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Movement Lawyers: The Tension Between Solidarity and Independence

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The Tension Between Solidarity and Independence

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Seeking to engage with scholars and activists who call for lawyer solidarity with social movements, this Essay considers professional ethics constraints on what a lawyer can justifiably do on behalf of clients in the name of solidarity with a movement. I consider whether the concept of solidarity, especially solidarity in the face of legal repression, justifies a movement lawyer in using tactics that would otherwise be grounds for legal prosecution, professional discipline, or moral condemnation. Drawing on the long history of legal repression of progressive activism, including repression of progressive lawyers, this Essay proposes a way to think about lawyers aligning themselves with client activism while acknowledging the attraction to the notion that the lawyer's role as counselor or adviser does not permit lawyer involvement in conduct that is immoral, unfair, or of doubtful legality. I test my argument about when lawyers may assist clients in conduct at the bounds of legality by considering bar discipline of lawyers involved with former President Trump's litigation seeking to invalidate the results of the 2020 election with the January 6 rally preceding the assault on the Capitol building. I then return to the challenges facing lawyers working with Left social movements today.

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INTRODUCTION

The fundamental principle of labor unionism, and the concept on which labor law is built, is *solidarity*. As the eminent labor and civil rights activist, lawyer, and historian Staughton Lynd famously put it:

> More than any other institution in capitalist society, the labor movement is based on communal values. Its central historical experience is solidarity, the banding together of individual workers who are alone too weak to protect themselves. Thus, there has arisen the value expressed by the phrase, "an injury to one is an injury to all."[1]

To cultivate and to empower solidarity, labor aspired and still aspires to be a *movement*; that is, an organized, politically engaged, and activist group of people seeking social change.

A fundamental principle of the lawyer's professional obligation is independence. Thus, although a lawyer owes a duty of loyalty to the client, the lawyer also must "exercise independent professional judgment,"[2] and is bound to abide by the client's decisions only "concerning the objectives of representation," but not "the means by which they are to be pursued."[3] Thus, courts have permitted lawyers to ignore the client's wishes regarding which issues to press on appeal[4] and even whether to seek to defend a client on the grounds of insanity, over the client's strenuous objection.[5] Some lawyers explicitly disclaim solidarity, relying on the idea expressed in Model Rule of Professional Conduct 1.2(b) that their representation of clients "does not constitute an endorsement of the client's political, economic, social or moral views or activities."[6] Yet others choose clients and causes precisely *because* they endorse them.[7] In this Essay, I wish to explore the tension between solidarity and

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1. Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984).
2. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983).
3. *Id.* at r. 1.2(a).
4. Jones v. Barnes, 463 U.S. 745, 751 (1983).
5. *See* United States v. Kaczynski, 239 F.3d 1108, 1112 (9th Cir. 2001).
6. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 1983).
7. *See generally* STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004) (explaining that cause lawyering "conveys a determination to take sides in political and moral struggle" and "expressly seek clients with whom they agree and causes in which they believe").

independence that sometimes looms large for lawyers who are part of social movements.

Legal scholars have long been interested in the role that law and lawyers play in social movements,[8] but recent scholarly calls for "movement law"[9] and studies of "resistance lawyering"[10] particularly focus on scholarly and activist efforts to build solidarity between lawyers and movement activists in order to create countervailing power against concentrations of wealth and corporate political power.[11] On the left, hope springs eternal that lawyers can help today's movements—including the Fight for 15, Red for Ed, and Bargaining for the Common Good teachers union campaigns, Black Lives Matter, and others—to create enduring social, economic, and political transformation. Some of my work is in this vein,[12] and I've been particularly inspired by historical studies of the labor and civil rights lawyers who worked alongside social movements to dismantle the Gilded Age and Jim Crow.[13] For radical labor lawyers in particular, the idea of solidarity between lawyer and client is an article of faith and a core aspect of their professional identity.

What are the professional ethics constraints on what a lawyer can justifiably do on behalf of clients in the name of solidarity with a movement? Does the concept of solidarity, especially solidarity in the face of legal repression, justify a movement lawyer in using tactics that would otherwise be grounds for legal prosecution, professional discipline, and/or moral condemnation?

These are not straightforward questions. Movement activism inspires legal repression, which puts fidelity to client and fidelity to law on a collision course.[14]

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8. The legal literature on law and social movements goes back at least to JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978). A relatively recent survey of the field is Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018).

9. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

10. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

11. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021).

12. Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63 (2020). In a book in progress, I explore the professional identity of lawyers for radical labor unions in the mid-twentieth century and explore how the idea of solidarity between lawyer and client, rather than the independent professional judgment promoted by the American Bar Association (ABA), was a core aspect of the professional self-conception of labor lawyers. Catherine L. Fisk, An Injury to All: Lawyers for the ILWU (unpublished manuscript) (on file with author).

13. *See, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915 (2013); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

14. Law has as often been on the side of repression as it has been on the side of liberation. The list of the activists and lawyers who faced criminal and civil prosecution is so long that to name any risks harm of omission, but some illustrations indicate the pervasiveness of repression: abolitionists, labor organizers, suffragists, pacifists, socialists, sit-down strikers, lunch counter sit-inners, indigenous people, Black Panthers, disability rights advocates, LGBT

One way that law has repressed activism or channeled movements away from radical demands has been to restrict what lawyers can do on behalf of movements.[15] Another has been to sharply restrict and harshly punish what people and organizations can do, which puts the movement's own lawyers in the delicate position of advising their clients to tone down some of their demands or their tactics or channel them toward legally preferred forms.[16] Yet another way law has responded to lawyer activism has been to discipline or ostracize lawyers for the *fact* of their representation of controversial clients as well as their *tactics*.

Legal repression of social movement activism poses a dilemma for lawyers who represent movement actors, especially (but not only) when the lawyers are deeply committed to the movement. The dilemma is particularly acute when the law, and the system through which it is enforced, are (or are reasonably perceived to be) unjust and where a prosecution of the defendant (typically for sedition, conspiracy, incitement, or even trespass or disturbing the peace) is aimed at repressing the movement. This is what has sometimes been called a "political trial."[17] A political trial is a peak moment in understanding the relation of law to movement activism because it is, as was observed about the prosecution of seven antiwar activists following a police riot at the 1968 Democratic National Convention, "a courtroom drama where no one—neither the characters, nor the viewers—expects that justice will be done."[18]

If a prosecution is politically motivated, and if the crime is belonging to a group or expressing certain ideas, lawyers defending the legitimacy of the group or the ideas must challenge the motives and legitimacy of the prosecution. Lawyers must

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activists, and many more faced and often faced down the use of law to repress activism.

15. *See In re* Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415 (1963). Susan Carle has deeply explored the intersection of legal ethics and the Black civil rights movement's legal campaign. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97 (2002); Susan D. Carle, *From* Buchanan *to* Button: *Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281 (2001).

16. Fisk & Reddy, *supra* note 12, at 130–31.

17. There is a substantial literature debating the existence or nature of a political trial. *See* NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT (1973) (citing books and articles and exploring the causes and possible approaches to disruptive courtroom conduct in four trials, including the Smith Act prosecution discussed *infra*, along with the famous trial of the Chicago Seven, prosecution of Black Panthers, and a sedition prosecution of American Nazis during World War II). Among the many works on legal repression of leftist labor activists, I'm particularly indebted to MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977); DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995); DONNA T. HAVERTY-STACKE, TROTSKYISTS ON TRIAL: FREE SPEECH AND POLITICAL PERSECUTION SINCE THE AGE OF FDR (2015); COLIN WARK & JOHN F. GALLIHER, PROGRESSIVE LAWYERS UNDER SIEGE: MORAL PANIC DURING THE MCCARTHY YEARS (2015); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016).

18. David Sims, *Aaron Sorkin's New Film Is the Right Story for this Moment*, ATLANTIC (Oct. 16, 2020), https://www.theatlantic.com/culture/archive/2020/10/trial-of-the-chicago-7-aaron-sorkin-netflix/616755/ [https://perma.cc/8K45-NY77].

call the court to account for participating in an illegitimate effort to punish ideas. Conventional lawyering considers this out of bounds. As Geoffrey Hazard put it, defendants in political trials seek to assert "counterclaims" that are "based on a maddening combination of transcendental political or ethical issues and procedural technicality."[19] To accuse the prosecutor and the court of being engaged in a "juridical pretension and a farce"[20] is likely to land defense counsel in jail for contempt of court, as indeed it has many times.[21] But to fail to challenge the court's role in an illegitimate prosecution is to acquiesce in an injustice.

Because many political prosecutions have targeted leftists, there is a tendency to think about activist movement lawyering as being primarily a phenomenon of the Left and law as being primarily the tool of conservativism.[22] Among many examples, there were abolitionist lawyers who sought to use legal tools to destroy the Fugitive Slave Act.[23] Or there was United Auto Workers general counsel Maurice Sugar who defended the legality of the sit-down strikes of 1936–1937 against the charge that the union and its lawyers were counseling workers to engage in massive trespass.[24] Even what has sometimes been branded as mob violence has been defended as lawful when it was in the context of American colonists' objections to the depredations of British colonial rule in 1769.[25]

But some of this year's activist lawyers facing legal troubles are on the far right. On January 6, 2021, former President Donald Trump, joined by his lawyer, Rudy Giuliani, and a law professor, John Eastman, incited a mob to attack the Capitol Building in an effort to prevent Congress from certifying the votes of the Electoral College and thus confirming that Trump had lost the election to Joseph Biden.[26] The

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19. Geoffrey C. Hazard, Jr., *Securing Courtroom Decorum*, 80 YALE L.J. 433, 449 (1971).

20. *Id.*

21. *See, e.g.*, Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2261–62 (2014).

22. A superb recent example of labor law history in this vein is Ahmed White, *Law, Labor, and the Hard Edge of Progressivism: The Legal Repression of Radical Unionism and the American Labor Movement's Long Decline*, 42 BERKLEY J. EMP. & LAB. L. 165 (2021).

23. Farbman, *supra* note 10.

24. Maurice Sugar, *Is the Sit-Down Legal?*, NEW MASSES, May 4, 1937, at 19. Jim Pope has shown that sit-down strikers "claimed to be exercising a legal right . . . [that] constrained not only corporate and governmental authorities, but also the sit-downers themselves." Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 47 (2006).

25. John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043, 1089 (1974) (arguing that "whig violence" was characterized by "restraint and constitutional self-defense" and must be understood as lawful, and "not be confused with what is called civil disobedience").

