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# Studies in Law, Politics, and Society

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STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 50

# STUDIES IN LAW, POLITICS, AND SOCIETY

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# "THEY COME AGAINST THEM WITH THE POWER OF THE TORAH": RABBINIC REFLECTIONS ON LEGAL FICTION AND LEGAL AGENCY

Tzvi Novick

## ABSTRACT

*Although rabbinic literature is often divided into the "legal" and the "homiletical," material classified under the latter category includes many important reflections on law and on legal action. This chapter centers on an extended passage in the homiletical work* Leviticus Rabba. *I argue that the passage conveys an implicit awareness of the dynamics of legal fiction and legal agency in the face of an unjust law.*

## 1. INTRODUCTION

The book of Deuteronomy (Deut 23:3) prohibits the *mamzer*, or bastard, from "entering the assembly." On the view deemed authoritative in *m. Yebam.* 4:13, a bastard is the offspring of any sexual union punishable by divine excision, but other definitions offered in this pericope and elsewhere,

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e.g., *t. Qidd.* 4:16, are more expansive, and include, in particular, the offspring of a Gentile father and a Jewish mother.[1] What Deut 23:3 denies the bastard is the right to marry a genealogically pure Israelite. Not only the bastard but also his direct descendants must endure this restriction: Deut 23:3 prohibits entrance into the assembly "[even] to the tenth generation."[2]

The law of the bastard, insofar as it makes a person suffer for his parent's or ancestor's sin, challenges the principle of divine justice. Many other phenomena pose similar, often more severe challenges to this principle, but Deut 23:3 conjoins the *theological* problem of divine injustice with a practical, *ethical* challenge. Because the verse introduces not a fact but a law, one that, like most biblical laws, depends on human beings for its implementation, the question arises: should one attempt to give force to the prohibition of Deut 23:3, or instead undertake to circumvent or oppose it?

This ethical dilemma can confront either the bastard himself or one who knows about his status. The fact that the genealogical blemish is inherited means that a person who is, by Torah law, a bastard will often be ignorant of this fact. Many sources in rabbinic literature address the issue of "outing" a bastard by revealing his genealogy, and although some of the cases clearly involve individuals who knowingly conceal their status, most seem to address the case of ignorance. The one in a position to reveal possesses special knowledge – be it supernatural, for God (*Gen. Rab.* 82 [Theodor-Albeck ed., pp. 990–991]) and Elijah (*t. 'Ed.* 3:4); scribal, in the case of the "scroll of genealogies" preserved in Jerusalem (*m. Yebam.* 4:13); or esoteric, as among the sages who transmit names of blemished families to their children or students once every seven years (*t. 'Ed.* 3:4) – to which the bastard does not himself have access.[3] Indeed, the very offspring of the transgressive intercourse may himself be ignorant of his status, given that its origin lies in an event preceding his birth. Thus, the question of whether to enforce the law of bastards arises, as often as not, not for the bastard himself, but for the authoritative figure in possession of the relevant knowledge.

This chapter examines an extended passage in rabbinic literature that addresses together both the theological and ethical aspects of the bastard problem. The passage occurs in *Leviticus Rabba*, a product of the second, amoraic stratum of classical rabbinic literature, and is structured as a homily on *Leviticus* 24:10–23. These verses tell the story of the son of an Israelite mother (a Danite) and an Egyptian father who goes out into the camp, becomes embroiled in a fight with a full-born Israelite, and blasphemes God. The blasphemer is brought to Moses and imprisoned, and an inquiry is made of God. Although the text does not identify the legal question, God's response, which opens and closes by emphasizing the

equivalence of the foreigner and the citizen with respect to the law of blasphemy (*Lev* 24:16, 22), suggests that Moses was unsure whether blasphemy by someone of mixed parentage is actionable.[4] God indicates that it is, and that the blasphemer must therefore be stoned. Moses and the Israelites carry out the execution.

The first part of this chapter examines the interpretation of this passage in the *Sifra*, a commentary on *Leviticus* from the earlier, tannaitic stratum of rabbinic literature. This commentary may be understood as implicitly highlighting some of the challenges addressed by *Leviticus Rabba*, which is analyzed in Sections 2–4. I argue that a sensitive appreciation of the interplay of fictions, agency, and injustice structures the treatment of *Lev* 24:10–23 in *Leviticus Rabba*. My discussion highlights a kind of legal fiction particular to certain systems of religious law, one involving claims about divine behavior. Methodologically, my analysis affirms the importance, for a full appreciation of rabbinic legal thought, of "homiletical" works like *Leviticus Rabba*, whose relevance is sometimes overshadowed by the Talmuds, in which law, both in form and in popular reception, plays a more overt role. Although much of the material in *Leviticus Rabba* occurs in or derives from other sources, its anthological art, instantiated in structural and redactional choices, conveys the work's unique sensibilities.

## 2. THE *SIFRA* ON *LEV* 24:10

The *Sifra*, adumbrating the direction that *Leviticus Rabba* will take, expands upon the blasphemer's genealogical irregularity and on the legal handicap under which he consequently suffers.

> "And the son of an Israelite woman went out." From where did he go out? From the court of Moses. For he went to pitch his tent in the camp of Dan. They said to him, what is your nature that you wish to pitch your tent in the camp of Dan? He said to them, I am from the daughters of Dan. They said to him, Scripture says, "Each man by his standard, with ensigns, according to their fathers' houses, shall the children of Israel encamp" (Num 2:2). He entered Moses' court, and left having lost, and stood and blasphemed.[5]

The *Sifra*'s interpretation depends on two anomalies in *Lev* 24:10. First, the verse indicates that the blasphemer "went out," without indicating where he came from. Second, we are told that the two men struggled *ba-mahaneh* "in the camp," an apparently superfluous observation, as all Israel dwelled together in the camp. In resolving these questions, the *Sifra* reads *ba-mahaneh*

to mean "concerning the camp," so that the phrase describes not the site of the conflict, but its cause. The fight between the half-Egyptian and the Israelite was not, in fact, a physical scuffle, but a lawsuit. The former wished to settle among Dan, his mother's tribe, but was denied access on the ground that tribal affiliation is determined by patrilineal descent.

This exegesis of *Lev* 24:10 sharpens the passage's envelope structure. The story of the blasphemer begins and ends with violent confrontation. On the surface of the biblical text, the participants differ: the opening confrontation pits the half-Egyptian against the full-born Israelite (*Lev* 24:10), whereas the closing confrontation has the half-Egyptian opposed by all the children of Israel (*Lev* 24:23). In the *Sifra*'s account, however, the participants are the same in both confrontations, for the full-born Israelite of *Lev* 24:10 stands for all "the children of Israel" of Num 2:2.

Both confrontations revolve, in the *Sifra*, around law, but yield opposite legal conclusions. On the question of the blasphemer's right to participate as a full-fledged member in Israel's tribal system, the blasphemer is deemed an outsider. On the question of his culpability for blasphemy, he is deemed an insider. The *Sifra*'s interpretation of *Lev* 24:10 thus frames the story as an implicit challenge to God's justice: His law seems to work not on any objective principle, but always to the disadvantage of the half-Egyptian. Alternatively, on the approach taken by the *Sifra*, God's decision about the blasphemer's culpability at the end of the story emerges as a rebuke to the Israelites' exclusion of him in the beginning. Even as God condemns the half-Egyptian to death, He acknowledges him, in a way that the Israelites of *Lev* 24:10 do not, as a co-equal subject under the law. The *Sifra* does not resolve, indeed, does not even make explicit, the questions about justice – divine and human – that its interpretation raises. In the homily on the blasphemer's story in *Leviticus Rabba*, the second exegetical work on *Leviticus* in rabbinic literature, these questions, cast in a different light, receive more direct attention.

## 3. THE SANHEDRIN AS OPPRESSOR: *LEV. RAB.* 32:8

Although the information about the blasphemer's genealogy conveyed in *Lev* 24:10 would not suffice to make him a bastard according to the Mishnah's favored definition – sex with a non-Israelite, though discouraged, is not punishable by excision – *Lev. Rab.* 32:3 cites the view that the blasphemer's

Israelite mother was married when she conceived her son with the Egyptian, so that the son, as the offspring of an adulterous union, was a bastard even under that definition. The blasphemer's status as bastard is assumed throughout the homily in *Lev. Rab.* 32.[6]

I introduce first the final section of the homily (*Lev. Rab.* 32:8), for it is most evocative of the *Sifra*'s exegesis of the same pericope.

> "And I turned and considered all the oppression." (Eccl 4:1) Hanina the tailor interpreted the verse as applying to bastards. "And I turned and considered all the oppression": these are bastards.[7] "And behold the tears of the oppressed": these parents' mothers sinned, but these miserable ones, they "distance" *them*! This one's father cohabited with a forbidden woman, but what has this one done, and what concern is it of his? "And they have no comforter," but "on the side of their oppressors there is power": this is Israel's great Sanhedrin, which comes against them with the power of the Torah and distances them, on the basis of, "A bastard shall not enter the assembly of the Lord." (Deut 23:3) "And they have no comforter." (Eccl 4:1) Says the Holy One, blessed be He: it is my task to comfort them. For in this world there is taint among them, but in the time to come, Zechariah says: I have seen them all gold, of pure gold (paraphrasing Zech 4:2).[8]

"Distancing" is a technical term for proclaiming a genealogical blemish with the purpose of enforcing a marriage prohibition. Hanina the tailor (Daniel the tailor, in most versions of the text) expresses sympathy with bastards, who are distanced from the assembly despite their innocence. Strikingly, their oppressor is not God, who legislates their exclusion, but the central court, which enforces it. God instead occupies the role of comforter. As in the portrait of *Lev* 24:10–23 suggested by the *Sifra*, but much more explicitly and unambiguously, Israel excludes the outlier, whereas God welcomes him.

The portrait of God as comforter and friend is characteristic of amoraic midrash, where it arises both through the co-option of Christian theological rhetoric and in response to the internal needs of the rabbinic movement, which, in its expansion among the general Jewish populace in the amoraic period, gravitated toward a more attractive, intimate view of the divine.[9] Elsewhere in *Leviticus Rabba* too, the law is characterized as oppressive and God brings relief from its oppression.

> "He deals justly with the oppressed" (Ps 146:7): these are Israel, as Scripture says of them, "So says the Lord: the children of Israel are oppressed" (Jer 50:33). "He gives bread to the hungry" (Ps 146:7): these are Israel, as Scripture says of them, "And he tormented you and made you hungry" (Deut 8:3). "The Lord frees (or: permits) the bound (or: the forbidden)" (Ps 146:7): what I prohibited you, I permit you. I prohibited you the fatty parts of domestic animals, but permitted you the fatty parts of wild animals. I prohibited you the sciatic nerve in wild animals but permitted it to you in fowl.

> I prohibited you (save with) slaughter in fowl, but permitted you (even without) slaughter in fish.[10]

Israel is oppressed – hungry, bound by the law – but God alleviates the nation's burden. In the preceding case, however, God is also responsible for the law's oppressiveness: if He permits, He is also the one who, in the first place, proscribed. What is striking about *Lev. Rab.* 32:8 is that not God but the great Sanhedrin is accused of oppressing bastards, even though the court seems merely to be fulfilling its duty in applying biblical law. The remainder of this chapter addresses how the earlier sections of the homily (*Lev. Rab.* 32:1–7) establish a basis for this concluding characterization. In Section 4, I focus on the homily's beginning, where God is portrayed as an exposer of bastards. Section 5 turns to the two sections of the homily immediately preceding *Lev. Rab.* 32:8. Here, responsibility for the exposure of bastards shifts instead to human authorities.

## 4. THE MOTIF OF PUBLICIZING: *LEV. RAB.* 32:1–6A

The motif that unifies *Lev. Rab.* 32 is publicizing or "outing," particularly in its application to the outing of bastards, in the two related senses of making their identity known and enforcing their separation from the community. Roots associated with making information public (*prsm*, *ngd*, *gly*, *dkr*), or references to the act of revealing bastards, occur in six of the homily's eight sections (*Lev. Rab.* 32:1–2, 5–8).[11] The opening of the homily, too, is carefully constructed to establish the motif of publicizing.

The "distant" verse in the homily's opening *petihta* (*Lev. Rab.* 32:1) is Ps 12:9, which ends with *ke-rum zelut*, an obscure phrase that the homily takes to refer to the "lifting up" (*rwm*) of the "despised" (*zly*) at the end time.[12] The phrase is first interpreted to forecast God's exaltation, in the eschatological Garden of Eden, of those who suffer in this world – according to one interpretation, the righteous, and according to another, the people of Israel – for their allegiance to God.[13] The final interpretation of the phrase associates it with bastards, "when the Holy One, blessed be He, shall reveal the skin (?) of the bastards."[14] Although the nature of this "revealing" is not altogether clear, the shift from the unambiguously positive language of "lifting up" (employed for the righteous and Israel in the first two interpretations of Ps 12:9) to that of "revealing" seems to imply that God's plan for bastards works to their detriment. This implication is confirmed by the conclusion of

the *petihta*, which links the exegesis of Ps 12:9 to the *seder*: though God will "reveal" bastards in the end time, He already revealed one through Moses, at *Lev* 24:14, with the words "remove the one who has cursed."[15] In the original biblical context, these words convey that Moses should have the blasphemer physically removed from the camp (which, sanctified by the presence of God therein, cannot abide killing, even judicial) so that he might be stoned. But the homily takes the imperative "remove" as the equivalent of the technical term "distance," and thus, as conveying God's wish that Moses publicly declare the blasphemer's genealogical blemish and thereby exclude him from the congregation.

It is remarkable that the opening *petihta* should attach to *Lev* 24:14. The story of the blasphemer begins at *Lev* 24:10. It is common practice for *petihta*s to attach to the first or second verse of the *seder*, on rare occasion to the third, but never elsewhere, as here, to the fifth.[16] Joseph Heinemann (1968, p. 341) therefore assumes that *Lev. Rab.* 32 is evidence (nowhere else corroborated) that some Palestinian community initiated a *seder* at *Lev* 24:14 (or more precisely, at *Lev* 24:13, the quotation formula that introduces the following verse). But it is extremely unlikely that a community would divide the short incident of the blasphemer across two Sabbaths and end a reading at *Lev* 24:12, with Moses ignorant of what to do with the blasphemer. Moreover, a later section of the same homily, *Lev. Rab.* 32:5, backtracks to include a *petihta* to *Lev* 24:11. We should therefore suppose that the *seder* to which *Lev. Rab.* 32 attaches opened with the beginning of the blasphemer incident, at *Lev* 24:10. The homily nevertheless begins with a *petihta* to *Lev* 24:14 because this verse enables it to set forth, at the outset, its central concern, the public revelation of bastards.[17]

The second section of the homily (*Lev. Rab.* 32:2) offers an especially subtle variation on the motif of publicizing information. The section is structured as a *petihta* to Eccl 10:20 "Even among friends don't curse the king, and [even] in your bed chambers do not curse the wealthy, for a bird of the sky will convey the report, and a winged one will report the matter." The general connection to the biblical narrative seems clear: the half-Egyptian curses the "king," God. But this link is something of a red herring. Eccl 10:20 is introduced in *Lev. Rab.* 32:2 less for the motif of blasphemy than for the motif of *reporting*. The homily reads the "bird of the sky" as God, who tells Moses from heaven to "remove the one who has cursed." Against the background of *Lev. Rab.* 32:1, Eccl 10:20 should be understood as referring, in *Lev. Rab.* 32:2, not (or not only) to the order to stone the half-Egyptian *qua* blasphemer, but to the order to publicize his status as bastard and thus "distance" him from the assembly.

The motif of publicizing sin is picked up in *Lev. Rab.* 32:5, which describes, in the language of Cant 4:12, how Israel in Egypt was an "enclosed garden," zealous for the preservation of its identity and virtue. Of the four behaviors for which, according to the homily of R. Huna, Israel merited redemption from Egypt, the third and fourth involve the conveyance of information. First, no one among Israelites informed the Egyptians of God's plan for Israel to "borrow" their neighbors' gold and silver, though they knew of the plan well in advance. Second, there was no sexual misconduct among Israelites. "Know that this was so, for there *was* one, and Scripture revealed her," namely, the blasphemer's mother, Shelomit (*Lev* 24:11). This last statement inspires an excursus (*Lev. Rab.* 32:6a) on cases in which Scripture singles out individuals by name, sometimes for good and sometimes for bad.

## 5. LEGAL FICTION AND LEGAL AGENCY: *LEV. RAB.* 32:6B–7A

Ambiguously in *Lev. Rab.* 32:1, and more clearly in *Lev. Rab.* 32:2 and 32:5, God (or His narrative embodiment, Scripture) occupies the role of publicizer, whether of the bastard's genealogical blemish or, relatedly, of his mother's adultery. Beginning with *Lev. Rab.* 32:6b, the homily works to dissociate God from this role. This shift is marked by the introduction of two statements asserting a limited life span for bastards.[18] The first, to which we shall return, is attributed to Rav: "Bastards do not live more than thirty days."[19] The author of the second statement is R. Hunia:

> Every sixty or seventy years, the Holy One, blessed be He, brings a great pestilence to the world and destroys bastards, but takes valid ones (i.e., genealogically unblemished people) with them.

This claim recollects a tradition preserved in the Palestinian *targum*s (Aramaic translations/paraphrases) to the Decalogue, according to which adultery brings "death," i.e., pestilence, upon the world.[20] But the *targum* does not imply that this pestilence kills *all* bastards. In taking this further step, R. Hunia's claim has the legal effect of obviating the bastard problem beyond roughly three generations. Anyone who can trace an unblemished ancestry back three generations is necessarily genealogically pure, because blasphemous lines older than three generations would have been cut off in the pestilence. This consequence becomes explicit in the Palestinian Talmud *y. Yebam.* 8:3 (9c) = *y. Qidd.* 4:1 (65c), where R. Hunia's pestilence is cited

in support of R. Eliezer's boast, "Bring me a third-generation bastard, and I will declare him pure."[21]

The reason that unblemished individuals die with bastards in the pestilence posited by R. Hunia is "so that sinners might not be made known." Both *Leviticus Rabba* and the Palestinian Talmud cite Resh Lakish's similar explanation for the injunction in *Lev* 6:18, that "the sin-offering shall be slaughtered in the place where the whole-offering is slaughtered." Here too, by dictating that sinners offer sin-offerings in the same place where other sacrifices are made for innocent reasons, God makes it impossible for bystanders to identify sinners. Elsewhere also, God's careful protection of sinners' identities becomes the basis for a limitation on exegetical practice:

> R. Judah b. Bathyra said: He who says Aaron was stricken will have to give account in the future. If He who spoke and the world came into being concealed him, shall you reveal him? And he who says that the wood-gatherer was Zelophehad will have to give account in the future. If He who spoke and the world came into being concealed him, shall you reveal him?[22]

Although Aaron and Miriam together sinned against Moses in Numbers 12, Scripture reports only that Miriam was stricken with leprosy. R. Judah b. Bathyra does not deny that Aaron, too, may have been stricken, but he prohibits publication of this inference, for it would be presumptuous to reveal what God chose to conceal. Likewise, the anonymous sinner of *Leviticus* 24, who violates the Sabbath by gathering wood, may not be identified with Zelophehad.[23]

R. Hunia's use of the principle of divine discretion is particularly cunning. His aim in positing a periodic pestilence is, presumably, to prevent the assertion of bastardy claims. By adding that the pestilence also kills some of the genealogically unblemished, so that sinners might remain unidentified, R. Hunia is able to have the pestilence provide not only a basis in "fact" for protecting bastards, but also a divine precedent for the very policy act that he undertakes in positing the pestilence.

Rav's assertion, that bastards live no longer than 30 days, seems to eliminate bastardy altogether as a practical legal problem. But the homily continues with two stories that show otherwise. In the first, R. Ze'ira, arriving in Palestine from Babyonia, hears men and women being identified publicly as bastards, and wonders: "it seems R. Huna's statement (in the name of Rav) that bastards do not live more than thirty days has gone!" R. Yaakov, in response, asserts that R. Ze'ira was himself present when R. Ba and R. Huna introduced, in Rav's name, a qualification of the 30-day premise: bastards do not live more than 30 days *when the bastardy is not well*

*known*. Thus qualified, Rav's statement does not support silence about bastardy, but on the contrary, encourages its publication. The second story effects the same transformation.[24] A certain Babylonian, evidently a poor man, comes to Palestine, to the town of R. Berekiah, and asks him to solicit charity on his behalf. After R. Berekiah's homily the following day, he asks his audience to support "this bastard." The poor man afterward complains the R. Berekiah has "cut off" his life, but R. Berekiah responds that he has in fact, on the logic of Rav's qualified statement, saved the man's life.[25]

How are we to understand what is occurring in these stories? Christine Hayes (2004, pp. 135–137) discusses some of the above sources, as they occur in *y. Yebam.* 8:3 (9c) = *y. Qidd.* 4:1 (65c), in an essay about legal fictions in rabbinic literature. Hayes contends that rabbis of the amoraic period, particularly in Babylonia, betray a certain anxiety about bald exercises of rabbinic power, an anxiety not in evidence among their tannaitic forbearers. This anxiety manifests itself in, inter alia, a tendency to shy away from bold legal fictions inherited from tannaitic sources, either by rejecting the conclusions they support or by finding other, more conventional grounds for those conclusions. As Hayes acknowledges, this trend is susceptible to other (not incompatible) explanations; my hunch is that the most important factor underlying the change is the development (again, in Babylonia more than in Palestine) of a sophisticated scholastic esthetic that came to view the blatant legal fiction as inelegant, and a violation of the rules of argumentation. More pointedly, however, I wish to suggest that *Lev. Rab.* 32 presents an inverse scenario, one where rabbinic power comes under criticism not for employing a blatant legal fiction, but for refusing to do so. The accusatory characterization of rabbinic leaders as "oppressing" bastards in *Lev. Rab.* 32:8 rests, I suggest, precisely on the understanding that these leaders decline to endorse the legal fiction according to which bastards do not survive. Because the legal fiction that might obviate the law of bastards is available to these leaders, they become responsible for the law when they refuse to employ the fiction, and this despite the law's origin in the Pentateuch.

In Hayes' analysis of *y. Yebam.* 8:3 (9c) = *y. Qidd.* 4:1 (65c), the principle that all bastards die in a cyclical pestilence is a straightforward factual assertion, introduced in the amoraic period so that the bastard problem might be alleviated without recourse to a legal fiction. It is true that to the rabbinic mind, a cyclical pestilence would have seemed far from impossible. Indeed, as noted earlier, the notion that adultery brings pestilence upon the world – but not a pestilence that kills all bastards – is attested outside the context of the law of bastards. But the fact that all would have conceded the possibility of such an event is no evidence that any thought it more than

possible. Nor is there clear evidence of a prior, more transparent fiction that circumvented the bastard problem, and of which the cyclical pestilence might be understood as a "factualized" transformation.[26]

But even if Hayes' analysis of the Yerushalmi text is correct, *Lev. Rab.* 32 constitutes a distinctive redactional context that must be considered on its own terms. It is important to recognize, first, that *Lev. Rab.* 32:6b–7a focuses on the premise that all bastards die within 30 days of their birth: the unit begins with it, and concludes with two stories that revolve around it. The alternative, more plausible notion of a cyclical pestilence arises only briefly, and in the middle of the unit.[27] Even the 30-day premise would not have been dismissed as impossible; the last of Egypt's plagues offers ample precedence for the visiting of death upon a particular class of children. But it clearly taxes credulity more than does the notion of a cyclical pestilence, as the stories of R. Ze'ira and R. Berekiah themselves demonstrate. R. Berekiah, in particular, seems not to view the premise in factual terms. The pauper whom he outs is obviously older than 30 days, and hence, on the premise that he endorses, the pauper must at his birth have acquired a reputation as a bastard (in which case further publication would profit him nothing), or he must not be a bastard.

One might suggest that, according to R. Berekiah, if, as in the case of his pauper, a bastard moves to a new location where his status is unknown, then the threat of the 30-day plague revives, and he must again be immediately "outed" if he is to avoid such a fate. Indeed, I think it probable that neither the proponents of the unqualified 30-day premise nor those who, like R. Berekiah, qualify it in such a way that human authorities must ultimately reveal the genealogy of every bastard not generally known to be so, act altogether in bad faith. They probably *do* mean to commit themselves to the claim that God acts – or at least, that He might act – as they assert that He does. But the very implausibility of the 30-day premise, and the ad hoc manner in which it is qualified, strongly suggest that the two parties arrive at their views of God's behavior *as a result of* their positions on the problem of enforcement of an unethical law. The proponents of the 30-day premise begin with a reluctance to out bastards. So as to act on these qualms in a responsible fashion, they advert to or modify a traditional view about bastards dying in plagues, and thus assign the resolution of the bastard problem to divine agency. The other side, less troubled by the ethical problem, or more troubled by the possibility of intercourse with bastards, refuses to divest itself of the task of outing bastards.

The legal fiction is an intentional concept: to characterize a given assertion as a legal fiction is to make a claim about the intention of the person making the assertion. We are justified in calling the unqualified

30-day premise a legal fiction, even though its proponents do commit to the view that God kills bastards within 30 days of their birth, because they make this commitment to achieve a desired legal outcome. At the same time, this legal fiction differs from typical legal fictions precisely by virtue of the fact that its authors commit themselves to the factual claim that they make. It is for this reason that their opponents, those who favor revelation of bastards, respond not by rejecting the 30-day premise, but by qualifying it. This qualified premise, in turn, is also asserted genuinely, and therefore carries the implication, in the case of the pauper, that R. Berekiah must reveal the bastard's genealogical status *in order to save his life*.

The recognition that the debate between the two parties ultimately revolves around the relative gravity of the ethical problem of handicapping bastards, and only incidentally around the question of whom God kills, underlies Hanina's condemnation of the "great Sanhedrin" as an oppressor of bastards in *Lev. Rab.* 32:8. The great Sanhedrin is Israel's central court, charged with deciding hard cases (Deut 17:8–11).[28] By attributing the enforcement of Deut 23:3 to the Jerusalem court specifically, Hanina implies that the application of the biblical law is not self-evident. The discussion in *Lev. Rab.* 32:6b–7a that precedes Hanina's statement elucidates the judicial question: can recourse be made to the legal fiction that no individual who has outlived his 30th day is a bastard, or, less drastically, that an individual who can trace a clean genealogy to three generations should not be deemed a bastard? We perceive echoes of *Lev* 24, where, in light of the exegesis in the *Sifra* and *Leviticus Rabba*, God emerges as one who welcomes the bastard into the communal fold precisely by ordering his execution. Here too, though in fictional terms, by having God kill bastards, either every 60 or 70 years, or before they have outlived a month, a court can render the unjust law of Deut 23:3 a dead letter. But the great Sanhedrin rejects this option. By rejecting the legal fiction that would circumvent the biblical law, it becomes that law's author, and responsible for its injustice. God, in turn, is relieved of responsibility, and instead takes up the role of eschatological comforter.

## 6. CONCLUSION

The beginning of *Lev. Rab.* 32 pits God against the bastard. God offers him no eschatological comfort, but pledges to expose him, as He did in the blasphemer's story. But in the continuation of the homily, the bastard's plight is relieved, first by a legal fiction, and then, when this fiction fails, by God's messianic pledge to "purify" him. In the previous sections, I have

focused on the way in which the availability of the legal fiction shifts responsibility for the bastard's exclusion from God to human beings, but here I wish to reflect briefly on the contrast between God's action under the legal fiction and His action in the messianic future. God eliminates the bastard problem in both cases, but in very different ways: in the first, through the bastard's (quasi-fictional) death, and in the second, through his purification. Let us press on this disparity: why does the legal fiction not assert that God has purified the bastard?

The likely answer is that purification of the bastard was understood to be an innovation in the *law*, even though the bastard's exclusion from the congregation could be understood as the corollary of some innate, corporeal "defilement." Because legal fictions must, by definition, make a claim about *fact*, purification of the bastard, even by God, is not coherent as a legal fiction. Thus, while the homily stages an alternation between the legal fiction and the messianic, and thereby highlights their functional equivalence, it simultaneously points to a difference between the two. Legal fictions, even as they circumvent particular legal directives, ultimately support law as an institution. Only the messianic can entertain an explicitly antinomian possibility.[29]

## NOTES

1. On the bastard in rabbinic literature see Blidstein (1972–1974), Touati (1985), Zemer (1992), Hayes (2002, pp. 184–186), Modrzejewski (2003), Fishbane (2007, pp. 4–15), and Chilton (2007).

2. For the possibility that "the tenth generation" should be construed strictly, at least in the case of female descendants, so that 11th-generation descendants may enter the congregation, see *y. Yebam.* 8:3 (9c) = *y. Qidd.* 4:1 (65c).

3. On the supernatural alternative see also Schäfer (1992, pp. 41–42).

4. See, e.g., Milgrom (2001, p. 2111).

5. *Sifra 'Emor* 14:1 (Weiss ed., p. 104c). The translation of this and all other Hebrew texts in this chapter are my own. The same tradition is recounted in *Lev. Rab.* 32:3 (Margulies ed., pp. 741–742).

6. See also, in tannaitic literature, *t. 'Ed.* 3:4; *Mek. R. Ish. Pisha* 5 (Horowitz ed., p. 15). The blasphemer's characterization as a bastard in these tannaitic sources (and especially the first) may, however, depend on the more expansive definition of the *mamzer* espoused, for example, in *t. Qidd.* 4:16, and not on the assumption that the intercourse was adulterous.

7. The full verse is: "And I turned and considered all the oppression (*ha-'ashuqim*) that is done/made under the sun. And behold the tears of the oppressed (*ha-'ashuqim*), and they have no comforter, and on the side of their oppressors there is power, and they have no comforter." The Hebrew for "the oppression" and "the

oppressed'' is the same, *ha-'ashuqim*, but the context disambiguates: since the first *ha-'ashuqim* is the subject of ''done/made,'' it must represent the abstract noun meaning oppression (as also in Elihu's speech in Job 35:9, a roughly contemporaneous text), and not the passive participle meaning the oppressed. However, Hanina, with homiletical license, understands ''done/made'' concretely, in reference to the gestation of oppressed bastards. Thus, on his reading (in contrast to the translation given above, which preserves the biblical sense), both instances of *ha-'ashuqim* should be translated as ''the oppressed.''

8. My translation of *Lev. Rab.* 32, and of other texts from *Leviticus Rabba*, follows the text of the Margulies edition, with very occasional deviations. The homily's pairing of Eccl 4:1 with Zech 4:2 appears to depend on the close verbal parallels between the texts: ''And I *turned* and *saw all* of the oppressions'' (Eccl 4:1); ''and he *returned* … and I *saw* … a lamp *all* of gold'' (Zech 4:1–2). The tailor's statement is paralleled in *Qoh. Rab. ad* Eccl 4:1, where it occurs as the last of a series of alternative interpretations of the verse. Eccl 4:1 is also read with reference to bastardry in *Avot R. Nat. A* 12 and *Avot R. Nat. B* 27 (Schechter ed., p. 27a–b), but in these sources, the oppressors are the parents who beget bastards.

9. See generally Anisfeld (2009).

10. *Lev. Rab.* 22:10 (Margulies ed., p. 521). As in *Lev. Rab.* 32:8, the word for ''oppressed'' in this passage is *ashuqim*.

11. For another case of a leitmotif binding different parts of a single homily in *Leviticus Rabba*, see Zohar (2007, pp. 100–118).

12. The *petihta* is a homiletical form that attaches to one of the verses at the beginning of the *seder*, the section of the Pentateuch designated for public reading on a given Sabbath or festival. The *petihta* begins with exegesis of an apparently unrelated verse from elsewhere in the Bible, and eventually arrives, by argument or association, at the *seder*'s first verse, the quotation of which brings the *petihta* to a close. Homilies in *Leviticus Rabba* typically begin with one or more *petihtas*, then continue with exegesis of subsequent verses from the *seder*.

13. The reading of Ps 12:9 as an account of the eschatological Garden of Eden likely depends on an unstated *gezerah shavah* (lexical connection). The verb in the first clause of the verse, *yithalekun*, recollects, for the homilist, Gen 3:8 ''And they heard the sound of the Lord God walking (*mithalek*) in the garden at the breezy time of day.'' That the echo of Gen 3:8 undergirds the exegesis in *Lev. Rab.* 32:1 is confirmed by another case in which an occurrence of *hithalek* inspires a portrait of the Garden of Eden in the end time; see *Sifra Behuqotai* 1:4 (Weiss ed., p. 111b). See also *Sifre Deut.* 457 (Finkelstein ed., p. 427) for the description of the righteous *mitayyelin* ''walking about'' in Eden; *tayyel* regularly renders *hithalek* in the Aramaic targums (e.g., *Pseudo-Jonathan* to *Gen* 3:8).

14. *Kerum* ''skin'' is enigmatic. In *y. Qidd.* 4:1 (65b), the word *keruv* in *Ezra* 2:59 = *Neh* 7:61 is interpreted as a reference to bastards. While all witnesses to *Lev. Rab.* 32:1 attest *ke-rum*, I wonder whether *keruv* is original; it is close enough to the exegetical trigger in Ps 12:9, *ke-rum*, particularly as *b* and *m* are both bilabials.

15. On the term *seder* see *supra* n. 12.

16. On the general tendency for the *petihta* to attach to the first or second verse of the *seder* see Heinemann (1971, p. 810b) and Heinemann (1968, p. 350).

17. Given this structural consideration, there is no need to assume, with Mann and Sonne (1966, p. 2.126), that underlying the *petihta* is a traditional homiletical link between the first word of Lev 24:10 (“and … went out”) and that of Lev 24:14 (“remove,” literally “cause to go out”). But their suggestion is not incompatible with the argument advanced here.

18. The first part of this unit in *Lev. Rab.* 32 is structured as follows: (1) statement: bastards live for no more than thirty days; (2) statement: bastards die in a cyclical pestilence; (3) the story of R. Ze‘ira proving that bastards live for more than 30 days if their genealogical imperfection is known; (4) the story of R. Berekiah proving the same. The Palestinian Talmud includes two passages that partially parallel this unit: *y. Yebam.* 8:3 (9c) (which recurs verbatim in *y. Qidd.* 4:1 [65c]) and *y. Qidd.* 3:12 (64c). *y. Yebam.* 8:3 (9c) contains parts (2), (1) and (3), respectively, while *y. Qidd.* 3:12 (64c) contains, parts (1), (4), and (3), respectively. The odd distance in *Lev. Rab.* 32 between the statement about bastards living for no more than thirty days and the two stories that qualify that statement, suggests that the editor of *Lev. Rab.* 32 began with the passage preserved in *y. Qidd.* 3:12 (64c), then spliced in, after (1), the passage preserved in *y. Yebam.* 8:3 (9c) (deleting (1), because it had already been introduced), then continued with the passage in *y. Qidd.* 3:12 (64c) (deleting (3), again because it had already been introduced).

19. For the claim that this principle arose in the Hellenistic period as a rhetorical means of discouraging illicit unions, see Ta-Shma (1967–1968). Can the death of David’s infant son (2 Sam 11:27 and 12:18), insofar as the infant was understood as the offspring of his adulterous union with Bathsheba, have played a role in the development of the principle?

20. See *Neofiti* and *Pseudo-Jonathan* to Ex 20:14 = Deut 5:18.

21. Citations to the Palestinian Talmud depend on MS Leiden.

22. *Sifre Num.* 105 (Horowitz ed., p. 103).

23. For other instances where a point is made of God concealing the identity of sinners see *y. Sotah* 5:6 (20d); *y. Sanh.* 6:2 (23b). The identification of the wood-gatherer with Zelophehad is one manifestation of a larger trend in Second Temple and post-biblical exegesis to view together the Pentateuch’s four “oracular novellae” (concerning the wood-gatherer, the blasphemer, the Second Passover, and Zelophehad’s daughters). See Chavel (2004, pp. 1–2). In light of this trend, and the particular tendency to read the closely parallel stories of the wood-gatherer and the blasphemer against each other, we may posit that rabbinic reflections on the outing of the blasphemer/bastard in *Lev* 24 arise not only from a general concern with the bastard problem, but also from a specific exegetical problem: why does the Scripture reveal the blasphemer’s name but not the wood-gatherer’s?

24. On the differences between the versions of this story in the Palestinian Talmud and in *Leviticus Rabba* see Miller (2006, pp. 240–241).

25. Kalmin (1999, pp. 57–58) acknowledges the second story as an exception to the general tendency that he discerns for Palestinian rabbis to be more discreet about genealogical blemishes than their Babylonian counterparts. He marginalizes the exception, in part, on the ground that the bastard does not belong to an important family, as in other Babylonian and Palestinian stories, but is a poor man, whom a rabbi might therefore more freely antagonize. Kalmin does not, however, account for the first story of R. Ze‘ira, which seems more damaging for this thesis in two

ways: first, there is no indication that it involves only lower-status bastards, and second, it seems to highlight a contrast (precisely the inverse of that which Kalmin draws) between Babylonia, governed by the assumption that no one over thirty days old was a bastard, and hence, that there can be no public revelation of bastardy, and Palestine, where this assumption did not hold.

26. Hillel's evasion of a bastardy finding by means of literalist interpretation of the marriage contract (*t. Ket.* 4:9) cannot be considered a fiction, and in any case, his stratagem is relevant only to a very particular factual scenario. On Hillel's stratagem see Rosenthal (1994, pp. 330–331).

