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THE CRIMINALIZATION OF PEACEMAKING, CORPORATE FREE SPEECH, AND THE VIOLENCE OF INTERPRETATION: NEW CHALLENGES TO CAUSE LAWYERING

Avi Brisman†

I. INTRODUCTION

In February 2005, shortly after radical lawyer Lynne F. Stewart had been convicted of charges that she aided and abetted terrorism, David Feige, in an article entitled *An Elegy for Radical Lawyering*, proclaimed: “[Stewart’s] indictment alone [in April 2002] had a chilling effect on defense attorneys, and the conviction may well mean the government gets what it really wants—a docile defense bar that refuses to touch terrorism cases for fear of themselves becoming targets.”¹ Radical lawyering did not, in fact, die with Stewart’s conviction or with her 28-month prison sentence handed down in October 2006.² But Feige is correct that the jury in Stewart’s case effectively “criminalized radical lawyering”³ (or, at least, a type of radical lawyering)—an argument that has become more salient when one considers that Stewart was resentenced in July 2010

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¹ David Feige, *Radical Sheik: An Elegy for Radical Lawyering*, SLATE (Feb. 14, 2005, 5:04 PM), http://www.slate.com/id/articles/news_and_politics/jurisprudence/2005/02/radical_sheik.html

² *Lynne Stewart Sentenced to Prison, but Free Pending Appeal*, THE CHAMPION, Dec. 2006, at 6, (Jack King & Phyllis E. Mann), available at <http://nacdl.org/champion.aspx?id=939>.

³ Feige, *supra* note 1.

to 120 months (10 years).⁴ And while the defense bar has not cowered to the point of refusing all terrorism cases, Feige is also right that Stewart's indictment, conviction, initial sentence, and now current sentence has had a "chilling effect" on defense attorneys.⁵

⁴ See, e.g., John Eligon, *A Defendant Pays the Price for Talking to Reporters*, N.Y. TIMES, July 17, 2010, at A17 (reporting that the judge increased the sentence to ten years after Stewart made remarks to the media interpreted as showing a lack of remorse); John Eligon, *Heftier Term for Lawyer in Terrorism Case*, N.Y. TIMES, July 16, 2010, at A22 (noting that trial judge resented Stewart to ten years after the Second Circuit Court of Appeals determined her first sentence to be too lenient).

⁵ See, e.g., United States v. Reid, 214 F. Supp. 2d 84, 95 (D. Mass. 2002) (taking judicial notice of the federal government's indictment of Stewart for violating the SAMs ("Special Administrative Measures") applicable to Rahman under 18 U.S.C. § 1001 and deploring "its chilling effect on those courageous attorneys who represent society's most despised outcasts"); Tamar R. Birckhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1, 1, 4, 11–12, 16, 50 (2006) (discussing the broader impact of the post-9/11 version of the SAMs and its potential to "chill" the attorney-client relationship, and describing how in the wake of Stewart's indictment, "many among the defense bar did express genuine concern that the Sixth Amendment right to effective assistance of counsel had been placed in peril. . . . Lawyers, chastened by the *Stewart* case, felt themselves engaging in self-censorship, declining to raise certain topics of conversation with their incarcerated clients—ranging from issues with clear potential for controversy, such as politics and religion, to case-related questions regarding criminal intent and association—for fear that they might lead to uncharted, and potentially dangerous, waters. Some expressed that this resultant 'chill' would inalterably jeopardize the attorney-client relationship, while others predicted that the defense bar would become increasingly less willing to represent alleged terrorists due to the very real potential of being subjected to criminal prosecution."); Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 16 (2003) (stating that the message that the indictment of Lynne Stewart sent to lawyers was "direct and unambiguous: represent accused terrorists and you too may be arrested," asserting that the 2001 amendments to 28 C.F.R. § 501.3 "are clearly an attempt to intimidate lawyers into not representing a specific class of defendants and to distract the public from focusing on existing flaws in terrorism intelligence gathering," and concluding that "[c]riminalizing Stewart's alleged violations of special administrative measures evidences Ashcroft's intention to intimidate other lawyers from representing politically outspoken or controversial clients. The true motivation behind Lynne Stewart's indictment is clearly evident. It is an attempt by the Attorney General to terrorize the defenders of justice with hopes of preventing them from protecting that which the government claims it is fighting to secure: the continued existence of a democratic American way of life."); Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375, 403 (2005) (stating that the "conviction of Lynne Stewart . . . serves as a chilling reminder that advocacy for unpopular defendants can have serious consequences."); Alissa Clare, *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, 651–52, 662–64, 666–68 (2005) (discussing how Stewart's conviction will chill zealous advocacy and legal representation for accused terrorists, and concluding that "Stewart's case should make all attorneys sit up and take notice. . . . [A]ttorneys will decline representation of unpopular defendants altogether. But maybe that's the point."); Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1254–55 (2003) ("The government's monitoring of Lynne Stewart's conversations with her cli-

ent, communications which should have been protected, poses a threat to the vitality of the attorney-client privilege and the principles that undergird it. Her indictment will, and in all likelihood was designed to, deter lawyers from representing unpopular clients, which imperils the very fabric of our constitutional system of criminal justice. . . . Ashcroft's indictment of Lynne Stewart, based upon her alleged violation of special administrative measures she was forced to sign in order to communicate with her client, will have a chilling effect on attorneys who may otherwise represent people facing political crimes in this emotionally-charged historical period."); Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 476 n.172 (2009) (stating that "lawyers put themselves at risk when representing politically unpopular defendants and abiding by their clients' wishes") (citing to Richard Acello, *Stewart Conviction: A Big Chill?*, 4 ABA J. EREP (2005)); Kevin R. Johnson, *Civil Liberties Post-September 11: A Time of Danger, a Time of Opportunity*, 2 SEATTLE J. FOR SOC. J. 3, 7 (2003) (describing how actions by the federal government in the aftermath of September 11, 2001 have "unquestionably chilled the attorneys representing detainees," and stating that "Stewart's indictment could not help but strike fear into the hearts of the attorneys seeking to provide legal assistance to alleged terrorists."); Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 14 CORNELL J.L. & POL'Y 377, 401 (2006) (stating that "[a]fter the Lynne Stewart conviction, defense attorneys may be tempered in their advocacy pursuit by the looming threat of criminal liability."); Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L.J. 167, 182 (2003) (discussing Lynne Stewart's case and commenting that "the threat of prosecution is surely intimidating to criminal defense lawyers."); Tom D. Snyder, Jr., *A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and Their Impact on the Attorney-Client Privilege*, 50 LOY. L. REV. 439, 450 (2004) (suggesting that Lynne Stewart's case raises the possibility that defense lawyers will "find themselves the subject of a criminal indictment supported in part by conversations with their own clients."); Tom Stephens, *Civil Liberties After September 11: Background of a Crisis*, 61 GUILD PRAC. 4, 10 (2004) (stating that the prosecution of Lynne Stewart sent "a clear message to other lawyers about the consequences of defending fundamental rights in the context of today's political climate."); Marjorie Cohn, *First They Came for Lynne Stewart*, 16(9) PRISON LEGAL NEWS, Sept. 2005, at 14, 15 (arguing that "Lynne Stewart's indictment, and conviction, will also chill attorneys from taking on cases of unpopular clients."); William Glaberson, *Lawyers Take Uneasy Look at the Future*, N.Y. TIMES, Feb. 11, 2005, at B8 (discussing how for lawyers who take politically unpopular cases, Lynne F. Stewart's conviction "was a warning that they could be prosecuted, too"); Andrew P. Napolitano, Op-Ed., *No Defense*, N.Y. TIMES, Feb. 17, 2005, at A27 ("No doubt the outcome of this case will have a chilling effect on lawyers who might represent unpopular clients. Since 9/11 the federal government's message has been clear: if you defend someone we say is a terrorist, we may declare you to be one of them, and you will lose everything."); Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A14 ("Across the country . . . lawyers who represent suspects in terrorism-related investigations complain that their ability to do their jobs is being hindered by the suspicion that the government is listening in, using the eavesdropping authority it obtained—or granted itself—after the Sept. 11 terrorist attacks," and noting that some lawyers "have found themselves under criminal investigation in recent years as a result of terrorism-related cases."); Margot Adler, *Jury Deliberates Case of Lawyer Accused of Helping Terrorist* (NPR radio broadcast Jan. 13, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4282198> (discussing the "chilling effect" that Lynne F. Stewart's case on the legal profession, as well as attorney Gerald Lefcourt's position that the government's purpose in prosecuting Stewart is to warn lawyers not to defend terrorist and other unpopular clients); Elaine Cassel, *The Lynne Stewart Case: When Representing an Accused Terrorist Can Mean the Lawyer Risks Jail*,

Too, COUNTERPUNCH (Oct. 12, 2002), <http://www.counterpunch.org/cassel1012.html> (claiming that Stewart's case "sends a clear warning to attorneys: Don't represent accused terrorists, or you could be our next suspect," and surmising that it may "make conscientious lawyers worry that they will not be able to do their job properly with such clients. A lawyer may wonder if she can be zealous when torn between avoiding her own prosecution and representing his client."); Elaine Cassel, *The Lynne Stewart Guilty Verdict: Stretching the Definition of "Terrorism" to Its Limits*, FINDLAW (Feb. 14, 2005), <http://writ.news.findlaw.com/cassel/20050214.html> ("Defense attorneys who represent alleged terrorists—or even detainees who are merely suspected of some connection to terrorism—now know that the government may listen in on their attorney-client communications. They also know that this eavesdropping may give rise to evidence that may be used in their *own* prosecution for terrorism if they cross the imaginary line drawn by the government."); Nat Hentoff, *High Noon for Ashcroft, Stewart, and the Defense Bar*, VILLAGE VOICE, Apr. 16, 2002, <http://www.villagevoice.com/2002-04-16/news/high-noon-for-ashcroft-stewart-and-the-defense-bar/> (stating that Stewart's indictment will "create a huge, chilling effect—indeed, a glacial effect—on attorneys approached by highly controversial clients to represent them" (quoting Jonathan Turley)); Sheilah Kast & Mimi Wesson, *Jailed Cleric's Lawyer Guilty* (NPR radio broadcast Feb. 13, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4497372> ("[M]any in the criminal defense community expressed the fear that [the prosecution] was intended as an effort to chill the efforts of zealous defense attorneys . . . [A]lthough some are still characterizing it as a persecution of a devoted attorney, others are willing to see it as a warning only that attorneys who represent defendants accused of terroristic crimes should be careful to observe the limits of their professional role" (quoting Mimi Wesson)); Robert Smith, *Lawyer Found Guilty in Aiding Terrorist Client* (NPR radio broadcast Feb. 11, 2005), available at <http://npr.org/templates/story/story.php?storyId=4494792> (describing Stewart's fear that her case has had a "chilling effect on defense lawyers around the country"); cf. Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 975 (2010) (concluding that "the Stewart case demonstrates that, in politically charged cases, the most powerful message to the public is sent when a conviction is obtained. Prosecutors who heed this message will be cautious in their charging decisions and make sure that their allegations are based on evidence that will very likely prevail at trial. Additionally, the Stewart case demonstrates that—in terms of public perception, at least—the government's message is best sent by way of a conviction, not an indictment or the Attorney General's interaction with the media when charges are brought"); Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When is it Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1883 (2009) (concluding that "[t]he case of Lynne Stewart should not engender fear that the criminal defense bar will be prevented from performing its important role in society by the looming threat of prosecution under the 'material support' provision of the USA Patriot Act because the Stewart case was a rare instance of an attorney getting too involved in her client's illegal activities. The mere fact of representing an unpopular client will *not* implicate a criminal defense attorney, as that would be a violation of the Sixth Amendment"); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 887 (2009) (discussing the "deterrent value" of Lynne Stewart's prosecution); Editorial, *Over the Line*, WASH. POST, Feb. 18, 2005, at A28 (claiming that "[Stewart's] conviction will chill defensework only to the extent that lawyers confuse defending terrorists with participating in their illegal activities"); see generally Lawrence S. Goldman, *Martha and Lynne: The Stewart Sisters and the Expansion of White Collar Criminal Prosecution*, THE CHAMPION, Aug. 2008 at 8, available at <http://nacdl.org/champion.aspx?id=845> (comparing the prosecutions of Martha Stewart and Lynne Stewart and stating that while "sentences in the white collar area probably have more general deterrent effect than in others . . . the recent emphasis on prosecuting white collar individuals and corporations for acts pre-

Stewart's case represents the most direct and most publicized attack on radical lawyering.⁶ What I wish to suggest in this article is that three recent developments (not including Stewart's new sentence) present—or have the potential to present—serious challenges to all stripes of cause lawyering.⁷ Only one of these developments—*Holder v. Humanitarian Law Project*,⁸ which was decided at the end of the 2009-10 Supreme Court term—involved designated terrorists or terrorist organizations.⁹ The other case, *Citizens United v. Federal Election Commission*,¹⁰ decided earlier in the 2009-10 term, struck down a provision of the McCain–Feingold Act and held that corporate funding of independent political broadcasts in candidate elections could not be limited under the First Amendment.¹¹ The third development is a ballot initiative in Oklahoma—a measure approved by voters in the November 2010 election requiring that courts rely on federal or state law when handing down decisions and prohibiting them from using international law or Sharia law (Islamic law) when making rulings.¹² This

viously not considered criminal (or sometimes even wrong) and on substantially increasing white collar penalties [is] both unfair and unlikely to be effective”).

⁶ See Avi Brisman, *Reframing the Portrait of Lynne F. Stewart*, 12 J.L. SOC'Y 1 (2011) (arguing that the impact of Stewart's case extends beyond the specifics of her representation and the defense of individuals accused of terrorism).

