause lawyers and cause clients must bring to bear to avoid cooptation. The first is that both cause lawyers and cause clients must explicitly, intentionally, and mutually commit to the "web of relationships" or "relational loyalty" advocacy approach. There can be no unspoken assumptions between lawyer and client about what each other's motivations are, what assumptions are being made, and upon what predictions are being relied. The work engaged in by lawyer and client goes beyond simple technical efforts to comply or enforce the law, and it requires the lawyer and client to insist that the "moral perspective" of the work is transparently a part of the conversation.[123] Further, cause lawyers and cause clients must understand

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120. Quigley, *supra* note 9, at 459 (quoting community organizer, Ron Chisom).

121. For a succinct and useful historical account of lawyers' dominance within the political system, *see* Robert W. Gordon, *Are Lawyers Friends of Democracy?*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 31, 33 (Scott L. Cummings, ed., 2011). To compare with accounts of lawyers and activists using the courtroom as political theater, see Gabel & Harris, supra note 9, at 379–89. The seminal critique of elite cooptation of social movements was issued in FRANCES PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 297–300 (1977) (assessing the welfare rights social movement and concluding that grassroots, activist protest work was co-opted by elite lawyers who were most comfortable using a court-based, litigation-focused strategy built on existing legal structures).

122. For an interesting case study of how elites can both help and hinder social movement work, see Douglas NeJaime, *Convincing Elites, Controlling Elites*, 54 STUD. LAW, POL. & SOC'Y 175, 195–196 (2011) (considering elite impact in the U.S. marriage equality campaign).

123. *See* Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 268–270 (2006) (arguing that moral dimensions permeate most work between lawyer and client and that competent lawyering cannot happen without explicitly engaging those moral dimensions); *see also* Kruse, *supra* note 17, at 111 (arguing that current legal norms result in lawyers inappropriately

that they both are capable of robust moral conversations and that disagreement does not mean disloyalty.[124] Just as they are meeting others with curiosity and compassion, so too, must they meet each other.[125] Cause lawyers and cause clients also must commit themselves to self-reflecting on their own actions, both as a way of checking and analyzing one's own behavior and also as a way of trying to build out a set of good habits needed for a web-of-relationship approach to advocacy.[126]

Again, I am not asserting that the approach is effective *and* easy. I am asserting, however, that the challenges that will come up between cause lawyers and cause clients, and between both as to others, are navigable and surmountable. Nonetheless, the approach cannot be pursued successfully if pursued half-heartedly. Then again, social change work, in whatever its variety, has never been easy. So, if cause lawyers and cause clients are going to be working hard no matter, better to work hard using a model that offers more hope for change.

I now turn to the second concern: that the power differential between those in control and those pushing for social change precludes any kind of true mutual relationship. As a result, cause lawyers and cause

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assuming their clients are motivated only by self-interest instead of a broader range of moral commitments).

124. Recall Gary Bellow's warning to cause lawyers not to err by assuming their clients are weak and manipulable, and his description of his own vigorous conversations with clients. Bellow, *supra* note 4, at 297–300, 303–304. As Ascanio Piomelli has described it, "An essential aspect of collaboration is fully engaging with clients and groups: listening, but also challenging; learning, but also teaching; allowing others to reach different conclusions, but sometimes voicing disagreement . . . ." Piomelli, *supra* note 21, at 471.

125. For those concerned about an approach calling for mutual engagement, this is often the moment where the concern is raised about the possibility of a cause lawyer and cause client reaching a complete impasse. The unspoken assumption is that such irresolvable impasses will happen so often, and that the risk to client individual autonomy is so great, that *any* model of mutual engagement between lawyer and client is inappropriate. Note that this concern applies to all lawyer-client relationships, whether the work is social change or private interests. Many scholars, including me, have considered how mutual engagement and client autonomy can work in harmony, and for purposes of this Article, I take that point as already having been well-articulated. *See generally,* Katherine R. Kruse, *supra* note 17; Vischer, *supra* note 123; Cantrell, *supra* note 104.