27. See *supra* note 18. While I argue there that the arrangement of this unit arises from the synthesis of two distinct sources, this synthesis represents a redactional choice whose motive is subject to analysis.

28. Cf. *m. Mid.* 4:5; *Lev. Rab.* 4:1 (Margulies ed., p. 75).

29. On law and the messianic see Cover (1993, p. 194).

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# FROM *PARATROOPERS* TO *WALTZ WITH BASHIR* – THE ABSENCE OF LAW FROM ISRAELI WAR FILMS

Shulamit Almog

## ABSTRACT

*The chapter contends that although Israeli reality is replete with legal issues, very few films deal directly with the law or with a legal process as a central theme. Contemporary Israeli films are not very different from the early Israeli films in their embracement of a national heroic narrative, which typically leaves very little space for legal issues. The chapter demonstrates the absence of law from Israeli cinema by looking closely at war films, which are probably the most popular and influential Israeli films. War films reflect and in the same time participate in the construction of the Israeli collective consciousness, wherein the army experience is central. Tracing the way in which law is presented (or lacks representation) in them may shed light from a new angle on the role of law in shaping social and political norms in Israel.*

## 1. INTRODUCTION

Law and film has become an area of academic analysis and research mainly because law, with its many features, is one of the subjects that have been

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given continuous and intensive attention in the cinema since its earliest days.[1]

Two assumptions are linked to the establishment of an interdisciplinary discourse centered upon law and film. The first assumption is that both law and film are complex social practices that are able to create meanings relevant to wide audiences. The second assumption is that there are complex interrelations between law and film, and both the phenomena influence and are influenced by each other.

The films that deal with law are usually located within a specific, easily identifiable location. A film about a murder trial that is conducted before a jury in the United States, a film that reveals of the incrimination of innocent people in England, a film that centers upon the exploits of an investigating judge in France – all such films and their like, even if they are of interest to the public throughout the world, are created within a certain society, and in most cases refer to a definite legal system and cultural circumstances that characterize that society.[2]

The issue of the relationship between the local and the universal aspects of cinematic art is a complex one. I do not wish here to enter into the complicated matter of defining the borderlines of national culture or "national films" and acknowledge the distinction made by Michel Lagny regarding the essential connections between a national culture and external cultural systems it is exposed to (Lagny, 1992, p. 98).[3] For my purposes here, it is sufficient to assert that awareness of the distinctiveness of the society in which a film is created and viewed may be in many cases important for grasping its poetic and cultural significance. In the same time, the film may advance a richer understanding of the society in which it was created. Against this background – the extensive concern with law as represented in films created in various states and societies and the developing research into the connections between law and film – I attempt to examine the affinities between Israeli films and law.[4]

A preliminary examination suggests that law does not figure prominently in Israeli films. As I discuss in greater detail later on, various descriptions and analyses refer to the history and development of Israeli cinematic art, but all of them omit any significant association to law. Although Israeli reality is replete with legal issues, very few films deal directly with the law or with a legal process as their central theme.[5] It is easy to discern that there are no courtroom dramas in Israeli cinema, but even if we widen the definition, and regard every film that deals with any kind of significance in questions concerning justice and its pursuance as a law film,[6] it will be difficult to come across many Israeli films that correspond to this wider definition.[7]

In the following section, I review the continuous absence of law throughout the development of Israeli cinema, while stressing on the contexts in which it may have been expected to appear. The absence of the law is of course not without importance. The refraining from dealing with a certain subject should be examined carefully to reveal its significance, and I try to do so by focusing on its absence in war films.

War films and war have a special place in Israeli films. Films that place soldiers and wars at their center have been created throughout the history of Israeli cinema, and they reflect the developments and changes that Israeli society has undergone. Beyond the stories of warfare and the warriors' camaraderie, war films reflect other central themes in the Israeli experience, such as the Holocaust and the Kibbutz life. But although law features prominently in Israeli life and that, as we shall see later on, it might have appeared in many of the war films because of the subjects they deal with, law remains constantly absent. Section 3 analyzes the place of law as an "absent presence" in a number of films dealing with the IDF (Israeli Defense Army) and its exploits. The following sections propose an overall analysis and suggest various possible reasons for the absence of law in Israeli war films.

## 2. THE FIRST YEARS

Israeli cinema was born in the 1920s, and its founders regarded it as a significant instrument for serving the Zionist cause (Ne'eman, 2006a, p. 133). The main subject of films created in those years was the story of materializing the Zionist dream in the Land of Israel. Such films were labeled "Zionist realism."[8] Common themes in these early films were the distress of European Jewry and arrival of abused Jews to Palestine, and their struggle for survival in their new, hostile environment (*Ibid*., p. 34). The films were mostly funded by the Zionist Movement, and served to advance settlement in Palestine and to raise contributions.[9] Such films, which were characterized by an overt propaganda dimension, were a powerful instrument in presenting the Zionist cause at its best both internally and externally, and even more so in helping to consolidate a national identity and potent myths that continued to affect Israeli society for decades.[10]

The state of Israel was established in 1948. In the 1950s, private investors began to finance films. In the same time the state gradually began to support cinematic productions. However, the main themes remained unchanged. The films that were created during the first years of Israel still belonged almost entirely to the genre called "national-heroic" (*Ibid*., p. 135).[11]

A typical example that perhaps delineates the end of the period of national-heroic films (Shor, 1984, pp. 39–40) is the one by Baruch Dinar, *They Were Ten* (1960). The film chronicles the survival struggle of nine men and one woman, refugees from the pogroms in Czarist Russia, who settled on a deserted hilltop in Galilee, and had to face internal disputes, the hostility of the nearby Arab village and the enmity of the Turkish rule. The absence of law in this film, as in other films belonging to the "national-heroic" genre, is hardly surprising. The preordained pattern of the national-heroic narratives did not leave any space to legal diversions.

After 1948, many films focused on stories of battle and bravery, thus supporting and intensifying the ideal of national identity and collective solidarity.[12] The conceptual orientation that stands out in these films was to represent the hostility and the threats to its mere existence that the young state was forced to cope with, and the collective sense that only a strong army supported by overall solidarity, sympathy, and total support could succeed in achieving its goals.

Israeli early cinema refrained from dealing with political, social, or cultural conflicts and focused on the collective-heroic narrative that did not need and apparently did not enable legal interpretations. The survival battles that were depicted in these films were more exhilarating than any tedious legalities could be. At the same time, the practice of law in the new state was in its eve and could not produce at that stage noteworthy dramas that could arouse interest in cinema producers.

During the 1960s the picture begins to change. The complexity of life and the social and cultural challenges in the young state of Israel gradually transformed the national-heroic cinema anachronistic and demands for "normal" cinema began to be heard. The production of films dealing with central and collective issues such as the Holocaust and its implications or the wars and the struggle for security, did not cease, but more and more films illustrating the daily realities of Israeli life appeared in addition to these. Melodramas[13] and comedies[14] were also produced. The films of Menahem Golan and Ephraim Kishon drew large audiences and began to change the image of the Israeli cinema. A genre nicknamed "burekas" (which is a popular oriental dish) that centered on a humorous portrayal of ethnic stereotypes began to achieve popularity. The most successful film in that decade was *Salah Shabati* (1964), a satire that reflected the hardships in the immigration process of Easterners Jews, encountering bureaucracy and political hypocrisy. The story was told through the figure of a new immigrant from Morocco who adapts himself, together with his family, to the realities of Israeli life.

"Author" films, influenced by the new wave in French cinema were also produced during these years. These are films that were called the "new sensitivity films[15]… used plots of an unusual nature in order to deal, by means of formalistic experiments, with existential subjects through introspection and the disregard of the Zionist narrative for commercial purposes" (Ne'eman, 2006a, p. 139).[16]

Israeli cinema of the 1960s is far more varied that it was in the past. Yet even this new diversity does not reveal any significant concern with law or with legal themes. It should be noted although that indirect or marginal relevance of law could have been linked with many of the films created during that period. For example, Ne'eman notes that Salah Shabati contains significant statements about human rights. The frequent confrontations between the hero, Salah Shabati, and representatives of the various authorities are not only humoristic illustrations, but imply reasoned arguments of the right of every person to gain a livelihood, even if she chooses the traditional means of a craft or trade, without being forced to hire herself out to hard physical labor in agriculture or industry, as was required from Shabati (*Ibid*., pp. 136–137). From this perspective, Salah Shabati, who derides the officials that arbitrarily force him to various kinds of futile agricultural work, claims the social right he was denied – the right for employment opportunities more suited to his preferences and abilities, with more real potential than being a hired hand, and also far more respectable.

The "burekas" films also were interpreted as relevant to the discussion on social rights and attaining equality Israel. For example, Ella Shohat claims that these films, although embodying ideological complexity, have led in the past to a problematic presentation of eastern characteristics that strengthened the harm done to equality. In her view, most of these films have presented a false picture in which the social gap between Mizrahim (easterners Jews) and Ashkenazim (westerners Jews) can be easily resolved by means of adaptation to western or Ashkenazi ways, and by intercommunal marriages. This option is portrayed in the films as a simple and accessible, and one that could and should be chosen quite naturally. This portrayal creates a problematic message that contributes to the perpetuation of the non-egalitarian reality.[17]

However, in all these films the relevance to law is not salient, and in most cases it is quite marginal within the general context of the film. Although the films are predisposed toward complex discussion regarding rights, which is a characteristic legal subject, they do not include any direct or significant reference to law. Even when possible to locate in the early films articulations

that have some association with law, such articulations are indirect and anecdotal.

## 3. POLITICAL CINEMA EXCLUSIVE OF LAW

Many have regarded the Israeli films created in the 1970s as essentially different from the films that preceded. Renan Shor writes that by the end of the 1970s normalization of the Israeli cinema had begun, a period of "shattering of pseudo-myths" and of normalization of Israeli cinema has begun (Shor, 1984). As examples, he mentions that the films of Uri Zohar, *Peeping Toms* (1972), *Big Eyes* (1974), and *Save the Lifeguard* (1977), described "the continuous process of de-mystification of the 'sabra' image as it appeared in films of the pre-statehood period and in the first fiction films…" (Shor, 1984).

A new model takes shape: the political Israeli cinema. Films begin to focus on socio-political issues central to public Israeli discourse. The political orientation of cinema intensified in the 1980s, following the First Lebanon War, and has in fact continued until today. The development of Israeli cinema is usually described as parallel to the development of Israeli society. Thus, films reflect the gradual transition from collective subjects and stories about security and survival, to narratives focusing on the individual, the private and the personal.

Sometimes such films touched the field of law, but again, it was mostly a matter of marginal or tangential contact in relation to the main statement of the films. Special interest in this context is generated by films that deal with social injustice and violation of human rights, issues that by their very nature are associated with law and legal battles. But unlike the American cinema that often deals with detailed descriptions of historical, constitutional, and other kinds of legal contests, and thus contribute to making them part of the American ethos, the Israeli films do not choose to describe successful legal processes or battles.[18]

In Israeli cinema that deals with social issues involving the violation of human rights, law is usually portrayed as almost without significance in the face of harsh realities, and not as a tool that can be used to alleviate injustices or change the problematic situation.

Here are some examples. In the center of *The Syrian Bride* (2004) stands the figure of Mona, a Palestinian Israeli, who is about to cross the border between Israel and Syria to marry a Syrian TV star. The legal norms and procedures applied on both sides of the border are presented in the film as

violating human rights. The vague security considerations, in the name of which both the Israelis and the Syrians act, are shown as hypocritical. The factors that make it possible to hold this wedding despite the legal difficulties is the human solidarity and empathy that have the sole power to circumvent the arbitrary legal norms.

The film *Promised Land* (2004) tackles the fate of women that are victims of a traffic in human network. It describes the torturous journey of women from Eastern Europe who are smuggled into Israel through the Sinai Desert. They are beaten, raped, transferred from hand to hand, and forced to engage in prostitution in various places in the country. The film supplies a realistic picture that is painful to watch of the harsh realities of prostitution and of physical and mental abuse, while the function of the law with regard to what is taking place is minimal.

The film *Travels of James in the Holy Land* (2003) deals with the phenomenon of foreign workers in Israel through the story about James, a young and naive African who arrives in Israel to fulfill a dream and to see Jerusalem. James is unjustly imprisoned and is released only to become involved in a vicious circle of exploitation and humiliation in which thousands of foreign workers are entrapped.

In these three films, law is portrayed as being an insignificant and impotent tool in view of an insupportable reality of widespread abuse, exploitation, and violation of human rights. But this does not provide for any meaningful discussion of the connection between law and injustice, similar to the discussion evoked by the genre so fully developed in American cinema, which presents the tension between legal norms and essential justice as a central theme of a film.[19]

## 4. WAR FILMS: CHILDREN IN AN ENCLAVE

### *4.1. General*

War films have a prominent place in Israeli cinema, as in Israeli culture at large. The battles the preceded the establishment of the state Israel, the War of Independence and the wars that followed, the camaraderie among the warriors – all these were natural and highly popular subjects for many of the films that were produced in the early years of the state. But even in the following years, the threat on security and the vitally important functions of the army and the soldiers continued to play a central role in the realities of Israeli life and in the collective consciousness, and as a result in cultural

discourse. Against this background, it is not surprising that the army was a subject in which Israeli cinema continued to show an on-going interest. Special cinematic attention was dedicated to the First Lebanon War, which started in 1981. This war is reflected in a number of films that were produced over a period of twenty years and some of which gained considerable public and critical acclaim (*Two Fingers from Sidon*, 1986; *Time for Cherries*, 1991; *Cup Final*, 1991; *Summer Story*, 2003; *Beaufort*, 2007; *Waltz With Bashir*, 2008; *Lebanon*, 2009).

The turn from heroic-collective narratives toward stories that focus upon personal dilemmas, political debates, and social issues was echoed, to some extent, in war films as well. Stories about the army and soldiers appeared in comedies that won widespread popularity (such as *Halfon Hill Does Not Respond*, 1976; *My Mother the General*, 1979; *Spihas*, 1982), in dramas (for example, *The Troupe*, 1978; *Licking the Raspberry*, 1992; *Five Five*, 1980), in political films that dealt with various aspects of the Israeli–Palestinian conflict (for example, *The Bubble*, 2006; *Smile of the Goatkid*, 1986), and in a genre dealing with the idiosyncratic situation of army life, and with the nature of the legendary soldier camaraderie (*One of Us*, 1989; *Repeated Dive*, 1989; *Time for Cherries*, 1991).

But to a great extent, the later military and war films once again reverted to the same setting in which the earlier war films had taken place. This is a very Israeli kind of setting, in which the army and soldiers have a particular status in society and culture; a setting characterized by a strong identification of civilians with soldiers. Criticism and anger over inept political decisions that involved the army merely entrenched the identification with the soldiers themselves, who are placed in Israel above all political and public disputes. In the background, as a sub-text that is always present, there is the recognition of the absolute need to maintain a solidarity that can withstand all contexts and represent a superior norm that transcends everything. Israeli cinema managed to present sensitively and correctly the special place that is held by the soldiers and the exceptional position of the solidarity norm in Israel.

One of the characteristics of the special sphere in which soldiers are located is the absence of law from that sphere. The sense of this absence is common to all war films, of various types and focal points. Yet, even if such absence is understood or even required when dealing with early war films, it becomes more conspicuous and raises an increasing number of questions when examining later war films. In most of the later war films, narratives about heroic accomplishment of military missions or the comradeship and bravery of warriors are exchanged for stories about the outrageous and

perhaps unnecessary loss of life, negligence and untrained conducting, battlefield wounds, training accidents, abuse of soldiers and citizens, unjustified violence, and other dilemmas that test the ethos of solidarity and camaraderie among brothers in arms. All these are subjects that clearly pertain to the sphere of law. In the realities of Israeli life, events of this kind whenever they occur have often, if not always, entailed legal or semi-legal measures in the form of judicial processes within the army or outside it, various kinds of investigations and attempts to attribute legal responsibility to the appropriate persons. All this finds almost no mention in war films. Even films that were perceived radical and were criticized for undermining the themes of security and traditional solidarity, the law remains outside.

Of course, the juxtaposing of law and war is complex and challenging. But it is just this complexity and depth that are embodied in the interaction between the army and law that might stimulate interest among film producers. In practice, such interest was not aroused, and the war films remained almost innocent of law. Just as it has so well been expressed by Ne'eman, whose war film *Paratroopers* will be analyzed later, "War is known as the cause of all causes and the main motivating force if not the only one in contemporary Israeli experience, and therefore there is nothing better than war to explore new possibilities for Israeli cinema" (Ne'eman, 2006b, p. 126). For that very reason there is nothing better than war films through which one can examine the absence of law in Israeli cinema, and the meaning of this absence.

I shall detail through an analysis of a number of war films, both early and late ones, how engagement with law or with semi-legal practices are shunted aside even when there is an expectation for it, and how this leads to the screen being dominated by other focal points.

### *4.2. Paratroopers*

*Paratroopers* (1977) is a film that was perceived as a milestone, and as representing a revolutionary trend that centers upon a critical perspective of the army.[20] The first part of the film is marked by death; it is an unsettling death both factually (What exactly happened? An accident or a suicide?) and with regard to the question of responsibility (Is there anyone responsible for causing this death?). Weisman (Moni Moshonov) is a recruit who fails to meet the expectations of his fellow platoon members during boot camp. Some of the difficulties are caused by social mobbing. In one of the opening scenes, the unit doctor selects Weisman to demonstrate

various medical procedures on his body, accompanied by loud ridicule of other soldiers. But the main predicament is Weisman's personality. He is sensitive and frail both physically and mentally. At a critical moment, Weisman asks for an interview with the mental health officer, but Yair, his commander (Gidi Gov) ignores the request, and the mobbing of Weisman goes on until it is terminated by his death. Weisman fails in a shooting drill and is ordered by the Yair to repeat the drill, even though the regiment commander had excused him from doing so. Weisman throws a grenade into the building, and runs into it without waiting for it to explode. He is killed instantly.

The second part of the film focuses on Yair, the platoon commander. Yair returns to the platoon on that same day. ''What happened, has happened, and the discipline of training will continue,'' he says to his soldiers. The next day the regiment commander arrives and announces the appointment of an officer of the military police to inquire into the case and that Yair would be given leave of absence until the investigation was completed. The military police officer (Shlomo Bar-Abba) begins to conduct a serious and thorough inquest and tries to trace the full and precise details of the event. But when it seems that the investigator is at the point of delineating the full circumstances of the death, the investigation is halted. The regiment commander informs the platoon commander that: ''We have decided that the matter ends here.'' The film does not give much explanation as to why the investigation was abruptly cut. We are not told who made the decision, neither what were the reasons for it.

Yair is called from home by a message transmitted to him: ''You are wanted at the regiment.'' He is hurt, but does not respond to the entreaties of his girlfriend and does not even have any real hesitations. His return to the platoon is the concluding scene of the film. Yair arrives and begins to light torches and rouse the soldiers for the journey of transition from the camp to another location. The routine of basic training recurs. Yair again says: ''What happened has happened, and the discipline of training will continue,'' as he said immediately after the death of Weisman. At the end of the film everyone is in full course of the journey, singing songs for the morale, just as they had done in the opening scene in which even Weisman had sung with enthusiasm alongside the members of the group to whom he did not succeed in joining.

Yigal Burstein, in his analysis of *Paratroopers*, indicates the gap between the two parts of the film. In his view, the first part is a convincing depiction of the realistic confrontation between Weisman who tries to opt out of the exhausting training trek, and his commander who wants him to continue

with it. From the moment of Weisman's death, the figure of the commander disintegrates (Burstein, 1990, p. 157). This disintegration, which characterizes the plot of the film, is in my view a symptom of the absence of law. However, in the narrative logic of the film, the absence of law is called for. The focus of the film is very far-off from the sphere of law, even though its central event – death in circumstances that demand clarification – is clearly a legal subject and requires legal clarification. But in the world of the film, engagement in the practicalities of legal investigation is shunted aside.

In actual fact, the decision to break off the inquest before it could end was a decision to exclude law from the territory in which death occurred. The film does not present the exclusion of law as connected with a significant conflict between the demands of law and the experience of "good soldiery," or as the result of a struggle between security needs and what the rule of law demands. In the world of the regiment, the choice of the exclusion of law is portrayed as clearly understood, as required, even as commendable; it is regarded as a course of action that does not need to be probed into because it is so natural.

The film presents a kind of equation in which the two sides are "we have decided that the matter ends here" = "you are needed at the regiment." Two factors allow an equation of this kind to function. The first is the special nature of the regiment – as an enclave with its own rules and laws; the second is the perception of the uniqueness of the military enclave as appropriate.

The uniqueness of the military enclave is characterized among other things by the absence of law. On the face of it, the regiment, with the permutations required by the nature of military service and training and by security constraints, is subject to the network of legal norms that envelope our lives in general. But as *Paratroopers* so well portrays, whenever a legal or semi-legal norm tries to penetrate into and influence realities within the regiment, it is blocked.

Here are some examples. At the beginning of the film, a soldier asks the army doctor how many hours of sleep soldiers are entitled to have. The doctor begins to answer, but is cut short by the platoon commander who fiercely enhances the irrelevance of the question, and indirectly of the fact that whoever insists on questioning the orders of headquarters and claiming their right to hours of sleep according to law will not become warriors. In another scene, one of the soldiers (whose father is a lawyer) mentions the possibility of raising a complaint anonymously before the Commissioner for Soldier Complaints, but the matter ends at that, and the hesitant thought of the possibility to subject that matters of the platoon to outside scrutiny is

barred from the very start. In one of the later scenes Weisman throws his radio into the latrine pit. The commander opens automatic fire into the pit while many soldiers are in the surrounding area. In another scene, during a trek, Weisman who is agitated is strapped to a stretcher. When the platoon returns to the camp, the regiment commander what happened, but his wonderment dies out of itself, and is not turned into a complaint according to military disciplinary rules for inappropriate behavior, or into some kind of investigation. Toward the end of the film, when a barrage of fire is being carried out, the platoon commander enters into the line of fire before the soldiers have emptied their weapons. A soldier fires a shot in the area where the platoon commander is standing. This involves serious security offenses, but in the film they are not treated as such. They are just ignored. The only hint of the incident is the humorous remark of the platoon commander: ''Whoever wants to kill me should aim better.''

The exclusion of law naturally comes to a height in breaking off the inquest concerning the death of Weisman. The scene exemplifies even in visual terms this exclusion. The investigating officer of the military police stands at the back of the frame, outside focus. In the front of the picture stand the regiment commander and the platoon commander. The former informs the latter that it was decided to close the case. The military police officer, who represents the legal option, disappears in a kind of visual as well as a narrative ''fade out.'' The regiment, so it appears, is set in a place into which law cannot penetrate; nor is there any need for its penetration because the regiment is autonomous and has the capacity to resolve any problem that arises with its own mechanisms.

The film describes painful events. The distress of Weisman arouses deep identification within Israeli audience, and associations with other painful cases of soldier suicides intensify this even more. Yet, the death that stands at the center of the film seems as though it occurred in another dimension, one with which normal, everyday Israeli law has no full access. To a great extent this could not be otherwise because the film concerns things that Israeli society do not want and is not prepared to judge. One of these things is the special status of the soldier group, and the need to protect it at any cost for the common good. It is vital to prepare the soldiers for the next war, and an inseparable part of the preparations is to establish solidarity among comrades-in-arms. Some of the cost is the arduous sifting process in which the group of comrades is created, and those who are not capable of fitting in are ejected from it. The entire group closes ranks to help Yair, the platoon commander, who is faced with a problematic situation, and all unite to overcome the trauma of a training accident (or suicide), which constitutes,

as all Israelis well know, a demanding moment not only for the family of the deceased but also for the platoon, especially a platoon of cadets. Throughout the film, whenever it becomes necessary to protect the group and its proper function, a soldier or commander may commit some kind of criminal or disciplinary offence, without anyone protesting. It is clear to everyone that this is the way that paratroop training is conducted and that it should be conducted in this way to consolidate the brotherhood of warriors.

Against this background, Yair's treatment of Weisman is not only perceived as "the sadistic abuse that the anti-hero must suffer"[21] but also as an effort to assist him in overcoming difficulties and holding up to win the desired prize – the status of being a member in a group of warriors. As the film reveals, Yair had himself suffered serious difficulties when he was a cadet, just as Weisman is at present. Through a similar process to the one over which he is now in command on the other side of the fence, as commander of the platoon, he had managed to mould himself into becoming part of a fighting group. The film draws a parallel between the two men, and the implication is that Yair, who is aware of the similarity between himself and Weisman, tries to help him through using the methods that had helped him.

The film therefore arouses not only a new identification "with a semi-detective investigation and inquiry into abusers in the army," which is imposed "on the militaristic and macho-type Israeli consolidation as a whole" as Ella Shohat (2006, p. 96) suggests, but also, and mainly, the traditional identification with the Israeli identity "steeped in war experience" (Ne'eman, 2006b) and in the brotherhood of warriors.

Ironically, the tragic fate of Weisman is derived from the ethos of group superiority and brotherhood among its members. The group rejects him because his presence mars the platoon's function. When Weisman is under arrest for disorderly behavior, two soldiers abuse him because they were not given their leave on his account. In fact they declare that he is not part of the group and as harming it and encourage in various ways his expulsion from it. After his death it is almost as if they are celebrating the expulsion by opening the food package he received from his parents and sharing out its contents among the members of the company.

In an essay dealing with Israeli war films, Ne'eman describes his film as follows: "*Paratroopers* was not a film about the Yom Kippur (Day of Atonement) War but on the badgering to death of a paratroop cadet. In other words: on the national obsession of Israel: to be soldiers" (Ne'eman, 2006c, pp. 130–31). He also makes a comparison between the inquest that stands at the center of the second part of *Paratroopers* and the inquiry

conducted by the Agranat Commission after the Yom Kippur War: "The agenda of the Agranat Commission was the national obsession with militarism, and so was the implicit agenda of *Paratroopers*. The Commission, which focused on the military ranks, seemed as though they had ruled that the State of Israel is a state founded upon military obsession, and that it should be so" (*Ibid.*).

*Paratroopers*, as Ne'eman suggests, raises the question whether it really "should be so," and to some extent undermines the positive answer. But the film, which has not lost its relevance today, suggests a multifaceted answer. In my view, Ne'eman's film indeed expertly presents the Israeli "national obsession with militarism" and the painful price it demands from certain individuals. Yet, the film maintains a close, living and vibrant connection with the national-heroic narrative and ends with renewed acceptance of this narrative, and with ruling that ultimately this is the way "it should be." The death of Weisman is tragic, but group unity in the army can and even must come to terms with this death and acknowledge it as unavoidable price for achieving collective goals.

*Paratroopers* is an important film that presents with depth and precision a crucial aspect in Israeli army experience and in the Israeli experience in general, and the tension that is sometimes catastrophic, as in the film, between the individual and the collective needs. But the film does not produce a serious critical statement. Like many of the other socio-political films that followed it, this film also played a role in developing the uninterrupted national narrative of military heroics, and of the unique quality of solidarity that only a company of soldiers knows how to ignite among its brother members. This is a story that had and still has a dominant position in Israeli society. It is a story that never could endow a significant place to legal considerations.

To sum up, *Paratroopers* leaves the death at its center unresolved. The film ends long before arriving at any legal clarification or decision. Even if a critical stance regarding the problematic nature of training cadets emerges from the film, it does develop into expressing criticism on the absence of law. The optimal functioning of the military system is portrayed as more important than pursuing questions such as legal responsibility for the death, or whether it is essential to impose legal punishment for a training accident (Zimmerman, 2003, p. 71).[22]

Such a position is depicted as possible, and perhaps required, since the death of Weisman occurred within an enclave, in that gray zone of vague borders and vague norms in which the soldiers are placed. This gray zone

always exists in Israel during wars and in between them, in every place where soldiers are stationed. This is a zone that, even if it formally falls within a territory, in which the law of the state applies, in actual fact a full application is unfeasible.

### *4.3. Avanti Popolo*

*Paratroopers* presented the rejection of law from within the enclave of the regiment, a rejection that even if one opposes, can be found to have an underlying ideological justification. Law in *Paratroopers* was at certain moments almost present, but was diverted aside. In the film of Rafi Bukai, *Avanti Popolo* (1986), an even more extreme course is taken. The film presents not only diversion, disregard or rejection of law, but a complete displacement from a world in which law has any kind of relevance at all.

A number of hours after the beginning of the ceasefire that ended the Six Day War, on June 11, 1967, four Egyptian soldiers find themselves separated from their comrades. One of them dies of his wounds. The commander, who does not accept the ceasefire, commands his remaining subordinates to attack a group of Israeli soldiers. They refuse for fear that drawing attention to themselves would lead to their deaths, and after the argument develops into a fight, one of the soldiers kills the commander.

The two soldiers who remain alive are a farmer (Suhel Haddad) and a stage actor (Salim Dau). They begin to march through the desert, exhausted with hunger and thirst. Various bizarre events occur on their way. They come across a jeep with a dead UN soldier. While they are there, they come upon a group of Israeli soldiers who are accompanying a British film director searching desperately for photographs of the real war and have no other choice but to film the dead UN soldier. When they discover the Egyptian soldiers who are drunk with the whiskey taken from the jeep, the Israeli soldiers decide to take them along, but one of the Egyptian soldiers vomits over them and they choose to leave them alone and go on their way. The two Egyptian soldiers continue their journey, and after a number of incidents they meet another group of Israeli soldiers. Knowing that the war is over, the Israeli soldiers deliberately ignore the two Egyptians. They do not kill them or capture them, but urge them to go on their way. But the Egyptians are too thirsty and desperate to go off on their own, and they stalk the Israelis. In an attempt to create some human bond, the

soldier-actor declaims in English the famous monologue of Shylock from the *Merchant of Venice*:

> I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions; fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge? (Shakespeare, 1987, Act III, Sc. 1)

This famous Shakespearean monologue, pronounced in such strange and unusual circumstances, succeeds in creating a link. The Egyptians receive water. A careful and fragile relationship begins to be formed between the Israeli and Egyptian soldiers. They march in the desert, singing together the song "Avanti Popolo." They spend the night together, but during the following day the group comes across a minefield. Some Israeli soldiers are killed, and one is seriously wounded. Other soldiers who arrive to rescue him mistakenly identify the Egyptians as those who had injured the Israelis and begin pursuing them, despite the attempts by the wounded soldier to explain that the Egyptians were not responsible for what had happened. The final scene of the film is the obstinate pursuit of the Israeli soldiers after the unarmed Egyptian soldiers. The farmer is wounded and dies. The actor continues to run toward the Suez Canal. But just as he reaches his goal, it appears that that he has not reached the safety so much desired. He stands between the two armies, the Israeli and the Egyptian, and is shot to death by both Israeli and Egyptian bullets.

*Avanti Popolo* is located in a twilight time and place – the transitional period between war and no war. The film presents a number of death scenes that occur after the formal declaration of ceasefire; yet it is clear that nobody will be held responsible for the death, or even required to give any account. Death takes place during a time of war, subject in principle to the laws for warfare, and this means among other things that in most cases there is no expectation that legal responsibility for it will be examined or that a legal price will have to be paid for it. War is an exceptional state of affairs; it creates an enclave that makes legal measure alien in nature, despite the attempts at rationalization that defines war as an enclave that is not detached from the sphere of law but as a situation to which special laws apply – the laws of warfare. But as *Avanti Popolo* so well demonstrates, there is no law that can appropriately encompass the chaotic nature of war.

As noted, the death incidents in the film take place after the war is formally over. The Egyptian commander is killed by his own soldiers, the

Israeli soldiers are killed in a minefield, and the Egyptian soldiers are killed by Israelis and Egyptians. The film is filled with unjustified, arbitrary, and meaningless deaths. Yet, these deaths are not punishable. The laws of warfare are a kind of partial mask over a chaotic situation that apparently cannot be submitted to any real legalistic judgment.

*Avanti Popolo* lacks any legal perspective. And once again, poetically this absence is called for. Just as in *Paratroopers*, the story that the film wants to tell stops before it reaches the sphere of law, and in the case of *Avanti Popolo* – long before it does so. This is although the film is filled with events of outstanding legal implications, even though they only concern the laws of warfare. By whom, and when was the UN soldier killed? Why was his body left in his vehicle? Who authorized the English film director to take photographs of his body under the protection and with the assistance of Israeli soldiers? How and under what authority do the soldiers accompanying the film director decided to take captive or not to take captive the Egyptian soldiers they encountered? Who is responsible for what is occurring? Is there any order or justice? Is there anyone at all who knows what order or justice is to be applied? Until when do the laws of warfare apply to a war that has just ended? And what exactly do they determine? It seems as though all the characters in the film are in a state of utter bewilderment. It is not clear to them what norms, if at all, constrain them. No one is responsible for anything, and law which is authorized to determine responsibility, resides in a territory that is totally detached from the one in which the film is taking place.

Indeed, the film presents the possibility of constituting human relationships between opponents that is detached from the outside world by depicting the tentative relationship that was formed between the Israelis and the Egyptians, and the inability to maintain the conventions of hostility and hatred when common human experience links the characters together. However, within the normative system that characterizes the film experience, all this becomes meaningless when faced with the random and pointless death of the heroes and the certainty that no one would bear responsibility for it.

In my view, the parodist/surrealistic intonation of the film constitutes, eventually, a kind of thin mask that conceals behind it the traditional narratives centered upon the heroism of the army and the brotherhood of its warriors, without allowing the film to fracture these narratives. The film clearly defines the arena of action: a hallucinated landscape on the chaotic borderlines between war and peace, a place denuded of law and order. Everything could possibly occur within it. War is presented as demanding a

horrifying price, but this price is portrayed as necessitated by the realities of war, and not as something that could or should be subjected to rational and normative examination.

Although Avanti Popolo creates a general humanistic message that is easy to agree with, the generality of the message prevents the holding of a serious discussion (Zimmerman, 2003, p. 67). Had a serious discussion been held, it would have required some investigation into questions of responsibility, and to deal with such questions, it would be necessary to enter legal fields.

### *4.4. One of Us*

In the Internet website on the battle legacy of IDF paratroopers, the brotherhood of warriors is defined as follows:

> The physical and mental hardships during military training, the shared experiences and dangers in parachuting and in punitive actions, consolidated the brotherhood of warriors. This is a special type of comradeship characterized by a common language of ideas, and special expressions that an outsider would not understand; a kind of commonly shared secret code. The brotherhood of warriors is a kind of mutual pledge, an asset that the paratroopers retain throughout their lives. (Gilai & Ben Uziel, 2009)

*One of Us*, a film that was produced in 1989, directed by Uri Barbash and based on a play by Benny Barbash, supplies a cinematic realization of this definition. The film, in a way, is in correspondence to *Paratroopers*. The story of Yair is a kind of narrative embryo to the story that stands at center of *One of Us*, which pursues even further the themes of the commander under investigation, and the brothers-in-arms alliance pit in test.

The film swings between two plots. The first is the story of friendship between Rafa (Sharon Alexander), Yotam (Alon Abutbul), and Amir (Dan Toren), three soldiers whose comradeship is forged in the course of rigorous battle training. The three try to survive the bullying of their commander, nicknamed "The White Angel."[23] Through this they become part of the family of warriors in which loyalty to one another stands above all else, as expressed in the slogan that is repeatedly heard in the film: "One for all and all for one."

As a practical joke to relieve tension, Rafa photographs the commander in a humiliating situation. When the photograph is discovered, the whole platoon in punished. Rafa tries to give himself up, but the company, for reasons of honor, decides to close ranks and not prevent him from confessing. The result is a day and a half of severe penalties that far exceed any standard of permissible or legal response. Rafa is exposed to the

increasing complaints of his friends and decides to give himself up through an anonymous telltale note (which he wrote himself). As punishment he is again harried until he is wounded and is hospitalized. Yotam and Amir visit him in the hospital and tell him that "The White Angel" has been transferred from his position. Rafa tells them that he has no intention to return to the unit.

Three years later Rafa, who is now an office in the military police force, arrives at an army base over which Yotam has command to investigate an incident in which a Palestinian was killed. Yotam tells Rafa that Amir was killed three weeks earlier. The connection between Yotam and Rafa in their renewed encounter is portrayed as a deep friendship that has endured despite the years that have passed. Rafa conducts his investigation against this background, and the expectations of all those who surround him is that he will confirm the version of the unit and declare that the Palestinian was shot during an attempt to escape. However, Rafa quickly realizes that the Palestinian was suspected of having killed Amir, and that the officers of the unit killed the Palestinian in revenge. He also finds out that the soldiers of the unit abused the residents of the nearby refugee camp. In the closing scene Rafa takes the envelope that contains the evidence he obtained (a video cassette that proves the murder) and the report he wrote, and walks toward the incinerator used for destroying documents.

We do not see him actually throw the envelope into the fire. In the director's band that is one of the special features in the DVD version of the film (2004) Uri Barbash says: "What he could possibly do near the incinerator is quite clear, but people still came out with question marks."

Did Rafa decide to destroy the evidence and cooperate with the soldiers of the unit who strived to hide their crimes? Or perhaps he did after all make his way out of the base to expose the truth and bring those responsible to justice?

Even if the end of the film can be interpreted as vague, in fact the answer to the question: "What exactly happened at the end?" is not at all important. What is at the center of the film is not an answer to the factual questions of legal significance (Was this a murder case? If so – will those responsible be put on trial?). The central subject of the film is the intense concern with the question whether Rafa, who is "one of us," will meet the expectations of his friends or go against them.