⁷ While the terms “radical lawyering” and “cause lawyering” are sometimes used interchangeably, see, e.g., Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 33 (Austin Sarat & Stuart Scheingold eds., 1998), some scholars distinguish “radical lawyering” from other types of “cause lawyering.” See, e.g., Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 215–16 (1998) (describing how “radical cause lawyers” endeavor to make changes in the basic structures of society and join forces with the social movements and their transformative interests and values). I conceive of “cause lawyering” rather capaciously and treat “cause lawyer” as an umbrella term that includes “radical lawyers,” as well as “proceduralist” lawyers who resemble mainstream or traditional lawyers in their belief in the fundamental soundness of the legal system, and who seek to maintain law's legitimacy by providing “equal justice.” See Thomas M. Hilbink, *You Know the Type. . . . Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 661, 665–73 (2004). In my article, I deliberately employ the term “cause lawyer” so as to include both “radical lawyers” and those who consider themselves “cause lawyers” simply because they work to serve “unmet legal needs” (i.e., represent clients who cannot afford a lawyer)—the least “transgressive” of cause lawyers. See Scheingold & Bloom, *supra* at 213–16.

⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

⁹ The U.S. Secretary of State has the power to designate an organization as a foreign terrorist organization. 8 U.S.C. § 1189 (2006).

¹⁰ *Citizens United v. Federal Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

¹¹ *Id.*

¹² Oklahoma State Election Board, State Questions for General Election, State

article argues that these three developments, while different and seemingly unrelated,¹³ when considered collectively, illustrate new challenges to “cause lawyering.” But first, a couple of comments about the ways in which “cause lawyering” has been conceptualized are in order.

II. TYPOLOGIES AND CONTINUA OF CAUSE LAWYERING

Although “cause lawyering” presents definitional problems—in part because it is practiced in different ways for the benefit of different groups¹⁴—it is “frequently directed at altering some aspect of the social, economic, and political status quo”¹⁵ and

Question No. 755 (Nov. 2, 2010), available at http://www.ok.gov/elections/documents/sq_gen10.pdf. See A. G. Sulzberger, *Voters Face Decisions on a Mix of Issues*, N.Y. TIMES, Oct. 6, 2010, at A17. See also Bobby Eberle, ‘Save Our State’ vs. Islam in Oklahoma, GOPUSA THE LOFT (Oct. 21, 2010, 7:13 AM), http://www.gopusa.com/theloft/2010/10/21/save_our_state_vs_islam_in_oklahoma; *Oklahoma Lawmakers Seek Voter Backing to Ban Shariah from Courts*, FOXNEWS.COM, June 15, 2010, <http://www.foxnews.com/politics/2010/06/15/oklahoma-lawmakers-seek-voter-backing-ban-shariah-courts>.

The word for Islamic religious law has been transliterated into English in a number of different ways, including Sharia, Shariah, Shari‘a, Shari‘ah, Sha‘aria, and Sha‘ria, among others. As someone who does not speak Arabic, I cannot profess to know which form is most accurate. Because the ballot title that Oklahoma voters saw on their ballot referred to Islamic law as “Sharia Law,” I will use this form throughout this article. Doing so should not, in any way, be construed as support for the measure—which should be obvious based on my discussion in Part IV *infra*.

¹³ Floyd Abrams discusses *Humanitarian Law Project v. Holder* in the same essay as *Citizens United*, but—and to my disappointment—does not integrate his analyses or think more broadly about their (combined) implications. Instead, he simply describes the case as one of a number of First Amendment cases decided during the October 2009 term and concludes, “[w]hen I think of *Citizens United*, I think of *Citizens United*. I think of the political documentary it produced, one designed to persuade the public to reject a candidate for the presidency. And I ask myself a question: if that’s not what the First Amendment is about, what is?” Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77, 88 (2010).

¹⁴ See *supra* note 7. See also Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 5 (Austin Sarat & Stuart Scheingold eds., 1998) (stating that “providing a single, cross-culturally valid definition of the concept [of cause lawyering] is impossible” and acknowledging that “cause lawyering is a contested concept”); Terence C. Halliday, *Politics and Civic Professionalism: Legal Elites and Cause Lawyers*, 24 LAW & SOC. INQUIRY 1013, 1015 (1999) (describing “cause lawyering” as “a portmanteau concept with relatively little denotative precision”); Hilbink, *supra* note 7, at 660 (stating that “[d]efining cause lawyering is a massive challenge”). See generally Raymond Michalowski, *All or Nothing: An Inquiry into the (Im)Possibility of Cause Lawyering Under Cuban Socialism*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 523, 543 (Austin Sarat & Stuart Scheingold, eds. 1998) (urging a distinction between “cause lawyering as a broad category of attorney activism” (emphasis added) and “cause litigating as a specific activist strategy” (emphasis in original)).

¹⁵ Sarat & Scheingold, *supra* note 14, at 4. See also Hilbink, *supra* note 7, at 659

[c]haracterized by a willingness to challenge mainstream representations of professionalism by, among other ways, taking sides in social conflicts. In so doing, cause lawyers, in effect, become advocates not only, or primarily, for their clients but for causes with which the clients' cases are associated—and with which the lawyer identifies.¹⁶

Perhaps because of the definitional challenges of “cause lawyering” and the ambiguity surrounding the term, scholars have attempted to craft “cause lawyering” typologies, spectra, and paradigms.

Law professor Thomas M. Hilbink, for example, identifies a tripartite typology: “proceduralist” lawyering (which resembles mainstream or traditional lawyering, reflects a belief in the fundamental soundness of the legal system, and seeks to maintain law’s legitimacy by providing “equal justice”);¹⁷ “elite/vanguard” lawyering (which treats “law as a superior form of politics” and believes that “law has the capacity to render substantive justice” and that through test-case litigation and substantive law reform one can change society);¹⁸ and “grassroots” (which views law as “just another form of politics and is skeptical of law’s utility as a tool of social change” and thus seeks to promote economic, legal, political and social transformation by working closely and in solidarity with social movements).¹⁹

Political scientist John Kilwein introduces a “continuum of lawyering styles” that includes “individual client lawyering,” “impact lawyering,” “mobilization lawyering,” and “client voice lawyer-

(describing “cause lawyers” as attorneys who “deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources”).

¹⁶ Scheingold & Bloom, *supra* note 7, at 209. See also Michalowski, *supra* note 14, at 523, 542 (quoting Sarat and Scheingold for the belief that cause lawyering involves “a self-conscious choice to give priority to causes rather than to client service,” and noting that cause lawyering is normally understood to “take[] place outside of the state when attorneys deploy litigation in support of social movements seeking to pressure the state to grant some rights claim.”). See generally Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 317, 333 (Austin Sarat & Stuart Scheingold eds., 1998) (noting the criticism that cause lawyers are “lawyers without clients” (citation omitted)); Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 118, 119 (Austin Sarat & Stuart Scheingold eds., 1998) (explaining that lawyers “are *expected* to defend their clients in a vigorous and partisan manner while remaining neutral to their clients’ objectives, activities, and identities” (emphasis added), but that “[t]he two things that distinguish the left-activist project are its fundamental challenges to the society and to the profession.”).

¹⁷ See Hilbink, *supra* note 7, at 665–73.

¹⁸ *Id.* at 673–81.

¹⁹ *Id.* at 681–90.

ing.”²⁰ The goal of “individual client lawyering,” Kilwein explains, is to provide legal services to those individual clients who might otherwise be without representation. Such lawyers tend to view the basic structure of the justice system as being essentially equitable and impartial, and frequently consider their work to be the “fine-tuning needed to make the justice system and society operate more fairly.”²¹ In contrast, “impact lawyering,” usually conducted through class action suits or strategically chosen individual cases, seeks to remedy conditions in society that affect a group (such as the poor) “to change policy, law, and social systems in such a way that the status of marginalized groups [i]s improved.”²² In “mobilization lawyering,” the lawyer attempts to “establish a new dialogue with her or his client and demythologize the myth of legal efficacy.”²³ Here, lawyers “do what they can for their clients within the existing legal structure” and “let clients know that the efficacy of traditional legal services is severely limited.”²⁴ The goal with “mobilization lawyering” is to try to work to change “the hegemonic structure that adversely affects the poor” by giving “clients greater class consciousness, a recognition that they are part of an oppressed group in society with a history.”²⁵ The hope is that “[c]lients would be made aware that they are part of a greater group whose members suffer similar problems as a result of the hegemonic structure of society. Ideally, similarly situated clients would develop a dialogue that would eventually lead to a unified mobilization of clients.”²⁶ Like “mobilization lawyering,” “client voice lawyering”—Kilwein’s fourth category—attempts to empower the client further and eliminate the hierarchical differences in the client-lawyer relationship. But “client voice lawyering” endeavors to go further than “mobilization lawyering.” As Kilwein explains, “[i]n a parallel space separated from the structured world of litigation, ‘clients could speak their own stories of suffering, accountability and change.’ This dialogue would allow clients to learn about themselves and people like them, about the (in)efficacy of litiga-

²⁰ John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 181, 183–86 (Austin Sarat & Stuart Scheingold eds., 1998).

²¹ *Id.* at 183–84, 187.

²² *Id.* at 189.

²³ *Id.* at 185.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Kilwein, *supra* note 20. Kilwein also regards the “mobilization lawyer” as one who “foster[s] client-community dialogue, thereby aiding the expansion of class mobilization.” *Id.*

tion, and the use of power”²⁷

Political scientists Stuart Scheingold and Anne Bloom, to offer a third example, present a “transgressive continuum” (or “continuum of transgressive legal practice”) with a “conventional end” and a “transgressive end.”²⁸ They situate “cause lawyering directed toward serving *unmet legal needs*” (defined in terms of clients who cannot afford a lawyer) at the “conventional end” and “radical cause lawyering” (which endeavors to make changes in the basic structures of society and join forces with the social movements and their transformative interests and values) and post-structurally-inspired “critical cause lawyering” (which focuses less on large-scale transformative politics than on rejecting hierarchy at micro-sites of power, e.g., the workplace, family, community, lawyer-client relationship) at the “transgressive end.”²⁹ In between “unmet legal needs” and “radical-critical,” Scheingold and Bloom place “civil liberties” and “civil rights” lawyering (which is court-focused and seeks to protect and/or extend legal and constitutional rights) and “public policy” cause lawyering (which is conducted in legislature and administrative agencies and which blurs the law-politics distinction, advancing a policy agenda identified by the lawyer(s)).³⁰

Without passing judgment on these typologies—or on those not mentioned—I lean more heavily in this article on the rich continuum offered by Scheingold and Bloom to assess the impact of *Holder v. Humanitarian Law Project*, *Citizens United v. Federal Election Commission*, and Oklahoma’s “Sharia Law Amendment” on cause lawyering. In the parts that follow, I suggest that each of these developments presents a challenge for cause lawyers—with *Humanitarian Law Project* and Oklahoma’s “Sharia Law Amendment”

²⁷ *Id.* at 186 (quoting Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for the Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 546 (1987–88)). I must confess that the distinction between “mobilization lawyering” and “client voice lawyering” is a bit difficult to discern—or, at least, Kilwein does not adequately articulate what “client voice lawyering” endeavors to achieve that “mobilization lawyering” does not or cannot. But Kilwein’s discussion in his section on “client voice lawyering” of the troubles lawyers encounter when representing the poor is helpful for my discussion of the potential impact of Oklahoma’s “Sharia Law Amendment” in Part V *infra*.

²⁸ Scheingold & Bloom, *supra* note 7, at 213.

²⁹ *Id.* at 214–16.

³⁰ *Id.* at 214–15. In *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Cause Lawyering*—his chapter in *Cause Lawyering: Political Commitments and Professional Responsibilities*—Scheingold discusses “left-activist lawyering” and explains that “[u]nlike the traditional civil liberties lawyer, who will defend legal and constitutional principles—free speech for Nazis, fair trials for right-wing terrorists, and so forth—left-activists narrow their conception of representation to political allies.” Sarat & Scheingold, *supra* note 14, at 128.

introducing new obstacles to a range of cause lawyers, and *Citizens United* creating new impediments to, as well as new possibilities for, “public policy cause lawyering.”

III. HUMANITARIAN LAW PROJECT AND THE CRIMINALIZATION OF PEACEMAKING

In *Humanitarian Law Project v. Holder*, the Supreme Court upheld the federal statute that makes it a crime to provide “material support” to foreign terrorist organizations—including “expert advice or assistance,” “training,” “personnel,” or “service”—even if such help takes the form of support for the humanitarian and political activities of the organization, legal training for peacefully resolving conflicts, and political advocacy.³¹ Humanitarian Law Project (HLP)—a non-profit organization (with consultative status at the United Nations) “devoted to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights law and humanitarian law”³²—wanted to train members of the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) to use international law to resolve disputes peacefully.³³ HLP challenged the constitutional-

³¹ 130 S. Ct. 2705 (2010). For a concise overview of the procedural history of the case and the Supreme Court opinion, see *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 259–69 (2010); *Holder v. Humanitarian Law Project* (08-1498), CORNELL LAW SCHOOL LEGAL INFORMATION BULLETIN, <http://www.topics.law.cornell.edu/supct/cert/09-89> (last visited Mar. 17, 2011). See also Renee Newman Knake, *The Supreme Court’s Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1513–16 (2010); Patricia Millett, Kevin R. Amer, Jonathan H. Eisenman & Josh N. Friedman, *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 20–23 (2010); Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 22, 2010, at A26; Editorial, *Terrorism and Free Speech*, N.Y. TIMES, Feb. 23, 2010, at A26; John Farmer Jr., Op-Ed., *What Does it Take to Aid a Terrorist?*, N.Y. TIMES, Feb. 23, 2010, at A27; Adam Liptak, *Before Justices, First Amendment and Aid to Terrorists*, N.Y. TIMES, Feb. 24, 2010, at A15; Adam Liptak, *Justices Uphold a Ban on Aiding Terror Groups*, N.Y. TIMES, June 22, 2010, at A1; Adam Liptak, *Right to Free Speech Collides with Fight Against Terror*, N.Y. TIMES, Feb. 11, 2010, at A18; Tony Mauro, *Justices Uphold Law Criminalizing ‘Material Support’ for Terror Groups*, N.Y.L.J., June 22, 2010, at 1; Rebecca Vernon & Frederick Wu (James McConnell ed., 2010), *Humanitarian Law Project v. Holder* (09-89).