26. *See, e.g.*, David G. Savage, *Lawyers Urge California Bar to Probe Key Advisor's Role in Trump Bid to Overturn Election*, L.A. TIMES (Oct. 5, 2021, 7:10 AM), https://www.latimes.com/politics/story/2021-10-04/trump-2020-election-john-eastman-california-bar [https://perma.cc/G9QE-KDHT]; Andrea Salcedo, *Law Professor John Eastman Spoke at Rally Before Capitol Riots. Facing Outrage, He Won't Return to His University*, WASH. POST (Jan. 14, 2021, 7:14 AM), https://www.washingtonpost.com/nation/2021/01/14/john-eastman-chapman-university-departure/ [https://perma.cc/ED2C-EPH3].

Capitol insurrection brought incitement and sedition back into the news to an extent not seen in many years, and Trump was impeached (but acquitted) for inciting an insurrection.[27] The news since then reports the FBI's steady work to hunt down and arrest those who participated in the attack on the Capitol and those who incited it.[28] The January 6 insurrection followed two months of litigation attacking the legitimacy of the Biden election victory, and some have called for lawyers to be held to account for enabling the abuses of the Trump Administration and Trump's postelection attack on democracy (e.g., by filing eighty election suits after November 8).[29] Bar disciplinary proceedings have been instituted in some states, and New York has suspended Rudy Giuliani's license.[30]

It is disturbing, to say the least, that lawyers joined the President on the platform as he rallied the mob to attack Congress, concocted a legal argument to justify a coup, and filed scores of suits seeking to overturn the results of the 2020 election based on legal theories and factual allegations that ranged from strained to preposterous to downright paranoid and racist.[31] It is alarming that there were many lawyers on the

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27. Nicholas Fandos, *Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority Votes 'Guilty'*, N.Y. TIMES (Feb. 13, 2021), https://www.nytimes.com/2021/02/13/us/politics/trump-impeachment.html [https://perma.cc/6CRY-85JW].

28. *See, e.g.*, Luke Broadwater, *F.B.I. Is Pursuing 'Hundreds' in Capitol Riot Inquiry, Wray Tells Congress*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2021/06/15/us/politics/capitol-riot-inquiry-fbi-congress.html [https://perma.cc/P5RD-DAEF].

29. *See, e.g.*, Sherrilyn A. Ifill, Opinion, *Lawyers Enabled Trump's Worst Abuses*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/02/12/opinion/politics/trump-lawyers.html [https://perma.cc/ZWW7-K7QA].

30. *In re* Giuliani, 146 N.Y.S.3d 266 (App. Div. 2021); Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html [https://perma.cc/T6NM-W4XF]. It has been reported that the Texas Bar is investigating whether Texas Attorney General Ken Paxton committed professional misconduct in filing frivolous litigation or making false and misleading statements in four suits he initiated contesting election results of four other states. Meryl Kornfield, *Texas Bar Association Probing Attorney General's Effort to Overturn 2020 Election*, WASH. POST (June 10, 2021, 5:38 PM), https://www.washingtonpost.com/nation/2021/06/09/texas-paxton-state-bar-investigation/ [https://perma.cc/K2HF-F86K]. Bar discipline is being sought for John Eastman. Paul Rosensweig, *Legal Ethics, Bar Discipline and John Eastman*, LAWFARE (Oct. 20, 2021, 3:13 PM), https://www.lawfareblog.com/legal-ethics-bar-discipline-and-john-eastman [https://perma.cc/2VTG-5VCL]; *see also* Press Release, Mich. Att'y Gen., AG Nessel, Gov. Whitmer, Secretary Benson Seek Disbarment of Attorneys for Pushing Election Fraud Narrative (Feb. 1, 2021), https://www.michigan.gov/ag/0,4534,7-359--551080--s,00.html [https://perma.cc/2MB4-6SWH] (reporting filing of bar disciplinary complaint against three Michigan lawyers—Greg Rohl, Scott Hagerstrom, and Stefanie Junttila—and a Texas lawyer—Sidney Powell—for making false statements in *King v. Whitmer*, a suit challenging Biden's electoral victory in Michigan).

31. *See* Rosalind S. Helderman, Emma Brown, Tom Hamburger & Josh Dawsey, *Inside the 'Shadow Reality World' Promoting the Lie that the Presidential Election Was Stolen*, WASH. POST (June 24, 2021, 10:46 AM), https://www.washingtonpost.com/politics/2021/06/24/inside-shadow-reality-world-promoting-lie-that-presidential-election-was-stolen/

phone with Donald Trump and Georgia elections officials on January 2 when Trump demanded that Georgia's Secretary of State "find" over 11,000 votes for him—enough to reverse the results of the election.[32] Many applaud the ethical restraint exercised by lawyers who refused to assert some of Trump's boldest claims about electoral fraud.[33] Yet the same partisan differences that infect every other aspect of an assessment of the Trump administration manifest in the debate about the role of lawyers. As Trump lawyers accused of misconduct trade charges with lawyers for the entities whom the Trump Administration sued, and the mainstream and right-wing media report different versions of the facts about the 2020 election, the question of lawyer responsibility becomes ever more contentious.[34]

This Essay proposes a way to think about lawyers aligning themselves with client activism while acknowledging the attraction to the notion that the lawyer's role as counselor or adviser does not permit lawyer involvement "in a line of conduct that is immoral, unfair, or of doubtful legality."[35] I seek to challenge my own thinking about using law and social pressure to target activist lawyers by thinking about former President Trump's lawyers. Remembering the FBI's and federal government's dogged anticommunist persecution of left-wing, labor-civil rights activists and their lawyers through the 1940 federal antisedition Smith Act, the 1947 Taft-Hartley Act, and bar discipline, I worry about excessive zeal of the FBI in identifying and prosecuting politically motivated people and about bar discipline and court sanctions targeting novel legal theories and the lawyers who make them.

[https://perma.cc/V9N5-PGPQ]; Scott Bauer, *Trump Loses Wisconsin Case While Arguing Another One*, ASSOCIATED PRESS (Dec. 12, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-madison-wisconsin-e911b00569c4a3214691ecb7b84e8330 [https://perma.cc/SX7S-H9XH] (noting that Justice Karofsky of the Wisconsin Supreme Court stated that the election lawsuit "smack[ed] of racism").

32. As the names of lawyers on the call became known, a number of large law firms announced that the lawyers in question had severed their relations with the firm. Lizzy McLellan, *Fox Rothschild Partner Who Sat in on Trump's Call to Georgia Resigns from Firm*, LAW.COM (Jan. 7, 2021, 8:06 P.M.), https://www.law.com/thelegalintelligencer/2021/01/07/fox-rothschild-partner-who-sat-in-trumps-call-to-georgia-resigns-from-firm/?slreturn=20210916152355 [https://perma.cc/DQE7-G9MM] (reporting Trump lawyers departing Fox Rothschild and Foley & Lardner).

33. *See, e.g.*, Adam Winkler, *Trump's Wildest Claims Are Going Nowhere in Court. Thank Legal Ethics.*, WASH. POST (Nov. 20, 2020, 3:40 PM), https://www.washingtonpost.com/outlook/trump-lawyers-legal-ethics/2020/11/20/3c286710-2ac1-11eb-92b7-6ef17b3fe3b4_story.html [https://perma.cc/CP9L-ZQYS]; Tom Schoenberg, Jennifer Jacobs & Jordan Fabian, *Trump Struggles to Find Lawyers as Impeachment Trial Nears*, BLOOMBERG (Jan. 14, 2021, 1:04 PM), https://www.bloomberg.com/news/articles/2021-01-14/trump-struggles-to-build-legal-team-as-impeachment-trial-nears [https://perma.cc/FXN6-JYMJ].

34. *See* Rosalind S. Helderman, *Impeachment is Over. But Other Efforts to Reckon with Trump's Post-Election Chaos Have Just Begun.*, WASH. POST (Mar. 12, 2021, 5:50 PM), https://www.washingtonpost.com/politics/election-claims-legal-sanctions/2021/02/21/4b051646-71fe-11eb-85fa-e0ccb3660358_story.html [https://perma.cc/W2GV-7UU5].

35. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

For the moment, I want to bracket the question whether there is a false equivalence between the lawyers who challenged Trump's loss of the 2020 election and those who challenged race and class inequality in the twentieth century. I'm using Trump lawyers and other conservative activism, such as militant and violent efforts to prevent abortions, to test out my intuitions about the justice of the persecution of labor activists and Left radicals, *and their lawyers*, with an eye toward understanding why lawyer involvement in social movement activism is perceived as so threatening. As today's Left movements use law and lawyers to build countervailing power, and today's Right activists also sought to use law and lawyers to overturn the 2020 election, it is worth recalling why solidarity between lawyers and movements have long been perceived as a threat.

In Part I, I consider solidarity between lawyers and social movement clients. I focus in particular on the use of the Smith Act to target solidarity between lawyers and clients in the 1940s and 1950s. In Part II, I explore challenges—involving lawyers on the Right and on the Left—to the idea that the professional role of a lawyer requires independence from the client, both in the role of counselor and in court. In particular, I consider the question whether a lawyer is justified in advising a client how to break the law or in engaging in lawbreaking on behalf of the client. In Part III, I propose a way to reconcile the concept of solidarity that is at the core of movement lawyering with the concept of lawyer independence. Part IV applies my proposed framework to labor lawyers working with activist clients in a hostile legal climate.

I. SOLIDARITY BETWEEN LAWYERS AND SOCIAL MOVEMENT CLIENTS

In a thoughtful and scrupulously researched 2019 article on how lawyers represented clients seeking freedom from slavery and to evade the depredations of the Fugitive Slave Act, Daniel Farbman describes and defends the concept of "resistance lawyering."[36] He recounts how lawyers representing people being prosecuted as fugitive slaves delayed proceedings and sought to transfer prisoners from federal to state custody where the chances for escape were greater to "create[] time and space for political organizing . . . that sometimes manifested as plans for escape, and sometimes allowed for the collection of funds to purchase the alleged fugitive's freedom."[37] Resistance lawyering involves "[u]sing a legal process as a tool to dismantle that *legal process itself*."[38] Importantly, Farbman explains, the legal strategies involving "[d]elay, confusion, and legal argument not only made rescue more likely, but also transformed the proceedings from a summary rendition into a community referendum on slavery."[39]

Reading Farbman's account of abolitionist lawyers drew me to think about mid-twentieth century radical lawyers who sought to disrupt the repression of working-class activism with similar goals and tactics. Some of these lawyers represented unions affiliated with (or expelled from) the Congress of Industrial Organizations

36. Farbman, *supra* note 10, at 1933.
37. *Id.* at 1898.
38. *Id.* at 1932–33 (emphasis in original).
39. *Id.* at 1898.