The film does not revolve around an investigation, trial and the execution of justice, as might have been expected from a story that deals with a series of serious offences – murder and abuse of refugees. The focal point of the film is the painful dilemma of Rafa, and the expectations of his friends in the

unit. Even if *One of Us* took a longer step in toward law than *Paratroopers*, and the law is felt breathing down the neck of the army to a greater extent, *One of Us* as well breaks away from involvement in the law at a very early stage. And even if the mystery of the death of the Palestinian were solved factually, the question of legal responsibility for the death remains open, since the story comes to an end before this matter is resolved. Here, too, the end of the story is convincing within the poetic context of the film. The legal relevance of the film is secondary to the moral dilemma that creates its ideological core – when should loyalty to army comrades prevail. And the implied answer is: always.

*One of Us* does not even set up the law as a worthy rival for the unit. From the very start the unit is described as an enclave well protected from outside interference, including legal interference. As is made clear at the beginning of the film, the reason why the death of the Palestinian came to be investigated by the military police was American pressure. The American ambassador was a friend of the dead man's father. The dead man with whom the film is concerned was specifically pulled from all the other cases that occurred in the army enclave but were not investigated, not because they were not worth investigating but because no external factor demonstrated interest in them. Legal involvement is presented in the film in as being forced, and not as naturally required. The dilemma of Rafa is presented not as a failure in the conduct of a man of the law who, instead of carrying out the investigation to the end, is drawn into questions of personal morality and friendship, but as a well-understood choice that represents the positive ethos that underlies the character of the Israeli soldier.

Rafa is portrayed as an honest and conscientious person, with strict moral standards. But ironically enough, it is just because of this that he is expected to cooperate in plastering over factual truth for the sake of a greater duty. When Karni (Arnon Zadok), the commander of Yotam, considers whether to transfer Rafa from the investigation because of his personal history in the unit, Yotam objects and says: "This man is straight, straight as an arrow." It is just because of this honesty that Yotam is sure Rafa will be guided by correct and proper standards that would lead him to do the right thing. And Rafa, who does indeed expose not only the lies of the officers and the fact that the Palestinian was murdered by them but also the cruel abuse carried out by the soldiers of the unit in the refugee camp, is in no hurry to openly share his knowledge with outsiders.

At the beginning of the film the following announcement appears:

> This film is not a documentary.
> Any resemblance between the plot and the
> characters and reality is completely coincidental.
> The story of the film does not reflect realities in the IDF.
>
> – IDF Spokesman

In the director's band that accompanies the DVD version, Uri Barbash notes that he was obliged to insert this announcement by the IDF spokesman. However, IDF does not regard the film as subversive nor aims to distance itself from it. On the contrary; IDF continuously screens *One of Us* in its courses for officers and commanders.

Again, as in *Paratroopers*, that is still being screened in various IDF contexts, the film *One of Us* also does not overturn the "military obsession" to use a phrase coined by Ne'eman, but only reflects to what extent it is present, and how ambivalent and complicated is the Israeli collective perception regarding jurisdiction over what takes place in the army. It seems that one of the results of this "military obsession," a result that *One of Us* so well reflects, is the emergence of a tendency to attribute collective responsibility to an army group for the occurrences that take place within the group enclave, and by doing so negate personal responsibility that underlies the legal perception of events.

### *4.5. Lebaon War Early Films – Two Fingers from Sidon and Time for Cherries*

*Two fingers from Sidon*
*I am so upset*
*Watching over all day long*
*Looking for someone to shoot at*
*Seeing a beautiful girl in a village*
*And remembering you.*

*Far from the eye, far from the heart*
*You have forgotten me and it hurts*
*Thinking of you a lot*
*A soldier captive in Lebanon*

*Two fingers from Sidon*
*Opening the routes is the primary task*
*A little confident and a little scared*
*In the bushes there is a roadside bomb*

*On a branch a butterfly rests*
*And I have down pat you.*

– Eli Madorsky.[24]

This is the opening song from the film *Two Fingers from Sidon* (1986). The song, which was highly popular in Israel and became a hit, represents until today the way in which the First Lebanon War was perceived in collective Israeli memory. As in the film that bears its name, the song describes the state of mind of a soldier who finds himself in a strange and alien place, full of hidden traps: the village that has a beautiful girl but also human targets to shoot at, a road with bushes and butterflies and also a roadside bomb. The Lebanon of *Two Fingers From Sidon* is a mixture of cherries and sweets, platonic love and childhood innocence, together with betrayal and denial, explosions and unexpected outbursts of firing, death lying in wait at every corner and bodies ripped apart. This is a place as Tuvia, the tough and clear-sighted commander, says, where "Black is white and white is black." In this illusory and distorted existence, every soldier is "a bit confident and a bit scared," having to cope with homesickness, fears and dangers. It was easy for Israelis to love this soldier, the soldier who represents the collective identity at its best.

This is a film that was produced by a filming unit of an IDF spokesman (a fact that arouses some degree of surprise in itself) and was filmed in Lebanon, with cooperation between actors and real soldiers playing their actual army roles. Although this is a sponsored film, it was regarded both in Israel and abroad as authentic, and even as a source of pride, stemming from the fact that that the army could produce a film that criticizes the very war that it is conducting.[25]

The film focuses upon the figure of a young officer, Gadi (Roni Finkovitz) who arrives in Lebanon equipped with humanistic beliefs and moral principles. His commander Tuvia (Shaul Mizrahi) repeatedly tells him one should not confuse the usual Israeli norms and what occurs in Tel Aviv with the treacherous realities of Lebanon. The events that he experiences provide one after the other, the cruel corroboration for this warning. The soldier Effi (Boaz Ofri) exchanges love glances, chocolate and cherries with a young Lebanese girl, until it is discovered that she is working for the Shiite terrorists. The Druze soldier Rauf (Nazzy Rabach), who is engaged to a Lebanese Druze woman, is found by his friends with his throat cut. A Lebanese child who befriends an Israeli soldier is killed by accident by Israeli soldiers.

In the central scene of the film, the conflict between the constant mortal danger in Lebanon and the aspiration to act morally reaches a climax. Gadi and his men surround a house in which a dangerous wanted man is

supposedly found. The soldiers debate whether it is better to break into the house or to blow it up. There is the apprehension that innocent civilians are living there, but blowing up the house would protect the lives of the soldiers. Gadi, in a kind of mirror image of Weisman throwing the suicide grenade in *Paratroopers,* bursts into the house, knowing for sure that he will die. Unlike Weisman's death in *Paratroopers*, that is perceived as unnecessary and as difficult or impossible to justify ideologically, the fate of Gadi is adorned with the highest kind of ideological justification and at the same time supports the perception that Lebanon is an enclave that deserves to be exterior to the confines of any legal jurisdiction.

This perception is reinforced in *Time for Cherr*ies, the film of Haim Buzaglo (1991). The film tells about a group of reserve soldiers who are sent to Lebanon in 1985 before the retreat of the IDF. In the center of the film is the figure of Mickey Gur (Gil Frank), a Tel Aviv copywriter. An American TV team accompanies Miki and his friends into Lebanon, and documents the events.

The routine of the Israeli soldiers in Lebanon is described as a bizarre combination of guard duty, watching pornographic films, evenings of group entertainment filled with bursting energy, and daily updates on the number of dead. During their entry into Lebanon the soldiers bump into a roadside bomb. Later on, Mickey goes on home leave instead of his friend who agrees to exchange leaves with him and postpone his departure. The friend is killed by a sharpshooter. On their return, the soldiers ride over an explosive device and Mickey and his comrades are killed. To describe the odd symbiosis between war and the media that follow their tracks, between the civilian and military population, and between the Tel Aviv realities and the Lebanon experience, the film uses the style of fantastic realism. This style expresses both the illusory character of being in Lebanon, as well as the dissociation between the war and its image in the media. The visual and poetic language of the film is beautifully presented in a scene depicting soldiers traveling in a covered jeep. Here is Nurit Graetz description of this scene:

> When the soldiers went up the slope of the mountain in their jeep for the first time, they seem like angels in a fantastic spectacle of mounting heavenward (with a pair of white wings bursting out of the landscape and accompanied by a chorus singing the Carmina Burana), and when they descend the slope the second time they are already dead soldiers – the fantastic vision of mounting to the heavens is fulfilled … . (Graetz, 2008, p. 346)

*Time for Cherries* emphasizes and intensifies the image of Lebanon as an anomalous enclave in which everything is possible and that nothing taking place within its borders can be subject to the usual standards of judgment. Immediately after a soldier of the unit is shot and killed by a sharpshooter,

one of the soldiers who are interviewed says: "Everything in our state is considered sacred, here nothing is considered so."

The film presents the gap between Israel – "our state" – and "Lebanon," and the significance of the gap in practical terms. In Lebanon one does things that one would never consider doing in Israel. But who can demand an account or impose judgmental standards when it comes to soldiers in danger of their lives, who relieve the tension through the excited smashing of dishes and disorderly behavior? It would surely be inconceivable to speculate as to whom the dishes belonged, whether the soldiers would be held responsible for the destruction of property, over whose home they took control, and whether their actions conform to the principles laid down for warfare in international or national law, or deviate from them. Who can judge with legal tools the emotional outburst of Mickey's rage after the death of his best friend, when he destroys the car suspected as a trap, doing so without appropriate inspection, taking an unnecessary risk, and destroying property?

Everything in Lebanon is permissible. *Time for Cherries* presents Lebanon of Israeli soldiers as a place in which law and order are absent, a kind of Wild West. Herds of cattle are devastated. Personal property becomes ownerless. No one reacts to illicit actions. This legal vacuum is portrayed as the consequence of Lebanese reality, the product of the struggle of the soldiers to survive in an impossible situation. As one of the soldiers in the film says: "When you are fired upon, you want to live, but afterwards, when you are in bed, you have the feeling that all this was unnecessary." The message and suggestion is that probing into the niceties of the law belongs to a dimension in which people are lying peacefully in bed and thinking about the futility of war; in other words – in Tel Aviv, which is presented in the film as the polar opposite of the Lebanon experience. When you are two fingers from Sidon, everything seems different.

### *4.6. Lebanon War Later Films – "Beaufort" and "Waltz with Bashir"*

In the years that have passed cinematic interest in the war did not fade away. In 2007 Joseph Cedar's *Beaufort* was screened, won vast acclaim and aroused lively critical discussions. *Beaufort*, which is based on the novel by Ron Leshem *If there is a Paradise* (2005), describes the last days before the IDF retreat from the outpost Beaufort, which was conquered by the Golani Brigade in 1982. Ziv Faran (Ohad Knoller) is an engineering office who was sent to deactivate an explosive device placed on the route descending from the outpost and blocking the ascent of the convoy toward it. Ziv examines

the area and comes to the conclusion that the task is too dangerous, and that instead of manually deactivating the bomb, it would be preferable to blow it up by using a bulldozer. After an argument with Liraz Liberty (Oshri Cohen), the commander of the outpost, Ziv presents his reservations to his superiors, and receives the order to act as planned. He goes out to perform the task and is killed in the process. Immediately after this, the bomb is deactivated by the alternative means that had been rejected. The route is opened.

In the background preparations are made to dismantle the outpost before its evacuation, while soldiers are being occasionally killed. Liraz repeatedly calls in vain for a revenge operation against the Hezbollah that are located at the foot of the mountain. The final part of the film describes the departure of the last soldiers from the outpost. The remaining equipment left behind is blown up, and then the soldiers mount the armored vehicles and return to Israel.

*Beaufort* focuses on and distils two of the themes that were prominent in the earlier war films: the army as an enclave distant from the realistic world and possessing its own laws, and the status of being protected from normal judicial processes that applies to the enclave and everything that occurs within it.

The first theme is constructed not only through the contents but also through the visual language of the film. The outpost is built from underground tunnels detached from reality and familiar geographical features. Not surprisingly, Ziv, the newly arrived engineering officer, loses his way through them. Within the surrounding gloom the soldiers lie down sleeping in their clothes and shoes, on bunks that are hung by chains from the ceiling.[26]

The unusual visual scenery forms an appropriate setting for the special norms that are observed in it, and their delineation constitutes the second central theme. Accordingly Ziv soon realizes that Beaufort is an enclave with its own norms. One of these norms is that deaths occurring in Beaufort are not to be examined too closely. Already at the beginning of the film Beaufort claims the life of Ziv, a death that casts a dark shadow over the rest of the film. Ziv, as mentioned, warned his commanders that there was no realistic possibility to carry out his task, and that the orders should be changed and another option should be used. Contrary to the common sense and reasonability that dictate that the expert in the field is better equipped to judge the actual situation, Ziv's commander ignores his opinion and orders him to carry out the task as planned. The attempt to deactivate the bomb fails and Ziv is killed. In reality, when such catastrophe occurs, the disregard of a report that a plan does not go with the situation in the field would have

been rigorously investigated, primarily to reach conclusions as to the question of responsibility for death. Yet in *Beaufort*, the death of Ziv is not presented as an event that will or should motivate this kind of inquiry. The death remains unresolved. The soldiers of the outpost are comforted by the unusual permission for hot showers and some special dishes that the opening of the route allows to be transported. But an investigation that would place responsibility on whoever had the duty to prevent the death of Ziv is not feasible. Even the bereaved father of Ziv does not mention the possibility or duty to find out why exactly his son died. He does speak in bitterness and pain about guilt and responsibility, but the only guilt and responsibility he can think of is his own:

> I blame only myself…one may blame the army, the generals, but these generals are not really responsible for my son, they don't know him at all. I am responsible for him, I educated him, and it seems I did not educate him well.

The death of Ziv, like the other deaths in the film, is perceived as random fortuitous, and at the same time unavoidable. There is no clear connection or even an indirect one between any death in the film to terms such as responsibility or guilt, or the expectation and demand to conduct investigations in matters of responsibility and guilt. All that Liraz, the commander of the outpost demands (a demand that his superiors reject) is to relieve the rage and to seek revenge through an attack that would make the enemy pay with their lives.

The film delineates the distance between the experience of the soldiers and a normal and normative regime, and at the same time shows how invalid it would be to impose such a regime on them. The soldiers in the Beaufort outpost are in a state of siege, both internally and externally, and in a situation of constant danger to life into which they were put by society. In such a situation, the besieged are left to their fate and there is no place for outside interference. The Beaufort enclave is organized (or at least is supposed to be organized) to defend as best possible both the individual and the group from outside threats and dangers. Law is not capable of intervention in the internal forces acting within the Beaufort enclave and among the group of soldiers inside it.

Throughout the film the soldiers are often called "children," even by their commander, who is not very much older than them, and seems no less a "child" than his subordinates. These children, who are perceived in Israel as the children of the Israeli society at large, are caught up in a nightmarish situation from which it is doubtful they will safely come out. The

combination that the film creates between the abnormal state of the Beaufort enclave and the vulnerability of the soldiers-children, laurelled by the feelings of mutual brotherhood, devotion, and self-sacrifice, adds another layer to a story that most Israeli war films specialize in – the heroic story of soldiers who salvage the entire society. This is a story in which there is no place for law.

In 2008, Ari Folman's film, *Waltz with Bashir*, was screened. The film is classified as a "documentary animation" (animation that is drawn on the basis of a documentary photograph in video form), but in fact creates a novel cinematic type. It takes place during the first months of the First Lebanon War, at the end of 1982, and focuses upon the massacre of Sabra and Shatila that took place at in September. The film-script makes use of the memories of the director and testimonies that he collected from other people who were in Lebanon in that period. Most of the figures in the film are based on animation drawn on the basis of photographs of real characters, but some are invented and dubbed by actors.

The film begins with a conversation between Folman and a friend who asks for his help in getting rid of a nightmare that has been pursuing him for years – the scene of the dogs that he killed at the beginning of the Lebanon War. Folman, whose figure stands at the center of the film, does not remember anything of his days as a soldier in Lebanon, except for a dream or illusion about night bathing on the shores of Beirut in light of illuminating flares. He decides to question those who had been in Lebanon, members of his former platoon and senior commanders, to help him recall the part he played in the events. The process of reconstructing his memories is not laid out in a linear way. The film is composed of a collection of images, some of them surrealistic and some of a more realistic character, that relate to the shreds of memory in the minds of Folman and other soldiers. Images, interpretations, nightmares and sounds, memories of Lebanon and memories of the Second World War, the streets of Tel Aviv, landscapes of Holland and pictures of burning Beirut are all weaved together. At the end of the film, Folman recalls the circumstances of the massacre and the place where he was located – apparently in the second or third circle of soldiers. A psychologist suggests why his memories were blocked. Actual pictures of the massacre conclude the film.

*Waltz with Bashir* includes certain elements that are similar to earlier Israeli war films. Folman presents the traumatic effect of war on soldiers, the death of comrades and other such harsh war events that have already been widely depicted in previous Israeli war films. *Waltz with Bashir* is not a

pioneer in the cinematic portrayal of failures and flaws in the military function and command of the army. *Paratroopers* and *One of Us*, as well as many other war films have not spared their audiences detailed descriptions of such failures. Depiction of the absurdities of war and military experience as an enclave was also well developed in previous films such as *Avanti Populo* and even *Beaufort*. In addition, *Waltz with Bashir*, like the other films that preceded it, emphasizes the motif of comradeship that army experience generates. This comradeship provides the practical and conceptual structure for the narrative framework of the film. The initial motivation for Folman's journey into memory is the anguish of a friend whose recollections of Lebanon torment him at night, and to distill his own memories from himself, Folman needs his other friends. Only through interweaving a narrative composed mostly of the evidences of soldiers who shared the experience can Folman achieve the catharsis he seeks.

Hence, the film thus makes use of salient elements that had characterized previous war films. However, it is also an exceptional articulation that breaks out to a great extent from the paradigm of the earlier films. In *Waltz with Bashir* the familiar themes serve as background for a novel discussion. The film is not centered upon the self-sacrifice of the soldiers or their bravery, nor on the absurdities and the glories of war. The film's main focus is a profound concern with the issues of responsibility and guilt.

The novelty of the film lies in the implied assertion that the army environment, however removed from reality it might be, does not really constitute an enclave that exempts those within it from the demands of responsibility and guilt. Interestingly enough, in this film that heightens the cinematic image of Lebanon as the opposite of a rational and law-abiding reality, central concentration is placed on the question of responsibility. The responsibility in this film is connected with an event known as "massacre," and it is examined in the film at both the collective and personal levels. For this reason, *Waltz with Bashir* is the most legal oriented film of all the war films that had preceded it, if only in the sense of being focused upon questions of responsibility and guilt.

According to the website of the film, Folman began working on it by "collecting evidence,"[27] a practice that is clearly of a legalistic nature. Over a period one year, scores of Israelis were interviewed about their experiences during the first three months of the Lebanon War, with the central event in the evidence gathered being that of Sabra and Shatila in September 1982.[28] As it is known, an examination of Israeli responsibility for what had

occurred was conducted by judicial inquiry appointed by the Israeli Cabinet to on September, 1982. Its task was defined as follows:

> To investigate all the facts and factors in connections with the atrocious acts that were carried out by Lebanese forces against the civilian population in the Sabra and Shatila refugee camps. (http://www.mfa.gov.il/mfa/go.asp?MFAH0ign0)

Presiding over the committee, called the Kahan Committee was Yitzhak Kahan, the President of the Israeli Supreme Court at that time. The Committee that then defence minister Ariel Sharon and than Chief of staff Rafael Eitan bore partial responsibility. In the Knesset website summary of the committee's conclusions, it was said:

> The Committee concludes that the direct responsibility for the massacre falls upon the Lebanese Phalangist Forces, and that no responsibility is placed upon the State of Israel or on those who acted on its behalf, although it found reasons to censure the behavior of the political and military ranks…The Committee found reason to censure the Minister of Defense, Ariel Sharon, for allowing the entry of the Phalangists into the refugee camp, and for not taking into account the danger that they would carry out revenge activities after the murder of the elected president, Bashir Jemayl, and for not taking the appropriate means to prevent the bloodbath or to reduce the danger. The Committee recommends that Minister Sharon draw personal conclusions. He should be transferred from his position, but may remain in the government as a minister without portfolio…The Committee criticizes the decision-making process in all that concerned the massacre in Sabra and Shatila, including the absence of suitable report and registration procedures, and recommends that education will continue in the IDF concerning the basic moral commitments that should be upheld in times of war. (www.knesset.gov.il/lexicon/heb/cohen_va.htm)

Does the examination of Israeli responsibility for the massacre in the film add any significant layer to the conclusions of the committee? Does the film provide a supplementary dimension that has so far been absent in public debate on the question of responsibility? If so, what can be deduced from this about the structural limitations of law as a medium that makes it possible to cope personally and collectively with the questions concerning the moral responsibility of the individual acting within an organizational framework that is not under his or her control?

A review of the positions expressed in Israel about the film reveals a debate over the stand it takes. The reactions range from criticism of Folman for missing the opportunity of bringing the public significantly closer to a discussion about responsibility, or even for making use of the film to fabricate an alibi to release the soldiers from responsibility, to regarding him as treating the question of responsibility in a balanced and appropriate manner, and going as far as to perceive the film as exposing hidden guilt, or

as unilaterally stressing Israeli responsibility for the event (*see*: Dichek, 2009, pp. 37–38). All the reactions, despite the gap in their perception of what the film is stating, share in the common recognition that *Waltz with Bashir* is a film that deals first and foremost with the issue of responsibility and guilt.

The debates concerning the "verdict" of the film testify to its complexity and depth, which do not allow a definite conclusion. Out of a medley of memories and the vagaries of personal consciousness translated into a unique visual language, comes a sharply portrayed concern with the question of personal and collective accountability that remains an open one. The film does not suggest a closure and sealing of the questions of guilt and responsibility it deals with, but seems to urge the viewer to hold a kind of personal trial in the light of the unusual evidence that the cinematic text lays before us.

*Waltz with Bashir* is not a "law film," but is one in which acts of judgment are central to it. It is the judgment that the author-narrator of the film activates against himself, against his friends, and against the decision-makers of that time, and the judgment of the friend-narrators. Side by side with these, the film promotes the personal judgment conducted by each and every viewer. Although the judgment is one that constitutes a reaction to the aesthetic presentation of reality, a presentation that from the start lacks objectivity and is the product of intentional and declarative manipulation, yet it is eventually a judgment. Present at the background is the formal judgment that finalize the events at the center of the film – the conclusions of the Kahan Committee, and the need to evaluate from the perspective of decades whether the formal judgment dealt sufficiently with the need to examine in depth the question of responsibility, or whether it has left gaps that are visible until today.

What does the film contribute to understanding the structural limitations of law as a means for coping with the question of the moral responsibility of the individual functioning within a military framework? It seems that the scarcity (or deficiency) of formal judgment on the question of responsibility for the massacre (as reflected in the conclusions of the Kahan Committee) as compared with the profound moral dilemmas with which the interviewees in the film are coping, does not lie in a specific failure of the Kahan Committee but in the structural failure of jurisdiction as a practice that allows for deep and comprehensive clarification of the question of moral responsibility. It may be that the main reason for this is the limited "mandate" that law is given from the start, or the ways in which events are legally presented through lawyers and procedural mechanisms[29] and are geared toward the

production of authoritative and declarative conclusions. In any case, it may be that this very deficiency that remained after the law had spoken is that which provides the starting point for the interviewees to cope with the question of their moral responsibility. The distance of time, together with the fact that this clarification is taking place in an extra-legal framework allow them to confront the questions that would certainly have been precluded (e.g., by lawyers, or by the laws concerning evidence) had they been raised in a juridical context. *Waltz with Bashir*, by circumventing these roadblocks, adds another valuable stratum to the legal engagement with the problem of the massacre, and by doing so it provides the concrete realization of the added value that cinema offers as a framework for the discussion of questions regarding personal and collective responsibility for this event.

Does the intensive engagement of *Waltz with Bashir* in the issue of responsibility and guilt, and the great success won by the film among audiences and critics,[30] indicate an expansion of the traditional areas so far dealt with by Israeli war films? *Waltz with Bashir* is an exceptional film in many respects, and perhaps its acute interest in questions of responsibility and guilt will remain isolated. Or perhaps the film contains a first attempt that will be continued, to fill a disturbing emptiness with significant content, to respond to the need of Israeli cinema to deal more profoundly with questions that were usually left to the world of law.

### *4.7. Interim Conclusion*

Israeli war films generally reflect a significant affinity with a heroic-collective narrative.[31] This affinity is often already noticeable at the stage of film production, in many of which the IDF spokesman is involved. *Two Fingers from Sidon* is a special case, in which the IDF spokesman funded and produced the film. But even the films that were privately funded have a significant link with the army, since in carrying out the intention to produce a war film that deals with the army depends, in most cases, with receiving army assistance – either in borrowing arms or in advice. Not all requests are accepted. Borrowing the equipment is conditioned upon presenting the script and its examination by the IDF spokesman.[32]

In addition, many of the producers of war films have a military background, which sometimes motivates them and is also the source of inspiration for their films. At the same time it constitutes a certain restrictive measure against total detachment from the Israeli ethos applied to the

perception of the army and its function. Even the public discourse about the films that refer not only to their contents and artistic value but also to the way in which they reflect on the image of the army in Israel and abroad indicates the inability to separate cinema from the Israeli reality that it describes.[33]

This means that both the film producers and their audience are not really prepared to forgo the narrative centered upon the permanent linkage between society and the army as having the highest responsibility for protecting its continued existence. The empathy for the heroic-nationalistic narrative that most war films maintain means an explicit or implicit detachment of this narrative from the sphere of law.

Evidently there is not full parallelism between the absence of law reflected in war films to its status in real army experience in Israel. It should also be noted that the phenomena and situations described in the films that refer past periods, have undergone changes and developments. Cinema does not provide an imitation of reality, but merely a fictional presentation of some parts of it. And in this spirit, the films dealing with the army provide a fictional representation of the army. They do not provide a mirror image of law actually applied to military territory. But even considering these reservations, it seems that the absence of law from one of central fictional representations that have been created in Israeli culture – war films – is a symptom of reflecting some of the deeper social perceptions that are connected to both the law and the arm in Israeli society.

It appears that the tendency to almost eliminate law from war films is linked to two perceptions that act in tandem and complement each other. The first is the perception of the army as an enclave that cannot and should not wholly subject to the law.[34] The second is the perception that soldiers often deserve law-exempt treatment.

According to the first perception, the army enclave is a territory that differs essentially from the realities of normal, civilian life.[35] A stay within it means surrounding oneself to the highest danger of losing one's life. The soldiers are demanded to take upon themselves his perilous stay within the enclave to protect the vital interests of the public outside it. Under such circumstances, everything that results from the abnormality of staying in an army enclave demands abnormal treatment. This means that cases of lawbreaking, which in other circumstances would receive legal treatment ending in the laying of responsibility, remain open and unaccountable if they take place within the army enclave. For example, usually violent deaths require immediate examination, stringent and exhaustive, to determine where responsibility lies. But if violent deaths occur within the army enclave,

often they would be perceived as raising questions of another kind that thrust aside the question of determining responsibility for the death, and in most cases, unless unusual circumstances arise (as in the unexpected interest of the American ambassador in the death that occurred in *One of Us*), detach the event from the sphere of law.

The second perception refers to status of Israeli soldiers. The Israeli public sends children-soldiers into an army enclave with all its dangers to preserve its existence, and places on their shoulders the burden of defending the entire society. To meet such a challenge in the best way, the soldiers develop the values of brotherhood, devotion, and self-sacrifice as meta-values that overrule the usual norms. This perception sometimes compels legal norms to retreat when encountered by these meta-norms.

In the films discussed earlier, the absence of law is not regarded as an unfortunate irregularity that the film criticizes or presents as disgraceful. Rather than that, the absence of law in the films is regarded as reflecting the basic meta-norms and their undeniable necessity. In all of them, this absence is not perceived as a perversion of justice as an outrageous Kolhaasian case,[36] but as an acceptable, and even vitally essential state of affairs, that corresponds with the social utilitarianism or pragmatism that hover in the background.

To sum up, some of the films that were reviewed (*Avanti Populo*, *Time for Cherries Season*, *Waltz with Bashir*) present the army experience as an enclave where the application of law is considered to a large extent irrelevant and even as unfair. From other films (*Stretcher Trek*, *One of Us*, *Two Fingers from Sidon*, *Beaufort*), the shunting aside of law is portrayed as being in conformity with the general good. Examining the situations presented in the films with the tools of law would be perceived as ingratitude toward the commanders and soldiers, and even be detrimental to soldier solidarity and motivation, and as a result – security and the general good would be harmed. It appears that the absence of law in war films represents a widely held perception in Israeli society and brings into prominence an important aspect, which sometimes remains hidden, of the existing socio-political reality.

## 5. WHY IS LAW ABSENT FROM ISRAELI CINEMA?

Until now I have been dealing with one type of potential rationale for the absence of law in Israeli war films. That rationale the way in which the

army and its soldiers are perceived in Israeli society. Another type of rationale focuses on the way in which law is perceived in Israeli society.

In an intriguing article, Yoram Shahar describes how the salient differences between the Anglo-American system of law and the Continental system are reflected in the literary and art works produced in each of the societies (2007). In his view, legal proceedings stand at the center of American culture, and are perceived as main instrument for redeeming the nation through achieving justice. The society produces legal heroes – juries and lawyers – that act bravely in courts of law:

> The American people put lawyers in the center of culture and tell their tales of courage every night at the campfires of the tribe…. In the paradigmatic story of heroic bravery about the boy who fights a dragon and wins, the American people cast lawyers as the brave boys. (*Ibid*., p. 154)

Such a paradigm is reflected in the various kinds of American cultural product, in literature, cinema, theatre and television. European culture, on the other hand, dictates "a model of serious law, based on bureaucratic mechanisms and professional expertise" (*Ibid*., p. 164). The institutional and professional law that is conducted in the Continent is not redeeming or a source of good, and those who engage in it are not the saviors of the people but professionals, charged with the rather tedious task of application of legal principles, and not on their redemptive interpretations. In this case as well, the collective perception of law is reflected classical and popular literature and in other products of Continental culture.

The argument of Shahar illuminates well the reason for the extensive engagement with law in American culture,[37] and even provides an explanation for the existence of a presumably contrary genre in American cinema that Shahar does not refer to one that presents the failures of law through a description of the tension between legal procedure and justice,[38] or the wrongful use of legal processes.[39] Such films constitute a kind of complement to the genre of "the redemptive trial" because the central message that emerges from the failure of law presented through them is the emphasis on collective denunciation of whoever travesties justice through the improper use of it. Therefore, even films that focus on the criticism of law, strengthen in their own way the American ethos on the power of law, and are an effective call to improve legal justice to fortify its power to continue its quality as redemptive.

American Courtroom dramas won global popularity and have been shaping the perception of the law not only in the United States but even beyond its borders (Machura & Ulbrich, 2001). In Israel, on the contrary,

law does not fulfill a similar function, despite its prominent presence in public life. The courts, and especially the Israeli Supreme Court, play a central role in Israeli society. Most of the main issues, sometimes even marginal issues, that engage public discourse in Israel, find their way into the courtroom. This situation, which has alleys and opponents within Israeli public, does not find any serious expression in Israeli cultural life. As it is known, the Israeli courts have made significant achievements in the establishment of human rights, especially impressive in view of the lack of a constitution.

However, these achievements have not received artistic depictions as they have in the United States, in which nearly every constitutional achievement has been translated into a film or a television series. The major legal struggles that occurred in Israel, have been reflected in quite a number of documentary films, and less often in television series, but not in cinematic feature films.

Perhaps the main reason for this is that the stories of courage and redemption in Israeli society are perceived as those that occur in war fields and not in legal fields. The role of young boys overcoming the dragon and saving the people is reserved for soldiers and commanders and not for judges or lawyers.[40] Since it is the army that fills the role in Israeli society of the savior of the community, there is hardly any place for stories about the saving power of other factors, including the law. The "military obsession" (the term used by Judd Ne'eman), produces among other things war stories, and blocks out stories about law. Nearly all the war stories that are told through films are in a sense heroic tales. Even films such as *Beaufort* and *Waltz with Bashir* that portray soldiers at moments of disorientation or fear of death, serve at the same time as another layer in the meta-narrative that deals with the courage of soldiers and their readiness to sacrifice themselves, and strengthen a general identification with them.[41]

Israeli Supreme Court repeatedly declares that every Israeli soldier must carry with him in his knapsack not only his army equipment but also all the norms of Israeli law (HCJ 1661/05). Yet the films insist on describing the army as an enclave in which special norms apply. And even if public discourse indicates that law is sought for in nearly every aspect of Israeli life, Israeli cinema presents a different state of affairs in which the special standing of the army and the superiority of the security ethos are emphasized.

## 6. CONCLUSIONS

It is worth repeating that it is not only war films that lack significant dealing with the law, but that law is almost absent from Israeli cinema in general,

and also (though to a lesser extent) from Israeli literature. As the A.B. Yehoshua describes it:

> Jurists do not belong in the context of a society that organizes things together, through intimacy, through loyalty to an ideology. A society of this kind cannot accept the finality of legal judgments. (Almog, 2002)[42]

Israeli films reflect, above all, a lack of interest in law. Perhaps this lack of interest as compared with the central function of law in Israeli life derives from a gap between the way law refers to itself and the way it is perceived in Israeli society. It may that even if the Israeli Supreme Court perceives law as an exalted and redeeming , a perception similar to the one associated with law in American culture, the public perceives law as instrumental, as a tool that rather than being associated with higher values, is identified with the option of providing practical answers to specific cases. The thought-provoking realization of the gap between the declared level at which law describes itself in it legal judgments and the way it is perceived in society is concretely expressed through the minimal treatment of law in the cinema, especially in war films.

As said earlier, one of the basic assumptions that justify researching cinematic representations of law is that it is possible to regard a cinematic work as a mirror that reflects, and also participates in its turn, in the construction of cultural norms and social values. Therefore tracing the way in which law is presented in films that describe one of the socializing mechanisms in the formation of the Israeli experience (the army experience), may shed light from a new angle on widespread cultural perceptions of the place of law in shaping the social and political norms in Israel. In this connection, the conclusion regarding the minor representation of law in these films may contribute to understanding the way in which law is perceived and the socio-historical developments that affect it in Israeli society. The absence of law in Israeli cinema until the 1980s seems to be in accord with the other indications of a dominant anti-legalistic trend in Israeli society and in the political establishment during those years. On the other hand, the minor representation of law in war films since the 1980s can be perceived as surprising in view of the trend toward legalization, entailing (among other things) the transformation of the Supreme Court into a central forum to which Israeli society addresses almost any significant issue.[43] It may be argued that the constant absence of law suggests interesting insights regarding the lack of social consensus around the vision ''world reform through jurisdiction'' that underlies the justifications for extensive involvement of the Israeli Supreme Court in public life.[44]

The cultural choice reflected by the absence of law, provides a key to understand the extent of the limited realization of this vision in Israeli society.

Other explanations for the absence of law in Israeli cinema from can be suggested. The law system in Israel is relatively young, and it may be that rich and varied juridical resources that would also have the power to produce the cultural treatment have not yet accumulated.[45] Moreover, ceremonial and visual aspects of the law, that go in partnership with cinematic representation of law, and are prominent features in the Anglo-American and Continental systems of law, are missing from Israeli law, which has never emphasized visibility. In this regard, the cinematic presentation of law conforms to the well-known maxim "Justice must be seen to be done" (Almog & Aharonson, 2004). Ella Shohat (1989, p. 269) raises an interesting speculation in this connection – what would have been the cinematic implications of the traditional Hebraic love for listening, in contrast with the Greek preference for seeing? In Jewish tradition, there is no need to see justice, but to listen to it; this is the tradition in which it is important to hear the commandment, to interpret its meaning, to tell stories about it as is done in Halacha (Jewish legal rulings) and Aggada (Jewish legend), but it was never essential in its framework to create a visual realization of it.

It is difficult to predict whether the future holds any potentiality for significant change. Cinematic production is a dynamic activity that is influenced by changing balances between social perceptions, economic factors, and artistic developments. It may be, as I would like to hope, that the changes in the weight of each of these and in the balance between them will put an end to the continual absence of law in Israeli cinema in general and in war films in particular, and will ensue the production of films that focus directly upon Israeli law.[46]

In this work I chose to sway from the conventional focus of law and film scholarship on analyzing cinematic representations of actual legal processes. I believe that that law and film scholarship (and indeed, the cultural study of law more generally) can gain important insights about the nature of law and about the place it captures in the collective consciousness by theorizing law's absence (from cultural texts which represent situations in which law could be expected to appear) and not only the forms of its appearance. Some of the arguments in the chapter have implications which go beyond the Israeli context. It would be interesting to investigate comparatively how law is represented in war films in different national contexts, and I hope this work will provide a useful point of departure for such an analysis.

## NOTES

1. Law and film research is engaged with films that use law as their central subject (legal films), films that describe legal processes (courtroom dramas), and films indirectly associated with the law. Law and film scholarship deals, among other things, with the influence of these films on the way in which law and its functions are perceived in society. Other studies focus on the structural similarity between law and cinema. For a review of the different types of research in the field of law and film, see Reichman (2008).

2. For a discussion about the links between society and community and the films that describe them, see McKierman (2008).