³² HUMANITARIAN LAW PROJECT, <http://hlp.home.igc.org> (last visited Mar. 17, 2011).

³³ See Adam Tomkins, *Criminalizing Support for Terrorism: A Comparative Perspective*, 6 DUKE J. CONST. L. & PUB. POL’Y 81, 82 (2010) (explaining that HLP wanted to “teach PKK members to petition the United Nations and other representative bodies for relief; and they wished to engage in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka.”). It bears mention that by the time the case reached the Supreme Court, the LTTE had been defeated militarily in Sri Lanka. The Court thus noted that “helping the LTTE negotiate a peace agreement with Sri Lanka appears to be moot [W]e do not consider the application of § 2339B to those

ity of the statute, 18 U.S.C. § 2339B, which makes it a federal crime to “knowingly provid[e] material support or resources to a foreign terrorist organization,”³⁴ on two grounds: 1) it “violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their provision of material support to the PKK and the LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations;”³⁵ and 2) the statute was impermissibly vague under the Due Process Clause of the Fifth Amendment. The Supreme Court disagreed on both grounds and expressed concerns about the fungibility of money and terrorist organizations’ ability to exploit and manipulate the well-intended support of organization such as HLP: “[m]aterial support’ is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”³⁶

Writing about the intersection of “attorney regulation” and free speech in the context of *Humanitarian Law Project* and *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*—which involved a challenge to the bankruptcy regulation that prohibits lawyers from offering advice about the accumulation of additional debt in the contemplation of filing for bankruptcy³⁷—Professor Renee Newman Knake asserts:

[T]he Supreme Court’s treatment of this federal statutory con-

activities here.” 130 S. Ct. at 2717. See Steven Lee Myers, *A Kurdish Rebel Softens His Tone for Skeptical Ears*, N.Y. TIMES, Jan. 1, 2011, at A8, for a report on the PKK’s apparent interest in pursuing peace, rather than war.

³⁴ Congress has amended the definition of “material support or resources” on a number of occasions, but at the time of the Court’s ruling, it was defined as follows:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism

18 U.S.C. § 2339B(a)(1) (2006). The authority to designate an entity a “foreign terrorist organization” rests with the Secretary of State, 8 U.S.C. § 1189(a)(1), (d)(4), and the terms “terrorist activity” and “terrorism” are defined in 8 U.S.C. § 1182(a)(3)(B)(iii) and 22 U.S.C. § 2656f(d)(2), respectively.

³⁵ 130 S. Ct. at 2714.

³⁶ *Id.* at 2725.

³⁷ 130 S. Ct. 1324 (2010).

straint on attorney advice may very well have significant ramifications for lawyers and clients. The results of these cases may have considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information. The Supreme Court's ruling in these cases also may adversely impact the ability of attorneys to offer advice in other areas of law, for an affirmation of these statutory restrictions on legal advice potentially emboldens Congress to impose similar restraints in other areas of law.³⁸

For Knake, an attorney's ability to deliver factual, full, and frank legal guidance is integral to the attorney-client relationship, and the cases of *Milavetz* and *Humanitarian Law Project*, she argues, will have "considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information."³⁹ While Knake is worried about the impact of these cases on clients specifically seeking guidance about bankruptcy or peace-making activities—and about how attorneys should negotiate these limits on the delivery of legal advice with their established ethical duties—she has a larger concern: Congressional involvement in the attorney-client relationship.⁴⁰ According to Knake, the First Amendment rights of lawyers and clients are under attack and the decisions in *Milavetz* and *Humanitarian Law Project* may embolden Congress to "legislate away the lawyer's ability to advise her client" in other areas of the law.⁴¹

Knake's comments illuminate the impact that *Humanitarian Law Project* may have on "individual client lawyering" (to use Kilwein's category) or "cause lawyering directed toward serving unmet legal needs" (to use Scheingold and Bloom's). But because the case essentially criminalizes individual, organizational, and non-state-sponsored peacemaking by prohibiting lawyers from working with designated foreign terrorist organizations to bring about peace, it may affect more "transgressive" lawyers who often share some of the interests, values, and perspectives of their clients.⁴² As noted above, "radical cause lawyering" endeavors to make changes

³⁸ Knake, *supra* note 31, at 1516.

³⁹ Renee Newman Knake, *Contemplating Free Speech and Congressional Efforts to Constrain Legal Advice*, 37 RUTGERS L. REC. 12, 19 (2010).

⁴⁰ *Id.* at 16–17, 19.

⁴¹ *Id.* at 16–17.

⁴² The extent to which the lawyer shares her client's *goals*, as well as the *means* and *methods* for achieving them, can prove problematic for the lawyer and client. See Brisman, *supra* note 6.

in the basic structures of society, and radical cause lawyers often join forces with the social movements and their transformative interests and values.⁴³ Just as I have explained elsewhere,⁴⁴ I do not intend to suggest here that lawyers who join designated “foreign terrorist organizations” or who engage in “terrorist activities” or who counsel their clients to participate in “terrorism” (however defined)⁴⁵ should avoid the repercussions of their decisions and actions. But the decision in *Humanitarian Law Project* may discourage some cause lawyers who (had) hope(d) to use international human rights law to bring about social and political change because the case effectively turns would-be peacemakers into criminals and places the ability to resolve conflicts peacefully solely in the hands of the federal government and its approved-of agents. Thus, to some extent, *Humanitarian Law Project* is really a case about the scope of State power—a case that essentially shows a lack of faith in individuals and groups (to resolve conflicts), and a belief that peaceful resolution to disputes must be according to/within State-defined parameters.⁴⁶ Just as the State has had a monopoly over the response to crime,⁴⁷ it now appears to have similar control over

⁴³ See Scheingold & Bloom, *supra* note 7, at 216.

⁴⁴ Avi Brisman, *Rethinking the Case of Matthew F. Hale: Fear and Loathing on the Part of the Illinois Bar Committee on Character and Fitness*, 35 CONN. L. REV. 1399, 1424 (2003) (concluding that “a bar applicant who belongs to a terrorist cell or who claims to support terrorist activities would most likely be rejected based on the rule of [*Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971)], a bar applicant who supports a terrorist’s criticisms of the U.S. government, but not the violent means, should not be denied admission.”).

⁴⁵ For a discussion of the moniker “terrorism,” and the confusion generated by the terms “eco-terrorism,” which is often used by governmental officials and corporate officers to refer to actions taken in the name of the Earth and for the sake of environmental protection—actions more appropriately labeled “ecodefense,” “ecotage,” or “monkeywrenching”—and “environmental terrorism,” the name frequently given to acts that use the environment as a tool for indiscriminate violence or threatened violence to large numbers of innocent civilians for the purpose of causing disruption, panic, harm and death (such as tampering with a food or water supply or the release of nuclear material or biological weapons), see Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 SEATTLE J. FOR SOC. JUST. 727, 754–60 (2008).

⁴⁶ See generally Avi Brisman, “*Docile Bodies*” or *Rebellious Spirits: Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals*, 43 VAL. U. L. REV. 459 (2009) (describing how the State retains its relevance and flexes its muscle through “endless” forms of talking and conversation).

⁴⁷ See Nils Christie, *Conflicts as Property*, 17 BRITISH J. CRIMINOLOGY 1, 3 (1977) (describing how “[v]ictims of crime have . . . lost their rights to participate. . . . [C]onflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people’s property. . . . [I]n a criminal proceeding . . . the proceeding is converted from something between the parties into a conflict between one of the parties and the state.”); Rick Sarre, *Restorative Justice: Translating the Theory into Practice*, 1 U. NOTRE DAME AUSTL. L. REV. 11, 11–12 (1999)

peacemaking. Cause lawyers may (come to) regard *Humanitarian Law Project* as a reflection of law—and lawyers’—limited potential to “repair the world.”⁴⁸

IV. *CITIZENS UNITED* AND CORPORATE FREE SPEECH

In *Citizens United v. Federal Election Commission*, the U.S. Supreme Court struck down a provision of the McCain–Feingold Act and held that corporate funding of independent political broadcasts in candidate elections could not be limited under the First Amendment.⁴⁹ The Court’s determination that corporations have the same free speech rights as individuals reversed decades of precedent and granted corporations the right to spend freely in candidate elections.⁵⁰ Not surprisingly, the case drew much interest from election law and campaign finance law specialists, as well as from First Amendment jurisprudence experts,⁵¹ and generated much attention in the 2010 midterm election season about the role and influence of money on elections.⁵² Even if one does not believe

(discussing how victims used to take the lead in organizing communal reactions to law-breaking and how now, the State takes action against offenders).

⁴⁸ See Brisman, *supra* note 6 (quoting GEOFFREY C. HAZARD ET AL., *THE LAW & ETHICS OF LAWYERS* 1064 (3d ed. 1999)).

⁴⁹ 130 S. Ct. 876.

⁵⁰ *Id.* *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003).

⁵¹ See, e.g., Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 *HASTINGS CONST. L.Q.* 131 (2010); David Solan, Comment, *In the Wake of Citizens United, Do Foreign Politics Still Stop at the Water’s Edge?*, 19 *TUL. J. INT’L & COMP. L.* 281 (2010); ADAM SKAGGS, *BUYING JUSTICE: THE IMPACT OF Citizens United on Judicial Elections*, Brennan Center for Justice (2010), available at <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1>.

⁵² See, e.g., Jill Abramson, *Return of the Secret Donors*, *N.Y. TIMES*, Oct. 17, 2010, at WK1; Matt Bai, *This Donation Cycle Catches G.O.P. in the Upswing*, *N.Y. TIMES*, Oct. 21, 2010, at A21; Jan Witold Baran, Op-Ed, *Stampede Toward Democracy*, *N.Y. TIMES*, Jan. 26, 2010, at A23; Adam Cohen, Op-Ed, *A Century-Old Principle: Keep Corporate Money Out of Elections*, *N.Y. TIMES*, Aug. 11, 2009, at A20; Ronald Dworkin, *The “Devastating” Decision*, *N.Y. REV. BOOKS*, Feb. 25, 2010, at 39; Brett Michael Dykes, *Left and Right United in Opposition to Controversial SCOTUS Decision*, *YAHOO!NEWS* (Feb. 17, 2010) http://news.yahoo.com/s/ynews/ynews_ts1137 (commenting on the question of the influence of money and campaign spending in elections); Editorial, *A Jury Convicts Tom DeLay*, *N.Y. TIMES*, Nov. 25, 2010, at A38; Editorial, *After Citizens United*, *N.Y. TIMES*, Apr. 20, 2010, at A20; Editorial, *A Welcome, if Partial, Fix*, *N.Y. TIMES*, Feb. 17, 2010, at A22; Editorial, *The Court’s Blow to Democracy*, *N.Y. TIMES*, Jan. 22, 2010, at A30; Editorial, *The Court and Campaign Finance*, *N.Y. TIMES*, Sept. 11, 2009, at A26; Editorial, *The Court and Free Speech*, *N.Y. TIMES*, Apr. 24, 2010, at A18; Editorial, *The Secret Election*, *N.Y. TIMES*, Sept. 19, 2010, at WK8; Editorial, *Stealth Money*, *N.Y. TIMES*, Oct. 18, 2010, at A34; David D. Kirkpatrick, *A Buck for Your Vote, Sir? (Prove It)*, *N.Y. TIMES*, Jan. 24, 2010, at WK1; David D. Kirkpatrick, *Lobbies’ New Power: Cross Us, and Our Cash Will Bury You*, *N.Y. TIMES*, Jan. 22, 2010, at A1; Adam Liptak, *Day at Supreme Court Augurs a Victory on*

that *Citizens United* was wrongly decided—and I think it was⁵³—one might still do well to note its impact on one aspect of cause lawyering.

In *Speaking Law to Power: Occasions for Cause Lawyering*, Richard Abel observes that much scholarly attention on cause lawyering has centered on litigation.⁵⁴ Although Abel recognizes the role of litigation,⁵⁵ he focuses on the confrontation between law and state power⁵⁶—on “how the structure, process, and personnel of legal institutions shape the interaction between law and power.”⁵⁷ Abel’s discussion of the electoral process is most relevant here. According to Abel, “[p]ower inequality assumes many guises”—one of which is manifested or reflected in the “differential ability to participate in and influence the polity: the size and organization of interest groups, their material resources and political sophistication, access to the media, ideological position, and incumbency.”⁵⁸ For Abel, “[b]ecause elections are quintessentially political, law plays a lim-

Political Speech, but How Broad?, N.Y. TIMES, Sept. 10, 2009, at A28; Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 27, 2010, at A16; Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1; Adam Liptak, *Justices Turn Minor Movie Case into a Blockbuster*, N.Y. TIMES, Jan. 23, 2010, at A13; Adam Liptak, *Rare Session for Supreme Court*, N.Y. TIMES, Jan. 21, 2010, at A22; Adam Liptak, *Viewing Free Speech Through Election Law Haze*, N.Y. TIMES, May 4, 2010, at A20; Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. TIMES, Oct. 18, 2010, at A10; Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1; ; Jeffrey Toobin, *Without a Paddle*, THE NEW YORKER, Sept. 27, 2010, at 34, 40; Ian Urbina, *Consequences for State Laws in Court Ruling*, N.Y. TIMES, Jan. 23, 2010, at A1; see generally David Brooks, *Don't Follow the Money*, N.Y. TIMES, Oct. 19, 2010, at A31.