126. There are many, many ways in which one might practice self-reflection, and I mention only two possible approaches here. One comes from the literature on mindfulness and lawyering, in which techniques such as mindfulness meditation are used to train good habits of attention and awareness. Exemplary of that approach is the work of Len Riskin. *See* Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L. J. 289, 314–15 (2010); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 83–85 (2004); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 23–27 (2002). For an example of social change lawyers using mindfulness in their work, see Angela Harris, Margaretta Lin & Jeffrey Selbin, *From the "Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073, 2114–15 (2007). The second approach comes from the literature related to legal clinical pedagogy, in which the role of self-reflection for good student learning has been extensively studied. Some examples include J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 60 (1996); ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 127–28 (2007), *available at* http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf (noting that self-directed learning requires that a student not "only learn something, but . . . reflect critically on the extent of her or his learning").

clients must understand those in power as adversaries because to do otherwise risks easy cooptation, or worse. Social movement history in this country provides cautionary examples of power's easy ability to trump agitators—think of any number of examples of violent suppression of labor organizing,[127] or violent uses of force during civil rights boycotts.[128] Further, power also brings with it the power to ignore. If those in power do not acknowledge opposition, then there is a risk that such opposition is not seen as being a part of the contest at all. Thus, if one believes that the risks of cooptation or of being ignored are high, then one might determine that the best strategy for change is to place oneself or one's community in high and visible opposition to the "other." More succinctly, to embark upon a strategy exactly contrary to the approach recommended in this Article. Consider two examples of that strategy—one from the left and another from the right.

First, an example from the left: In March 1987, AIDS activists in New York City came together to form the group, ACT UP. ACT UP staged its first protest on Wall Street on March 24, 1987.[129] The day before the protest, one of ACT UP's original members, Larry Kramer, had an editorial published in the *New York Times* titled "The F.D.A.'s Callous Response to AIDS."[130] In the editorial, Kramer excoriated the FDA for being "intransigent in the face of this monstrous tidal wave of death." He then called out national and local government administrations saying that "when the histories of the Reagan and Koch administrations are truthfully written, this scandal will dwarf the political corruption in New York and the foreign policy blunders in Washington."[131] Kramer's blunt, if not hyperbolic, writing became exemplary of ACT UP's rigorous and confrontational approach to direct action. In an interview for ACT UP's oral history project, Kramer noted that he became known as "the Angriest Gay Man in the World."[132] He also described his efforts to push ACT UP to become "more militant" and to understand itself as "an army," including getting members to take shooting practice.[133]

127. *See generally* PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 323–28 (1st ed. 2010) (detailing labor unrest and response in unionizing development in America).

128. *See, e.g.*, KING, JR., *supra* note 104, at 78–82 (describing responses to the Montgomery, Alabama bus boycott during which Dr. King's house was bombed).

129. ACT UP 1987 Wall Street Action, ACT UP, http://www.actupny.org/documents/1stFlyer.html (last visited Dec. 19, 2012) (recreating the flyer of the first ACT UP action on March 24, 1987 for a "Massive AIDS Demonstration").

130. Larry Kramer, *The F.D.A's Callous Response to AIDS*, N. Y. TIMES, March 23, 1987, at A19.

131. *Id.*

132. Interview by Sarah Schulman with Larry Kramer, ACT UP Oral History Project (Nov. 15, 2003) at 14, *available at* http://www.actuporalhistory.org/interviews/images/kramer.pdf.

133. *Id.* at 16.

Picking up on Kramer's theme of ACT UP standing in clear opposition to the establishment, another early member of ACT UP described the group as follows:

> ACT UP, the organization, does exactly what its name says. We do demonstrations, and act in such a way that the authorities (and in this case we mean government officials, researchers, politicians, the church and the law) feel is inappropriate but ultimately accomplishes our goal by bringing into focus the problems which they are unwilling or afraid to address.[134]

ACT UP demonstrations included chants that highlighted themes like being at war or in a fight. For example, at the group's second anniversary protest in March 1989, protestors chanted, "We'll never be silent again, ACT UP, we'll never be silent again, ACT UP, fight back, fight AIDS . . . ."[135] Similarly, at an October 1988 demonstration outside of the FDA's office in Washington, DC, protestors chanted, "Forty-two thousand dead of AIDS, where was the FDA, seize control, seize control, seize control."[136]

Next, an example from the right: the Thomas More Law Center (TMLC).[137] TMLC focuses its advocacy efforts on supporting school districts in teaching "intelligent design" in science courses instead of evolution.[138] TMLC has portrayed itself as being deeply and inexorably "within a grand narrative of oppression and resistance" to the mainstream political and cultural power structures.[139] Thus, TMLC has crafted a kind of heroic resistance narrative that calls on its members to stand firmly against "the other."