3. For the complex connections between the culture of a society and law, see Procaccia (2007). As Professor Procaccia asserts, the task of identifying the main cultural values that characterize a society is not a simple one, and one of the ways in which this can be done is by examining how cultural and societal values are reflected in works of art created in that society.

4. The chapter examines films that represent Israeli culture as hegemonic and reflect collective consciousness and narratives. As will be explained, war films are central in this context. Although this is a prism chosen for developing the arguments in the chapter, it is worthwhile remembering the multiplicity of human experiences which exist in Israel besides the collective one. "Israeliness" is wide. It includes any minority group which is part of the Israeli society, including women, Palestinians, Druze, Bedouin, new immigrants, and more. Exploring how the wide range of Israeli identities and experiences is reflected in Israeli films is a project I hope to pursue in the future.

5. On the characteristics of law films, see Greenfield, Osborn, and Robson (2001, pp. 14–24) See also Silbey (2001, p. 97).

6. As defined by Greenfield et al. (2001, p. 24).

7. Concern with legal themes in Israeli TV and documentary films is far more widespread. TV serials such as *Siton* (1995), *Bus Route 300* (1997), and *Franko and Spector* (2003) deal with actual legal events.

Many documentaries on legal cases are made for television, and sometimes are being screened in movie theaters. Here are some examples: Nili Tal's movie, *Mighty As Death* (1997) tells the story of a young woman who was murdered by her partner, and follows his appeal on his conviction. It is the first time that an Israeli movie includes real footages of a trial. Limor Pinchasov's film, *4.7 Million* (2005) tells the story of a man, who worked as a security guard in one of the biggest security transportation companies in Israel and robbed a truck with 4.7 million N.I.S. The director interviews the friends (who were suspected for helping him) and brings exclusive footages from the police's investigation. The representation of law in documentary and TV films is important and interesting, but is beyond the scope of this chapter, which focuses on Israeli feature films.

8. This term was coined by Natan and Ya'akov Gross (1991, p. 224).

9. For a review of the cinema produced in Palestine and during the first years after the establishment of Israel, see Zimmerman (2002, pp. 124–127).

10. For an analysis of the way in which the myths created by the early are reflected in later cultural productions, see Zimmerman (2002, pp. 117–118).

11. Below are further examples of films that were produced before the establishment of the state and in the first years that followed and can be classified as part of the national-heroic genre: *Land* (1947), which deals with a young Holocaust survivor who arrives at a boarding school in Palestine at the end of the Second World War, and succeeds to become involved in Israeli society and culture; *Pillar of Fire* (1958), which tells about the war of kibbutz members in the Negev against the Egyptians attacking their kibbutz during the War of Independence; and of course *Exodus* (1960), which despite being a Hollywood product, became the ultimate model of the heroic-Zionist cinema.
12. For example, see Talmon (2001, p. 32).
13. Such as *Eldorado* (1963), this deals with a criminal who tries to rehabilitate himself through a romantic affair.
14. For example, *Ervinka* (1967), a romantic comedy on an unemployed roughneck who conquers the heart of a policewoman, and *Dalia and the Sailors* (1964) on a stowaway that the sailors hide from the captain.
15. This term was coined by Ne'eman (2006a, p. 137). For a comprehensive analysis of the new sensitivity films, see Schweitzer (2003).
16. Among the films that belong to the new sensitivity trend are *Hole in the Moon* (1965), *Three Days and a Child* (1967), *Woman in the Second Room* (1966), *The Dress* (1969), *Case of a Woman* (1969), and Snail (1970).
17. Shohat (1989, p. 138) writes in this connection:

> The [social] criticism that is in any case not clear-cut, becomes irrelevant because of the ideology of integration – as if marriage and ashkenazification were sufficient to change the system of political and economic domination…The "happy end" of the "burekas" films encourage a "mythical" solution that in fact supports the status quo. In fact, the inequality in the second generation was greater than in the first one, since the very process itself that created the communal division of labor in the 1950s and early1960s also set up the machinery that recreated the communal division of labor and the inequality.

18. Here are a number of examples of American films that describe legal contests: *Inherit the Wind* (1960) describing the trial of 1925 in which a teacher was forbidden to teach Darwinism; *The Long Walk Home* (1990), *The Rosa Parks Story* (2002), and also *Separate But Equal* (1991) that deal with the struggle of Afro-Americans for equality in the 1950s and 1960s; *Roe vs. Wade* (1989), describing the precedent-making verdict of the American Supreme Court on the question of abortions; *The People vs. Larry Flynt* (1996), which describes the legal struggles over the question of free speech; *Erin Brockovich* (2000) based on the public and legal struggle of the citizens of California over the right to breathe clean air and to drink unpolluted water. *Recount* (2000) deals with a legal struggle over the recount of votes in the State of Florida and the intervention the Supreme Court which ended with the election of George Bush as president. *Heavens Fall* (2006), describes the Scotsborough trials of the 1930s in which a Jewish lawyer conducted a legal battle against the racist accusation of the number of black men for raping white girls. *Milk* (2008), deals with the legal battle of the politician Harvey Milk against a proposed law in California to exclude homosexuals and lesbians from teaching posts in public schools. And the list goes on.
19. See, in this connection: Almog and Aharonson (2004).

20. For example, Eyal Sivan defines the film as "a real kick at Israeli masculinity, perhaps the most critical and significant statement about the army" (Sivan & Munk, 2006, p. 25). And Ella Shohat notes that the film abandons the idealization approach of the national-heroic films that preceded it, and "cut down" the myth of the brave Israeli fighter (Shohat, 1989, p. 219).

21. As stated in the analysis of Shohat (2006, p. 97).

22. Zimmerman notes that in view of the stated position of the film, it is understood why the IDF gives the film its backing and sometimes shows it in the various courses it conducts.

23. It should be noted, however, that the figure of "The White Angel" who is portrayed as a sadist contains elements that add complexity and indicate that in fact "The White Angel" acts in accordance with the vital principle of preparing soldiers for battle through training methods that take them to the very limits of their endurance.

24. My translation from Hebrew.

25. As stated by the American journalist, Thomas L. Friedman (1986). Compare the words of Ella Shohat who criticizes this perception, and describes the film as "the modern successor of the Israeli national-heroic films," centered upon "the moral superiority of the Israeli soldier" (Shohat, 1989, p. 255). Yehuda Ne'eman also defines *Two Fingers from Sidon* as a "soft" war film that "which is restricted to a realistic descriptionof the Israeli fighter and his loss of morale in the Lebanon War," and belongs to the war films that were produced in the past in weaving garlands for the brotherhood of warriors and the purity of arms (Ne'eman, 2006b, p. 125).

26. See the description of Uri Klein, who notes the success of the film producers to turn the site in which the events of the film take place "into a territory that seems as though floating in a space of its own, as if on a planet separate from the state that the soldiers in the film are supposed to serve. Because of the décor and the uniforms that the soldiers are wearing, that sometimes give them a distorted and grotesque appearance (especially when they are filmed from a distance), Beaufort occasionally reminds us, especially in the first part, of science fiction films of the 1950s that describe what occurs in an isolated station somewhere in outer space" (Klein, 2007).

27. www.waltzwithbashir.com/home.html

28. In the website of the film the event is described as follows: That afternoon, Israeli troops penetrated a region in West Beirut that was mostly populated in those days by Palestinian refugees, and they surrounded the Sabra and Shatila refugee camps. Towards evening, large Phalangist forces made their way to the area, driven by a profound sense of revenge after the killing of their revered leader. At nightfall, Phalangist forces entered the Sabra and Shatila refugee camps aided by the IDF's illumination rounds. The declared objective of the Christian forces was to purge the camps of Palestinian combat fighters. However, there were virtually no Palestinian combat fighters left in the refugee camps since they had been evacuated on ships to Tunisia two weeks earlier. For two whole days the sound of gunfire and battles could be heard from the camps but it was only on the third day, September 16, when panic-stricken women swarmed the Israeli troops outside the camps, that the picture became clear: For three days the Christian forces massacred all refugee camp occupants. Men, women, the elderly, and children, were all killed with horrific cruelty.

29. On the way in which the established practice for legal clarification structurally neutralizes the ability to clarify in depth the questions regarding personal moral

responsibility in the context of the structural limitations of criminal proceedings, see Christie (1977).

30. It seems that *Waltz with Bashir* is one of the most widely acclaimed Israeli film ever produced. It has won the U.S. National Society of Film Critics Best Picture Award, the Golden Globe Best Foreign Film Award, the U.K. Best Foreign Independent Film Award and six Israeli Academy Awards. It was also nominated in 2009 for best Foreign Film in 2009 Academy Rewards.

31. Ruhama Merton mentions a similar characteristic as the source for the success of Israeli films which, even if they castigate some collective sin or present problematic aspects in the Israeli experience, they do so in moderate doses that do not upset the moral outlook of the viewers (Merton, 2007, p. 190). In war films it seems as though the characteristic described by Merton is even stronger. In this connection, see also the argument by Moshe Zimmerman according to which the meta-narrative model of Israeli cinema, which determines which subjects are permitted and which are prohibited (or better still – are not interesting) to be dealt with – remains fixed (Zimmerman, 2007).

32. According to officer appointed on this matter "there are conditions for assistance in production. It is necessary that the values of the IDF and the State are not compromised…we are for criticism and dilemmas, but will not assist a film that encourages anything that is opposed to our values" (Pinto, 2007).

33. An interesting of example is the lively public discussion that was conducted (mainly through talkbacks) around the question of the army serve of some of the actors in *Beaufort* (Dazanshvili, 2007).

34. For a discussion on the way in which cinema presents the enclave in which the special normative systems apply, see Almog and Reichman (2004).

35. The view of the army as an enclave and the emphasis on the gap between army experience and the experience outside, it is not exclusive to Israeli society and finds expression in many societies and their cultural artifacts. For example, the American films *Apocalypse Now* (1979), *Paths of Glory* (1957), and *Full Metal Jacket* (1987) present army experience as an enclave with its own legitimacy.

36. The reference is to *Michael Kolhaas*, the well known novella that became the symbol of the perversion of justice injurious to the individual and dangerous to social order. See Kleist (1982).

37. Concerning the centrality of cinema and television engagement with law in the United States, see Rafter (2001); Papke (1998–1999); Kuzina (2001).

38. See in this connection: Almog and Aharonson (2004).

39. For example, in the films *Good Night and Good Luck* (2005); *Citizen Kohn* (1992), and *Point of Order* (1965) that deal with processes in which the trial was used to persecute those who were suspected of Communism in the McCarthy period in the United States; *Sacco e Vanzetti* (1971), which deals with the political conviction of two citizens for a murder that they did not commit; and a television film *The Murder of Mary Phagan* (1988), concerning the conviction of a Jew for the murder of a girl of 13 that he did not commit, which resulted from public pressure and the desire for revenge.

40. *See* what Shahar (2007, p. 170) says in this connection: "The culture of the Return to Zion, of the pioneers, and of 1948 – none of them have given occasion for courtroom scenes or have chosen lawyers as their heroes…in national consciousness the good strikes at the bad with a stick or a harrow and not by cross-questioning."

41. There are many American films dealing with the conflict between the desire to examine the responsibility for deaths occurring in the army and the interest to protect the brotherhood of warriors. In most cases, law is presented in them as having the upper hand. The standpoint that emerges from these films strengthens the perception of law as the instrument that will save the entire community, and that its power is retained even in the military sphere. Here are some examples of such films: *The General's Daughter* (1999); *A Few Good Men* (1992); *A Soldier's Story* (1984); *In the Valley of Elah* (2007).

42. See also Almog (2000).

43. For a critical analysis of the legalization trend, see Aharonson (2008); Gal-Nur (2004).

44. For example, President Aharon Barak announced at the end of the 1970s that: "As jurists…we are the cutting edge of the aspiration for a more desirable and better kind of justice…we are the architects of social change" (Barak, 1977).

45. Similarly, it appears that the products of American culture, both in cinema and television, satisfy the needs of the Israeli, where these exist, in fictional legal dramas, while reference to Israeli law is supplied by the news broadcasts and documentary films.

46. Although the most recent Israeli war film, *Lebanon* (2009) seems to repeat some patterns of the previous war films. The film conveys the suffering of four Israeli soldiers in a tank, during the first Lebanon war, in 1982. The main focus of the film, that was made by Maoz, who drew from his personal trauma as soldier in Lebanon war, was to explore the emotional wounds caused by war and their continuing affect. The film avoids explicit references to the historic, political, or legal contexts of the war. In this sense, it is perhaps a step backwards in comparison to *Waltz with Bashir* (2008), which dealt, among other things, with the issues of collective and individual accountability. Nevertheless, following the international success of *Beaufort* (2007) and *Waltz with Bashir* (2008), *Lebanon* (2009) won wide global attention and won the Golden Lion Award at the 2009 Venice Film Festival.

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## Filmography

*4.7 Million* (Limor Pinchasov, 2005) [Hebrew]
*A Few Good Men* (Rob Reiner, 1992)
*Apocalypse Now* (Francis F. Coppola, 1979)
*A Soldier's Story* (Norman Jewison, 1984)
*Avanti Popolo* (Rafi Bukai, 1986) [Hebrew]
*Beaufort* (Yosef Sidar, 2007) [Hebrew]
*Big Eyes* (Uri Zohar, 1974) [Hebrew]
*Bus Route 300* (Uri Barbash, 1997) [Hebrew]
*Case of a Woman* (Jacques Cathmor, 1969) [Hebrew]
*Citizen Kohn* (Frank Pierson, 1992)
*Cup Final* (Eran Riklis, 1991) [Hebrew]
*Dalia and the Sailors* (Menahem Golan, 1964) [Hebrew]
*Eldorado* (Menahem Golan, 1963) [Hebrew]
*Erin Brockovich* (Steven Soderbergh, 2000)

*Ervinka* (Ephraim Kishon, 1967) [Hebrew]
*Exodus* (Otto Preminger, 1960)
*Five Five* (Shmuel Imberman, 1980) [Hebrew]
*Franko and Spector* (Amalia Margolin, 2003) [Hebrew]
*Full Metal Jacket* (Stanley Kubrick, 1987)
*Good Night and Good Luck* (George Clooney, 2005)
*Halfon Hill Does Not Respond* (Asi Dayan, 1976) [Hebrew]
*Heavens Fall* (Terry Green, 2006)
*Hole in the Moon* (Uri Zohar, 1965) [Hebrew]
*In the Valley of Elah* (Paul Haggis, 2007)
*Inherit the Wind* (Stanley Kramer, 1960)
*Land* (Helmar Lareski, 1947) [Hebrew]
*Lebanon* (Samuel Maoz, 2009)
*Licking the Raspberry* (Uri Barbash, 1992) [Hebrew]
*Mighty As Death* (Nili Tal, 1997) [Hebrew]
*Milk* (Gus Van Sant, 2008)
*My Mother the General* (Yoel Zilberg, 1979) [Hebrew]
*One of Us* (Uri Barbash, 1989) [Hebrew]
*Paratroopers* (Yehudah Ne'eman, 1977) [Hebrew]
*Paths of Glory* (Stanley Kubrick, 1957)
*Peeping Toms* (Uri Zohar, 1972) [Hebrew]
*Pillar of Fire* (Larry Frish, 1958) [Hebrew]
*Point of Order* (Emile de Antonio, 1965)
*Promised Land* (Amos Gitai, 2004) [Hebrew]
*Recount* (Jay Roach, 2000)
*Repeated Dive* (Shimon Dotan, 1989) [Hebrew]
*Roe vs. Wade* (Gregory Hoblit, 1989)
*Sacco e Vanzetti* (Guiliano Montaldo, 1971)
*Salah Shabati* (Ephraim Kishon, 1964) [Hebrew]
*Save the Lifeguard* (Uri Zohar, 1977) [Hebrew]
*Separate But Equal* (George J. Stevens, 1991)
*Siton* (Uri Barbash, 1995) [Hebrew]
*Smile of the Goatkid* (Shimon Dotan, 1986) [Hebrew]
*Snail* (Boaz Davidson, 1970) [Hebrew]
*Spihas* (Boaz Davidson, 1982) [Hebrew]
*Summer Story* (Shmuel Haimovich, 2003) [Hebrew]
*The Bubble* (Eitan Fuchs and Gal Ohovsky, 2006) [Hebrew]
*The Dress* (Yehuda Ne'eman, 1969) [Hebrew]
*The General's Daughter* (Simon West, 1999)
*The Long Walk Home* (Richard Pearce, 1990)
*The Murder of Mary Phagan* (William Hale, 1988)
*The People vs. Larry Flynt* (Milson Forman, 1996)
*The Rosa Parks Story* (Julie Dash, 2002)
*The Syrian Bride* (Eran Riklin, 2004) [Hebrew]
*The Troupe* (Avi Nesher, 1978) [Hebrew]
*They Were Ten* (Baruch Dinar, 1960) [Hebrew]
*Three Days and a Child* (Uri Zohar, 1967) [Hebrew]

*Time for Cherries* (Haim Buzaglo, 1991) [Hebrew]
*Travels of James in the Holy Land* (Ra'anan Alexandrovich, 2003) [Hebrew]
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# SHIFTING SOCIAL NORMS: GENETIC PRIVACY AND THE SPILLOVER EFFECT

Robin Pierce

## ABSTRACT

*Potentially major shifts in privacy norms are taking place as a result of advances in genetic technologies. This chapter identifies a spillover effect in the form of the inadvertent emergence of new norms and introduces an original typology developed in response to these new norms regarding privacy. It focuses on the emerging practice of compelling access to genetic information of biologically related persons to gain information about a particular individual. This chapter highlights the recent practice in child lead paint poisoning cases in which defendants seek to discover medical and I.Q. records of biologically related non-parties to establish alternate genetic causation of low I.Q. It concludes that greater attention should be given to the spillover effect and the emergence of shadow norms.*

> Craniometry was not just a plaything of academicians, a subject confined to technical journals. Conclusions flooded the popular press. Once entrenched, they often embarked on a life of their own, endlessly copied from secondary source to secondary source, refractory to disproof because no one examined the fragility of primary documentation.
>
> – Steven Jay Gould

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## 1. INTRODUCTION

Any significant change in human attitudes and behavior usually brings subtle, often unanticipated side effects. With the advances in genetic science, much attention has been devoted to the importance of shared genetic information among biologically related individuals. Attendant to this, we are becoming accustomed to the notion that individual genetic information may be beneficially significant for others (Clarke et al., 2005). In fact, as we become accustomed to sharing this information, we are also altering privacy norms. In the case of genetic privacy, there has been a recent shift in norms that is creating its own range of side effects. This shift acknowledges, accepts, and adapts behavior to the concept of a new biologic entity for which identity and interests extend beyond the individual to include varying spheres of persons with whom an individual shares common genetic data is also creating its range of side effects. Many of these anticipated side effects have been discussed in the literature, including the disclosure of genetic test results to relatives (Suter, 1993), research on socially identifiable groups and the rights and burdens of being a non-participant member of that group (Hallowell, Ardern-Jones, Eeles, Foster, Lucassen, Moynihan & Watson, 2005), and family rights and interests in genetic research on the proband (Murrelle & McCarthy, 2001).

The creation and acceptance of these emerging spheres of biologic identity demand careful attention to the interests, obligations, and rights of persons included in an individual's contextually referenced biologic sphere. Side effects can be seen in the gradual emergence of new norms regarding the sharing of biological information for the purposes of research, for example, disease investigation (Whitworth, 2006), therapeutic intervention (Offit, Groeger, Turner, Wadsworth, & Weiser, 2004), or contribution to general knowledge (Cavalli-Sforza, 1997), all of which claim to benefit society. However, there is a shadow side to this shift that implicitly recognizes a less individualistic sense of identity. While researchers and society are eager to gain the benefits that may be derived from the increased sharing of biological and, specifically, genetic information, we must also be attentive to spillover norms that share the origins of the beneficial norm but develop to function in ways contrary to the best interests of society.

Indeed, once we as a society accept the existence of a less individualistic notion of identity, many other shifts are immediately occasioned unless specifically addressed in some manner – either by an affirmative decision to employ a particular policy or by an affirmative decision not to adopt a specific policy. Recognizing a shared interest in a family member's genetic test results requires that we identify what, if any, rights and obligations should be

accorded that interest (Pierce, 2007). Findings derived from research on believed genetic traits in families then require that we identify what, if any, parameters we use to define individual attributes, identity, and rights.

Moreover, if we accept that family members should be accorded rights or privileges regarding a proband's genetic information, then we must consider the mirror concept (inverse use of the same terms) of this expanded reach based on shared genetic data and implicit shared interest. This mirror concept would suggest that once this beneficial relationship and obligation to share common information is accepted, then we must also accept the burdens attendant to the existence and use of common genetic information that are of a negative type. For not only must we then bind a biologic relative to the genetic status of the proband, we must tie biologically related relatives eternally to making available genetic information whenever the proband places it in issue. Thus, when a plaintiff alleges that she has suffered a compensable injury as a result of defendant's negligent actions, a defendant may seek to prove that the plaintiff's injuries were genetically caused rather than caused by the defendant's actions and, moreover, gain access to private medical and other records of a non-party relative in order to prove it. This forces the question of whether we should recognize a mirror obligation that would allow a defendant to legally compel access to genetic information of the plaintiff's family to show that the injury has a hereditary source rather than a source in the defendant's behavior.[1] Some courts presiding over lead paint cases think so (*Salkey v. Mott*, 1997; *Anderson v Seigel*, 1998).

This consequence is more than just a side effect of a new norm. The inadvertent emergence of the mirror concept that logically follows from adoption of a norm that recognizes the obligation to share genetic information between a proband and biologically related persons results in a situation in which a proband, by his or her actions, necessarily implicates those to whom he or she is related regardless of the context. Without specific privacy protections setting limits, the actions of any given individual compromises the privacy of those related to him. Thus, the mirror reflection of the emerging norm in the genetic biomedical context casts a shadow that would obligate relatives to each other, even to detriment. While I argue that this sharing of genetic information among individuals is the appropriate domain of social norms and not of legislation, this chapter also raises the question of whether this should also be the case with its shadow norm. This chapter explores why an answer in the affirmative preserves privacy rights and ultimately serves to protect the most vulnerable members of society.

To illustrate this point, I briefly consider the example of the emerging trend of assertion of the defense in lead paint actions alleging that the low

I.Q. of the lead-poisoned child plaintiff was not caused by lead toxicity but rather was genetically inherited from the parents. This case presents a peculiar phenomenon in that such a challenge to causation, in the wake of shifting norms regarding genetic privacy, is justifying discovery of medical and other information of biologically related non-parties. With varyingly lamentable results, notions of the hereditary nature of I.Q. have been put forth and widely circulated for decades (Gould, 1996). The intersection of privacy and notions of hereditary I.Q. is a powerful one with potentially wide-reaching reverberations.

Much has been written about implications of the compulsory versus voluntary sharing of genetic information in the biomedical context and recently regarding the use of genetic information in various aspects of law enforcement and the criminal justice system (Rothstein & Talbott, 2006). While the norm targeted by norm management seemed to be an expansion of society's concept of genetic identity and obligation in the interests of providing short- and long-term benefits to third parties, the mirror concept of this norm similarly expands the individual's right to jeopardize the privacy of related third parties when such sharing of *their* information would affect the interests of the individual. The notion of what constitutes a "benefit" can become blurred when disclosure of private information benefits one person but is detrimental to another or when it benefits society in some way but, at the same time, operates to the detriment of some segment of that society. For example, one could argue that compelling private records of non-parties to prove causation can be said to serve the interests of justice (Rosenthal, 2000). However, for reasons discussed below, the interests of neither justice nor society are served by such compromises in individual privacy for spurious reasons. The bestowal of legal mandate on disclosure of private information for reasons based solely on biological relatedness both restricts and minimizes the importance of agency and free will, implicitly alters basic notions of identity, and substantially diminishes human dignity in its aspect of the right to be left alone. Ultimately, privacy is about dignity. Unconsented incursions on individual privacy are incursions on our dignity. Recognizing the paradigms in which this may occur is an important step in the ordering of a democratic and just society.

## 2. BRIEF OVERVIEW OF NORMS

Scholars in the field of law tend to not fully appreciate the role of non-legal systems such as social norms in achieving social order (Ellickson, 1991).

Indeed, part of the reason might be because social norms are difficult to "pin down". Rather than presenting as readily identifiable practice, social norms are complicated by having seeped into the popular discourse (Fine, 2001). Norms, as "ought statements" (Ellickson, 1991; Etzioni, 2000) or rules that are tied to widely held values, also provide a framework through which individuals interpret a given situation and also take guidance for behavior in a particular domain (Ellickson, 1991, p. 140). Often we do not even think about them. Like stopping at a red light, which is legally mandated, we also know without thinking about it that we should not step in front of others in line at the grocery store, a behavior that is not legally mandated. Social norms are features of everyday life that function to maintain social order and do so without the intervention of law (Posner, 2000; Ellickson, 1991; Mitchell, 1999; Elster, 1989a, 1989b). Social norms operate in two primary ways: (1) internally enforced norms (socialization) and (2) externally enforced norms (subject to various forms of informal societal sanction) (Ellickson, 1998).

While the literature on social norms is substantial, relatively little has focused on norm emergence. Sociologists have been criticized for not making greater contributions to this area (Horne, 2001). Nor did norm emergence garner much attention among law and economics scholars until the mid-1990s (Ellickson, 2001). In the late 1990s, it was observed that little theoretical work had focused exclusively on norm formation and the process of "norm building" (Finnemore & Sikkink, 1998).

Yet, from the literature, we may draw several conclusions, one of which is that norms arise when persons or institutions seek to gain esteem (see, e.g., Ellickson, 1991; Elster, 1989a, 1989b) or defend one's pride (Finnemore & Sikkink, 1998). Thus, techniques that could build that norm might include showing a linkage to existing norms (Finnemore & Sikkink, 1998), for example, duty to rescue, obligations to kin, and giving prominence to the anticipated benefits. Therefore, if an individual either takes pride in viewing oneself or being seen as helpful or willing to sacrifice for the good of the group, then compliance with this emerging norm is likely to ensue.

Laws can also be regarded as special types of norms although they are often specifically set apart in the social norms literature (Mitchell, 1999). Social norms, despite their informal status, are very important to the functioning of the law in that (1) norms can control individual behavior in ways contrary to or separate from the law, (2) norms and law together can influence behavior, and (3) norms and law can influence each other (McAdams, 1997). Furthermore, laws that are supported by social norms are likely to be easier to enforce, and laws that are congruent with social

norms are more likely to be enacted than laws that offend existing norms (Etzioni, 2000).

These observations about the relationship between law and social norms can be put to good use. For example, when a law is being considered that is inconsistent with current social norms, norm management can be deployed to attempt to shift those norms such that enactment and implementation of the law will be easier and more effective in achieving its objective (See discussion by Cass Sunstein on the proper role of government in norm management in Sunstein, 1996a, 1996b). Elements of each of these observations about social norms can be seen in the unfolding of shifts in privacy norms occasioned by advances in genetic technologies.

Respect for individual privacy is a norm with deep roots in most western societies (Westin, 1967). The seminal article by Justices Warren and Brandeis, *The Right to Privacy*, identified a "right to be left alone," which, they concluded, found recognition at common law (Warren & Brandeis, 1890). Most western and democratic societies have embraced strong sensibilities regarding privacy (Westin, 1967). Even scholars who identify with communitarianism see a valuable place for privacy (See reference to Amitai Etzioni (Etzioni, 1999) in Laurie, 2002). Our sense of individual privacy is long standing, has references in the Constitution (U.S. Constitution, Amendments I, III, V), and is codified in the laws governing various sectors of American transactional life, for example, health, banking, and credit. In considering these examples, we quickly observe that because someone is biologically related to another typically affords no special privileges to access to private or confidential information. However, there is evidence that this may be changing with the advent of the "genetics revolution." While the usefulness of this information in proving certain kinds of genetic connections is clear in many instances, it is important to identify (1) in which instances it is useful and to what degree, (2) its limitations, and (3) when it is useful, whether it should be regulated, and if so how.

Here, I make the argument that considerable caution should be exercised with regard to spillover norms (new norms that arise as a consequence of the original norm). For example, norms that take their root in the value of sharing genetic information as a basis for diminished individual privacy should not gain legal sanction absent conduct that would otherwise legitimize involuntary intrusion (e.g., breaking the law). As the example of the lead paint defense shows, compelling biologically related third parties to disclose information for the purposes of identifying attributes of a specific individual can rest on spurious science. In addition, where existing popular stereotypes and misconceptions litter the issue in question, the result is likely

to be compromised informational and decisional autonomy, particularly for members of vulnerable populations. Therefore, where social norms rest on the convergence of questionable science and popular negative stereotypes and misconceptions, to give legal sanction to such, even widely held attitudes is to invite a repeat of past abuses of privacy and autonomy, often to the detriment of already vulnerable members of society.

### *2.1. Norm Patterns*

Two types of norms, norm bandwagons and norm cascades, have been identified as among many that have particular salience in certain types of norm management (Sunstein, 1996a, 1996b). Cass Sunstein defines norm bandwagons as small shifts that lead to large ones resulting in people "join[ing] the bandwagon" (Sunstein, 1996a, 1996b, p. 909). Sunstein contrasts this pattern of norm development with "norm cascades," which are larger scale changes that result in societies experiencing rapid shifts in norms, citing examples such as the outrage regarding apartheid in South Africa, the rise of feminism, and the change in the use of the term "liberal" as one of opprobrium with the election of Ronald Reagan (Sunstein, 1996a, 1996b, p. 912). The norm management that is accompanying advances in genetic technologies may appear to be unfolding as a version of a norm bandwagon, however, *with a subtext*. Since the inception of the Human Genome Project (HGP), headlines have pervasively reported studies regarding the genetic bases for everything from antisocial behavior and aggression (Morris, Shen, Pierce, & Beckwith, 2007) to homosexuality (Rahman, 2005; Hamer, Hu, Magnuson, Hu, & Pattatucci, 1993; Dawson, 1993), to alcoholism (Goldman, 1993; Brown, 2003), and I.Q. (Herrnstein & Murray, 1996), that is then scooped up and simplistically presented by the popular media (see, e.g., Nelkin & Lindee, 2007). This has aptly been referred to as "genohype" (Bubela & Caulfield, 2004).

This geneticization of behavior is significant both for the associations that it creates in the popular perception and for its implications for "remedy." Like genetic research in the biomedical context, the linking of genetics to particular behavior implicitly suggests a similar type of intervention, for example, a pharmacological one. Once the genetic basis is established, cures can be pursued and developed for maladies such as cancer, diabetes, and Alzheimer's disease and, upon establishing a genetic link for behavior, at least theoretically, a cure could be manufactured for "undesirable" behaviors, as well. For example, a pharmacological intervention for what was qualifiedly

classified as genetically based bad behavior has even been suggested (Caspi et al., 2002). However, to discover the genetic basis for these conditions, public participation in genetic research will become necessary at some stage (see, e.g., Clayton et al., 1995; Wolf & Lo, 2004). Even studies that are not designed to examine genetic components of a disease or condition are seeking to obtain genetic samples for unspecified future use (Hohmann, 2006). We are also encouraged to share genetic information regarding disease with relatives for whom it may indicate an elevated risk, thus allowing for earlier intervention (see, e.g., American Society of Clinical Oncology, 2003). As a society, we are likely to readily embrace the biomedical benefits promoted by the HGP and others engaged in the pursuit of genetic science and technologies. What is not overtly promoted, but is a necessary aspect of obtaining these benefits, is the sharing of one's genetic information, thus reducing the sphere of one's individual privacy. In short, while we are promised great biomedical advances, we are implicitly being invited to contribute to the individual and collective good of third parties at the expense of some individual privacy. Resistance to these pursuits is arguably moderated by the existing social norms that encourage us to help others, especially those in distress, when it does not involve undue sacrifice (Weinrib, 1980).

Shifting a norm to incrementally reduce privacy for the sake of third party benefit is not without successful precedent. Norms discouraging public smoking infringed on the decisional autonomy aspect of individual privacy. Many social norms direct us to forego what is legally our right in order to confer a benefit on others. It would seem that the degree to which we embrace such norms depends on several factors, for example, (1) the degree to which it infringes on our notions of individual autonomy, (2) the degree to which the infringement affects us personally, and (3) the degree to which we value the benefit produced by that norm or wish to avoid the cost of non-compliance.

However, when this calculation is removed from view, members of society do not actively participate in the creation of the new norm, rather they are passive "followers" of a directed norm that accompanies a valued benefit. Therefore, while it may appear to take the form of a norm bandwagon, the shift in privacy norms occasioned by the advances in genetics technologies actually has a more complex dimension to it in that the shift in norms is taking place under the radar of the general population. Academics, researchers, and others with special interests are more likely to be aware of the shifts in practices, but the general public, who is expected to participate in both research and therapeutic activity as well as transactions illustrative of the mirror norm of having one's individual privacy compromised by

biologically related relatives, generally has a fairly low exposure to and sophistication about the nature of these shifts and practices. For example, participation in a clinical trial that has been introduced by one's physician does not usually carry with it a high degree of explanation. It is unlikely that the parent of a child participant in a clinical trial on diabetes will question, challenge, or even completely understand the implications of consenting to the indefinite storage and use of her child's samples even after the child reaches the age of majority. In essence, the child's privacy rights have been turned over by the parent with no possibility of regaining them with regard to the sample that is now in virtually uncontained circulation.[2] One need not engage in hyperbole to understand the ramifications of this activity if parental consent in such studies is given on a large scale. There is a way in which the practice establishes the norm. The general population eventually becomes accustomed to this practice without necessarily having had the opportunity to consider alternatives.

### *2.2. Stealth Norms*

The point to be made is that this norm of a reduced sense and re-conceptualization of individual privacy rights is not necessarily being adopted by the general public in large numbers so as to constitute a "norm bandwagon." Rather something else is happening. The shift in the construction of privacy in practice is largely occurring without notice or fanfare and certainly without wide participation and awareness by the general public. I suggest that the norm of promoting disclosure of genetic information that is beneficial to biologically related third parties may perhaps be more appropriately called a "stealth norm" – a slowly creeping, furtive, or imperceptibly shifting norm (see Merriam-Webster, 2007 definition of stealth as "the act or action of proceeding furtively, secretly, or imperceptibly").

Stealth norms are not necessarily bad in themselves, except perhaps in the way that they circumvent the democratic process, which tends to favor open process and a degree of (opportunity for) participation (see, e.g., Habermas, 1996, discussion on the importance of debate in the public sphere). Still, the most well-known examples of norm management regarding, for example, recycling, littering, and smoking have occurred openly with considerable attention to the campaign designed to change attitudes and behavior. In contrast, the HGP and the genetic research enterprise have tended to call attention to the potentially enormous great beneficial medical interventions (see, e.g., Bubela & Caulfield, 2004; Nelkin, 1995), but not to the attendant

shifts in privacy norms that are occasioned by much of the research and integration of the technology into the health care system. Moreover, stealth norms that give rise to problematic norm spillover are likely to have implications of great concern.

### *2.3. A Typology of Norms*

In the following discussion, I present a typology of norms that will assist in illuminating how different types of norms emerge. Moreover, this typology facilitates discussion about the deliberate and inadvertent relationship between emergent norms.

#### *2.3.1. Norm Spillover or Spillover Norm: Good Intentions and Their Side Effects*

One question that arises from this discussion of the phenomenon of inadvertent norms arising from norm management is whether the correct term is "norm spillover" or "spillover norm." Norm spillover would most appropriately refer to any side effects arising as a result of a deliberately managed or created norm. A spillover norm, on the contrary, would constitute a new norm that extends inadvertently from the original norm. The difference between the two being primarily that the former refers to general implications while the latter actually constitutes a separate new norm that can ultimately take on a life of its own. (Of course, implications can be far-reaching, but they need not constitute a norm.) That a new *norm* arises is what is striking about the phenomenon of spillover norms.

That advances in genetic science would bring about new ethical, legal, and social issues was wisely anticipated resulting in the creation of the ELSI (Ethical, Legal, and Social Implications) Committee. Specific issues such as the ability to select for traits prenatally or whether insurance companies should have access to genetic information were addressed as discrete issues that could alter our current social and institutional paradigms. Early in these developments, some scientists warned about potentially unsettling implications for society. For example, in 1969, microbiologist and geneticist, Jonathan Beckwith, along with colleagues, presaged the existence of recombinant DNA and thereafter called a press conference to warn of possible far-reaching implications and the need for social and ethical responsibility in the conduct and management of this emerging science (Beckwith, 2002). Beckwith, a member of the first ELSI group, has advocated for social responsibility by scientists, suggesting that they can and should

exercise some control over the way science and specifically scientific findings are presented to the public, so as to decrease the chances that application of the science will go awry. Indeed, this presents an opportunity in which norm management can conceivably take a proactive role in curtailing norm spillover.

An essential mechanism of containment is adequate individual privacy protections. I assert that a shift in privacy norms to enable the coupling of misconceptions and spurious science such that they may begin to gain acceptability, create a special kind of spillover norm, which I call a shadow norm. This shadow norm is the mirror reflection of the terms of a beneficial norm and takes root in the insidious coupling of misunderstood science and existing negative stereotypes. A targeted norm created by norm management that is accompanied by adequate privacy protections will allow for the benefit while keeping the shadow norm under control. Pernicious attitudes have existed for centuries. What is changing are the privacy norms that enable them.