⁵³ Although an in-depth discussion of *Citizens United* is outside the scope of this article, I will use this occasion to note that I agree with Justice Stephen Breyer who, in speaking more generally about government regulation of certain activities affecting speech (e.g., campaign finance, corporate advertising about matters of public concern, and drugstore advertising that informs the public about the availability of custom-made pharmaceuticals), has written that the First Amendment should be read “not in isolation but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions.” STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 39 (2005).

⁵⁴ Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 69, 70 (Austin Sarat & Stuart Scheingold eds., 1998).

⁵⁵ Abel points out that “[c]ause lawyers may concentrate on litigation in part because their skills are essential; but the judicial forum is particularly attractive to the powerless as well because courts *must* hear every claim and give reasons for their decisions.” *Id.* at 95.

⁵⁶ “Because law constitutes the state, law can reconfigure state power. Because the state usually acts through law, the state can be constrained by law.” *Id.* at 69.

⁵⁷ *Id.* at 70.

⁵⁸ *Id.* at 69.

ited role.”⁵⁹ While the Supreme Court’s decision in *Bush v. Gore*⁶⁰ might have changed the tenor and tone of this statement, Abel is correct that “cause lawyers can use law to structure the competition for political power.”⁶¹ Abel’s assessment, however, takes on new meaning after *Citizens United*.

Abel contends that:

Lawyers can seek to configure districts and voting algorithms to maximize the power of subordinated people and organize the timing and process of elections to increase turnout. They can facilitate participation by new political parties and seek term limits to reduce the advantages of incumbency. Most important, if also most difficult, they can restrain the translation of economic power into political dominance, devising rules limiting campaign contributions, equalizing media access, and prohibiting political activity by government employees⁶²

Cause lawyers still play a role in districting and eligibility to vote.⁶³ But *Citizens United*, which gave corporations the unlimited right to spend money on political candidates, further affirms the correlation between economic power and political dominance. In other words, by holding that corporations have the same free speech rights as individuals, the Court in *Citizens United* further skewed the already differential ability to participate in and influence the polity.⁶⁴ Because *Citizens United* affects cause lawyers’ role with respect to issues concerning limits to campaign contributions and media access, cause lawyers may have to rethink how they use law to structure the competition of political power—if they do at all.

To a large extent, the type of cause lawyering that Abel discusses in his section on the electoral process falls under Scheingold and Bloom’s category of “public policy cause lawyering,” which

⁵⁹ *Id.* at 71.

⁶⁰ 531 U.S. 98 (2000).

⁶¹ Abel, *supra* note 54, at 74.

⁶² *Id.*

⁶³ See *id.* at 72. See generally Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283 (2007) (discussing the impact of criminal disenfranchisement on national, state and local elections, as well as its effect on both felons’ and ex-felons’ home communities and the communities where convicted offenders are incarcerated, arguing for a consideration of criminal disenfranchisement as an “environmental” issue, and suggesting a series of reforms to state criminal disenfranchisement laws and policies).

⁶⁴ See generally Noah Feldman, *What a Liberal Court Should Be*, N.Y. TIMES, June 27, 2010, Magazine at 38, 42 (describing the “antidistortion value”—“the concern that corporations will have a disproportionate effect on elections by providing more money than individuals can.”).

they situate between “unmet legal needs” and “radical-critical” in their “continuum of transgressive legal practice.”⁶⁵ According to Scheingold and Bloom,

Public policy cause lawyering is professionally transgressive, in part, just because it is less likely to be conducted in the courts than in legislatures and administrative agencies. In addition, its objective is to advance a policy agenda *identified by the cause lawyers, themselves*, as in the public interest. Thus, public policy cause lawyering is neither about remedying individual grievances nor even about asserting rights. All of this further attenuates the lawyer-client relationship while at the same time flaunting the profession’s carefully cultivated image of political neutrality.

Whether public policy cause lawyering is politically transgressive depends . . . on how sweeping its aspirations are and on whether it goes through, or attempts to bypass, “normal” politics . . . Typically, however, public policy cause lawyering is more cautious and may well be less politically transgressive than civil rights and civil liberties cause lawyering. This is because a decision to pursue discrete policy goals in the political arena entails reliance on lobbying of legislative, executive and regulatory agencies. Insofar as public policy cause lawyers, thus, decide to play the insiders’ game, they must play it by the insiders’ rules—privileging immediate substantive outcomes and the bargaining necessary to achieve them. In contrast, civil rights and civil liberties lawyers tend to turn to the courts because the other institutions of the state have been unresponsive to their claims.⁶⁶

In the aftermath of *Citizens United*, some cause lawyers may find themselves (once-and-for-all) fed up with efforts at “the conventional end of the continuum”—i.e., trying to reform, rather than transform the system.⁶⁷ “Lawyering at this end of the continuum is . . . about deploying legal practice to get the state, the society and the profession to live up to their established ideals,”⁶⁸ Scheingold and Bloom explain, and some cause lawyers may lose hope (if they have not already) in this possibility after *Citizens United*.

But other cause lawyers may feel that *Citizens United* simply forces them to reorient how they conduct “public policy cause lawyering”—*how* they use law to structure the competition of/for political power (in the electoral process), not *whether* they do so. For

⁶⁵ See Scheingold & Bloom, *supra* note 7, at 215.

⁶⁶ *Id.* (internal footnotes omitted).

⁶⁷ *Id.* at 245.

⁶⁸ *Id.*

example, with the Supreme Court's decision in *Citizens United*, corporations may spend freely in candidate elections; issues regarding the federal law that limits "soft money" donations to political parties remain, however, and in November 2010, the Supreme Court declined to hear a campaign finance case that would have allowed it to clarify aspects of its *Citizens United* ruling regarding "registration and disclosure requirements that apply to political action committees."⁶⁹ Given the rate with which the Roberts Court has ruled for business interests,⁷⁰ cause lawyers may find, then, that *Citizens United* has simply forced them to dig in their heels, rather than abandon ship.

To offer another example, Public Citizen—the national, non-profit consumer advocacy organization—examined disclosure forms filed with the Federal Election Commission (FEC) to determine which groups paid for "electioneering activities" during the 2010 mid-term elections, who funded those groups, and which candidates were supported or attacked by these outside groups.⁷¹ The organization determined that outside groups' contributions "were hidden and concentrated, and that the independent groups pushed their support to conservative candidates."⁷² According to Public Citizen, *ten* groups out of at least 149 independent organizations spending money to influence the midterm elections were responsible for 65% of the \$176.1 million expended by the end of

⁶⁹ See Adam Liptak, *Viewing Free Speech Through Election Law Haze*, N.Y. TIMES, May 4, 2010, at A20; Adam Liptak, *Justices to Weigh Broader Right to Legal Aid*, N.Y. TIMES, Nov. 2, 2010, at A22 (the appeal the Court declined to hear was *Keating v. Federal Election Committee*, 131 S. Ct. 553 (2010)). The case below was *SPEECHNOW.ORG V. FEDERAL ELECTION COMM'N.*, 599 F.3d 686 (D.C. Cir. 2010).

⁷⁰ See Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at 1, 26 (reporting that in the five terms of the Roberts Court, business interests have prevailed 61 percent of the time, compared with 46 percent in the last five years of the Rehnquist Court and 42 percent by all courts since 1953). See generally Feldman, *supra* note 64, at 38, 41 (describing how "constitutional progressives still say that the courts should defer to economic regulation by the government. But the ideal of judicial restraint has been undercut by the selective and opportunistic way in which liberals and conservatives alike have invoked it. And conservatives have once again mastered the art of depicting corporate interests in terms of individual liberties.").

⁷¹ Dorry Samuels and Josh Little, *U.S. Chamber, Other Groups Pour Millions into Campaigns*, PUBLIC CITIZEN NEWS (Public Citizen, Washington, D.C.), Nov./Dec. 2010, at 1, 6. "Electioneering activities" include "electioneering communication" (an advertisement broadcast before an election that "mentions a federal candidate but stops short of advocating a vote for or against the candidate") and "independent expenditures," which "expressly advocate for the victory or defeat of a candidate." Taylor Lincoln, *Disclosure Eclipse: Nearly Half of Outside Groups Kept Donors Secret in 2010; Top 10 Groups Revealed Sources of Only One in Four Dollars Spent*, PUBLIC CITIZEN, Nov. 18, 2010, at 1, 3, <http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf>.

⁷² Samuels and Little, *supra* note 71, at 1, 6.

October 2010—and that corporate money favored Republican candidates by a margin of 10-to-1.⁷³ Given this imbalance, cause lawyers might work to investigate whether various groups have the goal of influencing elections as their primary purpose. If such groups are registered as 501(c)(4) organizations, they would be in violation of tax laws, which preclude such organizations from having political campaign activity as their primary purpose.⁷⁴ “Public policy cause lawyers” might also seek the passage of the DISCLOSE Act (which purportedly would enhance disclosures and disclaimers, as well as prevent foreign entities from influencing the outcome of U.S. elections),⁷⁵ work for the approval of the Shareholder Protection Act, which would mandate shareholder authorization before a public company may make certain political expenditures,⁷⁶ or push for the passage of the Fair Elections Now Act—a bill that would create a public financing system for congressional elections, thereby limiting the influence of big money campaign donations and encouraging candidates with limited resources to run for office,⁷⁷ among other measures.⁷⁸ Ultimately, the personal motivations of the individual lawyer may determine whether the Court’s opinion in *Citizens United* permitting unlimited corporate spending in federal elections is interpreted as a sign of the limitations of liberal legalism (and thus, perhaps, a need for more radical lawyering) or is regarded as creating new possibilities for using law to curb the influence of economic resources on political power.

V. THE OKLAHOMA “SHARIA LAW AMENDMENT” AND THE VIOLENCE OF INTERPRETATION

The Oklahoma International Law Amendment (also known as the Oklahoma “Sharia Law Amendment” and the Oklahoma “Save Our State” Amendment⁷⁹)—a legislatively-referred constitutional

⁷³ *Id.* at 6.

⁷⁴ Under the federal tax code, 501(c)(4) organizations, unlike 501(c)(3) organizations, are not limited in the amount of time or money they can devote to lobbying, and may participate in political campaigns and elections, as long as campaigning is not the organization’s primary purpose. 26 U.S.C. § 501(c)(3), (4) (2010).

⁷⁵ Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010).

⁷⁶ Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).

⁷⁷ Fair Elections Now Act, S. 752, H.R. 1826, 111th Cong. (2010).

⁷⁸ Public Citizen, for example, has called for a constitutional amendment that would overturn the *Citizens United* ruling to clarify that corporations should not be treated as people under the First Amendment. See Samuels and Little, *supra* note 71, at 6.

⁷⁹ Joel Siegel, *Islamic Sharia Law to Be Banned in, Ah, Oklahoma*, ABC NEWS, June 14,

amendment—appeared on the November 2, 2010 general election ballot and presented Oklahomans with the opportunity to amend the Oklahoma Constitution to require courts to rely on federal and state law when deciding cases, and to prohibit them from considering or using international law or Sharia law. The ballot title that voters saw on their ballot read as follows:

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

Shall the proposal be approved?

For the proposal

Yes: _____

Against the proposal

No: _____

The measure passed with broad support—70.08% of 992,594 total votes (or 695,650) were in favor of the proposal.⁸⁰ A lawsuit was filed in the United States District Court for the Western District of Oklahoma immediately after the passage of the measure,⁸¹ and on November 29, 2010, United States District Court Judge Vicki Miles-Lagrange issued an injunction prohibiting state officials from certifying the election results for State Question 755 until the district

2010, <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521&tkw=&tsqshow=> (last visited Sept. 20, 2011).

⁸⁰ Sam Dillon, *Oklahoma—Election Results 2010*, N.Y. TIMES, Nov. 4, 2010, at A13.

⁸¹ See Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, *Muneer Awad v. Paul Zirix*, No. CIV-10-1186-M (W.D. Okla. Filed Nov. 29, 2010), available at <http://www.cair.com/Portals/0/pdf/argument.pdf>.

court could rule on the merits of the case.⁸²

Some might be quick to diminish the significance of the passage of the Amendment and the subsequent injunction barring the law from taking effect in the state because judges in Oklahoma had not been using Sharia law in their decisions prior to the November vote⁸³—indeed, the chief author of the bill even referred to it as a “a pre-emptive strike against Sharia law coming to Oklahoma.”⁸⁴ Thus, putting aside the constitutional issues raised in the lawsuit,⁸⁵

⁸² *Awad v. Zirriax*, No. CIV-10-1186-M, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010). See also Barbara Hoberock, *Injunction Issued on 755*, TULSA WORLD, Nov. 30, 2010, available at http://www.tulsaworld.com/news/article.aspx?subjectid=16&articleid=20101130_16_AI_ULNSbP539600; Tim Talley, *Court Order Blocks Okla. Amendment on Islamic Law*, ASSOCIATED PRESS/YAHOO!NEWS, Nov. 8, 2010, http://news.yahoo.com/s/ap/20101108/ap_on_re_us/us_islamic_law_lawsuit.