Both ACT UP and TMLC made a similar calculation. First, that a call to a kind of "hyper hyper-loyalty" better mobilizes supporters than does an approach that suggests there are any affinities between a group's supporters and other groups. Second, that this hyper hyper-loyalty is a very effective way to banish the risk of cooptation because it insists that there could never be any common ground, ever, with the other side. Thus, there is no reason to talk with anyone or any group that is not already committed to issues in the same way as the group. For ACT UP, the point was not to negotiate with the FDA for *any* possible change in the approval process for AIDS-related medications, from the smallest to

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134. Jon Greenberg, *ACT UP Explained*, ACT UP, http://www.actupny.org/documents/greenbergAU.html (last visited Dec. 19, 2012).

135. *Detailed Scenes: Fight Back, Fight Aids*, ACT UP, http://www.actupny.org/divatv/synopsis75.html (last visited Dec. 19, 2012) (transcript of video documentary by James Wentzy).

136. *Id.*

137. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 978–83 (2011) (describing Thomas More Law Center's approach to litigating "intelligent-design" education cases).

138. *Id.* at 978–79.

139. *Id.* at 980 (internal citations omitted).

the most significant. The point was to demand full capitulation by the FDA. In fact, ACT UP splintered when some of its members were perceived as agreeing to negotiate with the FDA and big pharmaceutical companies.[140] Similarly, the point of TMLC is not to accept *any* possible revisions to evolutionary teaching, but to accept only full use of an intelligent design curriculum. Under such a model, change only happens when it is crammed down on the other side, and change is an all or nothing proposition.

In some ways, the purity of the above approach is alluring. It offers up a simple narrative that there is a right way and a wrong way. There are no uncertain margins in which hard cases exist. Thus, there is no reason to be curious about conversing with someone who holds another position. It is better just to be a strong advocate. But the very features of that all-or-nothing approach that makes its group impermeable to cooptation and invisibility, also makes it impermeable to expansion. As described earlier, advocacy is often the least likely way to change a person's mind on an issue. The situation always is perceived as if it were a zero sum game, with winners and losers. Thus, standoffs, not change, are the more likely result.

Contrast the ACT UP/TMLC approach with another example from social movement work that provides a different understanding of power: a dynamic vision in which all actors have power, and power can be used to create space for a new, engaged dialogue and "to expand the sites, means, and agents of persuasion."[141] Concretely, I turn again to Martin Luther King, Jr. King, who insisted on calling out immoral and unconscionable behavior, including calling out the passivity and cooptation of black and white churches.[142] But, he did so adamantly and unrelentingly through the lens of his beloved community, and through his concept of nonviolence as "love in action."[143] King welcomed all into the civil rights movement so long as they trained in, and committed to, love in action.[144] King was steady in his belief that it was through engagement, not disengagement, that all members of a community would come to a commit-

140. *See* Interview by Sarah Schulman with Mark Harrington, ACT UP Oral History Project (March 8, 2003) at 58–59, *available at* http://www.actuporalhistory.org/interviews/images/harrington.pdf.

141. Piomelli, *supra* note 21, at 463.

142. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL (1963), *reprinted in* A TESTAMENT OF HOPE, *supra* note 101, at 298–99 ("let me rush on to mention my other disappointment. I have been so greatly disappointed with the white church and its leadership. . . . I felt that the white ministers, priests and rabbis of the South would be some of our strongest allies. Instead, some have been outright opponents, refusing to understand the freedom movement and misrepresenting its leaders . . . .)

143. MARTIN LUTHER KING, JR., *An Experiment in Love*, *reprinted in* A TESTAMENT OF HOPE, *supra* note 101, at 16–20 ("*Agape* is not a weak, passive love. It is love in action. *Agape* is love seeking to preserve and create community. It is insistence on community even when one seeks to break it.").