*2.3.2. Spillover Norms*

Here, I offer the term "spillover norms" to refer to norms that stem from another (primary) norm and are somehow related to that primary norm. (For example, when a norm emerges to encourage the behavior of recycling bottles, a new norm might emerge that says that one should empty the container before throwing it out.) These "spillover norms" seep out or "spill over" from an intentionally created norm and, unlike mere side effects or externalities, these side effects actually function like norms and can operate separately and independently from the original norm from which they arise. Thus, for example, even where recycling is not anticipated, guests at a picnic who have become accustomed to emptying containers before recycling may consume all the contents of their beverage cans in response to a spillover norm that was an inadvertent side effect of the original norm of recycling cans.[3] Moreover, spillover norms, as I conceptualize them, are highly unlikely to arise on their own, independent of the original norm. Unlike "externalities" and "spillovers" which refer to positive and negative intended and unintended effects on parties who were not involved in the decision-making (Howlett & Ramesh, 1995), spillover norms refer to those unintended effects that take the form of norms that emerge by logical extension of the original intended norm and have a normative effect on persons who may not have knowingly have contributed to or supported the creation of that norm. Spillover norms such as these abound in cultural practice throughout history often becoming separated from their functional origins.

*2.3.3. Mirror Norms*

Mirror norms are a special type of spillover norm. Mirror norms are spillover norms that, in addition to arising as a logical unintended extension of the norm, are actually reflective of the original norm. What holds the mirror norm together, that is, what gives it its force and legitimacy is that it is premised on the same logic as the original norm. An example might look like this – "we think well of individuals who sacrifice their privacy in order to benefit biologically related third parties," and the mirror (of parties and purpose): "we think well of third parties who sacrifice privacy for reasons that (negatively) affect the interests of individuals." Notice that the underlying logic and premise of biological connectedness justifying a diminished sense of privacy is still present in the mirror norm.[4] Yet, the underlying values may be vastly different and deceptively so.

*2.3.4. Shadow Norms*

The term "shadow norm" introduced in this article refers to a special kind of mirror norm (but see comment on Lampel, 2004). A shadow norm is an unintentionally created norm that mirrors the terms of the original norm and is the logical extension of an intentionally created norm, but it is applied in ways inconsistent with the positive spirit of the original norm. The shadow norm takes its legitimacy from the original social norm, but in the case of genetics, it relies on three primary elements for its successful emergence and existence: (1) popular (mis)conceptions of the science, (2) the involvement of some characteristic or behavior to which society attaches some moral content (e.g., criminality), and (3) widely known or generally familiar negative social stereotypes.

While the original norm, its progenitor, can conceivably garner support and wide embrace as an emerging social norm, the shadow norm cannot. It is not difficult to imagine why this would happen since the shadow norm is a norm that functions to the detriment of those obligated by it. In this instance, the legal norm that has been created, arguably as an offshoot of the aforementioned social norm, reifies the necessary implications of the accepted social norm but goes further and builds on existing stereotypes and scientifically motivated, but erroneous, perceptions or notions of causation and identity. When these shadow norms resurrect negative stereotypes and gain legal force, we have seen practices emerge that have had horrific reverberations in our relatively recent history, as in the case of the eugenics movement.

The establishment of a mirror norm requires us to acknowledge two linked ideas. There is an implicit consequence to adoption of the norm that

we must share genetic information that we hold in common for its beneficial purposes to third parties because these third parties have a legitimate claim to that information (e.g., on the basis that it may inform them of heightened risk). The mirror norm, which embodies the implicit consequence of the original norm, means that we cannot then accept that the individual stands alone when faced with allegations of hereditary (or genetically shared) traits. Yet, these "forced" associations and third party disclosures were not what was promoted at the outset of the HGP and ELSI in the heralding of the "genetics revolution" as a biomedical panacea (Nelkin & Lindee, 2007).

### *2.4. The Role of Science in the Construction of Shadow Norms*

Science can play a significant role in the creation of norms (Nelkin, 1995; Gould, 1996; Haller, 1984). New knowledge informs policy and behavior, both informally and formally (see, e.g., Lombardo, 2003). For example, knowledge about the dangers of tobacco smoking played an important role in changing behaviors and norms (Brandt, 2006). Similarly, awareness about the environment facilitated new norms regarding recycling and use of resources. Scientific discoveries about the consequences of smoking and consuming alcohol while pregnant also played a significant role in changing behaviors and norms.

What is less clear is the effect of popular renditions of science, misconstrued and misinterpreted by a lay public (see, e.g., Nelkin, 1976). In such cases, what is incorrectly perceived as scientific knowledge, like its accurate counterpart, becomes instrumental in changing norms and behavior, that is, popular misconceptions become the basis for new norms and changes in behavior. In the instance discussed here, there is legitimate basis for identifying higher risk in relatives and the opportunity for beneficial intervention based on this knowledge, but there is little to support a claim in the case of hereditary I.Q. as a basis for shifting causation away from the perpetrators of a toxic tort. Thus, we have two intervenors in the creation of this spillover norm – (1) the mirror concept of unavoidable relatedness and capacity to inform about all to whom one is biologically related and (2) the accuracy of genetic influence on certain traits such as I.Q. The first we may accept as a Mendelian fact. The second has been the subject of enormous controversy for centuries and remains unsettled in the scientific community with little support for the contention of a completely unavoidable hereditary character of I.Q. Yet, in the popular mind, this has become a "scientific fact," and with it has come low points in our

scientific and social history with devastating and highly regrettable consequences (see, e.g., Black, 2003).

### *2.5. Construction of the Shadow Norm*

The path by which the shadow norm is created is somewhat different from that of the "positive" original norm created by norm management. McAdams theorizes that the "initial force behind norm creation is the desire individuals have for respect or prestige, that is, for the relative esteem of others" (McAdams, 1997). For, unlike instances where a behavior becomes a norm as a result of those in the relevant community holding those who engage in it in high esteem, the normative value is suggested externally, for example, by the government and others associated with the enterprise. If we consider, for example, how norms were changed with regard to smoking, we see that the media played an enormous role in changing attitudes and perceptions (Brandt, 2006). Science, law, and the media worked in concert. In the case of genetics, the promotion of the HGP and advances in genetic science permeated the media heralding great benefit and long-awaited explanations for social and medical ills (Nelkin & Lindee, 2007; Nelkin, 1995; DeSalle & Yudell, 2005). Unlike the smoking campaign to change norms that specifically targeted the behavior that needed to change, norm management attendant to the HGP appealed to people's desire for medical advances and cures. Once this is embraced, shifting perceptions, attitudes, and behaviors to accept (1) a reduced sense of privacy in the interests of third party health benefits and (2) a strong sense of bio-relatedness that obligates individuals to sacrifice privacy interests in the interests of third party benefit would arguably be considerably easier. (I shall call these Norm 1 and Norm 2.) When Norms 1 and 2 are integrated, the intended and logical result is the desirable sacrifice of individual privacy interests for the sake of third party health benefit, as for example, in the disclosure of genetic test results to relatives. We may also see the force of these norms in genetic research, for example, in placing less emphasis on informed consent for different and unforeseen future use of genetic samples or other tissue, or participation in national, population, or disease databanking initiatives (see, e.g., Howard University's National Human Genome Center for genomic research on African Americans and other African Diasporic populations or Iceland's Health Sector Database designed to sample the entire Icelandic population). The shifting norm encourages us to both recognize our human inter-relatedness in the interests of a collective benefit and be willing to sacrifice a degree of individual privacy (e.g., by participation in genetic

research under terms that allow for a broader sharing of personal information) to obtain that collective benefit. As the norm shifts further in this direction and becomes more integrated into various aspects of individual, group, and scientific transactions, and thus more powerful (both in its appeal and ability to invoke informal social sanctions), we may expect that increasing numbers of people would become witting or unwitting members of the community governed by the new norm.

The following section considers the case of one emerging consequence of the spillover norm resulting from shifting privacy norms to facilitate third party health benefits in the genetic era. The shadow side of the emerging sense of obligation created by the recognition of a new legal entity of various spheres of biologically related persons also creates an obligation (legally mandated) to act in concert with those persons and, moreover, have one's rights triggered or compromised according to the actions of a proband. This negative type of spillover norm is a "shadow norm."

Thus, I have conceptualized three new categories of norms. First, the spillover norm, which refers to those spillover effects of a social norm that actually become norms themselves. Second, as a special category of spillover norms, I introduce the concept of "mirror norm" to refer to those norms that reflect the image or "mirror" the original social norm. The third category is yet a more specific type of mirror norm, the shadow norm. The illustrative case in this context involves the disclosure of private information of non-party relatives for the purpose of establishing alternative causation of low I.Q.

## 3. THE NEW LEAD PAINT DEFENSE: A SHADOW NORM EMERGES

### *3.1. The "New" Genetic Defense*

In November 2006, the Supreme Court of New York undertook to untangle "the Gordian knot of lead exposure specific causation" of low I.Q. in the plaintiff as it addressed whether to compel discovery of private and confidential information about a non-party (*Adams v Rizzo*, 2006). Citing a list of lead paint cases allowing discovery of non-party records, the court found that the defendants made a sufficient showing of medical-, scientific-, and fact-based need to discover "private" and "confidential" information about the plaintiff's mother. Furthermore, the court found that the mother's failure to comply with defendant's request unfairly restricted the defendant's ability to access all information that is relevant and material to the case. Here,

the defendant's objective was to prove alternate causation, in that the cognitive injuries suffered by the child were not the result of lead paint poisoning but rather were the result of hereditary factors (see also *Jones v. NL Industries, Inc*, 2005). In this case, the plaintiffs, who were children, claimed that they had suffered multiple neurological, cognitive, neurobehavioral, developmental, and psychological injuries that are known to be a common result of lead paint exposure while living in premises owned by the defendant.

In 1999, the American Bar Association journal ran a story in the "Trends in Law" section highlighting the case of Randy Bognes Jr., a hyperactive six-year-old with learning disabilities who had suffered lead exposure (Samborn, 1999). The defendants sought the mother's medical and psychiatric records to challenge causation. The article noted that "some defendants are overcoming state statutory privileges against disclosure" and are successfully obtaining the documents. Indeed, state courts across the country have permitted the discovery of non-party records in similar instances (Samborn, 1999). Similarly, in other lead paint cases, courts have authorized the discovery of I.Q., medical, educational, and other personal records to show that the cognitive deficits of the plaintiffs were not the result of the lead exposure but merely the result of hereditary cognitive deficiency or inherited low I.Q. (see, e.g., *Anderson v Seigel*, 1998; *Salkey v. Mott*, 1997).

This 2006 case, *Adams v Rizzo*, is preceded by a line of cases in which defendants have sought to obtain highly personal information as well as the actual private medical, educational, and I.Q. records of biologically related non-party relatives of the plaintiff in an attempt to prove alternate genetic causation. The courts have varied in their handling of the matter. Even within a single district, different departments have come to different results (Rosenthal, 2000). Indeed, in the New York Appellate Division, the First Department has disallowed discovery of non-party records, including I.Q. test results (*Andon ex rel Andon v 302-304 Mott Street Associates*, 2000), while the Second Department of the same appellate division has allowed such discovery (*Anderson v Seigel*, 1998). While it appears that the majority of the cases involving the assertion of this defense are in New York, courts in other jurisdictions, for example, Virginia, Maryland, and Oklahoma, have variously allowed and disallowed discovery of private non-party records for the purposes of proving alternate (genetic) causation of alleged lead paint injuries.

### *3.2. Background: Lead Paint Poisoning*

Lead poisoning is a progressive systemic disease that affects learning, behavioral, and motor abilities and may even cause death. The demographics

of lead paint poisoning are also important. Although children of all social and economic levels can be and are affected by lead poisoning, children living at or below the poverty line who live in older housing are at greatest risk (Centers for Disease Control and Prevention (CDC), 2007). Additionally, there are racial and ethnic patterns to exposure, with 3% of black children compared to 1.3% of white children having elevated blood lead levels (Morbidity and Mortality Weekly Report, 2005). As part of a multi-fronted effort, the CDC initiated a major program to eliminate childhood lead poisoning in the United States as authorized by The Lead Contamination Control Act of 1988 (CDC, 2007). This Act is accompanied by a plethora of laws enacted since 1973, at both the federal and the state levels. But despite the fact that there is a decline in elevated blood lead levels in children, lead is still a common, preventable environmental threat, with approximately 25% of children living in houses with deteriorated lead paint (Committee on Environmental Health, 2005). As a result of this increased risk of lead exposure, these children may suffer the systemic resulting injuries of cognitive impairments and other problems, with certain communities being at particularly high risk (Committee on Environmental Health, 2005). Thus, for various reasons, lead poisoning in young children, particularly those who are poor, minorities, and those living in older homes (Morbidity and Mortality Weekly Report, 2005), continues to be a serious problem.

### *3.3. The Defense: Inherited Low I.Q. Not Toxic Tort*

When a child is found to have lead toxicity as a result of lead paint, a claim for damages against a landlord, paint manufacturer, or of other responsible agent may ensue. Among the damages known to result from lead poisoning at levels as low as 10 ug/dl are cognitive deficiencies and behavioral problems (CDC, 2007). Moreover, these neuropsychological and cognitive impairments, including lowered I.Q. currently, have no proven treatment that restores these functions (see Rogan, Dietrich, Ware, Dockery, Salganik, Radcliffe, Jones, Ragan, Chisolm, & Rhoads, 2001; Ruff, Bijur, Markowitz, Ma, & Rosen for discussion of effectiveness of chelation therapy in improving cognitive abilities). (At least some awards have been based on permanent cognitive damage affecting income earning capacity (see Verdicts, Settlements & Tactics, 1992, a case in which the plaintiffs sought $345,00 at settlement, while defendants offered $25,000. The case went to trial whereupon plaintiffs received an award of $518,444.) The range of damage awards involving diminished I.Q. as a result of lead paint poisoning

can range from $145,000 to $7,000,000 (In re Spencer et al., Case No. 24C95066066, 2006, note also that the $7,000,000 verdict was expected to be reduced to $1,500,000 per plaintiff due to cap on non-economic damages in Maryland), with many cases being resolved in the range of $500,000 (see Lexis, "Jury Verdicts and Settlements," search "lead paint" and "I.Q."). As in any lawsuit, defendants in lead paint cases seek to minimize the cost of damages.

The troubling twist in the case of child plaintiffs alleging cognitive impairments as a result of lead paint poisoning is not that defendants seek to reduce their damages, but the manner in which they seek to do so. These defendants claim a genetic causation in the form of inherited low I.Q., a claim purportedly based on established science, but which finds little unqualified basis in the serious scientific literature (Devlin, Fienberg, Resnick, & Roeder, 1998). Defendants seek to establish that this causation is by compelling discovery of private information in the form of medical and academic records as well as the I.Q. test results of biologically related non-parties. The reasoning the defendants put forth is that if the lead-poisoned child's relatives demonstrate poor academic achievement, then it follows that the child's poor cognitive performance is inherited rather than a result of the lead poisoning.

There are at least two hurdles for a defendant seeking to discover the private records of a non-party – (1) the information may be privileged and (2) the information may be of questionable relevance to proving genetic causation and arguably outweighed by its prejudicial value. Socially and ethically, yet other problems arise, not the least of which regards the nearly complete loss of individual privacy when a biologically related person places a purportedly genetic trait in issue.

A few analyses of this issue appear in the legal literature. Probably, the most often cited in court opinions is the law review article by Jennifer Wriggins, law professor and former plaintiff's attorney, in which she challenges the permissibility of discovery of non-party records for the purpose of proving hereditary causation of low I.Q. on grounds of flawed understanding and application of I.Q. tests, ill-conceived notions of maternal determinism, and the fallacy of genetic determinism (Wriggins, 1997). Other articles have focused more generally on the permissibility of discovery of non-party records, referencing the emerging lead paint defense as being appropriate in the interests of fairness to the defendant by allowing a wide discovery net (Rosenthal, 2000), or as one of three types of cases in which defendants seek discovery of non-party medical records generally, and questioning a disparate racial or ethnic impact of the practice (White,

2000). Here, I analyze the defense in its social and historical context with particular regard to shifting notions of privacy occasioned by the "genetics revolution" and identify this defense as an example of the emergence of a shadow norm, a norm riding the coattails of another norm and finding sufficient fertile ground in the confluence of social, political, and scientific factors such that it may begin to take root.

*3.3.1. Historical Perspective*

There have been claims of the heritability of I.Q. for centuries (Gould, 1996). Such claims have been used to try to impact public policy (Herrnstein & Murray, 1996) and social policy (see, e.g., Haller, 1984) and justify inequalities and hierarchical ordering of society (Gould, 1996) Yerkes and Goddard advocated for instituting national policies based on hereditarian notions of I.Q. (see, e.g., Gould, 1996; Broberg & Roll-Hansen, 1996). Although the use of lead paint in residential housing was banned in 1978, cases specifically claiming "cognitive injury" from lead paint did not arise until 1992 in the case of *Dickerson v. Little*, and the first case alleging loss of I.Q. appears in 1991 (*Miller v Beaugrand*, 1991). However, the first published case in which defendants specifically allege a genetic basis for I.Q. did not appear until 1997 (*Salkey v. Mott*, 1997) although it was suggested in other cases (see, e.g., *Hill v. City of New York*, 1994). Thus, the attempt to prove genetic factors as the cause of low I.Q. in children who have suffered lead paint poisoning did not appear until the HGP, which began in 1989, was well underway and had claimed headlines the world over, announcing success in 2000. It is interesting and arguably significant that other major discussions of the hereditary nature of I.Q., for example, *The Bell Curve*, which appeared in 1994, had also received considerable attention during this time. This book appeared on the front covers of Newsweek, The New Republic, and The New York Times Book Review, with its message about I.Q. as "an inherited system of stratification" (Jacoby & Glauberman, 1995). It would be virtually impossible to unravel the independent effect of these two major occurrences. However, it is arguable that the HGP in a subliminal way strengthened the arguments of *The Bell Curve*[5] and, together, synergistically contributed to the popular linking of genetics with I.Q. along with other behavioral and physical traits for which the genetic link has stronger scientific basis. Furthermore, one must also consider the factors that led to the wide popularity of *The Bell Curve* when it was first published.

The appearance of this defense and successful discovery of non-party records, where it has occurred, is the product of the convergence of several significant factors. One of the most important of these factors is the

emerging shift in social norms that encourages a diminished notion of individual privacy to confer a third party individual or collective benefit. Indeed, this shift, which I suggest is, at least partially, driven by norm management, is promoted on the occasion of the advent of genetic technologies that many would argue cannot be fully exploited unless we alter our norms regarding individual privacy. To not fully exploit this potential of the new genetics, this argument posits, would be wasteful and shameful to the extent that preventable disease and death would not be interrupted by use of the technology because of individual privacy concerns.

The compelling of discovery of private information of non-party biological relatives to prove genetic causation can be seen as a mirror image of the emerging beneficial norm of individuals sharing genetic information to beneficial effect of a biologically related third party. That is to say that currently this emerging norm of sharing genetic information with others, including biologically related individuals, relies upon voluntary compliance and informal social sanction. However, this mirror norm of forcing disclosure of private information by relatives for the purpose of proving genetic causation of low I.Q. has taken legal form, along with legal sanction for failure to comply.

Pre-existing social norms that are consistent with the objectives of legal norms often meet with greater success (see, e.g., Etzioni, 2000). Thus, the beneficial purpose that initially justified diminished sensibilities regarding individual privacy, in many respects, is paving the way for other uses of reduced individual privacy norms and are, in effect, producing what I have referred to as a shadow norm – an unintentionally created norm that is the logical extension of an intentionally created norm that is applied in ways inconsistent with the positive spirit of the original norm. Sharing genetic information in the biomedical context can garner wide immediate support. Being forced to disclose individual genetic information to support a claim of inherited "negative" traits is likely to be more controversial and meet with greater resistance. And, indeed, as the cases show, requests to discover private information such as medical records and I.Q. test results of non-parties are rarely met with voluntary compliance (see, e.g., *Andon ex rel. Andon v 302-304 Mott Street Associates*, 2000). Consequently, as will become apparent, shadow norms, like the permissible intrusion on the privacy of biologically related third parties whenever an individual conducts himself or herself in such a way that his or her individual privacy may legitimately be placed in issue, are likely to require legal enforcement given the loss of control over one's private life and the loss of the ability to control what information is in circulation about him (see Westin, 1967). Thus, the

ability to discover personal and private information such as medical records and I.Q. test results of someone who is not a party to an action, nor necessarily has any connection to the litigant except biologically, places non-actors, that is, innocent uninvolved persons, in the position of not knowing when or how their privacy may be compromised. Furthermore, it deprives them of the possibility of regulating their behavior in any way that would minimize the chances of such compromise. For this reason, I assert that a shadow norm of the beneficial sharing of common genetic information is the loss of the ability to control the extent to which a person's private information is communicated to others. In the case of the lead paint defense of alternate genetic causation, this norm is particularly insidious because of the spuriousness of the underlying science supporting such a claim.

### *3.3.2. Defensive Discovery*

The temptation to view the instances of courts permitting this kind of discovery as an aberration is great, since there is great variability in the holdings of the courts across jurisdictions and even departments on this issue (Rosenthal, 2000) with courts more often tending to view the private information of non-parties as privileged and, therefore, disallowing discovery (see *Andon ex rel. Andon v. 302-304 Mott Street Associates*, 2000). Yet, one very important placement of discussion of this defense suggests that this defense needs to be taken seriously as an indication of a possible introduction of a new legal norm and a significant shift in privacy sensibilities. That this is neither a regional nor jurisdictional idiosyncrasy is evidenced by the "institutionalization" of this defense in one of the two leading jurisprudential treatises in American law, American Jurisprudence (Am. Jur.). In the volume entitled Am. Jur. Trials, which is directed at attorneys involved in litigation, the defense of alternate genetic causation appears. This comprehensive treatise includes a chapter entitled, "Childhood Lead-Based Paint Poisoning Litigation" (Penofsky, 2007) and in Section 123 lists seven commonly argued defenses to lead paint tort actions.

1. Statutes of limitations
2. Lack of knowledge
3. No lead in paint
4. Lead exposure from other source
5. Low I.Q. inherited from parents
6. Alternative medical causation
7. Negligent supervision of child by parents

As Penofsky, author of the *Am. Jur.* entry, points out, children cannot be held responsible for contributory negligence and therefore a claim that the affected children *chose* to eat the paint is not a permissible defense. However, very closely related to an allegation of contributory negligence is the claim that the child's parents were responsible for the lead paint ingestion. Thus, defenses alleging negligent supervision were not uncommon (see, e.g., *Weaver v. Arthur A. Schneider Realty Co*, 1964). Alternative medical causation seems to present neutrally in that blame is not necessarily assigned by ascertaining, for example, medical error at birth or other anomalous birth circumstances (see, e.g., *Hill v. City of New York*, 1994, where the court held for the defendants finding that the child's impairments were a result of being born with meconium on the face and had sustained head injuries). Moreover, these defenses may not present or be analyzed by the court in terms of establishing as a single causative factor. For example, in *Hill*, the court held for the landlord defendant because of a finding of alternate medical causation in the form of meconium on her face and a head injury at 26 months, the court also entertained the possibility of genetic causation as well, stating that

> the child was a high risk baby who was born with meconium on her face and required antibiotics to ward off possible meningitis, that she sustained a head injury at age 26 months when struck by a swing, that she had been physically abused, and that congenital or hereditary factors might also have affected her condition. (*Hill v. City of New York*, 1994)

There are a number of significant aspects here that traces historically as well, one of which is the shifting of responsibility from the environmental tortfeasor to the victim. Arguments asserting the relocation of "fault" for a known systemic injury of lead paint poisoning also shift the focus of the inquiry such that non-party relatives of the alleged victim can be hauled into court and forced to disclose private and arguably privileged information based purely on biological connection to the plaintiff.

The entry in *Am. Jur.* also provides a short description of the inherited low I.Q. defense in which it becomes clear that the focal point of the litigation has shifted to the culpability of the child plaintiff's parents.

> A defense urged in many childhood lead-based paint poisoning cases is that the child's low I.Q. and other learning disabilities, such as poor reading skills and short term memory failure, are attributable not to lead poisoning, but rather to genetic traits inherited from the child's parents. This alternative causation defense gains validity where the defense is permitted to introduce evidence at trial showing that one or both of the child's parents had a low I.Q. and suffered from learning disabilities. (Penofsky, 2007)

Whether *Am. Jur.* merely serves a descriptive purpose and can be used to assist defendants or plaintiffs in preparation for trial, the presence of this entry in this treatise arguably lends it a certain credibility and, moreover, places it squarely in the legal discourse, no doubt suggesting it where it may not have been otherwise considered. This observation is not to imply that this defense should not be presented in a text like *American Jurisprudence*, but rather the critique more appropriately goes to the content of the presentation. That this entry contains no discussion of the merits of the underlying science or even casual mention of its general lack of acceptance in scientific community (see Devlin et al., 1998) or the readily communicated factors that could unseat such a claim contributes to its veneer of credibility as a defense and, in doing so, further exacerbates the popular misunderstanding of the underlying claim of inherited I.Q. The implications of this, particularly in a diverse society where stereotypes regarding I.Q. and racial and ethnic groups abound, are significant.

*3.3.3. Discovery of Non-Party Medical Records: A Norm Up-Ended*

It is helpful to briefly lay out the procedural terrain of this emerging practice. Discovery allows each party to prepare for trial by acquiring non-privileged relevant information necessary to the presentation of their case, whether in claim or defense. This information need not itself be admissible at trial if it appears reasonably calculated to lead to admissible evidence. There are important limitations on discovery in that (1) it may not be overbroad and (2) may not cause "unwarranted annoyance, embarrassment or oppression." Furthermore, the trial court may limit "overly intrusive discover," and balances the individuals' right to privacy against the need for discovery where sensitive information is sought.

Discovery of non-party medical records is a practice that is most often attempted in three types of cases: (1) medical malpractice; (2) alleged cognitive, developmental, and behavioral injuries to children; and (3) medical products liability (Samborn, 1999). The first of these has been justified as necessary to show a pattern of negligence by the physician, which would require being able to show similar negligence in the care of other patients. The latter most often occurs with regard to injury at birth cases but in the past 10 years has begun to be applied to claims for cognitive injuries to children poisoned by lead paint (Richardson, 2005). It is precisely this emerging practice of seeking to prove general alternate causation by discovery of medical and other sensitive information of non-party relatives that exemplifies a shadow norm of infringement on individual privacy as a result of biological relatedness.

### *3.4. The Cases: Asserting Inherited Low I.Q.*

The assertion that a plaintiff child's cognitive injuries, particularly low I.Q., is a result of genetic causation is emerging as an acceptable and recognized defense (see, e.g., Penofsky, 2007). This section examines privacy aspects of the lead paint cases in which hereditary low I.Q. has been proffered as alternate causation to justify seeking medical, I.Q., and academic records of non-parties. Beginning with *Hill v City of New York* in 1994, and more pointedly in *Salkey v Mott* in 1997, defendants have begun to aggressively argue that the cognitive deficiencies suffered by a child plaintiff, who has been conclusively shown to have lead poisoning, are the result of inherited traits.

Many of these cases have already been discussed here, but it is important to examine the language of the opinions in their discussions of the merits of allegations of genetic causation and the court's reasoning for allowing or disallowing discovery of private information of biologically related non-parties to prove it. Expert testimony can also yield insight into the formulation of the ruling (see Rosenthal, 2000, for discussion of the expert testimony in Andon in which the lower court permitted discovery but was overturned and disallowed on appeal), and close examination of the underlying science is outside of the scope of this chapter.

The language of the courts in the decisions to permit discovery of non-party records to allow defendants to pursue a defense of genetic causation of low I.Q. is telling both for the reasoning and for the assumptions that underlie the reasoning. This is particularly important to examine because assumptions are, by nature, invisible.

One of the threshold findings that the court must make in determining whether to permit discovery of non-party records is whether or not such information is relevant (to prove causation). To make that determination, the court must find that the evidence in question has probative worth and that some tendency to establish a fact that is material to the lawsuit (Bocchino & Sonenshein, 2000). Thus, among the things that the court must find are (1) that I.Q. is inherited to a degree sufficient to establish genetic causation of the trait rather than lead-induced impairment, (2) that the results of an I.Q. test taken by the mother (and siblings) at the time of the trial will assist in determining whether the trait was hereditary, and (3) that academic and medical records of the mother (see Wriggins, 1997, for interesting discussion of the fact that of the two parents, almost exclusively mothers (and not fathers) have been subjected to this discovery motion, a phenomenon that Wriggins speculates may be partially a result of a societal tendency toward "maternal explanations") (and siblings) will assist

the trier of fact in determining whether the low I.Q. of the plaintiff was inherited. Note, however, that in 2004, defendants, in at least one case, sought to introduce evidence about the father of a plaintiff to prove alternate causation (*Mayi v. 1551 St. Nicholas, LLC*, 2004). There, the court disallowed the evidence and awarded damages to the plaintiffs.

The court in Salkey merely declared that compelling the mother of the infant plaintiff to supply authorizations for non-privileged academic and employment records, as well as directing her to submit to an I.Q. test, did not constitute a violation of privileged medical information (*Salkey v Mott*, 1997). In *Anderson v Seigel*, the court, in overturning the decision of the lower court, permitted discovery saying that the academic records of the infant plaintiff's siblings and her mother (who was a plaintiff in the case), "the mother's employment records, and the I.Q. testing of the infant plaintiff's mother, were likely to lead to the discovery of admissible or relevant evidence" (*Anderson v Seigel*, 1999).

As recently as 2006, a court in Virginia compelled discovery of personal information of the plaintiff's mother to prove alternate causation. The court reasoned that only a "heightened relevance standard" would disallow discovery of the non-party mother's records to show possible genetic causation.

> Since the defendants' expert has testified that the educational records of Ms. Bunch could provide information that would tend to prove whether plaintiff's alleged lead poisoning and deficits are the result of genetic inheritance, biological factors, or some environmental factor other than lead poisoning, it is difficult to suggest that these educational records are not "relevant," unless some heightened relevance standard is applied. (*Bunch v Artz*, 2006)

Perhaps, the cases in which the courts either did not allow discovery of non-party familial records or permitted some access but held that alternate causation was not established tell a different side of the story. In fact, these courts also provide a narrative of the resistance to a shift in privacy norms in this context.

*Van Epps v. County of Albany* articulates the fundamental issue impeccably.

> Establishing relevance involves a balancing of the interests of the parties and public policy. Discovery requests that tend to broaden the scope of litigation and intrude upon rights to privacy should not be permitted unless there is a showing that the need for disclosure outweighs the importance of protecting nonparties' privacy. (*Van Epps v. County of Albany*, 1998)

In denying the defendant's motion to compel, the court states unequivocally that "neither the infant plaintiffs' parents nor their sibling are parties to the action [n]or have [they] placed their mental or physical

condition at issue.'' Consequently, this New York court did not find any implicit waiver of any privilege concerning the medical records or medical information (*Van Epps v. County of Albany*, 1998). The court also found the educational records of non-parties to be privileged. The defendant's expert, Robert J. McCaffrey, PhD, merely stated in general terms that the information and records sought are necessary to ''fully assess the validity of the plaintiffs' claims,'' which include ''significant cognitive deficiencies including a loss of intelligence and IQ reduction, and that this justified the need to examine parents' and sibling's educational and employment records and the information to be obtained from having their mother submit to an I.Q. test, which he argued is 'well accepted in his field of practice' of neuropsychology …'' Showing some impatience with defendant's argument, the court declines to permit the requested discovery stating that allowing disclosure could lead to a ''never-ending foray into the realm of speculation, that offers no hope of achieving a resolution of any causality issue'' (*Van Epps v. County of Albany*, 1998). The court observed that even limiting the inquiry to records pertaining to the mother and father of the plaintiff and the non-party siblings would not be appropriate because

> *if it is their [the defendant's] contention that the cognitive deficiencies at issue may have resulted from biological, genetic, or environmental causes, why not expand discovery to include the plaintiffs' grandparents, aunts, uncles, cousins and other biologically or even nonbiologically related family members*. Moreover, if it is revealed that any one of these persons has a cognitive deficit, would not defendants' argument demand full discovery from anyone related to that individual and so on ad infinitum?

Essentially, the court found that the defendants had failed ''to demonstrate a need to obtain the nonprivileged records and information that outweigh[ed] the nonparties' rights to privacy …'' (*Van Epps v. County of Albany*, 1998).

*Dombrowski, et al. vs. Gould Electronics, Inc* (2000), a federal court case arising out of a dispute in Pennsylvania, held that alternate genetic causation was not found, while also dismissing environmental causation as a result of inadequate parenting. Referring to the defendants' expert testimony on the role of genetics and family environment in causing learning disabilities, the court observed that there was

> a distinct lack of credible testimony in these particular cases, however, showing that genetics or family environments did, in fact, cause the difficulties suffered by these individual Plaintiffs. While perhaps the families involved were not sterling examples of academic achievement and intellectual encouragement, there is no showing of abject neglect or continual lack of interest in their children's welfare and achievements that would cause such severe problems, absent the intrusion of lead contamination suffered by the Plaintiffs in this case.

The instance of the lead paint defense serves as a poignant example of attempting to identify "intrinsic inferiority" using biological justification and, moreover, placing the burden of intrinsic inferiority on "despised groups" and worse, perhaps, eliminating the possibility of alteration, change, or growing beyond one's inherited biology (Gould, 1996).

Despite the numerous controversial aspects of the defense asserting alternate genetic causation, this maneuver by the defense has gained a degree of validity, if not overwhelming success. Notably, the inclusion of this defense in Am. Jur. as one of seven common defenses in lead paint litigation may lend it a degree of legitimacy. But the text may be said to be merely descriptive with no qualitative or normative goal. More important is the emergence of this defense and the fact that some courts and juries are finding for defendants who seek to limit damages due to cognitive injuries by arguing genetic causation. Indeed, former plaintiffs attorney Jennifer Wriggins, whom Kavanagh (1999) suggests that Wriggins has a bias as a result of her prior work as plaintiffs attorney, has asserted that defendants often use this discovery motion as a "tactic to intimidate plaintiffs who don't want embarrassing medical information released" (Samborn, 1999). Specific to the concerns of privacy in the wake of significant advances in genetics is the mere opening of this door. In terms of both the compromise of individual privacy over which any single individual has no control and utilizing arguments of genetic causation to shift fault and relocate causation of negative consequences to the sufferer should be noted with great concern. Significantly, the lead paint defense does not stand alone as an example of a shadow norm. Historical and contemporaneous parallels can be found with many of the same dynamics of class, race and ethnicity, genetic justifications (often ill-founded), and arguably, the yield of some benefit at the great expense of persons in these groups. The next chapter examines the social and historical context of this shadow norm.

Before concluding this section, it is worth noting that the robustness of the science is but one of the weak links in this emerging defense, particularly given that numerous intervenors (e.g., environmental) can have significant bearing on the cognitive abilities of an individual even in the presence of genetic influence. The primary argument of this chapter regards the need to maintain, if not enact, robust standards for permissible breaches of privacy interests such as those by defendants against non-party relatives. The erosion of privacy protections such that any individual's private information can become public solely because of the actions of a third party (particularly for spurious reasons) ultimately does not serve a society that values autonomy, responsibility, as well as some notion of "the private sphere."

# 4. CONTEMPORARY CONSIDERATIONS

## *4.1. Climate for Shadow Norms*

This special type of mirror norm, the shadow norm, bears a different relationship to morality than other social norms. Given that one of the primary ways that social norms function is through threat of societal disapproval, it appears that the shadow norm, which operates independently of the original social norm from which it derives, may need stronger enforcement if it can be perceived to have a negative impact. Thus, we are likely to see the shadow norm adopt legal enforcement. One of the reasons that the mirror norm can take hold as a legal norm, I argue, is that the alleged characteristic or behavior underlying the norm is seen to carry a moral component. This moral component justifies codification. Whereas it is reasonable to assume that people will comply with social norms to confer a benefit without legal enforcement, it is more difficult to convince people that they should voluntarily act against self-interest and in a way that not only does not confer a "benefit," but rather is likely to confer an arguable detriment. Thus, although the mirror norm is justified by the informal enforcement of a social norm, the shadow norm, because it tends to entirely operate against interest (and other norms), can only function effectively when rendered as a legal norm.

The shadow norm takes its legitimacy from the original social norm but relies on three primary elements for its successful emergence and existence: (1) popular conceptions of the science, (2) the involvement of some characteristic or behavior to which society attaches some moral content (e.g., criminality), and (3) widely known or generally familiar social stereotypes.

The confluence of these three elements can also be found in the examples of contemporary laws permitting the acquisition of DNA samples from relatives of known or suspected criminals and the eugenics movement of the early to mid-1900s.

## *4.2. Contemporary Spillover Norms*

> There's a new saying in law enforcement circles these days: don't do the crime if your brother's doing time. And the reason for that is the power of DNA. (CBS, 2007)

A new practice in law enforcement is being considered, which involves obtaining and using DNA samples from persons who are not necessarily suspects in a crime. In some instances, these persons can be relatives. For example, in the United Kingdom, a rape case was solved by investigating the

similarity in markers between the perpetrator (who had left semen) and a non-match that was obviously likely to be related to the perpetrator (CBS, 2007). What this technique involves is somehow securing the DNA of persons and using it as a means of identifying the perpetrator since there are greater similarities in markers between biologically related persons than non-related persons (CBS, 2007). Essentially, it is a similar technique as what is being proposed in the lead paint defense, that is, using the personal information about a person not believed to be involved in any criminal activity to ascertain, here, the identity of the criminal. Again, like in the lead paint defense, non-parties and non-actors are involuntarily caught in the net of, arguably legitimate, intrusion into the privacy of a related individual.