⁸³ See Steve Biehn, *SQ 744, 754, and 755 Draw Voters' Interest*, THE ARDMOREITE, Oct. 10, 2010, <http://www.ardmoreite.com/news/x1197813401/SQ-744-754-and-755-draw-voters-interest> (“Since judges in Oklahoma are already bound to follow state and federal law in their courtrooms, critics question why such a measure is even on the ballot. The question does offer voters an outlet to voice their anger at followers of the Muslim faith.”). Compare Editorial, *Our SQ Choices*, THE OKLAHOMAN, Oct. 17, 2010, http://www.newsok.com/our-sq-choices/article/3505493?custom_click=headlines_widget (“This is another feel-good measure that has no practical effect and needn’t be added to the Oklahoma Constitution. The question would prohibit the use of international or Sharia law when cases are decided in Oklahoma courts. As it is, judges exclusively use state and federal law to guide their judicial decision-making. Passing the question might make some politicians happy and make some Oklahomans feel better. That’s all it would do. Voters should reject it as unnecessary.”), and Editorial, *Our Take on the State Questions*, THE ENID NEWS AND EAGLE, Oct. 18, 2010, <http://enidnews.com/opinion/x154637225/Our-take-on-the-state-questions> (“This measure would prohibit the use of international or Sharia law when cases are decided in Oklahoma courts. There is no need for this law because judges exclusively use state and federal law to guide their decisions. This is meant as nothing more than a feel-good measure.”), and Editorial, *State Questions: Only One, SQ 757, Worth Passing*, TULSA WORLD, Oct. 24, 2010, http://www.tulsaworld.com/opinion/article.aspx?subjectid=61&articleid=20101024_61_0_Eleven670211 (“SQ 755 would prohibit state judges from using international law, and specifically Shariah law, in making their decisions. The proposal is bigoted and seeks to solve a nonexistent problem. It should be rejected.”), and Editorial, *OUR VIEW: State Questions 754, 755*, THE OKLAHOMA DAILY, Oct. 27, 2010, <http://oudaily.com/news/2010/oct/27/our-view-state-questions-754-755/> (“Oklahoma couldn’t miss out on the Islamophobia in America. If passed, SQ 755 would outlaw the use of Sharia Law in state courts. The idea that these courts use or could use Sharia is ridiculous, and the measure implies Oklahoma’s Muslims are all extremists trying to subvert U.S. laws. Let’s not marginalize the state’s Muslim population.”), with Robert Spencer, *Sharia? What Sharia?*, HUMAN EVENTS (Oct. 19, 2010) <http://www.humanevents.com/article.php?id=39471> (arguing that “there is plenty of evidence of attempts to establish the primacy of Islamic law over American law, and much to indicate that Sharia is anything but benign.”).

⁸⁴ Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, THE EDMOND SUN, June 4, 2010, <http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot>.

⁸⁵ Because this Article is concerned with the potential impacts of various legal developments on cause lawyering, rather than the strengths and weaknesses of the legal

some might contend that the Amendment, even if it were to become law, would have little impact on decision-making or lawyering.⁸⁶ But I would suggest that regardless of the outcome, cause lawyers should take notice. And if the Amendment does become law—if judges are not permitted to consider international law or Sharia law (however infrequently this may occur)—then one potential outcome is that criminal defense lawyers will likely not make such arguments in court, thereby curtailing their ability to creatively defend their clients, and lawyers in civil suits may be limited (or *feel* limited) in their pursuit of or discouraged from finding “creative solutions to problems so [as to] minimize contentious argument and satisfy more party needs.”⁸⁷

and public policy arguments of different positions, I will not analyze the merits of the different parties’ arguments, the reasoning behind Judge Miles-Lagrange’s order, or speculate on the outcome of the case.

⁸⁶ It bears mention that although Oklahoma has very few Muslims—only 30,000 out of a population of 3.7 million—some fear that the Amendment, if it becomes law, could discourage foreign companies from doing business in the state if they believe international agreements will not be honored in court. *See Eberle, supra* note 12.

⁸⁷ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 25 (1996). Menkel-Meadow’s full statement is as follows: “expanding the stories, the interests, the issues, and the stakes actually enhances the likelihood of making ‘trades’ and finding other creative solutions to problems so that we can minimize contentious argument and satisfy more party needs.” Although Menkel-Meadow is not discussing Sharia law, I am suggesting here that when judges are permitted to consider more types of law, lawyers can tell better stories, which can result in better client defense and more creative problem-solving/dispute resolution. Conversely, when lawyers are limited in the substance or language of their legal discourse, then their legal power is diminished—and often greatly so. *See Sally Engle Merry, Resistance and the Cultural Power of Law*, 29 LAW & SOC’Y REV. 11, 14 (1995) (explaining that “[c]ourts . . . provide performances in which problems are named and solutions determined. These performances include conversations in which the terms of the argument are established and penalties determined. The ability to structure this talk and to determine the relevant discourse within which an issue is framed in other words, in which the reigning account of events is established is an important facet of the power exercised by law, as carefully described by recent studies of legal discourse.”). *See generally* JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 14 (1998) (concluding that “language is not merely the vehicle through which legal power operates: in many vital respects, language *is* legal power. The abstraction we call power is at once the cause and the effect of countless linguistic interactions taking place every day at every level of the legal system. Power is thus determinative of and determined by the linguistic details of legal practice”); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814, 827 (1987) (explaining that “the interpretation of law is never simply the solitary act of a judge concerned with providing a legal foundation for a decision which, at least in its origin, is unconnected to law and reason. . . . The practical content of the law which emerges in the judgment is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence. They thus have unequal ability to marshal the available juridical resources through the exploration of exploitation of ‘possible rules,’ and to use them effectively, as symbolic weapons, to win their case. The juridical effect of the rule—its *real* meaning—can be discovered in

Restrictions on the use of international law and Sharia law also run the risk of a certain kind of violence—*interpretive violence*.⁸⁸ As

the specific power relation between professionals. Assuming that the abstract equity of the contrary positions they represent is the same, this power relation might be thought of as corresponding to the power relations between the parties in the case.”).

For more in-depth analysis of the ways in which legal discourse in various legal forums (e.g., courts, law offices, mediation centers) affect and define identities and relationships among and between various legal “players” (including clients, litigants, defendants, and others “using” the law), see, e.g., JOHN CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 *LAW & SOC’Y REV.* 775 (1980–81); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS* (1990); William M. O’Barr & John M. Conley, *Lay Expectations of the Clinical Justice System*, 22 *LAW & SOC’Y REV.* 137 (1988); William M. O’Barr & John M. Conley, *Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives*, 19 *LAW & SOC’Y REV.* 661 (1985); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*, 20 *LAW & SOC’Y REV.* 93 (1986).

⁸⁸ See Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 49, 52 n.37 and accompanying text (Austin Sarat ed., 2001) (citing HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1973)). See also Robert M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4, 44, 53 (1983) (arguing that “[b]y exercising its superior brute force . . . the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. . . . Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispthic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”); Robert M. Cover, *Violence and the Word*, 95(8) *YALE L.J.* 1601, 1615 (1986) (“When judges interpret, they trigger agentic behavior within just such an institution or social organization. On one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience. But on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously.”).

Note that according to one Cover scholar, Cover “distinguished between the word or ‘interpretation,’ with its suggestion of ‘social construction of an interpersonal reality through language,’ and ‘violence,’ as ‘pain and death,’ with its language—and ‘world-destroying’ capacity.” Marianne Constable, *The Silence of the Law: Justice in Cover’s “Field of Pain and Death,”* in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 49, 83 (Austin Sarat ed., 2001). This does not mean that Constable believes that Cover did not find violence in legal interpretation. Indeed, Cover begins *Violence and the Word* by asserting:

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. This much is obvious, though the growing literature that argues for the centrality of interpretive practices in law blithely ignores it.

Kim Lane Scheppelle describes in *Narrative Resistance and the Struggle for Stories*:

We (those who subscribe to American law as a set of practices) need cases; we thrive on facts. With facts, we make stories, and we worry about the application of rules to the stories we make . . . We can no more do law without stories than we can fly without mechanical devices. Stories are already always everywhere in American legal scholarship, no matter how doctrinal the scholarship is. To a civilian lawyer, Americans appear obsessed with stories.⁸⁹

Similarly, Dragan Milovanovic explains that “[l]awyers construct stories. Stories are organizational devices for presenting believable (plausible) chains of events,”⁹⁰ and George P. Lopez describes how “[l]aw is not a collection of definitions and mandates to be memorized and applied but a culture composed of storytellers, audiences, remedial ceremonies, a set of standard stories and arguments, and a variety of conventions about storywriting, storytelling, argument making, and the structure and content of legal

COVER, *Violence and the Word*, *supra* at 1601. What I believe Constable is suggesting here is that Cover differentiated between legal interpretations that lead to or bring about violence and the violent acts themselves—“interpretations which occasion violence are distinct from the violent acts they occasion.” *Id.* at 1613. In other words, Cover sought first to distinguish the “physical pain” or pain “in the flesh” from the interpretive act that propagate or otherwise order or result in violence, and second, to distinguish between judicial interpretation that leads to “real” or “actual” violence and the “figurative” or “literary” violence that “strong poets do to their literary ancestors.” *Id.* at 1609 n.20. See also Peter Fitzpatrick, *Why the Law is also Nonviolent*, in LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 147 (Austin Sarat ed., 2001). Cover’s goal was simultaneously to call attention to the way in which law (via legal interpretation) is violent without diminishing the actual pain one experiences when one loses one’s freedom, property, children, or life as a result of a judicial decree.

⁸⁹ Kim Lane Scheppelle, *Narrative Resistance and the Struggle for Stories*, 20 LEGAL STUD. F. 83, 83–84 (1996). See also JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION xviii (2008) (stating that “[m]uch of law concerns . . . telling of stories”). See generally Cover, *Nomos and Narrative*, *supra* n.88 at 4–5 (“We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”).

⁹⁰ Dragan Milovanovic, *Law, Ideology, and Subjectivity: A Semiotic Perspective on Crime and Justice*, in VARIETIES OF CRIMINOLOGY: READINGS FROM A DYNAMIC DISCIPLINE 231, 243 (Gregg Barak, ed., 1994) (citing BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1991)).

stories”⁹¹ But, as Kilwein explains (in the context of discussing “client voice lawyering”), “lawyers who represent the poor need to be aware of the potential interpretive violence they perpetrate as they transform their clients’ stories into . . . universal legal narratives, that is, accounts that are accepted and acted upon by the legal system.”⁹²

Admittedly, the translation of stories into legal narratives based on international law or Sharia law *may still risk* interpretive violence—because “[c]lients want more than a translation of their story into a universal legal narrative; they want the ability to express their own, untranslated personal narratives.”⁹³ Nevertheless, re-

⁹¹ GEORGE P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 43 (1992).

⁹² Kilwein, *supra* note 20, at 186. See also Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narratives*, 100 YALE L.J. 2107 (1991); Steve Bachman, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-85); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Gerald P. Lopez, *Training Lawyers to Work with the Politically and Social Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 350 (1989); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990); Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for the Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 534 (1987-88); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. R. 387 (1990-91). See generally Pierre Bourdieu, *supra* note 87, at 834 (explaining that “[t]hose who tacitly abandon the direction of their conflict themselves by accepting entry into the juridical field (giving up, for example, the resort to force, or to an unofficial arbitrator, or the direct effort to find an amicable solution) are reduced to the status of client. The field transforms their prejuridical interests into legal cases and transforms into social capital the professional qualifications that guarantees the mastery of the juridical resources required by the field’s own logic.” (emphasis added)).

⁹³ Kilwein, *supra* note 20, at 186 (citing Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990)); White, *Paradox, Piece-Work and Patience*, *supra* note 92. See generally Bourdieu, *supra* note 87, at 831-32 (“Entry into the juridical field implies the tacit acceptance of the field’s fundamental law, an essential tautology which requires that, within the field, conflicts can only be resolved *juridically*—that is, according to the rules and conventions of the field itself. For this reason, such entry completely redefines ordinary experience and the whole situation at stake in any litigation. As is true of any ‘field,’ the constitution of the juridical field is a principle of constitution of reality itself. To join the game, to agree to play the game, to accept the law for the resolution of the conflict, is tacitly to adopt a mode of expression and discussion implying the renunciation of physical violence and of elementary forms of symbolic violence, such as insults. It is above all to recognize the specific requirements of the juridical construction of the issue. Since juridical facts are the products of juridical construction, and not vice versa, a complete retranslation of all of the aspects of the controversy is necessary in order . . . to institute the controversy *as a lawsuit*, as a juridical problem that can become the object of juridically regulated debate. Such a retranslation retains as part of the case everything that can be argued from the point of view of legal

strictions on a judge's use of international law or Sharia law (which raise their own questions regarding "judicial independence"⁹⁴) may not only limit a lawyer's right and privilege to define her approach as a lawyer to defend her client in criminal cases,⁹⁵ but might infringe on her *representation* in the sense of "storytelling"—in the sense of presenting and depicting different points of view, values, opportunities, tragedies, and social pathologies in both criminal and civil cases alike.⁹⁶ Indeed, for many clients, feeling as if one's story has been told may—and often is—ultimately more important than the outcome of the case.⁹⁷

pertinence, and only that; only whatever can stand as a fact or as a favorable or unfavorable argument remains.”).

⁹⁴ See generally David S. Law, *Judicial Independence*, in THE INTERNATIONAL ENCYCLOPEDIA OF POLITICAL SCIENCE (Bertrand Badie, Dirk Berg-Schlosser & Leonardo Morlino eds., 2011), available at http://works.bepress.com/david_law/22/; A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1. For a discussion of the importance of “lawyers’ independence,” see Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006). See also *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (noting importance of “an informed, independent bar”); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257, 268.

⁹⁵ See Brisman, *supra* note 6.