(CIO) in the 1940s and were, like their clients, committed to broad organizing and radical activism on issues of racial inequality. In the late 1930s, the United States Department of Justice began a series of antitrust actions against unions and also targeted radical union leaders under the 1940 antisedition Smith Act. The Smith Act criminalized advocating the overthrow of the government by force, printing, publishing, or distributing any materials so advocating, or even belonging to any association that did so.[40] After 1945, in part responding to a postwar strike wave and the CIO's effort to combat racism in the South through a mass organizing drive known as Operation Dixie, the DOJ revived Smith Act prosecutions and businesses used the antilabor Taft-Hartley Act of 1947 to squelch union activism. The Taft-Hartley Act sought to purge communists from the labor movement by requiring all union leaders to sign and file affidavits swearing they were not communists. Any union whose leadership refused to sign would be prohibited from invoking the protections of federal labor law, including by filing charges against unfair labor practices or seeking an election supervised by the National Labor Relations Board or certification as a representative of workers empowered to bargain collectively.[41] Taft-Hartley also prohibited certain forms and goals of labor activism, including secondary boycotts, a tactic that had been part of the DOJ's antitrust enforcements before 1941.[42]

For defending their clients against these repressive laws, many radical lawyers paid a steep personal price. Some were prosecuted for sedition, and even those who were not themselves prosecuted were held in contempt of court for their zealous defense of clients who were prosecuted.[43] The House Committee on Un-American Activities went after them.[44] The Attorney General and the American Bar Association called for radical lawyers to be disbarred, and many state bar disciplinary bodies heeded that call.[45]

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40. Dennis v. United States, 341 U.S. 494, 496 (1951).

41. *See* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 27–30 (1995).

42. *See* 29 U.S.C. § 158(b)(4).

43. *See, e.g.*, Sacher v. United States, 343 U.S. 1, 3–5, 11 (1952) (describing procedural history of contempt citation of five lawyers and holding that the judge may wait until the end of a trial to punish contemptuous lawyers).

44. Los Angeles labor and civil liberties lawyer Ben Margolis recalled in his oral history that he was served with a subpoena to testify before HUAC as he walked out of court on the last day of the Smith Act trial. Dep't of Special Collections, Univ. of Cal., L.A., *Law and Social Conscience, Ben Margolis*, ONLINE ARCHIVE CAL. 429 (May 3, 1985), https://oac.cdlib.org/view?docId=hb6c6010vb;NAAN=13030&doc.view=frames&chunk.id=div00046&toc.depth=1&toc.id=&brand=oac4 [https://perma.cc/3JMK-45Y8].

45. *See* Sacher v. Ass'n of the Bar of N.Y., 347 U.S. 388, 389 (1954) (holding that permanent disbarment was "unnecessarily severe"); *In re* Disbarment of Isserman, 348 U.S. 1 (1954) (setting aside order of disbarment of lawyer from Supreme Court bar); BELKNAP, *supra* note 17, at 219–221 (describing disciplinary charges against counsel for Smith Act defendants and ABA's efforts to ban picketing outside court buildings, calls for discipline of lawyers who represented Smith Act defendants, and resolution urging that all attorneys be required to sign and file affidavits of noncommunist affiliation); STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR 154 (1982) (describing the Attorney General's criticism of lawyers); *see also infra* text accompanying notes 70–71.

Smith Act prosecutions stopped after the Supreme Court ruled in 1957 and 1961 that people could not be convicted of conspiring to overthrow the government simply on evidence that they belonged to the Party or read communist books.[46] The Taft-Hartley Act's anticommunist oath provision was upheld against a First Amendment challenge in 1951.[47] It was replaced in 1959 by section 504 of the Labor Management Reporting and Disclosure Act, which made it a crime for a Communist to serve as an officer or employee of a labor union; the Supreme Court declared section 504 unconstitutional in 1965.[48] The Taft-Hartley Act remains a potent weapon to squelch union activism.[49] The anticommunist fervor of the 1940s and 1950s was one chapter in the longer history of repression of radicalism in the twentieth century. The upsurge of activism in the years bracketing World War I was met with brutal repression in the Palmer Raids of 1920. The federal government used deportation proceedings to target left-wing activists throughout the century, and made four efforts to deport the president of the progressive and antiracist International Longshore and Warehouse Union (ILWU).[50] States prosecuted labor and civil rights activists for criminal syndicalism.[51] Georgia invoked its nineteenth-century Insurrection Act, originally designed to repress and deter slave revolts, against Communists, including Angelo Herndon, an African American organizer who was arrested and charged with insurrection in 1932.[52] He was arrested after leading a march of black and white unemployed people to the Fulton County Courthouse, but the evidence against him consisted largely of his possessing some communist literature.[53]

In response to repression, the Communist Party and an organization of sympathetic lawyers known as the International Labor Defense concluded that proletarians could expect no justice from the court system. They therefore decided, not unreasonably, that trials should be used to elicit public support for the cause and

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46. Yates v. United States, 354 U.S. 298 (1957); Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961).

47. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950).

48. United States v. Brown, 381 U.S. 437, 439 n.3, 462 (1965) (explaining the history of the anticommunist oath provision and holding the prohibition unconstitutional as a bill of attainder).

49. *See* ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union, 442 F. Supp. 3d 1329, 1338–39 (D. Or. 2020), *appeal filed* (granting motion to set aside jury verdict for nearly $94 million against a union for an allegedly secondary boycott, remitting award to $19 million or alternatively ordering new trial on damages).

50. JULIA ROSE KRAUT, THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES 101–107, 112–117 (2020); PETER AFRASIABI, BURNING BRIDGES: AMERICA'S 20-YEAR CRUSADE TO DEPORT LABOR LEADER HARRY BRIDGERS (2016); *see also* Bridges v. California, 314 U.S. 252 (1941); Bridges v. Wixon, 326 U.S. 135 (1945); Bridges v. United States, 346 U.S. 209 (1953).

51. *See* Whitney v. California, 274 U.S. 357 (1927); *see generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004). As regards radical labor in particular, see, for example, White, *supra* note 22.

52. Herndon v. Lowry, 30 U.S. 242 (1937) (holding the Insurrection Act unconstitutionally vague and reversing Herndon's conviction).

53. *See* John Hammond Moore, *The Angelo Herndon Case, 1932-1937*, 32 PHYLON 60 (1971); CHARLES H. MARTIN, THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE (1976).

for organizing the movement.[54] To that end, criminally accused people either should represent themselves or, when represented by counsel, should keep the lawyer in the role of "courtroom technician," and find ways to use the legal proceedings to go on offense.[55]

Judges responded harshly. Even appellate judges who voted to reverse contempt citations against lawyers who were involved in defendants' disruptive tactics for propaganda purposes branded the lawyers' conduct "abominable" (said Judge Clark of the Second Circuit),[56] "outrageous," (said Judge Frank),[57] or "more suggestive of an undisciplined debating society than of the hush and solemnity of a court of justice" (said Justice Frankfurter).[58] Even scholars sympathetic to the plight of leftists and hostile to the government's campaign against them have not been kind to this strategy. Historian Michal Belknap branded as "faulty" the Communists' belief that "the preservation of their movement [w]as dependent upon fighting strength rather than the ability to use the tools provided by the law," and explained the Party "pa[id] dearly for its deficiencies."[59]

Leaving aside the efficacy or instrumental justifications of the lawyers' refusal to preserve the "hush and solemnity of a court of justice," I want to explore the connections between their self-conception as activists and the justification for lawyering tactics that might otherwise be out of bounds. When the scales of justice are so obviously tipped against their clients, I'm not sure I'm prepared to condemn their conduct on instrumental or intrinsic grounds. But it's not an easy issue.

As Professor Donna Haverty-Stacke recounts in her history of the first indictments and criminal prosecutions under the Smith Act, in June 1941, "FBI agents and U.S. marshals raided the offices of the Socialist Workers Party (SWP) in Minneapolis and in St. Paul. Following orders from the Department of Justice, they confiscated party files and literature, two red flags, and several pictures of Leon Trotsky."[60] The raids led to arrest of twenty-nine people, including fifteen members of the militant Teamsters Local 544. Eventually eighteen of them were convicted and sentenced to twelve to sixteen months in federal prison.[61] Among those who were prosecuted and convicted were the Socialist Workers Party's lawyer, Albert Goldman. Goldman, along with other lawyers including from the national ACLU, handled the defense of the twenty-nine, along with the appeals. When the United States Supreme Court rejected the final appeal, Goldman reported for prison along with his clients,[62] and he was disbarred.[63]

The government's next major target for a Smith Act prosecution were thirty-one Nazi sympathizers who allegedly conspired to cause insubordination in the armed

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54. BELKNAP, supra note 17, at 13–14.

55. *Id.* at 13.

56. United States v. Sacher, 182 F.2d 416, 463 (2d Cir. 1950) (Clark, J., dissenting), *aff'd*, 343 U.S. 1 (1952).

57. *Id.* at 454 (Frank, J., concurring).

58. Sacher v. United States, 343 U.S. 1, 38 (1952) (Frankfurter, J., dissenting).

59. BELKNAP, *supra* note 17, at 15.

60. HAVERTY-STACKE, *supra* note 17, at 1.

61. *Id.* at 2.

62. *Id.* at 137, 171.