The DNA familial searches now being considered for use in law enforcement bear some important differences from the lead paint defense and further serve to illustrate two of the categories of norms that I introduce. First, the science underlying the use of ''short tandem repeats'' (STRs) to identify possible or likely biologically related persons is technically solid. The more controversial use of STRs, ''low stringency searchers,'' which requires fewer than the requisite 13 matches in loci to identify a suspect who may be the first-degree relative of someone in the database, drifts closer to DNA canvassing but still relies on familial genetic similarities for the purposes of identifying a possible criminal. Second, unlike the lead paint defense, the role of existing stereotypes is not so prominently featured in the use of the technology. Although I would consider the presence of a parallel text that speaks to the stereotype that crime runs in families, it is in fact, a parallel text, and not, arguably, embedded in the practice itself (see Rothstein & Talbott, 2006).

For the foregoing reasons, I would categorize the use of familial DNA searches as not a ''shadow norm,'' but a mirror norm. It is, indeed, an almost perfect reflective image of the terms of the beneficial norm necessitated by the integration of genetic technologies in the biomedical sphere of sharing genetic information to benefit biologically related third parties. The primary thing that distinguishes a mirror norm from a shadow norm is the ''spuriousness'' or popular misunderstanding of the science and that it gains its sanction and sustainability in existing negative stereotypes. Here, the science is technically uncontroversial and notions of ''who the criminals are,'' while certainly a part of the contextual application of the tool is not embedded in this particular science. (A strong argument can be made that the two are inseparable; however, presentation of that argument is best left for another article. Nevertheless, it should be mentioned that there are valid concerns about racial bias and the disproportionate impact of

these law enforcement uses of DNA on certain communities and populations, see, e.g., Rothstein & Talbott, 2006.)

It is important to note that the presentation of the application of this science does show signs of aggressive norm management on its own. The episode on CBS 60 Minutes was a landmark example of framing. The initial presentation of familial searches involved capturing a multiple rapist. Who could be against that? The closing feature was about an African-American long-term inmate who had been exonerated by the use of familial DNA searches. The subtext being that not only does it catch the bad guys, but it also frees innocent people and, as the last example (CBS, 2007), shows it is not racist in its usage. (See, e.g., Ossorio, 2006, for discussion on other developing genetic technologies used by law enforcement that clearly embed notions of "who the criminals are," e.g., forensics claiming to be able to determine race and racial morphology based on genetic (ancestral) information.) We are being coached to change our attitudes regarding the careful guard of individual privacy to promote the collective good. This, in essence, is the direct marketing of a mirror norm. Unlike the heralding of biomedical benefits accompanying the early development and integration of genetic technologies that merely had the reduced notions of individual privacy and an unarticulated subtext, the "promotion" of familial DNA searches is stating up front that we will sacrifice some genetic privacy, clearly it is worth it and we will be doing our part to contribute to the collective good. As norms scholars widely acknowledge, laws that are congruous with existing social norms are likely to be more easily implemented and more effective once implemented (Etzioni, 2000). Indeed, states across the nations are beginning to vote on these and related measures (Simoncelli & Steinhardt, 2006, 2000). The media, as a useful tool of norm management, can effectively lay the groundwork.

Whether the practice of engaging in familial searches for criminal law enforcement and the acceptance of and participation in these practices should take on legal sanction is pressed to the fore once it is identified as a mirror norm. Purely on the basis of its distinction from a shadow norm, I would suggest that legal sanction of this norm would be less problematic. However, because of the existing social context in which this technology would be applied (e.g., the disproportionate rates of arrest of African Americans), the result could be quite devastating for a particular segment of society, which would be unacceptable. But by identifying this practice as a mirror norm, and not just another application of the science, we can observe the pathways of acceptability and consider whether, why, and how the mirror norm warrants different codification than the original norm.

## 5. CONCLUSION

This chapter has explored the emergence of norms on the occasion of the genetics revolution. The media, the players, and the biomedical establishment, intentionally and unintentionally, are creating a vision of genetic medicine that holds out great promise for curing a range of physical, social, and psychological ills. From research to application, the fulfillment of these promises seem to require that we make a shift in our notions of individual privacy and how closely we protect rights recognizing and protecting the privacy of individual persons. One of the oft-referenced features of genetic information is its ability to potentially reveal information about biologically related persons in varying spheres of proximity. At the innermost spheres, first- and second-degree relatives can shed some light on the genetic constitution and likely resulting phenotypes of any individual within that sphere. The ability to deliver more timely and therefore more effective biomedical interventions in the case of heightened disease risk, for example, requires that we share information about our genetic constitution to make use of this important characteristic of genetic information. We rightly look forward to promising developments in the biomedical field to combat disease and unnecessary suffering from compromised health.

Unfortunately, the shift in privacy norms necessitated by the integration of genetic technologies has a number of spillover effects. The creation of a shadow norm that increases and even compels access to genetic information of any biological relative of an individual for the purpose of gaining information about the individual can have disturbing consequences in the presence of "shadow factors." While many have considered the ethical, legal, and social issues of the HGP since its inception, viewing this particular issue through the lens of social norms and alternatives to legal regulation is an important step. The reasons for refraining from giving broad intrusions on individual privacy legal force range from concerns about counterproductive effects to the repeat of reprehensible abuses. Furthermore, this analysis also offers a way to identify and possibly even anticipate the appropriate type of regulation for similar inadvertent norms that emerge from the confluence of the three critical factors identified here – existing negative stereotypes, popular misunderstanding of the science, and a widely, albeit spurious, view of the presence of a moral component.

I have argued that even the sharing of genetic information among biologically related relatives for beneficial biomedical reasons should be left to the domain of social norms, partly because mandatory compromises in privacy are likely to be counterproductive and also because the wider

implications for the diminished notion of individual privacy cannot be halted. The shadow norm, as I have discussed, tends to take on a legal form, shifting from social norm to legal norm, not so much because we are more sure that the intrusion on privacy is justified and so clearly is outweighed by the benefit but because it is largely inconsistent with existing norms and cannot stand on its own as a mode of regulating behavior. Indeed, there are, no doubt, some who would voluntarily yield private information to reveal purportedly genetic information to show whether a child inherited his low I.Q., but we cannot be surprised when people refuse to do so. Like the eugenics movement where existing negative stereotypes, popular misconceptions about the underlying science, and a sense of moral blameworthiness allowed for the creation of both a social norm and the emergence and flourishing of a legal norm that was consistent with it, the persons bound and most directly affected by these norms could be expected to be voluntarily compliant. They were "forced" to do the "right thing" or, more accurately, have the "right thing" done to them and comply with the norm of the time. It is arguable that if negative eugenics had not gained legal sanction, then the eugenics movement might not have unfolded as it did, and certainly not at the magnitude that it did. The mirror norm of wanting to "improve" society by positive eugenics turned out to be the shadow norm of negative eugenics and the rampant forced sterilizations that were legalized and conducted. Clearly, compelling a parent to disclose private information to prove whether or not a lead-poisoned child's low I.Q. is the result of hereditary factors is quite different from forced sterilization. But the confluence of underlying factors and the need to legally mandate the behavior are similar, and the resulting "genetic oppression" is set in motion.

For the foregoing reasons, society must be very vigilant in being aware of the emergence and identification of shadow norms. They can wreak great and unnecessary havoc and damage to people's lives. Consequently, just like their beneficial and effectively functioning social norm counterparts, I argue that shadow norms must take the non-legal form of the norm from which they take their legitimacy. To legally mandate compromise of the privacy of biological relatives of a "person of interest" is to dissolve respect for the fundamental dignity of persons and their right to be let alone. As Stephen Jay Gould has observed, "faulty science will always take on a life of its own." To give it legal valence merely serves to compound the wrongs. For not only does compelling a non-party relative to disclose private information *not* prove whether or not the child's I.Q. was inherited, it diminishes the dignity of innocent persons.

While we can decry the growing pervasiveness of genetic essentialism and the resulting increase in popular misconceptions of the science, we cannot force people to believe only those things that are true or scientifically sound (not necessarily the same thing). What we can do is to refrain from falling into the trap of yielding to the multifaceted flourishing of faulty or poorly understood science and leave it to the informal mechanisms of norms. People should be free to believe that certain racial groups have lower I.Q. than others as well as think that it has some scientific basis. What people should not be free to do is engage in behavior based on those beliefs that intrudes in people's lives and do so with the force of law. Therefore, in the case of the lead paint defense, as offensive as it is, defendants may well be in their rights to suggest hereditary causation of the child's low I.Q., but it is untenable for the courts to compel the production of the private information of non-party relatives to prove this claim.

The moment that third parties become legally obligated to disclose private information when a relative places his own identity and genetic constitution in issue, the erosion of individual autonomy and control over one's life begins. Individuals will cease to be able to determine when, where, or why they come under the public gaze. Casting this kind of disclosure as voluntary recognizes the importance of maintaining one's ability to have a private life, to self-actualize, and maintain dignity in his public face (which many European countries recognize in their constitutions as a fundamental right for which privacy is essential (see, e.g., German constitution. (Grunnloven.) Article 2, Section 1, which states that "Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.").

### *5.1. What of Negative and Harmful Social Norms?*

Since I have argued that recognizing shadow norms and refraining from giving them legal sanction is critical, I must also address the question of what can and should be done about shadow norms that are harmful to segments of society. Are they to be left to the whims of normative behavior? I could not, for example, assert that gender and race inequality should have been left to the domain of social norms when the prevailing attitudes were those of inequality and discrimination. Therefore, this argument that asserts that practices emerging out of shadow norms, like compelling disclosure of private information of non-party relatives to prove alternate genetic causation of low I.Q. should not receive legal sanction, must also address

the force of social norms when they perpetrate and perpetuate harmful effects. That is, even social norms, which are without legal sanction, can have considerable force and impact on peoples' lives. Are we then to not legally curtail the potential impact of such insidious norms? There would seem to be two alternatives: (1) to issue a legal mandate forbidding encroachment of individual privacy of biological relatives of a person of interest (either comprehensively or for specific purposes) or (2) refrain from compelling infringement of individual privacy of relatives, essentially leaving the area unregulated except by informal norms.

Previous norms, in the form of professional privilege and confidentiality, essentially forbade the unconsented encroachment of individual privacy in relevant domains. Therefore, the question before us now is what accommodations should we make for the new kind of information provided by genetic technologies such that we can maximize its beneficial value (and minimize whatever detrimental attendant effect there may be). I assert that rather than a leap from forbidding involuntary breaches of privacy to compelling breaches of privacy, we consider the intermediary terrain of social norms, which would allow for voluntary disclosure of private information, thus neither legalizing breach nor forgoing the benefit. However, when the norm of the intermediate terrain is harmful and insidious and founded on spurious scientific grounds, then the appropriate mechanism, recognizing the potential force and control exerted by norms, requires aggressive action. One avenue likely to prove effective is that of widespread state-sponsored education. Jay Winsten, director of the Office of Health Policy Information at Harvard School of Public Health, makes several recommendations in his article on *Science and the Media* directed at more responsible reporting of scientific studies and their findings in the popular media (Winsten, 1985). These recommendations can play a pivotal role in enhancing general understanding of scientific developments and their limitations. However, it may not be enough to leave it to the popular media (who, of course, have interests of their own). Rather, the state may find an appropriate way of engaging in various public science education campaigns. A public education campaign that takes seriously the importance of communicating the capabilities and limitations of scientific developments, particularly regarding areas that lend themselves to social misuse, can contribute greatly to responsible norm management regarding the use of private information between biologically related persons, thus reaping the benefit and being responsible regarding the spillover effect. In many European countries, privacy is regarded as a fundamental right and, as such, provides a floor below which intrusions may not occur without meeting certain rigorous

criteria (Pierce, 2009). Without regard for privacy as a fundamental right, norms (particularly stealth norms) may drift and shift over time without strong basis for resistance. Absent the status of fundamental right, countries like the United States must find other ways to monitor and ensure the existence of boundaries for what costs (in terms of privacy rights and interests) that society is willing to pay for a perceived "benefit."

As society decides which third party benefits justify intrusion into individual privacy rights, a series of calculations and projections are being made, intentionally or unintentionally. The relative worth of rights and interests are being calculated, and the consequences of the chosen course are being deemed acceptable. We tend to accept the legislative calculation of the former and consider only the short term nature of the latter (if at all). The concept of the shadow norm provides a useful lens for viewing the calculation of both the original norm and the unintended consequences. Moreover, the concept of the shadow norm forces us to consider the underlying source of legitimacy of the norm and waves a red flag when new spillover norms stray too far from the purpose and justification of the original norm and, worse, garner support from spurious social and historical beliefs, leading to new forms of oppression. Pernicious attitudes have existed for centuries. What may be changing are the privacy norms that give them power.

## NOTES

1. It is not unreasonable to challenge this construction of mirror norm as simply consequences of a newly discovered fact. However, there are at least two aspects that set this apart from naturally following consequences of new information. First, it is the "official" decision to accept the sacrifice of individual privacy and embrace the positive benefits of sharing common genetic information that does not necessarily follow from the establishment of a fact. The existence of a thing does not imply its regulation. (Although I argue elsewhere that implicit normativity must be acknowledged at the outset of policy development regarding any new technology such that a "neutral" starting point may be more likely to obtain.)
2. The circulation is restricted by law and whatever terms were in agreed to in the consent form. Thus, if a parent agrees to indefinite storage and use by unspecified third parties, the limits on circulation are minimal.
3. There is a distinction to be made here between a norm that is merely incidental to or instrumental in effecting the original norm and a distinctly separate norm that encourages a separate behavior. That is to say, the spillover norm of drinking the contents of one's beverage container arose out of the behavior of recycling, but the norm of drinking all of the contents can become its own norm, separate from the original norm, such that people will drink all the contents even when the container is not destined for recycling.

4. The terms of the mirror norm do not constitute an exact mirror image of the original norm. If they did, no new meaning would be added. Instead, it is the logic and some key terms that are mirrored.

5. Discussions with Jonathan Beckwith prompted consideration of a synergistic effect as opposed to attempting a dichotomous explanation for the emergence of the defense asserting genetic causation. Indeed, the linking of genetics and I.Q. has a long and vibrant history (see, e.g., the 1969 phenomenon of Arthur Jensen's article asserting that attributing differences in I.Q. to environmental differences was a big mistake). This article went on to become the sixth most cited social science article in 1978. See Jacoby and Glauberman (1995).

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# PUNISHMENT, PURPOSE, AND PLACE: A CASE STUDY OF ARIZONA'S PRISON SITING DECISIONS

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## ABSTRACT

*In this chapter, I trace Arizona's prison siting and construction history to examine how cultural norms and traditions, economics, political prerogatives, and notions about the prison's purpose shape how such institutions are conceived, planned, and realized over time. By looking longitudinally at how prisons have come to be – as physical entities – in one locale, I reveal both the continuities and changes in the underlying meaning of the prison. In doing so, I aim to contribute to a broader understanding of the process of late modern penal change, especially the proliferation of prison building in the past 30 years.*

## INTRODUCTION

In 1876, Arizona opened the Yuma Territorial Prison, which, on the surface, seemed to be part of the last wave of a larger penitentiary-building

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movement that had swept across the United States over the prior half-century. Yet the Yuma prison, like many of its western peers, had an underlying ethos that was both tougher and less concerned with the prisoner's capacity to reform than such institutions in the eastern region of the country. Built in the desert near the Southern Arizona–California border, where summer temperatures sometimes reach 120°F, the Yuma prison has been memorialized in Western films and novels as a place so harsh that no prisoner ever escaped alive.[1] Although it was only open for a total of 33 years, this institution seemed to put into motion a distinct set of norms about the prison's function and meaning that have shaped Arizona's punishment practices across its history. Indeed, when the state began its major facilities expansion 110 years after Yuma originally opened, similar notions about what prison life should be like – austere, unpleasant, and as economically self-sufficient as feasible – were articulated by state leaders as they made decisions about the kinds of facilities they aimed to build.

In this chapter, I trace the prison construction history in Arizona to examine how cultural norms and traditions, economics, political prerogatives, and notions about the prison's purpose shape how such institutions are conceived, planned, and realized over time. I am particularly interested in how that process reflects some of the underlying ideals about prisons and their function in the larger social sphere. Using existing press reports, government records, and other primary and secondary sources, I construct a history that begins in the 1870s, when the Arizona territorial government first got into the prison business, and that culminates in the most recent prison-building boom which was launched more than 100 years later. By looking longitudinally at how prisons have come to be – as physical entities – in one locale, I aim to contribute to a broader understanding of the process of late modern penal change and expansion, about which many scholars have written (see De Giorgi, 2006; Garland, 2001; Gottschalk, 2006; Simon, 2007).

The chapter will proceed as follows: in the next section, I offer a broad stroke review of penal developments in the 19th and 20th centuries at the national level. I follow with six chronologically sequential sections that each addresses a specific thematic period and/or moment of transition in the state's prison construction history. Each section will detail how state actors articulated their (sometimes competing) vision of the institution's purpose, including its relationship to both those who are confined within it and the larger community. Within that, I focus on how those articulations shaped decisions about where to site new institutions, and what the physical manifestations should look like.

## PRISON BUILDING AS A REGIONALLY SPECIFIED NATIONAL PHENOMENON

As has been well documented by many scholars and policy analysts, US incarceration rates began to dramatically increase in the late 1970s, forcing most state correctional systems (and the federal penal system) to come to terms with the outer limits of their institutional capacity. Every state in the nation experienced incarceration increases of a very similar magnitude despite significant jurisdictional and regional differences in political cultures and structures, criminal justice styles, and incarceration rates (Zimring & Hawkins, 1991). States that did not have the kind of welfarist political structure that has allegedly been supplanted by the leaner and meaner neo-liberal form of governance (such as many places in the deep South and much of the non-coastal West) began to amp up their use of incarceration after decades of maintaining relatively stable rates of imprisonment in the 1970s right alongside those states that had exemplified the rehabilitative model.

Up until then, jurisdictions had generally regulated the use of prison, even in times of social and economic insecurity, so that a relatively stable percentage of the general population was incarcerated year by year (Zimring & Hawkins, 1991). Specifically, while prison population numbers grew along with general population growth in states across the United States, the national average incarceration rate vacillated around 100 prisoners per 100,000 citizens from 1929 to the 1970s (Bureau of Justice Statistics, 1998). In contrast, between 1974 and 2000, the rate of incarceration grew from 93 per 100,000 to 478 per 1,000,000. Although individual states' incarceration rates continue to significantly vary from each other, ranging from a low of 128 in Minnesota and a high of 801 in Louisiana by year-end 2000, they all grew by roughly the same multiplier in the late 20th century (Beck & Harrison, 2001; Zimring & Hawkins, 1991). As a result of this dramatic growth in the prison population, states began building new facilities across the nation by the end of the 1970s, with the construction accelerating through the late 1980s and early 1990s at a rate unprecedented in history (Lawrence & Travis, 2004; Myers & Martin, 2004). The majority of the new construction has been in rural areas, with 350 new rural facilities opening in the last 2 decades of the 20th century (King, Mauer, & Huling, 2003).

This, however, was not the first "wave" of prison building in the United States. A century before the contemporary facilities expansion began, most states had just recently completed construction on the first round of state level penal institutions, as they followed the lead of early 19th century New York and Pennsylvania in building their own penitentiaries. As many

sociologists and historians have documented, the first American prison-building movement was generally underpinned by a set of beliefs and justifications about how such an institution would benefit offenders and their larger communities (Rothman, 1971). Very nascent conceptions about the potential for human reform spawned a range of institutions that sought to shape the body and soul of myriad human subjects (Foucault, 1977[1975]; Rose, 1998). Specialized facilities for the developmentally disabled, the mentally ill, and those with physical anomalies and moral shortcomings cropped up at roughly the same time as the penitentiary became a standard state feature, which, in its idealized form, would reshape criminal offenders into productive, morally fit citizens.

In the United States, though, even this earlier penitentiary movement was characterized fundamental regional variations in terms of how the institution was conceived and justified. Although most of the early prisons were expected to strive for self-sufficiency (Feeley, 2002), Southern and Western penitentiaries, which came into being later than those in the Northeast region, typically exploited prisoner labor in ways to ensure no cost, if not a profit, to the state. In the post–Civil War South, many new institutions developed extensive farming operations that produced valuable crops to market, and simultaneously developed programs of repressive convict leasing to private landowners who could purchase convict labor to replace newly freed slaves. In the West, similar kinds of inmate labor schemes were utilized, albeit with less severity and brutality than the Southern schemes. In these places, the prisoner was mainly there to work for the state's (and the state's powerful private citizens) economic benefit, often under brutal conditions; other reformative efforts were scarcely employed (see Adamson, 1983; Edgerton, 2004; Johnson, 1997; Lichtenstein, 1996; Lynch, 2009; Massey & Myers, 1989). In contrast, Northeastern and Midwestern penitentiaries were more likely to use work as a mode of correction, in conjunction with other practices that were designed to improve the offender as a person. Furthermore, the first penitentiaries in the North and Midwest were frequently located in or near urban centers (i.e., Baltimore, Boston, Philadelphia, Trenton, NJ, and Columbus, OH) whereas Western, and especially Southern penitentiaries were more often sited in rural settings that allowed for large farming industries (Farrigan & Glasmeier, 2002).

The 20th century, into the 1970s, saw a slow but steady pace of institutional construction, primarily in the larger states. Often these new institutions were designed to institute rehabilitative improvements based on the penological expertise that was growing in academic and institutional settings. Thus, California, for instance, built a series of specialized correctional institutions

between 1941 and 1965 that served specific offender subpopulations through programs of vocational training, medical intervention, and psychotherapeutic treatment (Simon, 1993). But by the time that prison admissions began to skyrocket, the rehabilitative ideal that undergirded the penal enterprise in many jurisdictions had fallen out of favor across numerous constituencies, thereby destabilizing the prison's meaning despite its proliferation (Allen, 1981; Garland, 2001).

Consequently, the contemporary building spree appears to be less tied to an internal logic about the purpose of the prison and its relation to offenders, and prison construction seems to be increasingly justified by external considerations. In many jurisdictions, the new wave of construction has been justified simply as a necessity to meet the dual demands of federal courts that required conditions comply with the Constitution, and state and local courts that sent rapidly increasing numbers of offenders to prison (Lynch, 2009; Schoenfeld, 2008). This has been followed, in a number of jurisdictions, by a trend in which state political actors have explicitly sold prison construction to local, generally rural, civic leaders and citizenry as an economic stimulus opportunity (Gilmore, 2007; Huling, 2002; Myers & Martin, 2004). Thus, the linkage between the criminality of individual offenders and the "account" of the institution's purpose has become somewhat decoupled, allowing the prison to more explicitly serve purposes outside of its basic custodial and corrective functions.

Indeed, as Ruth Gilmore (2007) demonstrates in her analysis of California's prison expansion, the unprecedented investment in prisons that began around 1980 in that state is the likely product of a series of social, economic, and political factors that have little to do with crime rates and the problem of criminality, and much more to do with dramatic restructuring of local economies as a product of myriad forces – globalization of capital, the demise of manufacturing in many industries, and shifts and declines in farming and extraction industries. In a broader analysis, Jonathan Simon (2007) has also illustrated how state actors have taken to "governing through crime," offering the prison as a key "solution," in response to deeper insecurities and loss of faith in the state's ability to protect the populace. Thus, the prison is not only rhetorically constructed as a solution to myriad social ills, it is literally offered up by state leaders as the solution to local economic woes (Gilmore, 2007; Huling, 2002; King, Mauer, & Huling, 2004).

Although the fact that the contemporary incarceration explosion occurred in every state over a similar period of time indicates some form of national level process at work; ultimately, rather localized decisions had

to be made in a multitude of jurisdictions to invest in penal institutions at a rate that was unprecedented up to this time. Thus, this case study of a single jurisdiction explores the particulars of that local process: how such building was justified and sold to the public, how decisions were made about each institution's physical characteristics, including size, features, and location, and how state actors committed to these large scale public investments, particularly as the costs could not be absorbed by the state's existing revenue streams.

## THE ARIZONA CASE STUDY

### *Overview*

Looking longitudinally, Arizona's *pattern* of incarceration over time is fairly congruent with the national trends, although its *rate* has consistently trended higher than national averages. The state maintained an incarceration rate that generally hovered about 8–10% above the national average into the 1970s, and got by with just one adult prison institution throughout that period. After a brief dip below the national average in the early 1970s, however, Arizona's imprisonment rate began to shoot up rapidly at the end of that decade – outpacing the national average growth – and by 1984, it was among the top 10 of the 50 states in incarceration rate, where it has stayed ever since. In terms of actual numbers, the total adult prison population in Arizona was maintained at or below 2,000 inmates into the early 1970s, but by September 2008, the state imprisoned over 39,000 convicts, housed within 10 prison "complexes" scattered around the state, as well as in 8 contracted facilities, 7 of which are private prisons (2 of those are operated out of state).

The state's resistance to prison expansion prior to the 1970s had little to do with a commitment to being humane or appropriately "corrective" with wrongdoers. Rather, Arizona's style of punishment was traditionally harsh and punitive from the start (Lynch, 2009). Rehabilitation had no place in the penal regime until the late 1960s, when it then had a short-lived, fitful existence that was primarily the product of importation via "expert" corrections directors who were appointed from out of state (Lynch, 2009). And even though severe overcrowding was a fact of life for the lone state prison from just about the start, there was little political will or fiscal commitment to dramatically expanding capacity, and no commitment whatsoever in adding new institutions until the 1970s.

## *Deciding Where Prisons Belong: A History of Politics and Compromise*

As noted earlier, the first prison in Arizona was built in the small, isolated desert town of Yuma. The facility itself was located high on a rocky hill, bordered by the Gila and Colorado Rivers as well as by miles of undeveloped desert, so the landscape provided a natural barrier to those who might try to flee. Nonetheless, the prison was fortified by a limestone and adobe perimeter wall that, at its widest, was 8 feet thick and at its tallest nearly 20 feet tall. The prison was built almost exclusively by inmate labor – the 15 prisoners who became its first occupants had lived on the site for several months while constructing the initial cells and administration building (Jeffrey, 1969).

Yuma prison became best known – in folklore at least – for its brutal punitive regime, rather than for any enlightened reformative ideals. Disciplined prisoners were subjected to restraints of the ball and chain, as well as to stints of isolation in the bleak "Snake Den" dungeon, which was a stark, empty hole of a cell that was dug into the ground and covered with solid iron doors designed to keep light and fresh air out of the space. The placement of the Yuma prison – in a desolate and inhumanely hot locale – has been inextricably linked to its penal philosophy in the constructed narrative about this institution. Indeed, in 1896, the *New York Times* published a long feature about the prison that was particularly taken with the geographical elements of the site, calling it "one of the most remarkable prisons in the United States" from which none of the "desperate characters" who filled it had ever escaped (*New York Times*, 1896, n.p.).

Yet its siting was actually an accident of oversight, politically speaking. After a brief experiment in nominally converting all of the territory's local jails into territorial penitentiaries, the government decided to commit to building a new institution that would genuinely function as a territory-wide prison. Several cities competed to have the prison be built in their jurisdiction, and there was fairly broad agreement within the territorial legislature to build it in or near Phoenix. In 1868, a bill authorizing that a prison be built in Phoenix was passed, but it took seven more years for a funding scheme to be approved. A Phoenix legislator introduced a bill to approve a bond issue to raise funds for construction in 1875, however two legislators from Yuma inserted the name, "Yuma" in for "Phoenix" within the body of the bill as it was being voted upon. The bill passed, the governor signed off on the altered bill, and the bonds were quickly sold to raise about $20,000 in construction funds, resulting in the prison being built in Yuma (Jeffrey, 1969; Trazfer & George, 1980).

Like the representatives from Phoenix and Florence (which also competed for the prison), Yuma's legislators were motivated to secure the prison for economic reasons. Yuma had a population of just several hundred people, and the prison would have a huge impact on the local economy by opening up opportunities for lucrative goods and services contracts (Jeffrey, 1969). Indeed, even the Southern Pacific Railroad had a major stake in having the prison go to Yuma, as the town was right along their line (*Los Angeles Times*, 1897).

The superintendents at Yuma also appeared to be in sync with trends from penitentiaries in the eastern region of the United States, which had labor as the centerpiece of the penal regime. Their biennial reports generally included a detailed discussion of their efforts to reach full employment among the inmates, which also signaled their perception that territorial leaders considered inmate employment an important goal. But because the land in Yuma was inhospitable to an agricultural industry, prison administrators struggled to come up with other work opportunities to occupy the bulk of the prisoners. Some inmates were assigned to the quarry on site to break rocks, and others worked on construction, maintenance, and adobe brick manufacturing projects within the prison, but the majority of inmates had no work to do.

Unlike the underlying rationale for inmate employment in Eastern penitentiaries, though, the value of work in this case was not primarily driven by its utility as a disciplinary or correctional strategy. Rather, it was articulated as an economic one in that it would help make prisons more self-sufficient and less reliant on tax dollars. For instance, in 1890, Superintendent Ingalls proposed an experimental plan to harvest, process, and sell the naturally growing hemp along the neighboring riverbanks as a "means of making the prison, as far as possible, self-sustaining" (Ingalls, 1890, p. 2) through full inmate employment in a potentially revenue-generating industry. A few years later, Superintendent Gates reported of another "experiment" to get a farming industry off the ground on some donated land from the federal government, suggesting that if it succeeded it too could "prove quite a factor in making the prison self-sustaining" (Gates, 1895, p. 4).[2] Superintendent Gates went on to highlight the importance of striving for self-sufficiency in his biennial report

> It is a most lamentable fact that a large number of prisoners of late and at present confined here have been in nowise instrumental in providing for their support and are therefore totally dependant for maintenance on the citizens of the Territory, this creating a burden in the matter of taxation, which to say the least is very irksome … (Gates, 1895, p. 4)

Yet despite the efforts of prison administrators, the goal of full inmate employment and a self-sustaining institution were never realized at Yuma, which was a major part of the impetus in the drive to move the prison to a new location.

## *Replacing Yuma*

The territorial prison was replaced by a new facility in 1908, which was built by a subset of Yuma prisoners in Florence, a small town located about 200 miles east of Yuma and 75 or so miles either way to Phoenix and Tucson. Several factors prompted the decision to change locales. The debates centered on Yuma's geographic isolation, which contributed to the high expense of maintaining the prison there, and – equally importantly – the limited employment opportunities available to inmates. Catalyzing the realization of a new prison was the geographical limitation of the existing institution on top of a rocky hill, in that there was no way to expand the facilities to sufficiently keep up with a growing penal population, nor was there space to add manufacturing facilities to keep the growing population employed. By 1889, the inmate population had grown to over 134, whereas the facility opened just over a decade earlier equipped for 34 inmates (Ingalls, 1890). By 1904, the population had more than doubled again, to 294. At that point, the prison's single cells housed 6 inmates, the double cells held 12, trusty prisoners slept outside on cots, and an iron prefabricated "cage" had been purchased and installed to house additional inmates (Griffith, 1904). Before the move actually happened, the Yuma prison population had expanded to over 400 inmates, and there was absolutely no room to add more. Thus, a new institution had to be built somewhere, which opened up the possibility of a change in locale.

The effort to move the prison began in 1887, but was not realized for another two decades. During this period, political and press commentators throughout the rest of the territory raised issues about the economic drain to the taxpayers that resulted from having the prison located in a remote area, and legislators made it clear that the new site would need to offer opportunities for full inmate employment (*Arizona Daily Star*, 1907). Once again, political leaders from several locales vied for the new prison; this time, the towns of Florence, Prescott, and Benson all competed for the prison, whereas Yuma leaders fought to keep the institution in their town, as it accounted for about $50,000 a year in revenue (*Los Angeles Times*, 1899b, February 18).

Prescott was a persistent suitor: its legislators sponsored bills to remove the prison to their town on an annual basis beginning in 1895. Senator Norton, from Prescott, was a major backer of this effort, arguing for the move on the grounds that it would allow prisoners to "earn their keeping" (*Los Angeles Times*, 1897, p. 2) and would return thousands of dollars of contracts for prison supplies to Arizona from California, which had been the practice at Yuma. By 1899, Prescott offered to donate the land for the new prison, plus cover most of the construction costs (*Los Angeles Times*, 1899a, February 10), but ultimately failed to woo the majority of the legislature.

Florence ultimately won the prison siting battle when it donated 160 acres of city owned land to the territory for the prison to be built. Florence also had support from influential Phoenix legislators, which helped close the deal in terms of votes. The site was lauded for the low maintenance costs that would come with it, as well as the opportunities for utilizing inmate labor for state benefit (*Los Angeles Times*, 1908). Since Florence had the climate and agricultural conditions conducive to farming, it was an ideal site that would allow for the kind of self-sufficiency that governmental actors sought for the prison institution. Consequently, as planned, the new prison developed a major farming component, eventually on 820 acres that surrounded the prison facility. Although the prison also developed a labor regime that had its inmates building new roads, bridges, and highways once Arizona reached statehood in 1912, farming was the Florence prison's primary industry and work program.

Although its productivity varied greatly over the years – depending on the leadership of the prison – the farm industry was viewed as vital to the facility's self-sufficiency, and therefore central to its effectiveness as an institution. For example, in a 1938 state audit of the prison, the field auditor, Clyde Cropper, bemoaned the incompetent and inefficient use of the acreage, detailing how it could be better utilized to grow sufficient crops to feed all the inmates and staff. He suggested that, "this is one reason why the account for foodstuffs is excessive," and why expenses were "all out of proportion" (Cropper, 1938, pp. 10–11). In his assessment, this was one key component of an overall profligate and sloppy fiscal operation that needed major reform.

More fundamentally, the farm operations were key to the institution's meaning all the way into the 1970s, especially from the mid-1950s through the early 1970s under Superintendent Frank Eyman, who both wholeheartedly believed that work was key to prison order and discipline, and who boasted of the added value offered by the cost savings that were generated for the state due to the extensive and varied farm production (Eyman, 1958, 1960, 1962; Lynch, 2009). The farm, under Eyman's

leadership, produced all of the meat, eggs, dairy products, grains, fruits, and vegetables for inmate meals; grew and milled the wheat to make baked goods; and grew, processed and wove the cotton for all of the inmate uniforms. The farm even turned a profit (on paper) in that the canned and packaged excess foodstuffs were sold to other state agencies and institutions (Eyman, 1958, 1960). The placement of the prison at Florence, then, was ultimately a success on several fronts, since it allowed for a self-contained agricultural labor program that would fulfill multiple institutional goals.

## *The Prison as a Place on the Continuum of Community: The Late 1960s–Early 1980s*

The next time that there was any serious consideration about building and siting a new prison was in the late 1960s after a formal department of corrections was established in the state. By this time, though, the definition of a successful prison had changed dramatically for penal administrators, the executive branch, and even the majority of the legislature. Indeed, the rural, all-purpose prison was considered an antiquated and ineffective model, if for no other reason than its location, and new institutions should ideally strive for inmate reform and reintegration back into the community. Nonetheless, the goal of cost-effectiveness still played at least a rhetorical role in trying to sell prison construction to urban communities that fought against having facilities sited in their vicinity.

The first director of the newly formed Arizona Department of Corrections, Alan Cook, introduced his vision for new state institutions very early on in his tenure. Cook had come to the state after retiring from the California Department of Corrections, which was then a highly innovative system in terms of its rehabilitative regimes, and his goal was to modernize Arizona's penal practices in line with contemporary correctional ideals. Thus, he proposed building "revolutionary" new facilities that would render the antiquated prison at Florence obsolete. Key to his plan was building smaller, specialized facilities that would serve the diverse needs of the prison population, primarily within urban settings. Despite a very stingy legislature, he was able to make some small-scale additions to the penal system that converged with this larger vision. He opened the state's first halfway houses in both Phoenix and Tucson, and he oversaw the building of a modern juvenile boys' facility in Tucson (the existing industrial school was in a very rural ranching area, approximately 4 h from Phoenix) and a girls' school in

outer Phoenix, replacing the state contracted patchwork of placements that had served girls.

But his dream project was a planned ''training facility'' for 18–25 year old young men offenders, which was to be built in Phoenix. After receiving a $35,000 appropriation from the legislature in 1970 to begin planning on the project, Cook applied for and received an additional $100,000 from the federal government to pay for plans and design. This facility was going to be the first of its kind and would realize all of the modern correctional goals that Cook had planned for the state. It would be situated within an urban setting from which the majority of prisoners came, and was to include residential and work furlough treatment programs, vocational and educational training, diagnostic services for the courts, and services for probation violators and parole recidivists. It would also be specialized, in that it would serve a specific subset of inmates and directly address their correctional needs.

As a Department spokesman told a reporter in 1971, ''Arizona is going to try to establish a new pattern of correctional institutions with this facility by departing from any past traditional type [institutions] … and will try to create the concept of normal community life'' (Phoenix Gazette, 1971). The institution would be classified as a ''medium security'' facility, with a 100 person diagnostic center as the starting point, and 10 small but secure housing units that would each accommodate 30 inmates in single rooms, with extensive facility space for treatment programs offering individual and group therapy, an educational program, and vocational programs. Outside of the secured facility would be three housing units designed for 90 residents, to accommodate those who ''graduated'' to work furlough/training furlough in preparation for release.