⁹⁶ Scheppele, *supra* note 89, at 87. See also AUSTIN SARAT, *Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction*, in LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 3, 8 (Austin Sarat, ed., 2001) (discussing how the law can be violent “in the ways it uses languages and in its representational practices, in the silencing of perspectives and the denial of experience, and in its objectifying epistemology” (internal footnotes omitted)). Menkel-Meadow claims that “different people will interpret the same ‘fact’ in different ways,” and, thus, that “if ‘truth’ is to be arrived at, it is best done through multiple stories and deliberations.” Menkel-Meadow, *supra* note 87, at 8, 20. In this article, I stop short of discussing whether “truth”—either “absolute truths” or “particular truths”—can be arrived at and, if so, whether it is best accomplished through multiple stories and deliberations. See Joan Chalmers Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713 (1990). Instead, I contend, as I have elsewhere, that opening the avenues for more stories to be told and increasing the ways in which (those) stories are told produces not just “edifying conversation,” but “strategies through which a population, inevitably divided by differences over a very broad range of affairs, can seek a series of . . . understandings”—both provisional and long-term ones. *Id.* at 735. See also Avi Brisman, *Appreciative Criminology and the Jurisprudence of Robert M. Cover*, Paper presented at the Annual Meeting of the American Society of Criminology Annual Meeting, San Francisco, CA (Nov. 20, 2010); Avi Brisman, *Judicial Decision-Making in Problem-Solving Courts: A Case of “Kadi-Justice”?* Paper presented at 13th Annual Association for the Study of Law, Culture and the Humanities (ASLCH) Conference, Brown University, Providence, RI (Mar. 19, 2010).

⁹⁷ See e.g., PETER JUST, *DOU DONGGO JUSTICE: CONFLICT AND MORALITY IN AN INDONESIAN SOCIETY* 15 (2000) (asserting that litigants seeking justice are at least as interested in having audiences to whom they can tell their stories, in whom they can sense the sense of pity and awareness, outrage and indignation, terror and grief that has brought them to whatever pass they have been brought to achieve whatever therapeutic

In *The Force of Law: Toward a Sociology of the Juridical Field*, French sociologist Pierre Bourdieu writes:

tic ends are available); E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (analyzing the fairness of procedures and social processes); LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 52 (2006) (explaining that in some cases, “procedural justice may outstrip the desire for victory alone” and that “courts that fail to respond to actual litigant needs and designs may become deeply alienated from the cultures they ostensibly serve.”); JONATHAN SIMON, *The Vicissitudes of Law’s Violence*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 17, 25 (Austin Sarat, ed., 2001) (noting the “substantial psychological evidence suggesting that procedural fairness does matter, even to those who lose in legal conflict”); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 265 (1984) (“The fact that the case is always a narrative means something from the point of view of the litigant in particular. For him the case is, at its heart, an occasion and a method in which he can tell his story and have it heard”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUSTICE* 283–357 (2003); see also Lewis H. LaRue, *A Jury of One’s Peers*, 33 *WASH. & LEE L. REV.* 841 (1976); see generally J. John Paul Lederach and Ron Kraybill, *The Paradox of Popular Justice: A Practitioner’s View*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 357, 368 (Sally Engle Merry and Neal Milner, eds., 1995) (describing how the success of justice systems based on restorative notions are not necessarily measured by the final outcome or legal result, “but rather by the degree to which people feel they have an impact, that they have been treated fairly, that they have understood each other, that they have better mechanisms for making decisions and handling their differences, and that their key issues have been addressed”); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (analyzing methods of conflict resolution in the context of social psychology); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton University Press, 2006); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (Russell-Sage Foundation, 2002); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 *ANNUAL REV. L. & SOC. SCI.* 171, 171–201 (2005); Dragan Milovanovic, *“Rebellious Lawyering”: Lacan, Chaos, and the Development of Alternative Juridico-Semiotic Forms*, 20 *LEGAL STUD. F.* 295, 297–98 (1996) (stating that “success in criminal law [practice] is an exercise in constructive narratives that have plausibility in the eyes of criminal justice practitioners and the jurors. Accordingly, segments of the population that are disenfranchised find themselves more at risk in the use of dominant symbolizations and constructions, whereas higher income individuals remain ‘beyond incrimination.’”); Michael D. Reisig, *Procedural Justice and Community Policing Programs: What Shapes Residents’ Willingness to Participate in Crime Prevention Programs?*, 1(3) *POLICING* 356, 356–69 (2007); Sarre, *supra* note 47, at 12 (explaining that “cultural and gender issues are . . . officially irrelevant to adversarial criminal proceedings, although they may, in fact, be crucial to the etiology of the incident in the first place and crucial to the outcome. Thus, at the end of the day, many parties tend to leave the modern criminal justice system experience embittered, burdened with costs and often determined to seek further action, judicial and extrajudicial, if at all possible. This is a common experience amongst many victims, offenders and their families alike.”); Jason Sunshine and Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *L. & SOC. REV.* 513, 513–48 (2003); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimization*, 57 *ANNUAL REV. PSYCHOLOGY* 375, 375–400 (2006); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *OHIO STATE J. CRIM. L.* 231, 231–75 (2008).

[E]ntry into the juridical field requires reference to and conformity with precedent, a requirement which may entail the distortion of ordinary beliefs and expressions Precedents are used as tools to justify a certain result as well as serving as the determinants of a particular decision; the same precedent, understood in different ways, can be called upon to justify quite different results. Moreover, the legal tradition possesses a large diversity of precedents and of interpretations from which one can choose the one most suited to a particular result.⁹⁸

I cite Bourdieu here because—and I wish to be perfectly clear about this point—I am *not* suggesting that international law or Islamic law serve as binding precedent. I am not arguing that international law or Islamic law should trump U.S. law (constitutional or statutory, federal or state), nor am I urging federal, state, or local judges consistently or regularly consult foreign law or Sharia law.⁹⁹ While I eschew the myopic “legal isolationism”¹⁰⁰ (and bor-

⁹⁸ Bourdieu, *supra* n.87, at 832-33.

⁹⁹ In the last decade, the United States Supreme Court considered foreign and international law in *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Roper v. Simmons*, 543 U.S. 551 (2005)—which sparked a huge academic and public debate about the propriety of citing of foreign and international law in U.S. constitutional law cases. *See, e.g.*, Adam Liptak, *Justices Agree to Take Up Life-Without-Parole Sentences for Young Offenders*, N.Y. TIMES, May 5, 2009, at A16. For an overview, *see The Debate Over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103 (2005)—especially footnotes 9, 10. For a more in-depth analysis, *see, e.g.*, Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005). *See also* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637; Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695 (2006). While a comprehensive analysis is well-outside the scope of this Article, I will briefly note that my position is akin to that of the Israeli jurist, Aharon Barak, who has lamented the hesitancy of U.S. judges to contemplate foreign law, as well as that of U.S. Supreme Court Justice Ruth Bader Ginsburg, who has defended the use of foreign law by American judges. Barak states: “Regrettably, the United States Supreme Court makes very little use of comparative law . . . [M]ost Justices of the United States Supreme Court do not cite foreign case law in their judgments. They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems . . . American law in general, and its constitutional law in particular, is rich and developed. American law is comprised of not one but fifty-one legal systems. Nonetheless, I think that it is always possible to learn new things even from other democratic legal systems that, in their turn, have learned from American law.” Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2001). Similarly, Justice Ginsburg has asked, “Why shouldn’t we look to the wisdom of a judge from abroad with at least as much ease as we should read a law review article written by a professor?” (quoted in Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14). Citing a decision of a foreign court does not

derline xenophobia) of those scholars, judges, and jurisprudence experts who assert that U.S. judges should ignore foreign courts and their legal rulings,¹⁰¹ I also recognize that some features of Islamic law are downright draconian.¹⁰² But, as Milovanovic explains in *“Rebellious Lawyering”: Lacan, Chaos, and the Development of*

mean that the judge considers herself bound by foreign law. Rather, citing a foreign case means that the judge has found power in the reasoning of that foreign precedent. *See id.*; *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” (Kennedy, J.)). *See generally* Rick Sarre, *Is There a Role for the Application of Customary Law in Addressing Aboriginal Criminality in Australia*, 8(2) *CRITICAL CRIMINOLOGY* 91, 97 (1997) (explaining that “[t]here is quite a difference . . . between acknowledging traditional practices and granting customary law a status equal to the common law applying generally”). According to Ginsburg, ignoring foreign courts and their legal rulings would have been completely at odds with the views of the United States’ founding fathers, who were very interested in the opinions and laws of other countries. *See* Editorial, *A Respect for World Opinion*, *N.Y. TIMES*, Aug. 3, 2010, at A22. Furthermore, the failure to engage foreign decisions has resulted in diminished influence for the United States Supreme Court. *See, e.g.*, Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, *N.Y. TIMES*, Apr. 12, 2009, at A14 (“You will not be listened to if you don’t listen to others’”) (quoting Justice Ginsberg); Adam Liptak, *U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations*, *N.Y. TIMES*, Sept. 18, 2008, at A1, A30. *Cf.* Gerald V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 *ME. L. REV.* 211 (1994); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 *COLUM. L. REV.* 537 (1988).

¹⁰⁰ Editorial, *A Respect for World Opinion*, *N.Y. TIMES*, Aug. 2, 2010, at A22.

¹⁰¹ *Compare* *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (“The plurality’s reliance upon Amnesty International’s account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation.”), *with* Cristina Silva, *Muslim Law Taking Hold in Parts of US*, *ASSOCIATED PRESS*, Oct. 7, 2010, available at http://www.msnbc.msn.com/id/39564255/ns/politics-decision_2010/t/angle-muslim-law-taking-hold-parts-us/#.Tl0ZPzuk9aU (“My thoughts are these, first of all, Dearborn, Michigan, and Frankford, Texas are on American soil, and under constitutional law. Not Sharia law. And I don’t know how that happened in the United States. It seems to me there is something fundamentally wrong with allowing a foreign system of law to even take hold in any municipality or government situation in our United States” (quoting U.S. Senate candidate Sharron Angle (R-Nev.))), *with* Eliyahu Stern, *Don’t Fear Islamic Law in America*, *N.Y. TIMES*, Sept. 2, 2011 (“Shariah is a mortal threat to the survival of freedom in the United States and in the world as we know it” (quoting Republican presidential candidate New Gingrich)). Justice Scalia’s comment strikes me as short-sighted, Angle’s and Gingrich’s as xenophobic and inaccurate.

¹⁰² *See, e.g.*, Norimitsu Onishi, *Stricter Brand of Islam Spreads Across Indonesian Penal Code*, *N.Y. TIMES*, Oct. 28, 2009, at A6. Similarly, Sarre notes that there are instances “where customary law may offend other human rights and the laws based upon those rights.” Sarre, *supra* note 47, at 99. Thus, a call for greater flexibility for judges to consult international law or Sharia law (or customary law practices, in the case of Sarre) should not be interpreted as endorsement of all of the substance and features of those legal regimes.

Alternative Juridico-Semiotic Forms, “certain narrative constructions reflecting dominant understandings can take precedence in [U.S.] law, whereas other narratives, other voices, other desires remain denied, or find incomplete expression in legal discourse.”¹⁰³ Depriving judges of the opportunity to consider or use international law or Sharia law can discourage a lawyer from using all the tools at her disposal to construct a(n) (alternative) narrative for her client,¹⁰⁴ which can be an important part of procedural justice.¹⁰⁵ Rather than restricting lawyers’ storytelling abilities, we should, as Professor Carrie Menkel-Meadow argues, “rethink the ways to permit *more* voices, *more* stories, *more* complex versions of reality to inform us and to allow all people to express [their] views.”¹⁰⁶ Or, as Robert M. Cover argued in his pleas for judicial toleration and respect, “[w]e ought to invite new worlds.”¹⁰⁷ Doing so may actually

¹⁰³ Milovanovic, *supra* note 97, at 295.

¹⁰⁴ Menkel-Meadow “envisio[n]s a greater multiplicity of stories being told, of more open, participatory, and democratic processes, yielding truths that are concrete but contextualized, explicitly focused on who finds ‘truth’ for whose benefit.” Menkel-Meadow, *supra* note 87, at 23–24. I suggest that when a judge is allowed to consider more types of law (e.g., international, Sharia), lawyers can tell more stories (and better ones), increasing the likelihood of arriving at the “truth”—or, at the very least—diminishing the potential for “distort[ing] the truth.” *Id.* at 21.

¹⁰⁵ Milovanovic might add that constructing alternative narratives might help the lawyer to overcome—or, at least, reveal—“the various biases and prejudices embodied in law.” Milovanovic, *supra* note 97, at 295.

¹⁰⁶ Menkel-Meadow, *supra* note 87, at 31 (emphases added). See also Bruce A. Arigo, *Postmodern Justice and Critical Criminology: Positional, Relational, and Provisional Science*, in *CONTROVERSIES IN CRITICAL CRIMINOLOGY* 43, 46–49 (Martin D. Schwartz & Suzanne E. Hatty eds., 2003) (lamenting that “[l]egal language endorses only that speech that reaffirms its own legitimacy to settle disputes. Anything falling outside of the judicial sphere is declared inadmissible, irrelevant, immaterial . . . Entire ways of knowing are denied expression and legitimacy in the courtroom,” and arguing that because “certain ways of knowing are privileged while certain others are not” we need to “include the voices of those whose understanding of the world would otherwise remain dormant and concealed . . . to embrace articulated differences, making them a part of the social fabric of ongoing civic interaction”); DONOVAN, *supra* note 89, at 256 (calling for increased study of the “embedded parochialisms” of the U.S. legal system, and stressing the need for decision makers to be “more sympathetic to the lifeways of other people”); Milovanovic, *supra* note 90, at 233 (describing how “[t]he trial represents the occasion in which a clash of alternative constructions of reality takes place. It is ‘a struggle in which differing, indeed antagonistic world-views confront each other. Each, with its individual authority, seeks general recognition and thereby its own self-realization.’ Clients, however, are disempowered from the onset of the battle when deferring to the expertise of their mouthpieces, lawyers. It is the state’s version of truth or understanding that ultimately prevails, and hence the symbolic field is repeatedly created anew” (quoting Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 814, 837 (1987))).