63. *Id.* at 155.

forces during World War II.[64] At trial, both the defendants and their counsel were "disorderly" and exhibited disrespect for the judge. After seven months of trial featuring constant conflict with the defendants and their lawyers, the judge died before the prosecution rested its case. This prompted a mistrial, and eventually the indictment was dismissed.[65]

The first major postwar Smith Act case was in New York with a sensational trial of the leadership of the Communist Party of the United States of America (CPUSA) at the federal courthouse in Foley Square.[66] Accused Communists, unlike the accused Nazis, went to prison. The "Battle of Foley Square," like the trial in Minneapolis, featured extensive evidence about the writings of Karl Marx and other theorists. Prosecutors introduced *The Communist Manifesto* into evidence and read Marx, Engels, Lenin, and Stalin aloud to the jury. As became typical of the Smith Act trials, prosecution "expert" witnesses testified over defense objection that the Party was "[a] political party of the American working class, basing itself upon the principles of scientific socialism, Marxism-Leninism," and "is basically committed to the overthrow of the Government of the United States."[67]

Given that the government had decided to prosecute people for belonging to a political party, and to prosecute the party's lawyer along with the leadership, it's not surprising that the Smith Act trials in Minneapolis, New York, and other cities turned into trials about ideas. The defense in New York, having seen what happened to the Socialist Workers Party in Minneapolis and to the Nazi sympathizers in Washington, concluded that the best defense was a good offense. Mounting a defense aimed at the public as well as the jurors, the New York defendants and their lawyers attacked the government, in court and out, for criminalizing the ideas. The trial judge baited the defense lawyers, who accused the judge of bias. After the jury returned the guilty verdict, the judge summarily held all five lawyers in contempt and sentenced them to six months in federal prison.[68]

The government showed no mercy to the lawyers in enforcing the contempt sanctions. It refused Richard Gladstein's request that he be allowed to surrender in his home city of San Francisco, forcing him to pay his own travel expenses to New York where he was put in manacles and leg irons for a seven-week, meandering drive from New York to Texarkana, Texas. It denied the requests of all the lawyers to be incarcerated in the North where they could receive visits and be less at risk of racist violence and sent both the Jewish and Black lawyers to southern prisons.[69]

Sentencing the lawyers to prison made good on a threat made in 1946 by Attorney General Tom Clark in a speech to the Chicago Bar Association. Lawyers, Clark warned, needed to be vigilant against "the revolutionary who enters our ranks, takes the solemn oath of our calling, . . . and then uses every device in the legal category

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64. BELKNAP, *supra* note 17, at 40.

65. *Id.*; United States v. McWilliams, 69 F. Supp. 812 (D.D.C. 1946), *aff'd*, 163 F.2d 695 (D.C. Cir. 1947).

66. *See* Dennis v. United States, 341 U.S. 494 (1951).

67. BELKNAP, *supra* note 17, at 84–85.

68. The dispute over strategy is recounted in KUTLER, *supra* note 45, at 164–172.

69. *Id.* at 164; *see also id.* at 152–182 (recounting, in a chapter titled "'Kill the Lawyers': Guilt by Representation," the attacks on lawyers who represented Smith Act defendants and the effects it had on the bar).

to further the interests of those who would destroy our government by force, if necessary." The bar association, he warned, should take "those too brilliant brothers of ours to the legal woodshed for a definite and well-deserved admonition."[70] Taking that message to heart, the ABA House of Delegates between 1950 and 1953 adopted a series of resolutions recommending that state bars expel Communists and ban them from the practice of law.[71] Clark sought to put the National Lawyers Guild (NLG) on the Attorney General's List of Subversive Organizations (AGLOSO), apparently fearing that the NLG's racially diverse membership and embrace of civil liberties, civil rights, and labor rights was a threat to the ABA's racist and classist hegemony in the legal profession.[72]

In the late 1940s, as Justice Department lawyers fanned out across the United States to prosecute leftists under the Smith Act, the experience of the New York lawyers apparently stood as a lesson for others. Defendants reported asking scores or hundreds of lawyers for representation and finding no one willing to take their case.[73] The Supreme Court had anticipated this problem when it reviewed the contempt sanctions against the *Dennis* lawyers, professing that "[w]e are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice."[74] But it affirmed the sanctions anyway.

One group of lawyers who were not deterred from mounting a vigorous defense against Smith Act prosecutions were labor union lawyers. When the Smith Act reached Hawai'i in 1951, one of the government's targets was the radical ILWU, which had just shaken up the Islands' power structure by successfully organizing across the boundaries of race and occupation until the workers at the ports, the pineapple and sugar plantations, and all the processing and packing houses were in the ILWU. The government indicted ILWU Regional Director Jack Hall, along with six other people active in progressive and labor circles, including a schoolteacher, a soil chemist who was chair of the Hawai'i Communist Party, and two editors of the left-wing newspaper.[75]

The defendants were represented by longtime ILWU lawyers Richard Gladstein (whose New York contempt conviction was still on appeal), Harriet Bouslog, and Myer Symonds. Bouslog and Symonds had been recruited by the ILWU to Hawai'i several years before to support the union's wildly successful but hard-fought labor organizing. Bouslog was one of very few women admitted to the Hawai'i bar. About

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70. *Id.* at 154.

71. *Id.*

72. *See* Robert Justin Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, PROLOGUE (2006), https://www.archives.gov/publications/prologue/2006/fall/agloso.html [https://perma.cc/7KA7-ZDWD] (describing the history of AGLOSO); ANN FAGAN GINGER & EUGENE M. TOBIN, THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN (1988).

73. *See* Dep't of Special Collections, Univ. of Cal., L.A., *Law and Social Conscience, Ben Margolis*, ONLINE ARCHIVE CAL. 408 (Nov. 5, 1984), https://oac.cdlib.org/view?docId=hb6c6010vb;NAAN=13030&doc.view=frames&chunk.id=div00046&toc.depth=1&toc.id=&brand=oac4 [https://perma.cc/6VFF-6MKB] (describing fruitless efforts to get a distinguished and experienced lawyer to argue United States v. Yates, 354 U.S. 298 (1957)).

74. Sacher v. United States, 343 U.S. 1, 13 (1952).

75. *See* United States v. Fujimoto, 107 F. Supp. 865 (D. Haw. 1952).

six weeks into the trial, Bouslog traveled with Hall from Honolulu, where the trial was being held, to a pineapple plantation village on the Island of Hawai‘i to speak at a Sunday morning union meeting.[76] Having the defendant and his lawyer speak to a meeting of the plantation workers was an effort to promote solidarity and to protect the organizing gains from the attack by criminal prosecutors.

The vociferously antiunion local newspaper published an account of what Bouslog said—though she disputed the newspaper's account, and the reporter "lost" the notes he took at the meeting. Bar disciplinary proceedings against Bouslog instead relied on "an expanded version" prepared by the reporter "at the direction of his newspaper superiors."[77] (By the time of the disciplinary proceeding against Bouslog, the reporter had taken a public relations job with the Hawai‘i Sugar Planters Association, the employer organization that bitterly fought the union.)[78] According to the reporter, Bouslog said the defendants "were being tried for reading books written before they were born." She criticized the doctrine of criminal conspiracy, which she described as the crime charged "when the Government did not have enough evidence 'it lumps a number together and says they agreed to do something.' 'Conspiracy means to charge a lot of people for agreeing to do something you have never done.'"[79] She complained that the FBI "spent too much time investigating people's minds," and declared: "There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case. . . . They just make up the rules as they go along."[80]

Based on these statements, the Hawai‘i Bar found that Bouslog had impugned the integrity of the judge. It suspended Bouslog's license for a year. The U.S. Supreme Court overturned the suspension, reasoning that "a lawyer may criticize the law-enforcement agencies of the Government, and the prosecution, even to the extent of suggesting wrongdoing on their part, without by that token impugning the judiciary."[81] After all, "appellate courts and law reviews say that of judges daily" and "[d]issenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed."[82]

There was another flurry of interest in punishing lawyers who too readily supported client criticisms of political trials after the trial of the Chicago Eight in 1968. Judge Julius Hoffman imposed a lengthy sentence for contempt of court on William Kunstler for his trial conduct. Among the contumacious conduct was Kunstler's objections to Judge Hoffman's order that Black Panther leader Bobby

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76. *See* SANFORD ZALBURG, A SPARK IS STRUCK!: JACK HALL & THE ILWU IN HAWAII 349–50 (1979).

77. *In re* Sawyer, 360 U.S. 622, 623, 627 (1959) (overturning the territorial bar's suspension of Bouslog). Bouslog was suspended both for the speech at the union meeting and for interviewing a juror after the verdict had been read and the jury had been discharged. The Supreme Court made short work of the charge that it was professional misconduct to interview jurors after the close of the case by noting that it is common practice. *Id.* at 637–38.

78. Summary of Transcript of Hearings Before Legal Ethics Committee of the Hawai‘i Bar Association at 2, *In re* Sawyer (Nov. 22, 1954) (on file with author).

79. *In re* Sawyer, 360 U.S. at 628–29.

80. *Id.* at 629–30.

81. *Id.* at 632.

82. *Id.* at 635.

Seale be bound and gagged so that Seale could not seek to represent himself or otherwise object to the court's refusal to allow him his choice of counsel.[83] In the wake of the Chicago Eight trial and other prosecutions of Black Panther leaders, a number of people published books and articles on the subject of courtroom decorum and the lawyer's role in political trials.[84]

Criminal prosecutions of unpopular political parties or activists—whether in the form of what comes to be seen as a "political trial" or in more quotidian cases[85]—do not come close to exhausting the conflict lawyers face in advising clients facing what appears to be oppressive law. Labor and civil rights activists have faced many situations in which a court has enjoined peaceful protest and the question is whether to violate what seems an unconstitutional injunction or instead to spend months or years litigating the injunction and risk the loss of the movement.[86] This was the story of *Walker v. City of Birmingham*, in which Martin Luther King Jr. and civil rights activists marched in Birmingham in defiance of an unconstitutional state court injunction. Upholding their contempt convictions, the Supreme Court held that the proper procedure is to challenge the injunction, not to violate it and then collaterally attack it.[87]

To characterize the Birmingham march or other instances of protest as civil disobedience to law concedes too much. The labor and civil rights protests that persisted in defiance of injunctions, vagrancy laws, or other prohibitions on protest were not lawless, but rather articulated a different vision of law. Hence, the lawyers did not necessarily counsel defiance of law. Rather, I think they and some of today's activist lawyers are sometimes appealing to a different kind of law when advising clients to continue the protest or in joining the protest themselves.[88]

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83. Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1327 (2000).

84. *See, e.g.*, DORSEN & FRIEDMAN, *supra* note 17. The *Dennis* trial, the trial of the Chicago Eight, and the discipline of Harriet Bouslog are by no means the only examples of punishing lawyers who cross some legal line in representing clients. *See, e.g.*, Sterling, *supra* note 21; Alissa Clare, Comment, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651 (2005).

85. *See, e.g.*, AMERICAN POLITICAL TRIALS (Michal R. Belknap ed., 2d ed. 1994) (collection of thirteen essays on political trials from Anne Hutchison's prosecution for heresy in seventeenth-century Massachusetts Bay Colony to Oliver North's trial in the late twentieth for the Iran-Contra affair).

86. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). Part of Bouslog's fury at the judicial repression of the ILWU in Hawai'i came from the union's experience with such injunctions. *See, e.g.*, Int'l Longshoremen's & Warehousemen's Union v. Ackerman, 82 F. Supp. 65 (D. Haw. 1949), *rev'd*, 187 F.2d 860 (9th Cir. 1951).

87. Walker v. City of Birmingham, 388 U.S. 307 (1967) (upholding criminal contempt conviction for violating an unconstitutional restriction on First Amendment speech).

88. Harriet Bouslog believed exactly that when she defended the legality of her advocacy. She said that the government targeted her for professional discipline because of her vigorous defense of seventy-five union members indicted for unlawful assembly and picketing, *Ackerman*, 82 F. Supp. 65, and fifteen union members charged with contempt for violating an injunction against picketing, Int'l Longshoremen's & Warehousemen's Union v. Wirtz, 37

Whether lawyers believe they are violating the law or not, there are some difficult issues in sorting out how far a lawyer can go in supporting client activism, whether in court or out. It is to those issues I now turn.

II. TENSIONS BETWEEN SOLIDARITY AND INDEPENDENCE

The solidarity between some union lawyers and their clients made them willing to face the threat of criminal sanctions and professional discipline in Smith Act and other political cases. The history of labor and civil rights suggests that solidarity is a practice that is worthy of cultivation. As Staughton Lynd eloquently explained in the article I quoted in the beginning of this Essay, solidarity, like family devotion, is a good in itself, even apart from the ends that the solidaristic group pursues.[89] (Which is not to say that everything done in the name of solidarity is good, nor is everything done in the name of family good.) Solidarity promotes democratic political engagement and is necessary to build countervailing power in a society with large and wealthy institutions. Solidarity also makes people courageous. But solidarity can also corrupt judgment. A lawyer who becomes so enamored of a client's strategy or goals that the lawyer participates in client violation of securities law or labor law might also say he acts in solidarity. How do we distinguish what is good in lawyer-client solidarity from a lawyer's failure to provide independent judgment? There are lots of tough cases, but several most recently in the news involve former President Donald Trump.

In the week after Donald Trump, along with lawyers Rudy Giuliani and John Eastman, riled up a crowd who then invaded the Capitol on January 6, 2021, the chair of the New York State Senate's judiciary committee made a formal request to the New York courts to disbar Rudy Giuliani for his role in inciting the mob.[90] An organization that identified itself as Lawyers Defending American Democracy, "a non-profit, non-partisan organization the purpose of which is to foster adherence to

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Haw. 404 (1946), *aff'd*, 170 F.2d 183 (9th Cir. 1948). As Bouslog wrote to ILWU leader Lou Goldblatt, the cases

> are particularly important in the Territory because an ex parte labor injunction has become an employer's first step in a labor dispute, no matter what the facts are. During the pineapple strike [of 1947], police officers illegally tried to enforce the orders. The limitations on the right to picket usually contained in these orders are so narrow that, for all practical purposes, it makes the right to picket meaningless.

Letter from Harriet Bouslog to Louis Goldblatt (Feb. 24, 1949) (on file with author).

89. *See* Lynd, *supra* note 1, at 1426–28.

90. Press Release, Sen. Brad Hoylman, NY Senate Judiciary Chair Brad Hoylman to File Formal Complaint Asking New York Appellate Division to Consider Revoking Rudy Giuliani's License to Practice Law (Jan. 11, 2021), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/ny-senate-judiciary-chair-brad-hoylman-file-formal-complaint [https://perma.cc/2LSH-H2N4]; *see also In re* Giuliani, 146 N.Y.S.3d 266 (App. Div. 2021); Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html [https://perma.cc/ZAZ4-HTVN].

the rule of law," filed an ethics complaint against Giuliani accusing him of several violations of the New York Rules of Professional Conduct, including making false statements to the public, filing frivolous litigation, and "abus[ing] the court system to undermine democracy and the rule of law."[91] Cataloguing Giuliani's efforts on behalf of Trump to reverse the outcome of the 2020 presidential election, the complaint alleged that Giuliani's conduct constituted violations of numerous rules. The complaint, quoting the Preamble to the New York Rules of Professional Conduct, charged that Giuliani violated a fundamental duty lawyers have "to uphold the legal process" and "to demonstrate respect for the legal system."[92]

The complaint alleged a number of specific violations of the New York Rules of Professional Conduct. First, frivolous election fraud litigation violated Rule 3.1, which prohibits knowingly advancing frivolous claims or defenses in litigation.[93] Election fraud statements in various press conferences and statements to legislators and the public violated Rule 4.1, which prohibits knowingly making false statements of law or fact in various out-of-court statements.[94] Frivolous litigation against the state of Pennsylvania seeking to overturn its vote violated Rule 4.4, which prohibits lawyers from using "means that have no substantial purpose other than to embarrass or harm a third person."[95] The argument is that the litigation was aimed at disenfranchising voters in states where there was a narrow majority who voted for Biden, and that the effort of Texas (for example) to toss out the electors of Pennsylvania was aimed at harming the Democratic majority in Pennsylvania.[96] More generally, the complaint alleged, Giuliani's various false claims about election fraud violated Rule 8.4(c), which prohibits lawyers from engaging in "dishonesty, fraud, deceit, or misrepresentation."[97] Finally, the complaint alleged the whole "Stop the Steal" campaign violated Rule 8.4(h), which prohibits lawyers from engaging in conduct that adversely reflects on their fitness to practice law.[98]

In its ruling ordering interim suspension of Giuliani's license, the court relied on rules 3.3 (false statements to tribunal), 4.1 (false statement to third persons), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(h) (conduct adversely reflecting on fitness as a lawyer).[99] It did not rely on rule 3.1 (frivolous claims) or 4.4 (use of means with no purpose other than harm to third persons).[100] The court emphasized that Giuliani conceded he had falsely stated in radio broadcasts, podcasts, and legislative committee hearings in Pennsylvania and Michigan that Pennsylvania counted over 600,000 fabricated mail-in ballots; the

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91. Letter from Lawyers Defending Am. Democracy, Inc., to Att'y Grievance Comm., Sup. Ct. State of N.Y., App. Div. (Jan. 20, 2021), https://ldad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf [https://perma.cc/HKE6-JPSZ].

92. *Id.* at 2–18.

93. *Id.* at 10–13.

94. *Id.* at 13–15.

95. *Id.* at 15–16.

96. *Id.* at 16.

97. *Id.* at 17.

98. *Id.* at 18.

99. *In re* Giuliani, 146 N.Y.S.3d 266 (App. Div. 2021).

100. *See id.*

court rejected his contention that the false statements were inadvertent and made in reliance on the error of an unidentified member of his team.[101] Giuliani repeatedly asserted in press conferences, in legislative hearings, and in media commentary that between 8000 and 30,000 dead people (including the late boxer Joe Frazier) had voted in Philadelphia and 6000 had voted in Georgia; that Dominion voting machines manipulated vote tallies in Georgia; that between 65,000 and 165,000 underage people, and about 2500 felons, voted illegally in Georgia; and that tens or hundreds of thousands of noncitizens voted in Arizona.[102] In the interim suspension proceedings, the court noted, Giuliani produced no evidence to substantiate these assertions and did not rebut the evidence showing the assertions were false.[103] In addition, the court observed that Giuliani falsely alleged in litigation in federal court in Pennsylvania that his client, then-President Trump, was alleging fraud when in fact the amended complaint had withdrawn the fraud allegations.[104]

In discussing whether conduct sufficiently harmed the public interest to warrant interim suspension, the court reasoned:

> False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society. When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information.[105]

The court then said:

> The AGC contends that respondent's misconduct directly inflamed tensions that bubbled over into the events of January 6, 2021 in this nation's Capitol. Respondent's response is that no causal nexus can be shown between his conduct and those events. We need not decide any issue of "causal nexus" to understand that the falsehoods themselves cause harm.[106]

The challenging aspect of the Giuliani case is that no one can dispute the value of ethics rules that prohibit lawyers from lying to a court or filing frivolous claims or defenses, even in pursuit of laudable goals. Making false statements in podcasts or on the radio is a harder question. If the clients earnestly believe that the election was being stolen by elections officials and manufacturers of voting machines, or if future elections are marred by vote suppression and voter intimidation, a rule that prohibits a lawyer from talking about the allegations in public until there is sufficient evidence to support the claim can be as dangerous to democracy as allowing lawyers to make false statements.

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101. *Id.* at 270–73.
102. *Id.* at 274–79.
103. *Id.* at 278.
104. *Id.* at 273–74.
105. *Id.* at 283.
106. *Id.*

Some of the proceedings against Trump lawyers are not controversial, in the sense that they rest on settled law of defamation or prohibiting false allegations and frivolous litigation. A Michigan judge awarded sanctions against Sidney Powell, Lin Wood, and other attorneys associated with the case brought to overturn the election results in Michigan.[107] Wisconsin Governor Tony Evers filed a separate federal suit against Powell and her co-counsel seeking legal fees and sanctions for similar conduct in his state.[108] Two Georgia counties filed motions asking for attorneys' fees from the Trump campaign and the state GOP chairman.[109] A complaint was filed by two state bar association presidents in Arizona against Trump attorneys for bringing "utterly meritless cases."[110] A state court in Arizona ordered the Republican Party to pay legal fees of over $18,000 relating to frivolous litigation.[111] Sidney Powell and Rudy Giuliani are both being sued by Dominion in federal court as part of their defamation suits relating to misinformation surrounding the 2020 election; the suit also includes Fox News and Mike Lindell as defendants.[112] Powell's defense is that "no reasonable person would conclude that the statements were truly statements of fact" and that her statements were clearly opinion, although she still believed them to be true.[113] She made recent public statements that make this defense untenable.[114] There have also been recommendations for sanctions against lawyers seeking to sue

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107. King v. Whitmer, No. 20-13134, 2021 WL 3771875 (E.D. Mich. Aug. 25, 2021).

108. Alison Durkee, *Sidney Powell Gets $100,000 Bill from Wisconsin: Governor Demands Legal Fees Over Election Lawsuit*, FORBES (Apr. 1, 2021, 1:02 PM), https://www.forbes.com/sites/alisondurkee/2021/04/01/sidney-powell-gets-100000-bill-from-wisconsin-governor-demands-legal-fees-over-election-lawsuit/?sh=53d7f53c2543 [https://perma.cc/56NT-C227].