Just as Cook was about to retire in early 1973, the legislature agreed to support two such facilities and provided immediate funding for the first to be built in Phoenix, and also promising future support for the second to be built in Tucson. The institutions would be smaller than the original plan, each serving between 250 and 300 young offenders, but the net effect would be that a significant portion of the adult male penal population – around one third of the approximately 1,500 prisoners at Florence in early 1973 – could potentially end up in the new facilities.

The key to these institutions was their placement in the state's population centers, which would provide myriad therapeutic benefits for the inmate that directly linked to the entire purpose of the institution itself. The location allowed for experts and specialists who would already be based in the cities to be utilized for treatment. The urban placement would also allow the institution to exploit the college communities – Arizona State University,

near Phoenix and University of Arizona in Tucson – for additional expertise and volunteer help. Most importantly, the facilities would be based within the offenders' own communities to help maintain family bonds, which was seen by the correctional administration as crucial to the rehabilitative process, and which would allow for the graduated release process and the integration of corrections within the community.

In conceptualizing this institution, the Department of Corrections administrators purposefully linked the placement of the facility, the architectural design, and the planned activities to take place within its walls to both the offenders' needs and the larger community's needs. A Department of Corrections official who made a presentation to state leaders and community members during the design period made this explicit to his audience: "It cannot be overemphasized that the proposed design followed the defining of the program, and, therefore, all design is oriented to the needs and requirements of the target population, as well as those of society at large" (Arizona Correctional Training Facility presentation, 1971, p. 2). The presenter suggested that the day of "the remote, out-of-sight, out-of-mind institution is … over" and that the ability to successfully implement the proposed program was "literally built in to the site location" (Arizona Correctional Training Facility presentation, 1971, p. 3).

As the facility moved into the concrete planning stage, the linkages between the design of the institution and its broader penological goals were more specifically made clear. In the 1973 Preliminary Plan of the Arizona Correctional Training Facility, the superintendent of the planned institution asserted that because "traditional prison design mitigates against treatment goals," this facility was designed to be "as non-institutional as possible, [to] create an atmosphere of openness" (Geddis, 1973, p. 9). The institution was thus planned in an open campus style, and utilized high security unbreakable, bullet-proof glass windows rather than metal bars to "maintain a non-punitive and rehabilitation-oriented environment" (Schwartz, 1975, p. A1).

It took until 1978, after a series of major political battles, for even the first of these institutions to be realized. In the early years of the process, the concept of the urban institution was widely supported by the corrections department, the majority of the legislature, and the governor, but the political support became diluted as the planning moved toward becoming a reality. Over an 18-month period in 1973 and 1974, there were crippling community protests against every proposed site in or near Phoenix, and five different viable locations in the metropolitan area ended up getting rejected as a result. Legislative representatives from each district where the new prison was being proposed used all their power to sway their colleagues

against forcing the prison on the affected communities. The representatives did not object to the concept of building a prison in an urban setting, they just did not want it in their districts where their protesting constituents lived. Because both houses of the state legislature were majority Republican and the representatives from the affected communities tended also to be Republicans, they were able to convince their colleagues to drop the given site.[3] In the end, the legislature gave up and moved the first facility to Tucson, where the mainly Democratic representatives had less political sway with their peers.

There were several significant aspects to this prison siting battle. First, the idea that the prison would serve as an economic booster was raised here in a way that both echoed the past and foreshadowed the future. Several proponents of the urban prison attempted to quell residents' objections by suggesting that their local community and its businesses would greatly benefit from the prison, through contracts for goods and services, and as a result of corrections' employees spending money in the locale. An *Arizona Republic* headline, "Proposed prison called a gold mine" (Swanson, 1974) exemplified this pitch to the community, and the attached article detailed the ways in which it would financially benefit Phoenix, according to a visiting "corrections expert."

In addition, two rural communities actively sought the new prison, much in the manner that had been the case with the Yuma and Florence prisons many years earlier. Florence was one of the towns that sought the new prison, as it would continue to do as the impending prison-building spree commenced. Florence's economy was substantially built around the existing state prison, and city leaders realized the fiscal benefits associated with its presence. However, Florence's non-urban location doomed it in the eyes of the majority of the stakeholders.

Similarly, the town of Gila Bend, which was about an hour and a half from Phoenix, wanted the prison "desperately," as a newspaper editorial put it at the time, because the economy had suffered ever since a major highway was built that bypassed the town (Arizona Republic, 1974, n.p). Town leaders offered the state a large plot of land for $2.50 an acre, and offered to supply the required water as well, if the state would locate the prison in Gila Bend. These local leaders explicitly framed their desire for the prison solely on economic grounds. Their pleas, coupled with the incentives offered to the state, convinced some lawmakers to abandon their commitment to an urban facility. This was the first fracture in the long-term plan to update the state's penal system through the use of specialized, locale-sensitive facilities. The local news media joined in, with the state's

major paper, the *Arizona Republic*, demanding in an editorial that the state quit "dawdling" and put the prison in Gila Bend (Arizona Republic, 1974).

Nonetheless, during this entire period, the discourse about the prison was generally maintained at the level of the institution as a holistic entity. Institutional actors, political actors, and others did not speak of the proposed facility in terms of its individual level capacity (i.e., "bed space") – which would come later – nor as a generic unit among a large network of prisons within which a share of the prison population could be diverted (which would also come later). Rather, the training facility was largely conceptualized, planned, and debated in terms of its overall goals and ideals – who specifically it was designed to serve, how it would serve that population, and how it would fit within the larger community. Even during the turmoil over where the first prison would be sited, the legislators from the affected areas acknowledged the importance of the urban setting for rehabilitation and reintegration goals (Bolles, 1974). This would begin to change by the time it became a reality.

### *The Transition from Institutions to "Beds"*

When the new prison came on line in Tucson, the facility had been significantly transformed from the time of its inception by Alan Cook in 1969 to its concrete realization nearly a decade later. Its name – the Arizona Correctional Training Facility – was the strongest representation of its original vision; in practice, it was another place, outside of the Florence main cellblocks, to divert prisoners in the state's effort to comply with a standing court order to reduce the population at the main prison. Indeed, by its opening in 1978, discussions about the training facility focused primarily on the "bed space" it offered as a relief to the overcrowding in the Arizona State Prison at Florence.

This metamorphosis symbolically reflects a change in priorities over that period, and is indicative of the movement toward a mass incarceration state. Even though Ellis MacDougall, the corrections director who was in place at the time this institution opened, was deeply committed to the rehabilitative ideal, forces at work within the state had morphed what was to be a "revolutionary" institution into mere additional housing for the growing influx of inmates being sent to the department. And while it was, in its early years, used only for young adults who were 25 or younger and for juveniles convicted as adults, over a matter of just a few years, it offered little to differentiate it from any other medium security facility.

Nonetheless, there remained a strong ideological commitment by the Department of Corrections and the governor to the concept of siting institutions in urban settings. And in 1978, with the pressures of severe prison overcrowding that were not alleviated by the Tucson facility, there was political will to build the second planned urban institution, this time in Phoenix, no matter what the objections were from the public or their legislative representatives. This second facility, however, would not be conceptualized as either revolutionary or innovative as had the first – it merely needed to provide bed space for the burgeoning prison population. The goal in building it was to maximize capacity as much as possible in light of the political obstacles it would face in the Phoenix area.

Because both the Democratic governor, Bruce Babbitt, and the corrections director, Ellis MacDougall, were major political actors who were committed to building the facility in the vicinity of Phoenix, this time around the state withstood intense public opposition and imposed the prison on a community that absolutely did not want it. As was the case during the earlier attempt to locate a prison in Phoenix, there were massive protests every time a site was proposed in the metropolitan area, and again there was strong pressure from the legislators representing the potential site communities not to build in the respective locations. After much political wrangling, and over the objections of the legislators from the area, the governor's site selection advisory committee settled on a site near west Phoenix, in Litchfield Park.

Community members from Litchfield Park sued the state to keep the prison out, but the department forged ahead during the litigation, and took bids for the construction of a 1,200 bed prison (1,000 men and 200 women) at the site. In the summer of 1979, a Maricopa County judge dismissed both pending lawsuits that challenged the prison. Plaintiffs in one of the cases appealed, and despite a minor victory in the state Court of Appeals and state Supreme Court, the department proceeded on the construction of what was named the Arizona Correctional Center, Perryville. The housing units for men opened in 1981 and the women's unit was opened a year later.[4]

At the start of this process, the majority legislators were not opposed to siting the prison in the Phoenix area, but as the stand-off between the governor's office and the community became more heated, the Republican dominated legislature abandoned its commitment to urban institutions. In the months following the selection of the Litchfield Park site, the legislature passed a bill that required the state to build the new prison in Florence where the old maximum security prison still operated. In the spring of 1979, Governor Babbitt vetoed that legislation, reasserting his commitment to the Litchfield Park site. By 1980, the siting issue had become nearly completely

polarized on party lines. The chairman of the state Republican Party issued a long news release that castigated Babbitt for his arrogance in prioritizing "the technical requirements of penologists against the most fundamental rights of the people of Litchfield Park to safety and security of life and property" (Pappas, 1980, p. 2). The press release's message captured the essence of what would become a mainstay of criminal justice policy making here, as well as in many jurisdictions: That offenders were in a zero-sum game with victims and potential victims, and political figures ought to choose the right side to survive.

Almost concurrent to the planning of the Perryville prison, the department incurred more community wrath by buying a motel in central Phoenix, which was to be converted into a women's prison for use until the Perryville women's unit came on line. As was the case with the two urban training facilities, the site selection for this facility was constructed as important for penological reasons, particularly for the seamlessness with which the community and the correctional population could interact. The Director of the Department of Corrections, Ellis MacDougall, suggested that the location was beneficial because it "not only allows some of the women to go outside the institution but brings the community into the institution" (MacDougall, 1980, p. 34). This project was also challenged and went to court, and again the state played hardball by forging ahead with the renovations while simultaneously fighting the lawsuit. Ultimately, after an extensive hearing in front of a Maricopa County judge, the state prevailed and opened the converted motel as the Arizona Center for Women in 1979, which continues to house women prisoners despite its original designation as a temporary prison.

In both of these cases, there was sufficient elite political will (at least in the executive branch), and a commitment to an ideology about prison's broader purpose that necessitated its placement in an urban setting, to overcome all kinds of resistance. At this point, the design of the institutions themselves was less strategically important than it had been in the conceptualization of the first urban facility, but locating facilities within an urban setting was still considered vital, at least by some state actors, especially to secure professional staff. Thus, Governor Babbitt and the corrections department fought off significant pressure to move the second "training" institution to Florence, which had lobbied for it (as did many legislators). They also withstood the significant challenges from Phoenix municipal and business leaders to locate a 160-bed women's facility right in the city.

Clearly, though, the ideals underlying the original conceptualization of the training facilities had been eroded by the time that the Perryville

institution was even in the planning stage, and the signifiers of the mass incarceration state were emerging. In 1973, when the legislature first authorized the training facilities, the plans were for smaller, specialized institutions. The Tucson facility lived up to that design feature in that when it opened, it served 380 youthful adult medium security inmates. Perryville, however, was designed from its inception to be over three times larger, and to serve a whole range of inmates, from minimum to medium security for men and from minimum to maximum security for women, of any age and criminal background. So while the Department of Corrections had declared in 1971 that "the day of the large, catch-all institution is over" (Arizona Correctional Training Facility presentation, 1971, p. 3), by 1978 that obsolete form of institution was back.

Furthermore, in the planning years for the Tucson facility, the bed space capacity was rarely mentioned in news stories, and when it was, it was generally noted as a feature of the new kind of smaller, specialized facility that was being designed. In contrast, discourse about the Perryville institution, by political actors as well as by corrections officials, consistently referenced its value in providing desperately needed bed space during the planning years, especially as the department faced court orders to relieve overcrowding in the existing prisons (Lynch, 2009). News stories regularly referred to it as the "1,200-bed" prison, thus highlighting its value in increasing system capacity.

### *The Move to Warehousing: From the Training Center to the Prison City*

Ironically, the first glimmer of the kind of warehousing model that is said to characterize contemporary prisons (Robertson, 1997) came almost simultaneously to the planning and development of the training facility in Tucson. In 1975, the governor of New Mexico, Jerry Apodaca, wrote to Arizona Governor Raul Castro asking if Arizona would consider exploring the possibility of a regional prison for special "problem offender" groups (Apodaca letter to Castro, 7-15-1975, Castro's papers). The original proposal was to investigate the feasibility of building a maximum security prison that would serve offenders from Arizona, Colorado, New Mexico, and Utah. This proposal was framed in the kind of "risk management" language that Feeley and Simon (1992) have identified as emerging in the penal field in the late modern period.

The regional prison proposal culminated in a planning "conference" 1978, and by this time Nevada had been added to the group of interested

states. The purpose of the proposed facility was solidified at the conference as a way for the participating states to, "remove the hard-core incorrigible prisoners from the state facilities and put them in a maximum-security prison" (Report to the Governor on Regional Prison Conference, 1978). Arizona's delegates to the regional prison committee felt that the idea was worth pursuing because it would provide relief for the severe prison overcrowding Arizona was experiencing, it would allow for the removal of incorrigibles to aid in overall inmate control, and it would be less expensive than building such an institution at the single state level.

In a 1978 State of Arizona position paper on the regional prison, the proposed facility was referred to as a "super-maximum security" prison, foreshadowing state level developments to come (Richards position paper, 1978). Ultimately, while this regional facility was never built, the idea underlying it – for a "super-maximum" level unit in which to place the system's most problematic inmates – became a reality in Arizona just two years later with the building of CB-6, a 200-bed high-security unit that opened at Florence in 1980 (see Lynch, 2009 for more on this unit's history). This was followed, seven years later with the opening of the first of the new generation supermax prisons in the country, also at Florence.

More generally, after the drawn out fight to get the Perryville prison built in Litchfield Park, the will in the executive branch to fight opposition to urban prisons disappeared. This was the product of several factors. First, as in other states, there was a hardening of "law and order" politics within the legislature, which prompted a number of law changes that dramatically increased sentence lengths, beginning with a major criminal code change in 1978. This added enormous pressure on the state to add prison beds to the system as quickly and inexpensively as possible. The stepped up "tough on crime" rhetoric in the state also contained a central strand that heralded making the prison experience as unpleasant as possible, and that fully discounted the value of offender rehabilitation and reintegration. Second, leadership changes, first in the corrections department and eventually in the governor's office, eroded the unified commitment to urban prisons.

Even before this turnover, the demands on the existing system, which was under court order to reduce overcrowding and improve inmate living conditions in the Florence main prison, necessitated that Governor Babbitt and Director MacDougall add beds wherever they could. As a result, with several prison sites now established in the state, a new strategy for prison expansion – what I call a "dispersed concentration" model of siting new housing units and complete institutions – began to prevail. This happened somewhat haphazardly in the early years, as corrections officials scrambled

to create space for beds within the existing facilities, but eventually became formalized as policy.

For instance, in 1982, a new warehouse built for the prison industries program at Florence was immediately converted into an inmate warehouse – 100 "residents" were housed in the sweltering warehouse for most of the year since there was no more space for them in more conventional housing throughout the system. In addition, "tent cities" were erected in early 1982 to house inmates on the grounds of the Tucson prison and at a rural minimum security facility.[5] In the same year, Senator Barry Goldwater acquired 136 Quonset huts from the United States military that had been in storage for over 30 years in Georgia. They were allocated to the Department of Corrections as "do it yourself" prisons, and were transported by train to Florence, where inmates reconstructed them as housing units. They were derogatorily named the "tin cans" by the inmates assigned to take residence in them (Ariav, 1982); however, they continue to be used for housing today. And throughout the system, available recreational spaces, such as lounges, TV rooms, and gyms were converted into makeshift dormitories for the overflow population.

The "dispersed concentration" policy became more formally institutionalized under new corrections director Sam Lewis in 1985, when he regrouped and renamed the existing institutions into "prison complexes." In a clear move to eschew rehabilitation as a goal of the state's prisons, he abandoned the use of any "correctional" terminology in referencing state penal institutions, and instead opted for the use of "prison" to refer to all the facilities (Directions, 1985). This was followed by a huge prison-building campaign that began in 1986, during which new complexes were added to the system and most existing "complexes" more than doubled in size.

During this period, where there was a foothold, new housing units were added to the complexes, either on existing property or on acquired land in the vicinity of the existing facilities, which dramatically changed the character of the original institutions. Tucson went from the 380 person capacity that it opened with in 1978 to adding 1,000 new construction beds in the 1986–1987 prison expansion campaign; currently, the Tucson "complex" houses over 3,900 inmates at all security levels (ADC Daily Count, 9-16-2008). Florence grew by leaps and bounds in the 1980s, and eventually split into two adjacent prison complexes when the Eyman complex, which includes two supermax prisons, was formally established in 1991. Today, over 8,800 state inmates are in the Florence and Eyman complexes, and about 1,700 more Arizona prisoners are in several private prisons that have been built in the town (ADC Daily Count, 9-16-2008).

And despite a settlement made with the residents in Litchfield Park that capacity at the Perryville prison would be capped at 1,400 inmates, the state continued to add bed space to that facility, breaking its promise along the way. In the early 1990s, with authorization from the legislature, the department went to double-celling within the existing housing units at Perryville, and added tent housing on the grounds as the system experienced crisis overcrowding. Currently, the Perryville complex has bed space, which is filled to capacity, for over 3,700 prisoners (ADC Daily Count, 9-16-2008).

In addition, between 1983 and 1999, four more brand new prison complex sites (not including the Eyman complex described earlier) opened to complement the five that already existed. As will be discussed in detail later, these sites were selected largely on grounds that were external to traditional penological goals directed at the offender. In particular, they served as a kind of gift to struggling communities to stimulate local economies. Furthermore, the new complexes' design had become completely divorced from any penological rationale; rather efficiency concerns – construction costs, quick capacity expansion promises, and so on – fully guided the planning and design of the institutions themselves.

Coinciding with the dispersed concentration model was the closing of the urban re-entry facilities, which was justified by the Department of Corrections on economic grounds. By the mid-1990s, most of the state's urban release centers and halfway houses had been closed; just one facility for women, located in Tucson, remained in operation. Instead, the priority for the department of corrections, the governor, and the legislature was capacity building, exclusively conceived in terms of adding prison beds to the system as quickly and cheaply as feasible. Thus, at this point, penal institutions were no longer framed as living, holistic social spaces, and the discursive unit of analysis had become the "prison bed" in political and institutional communications about proposed expansion.

Within the political arena, this shift in the purpose of prisons was quite congruent with the prevailing message about crime and punishment. Republican legislators framed the policies that allowed for double-bunking and the addition of crowded, substandard housing within previously designated programming areas (such as gyms and industries warehouses) as a way to get rid of the "country club" lifestyle that had allegedly prevailed in the system (Nilsson, February 9, 1983, p. B-4). In addition, legislators in the state passed legislation that would deliberately ensure that the prison experience was neither beneficial nor comfortable for the inmates, while reducing costs to the state. For instance, in 1983, the legislature passed a bill mandating that all prisoners do 40 h a week of "hard labor,"

and in the following year mandated that all new prison construction be completed "predominantly through the employment of inmate labor" (Ricketts, n.d., p. 4).

### *Prisons as Economic Stimuli: Lobbying for Lock-Ups*

Prison siting and construction decisions became completely decoupled from internal institutional purposes once the state began doling out prisons to lobbying communities on economic development grounds in the 1980s.[6] Although this phenomenon was reminiscent of Arizona's earliest prison-building experiences, this time around, there was little balancing or weighing of the various, divergent interests and needs of the prison inmate population, staff and administration, and community members. Instead, the siting became a political plum that was awarded to the locale that either offered the most for it, or needed it the most for economic survival. Indeed, a legislative mandate to consider economic benefit of siting for distressed, mainly rural communities was established in 1993, thus formalizing the economic consideration as the primary one in prison siting decisions. With this approach, the state has been able to create dispersed new sites in which to continue to concentrate the state's prison population. Consequently, small rural communities such as Douglas, in southern Arizona and Winslow in the north, became sites for prison expansion – each earning its own prison "complex" in the 1980s – despite their relative isolation and distance from the state's population centers.

The town of Florence has been the master in maximally benefiting from this. It has proactively lobbied the state for all the planned prisons since the turn of the 20th century, and by the late 1980s, it became the go-to locale for siting new facilities. Its success is best exemplified by Governor Rose Mofford's 1989 "Prison City" initiative, which aimed to make Florence the "prison city" of the state. Mofford convened a task force that would work with Florence to increase housing and other infrastructure in the town so that the state could continue building prisons in the area. The state, for its part of the partnership, offered resources to the city to encourage prison employees – the bulk of whom commuted from other areas – to live in Florence, including aid to the local schools, mortgage incentives, and property and income tax breaks. The goal of the "prison city" initiative was to add 6,000 prison beds in Florence over a decade and a half, and provide housing for the bulk of the staff needed for that expansion (Polsgrove, 1989).

Florence was an enthusiastic partner, and actively sought the additional beds that were promised by the state. By this point, Florence had figured out how to optimize the financial rewards of being a home to prisons in several ways. First and foremost, Florence realized the economic benefits of having an incarcerated subpopulation that garners per capita revenues with little cost to the city. Prison population growth meant that the town could gain numbers without having to pay for most of the basic services for that population, since they were confined to state custody. Thus, in 1982, the city annexed the land on which the original prison was built, which immediately increased the town population by about two thirds. In anticipation of continued prison building, the town twice more annexed unincorporated land that abutted city limits to then sell to the state for new penal facilities.

As a result, the physical size of the town grew from approximately 10 to 50 square miles over less than 2 decades (Town of Florence homepage). The official city population has grown from 3,391 in 1980, before the first annexation, to 17,781 in 2007 (Decennial Census Population of Arizona, Counties, Cities, & Places: 1860–2000, n.d.; U.S. Census Bureau, 2008). Nearly three quarters of the current population is incarcerated, which is the highest percentage in the nation for towns with populations above 10,000 (Kulish, 2001). Yet the town has little fiscal responsibility to the vast majority of its residents – it only needs to provide sewer lines and back-up fire and police services to the prisons. Conversely, the majority of the town's residents have no say in local governance since, as prisoners, they cannot vote. In 2001, Florence's per capita revenue for inmates alone was approximately $4 million (Whiteside, 2002).

Around the time of the "prison city" initiative, the city also instituted a 2.5% construction tax, which they charged to the state when it expanded facilities, and which provided an immediate boost to the city coffers. Finally, the city benefited during the initial expansion phase by getting state subsidies to develop infrastructure, which was provided to attract staff to live in the area. Thus, while the town's annual budget was significantly subsidized by an ongoing revenue stream based on per capita state and federal funding for the prisoner "residents," it also managed to get the state, at several points, to come up with large lump sum payments in the form of construction taxes and development funds. All three of these benefits were beyond the scope of the traditional promised economic benefits that prisons purportedly would bring to a community, such as expanded job opportunities, contracts with local vendors and service providers, and added retail commerce from the influx of staff. The aggressive tactics of Florence have garnered national headlines in *Harper's* magazine (Whiteside,

2002) and the *Wall Street Journal* (Kulish, 2001), both of which featured Florence in stories about this kind of new prison town.

Florence, though, eventually fell out of favor as the go-to prison site, as other communities clamored for their own prison with fewer or no strings attached. Once the locale of the prison became an obsolete concern (on programmatic and staffing grounds), the state had the liberty to site the prison in any locale that asked for it. Florence nonetheless has continued to be the "prison city" of Arizona. The town actively marketed itself to private prison vendors who not only paid the construction tax, but also imported new residents from out of state. In addition to being home to the two large state prison complexes, Florence now has 4 private prison facilities and a private immigration detention center that collectively hold approximately 5,000 prisoners from Arizona, Alaska, California, Hawaii, Washington state, and the federal government.

The next wave of Arizona prison towns built on Florence's successes, particularly in terms of annexing land into city limits to benefit from the captive population growth. The town of Buckeye, which actively sought a prison in the 1990s, was awarded the state's single largest prison, and one of the largest in the country – the 4,150 inmate Lewis State Prison Complex facility – which opened in 1998. From 1997 to 1999, the city sought to annex the land on which the prison was being built, even though the prison site was 15 miles outside of town. In 1998, the legislature passed a law tailored for this situation, in that it authorized such annexation as long as the land to be annexed was within 15 miles of the town's borders, thus ensuring Buckeye's success in this effort. As a result, the town was able to nearly double in size in time for the 2000 census, which has meant approximately $1.3 million in additional revenue for the town each year (DeFalco, 1999). The Lewis prison has since grown, and as of September 2008, houses 5,263 inmates, thereby increasing Buckeye's revenue stream even more. Following Florence's lead, Buckeye leaders also instituted a construction tax that they tried to collect from the state – totaling $2.8 million for the original Lewis prison construction (which was more than the town's entire annual budget), but were denied the bulk of it since the annexation was not granted until late 1999.

The planning and construction of the Lewis prison further reflects the now complete disconnect between what might be the social and human purposes of a penal institution and its current goals. In other words, this prison was represented by corrections officials and political leaders as, at least implicitly, a mammoth human storehouse that was successful exclusively because of its efficiency features. The description of its design, offered by the Arizona Department of Corrections, is telling on this issue

> [T]he State of Arizona is putting construction technology, safety and security designs to practical use in a massive prison construction project known as the Arizona State Prison Complex-Lewis. Based on numerous comments by corrections officials from around the country who have toured the facility, the Arizona Department of Corrections (ADC) has been described as a leader in the field of prison construction. Other states are interested in learning how ADC builds at such a reduced cost rate. According to (then) Corrections Director Terry L. Stewart, the reason for its prison construction success is attributable to the continuing use of a prototypical concept …
>
> Other savings ideas included the careful selection of geographical location to maximize cost efficiency and enhance safety considerations. Construction design included consolidating all prison units into a smaller land area, thereby reducing the need for additional utilities, site lighting, and roads. All units are housed under one complex operation, but maintain the autonomy to respond to unit alarms.
>
> The Arizona State Prison Complex – Lewis is one of the largest single correctional facility construction endeavors in the United States. The behemoth of prison, costing $157 million, includes two 800-bed level 3 male units, two 800-bed level 4 male units, one 600-bed female unit, and one 350-bed maximum security minors unit, with a total inmate population of 4,150, making ASPC-Lewis larger than over 30,000 towns across the United States. The complex contains 294 acres inside the perimeter patrol road. This acreage supports 23 miles of road, 22 miles of fence, 44 acres of agriculture fields and six 24-acre stand alone prison facilities. (Arizona Department of Corrections website)

The account continues on to describe how many gallons of raw sewage would be processed at the prison daily, how many meals would be cooked and pounds of laundry cleaned, and provides details about its advanced security and communications systems. No discussion is offered in this description of what life will be like inside the prison for its 4,150 residents, in that there is no mention of programs, work or educational opportunities, other than to mention the cost savings generated by using inmate labor for construction and farming projects. Furthermore, the geographic siting was based exclusively on efficiency and security goals, rather than on the connection of the prison's users – both inmates and staff – to the larger community, as had been a major consideration just two decades earlier. Rather, the overall message offered in this account of the Lewis prison complex highlights the efficiency benefits of building a "behemoth" institution that uses a generic design template to reduce design and construction costs, and that could be located anywhere with sufficient open land to allow for its construction. The institution itself merely needs to contain those bodies assigned to it on completion, and the prisoner as agent/subject is no longer a consideration in the design or placement.

A consequence of this current logic of prison siting is that prisoners, if anything, have been reduced to units of cost, rather than as live entities to be

corrected or acted on in any deliberative strategy. This shift has allowed for a final phenomenon of interest in the Arizona case (although clearly not limited to this case). That is, the state now treats prisoners as, in some sense, transferable expenses whose costs can and should be reduced through whatever modes available to the state. This has been realized in several ways. First, as is illustrated by the Lewis prison construction described earlier, new construction projects are designed primarily with economics in mind, both in terms of the costs to build new bed space, and in terms of long-term operational expenses. Security also weighs into the design formula, but programming has completely fallen out of the equation. This almost ensures that, even if there was a will to create institutions that were designed for the well-being and development of their residents, the physical manifestation of the institution – from the siting in rural settings, generally miles from residential areas, to the actual creation of space within the fences of the new institutions – will be at odds with that interest.

Second, Arizona, like a number of other states, has taken to using private or contracted bed space to deal with various subgroups of their prison population. Arizona Department of Corrections first began "outsourcing" inmates in 1994 after a bill authorizing the use of private prisons passed the legislature. The department now contracts with 5 private prisons that have been built in state, a rural in-state county jail, and 2 private prisons in Oklahoma, and nearly 1 of every 5 Arizona inmates is currently in a contracted facility (ADC Daily Count Sheet, 9-16-2008). The development of sending inmates to private facilities is solely justified on cost effectiveness grounds, especially in terms of the savings the state realizes by not having to pay the upfront construction costs for capacity expansion. Private companies also tout their lower per capita costs, in comparison to state costs, although the data on which these claims are made in Arizona have been called into question (Pranis, 2005). The irony is that there is now a national market for prisoners as commodities for private facilities, so for a growing number of state inmates, there is no assurance that their confinement will even be in the same state, much less the same region, in which they were sentenced. Thus, private facilities in Arizona import prisoners from multiple states in the West, even as far away as Alaska and Hawaii, whereas the state of Arizona sends over 3,200 of their inmates all the way to Oklahoma despite the existence of thousands of private bed spaces within the state.

In the case of Arizona, this feature of the contemporary prison had the potential to go international several times in recent years. In 1997, Governor Fife Symington and then-Department of Corrections Director Terry Stewart devised a plan to move Mexican national prisoners out of the

state's facilities and back to Mexico by contracting with a private prison company to build a prison across the border. The inmates would still be under the jurisdiction of Arizona and the state would be responsible for them through the private prison contract system, but the facility itself would be in Mexico. The governor argued that under NAFTA, such an arrangement should be feasible if both parties agreed to it.

The plan was touted in large part for its economic benefits, in that it would provide huge savings to the state, given the substantially reduced construction and labor costs in Mexico. Although the request for proposals issued by the Arizona state government yielded interest from one private prison firm from the United States, and one based in Mexico, the plan was ultimately abandoned due to the lack of an international treaty that would allow such an arrangement across national lines (see Fitzpatrick, 2004, for more on this). The idea was resurrected in 2005, when a Republican state legislator introduced a bill that aimed to get around the treaty problems with the earlier legislation. The bill passed both houses of the legislature, but Governor Napolitano vetoed it (Arizona Daily Star, 2005). Had such a plan been implemented, it had the potential to fully globalize and commoditize what was previously an exclusively state function that in its idealized form aimed to reform offenders and improve society.

## CONCLUSION

Although, the ultimate determinations about where to site prisons and what kind of facilities will be built are inevitably the product of a contested and negotiated process – ideals get compromised, finances always constrain, micro-politics invariably play out in not always predictable ways – those mediated resolutions, taken together as a pattern of connected events, tell a powerful story about the meaning(s) of the prison in a given place over a period of time. In this case, that story suggests that the prisoner's stake in such decisions has been consistently devalued, and the prison's location and physical manifestation is more often a product of externally based factors that have little to do with penological ideals.

Micro-regional politics have been hugely influential in determining how prisons have been sited from 1876 onwards, and the planning and building of institutions has consistently reflected a broader political ethos about expecting punishment to be both tough and cheap, with inmates earning their keep as much as possible, except for during a brief period in the 1970s (see Lynch, 2009, for more on this). Thus, this case study of Arizona

suggests that rather than a major paradigm shift occurring in the late 20th century, breaking from a past that privileged rehabilitative rhetoric and practices, rehabilitation was itself the brief ''break,'' which was materially reflected in the design and construction of the urban facilities.

Specifically, in the conceptualization of the 1970s Tucson training facility, the physical incarnation of the institution was as important as the geographical place that it was built, and those two elements were both interdependent and connected to a larger social and penological mission. The facility would not realize its goals unless it was located in an urban space, and its placement in an urban space would be futile if not designed to take advantage of its location through the structure of the housing units, and therapeutic spaces, as well as through the tapping of expertise and familial ties in the surrounding community. Underlying this logic was a direct consideration of the needs of the residents, which shaped many of the design features and siting decisions. Although the decision to site the territorial prison in Florence 70 years earlier had prioritized potential work opportunities for inmates in the calculus, that emphasis was based on an economic goal than a reformative one. So the explicit concern with designing a holistically rehabilitative institution in the 1970s stands as an anomaly in this state's history.

Concerns that new institutions be designed for the rehabilitative benefit of inmates, though, quickly slid in priority as the pressures of huge prisoner population growth reduced the scope of the prison's purpose to a matter of bed space. The urban setting as a key priority was sustained for a few more years, yet even that geographic imperative lost value in the prison siting equation as the pressure increased to add beds to the system in the most economical and efficient manner possible, while following the path of least resistance.

As the prison transformed into an institution that need only contain prisoners, its location was no longer considered whatsoever in relation to the inmate's needs. Rather, the political benefit of rewarding communities whose leaders wanted or ''needed'' a prison for economic development made the siting decisions easy. As municipal leaders offered up their locales for prison expansion, state political actors could gain points by complying with those requests, while avoiding the political costs of siting prisons where they were not wanted. The state also benefited economically from this course of action in that facilities could be designed to hold thousands of prisoners, and could be built quickly, often on discounted land.

In many ways, the politics of prison siting from the mid-1980s on had considerable congruence with the earliest siting decisions during territorial times. But the logic of the contemporary Arizona prison is not the identical

to that driving the Yuma and Florence prisons over 100 years ago. Those earlier facilities were conceived of and built explicitly to deal with offenders – certainly in a more punitive manner than others of their time, and with cost-effectiveness as a central goal – but the offender was still present as a consideration in the decision-making process. This was seen most clearly in the emphasis placed on the goal of full inmate employment, both in the decision to abandon Yuma and in selecting Florence as a site. In contrast, today's facilities seem not to even have in mind the human aspects of those living bodies that are held within them as they are designed and built.

Instead, prisons have foremost become economic development opportunities in both the private and public sectors. The mere presence of prisoners' bodies within city limits ensures annual state and federal revenue streams for prison towns, a benefit much more lucrative and tangible than the potential jobs and commerce promised by the prison industry. Beyond that, in the growing private prison sector, the offender has been reduced to a form of cost/commodity in a world where one can buy stock in companies that aim for institutional cost-effectiveness for their shareholders' benefit (rather than for the state good), and where offenders themselves can be shipped all over the country to be confined by the lowest bidder.

Thus, the Arizona case both reinforces the insights derived from Gilmore's (2007) California study about the tight relationship between the transforming post-industrial economy and prison expansion, and suggests that the longer historical view provides an understanding of the precursor conditions that allowed for the prison to become so divorced from an offender based purpose in the process. That the state's investment in prison building was historically driven by economic and political considerations to the extent that it was provides something of a precedent for the contemporary period, and opened up the possibility of the kind of prison as industry model that we currently are witnessing. As such, this case study challenges some prevailing theoretical accounts that suggest the ideology underlying contemporary prisons represent a paradigmatic break from the past, and that a correctionalist ethos was hegemonic across the United States up until the 1970s (Garland, 2001).

## NOTES

1. There were, in fact, plenty of escapes. The biennial reports from the prison indicated prisoner escapes during almost period, most (but not all) of whom were caught, returned to prison, and punished with the ball and chain and/or a stint in the "dungeon." Several more were killed during capture.

2. By 1900, this experiment was functionally dead and the superintendent at the time asked permission to pull the plug on it. It turned out that the few acres that were usable were extremely difficult to irrigate during the "cropping season" and subject to flooding by the Colorado River in the spring (Brown, 1900).

3. One proposal was to place the prison in an area near the city's mental hospital, county jail, and city dump, since in the prison committee's view, this was the neighborhood where criminals came from. This proposal almost made it through since the legislator representing this area was a Democrat.

4. The legal issues were resolved when the state and the community reached an agreement about ultimate capacity limits at the site, which the state later violated.

5. Maricopa County Sheriff Joe Arpaio has claimed the tent city concept as his own innovation when he erected old military tents in Phoenix in 1993 for local inmates, but the state department of corrections predated his use of tents by a decade. See Lynch (2004, 2009), for more on Arpaio's penal practices.

6. It should be noted that research indicates that prisons are not a particularly good economic remedy, especially to small, rural communities that seek them (see Gilmore, 2007; Huling, 2002; and King et al., 2003 for more on this).

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# HUMAN, NOT TOO HUMAN: WHY IS MEDIATION A PROFOUND ALTERNATIVE TO THE LEGAL PROCEEDINGS?