¹⁰⁷ Cover, *Nomos and Narrative*, *supra* note 88, at 68. See also Austin Sarat, *Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 3, 10 (Austin Sarat ed., 2001) (describing

result in greater respect for and trust in the U.S. legal system by immigrants unfamiliar it.¹⁰⁸

Recognizing that Oklahoma's very small Muslim population has not called for greater reliance on international law or Sharia law, that Oklahoma judges were not leaning on foreign law or Islamic law in making their decisions, and that the amendment requiring Oklahoma courts to rely on federal and state law when deciding cases, and prohibiting them from considering or using international law or Sharia law may never become law, this Part has set forth the following arguments:

1. If judges are not permitted to consider international law or Sharia law, then criminal defense lawyers may be less inclined to make such arguments in court, thereby curtailing their ability to creatively defend their clients, and lawyers in civil suits may feel limited in their pursuit of, or discouraged from, finding "creative solutions to problems so [as to] minimize contentious argument and satisfy more party needs"¹⁰⁹—a potentially unfortunate development given that "[m]ost enduring solutions and satisfactory outcomes are likely to occur in a non-adversarial environment than an adversarial one."¹¹⁰

how Cover "urged judges to tolerate and respect the normative claims of communities whose visions of the good did not comport with the commands and requirements of state law"); Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 49, 56–65 (Austin Sarat ed., 2001) (explaining that Cover believed that state law "should be tolerant and respectful of alternative normative systems rather than trying to make them bend, lest they be destroyed by the ferocious force that the state routinely deploys," and that whenever possible, state law should "let new worlds flourish"). For a discussion of Cover's "vision of plural normative worlds," see Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *NARRATIVE VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 1, 1–11 (MARTHA MINOW, MICHAEL RYAN, & AUSTIN SARAT EDS., 1995); MICHAEL RYAN, *Meaning and Alternity*, in *NARRATIVE VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 267, 267–76 (MARTHA MINOW, MICHAEL RYAN, & AUSTIN SARAT EDS., 1995); Brisman, *Appreciative Criminology and the Jurisprudence of Robert M. Cover*, *supra* note 96.

¹⁰⁸ See Menkel-Meadow, *supra* note 87, at 29 (explaining that "[w]ithin our own borders multicultural concerns are revealed when immigrants from other systems either fear or will not use our system because they do not understand or trust it, or when it is alien to what they know" (internal footnote omitted)). See generally *supra* note 47 [re procedural justice]; Sarre, *supra* note 47, at 17 (discussing the notion of "legitimacy"—"a greater willingness of participants to accept the justice system if it recognizes crucial relationships" (citing A. Bottoms, *Avoiding Injustice, Promoting Legitimacy and Relationships*, in *RELATIONAL JUSTICE: REPAIRING THE BREACH* 58 (J. Burnside & N. Baker eds., 1994))).

¹⁰⁹ See Menkel-Meadow, *supra* note 87, at 25. For a discussion of "consistency" versus "democratic creativity" in the context of juvenile justice, see *id.* See also Sarre, *supra* note 47, at 21.

¹¹⁰ Sarre, *supra* note 47, at 13. Note that at least one commentator has found that

2. Restrictions on a judge's use of international law or Sharia law may limit a lawyer's right and privilege to define her approach as a lawyer in defending criminal cases; and might infringe on her *representation* (in criminal and civil suits) in the sense of "storytelling"—that is, presenting and depicting different points of view, values, opportunities, tragedies, and social pathologies; for many civil litigants and criminal defendants, feeling as if one's story has been told can contribute to a sense of procedural justice and may—and often is—ultimately more important than the outcome of the case.
3. Rather than limiting voices, stories, and versions of reality, we should—as an increasingly multicultural society and as a legal system reflecting this increasingly multicultural society—endeavor to permit more voices, more stories, more complex versions of reality to inform us and to allow all people to express their views; doing so may actually result in greater respect for and trust in the U.S. legal system by immigrants unfamiliar with it.

What does this mean for cause lawyers? Should the measure eventually become law, it has the potential to affect the nature of representation for even the most conventional cause lawyers in Oklahoma—those who engage in “cause lawyering directed toward serving unmet legal needs” (or “proceduralist lawyering”). As articulated above, such lawyers will have at their disposal fewer tools to creatively defend their clients, seek solutions to civil suits, and provide their clients with a sense of procedural justice. Outside of Oklahoma, groups and organizations espousing hateful “Save Our State” views may feel emboldened by the developments in Oklahoma and may try to follow suit, pushing for similar types of measures in their states.¹¹¹ Civil rights and civil liberties cause law-

some lawyers involved in alternative dispute resolution (ADR) (still) approach ADR with an “adversarial” mindset. See Menkel-Meadow, *supra* note 87, at note 97 and accompanying text.

¹¹¹ Recently, legislative leaders in at least half a dozen states, including Georgia, Mississippi, Nebraska, Oklahoma, Pennsylvania, and South Carolina, have indicated that they will propose bills similar to the controversial Arizona law, adopted in the spring of 2010, authorizing state and local police to inquire about the immigration status of anyone they detained for other reasons if they had “reasonable suspicion” that the person was an illegal immigrant. Although a federal court has suspended central provisions of the Arizona statute, legislative leaders appear undeterred; some have also announced measures to crack down on illegal immigration by canceling automatic U.S. citizenship for children born in this country to illegal immigrant parents, as well as legislation to punish employers who hire illegal immigrants and measures to limit access to public colleges and other benefits to illegal immigrants. Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1, A11. This willingness to follow Arizona's lead despite the federal court stay suggests that the anti-immigration current may be sufficiently strong as to inspire initiatives

yers, then, may feel compelled to fight such measures, affecting the contours of their agendas and caseloads.¹¹²

VI. CONCLUSION

In October 2010, the Census Bureau reported that nearly one in five Americans are either immigrants or were born in the United States to at least one parent from abroad.¹¹³ In 2009, 12% of the population (36.7 million people) were immigrants and 11% of the population (33 million) were children of at least one immigrant parent.¹¹⁴ According to Elizabeth M. Grieco, chief of the Census Bureau's Foreign-Born Population Branch, the "second generation" was more likely to be better educated and earn more, and less likely to be living in poverty, suggesting that "children of immigrants are continuing to assimilate over time as they have in past generations."¹¹⁵

From an anthropological perspective, *assimilation* refers to the process of change that a minority ethnic group may experience when it moves to another country where another culture dominates—a process that entails the minority group's adoption of the patterns and norms of the new country's dominant culture, often to the point that the minority group ceases to exist as a separate cultural unity.¹¹⁶ Assimilation may be independent of educational achievement and economic success. In other words, the "second generation"—children of an immigrant parent or parents—can achieve economic success without assimilating, and assimilation

modeled after Oklahoma's "Sharia Law Amendment," despite the present injunction. *See, e.g.,* Stern, *supra* note 101 ("More than a dozen American states are considering outlawing aspects of Shariah law. Some of these efforts would curtail Muslims from settling disputes over dietary laws and marriage through religious arbitration, while others would go even further in stigmatizing Islamic life: a bill recently passed by the Tennessee General Assembly equates Shariah with a set of rules that promote 'the destruction of the national existence of the United States.'").

¹¹² *See generally* Preston, *supra* note 111, at A11 (reporting that Latino and immigrant advocate legal organizations are preparing for court challenges to Arizona-style anti-immigration bills, as well as legislation intended to eliminate birthright citizenship for American-born children of illegal immigrants).

¹¹³ Sam Roberts, *Washington: 1 in 5 Americans Have Close Ties Elsewhere*, N.Y. TIMES, Oct. 20, 2010, at A17.

¹¹⁴ *Id.* According to the Census Bureau, in New York, the number of African-born immigrants has increased from 78,500 in 2000 to nearly 125,000 in 2009; immigrant advocates, however, believe that the number is higher than the Census Bureau estimates for 2009. Nadia Sussman, *West African Immigrants Find a Shepherd in an Imam in Harlem*, N.Y. TIMES, Nov. 3, 2010, at A24.

¹¹⁵ Roberts, *supra* note 113, at A17.

¹¹⁶ *See* CONRAD PHILLIP KOTTAK, WINDOW ON HUMANITY: A CONCISE INTRODUCTION TO ANTHROPOLOGY 381–82 (3rd ed. 2008).

can occur without the minority ethnic group making educational or economic gains. In fact, many anthropologists contend that in the United States (as well as in Canada), *multiculturalism*, not assimilationism, is of growing importance.¹¹⁷ Under the multicultural model, which is the opposite of assimilationist model, cultural diversity is valued and individuals are socialized into the dominant (national) culture and ethnic culture. Rather than being a “melting pot,” the United States and Canada can be better described as “ethnic salads,” where “each ingredient remains distinct, although in the same bowl, with the same dressing.”¹¹⁸

Thus, what the Census Bureau’s report really reveals is that because of immigration and differential population growth, the ethnic composition of the United States is changing dramatically. Various political developments, however, suggest that for many this is not a welcome phenomena—from Oklahoma’s “Sharia Law Amendment,” discussed above, as well as its recent amendment to the state constitution making English the official language of the state¹¹⁹ to the *de facto* “ethnic expulsion” that could result from Texas Republican Senators Kay Bailey Hutchison and John Cornyn’s blocking of the DREAM Act, a bill that would have granted citizenship to thousands of young illegal immigrants if they enrolled in higher education or enter military service, to *de*

¹¹⁷ *Id.* at 383.

¹¹⁸ *Id.* at 385.

¹¹⁹ Oklahoma State Question 751, known as the “English is the Official Language of Oklahoma Act,” appeared on the November 2, 2010 ballot in Oklahoma as a legislatively-referred constitutional amendment. The measure passed easily with 740,918 of 980,822 voters (or 75.54%) voting in favor of the amendment—the largest margin of the eleven state questions on the ballot. See Marc Lacey, *California Rejects Marijuana Legalization as Nation Votes on Issues Big and Small*, N.Y. TIMES, Nov. 3, 2010, at P8. On November 9, 2010, a lawsuit was filed in Tulsa County District Court against the measure by James C. Thomas, a Tulsa attorney and University of Tulsa law professor. See also James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12; Michael McNutt, *Oklahoma English-only Measure Challenged*, NEWSOK.COM, Nov. 11, 2010, <http://newsok.com/oklahoma-english-only-measure-challenged/article/3513258#ixzz155USgwAS>.

It bears mention that Oklahoma’s “English-only” efforts are not anomalous. See, e.g., Peter Applebome, *Yes, English is Spoken Here. But, Just in Case, it’s Now the Law*, N.Y. TIMES, May 13, 2010, at A22 (describing efforts to require that all business in Jackson, N.Y., be conducted in English); *Judge Sentences Hispanic Men to Learn English*, ASSOCIATED PRESS, Mar. 27, 2008, available at http://www.msnbc.msn.com/id/23831149/ns/us_news-crime_and_courts (reporting that Luzerne County Judge Peter Paul Olszewski, Jr., ordered three Spanish-speaking men to learn English or go to jail); Editorial, *The Candidate from Xenophobia*, N.Y. TIMES, Apr. 29, 2010, at A30 (discussing Alabama gubernatorial candidate Tim James’ vow to put an end to “that grave threat posed by driver’s license tests being conducted in any language but English,” and quoting Mr. James for the proposition that, “This is Alabama. We speak English.”).

jure ethnic expulsion in Arizona, where it is now a crime to be in the state without a visa.¹²⁰ Indeed, an “ugly nativist strain [seems to

¹²⁰ See James C. McKinley, Jr., *After Dream Act Setback, Eyeing a Sleeping Giant*, N.Y. TIMES, Dec. 21, 2010, at A23.

European countries are also struggling with multiculturalism and rising anti-immigrant sentiment. See DEREK MCGHEE, *THE END OF MULTICULTURALISM? TERRORISM, INTEGRATION AND HUMAN RIGHTS* (Maidenhead: McGraw-Hill/Open University Press 2008). See also David Prior, *Disciplining the Multicultural Community: Ethnic Diversity and the Governance of Anti-Social Behaviour*, 9(1) SOC. POL’Y. & SOC’Y. 133, 133 (2009) (explaining that “multiculturalism has come under challenge as a result of three distinct developments: the 2001 disturbances in Bradford, Oldham and Burnley and subsequent similar events elsewhere; the perceived threat of Muslim terrorism to national security post 9/11 and especially since the London bombings of 2005; and the growth of ‘new’ immigration from EC accession states and other regions including Africa”); Michael Slackman, *Right-Wing Sentiment Collects, Ready to Burst Its Dam*, N.Y. TIMES, Sept. 22, 2010, at A8 (discussing how Sweden elected an anti-immigrant party to Parliament for the first time in September 2010, France has been repatriating Roma, and Germany has been debating Thilo Sarrazin’s book, *Germany Does Away with Itself*, which asserts that the growing number of Muslim immigrants are “dumbing down” German society); Michael Weissenstein, *Culture Clash: European Art Provokes Muslims*, ASSOCIATED PRESS, Mar. 15, 2010, available at <http://www.huffingtonpost.com/huff-wires/20100315/europe-art-and-insults/> (discussing rising European unease with a rapidly growing Muslim minority, including the electoral success by an anti-Islamic Dutch party, moves to ban veils in France and minarets in Switzerland, and arrests in Ireland and the U.S. in an alleged plot to kill a Swedish cartoonist who produced a crude black-and-white drawing of Muhammad with a dog’s body in 2007).