109. Alison Durkee, *Georgia Counties Ask Trump for Nearly $17,000 in Legal Fees as GOP Election Lawyers Face Consequences*, FORBES (Feb. 24, 2021, 8:21 PM), https://www.forbes.com/sites/alisondurkee/2021/02/24/georgia-counties-ask-trump-for-nearly-17000-in-legal-fees-as-gop-election-lawyers-face-consequences/?sh=40a698457c87 [https://perma.cc/CT92-4CPN].

110. Joe Dana, *Bar Complaint Filed Against Trump Attorneys in Arizona*, 12 NEWS (Dec. 17, 2020, 4:27 PM), https://www.12news.com/article/news/politics/bar-complaint-filed-against-trump-attorneys-in-arizona/75-857a2dd9-9e96-47b1-83f5-f9782bd875fb [https://perma.cc/3CJT-3T4R].

111. Arizona *Court Rules GOP Must Pay Court Fees in Frivolous Lawsuit*, DEMOCRACY DOCKET (Mar. 15, 2021), https://www.democracydocket.com/2021/03/update-arizona-court-rules-gop-must-pay-court-fees-in-frivolous-lawsuit/ [https://perma.cc/QAN6-XUP9].

112. Merrit Kennedy & Bill Chappell, *Dominion Voting Systems Files $1.6 Billion Defamation Lawsuit Against Fox News*, NPR (Mar. 26, 2021, 11:14 AM), https://www.npr.org/2021/03/26/981515184/dominion-voting-systems-files-1-6-billion-defamation-lawsuit-against-fox-news [https://perma.cc/VTJ9-GGS8].

113. Jane C. Timm, *Sidney Powell's Legal Defense: 'Reasonable People' Wouldn't Believe Her Election Fraud Claims*, NBC NEWS (Mar. 23, 2021, 11:23 AM), https://www.nbcnews.com/politics/donald-trump/sidney-powell-s-legal-defense-reasonable-people-wouldn-t-believe-n1261809 [https://perma.cc/79RJ-AA7R].

114. Adam Rawnsley, *Sidney Powell Just 'Eviscerated' Her Own Legal Defense, Experts Say*, YAHOO! NEWS (June 8, 2021), https://news.yahoo.com/sidney-powell-just-eviscerated-her-162126316.html [https://perma.cc/6ACN-JT9N].

Dominion or overturn the election in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin.[115]

Implicit and explicit in the disciplinary actions against lawyers for Trump, like those against lawyers for twentieth century socialists, communists, and labor radicals, is the notion that the lawyers had a duty both to refrain from certain tactics (e.g., making false statements of fact or law) and from representing the clients at all in pursuit of their campaign against the election. The allegations in the Giuliani disciplinary complaint (which the court did not address) that trouble me most are that lawyers have a duty generally to refrain from harming third persons (e.g., voters) or from a vague category of conduct that reflects adversely on the attorney or that fails to demonstrate respect for the legal system. These allegations suggest that lawyers should decline to participate at all in cases that may later be found to be deleterious to public faith in the electoral or legal system. The whole point of the Trump litigation and PR campaign was that the voting system and the legal system could not be trusted. Those who invaded the Capitol believed the Electoral College could not be trusted, Congress could not be trusted, and even Mike Pence could not be trusted to preside over the counting of the ballots of electors. In this respect, they share some similarities (though surely some differences, but more on that later) with the Smith Act defendants and their lawyers who doubted the legitimacy of the DOJ prosecutions and tactics. They also share something with the abolitionist lawyers who believed that the goals of the Fugitive Slave Act and the processes it created for sending Black people into slavery were unjust and that the courts would not deliver justice to the Black litigants.

The bar expects lawyers to play by the rules, even when the rules themselves are unjust. But scholars of legal ethics have long argued that sometimes lawbreaking by lawyers (or counseling lawbreaking) serves justice and may in fact be more consistent with the spirit of the law than adherence to the letter of it. Bill Simon is in this group, and contrasts Positivism (a lawyer must obey the law exactly as written) with Substantivism (a lawyer must obey the substance of the law) and argues that obedience to the spirit of the law aligns more closely to justice.[116] Thus, in the days before no-fault divorce, lawyers might justifiably advise clients about the grounds on which divorce would be granted even if it might prompt clients to commit perjury to establish the grounds, or they might permissibly advise their clients in the days before legal protection for homosexual sex as to the unlikelihood of enforcement of laws prohibiting sodomy.[117] To be sure, not every legal ethicist agrees.[118] In cases of more extreme injustice, such as the Fugitive Slave Act proceedings that Farbman

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115. Governor Tom Wolf's and Former Sec'y Kathy Boockvar's Motion for Sanctions, O'Rourke v. Dominion Voting Sys. Inc., No. 20-cv-3747-NRN (D. Colo. May 17, 2021); John Gerstein, *Lawyer Who Brought Election Suit Referred for Possible Discipline*, POLITICO (Feb. 19, 2021, 8:01 PM), https://www.politico.com/news/2021/02/19/lawyer-election-suit-discipline-470369 [https://perma.cc/DB3R-FR2H].

116. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 77–108 (1998).

117. *Id.* at 105–08.

118. *See, e.g.*, W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 6 (2010) (arguing that "lawyers should act to protect the legal entitlements of clients, not advance their interests") (emphasis omitted).

studied, a lawyer's commitment to justice may not merely allow but perhaps even compel breaking the rules. In extreme cases, it may be necessary to protect clients by engaging in tactics aimed at dismantling the system from within. And the appeals to the public—using "every courtroom battle . . . to build political power"[119]—is part of the cause lawyer's role.

Debates about lawyers counseling or engaging in lawbreaking swirled in the early 1990s in connection with abortion protest. Lawyers on both sides engaged in lawbreaking or counseling lawbreaking,[120] and studies of lawyers and of legal ethics revealed a diversity of views about it.[121] Perhaps abortion provides the clearest comparison to the Smith Act and labor struggles I have described because views of the absolute moral rightness are equally firm and passionate on each side, and it is challenging to find an empirical basis for diametrically opposed factual assertions that would be acceptable to both sides. But what both sides in the abortion fights could agree upon, like both sides in Smith Act cases, is that a good lawyer should be devoted to the cause.[122] And devotion to the cause is in tension with, and perhaps even inconsistent with, the idea of lawyer independence.

Labor lawyers' devotion to the cause of labor—their self-conception as cause lawyers—represented an ideal of professionalism that challenged the elitism and racial exclusiveness of the American bar. The standard bar association dinner speech nostrum that lawyers must be independent of their clients simply did not speak to them. When fidelity to client conflicted with fidelity to law, the client came first. Their self-conception and professional ideals were shaped by their role as lawyers for the underdogs and also by their own outsider life experience as Jews, communists, immigrants, women, working class, and, in some cases, people of color.[123] Many had received elite educations, and all embraced devotion to the craft of excellent legal work, which made them elitist in one sense. But they were deeply anti-elitist outsiders.

Ironically, labor lawyers' devotion to labor solidarity, and their fidelity to their clients, contributed to the perception—widespread among later scholars—that mid-century labor lawyers were not truly cause lawyers.[124] One reason that mid-twentieth

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119. Farbman, *supra* note 10, at 1932.

120. *See* JOSHUA C. WILSON, THE STREET POLITICS OF ABORTION: SPEECH, VIOLENCE, AND AMERICA'S CULTURE WARS (2013).

121. *See, e.g.*, Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 742–43, 743 n.79 (1991) (arguing that a pro-choice lawyer should represent an activist charged with a crime for blockading a clinic that provides abortion services); Kathryn Abrams, *Lawyers and Social Change Lawbreaking: Confronting a Plural Bar*, 52 U. PITT. L. REV. 753, 755–60, 774–75 (1991) (exploring the diversity of views about lawyer lawbreaking and describing how a reproductive freedom lawyer violated a law prohibiting advising women how to obtain an abortion to raise awareness about the unconstitutionality of the law); David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 810–13 (1991) (arguing that a pro-choice lawyer need not and perhaps should not represent an Operation Rescue activist).

122. *See* WILSON, *supra* note 120, at 122–29, 135–41, 148–57 (describing how pro- and anti-choice activists and their lawyers described the law).

123. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 40–73 (1976). *See generally* FORBATH, *supra* note 86.

124. In the large literature on lawyers and social movements and cause lawyers, emphasis

century labor union lawyers have not captured the attention of cause lawyering scholars is some of the unions these lawyers represented so loyally discriminated on the basis of race and gender. Their experience was one of surviving endless purges—from the New Deal, from labor unions after Taft-Hartley, in some instances from the elite ranks of the progressive left, and ultimately from the scholarly consensus about who were the original cause lawyers.[125]

Labor lawyers struggled to resist the movement restraining aspects of the state restrictions on labor protest that the Supreme Court allowed after 1942. They endured criminal prosecutions, FBI surveillance, and bar discipline to survive and help their clients survive the anticommunist fervor from World War I through the 1950s. It was a constant struggle and, as I have explained elsewhere, lawyers were the fulcrum of the government's efforts to deradicalize labor.[126] Repressive law conscripted lawyers in the project of protecting the economic viability of unions and labor-civil rights work at the expense of in-the-streets activism. Especially by the 1950s, labor unions were large organizations with money in the bank, and it was the job of the lawyer to make sure that movement activism didn't wipe out the union's finances. The law challenged the lawyer's self-conception as a movement activist, for it put the lawyer in the position of policing the legality of client activism.

III. RECONCILING COMMITMENT TO THE CAUSE AND TOLERANCE IN A DIVERSE SOCIETY

To return to the problem of lawyer devotion to client causes in a pluralistic society, I want to begin with Derrick Bell's observation, in his classic and brilliant article exploring lawyer accountability to clients in desegregation litigation: "Idealism, though perhaps rarer than greed, is harder to control."[127] Bell's concern was that civil rights lawyers litigating school desegregation cases had a vision about what served the interests of Black schoolchildren that made the lawyers inattentive to the wishes of their clients. In Bell's account, lawyers had become too independent from their clients.[128] But, as I have suggested using Trump lawyers as an example, lawyers can also be too captivated by their client's interests and wishes. Whether we see lawyers as too much or too little independent of (or in solidarity with) clients is probably a function of how much we share the client's vision of a good outcome.