144. MARTIN LUTHER KING, JR., *Nonviolence: The Only Road to Freedom*, *reprinted in* A A TESTAMENT OF HOPE, *supra* note 101, at 54–61.

ment of equality.[145] Nothing about the approach was easy, nor was the change swift. But, change did come.[146]

A final concern with the approach presented in this Article may be that it defies a fundamental and necessary condition of social change—that there is an identifiable group that has a grievance against another.[147] Social movement theorists have posited that there is no movement until a group constructs an identity for itself that is in opposition to another.[148] That boundary drawing serves important functions of legitimating the group and spurring collective action.[149] The drawing of the boundary between "us" and "them" provides the glue that allows "us" to be effective collective actors. Without that glue, social movement work does not even begin.

In fact, the approach in this Article presumes that some sort of group boundary drawing does happen and has some practical utility. A cause lawyer and cause client must first self-identify as such, and in the process discern as a starting matter who else has the same problem that needs solving. There must be some initial conversations and organizing work that happens in order to build a group that has sufficient energy, resources, and skills to proceed with social change work. The group needs to be sufficiently cohesive so that its members' efforts can be coordinated and so that the group can assess how effective those efforts have been. Relational loyalty between cause lawyer and cause client still requires all of the above to occur; however, it encourages formation to happen in harmony with a set of expectations about how the group is situated more broadly within a web of relationships, and that advocacy efforts will be imbued with curiosity and compassion. Thus, whatever useful notions of "us" and "them" are needed at the beginning of organizing do not become so rigid and hardened to preclude expanding boundaries.

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145. *See* MARTIN LUTHER KING, JR., SHOWDOWN FOR NONVIOLENCE (1968), *reprinted in* A A TESTAMENT OF HOPE, *supra* note 101, at 64–72; MARTIN LUTHER KING, JR., THE ETHICAL DEMANDS FOR INTEGRATION (1963), *reprinted in* A TESTAMENT OF HOPE, *supra* note 101, at 117–25.

146. I do not mean my brief description of Dr. King's work to suggest that the civil rights movement was something other than a complicated and nuanced sociological, psychological, and political drama. My point is not to capture a complete picture of the civil rights movement, but to be clear about how straightforward were Dr. King's first principles, and to suggest that his first principles mattered to outcomes.

147. *See* Melucci, *supra* note 13, at 48 (a collective "makes the basic assumption that its distinction from other actors is constantly acknowledged by them, even in the extreme form of denial); *see also* Jennifer Fredette, *Social Movements and the State's Construction of Identity: The Case of Muslims in France*, 54 STUD. LAW, POL. & SOC'Y 45, 54 (2011) (arguing that there is no real Muslim social movement in France because Muslims currently have no "collective identity," but, instead, "there is great variation and even spirited disagreement" about identity, kinds of grievances, and goals of activism).

148. *See* Melucci, *supra* note 13, at 48.

149. *Id.* at 48–49.

CONCLUSION

Fundamentally, cause lawyers engage in their work to make social change. Scholars of cause lawyering have generated a robust and rich literature considering important issues such as what kinds of advocacy work best to generate social change and what features are critical to an engaged and mutual relationship between cause lawyer and cause client. But the literature has neglected a key aspect of that relationship—whether the particular kind of loyalty that exists between cause lawyer and cause client hinders or helps in achieving social change.

This Article has taken up that inquiry. It has demonstrated that cause lawyers and cause clients expect each other to show a heightened level of fidelity to each other, what I have labeled hyper-loyalty. A critical feature of hyper-loyalty is that cause lawyers and cause clients view the advocacy landscape as consisting only of friends and enemies. Further, because of several dynamics, including the force of cognitive heuristics and biases, and the force of intentional relationship choices, cause lawyers and cause clients maintain strict and rigid classifications between friends and enemies. Thus, cause lawyers and cause clients view any overtures to enemies as exceedingly disloyal behavior. The force and rigidity of hyper-loyalty diminishes the possibilities that cause lawyers and cause clients can create actual social change.

However, this Article provides a way forward by suggesting that hyper-loyalty be replaced by relational loyalty. The Article defines relational loyalty as having three critical features. First, that cause lawyers and cause clients understand the architecture in which they are situated to be a connected web of relationships instead of a dyadic and oppositional structure. Second, that cause lawyers and cause clients approach the web of relationships with curiosity instead of advocacy. Finally, that cause lawyers and cause clients respond with compassion to all contained in the web of relationships. This Article argues that relational loyalty inculcates a helpful dynamism in relationships, which in turn creates unexpected opportunities to craft innovative strategies or pathways to social change.