For a discussion of issues in Denmark, see, e.g., Reuters, *Danish Pol: Ban Arab TV Channels*, METRO, Nov. 1, 2010, available at <http://www.metro.us/newyork/article/678295>. For France, see, e.g., JOHN R. BOWEN, , *WHY THE FRENCH DON’T LIKE HEAD-SCARVES? ISLAM, THE STATE, AND PUBLIC SPACE* (2008); Linda Chavez, Op-Ed, *Banning the Burqa*, NEW YORK POST, May 22, 2010, http://www.nypost.com/p/news/opinion/opedcolumnists/banning_the_burqa_QLNZArwCXHYohKXszTSSeJ; Jean-François Copé, Op-Ed, *Tearing Away the Veil*, N.Y. TIMES, May 5, 2010, at A31; Abby Ellin, *Fitness Tailored to a Hijab*, N.Y. TIMES, Sept. 10, 2009 at E1, E12; Steven Erlanger, *Burqa Furor Scrambles the Political Debate in France*, N.Y. TIMES, Sept. 1, 2009, at A6; Steven Erlanger, *Face-Veil Issue in France Shifts to Parliament for Debate*, N.Y. TIMES, Jan. 27, 2010 at A9; Steven Erlanger, *For a French Imam, Islam’s True Enemy is Radicalism*, N.Y. TIMES, Feb. 13, 2010, at A6; Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils*, N.Y. TIMES, July 14, 2010 at A6; Steven, Erlanger, *France: Senate Passes Bill on Facial Veils*, N.Y. TIMES, Sept. 15, 2010, at A6; Steven Erlanger, *France: Full-Face Veil Ban Approved*, N.Y. TIMES, Oct. 8, 2010, at A8; cf. Maïa de la Baume, *France’s Palate Acquires a Taste for Halal Food, to the Delight of Muslims*, N.Y. TIMES, Sept. 9, 2010, at A10. For Germany, see, e.g., Judy Dempsey, *Germany: After Merkel’s Comments, President Makes Trip to Turkey*, N.Y. TIMES, Oct. 19, 2010, at A13; Audrey Kauffmann, *Merkel Says German Multi-Cultural Society Has Failed*, AGENCE FRENCH PRESSE, Oct. 17, 2010, <http://www.commondreams.org/headline/2010/10/17-2>; Nicholas Kulish, *German Mosque Used by 9/11 Plotters Is Closed*, N.Y. TIMES, Aug. 10, 2010, at A9; Michael Slackman, *A Messenger Is Denounced, but His Book Grips Germany*, N.Y. TIMES, Sept. 3, 2010, at A4; Michael Slackman, *Hitler Exhibit Explores a Wider Circle of Guilt*, N.Y. TIMES, Oct. 16, 2010, at A1, A7. For the Netherlands, see, e.g., Associated Press, *The Netherlands: New Trial Ordered for Anti-Islam Lawmaker*, N.Y. TIMES, Oct. 23, 2010, at A5; Ian Buruma, Op-Ed., *Totally Tolerant, Up to A Point*, N.Y. TIMES, Jan. 30, 2009, at A29; Stephen Castle, *Dutch Opponent of Muslims Gains Ground*, N.Y. TIMES, Aug. 6, 2010, at A4; Alan Riding, Essay, *Navigating Expression and Religious Taboos*, N.Y. TIMES, Jan. 22, 2005, at A25; Marlise

be] running on the edges of American life”¹²¹ and rarely a day seems to pass where the newspapers do not report an instance of the harassment or mistreatment of ethnic “others” in the U.S.¹²² Anti-Islamic sentiments in the U.S. seem to be growing—and growing more pernicious.¹²³

Simons, *Militant Muslims Act to Suppress Dutch Film and Art Show*, N.Y. TIMES, Jan. 31, 2005, at A4; Toby Sterling, *Dutch Prosecutors Seek Acquittal of Anti-Islam Pol*, HUFFINGTON POST, Oct. 15, 2010, <http://www.huffingtonpost.com/huff-wires/20101015/eu-netherlands-hate-speech>. For Sweden, see, e.g., Stephen Castle, *Anti-Immigrant Party Rises in Sweden*, N.Y. TIMES, Sept. 14, 2010, at A12. For Switzerland, see, e.g., Nick Cumming-Bruce & Steven Erlanger, *In Bastion of Tolerance, Swiss Reject Construction of Minarets on Mosques*, N.Y. TIMES, Nov. 30 2009, at: A6, A12; Ross Douthat, Op-Ed., *Europe’s Minaret Moment*, N.Y. TIMES, Dec. 7, 2009, at A29; Editorial, *A Vote for Intolerance*, N.Y. TIMES, Dec. 1, 2009, at A34; Michael Kimmelman, *When Fear Turns Graphic*, N.Y. TIMES, Jan. 17, 2010, at AR1, AR26; Reuters, *Libya: Qaddafi Calls for Holy War on Switzerland over Mosques*, N.Y. TIMES, Feb. 26, 2010, at A9; Peter Stamm, Op-Ed., *Switzerland’s Invisible Minarets*, N.Y. TIMES, Dec. 5, 2009, at A19; John Tagliabue, *Baking Swiss Treats Amid Acid Debate*, N.Y. TIMES, Jan. 27, 2010, at A9.

¹²¹ Ginia Bellafante, *Postracial Vigilantes in a World in Peril*, N.Y. TIMES, Sept. 7, 2010, at C1.

¹²² See, e.g., AFP, *240,000 Dollars Awarded to Man Forced to Cover Arab T-shirt*, Jan. 5, 2009, http://www.google.com/hostednews/afp/article/ALeqM5i9_XPfp0_Xi0USqY-9P3ds2OhJg; AFP, *Student Detained over Arabic Flashcards, Lawsuit Says*, Feb. 10, 2010, http://www.google.com/hostednews/afp/article/ALeqM5i-JHBrLMJvN_S_ymxLHj mAgrNyZg (last visited Dec. 23, 2010); Liz Robbins, *9 Muslims Are Pulled from Plane and Denied Re-entry; Airline Apologizes Next Day*, N.Y. TIMES, Jan. 3, 2009, at A9; John Schwartz, *Iraqi Gets \$240,000 Settlement in T-Shirt Incident at U.S. Airport*, N.Y. TIMES, Jan. 8, 2009, at A16; Stephanie Strom, *A.C.L.U. Report Says Antiterror Fight Undercuts Liberty of Muslim Donors*, N.Y. TIMES, June 16, 2009, at A14.

¹²³ See, e.g., Al Baker, *Teenagers Are Charged in Harassment at a Mosque*, N.Y. TIMES, Sept. 1, 2010, at A18; Robbie Brown, *Arson Case at Mosque in Tennessee Spreads Fear*, N.Y. TIMES, Aug. 31, 2010, at A10; N.R. Kleinfeld, *Rider Asks Cabdriver If He Is Muslim, Then Stabs Him*, N.Y. TIMES, Aug. 26, 2010, at A19; Ray Rivera & Karen Zraick, *Man Held in Cab Stabbing Showed Zeal for Veterans*, N.Y. TIMES, Aug. 27, 2010, at A17. See also Damien Cave, *Far from Ground Zero, Obscure Pastor is Ignored No Longer*, N.Y. TIMES, Aug. 26, 2010, at A14, A18; Damien Cave, *Gainesville, Aghast, Disavows Pastor’s Talk of Burning Koran*, N.Y. TIMES, Sept. 11, 2010, at A1, A12; Damien Cave, *In Florida, Many Lay Plans to Counter a Pastor’s Message*, N.Y. TIMES, Sept. 8, 2010, at A16; Damien Cave & Anne Barnard, *Florida Minister Wavers on Plans to Burn Koran*, N.Y. TIMES, Sept. 10, 2010, at A3; *Church Weighs Koran Burning After Warning on Troop Safety*, METRO, Sept. 8, 2010, at 06; Susan Dominus, *In a Taxicab, an Opening for Frank Talk*, N.Y. TIMES, Aug. 28, 2010, at A14; Antonio Gonzalez, *Afghans Protest, Fla. Pastor Plans to Meet NY Imam*, YAHOO! NEWS (Associated Press), Sept. 10, 2010, <http://www.deseretnews.com/article/700064345/As-Afghans-protest-Florida-pastor-plans-to-meet-New-York-imam.html>; Laurie Goodstein, *Concern is Voiced over Religious Intolerance*, N.Y. TIMES, Sept. 8, 2010, at A16; Liz Goodwin, *Even Pastor’s Old Church Condemns Quran-burning*, YAHOO! NEWS, Sept. 8, 2010, http://news.yahoo.com/s/yblog_upshot/20100908/pl_yblog_upshot/even-pastors-old-church-condemns-quran-burning; Steven Greenhouse, *Offended Muslims Speak Up*, N.Y. TIMES, Sept. 24, 2010, at B1; Nicholas D. Kristof, Op-Ed., *Message to Muslims: I’m Sorry*, N.Y. TIMES, Sept. 19, 2010, at WK11; James C. McKinley, *A Claim of Pro-Islam Bias in Textbooks*, N.Y. TIMES, Sept. 23, 2010, at A21; Alissa J. Rubin, *2 Afghans Killed in Protest over Koran*, N.Y. TIMES, Sept. 13, 2010, at A14; Brian Stelter, *A Fringe Pastor, a Fiery Stunt and the Media Spotlight’s Glare*, N.Y. TIMES, Sept. 8, 2010, at A1; Robert F.

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Cause lawyers can and should continue to work for justice and equality—as cause lawyers of various stripes have always done¹²⁴ — and should endeavor to promote tolerance, diversity, and respect¹²⁵ by using the law to fight anti-Islamic, anti-immigration and other xenophobic forces. They have their work cut out for them and will encounter new challenges in the process: *Humanitarian Law Project v. Holder* may impede direct client representation, as well as extra-state efforts at peace; the decision in *Citizens United* will further the role of money in the quest for political power, and reveals the extent to which we need cause lawyers to help turn the tide of treating corporate interests as individual liberties.¹²⁶ Oklahoma’s “Sharia Law Amendment” may, in practice, have the least impact on cause lawyering in Oklahoma or elsewhere. But it does not inspire much confidence—at least, not great confidence in the Oklahoma electorate—and could be a harbinger of things to come in other states and jurisdictions.¹²⁷ I would like to think that courts are still protectors of minority rights.¹²⁸ While “a process

2010, at A21; TY MILBURN, *Opposing Views on Proposed Islamic Center Heard at Queens Forum*, NY1, Nov. 22, 2010, http://www.ny1.com/content/top_stories/?ArID=129407; Erik Ortiz, *Mosque Saga Boils*, AM NEW YORK, Sept. 10–12, 2010, at 03; Sharon Otterman, *A Mosque Invisible to Many Is a Target*, N.Y. TIMES, Sept. 4, 2010, at A14, A15; Feisal Abdul Rauf, Op-Ed., *Building on Faith*, N.Y. TIMES, Sept. 8, 2010, at A27; JOHN SCHWARTZ, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES, Sept. 4, 2010, at A11; SHERYL GAY STOLBERG, *Obama Strongly Backs Islam Center Near 9/11 Site*, N.Y. TIMES, Aug. 14, 2010, at A1, A15; Sheryl Gay Stolberg, *Obama Says Mosque Remarks Were About Rights*, N.Y. TIMES, Aug. 15, 2010, at A4; Nadia Sussman, *West African Immigrants Find a Shepherd in an Imam in Harlem*, N.Y. TIMES, Nov. 3, 2010, at A24; Paul Vitello, *For High Holy Days, Rabbis Weigh Their Words on Proposed Islamic Center*, N.Y. TIMES, Sept. 9, 2010, at A26.

¹²⁴ See Hilbink, *supra* note 7, *passim*. See generally Kenneth W. Mentor & Richard D. Schwartz, *A Tale of Two Offices: Adaptation Strategies of Selected LSC Agencies*, 21 JUST. SYS. J. 143, 145 (2000) (discussing the concept of cause-lawyering, with its principal focus on changing the legal balance toward greater equality for the poor”).

¹²⁵ See Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 59 (Austin Sarat ed., 2001).

¹²⁶ See Feldman, *supra* note 64, at 43 (asserting that “[c]orporate rights should not be confused with individual rights”).

¹²⁷ See Stern, *supra* n.101 (describing more than a dozen states efforts to outlaw aspects of Shariah law, and arguing that “The crusade against Shariah undermines American democracy, ignores our country’s successful history of religious tolerance and assimilation, and creates a dangerous divide between America and its fastest-growing religions minority. . . . Anti-Shariah legislation fosters a hostile environment that will stymie the growth of America’s tolerant strand of Islam. The continuation of America’s pluralistic religious tradition depends on the ability to distinguish between punishing groups that support terror and blaming terrorist activities on a faith that represents roughly a quarter of the world’s population.”).

¹²⁸ The scope and capacity of courts to protect minority rights has been widely discussed and debated. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*

that forces minority rights onto an unwilling populace will often not ‘stick’ in a democracy,”¹²⁹ democracy ultimately benefits when its peoples enjoy full equality and unencumbered legal representation, and feel encouraged to participate in the polity, make use of its courts, and contribute to the marketplace of ideas. We will need (more) cause lawyers to ensure that this is still is—or, at least, *can be*—the case.

(1991); W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

¹²⁹ WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 148 (2002).