One can be both appalled by what Trump's election lawyers did and queasy about calls for bar discipline. First, I both celebrate the devotion of the labor lawyers and

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tends to be on lawyers for the civil rights, womens' and immigrants' rights movements, poverty lawyers, civil liberties organizations, and environmental groups, and little or no attention is given to lawyers for labor unions. *See, e.g.*, ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 49–90 (2013) (surveying the field of public interest law and omitting labor union lawyers); SCHEINGOLD & SARAT, *supra* note 7 (same); Cummings, *supra* note 8 (same). *See generally* Fisk & Reddy, *supra* note 12 (discussing the omission of labor from the field of law and social movements studies).

125. Fisk & Reddy, *supra* note 12.

126. *Id.*

127. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 504 (1976).

128. *See id.* at 488–93.

radical leftists of the mid-twentieth century and the abolitionists, and I loathe the devotion of Trump's lawyers. Second, I struggle to figure out—other than saying that my cause is just and theirs is not—how to distinguish them. Third, I recognize we live in a diverse and democratic society in which tolerance for different views is essential. Finally, I'm not confident that giving power to bar disciplinary bodies, or law firms, to impose discipline on inappropriate lawyer solidarity with clients will ever serve the values I care about because these organizations—at least until recently and perhaps even now—have been dominated by groups whose values I don't share.

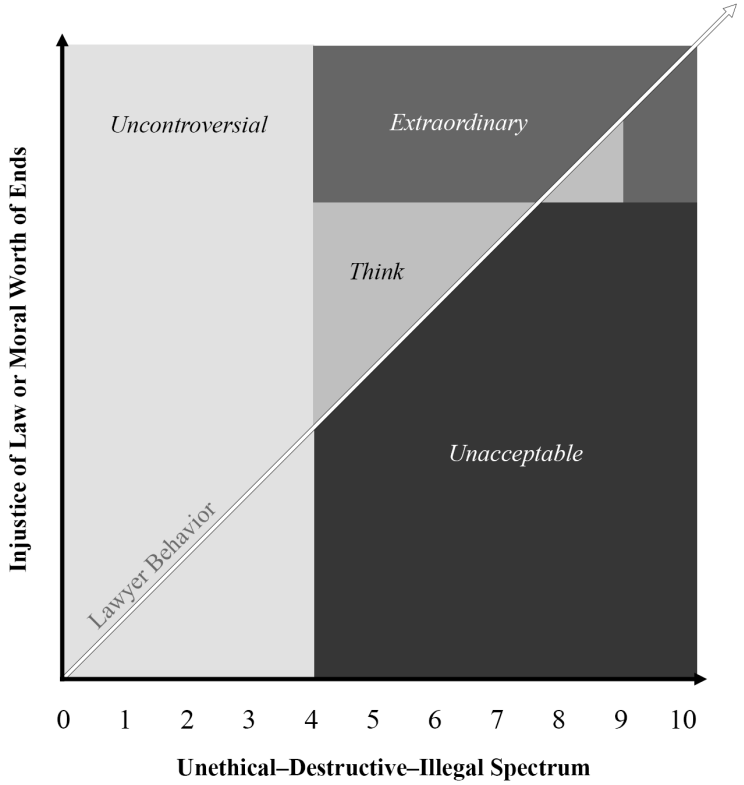
So, I join the effort of other legal scholars who distinguish between the need to tolerate a diversity of different social movements while adhering to an agreed-upon set of tactics that lawyers may use in supporting their movement clients. But I don't think the distinction is either/or. Both as a normative matter, and as a description of what the lawyers I have described above appear to believe, the importance of the cause and the injustice of the laws under which the lawyers operate exist in relation to the permissibility of the tactics.

That said, for the reasons suggested above, I think it's impossible to escape value choices in assessing when lawyers are justified in doing what dubiously lawful things on behalf of their clients. If abolitionist lawyers are justified in helping clients escape from custody, why isn't every criminal defense lawyer so justified? If lawyers representing European Jews in the 1930s are justified in forging documents to help them travel abroad or to hide assets from Nazis, or arranging sham sales of property to non-Jews to save their property from Nazis, why isn't every lawyer justified in doing so?

Accordingly, I propose a matrix (see Figure 1) for thinking about what lawyers can do in support of their clients, whether it is called resistance lawyering, movement lawyering, or something else.[129] The idea is that a lawyer is more justified in using disruptive, unethical, or even illegal tactics if there is an increase of injustice within the legal system in which the lawyer operates and/or an increase in the moral worth of the lawyer's and client's cause. But even so, there may be limits, at least up until the point a system is so utterly unjust that the lawyer becomes a fighter in guerrilla warfare.

129. I'm particularly grateful to Mara Chemerinsky for conceptualizing this matrix. She, in turn, wishes to acknowledge the wisdom of the internet, in particular the anonymous author(s) of the Universal Hot-Crazy Matrix.

Figure 1. The Activist Client-Lawyer Matrix



The vertical (Y) axis represents the justice of the client's and the lawyer's cause or the injustice of the law under which the client is being prosecuted. Of course, this scale is one of values. Resisting genocide or massive deprivations of civil liberties would rank high. Thus, lawyers assisting Jews to flee Nazis, or Japanese Americans to avoid the government's efforts to round them up and confine them to concentration camps during World War II, would be high on the scale. Representation of labor activists facing criminal prosecution for serious crimes, including sedition, based solely on the activists' peaceful advocacy and organizing would be high, though if the crime is disturbing the peace, perhaps less so.

Whether the lawyer is acting in solidarity with a movement also matters in assessing the justice of the cause. This is because solidarity, selflessness, and community engagement are intrinsically valuable in a democratic society, even apart from the position that the group seeks to advance. I recognize the difficulty of distinguishing between lawyers who are in solidarity with a movement and those who are in solidarity with a corporate or other well-heeled client. Defining a social movement and a social movement lawyer and distinguishing them from organizations and their lawyers that pursue their interests for reasons of profit is a task beyond the scope of this Essay.

Finally, also on this axis must be some consideration of the reasonableness of the lawyer's belief in the justice of the cause. This is perhaps the most troubling consideration for me, in part because reasonableness is not value neutral.

Nevertheless, in assessing the justice of the lawyer's actions, it matters not only what the lawyer sincerely believes but also whether it is reasonable to believe that the principle is threatened by or advanced by the legal action. A lawyer who sincerely believes it is necessary to destroy evidence or suborn perjury to save the Earth from a Martian invasion presents a different case for discipline than one who believes it's necessary to do so to help a Jew flee France in 1941. Even if the Trump lawyers sincerely believed that Democrats stole the election, it would matter whether they reasonably believed, for example, that the late Venezuelan President Hugo Chavez founded and owned the voting machine company that was allegedly used to flip votes.[130] When lawyers for the United Auto Workers aided strikers in 1937 in their strategy of occupying the auto and other factories in Detroit and other cities, they believed that the trespass was justified as the only available form of resistance to large-scale repression of unionism and violence toward workers that General Motors and other auto companies had used against the workers, and by the companies' refusal for two years to abide by the requirements of the National Labor Relations Act.[131]

The horizontal axis represents the permissibility of the lawyer's tactics and shows a spectrum from the invariably permissible, to the dubious (in a moral sense but perhaps not in terms of rules of professional conduct), to the unethical in terms of rules of court or rules of professional conduct, to the destructive if not downright illegal, to the clearly illegal (e.g., bribing witnesses not to testify, suborning perjury) and the morally wrong and illegal (killing witnesses).

In the light gray, "uncontroversial" zone (represented here as zero to four on the X axis, although I don't know whether four, three, or five is the cutoff) are lawyer tactics that are uncontroversial, although one might think that the closer one gets to the line between disruptive or destructive and unethical or illegal, the more troubling is the case for the lawyer conduct. The black, "unacceptable" zone reflects conduct that is unacceptable for lawyers, because it is unethical or illegal and because there is no justification for it based on the injustice of the system. The medium gray "think" zone is where we find the lawyers participating in or tolerating client disruption of the Smith Act trials. And the dark gray "extraordinary" zone, it seems to me, is where we find the abolitionist lawyers assisting clients to escape federal or state custody in Fugitive Slave Act cases and helping them find their way to the Underground Railroad to freedom in Canada.

The diagonal line represents the idea that the more justifiable the ends, the more justifiable the means a lawyer may use, with some limits. The upper right corner, where the legal system in which the lawyer works is exceedingly unjust or the morality of the conduct the lawyer seeks to defend is compelling, but the lawyer's conduct is illegal or harmful, is the "extraordinary" case in which it is hardest to decide whether the ends justify the means. Is it ethical for a lawyer to forge a

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130. *See* Nick Corasaniti, *Four Falsehoods Giuliani Spread About Dominion*, N.Y. TIMES (Jan. 25, 2021, 4:35 PM), https://www.nytimes.com/2021/01/25/technology/rudy-giuliani-dominion-election.html [https://perma.cc/5XLL-ZK5V] (reporting the allegation in the defamation suit brought by Dominion that the company was founded in Toronto in 2002 to help blind people vote, not by Chavez in Venezuela in 2004 to steal elections as Giuliani claimed).

131. *See* Sugar, *supra* note 24, at 19–21.

document if it's the only way to enable a client to escape a genocidal regime? It was, Farbman suggests, ethical for abolitionist lawyers to help their clients escape from confinement, or to use every possible means to help them because otherwise the clients faced a serious risk of death or serious bodily injury as punishment for escape. As Sugar observed in his legal defense of the sit-down strikers who occupied auto manufacturing plants, it was ethical to help the strikers engage in trespass because the factory owners and their lawyers were also flouting the law. As Sugar explained, the very lawyers who attacked the lawlessness of the strikers had themselves "announced that the Wagner Labor Act was unconstitutional, and deliberately encouraged its violation" by counseling their clients for two years to disregard it in the hope that the Supreme Court would declare it unconstitutional.[132] Sugar justified disrespect for property rights because the employers were disrespecting the workers' rights; the employers "are not seeking respect, they are seeking submission. . . . Respect springs from free men; submission comes from slaves."[133] If one side is engaged in systematic violations of law, the other may be justified in engaging in tactics that would otherwise be impermissible.

IV. THE CHALLENGE OF LAWYER-CLIENT SOLIDARITY IN A HOSTILE LEGAL CLIMATE

As suggested by the foregoing examples of lawyers encouraging or countenancing client lawlessness in response to others' lawlessness, the hardest ethical dilemmas for lawyers are in places and times where the law is very unjust and the client's goals are very just, but the client also seeks lawyer assistance in conduct that is outside the bounds of legality. As the references to resisting slavery and genocide suggest, this happens in authoritarian regimes. But it also happens, to some extent, in labor law.

Workers who try to organize today find legal obstacles, and frequently illegal employer coercion, at every turn. Amazon warehouse workers in Bessemer, Alabama, tried unsuccessfully to form a union in 2020 and 2021 in the face of tremendous and illegal corporate resistance. Amazon forbade workers from speaking to one another about the union on the job while barraging workers with daily on-the-job meetings and text messages advocating against unionization.[134] It denied workers any place on the property to hear information about the union, including the parking lot, so organizers tried distributing leaflets and speaking to drivers at the warehouse

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132. *Id.* at 20–21.

133. *Id.* at 21.

134. Jay Greene, *Amazon's Anti-Union Blitz Stalks Alabama Warehouse Workers Everywhere, Even the Bathroom*, WASH. POST (Feb. 2, 2021, 6:00 AM), https://www.washingtonpost.com/technology/2021/02/02/amazon-union-warehouse-workers/ [https://perma.cc/R5FG-MY47]; Michael Corkery & Karen Weise, *Amazon Union Drive Takes Hold in Unlikely Place*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/business/amazon-union-alabama.html [https://perma.cc/KZ3V-9D76]; Joseph Pisani, *Amazon Faces Biggest Union Push in Its History*, AP NEWS (Mar. 29, 2021), https://apnews.com/article/amazon-workers-union-c8493c24dabe7609de8fec8716460737 [https://perma.cc/4JJV-WE8N].

exit while they were stopped at a red light.[135] Amazon then prevailed upon the city to change the timing of traffic lights to prevent organizers from speaking to workers stopped at the light.[136] Amazon may have believed it could get away with this because the majority of the NLRB at the time were not sympathetic to union rights[137] and the state of Alabama was unlikely to come to the workers' aid.[138] Nor were local government officials in Bessemer likely to be friendly to the workers.[139] And in the rare instance in which law protects workers' right to hear both sides of the issues during an organizing campaign by requiring employers to allow union organizers on the property for brief periods before and after work, business groups prevailed on the Supreme Court to rule that access rules violate the Constitution.[140]

But that imbalance of power invites resistance on the union side, which presents a dilemma for union lawyers. Are the lawyers justified in counseling activists about how to get away with trespass or other lawbreaking? This is the issue with which union lawyers have long been confronted. When Appalachian miners in the late 1980s felt that coal mine operators were determined to destroy their union, union-negotiated compensation, job security for working miners, and health benefits for retired miners, they launched a strike against one—Pittston. As the company hired replacement workers, got several courts to enjoin various strike activities and state police to arrest strikers and supporters, the workers' resistance hardened, which seemed to the company to be more lawless. Richard Brisbin Jr., who studied the strike in detail, found that arrests of protesters, along with repressive behavior by the state police, and the immunity of replacement workers and private guards from any legal punishment for their violence against the workers, "generated among the strikers a growing ambivalence toward legalism. . . . They lost faith in the certainty that law and legal practices could establish justice."[141]

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135. *See* Russell Brandom, *Amazon Changed Traffic Light Timing During Union Drive, County Officials Say*, VERGE (Feb. 17, 2021, 10:32 AM), https://www.theverge.com/2021/2/17/22287191/amazon-alabama-warehouse-union-traffic-light-change-bessemer/ [https://perma.cc/Y98N-UKCF].

136. *Id.*

137. *See* CELINE MCNICHOLAS, MARGARET POYDOCK & LYNN RHINEHART, ECON. POL'Y INST., UNPRECEDENTED: THE TRUMP NLRB'S ATTACK ON WORKERS' RIGHTS 6–8 (2019).

138. *See* Greene, *supra* note 134.

139. *See* Kim Kelly, *An Unholy Union*, VOX (Mar. 22, 2021, 8:00 AM), https://www.vox.com/the-highlight/22320009/amazon-bessemer-union-rwdsu-alabama [https://perma.cc/33S3-5FDX] ("Local leaders in Bessemer who remain mindful of their city's fragile economic development have shied away from calling out Amazon or endorsing either side. . . .").

140. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (holding California Agricultural Labor Relations Act's access rule to be a taking of property that, under the Fifth Amendment, requires payment of "just compensation" to the property owner).

141. RICHARD A. BRISBIN JR., A STRIKE LIKE NO OTHER: LAW & RESISTANCE DURING THE PITTSTON COAL STRIKE OF 1989–1990 190 (2002) (documenting in a chapter called "Lawbreaking" how the impunity of the company, and the legal repression of the strikers, led to even more lawbreaking by strikers, including wildcat strikes involving more than 40,000 miners across ten states, rock-throwing, trespass, blocking roads, and using "jackrocks" to destroy tires on coal trucks and other vehicles).

The lawyers for the union were involved before, during, and after the strike. They trained strikers in civil disobedience by counseling about how law penalized different forms of protest, such as sitting on train tracks to block train shipments of struck coal as opposed to sitting on roads to block coal trucks. They negotiated endlessly with the company, with state and local police, and with an array of local, state, and federal officials. They defended many of the 4000 people who were arrested. They visited strikers who were in jail, and even helped a few understand the dangers of going on a hunger strike. They tried to protect the union from company efforts to seize bank accounts and other assets.[142] But judges issued injunction after injunction against the workers' protests and began holding the union in contempt of court when workers refused to cease protesting. A union lawyer said:

> At one point, we had so many injunctions coming into the building, at the headquarters, that we shut the doors, we shut the windows. They were trying to serve injunction notice, and they would try and shove it under the window, and the fax machines were all backed up and it was just sad, where it'd just gotten out of control. I think that was when we had had the strike against the State of Virginia, and every coal company was filing injunction orders and we just shut down the building so nobody could get in and shove that notice in.[143]

The union lawyer recalled the company finally settled the strike was when it became clear that all the coercion in the world wouldn't break the workers' resolve, even though the contempt fines the union was facing were so high it was like "the national debt":

> I was at the bargaining the day that I think the tables turned, months into the strike, where Cecil Roberts [UMWA leader] turned to the head negotiator at Pittston [Joe Farrell, the company's Vice President], and said, "Frankly, we'll just take our money, all the money we have, and we'll just throw it on the front steps of your corporate headquarters in Connecticut. But this strike is not going away. So if you want our money just tell me and we'll just roll up to the steps and dump it all on the corporate steps because the union is not about our assets or our money." . . . It was like a light bulb finally went off in the brain of [Joe Farrell and the company negotiators]. They thought if they could force the fines to go up and up and up and eventually they would crush the union, and [we] would give up. And that just wasn't the case. As soon as [Farrell] understood that money—unlike in the corporate world—that money did not govern the decision-making of the union and its goals. It was like, "Wow, this dispute may not go away as we had planned, and we may have to get this thing settled."[144]

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142. Interview with a Lawyer Who Represented the Union, in Wash. (July 10–11, 2019) (on file with author).

143. *Id.*

144. *Id.*

Nevertheless, the lawyer remarked bitterly that eventually the company collected several million dollars from the union in damages for the strike. Yet, in some respects, the lawyer recalled, the Pittston settlement was a victory for the union and its members. The union won "a great contract" and saved health benefits for retirees. "But when you look back at that strike, you also have to conclude how broken labor law is." To save basic job protections, 4000 workers were arrested, the union faced "triple the national debt in fines," and the company collected millions of dollars of the union's money—every penny of it from hard working miners' paychecks. "It was a huge price tag for workers just to protect a commitment to retiree health care and job security in the coal fields." It infuriated the lawyer that the workers had to mount this kind of campaign and face such huge penalties just "to basically survive."[145]

Recognizing the high stakes in all of this, the lawyer emphasized the importance of the union members deciding collectively on a strategy, the union leadership being responsive to the membership, and the lawyer having an obligation, born both of commitment to the cause and of the lawyer's duty to the union, to support the actions that the members and leaders had decided to take. They said:

> The mine workers had an incredible appreciation for lawyers and law, and always wanted to hear our viewpoints. And there was always also a really healthy disrespect for the courts, so it wasn't like if we lost our legal theory, people would say, "How could that happen?" It was like, "What else do you expect?" So it was a great place to practice [law]. There was really a sense that everybody was in the struggle, everybody was doing the best they could, and if we didn't win legal arguments, that never was anything that people should be relying on anyway.[146]

But the lawyer added:

> I've always felt that as labor lawyers in the best of all worlds would be seen as, "Okay, where do you want to go? What's the problem? And what are some options and strategies you can use to get the biggest bang for the buck?" . . . So, that doesn't mean you aren't going to get in trouble, and you aren't going to take on risks and you aren't going to accumulate fines and you aren't going to do things that cost. And the labor lawyer's role is to defend that. As the mine workers always said, "Your job is not to keep us from jail, it's to get us out of jail." And I think in the best of worlds you'd be part of the strategic team where everybody's working for the same goal.[147]

Yet, the lawyer conceded that sometimes, because of the constraints imposed by labor law, the lawyer must "shut down activity and then as a result dampen or destroy activism because the activists are fired or the activists are discouraged or the feel not part of the process." That is the challenge faced by a lawyer committed to abiding by an unjust law, and it is painful when a lawyer considers their role as

145. *Id.*
146. *Id.*
147. *Id.*

being part of the movement. "I hate the notion that one would think of labor lawyers as the people who enforce the law on the union."[148]

This lawyer took comfort from being part of a team and believing it was up to members and union leaders to make decisions. The role of the lawyer on that team is to present options and to help the workers figure out how to build the greatest movement with the least legal cost. I know of no basis to think the UMW lawyers did anything illegal or unethical, so their behavior would presumably remain in the "uncontroversial" zone of the Activist Client-Lawyer Matrix. But the significance of their story, like the stories of the Amazon warehouse workers, the antiabortion activists, the abolitionists, or the Smith Act lawyers, is the shared sense between clients and lawyers that the legal system is stacked against them and their clients and the stakes in their struggle are high.

CONCLUSION

Labor lawyers, like other lawyers who are devoted to the cause, prize solidarity with their clients. And when clients face what they deem an unjust legal system, that solidarity can put the lawyer's devotion to client in conflict with the lawyer's duty to law. The history of efforts to repress movements by punishing lawyers suggests reasons to be cautious in disciplining lawyers because of their efforts to assist client activism. But, as suggested by my queasiness about professional discipline for Trump lawyers who crossed lines in frivolous election litigation or when supporting illegal protest, it's much easier to laud lawyer-client solidarity in activism at or beyond the boundaries of law when one shares the values that they seek to advance.

148. *Id.*