Ran Kuttner

## ABSTRACT

*This chapter presents an attempt to understand why mediation has gained so much popularity in the western world in the past three decades. I demonstrate how mediation, of all the processes that have sprung under the umbrella of the ADR movement, responds to some basic human needs and offers a way to thoroughly deal with authoritarian tendencies and patterns common, too common, in modern everyday life. A wider understanding of these needs can help emphasize the added values of the mediation process as a profound alternative to the legal proceedings as a mechanism for transforming disputes.*

> Once paradise is lost, man cannot return to it. There is only one possible, productive solution for the relationship of individualized man with the world: his active solidarity with all men and his spontaneous activity, love and work, which unite him again with the world, not by primary ties but as a free and independent individual.
>
> – Erich Fromm

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In 1971, when mediation was just emerging as a legitimate alternative dispute resolution practice, Fuller (1971, p. 315) described the key to understanding mediation as follows:

> A serious study of mediation can serve, I suggest, to offset the tendency of modern thought to assume that all social order must be imposed by some kind of authority. When we perceive how a mediator, claiming no authority, can help the parties give order and coherence to their relationship, we may in the process come to realize that there are circumstances in which the parties can dispense with this aid, and that social order can often arise directly out of the interactions it seems to govern and direct.

The assumption that order must be imposed by outer authority, emphasizes Fuller, is reexamined with the help of the mediator's unique form of intervention. That outer authority – or rather, authoritarian tendency – is replaced by direct interaction. "The central quality of mediation," Fuller (1971, p. 325) writes, "[is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another. This quality of mediation becomes most visible when the proper function of the mediator turns out to be, not that of inducing the parties to accept formal rules for the governance of their future relations but of helping them to free themselves from the encumbrance of rules and of accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions." This chapter explores the loss of this capacity and will elaborate on the quality to orient the parties to each other in a dialogic manner, at the expense of formal governing rules. The first part deals with Erich Fromm's analysis of twentieth-century personal and social mechanisms to escape from freedom, presenting his diagnosis of authoritarianism as a prominent malady derived from changes that occurred in modern times. Emphasis will be put on the loss of dialogical abilities as a symptomatic manifestation of that malady. The second part addresses how the legal system is recruited to function as an escape mechanism, thus serving a need contradictory to the need for dialogue. In the third part, mediation is presented as a process which in its philosophical foundations aspires to restore the lost dialectical sense of freedom, both on a personal and on a social level.

## AUTHORITARIANISM AND THE MODERN WORLD

Erich Fromm, an intellectual and psychoanalyst who is considered to be one of the founders of the stream in psychoanalysis known as *Humanistic Psychoanalysis* and mostly identified with The Institute for Social Research,[1] investigates in his book *Escape from Freedom* (1994a) the reasons for the political changes and social regression that were occurring in Europe at the time. Fromm wrote *Escape from Freedom* during the Second World War, only a century and a half after the French revolution. To many intellectuals, it seemed that with the French revolution and the new social order – in the name of "Liberty, Equality, Fraternity," the slogans of the French revolution – the Enlightenment had reached its full potential and social development. If so, how could it be then that so shortly thereafter, the key players in European politics were Stalin, Hitler, Mussolini, and Franco? How could European peoples allow – apparently of their own free will – the establishment of totalitarian regimes? It would not be wrong to frame Fromm's motivation as puzzlement over the way we had renounced the promise of the new social order and the new possibilities for freedom that had emerged from the French revolution: Why did we choose to restore chains upon ourselves and to replace the ideal of human fraternity with the horrors of the epoch?

By describing the changes that modern society had undergone from the Enlightenment to the twentieth century, Fromm provides a developmental psychological and historical explanation. His analysis is penetrating on two levels: the phylogenetic, that is, the development of the human race; and the ontogenetic, that is, the development of the individual. It is important, for a clearer understanding of his thoughts and methodology, to realize the mutual fertilization of the two levels and the manner in which he sees their interaction: "To understand the dynamics of the social process," he writes (Fromm, 1994a, p. x), "we must understand the dynamics of the social processes operating within the individual, just as to understand the individual we must see him in the context of the culture which molds it."

When a baby is born – according to Fromm's ontogenetic explanation – a process of separation from the mother commences. This separation involves the development of recognition in the mother's existence as a separated entity, having her own *needs*, feelings and thoughts, which are not in a symbiotic connection with him. Correspondingly, the child learns to recognize *himself* as having needs, feelings and thoughts separated from those of his mother. This is the process of *individuation,* a process in which every human being discovers

the freedom of standing on one's own as an independent being, separate from the symbiotic connection and total reliance on the mother. This process carries a dialectical nature and tension: On the one hand, it involves the strengthening of the self through discovering the freedom embedded in the opportunities opened to oneself for personal realization; on the other hand, along with that experience of emancipation grows an acute sense of loneliness and uneasiness due to the growing responsibility this freedom brings. A *conflict* is created between the wish to gain more power and potency through the solidification of a separated identity, and the impulse to "give up on one's individuality, to overcome the feeling of loneliness and powerlessness by completely submerging oneself in the world outside" while surrendering the personal identity.[2]

This tension is a natural component of the individuation process. One may develop the capacity to manage it in a constructive manner, as a means for growth and exploration, or one may experience it as an unbearable conflicting burden. In order for the individuation process to lead constructively to the development of a fully matured and free human being, explains Fromm, it should properly balance the freedom and independence of separation with a "new kind of closeness and solidarity with others" (Fromm, 1994a, p. 30), based on a dialogic relationship and mutual respect. These relations replace the primary ties and help the individual develop the capability to recognize and manage these conflicting passions and to realize the dialectics of human nature.

When developing the concept of freedom, Fromm explains, a mature human being realizes that freedom is an integration of the separation from worldly constraints ("*freedom from*"), and the development of individual strength through the establishment of dialogic relationships to which the separated self returns ("*freedom to*"). This realization, he writes, is the realization that once the paradise of pre-individuation symbiotic relationship and no personal responsibility is lost, active solidarity and spontaneous activity are the only choice one has to balance individuation, to develop a complex meaning of personal responsibility, and to practice his or her humanness. This active relation to other people and to the world, as opposed to passive relation that will be later described, embodies in its complex notion of independence the unification with the world. This notion of unification does not mean "becoming one with the world," a regressive one-dimensional assimilation, as a singular heart's desire. Instead, this unification of a free and independent individual with the world is based on the experience of dialogic relationship and mutual respect that grants a sense of roots and stability, realizing spontaneous activity and active solidarity as

themselves constituting freedom and independence. Thus, freedom is understood not only as an outcome of being independent, but embedded in the act of solidarity itself.

If the process of individuation does not include this realization and does not balance the natural process of separation with the process of creating a new kind of closeness and solidarity, the growing individual may find himself unable to incorporate that – or any other – dialectical tension. Unlike the dialectical relation and complex cognition described earlier, a one-dimensional consciousness develops, possessing a dichotomous pattern of thought. The individual faces a seeming need to *arbitrate* between two unbearable and tormenting possibilities: either separation with all its powers but also with deep loneliness and overwhelming responsibility; or the surrender of separation in favor of new "secondary bonds" as a substitute for the primary bonds that have been lost, thus eliminating the unbearable burden of free choice and the anxiety that comes along with it. The occurrence of individuation (which is a natural and inevitable process) without the establishment of new dialogic ties leads to – and this is Fromm's major contribution to the understanding of this situation – the formation of what he sees as a major pathology unique to twentieth-century humans: *authoritarianism*. Owing to the inability to achieve freedom in its full sense, the authoritarian figure seeks a mechanism to escape the burden of the unbalanced freedom. The authoritarian pathology that one develops, explains Fromm, includes a quest and tendency to surrender the freedom of the lonely and anxious self who is forced to make difficult choices, in favor of the desire for subjection and assimilation.

The authoritarian tendency, it is important to note, should not be mistaken with positive authority that has an important role and is needed in normal relationships. The authoritarian tendency, explains Fromm, can have both masochistic (submission) and sadistic (domination) manifestations, both – although seemingly opposing – potentially found within the same person, being two sides of the very same coin. In its masochistic form, it is manifested in helplessness and a wish to pass control of one's life to an outer authoritarian mechanism that would assume decision-making responsibility and thereby help him renounce the burden of freedom. The sadistic manifestation includes the desire to dominate others by making them dependent on oneself, while relating to them as having no needs, interests, thoughts, and feelings of their own. The sadistic authoritarian figure treats others like clay in a potter's hands, controlling, and abusing them, at times wishing to see them suffer. This pathology not only lacks the realization of self and other as having thoughts and feelings, needs and

interests, distinct from each other and in need of appreciation but also lacks appreciation for the role dialogue, based on fraternity and spontaneity, is playing in the creation of the free individual.

It is important to note that although Fromm describes the process of individuation in the context of an infant after his birth, the description is relevant for other situations in life. Fromm does not see "birth" as a one-time process, but a process that takes place in different forms and magnitudes again and again throughout life.

As mentioned, the development of the individual resonates on the process western societies undergo in the modern times, arriving at an unbearable peak in the first half of the twentieth century. According to Fromm the aspect of both submission (the wish to hand over one's control) and domination (the wish to make the other dependant upon oneself) are characteristics of man in modern society. These are characteristics of a pathology Fromm designates as "the pathology of the twentieth century," common within society and manifested, in various intensities, in many aspects of modern life and human relations. The coming pages will show why this phenomena has gradually intensified, and the next section will present why the anxiety described earlier brings new levels of authoritarian needs and human alienation in the second half of the twentieth century.

According to Fromm, this pathology lies within the roots of the mass movements that led to the establishment (supposedly out of "free will") of totalitarian regimes. Being an oppressor or being oppressed, defeater or overpowered – are expressions of that pathology, and both the submission and domination tendencies find their vivid expression in the new social orders found in Europe in these days.[3]

On the phylogenetic level, Fromm describes the modern era as the breakdown of medieval world, in which humans felt secure and safe despite many dangers. He sees the modern era, starting in the Renaissance and increasingly during the Reformation with its radical economic changes, as an epoch in which the full emergence of the individual is taking place, alongside its isolation and solitude.

> A new concept of freedom developed then, which found its most significant ideological expression in new religious doctrines, those of the reformation…on the one hand the growing independence of man from external authorities, on the other hand his growing isolation and the resulting feeling of individual insignificance and powerlessness. (Fromm, 1994a, p. 37)

The Enlightenment era, with its belief in scientific progress and independent thinking, sets the terms for the separation of man from his

natural ties and bondages. The mark of the era is the ideal of becoming free from the constraints of nature while cutting loose from the chains that have suppressed the human self. It involves separation (''individuation'') from nature, from tribal order, as well as from the sovereignty of the church, all in the name of man's personal intelligence and reasoning. Emanuel Kant, for example, opens his famous article ''An Answer to the Question: What is Enlightenment'' with the following definition:

> Enlightenment is man's emergence from his own self-incurred immaturity. Immaturity is one's inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: Sapere aude! Have courage to use your own understanding. (Kant, 1784, p. 1)

The emphasis is on self-reliance and self-guidance, finding the courage to not rely on others.

Fromm further describes the modern era, which starts with the enlightenment and the scientific revolution of seventeenth century, as a time in which the celebration of individuality and personal freedom had not been balanced with the creation of institutions that would enhance social connection and active solidarity. The deconstruction of the old social order and the celebration of the release and separation from the old oppressive chains, gained clearest philosophical expression in Nietzsche, whose ideal ''overman'' or ''superman'' (''*übermench*''), overcomes nature in a way that Fromm's analysis shows to be one-dimensional. Giving room only to the negative aspect of freedom, this celebration cannot suffice to set the foundations for a positive consciousness of freedom. A gap thus opens, Fromm explains, between the *freedom from* the world that offers security but also constraints, and the *freedom to* engage with the world as a mature individual. An unbalanced consciousness is formed, lacking the conviction of the dialectical tension embedded in the concept of freedom itself. Only recognition of both vectors as operating simultaneously in a dialectical manner may allow humans to fulfill their full maturity and humanity and become ''human, not *too* human,'' as opposed to Nietzsche's übermench, who is enslaved to the will to power and to overcome nature and his ''human, all too human'' existence (see Nietzsche, 1967; Nietzsche, 1997). The definition of human nature as described by Fromm is foundational to the humanistic school of thought in psychology.

If this is the model of freedom that you offer us – cries Dostoyevsky's (Dostoyevsky, 1993) tragic hero Ivan Karamazov to the absent God, thus expressing the distress of modern man – then we don't want it! The absence

of roots and of a stable frame of reference characterizes Dostoyevsky's hero and, through his voice, characterizes the citizens of the modern era, who failed to realize the insufficiency of the *freedom from* without the *freedom to*. The significance of the latter for attaining free consciousness is ignored in modern times. The *freedom to* – explains Fromm – is constructed in the recognition that man also remains connected to the world, being also part of nature and subject to her physical laws:

> [Man] is part of nature, subject to her physical laws and unable to change them, yet he transcends the rest of nature. He is set apart while being a part…He is partly divine, partly animal; partly infinite, partly finite. The necessity to find ever-new solutions for the contradictions in the existence, to find ever-higher forms of unity with nature, his fellowmen and himself, is the source of all psychic forces which motivate man, of all his passions, affects and anxieties. (Fromm, 1990, p. 23)

On an inter-personal level, man's separation from his fellow human beings should be integrated with the freedom to take part in active solidarity and spontaneous activity with the very same human beings. On an institutional level, the manifestation of that recognition means the need to create dialogic mechanisms and institutions based on spontaneity and genuine expression. Such dialogic mechanisms need to be implemented while interacting with these "others" in the various settings of daily life – settings to which the *freedom to* grants meaning.[4] However, claims Fromm, the partial and insufficient concept of freedom in the modern era, does not enable the facilitation of these values, even though they are central to the modern times succeeding the French revolution. Fromm sees the modern era as the breakdown of the medieval world, in which humans felt safe and secure. Within the medieval sense of security, according to Fromm "Although a person was not free in the modern sense, neither was he alone and isolated. In having a distinct, unchangeable, and unquestionable place in the social world from the moment of birth, man was rooted in a structuralized whole, and thus life had a meaning which left no place, and no need, for doubt. A person was identical with his role in society; he was a peasant, an artist, a knight, and not an *individual* who *happened* to have this or that occupation. The social order was conceived as a natural order, and being a definite part of it gave a feeling of security and of belonging" (Fromm, 1994a, p. 41). In a society that celebrates the breaking free from this social order without the creation of the necessary balances, the development of a complex and free identity that holds the dialectical tension mentioned earlier, is bound to fail, replaced by an attempt to define identity only in terms of separation, stressing distinctness from others, who might

obstruct the development of individual freedom.[5] The authoritarian mechanism described earlier is called into action to help escape the dialectical sense of freedom. The freedom to engage in spontaneous dialogue and re-establish solidarity with others is undermined; instead, humans seek to dominate their fellow human beings and at the same time the domination of outer authoritarian institutions to help them deal with the unbearable situation: "Modern man's feeling of isolation and powerlessness is increased still further by the character which all his human relations have assumed. The concrete relationship of one individual to another has lost its direct and human character and has a spirit of manipulation and instrumentality…It is obvious that the relationship between competitors has to be based on mutual human indifference" (Fromm, 1994a, p. 118). These relations, he writes, are true in all life's dimensions, as human beings perceive each other as means to an end and relations as instrumental, "not only in economic, but also the personal relations between men have this character of alienation; instead of relations between human beings, they assume the character of relations between things" (Fromm, 1994a, p. 119). When defining in a later book the alienation that he finds to be too common in modern life, Fromm (1990, p. 120) writes: "By alienation is meant a mode of experience in which the person experiences himself as an alien. He has become, one might say, estranged from himself. He does not experience himself as…the creator of his own acts – but his acts and their consequences have become his masters, whom he obeys, or whom he may even worship…He, like the others, are experienced as things are experienced; with the senses and with common sense, but at the same time without being related to oneself and to the world outside productively."[6]

In the following section, I show how the inner logic of the pathology described by Fromm harnesses, in the second half of the twentieth century, a prominent social institution, which functions as an escape mechanism and allows the alienation of modern life to find its expression.

## THE LEGAL SYSTEM AS AN AUTHORITARIAN MECHANISM

The second half of the twentieth century can be viewed as an era in which the social order as a "structuralized whole" continues to dissolve and the freedom to choose between numerous practices and roles increases. Modern humans are free from the identities that once determined their role in

society. The moral criteria for choosing among the numerous practices become less and less legitimate, and the lack of moral criteria and binding conditions results in a world in which theoretically ''anything goes.'' In such a world, humans – as Peter Berger defines it – become homeless. As Mautner, Sagi ans Shamir describe: ''In the pre-modern period people lived mainly in a cultural setting that was characterized by relatively high level of coherence. 'One law, one religion, one king'. Contrary to that, in the modern era, especially in the twentieth century and moreover in the post-modern era, human beings live in a state of cultural discontinuity, that is, in a state where daily life is conducted in the field of many cultural communities with differing and sometimes even contradicting contents. Daily life of human beings therefore includes ceaseless non-sequential transitions between differing cultural communities'' (Mautner, Sagi, & Shamir, 1998, p. 75).

These changed conditions have an effect on people's identity, becoming increasingly split and non-coherent. Berger even pointed to the severe psychological outcomes that derive from human existence in such terms, saying that man has lost his ''ontological security,'' the meaning that enables orientation in his existence. In such a world, where it is in principle possible to choose between numerous practices and where the cultural discontinuity forces the individual to constantly make choices, anxiety – which Fromm sees as the basis of the authoritarian pathology – only increases. Accordingly, modern individuals must establish new escape mechanism.

The harsh expression of the authoritarian pathology, reaching its peaks in the totalitarian regimes of the first half of the twentieth century, should be distinguished from its internalization. Indeed, after the Second World War, the lesson was learned with regard to the external political expression of that pathology: serious restrictions in western countries will prevent totalitarian regimes from rising again and from gaining power as they did in the first half of the century. Moreover, many resources have been devoted to educational programs that stress anti-totalitarian aspects of democratic values and that condemn such regimes. However, the distinction between the symptomatic expressions of authoritarianism and its root causes helps clarify that this ''pathology of the twentieth century'' did not cease to exist with the removal of the totalitarian regimes in the first half of the century. Once the authoritarian pathology was internalized, it became an immanent part of modern existence; the removal of totalitarian regimes addressed only the external manifestation of the pathology. Because the root causes of authoritarianism have not been addressed, modern humans produce new institutions or adopt existing ones (in a more sophisticated and less apparent

manner) to facilitate the existence and growth of that pathology. Once the mark of the concrete figures that embodied the traditional authoritative forces has faded, the individual father figures have gradually disappeared and were absorbed by the institutes (Zuckerman, 1999).

The concern of this section is the manner in which late-twentieth-century humans harness *the legal system* to address a need springing from the authoritarian pathology described earlier, and how ''The law,'' ''the lawyer,'' and ''the court'' serve as an escape mechanism from freedom in daily life and daily interactions. The intent is not to criticize the legal system or to dismiss its central role in a democratic society, as the legal system, through legislation and the enforcement of that legislation, has a central role – unique in the history of social orders – in maintaining the democratic system at large and in improving the everyday lives of the citizens in particular. The legal system is an important point of reference for people when wrongdoing demands legal intervention to help surface the wrongdoing, so injuries will not go unnoticed, and to help people transform unperceived injurious experience to perceived injurious experience, transform it into a grievance, voice it and ask for some remedy (Felstiner, Abel, & Sarat, 1981); in fact, as Felstiner, Abel and Sarat show, ''the study of the emergence and transformation of disputes may lead to the judgment that too little conflict surfaces in our society, that too few wrongs are perceived, pursued, and remedied'' (*Ibid*., p. 632). However, the inner logic of the social and personal psychological mechanisms feeds and distorts the logic from which the law draws its strength, and when it comes to choosing a dispute institution or a mechanism to manage disputes, the alternative offered by mediation is frequently ignored. The intent is therefore to analyze the manner by which the legal system is harnessed and used in society; in other words: an understanding of the distorted uses of the legal system as an escape mechanism may contribute, among other things, to the recovery of the logic at its basis, as well as to a reconsideration of the way in which it is used. By that, it may be possible to address the fact that on the one hand people are far too ready to litigate, while on the other – that there are too little conflicts in our society (*Ibid*., p. 651).

In his famous speech in the 1976 Pound Conference, in which he articulated the vision that underlies the establishment of the field of Alternative Dispute Resolution – later known as ''The Multi-Door Courthouse'' – and advocated the formal integration of mediation into the U.S. legal system, Harvard Law Professor Frank Sander claimed that ''there seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other

institutions of society. Much as the police have been looked to 'solve' racial, school and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family'' (Sander, 1976, p. 68). Sander identifies the police as well as the court as institutions harnessed in a new manner. Although he does not refer to Fromm's historical and psychological analysis, Sander also highlights the decline of old social order and the role new authoritarian institutes are expected to play because of that. A void was created – a void that Fromm would designate as a source of great anxiety as it involves *freedom from* the old constrains without the required balance in terms of *freedom to* re-engage constructively with others. The court, explains Sander, is expected to maintain the old social order and to play the role of dominant entities – the police, the church, and the patriarchal family.[7]

While in a conflict, the copartners to the conflict are often quick to give up on the possibility of having a dialogue in their shared common space, with spontaneous activity and active-solidarity in which needs, interests, thoughts and feelings are shared. Once the common-space dialogue is breached, each of the parties withdraws to a separate, private space: his or her own view of the situation at hand. The possibility of creating a new kind of closeness and solidarity with the other copartner quickly fades away. Each party then shapes a view of the situation which is – most importantly for him – independent from the other party's view, with whom he can no longer reach an understanding.[8] That view or standpoint is an apparent release from the common space without the *freedom to* take part in a more constructive dialogue within that common space. Each of the disputants replaces the common space of the dispute with a newly created separate space, thus developing an unbalanced, non-dialectical sense of freedom – freedom from the common space in which a conflict have arisen – by constructing a private world/language, an internal grammar of the situation in hand, without the other party's input. The withdrawal from the dialogue in the common space forms an authoritarian consciousness with an internal escape tendency with regard to the dispute. Through the submission tendency, it is accompanied by the need to establish an outer escape mechanism, an institution that would allow its expression and confirm the parties' independence from one another and from each other's needs, wishes and interests; the parties replace the dialogue by addressing an outer reference point that would free the individual from that common space and manifest his separation from the other and from the common dialogic space. This escalation of the conflict, with its failure to replace the lost relations in the common space with spontaneity and genuine expression, requires

disputants to surrender their powers to manage the conflict and instead to draw power from the authoritarian institutions outside the common space, thus avoiding the necessary dialectical tension that exists within the common space. Through the domination tendency, each disputant seeks to dominate the common space as well as to dominate the other disputant (at times, to the point of abusing and humiliating him) by drawing power from outer institutions.

Thus, the law, its agent (the lawyer), and its representative (the court) are called in, in search of a resolution to the conflicting situation at hand based on legal authority. Leonard Riskin (1982, p. 43) describes the philosophical foundations of the legal system to which mediation offers an alternative as follows:

> The philosophical map employed by most practicing lawyers and law teachers, and displayed to the law student – which I will call the lawyer's standard philosophical map – differs radically from that which a mediator must use. What appears on this map is determined largely by the power of two assumptions about matters that lawyers handle: (1) that disputants are adversaries i.e., if one wins, the others must lose and (2) that disputes may be resolved through application, by a third party, of some general rule of law.

The two assumptions in the lawyer's standard philosophical map correspond with the analysis presented in this chapter: the adversarial assumption creates a relationship of domination and surrender (''if one wins the other must lose''), which is the classic expression of the authoritarian pathology, and the assumption that disputes must be resolved by application of law reflects the rejection of the common dialogic space in favor of an outer reference point – a general rule or law (''the law''), applied by a third party (''the court'') and his representative (''the lawyer''). The underlying alternative assumptions offered by mediation, according to Riskin, invite the replacement of the outer authoritarian reference point, by focusing on the unique situation at hand without resorting to unifying routines or governing general principles and by assisting the parties to engage take part in spontaneous activity and active solidarity. They are able to transform the rigid, polarizing, either/or, you/me state of mind and to recover the complex sense of freedom, followed by reaching complex solutions.

The acts of invoking the law as an outer reference point, of forming a one-sided positional distributive argument with one's lawyer and of surrendering the powers to manage the situation by requesting the court to decide the case, all strengthen the separated and reduced private spaces in which each of the parties entrenches and which replace the common dialogic space.

The shadow of the law may help relieve the burden to manage a complex conflict. It legitimizes avoidance of dialogue, and thus legitimizes avoidance of the complex dialectical nature of the situation. That complex dialectical nature is replaced by a one-dimensional perception of the situation, which lacks complexity and supports a polarizing right/wrong domination/submission win/lose state of mind. The legal system may thus serve as an authoritarian institution that enables disputants to surrender their powers to deal with the complex situation with active solidarity and spontaneous activity, through the formation of a one-sided legal claim.

Each disputant thus replaces the complexity of the situation, which includes the interaction of various perceptions that constantly relate to each other and thus compound the common space, with an allegedly coherent, non-conflicting, perception of the situation, which he constructs with his lawyer in total separation from the other party, in a one-dimensional private space. This one-dimensional private space may include the view of the other, but in a static way, filtered and understood in separation by each party. Each disputant now wishes to enforce this one-dimensional and rigid perception upon the other, while avoiding the non-harmonic, non-coherent conflicting characteristics of the situation and the other party as he may reveal throughout the dialogue. Instead of developing active solidarity and spontaneous activity, which will "unite him again with the world" (or rather – which would allow for a new kind of closeness and solidarity with his or her copartner), each disputant is developing a dominating tendency in the name of *rights*: he expects to enforce his view, to control and dominate the other, all in accordance with the law as he perceives it. Distinguishing between "rights-based discourse" and "identity discourse," Avi Sagi (2000, p. 45) writes:

> In the rights-based discourse each person is fenced in his or her own self-territory. They address each other indirectly, through the law, only to secure that their world will not be hurt by the other. In contrast to that, in dialogue exactly that self-territory is breached… the rights-based discourse comes to secure man's fortress, his concrete and spiritual home, and maintain the walls surrounding it, in accordance with the legal constrains.

Individuals harness *rights-based discourse* not only to maintain these walls but also to help construct them, thus giving expression to both aspects of the authoritarian tendency: exhibiting submissiveness by surrendering their own powers to engage the conflict in the common space and by surrendering their needs and interests, replacing them with a legal argument; and exhibiting dominance by seeking the surrender of the other party's needs and interests. The common understanding that "the court will decide" and that "the law

prevails'' is the pseudo-solidarity that the disputants now share, solidarity with the outer authoritarian reference point of the law, to which each of the parties arrives bounded and positioned.

Although the notions of parties *meeting* each other or *seeing* each other are highly regarded human dialogic values, these values are abused within the new aforementioned subsidiary one-dimensional common space. Instead of meeting in dialogue, the parties agree to ''meet in court''; instead of seeing one another's face, they ''see each other at trial.'' Each disputant replaces his perception of the actual living other – with whom any kind of inter-personal solidarity is presumed no longer possible – with an abstract ideology of rigid and oversimplified ''other,'' with whom one relates only through legal rights and duties.

It is important to note that the withdrawal and disengagement from the dialogic common space perpetuates the presence of the other party, who is now perceived as an exterior ''other'' to the new perception of the conflict created in the separate private space. The other's presence as a distracting factor outside the separate private space practically defines the boundaries of that space and limits one's freedom. In a paradoxical manner, the disengagement from the common dialogic space leads to the internalization of the other as a threatening factor that must be dominated and overcome.

The ''right'' and ''just'' position is defined in opposition to the other's position, which is both ''un-just'' and ''not-right'' (i.e., ''wrong'') and, by definition, contradictory to one's own. These limiting conditions shape the firm boundaries both of the perceived ''other'' and of one own positional standpoint and create a sense of firm bounded common legal space that becomes both parties' reference point. Real solidarity, dialogue, and a human effort to question the boundaries or breach the walls between them, all remain a sentimental dream, irrelevant to the situation the parties are facing.

In response to the role that rights-based discourse and other escape mechanisms play in constructing walls during conflict escalation, I suggest that mediation may be seen as an institution that offers a worldview and dialogic way of action, in which that self-territory, which serves as an illusive authoritarian construction and escape mechanism, is being breached.

As mentioned, this analysis focuses on the processes through which the legal system is harnessed to serve as an authoritarian escape mechanism. It may be that the ease with which the legal system plays this role derives from its reputation as an institution that guards *against* authoritarian escape mechanisms as manifested in earlier times, such as totalitarianism, and so it is assumed not to play that same exact role.

Jerome Frank, in a chapter titled "Getting Read of the Need for Father-Authority" claims lawyers, by silencing the ineradicable mutability of law, are "keeping men to a falsehood and, worse, to the debilitating irresponsibility arising from reliance on supposed safety-conferring external authority" (Frank, 1970, p. 260), thus prolonging infancy at the expense of people's development and maturation. Elsewhere in that book he adds:

> Why do men seek unrealizable certainty in law? Because, we reply, they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute of firmness, sureness, certainty and infallibility ascribed in childhood to the father. (Frank, 1970, p. 22)

Men's belief in a body of infallible law, he argues, strengthens the poisonous slavery to mere authority. Frank (1970, p. 264) defines "civilization" as man's escape from the fear of change, of migrating into uncharted seas, as "we must not confuse civilization and security, for security and stability will, in advancing civilization, grow less."[9] This is a process of outgrowing the securing father-authority of the law. Modern mind, he claims, is a mature mind, a mind free of father-governance, and the law has to adapt to the modern mind and its needs (1930, p. 269). However, "the 'rule of law' in modern society," asserts Howard Zinn (1971, p. 18), "is not less authoritarian than the rule of men in pre-modern society." Austin Sarat (2000, p. 3) claims that "fatherhood becomes one of the key terms through which law is mythologized and through which fantasies and anxieties about law are expressed." "The all powerful father who becomes a harsh tyrant", Sarat (2000, p. 39) concludes, "captures an ambivalence rooted in the recognition that accompanying law's power to protect is the horrifying possibility that its power can be exercised willfully, cruelly, and wantonly against all, or any, of us, and that our fathers may abandon us to that power. As a result, we seem to be trapped in a recurring cycle of desire and anxiety. We invest both law and fathers with a burden they cannot possibly bear – providing security against threats, some predictable, most totally unpredictable, that hover over us. At the same time we want to believe that it is possible to escape from the companion threats posed by investing so much power in them."

The law in modern society thus puts constraints on modern man, creating fixed images of the social order, and "morality is 'legalized' as the cultural idea becomes identified" with these fixed images (Nonet & Selznick, 2001, p. 48).

The harnessing of the legal system is a troublesome issue for the courts themselves, as they realize that traditional legal proceedings cannot fully

meet the needs of the individual disputants. In his keynote address to the 1976 Pound Conference, titled "Perspectives on Justice in The Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," U.S. Supreme Court Chief Justice Warren E. Burger (1976, p. 24) states the following:

> But we have not really faced up to whether there are other mechanisms and procedures to meet the needs of society and of individuals. And, even if what we now have is presently tolerable, we must ask whether it will be adequate to cope with what will come in the next 25 or 50 years given the dynamic expansion of litigation in the past ten years, the growth of the country, and the increasing complexity of both.

Chief Justice Burger addresses both the quantitative issue, the expansion in the use of the legal system, as well as the qualitative issue – the complexity for which non-legal mechanisms and procedures might better meet the needs of society and individuals.

In Israel, for example, the Supreme Court is sometimes called upon to deal with issues, which it believes are better suited for resolution through dialogue within the social realm than in an adversarial legal proceeding. The court finds itself referring some major conflicts back to the Israeli parliament for further deliberation, to reach consensual agreement that would satisfy the various sectors involved. In a 1996 appeal, for example, the Supreme Court was asked to decide whether Bar-Ilan Street in Jerusalem would remain open for traffic on Saturday, thus respecting the right for freedom from religious coercion, or would be closed, thus respecting the rights of the religious Jews that are keeping the Shabbat. In the opening pages of his opinion, Chief Justice Aaron Barak states the following: "Our [the court] case is not the social dispute; our case is not the relations between religious and secular sectors in Israel; our case is not the relationship between religion and state in Israel; our case is not the characteristic of Jerusalem. Our case is Bar-Ilan Street plain and simple; our issue is the authority that the Traffic Sign Central Committee has and the scope of its consideration" (HCJ, 15). Barak does not deny that the dispute implicates the fundamental identity issues he identifies earlier, or that the issue at stake is only "the authority that the Traffic Sign Central Committee has and the scope of its consideration", the matter which the court will address. On the contrary: recognizing the major identity issues involved, Barak claims that it would be better if these issues were not before the court. He frames the major issue as "[The] bitter dispute over the character of Israel as a Jewish and Democratic State" (*Ibid.*) and the dispute over the opening or closing of Bar-Ilan Street for traffic during the Shabbat as only a manifestation or

symptoms of this much larger issue. This issue, he claims, should be managed outside the courthouse, and resolved by consent between the various public sectors, "based on mutual tolerance and patience" (*Ibid.*, p. 25).

## THE MEDIATION ALTERNATIVE

When in conflict, as described, parties may resort to authoritarian mechanisms. Even where parties have called authoritarian patterns into action due to a seeming lack of capacity to manage their conflict, mediation has the potential to help the parties shift from that tendency, by thoroughly addressing the mechanism at the core of the manifested authoritarian pattern. As Folberg and Taylor (1984, p. 10) describe:

> Mediation can educate the participants about each other's needs and provide a personalized model for settling future disputes between them. It can thus help them learn to work together, isolate the issues to be decided, and see that through cooperation all can make positive gains. Mediation offers this advantage because it is not bound by the rules of procedure and substantive law, as well as certain assumptions, that dominate the adversary process. The ultimate authority in mediation belongs to the participants themselves, and they may fashion a unique solution that will work for them…They may, with the help of their mediator, consider a comprehensive mix of their needs, interests, and whatever else they deem relevant regardless of rules of evidence or strict adherence to substantive law. Unlike the adjudicatory process, the emphasis is not on who is right or wrong or who wins and who loses, but rather upon establishing a workable solution that meets the participant's unique needs…In contrast, litigation tends to focus hostilities and harden the disputants' anger into rigidly polarized positions. The adversarial process, with its dependence upon attorneys on behalf of the clients, tends to deny the parties the opportunity of taking control of their own situation and increase dependence on outside authority.

The mediation process thus may allow the parties the opportunity to take control of their own situation and overcome the tendency to withdraw to outer escape mechanisms. If addressing the authoritarian tendency described earlier and while taking it to account, the mediator can work to set the terms that may help the parties deal with the impulse to turn to adversarial interaction.

Following his description of the governing assumptions of the Lawyer's Standard Philosophical Map, Leonard Risking claims that "these assumptions, plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit through a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any

general principle except to the extent that the parties accept it'' (Riskin, 1982, p. 43). The underlying alternative assumptions offered by mediation, according to Riskin, invite the replacement of the outer authoritarian reference point, by focusing on the unique situation at hand without resorting to unifying routines or governing general principles and by assisting the parties to engage in spontaneous activity and active solidarity. With the right intervention, they may be able to transform the rigid, polarizing, either/or, you/me state of mind and to recover the complex sense of freedom, followed by reaching complex solutions.

Parties may treat the mediator like an adjudicator, seeking to convince her through adversarial argumentation that they are right (Diagram A).[10] However, the mediator – if engaging the parties with the right state of mind and skills – could offer to help the parties to ''change the game'' (Fisher & Ury, 1981, p. 10) by finding a new kind of closeness and solidarity, regaining balances and a complex view of the situation, and re-constructing the common dialogic space (Diagram B).

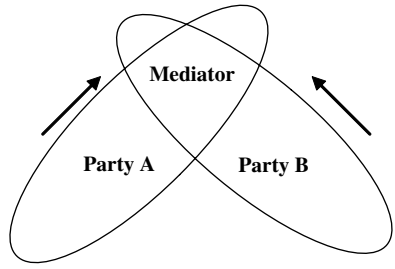


*Diagram A.* Addressing the Mediator in an Authoritarian Manner.

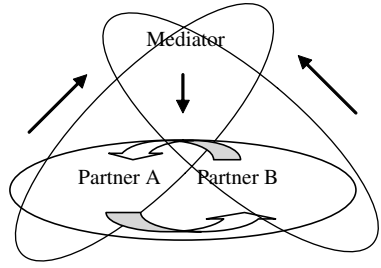


*Diagram B.* Mediator's Assistance to Overcome the Authoritarian Tendency.

The process of mediation has the potential to be structured in a manner that would help the parties by providing the necessary conditions for conducting a *free* negotiation – free in the complex sense described earlier. In the reconstructed common dialogic space, the parties may regain the freedom to manage their own conflict constructively. Moreover, by helping the parties recover the ability to hold the dialectical tension in the common dialogic space and to relate to each other with genuine expression, the mediation process may help disputants transform both the tendency to relinquish their power to the legal system and the tendency to exert power by trying to dominate the other party with a win–lose adversarial approach. Parties realize, as they recover "active solidarity and spontaneous activity," that these two components of freedom are vital for them to become truly free individuals with regard to the dispute at hand. This realization is possible through the recovery of the common dialogic space, in which the parties may continue to engage or choose to separate.

The authoritarian character, describes Fromm, tends to sanctify the past. Sanctifying the past, the authoritarian character is not willing to take the necessary steps to entertain new options or to aspire to an outcome or relationship that did not exist beforehand. Therefore, he seeks shelter in the shadow of an adversarial state of mind and process, giving up on any creative thinking that may lead to integrative, value-creating states of mind and solutions. Relating to the world in a new way may be possible, according to Fromm, by replacing the authoritarian pathology with the realization that there is only one possible, productive solution for the relationship of individualized man with the world once paradise is lost: "His active solidarity with all men and his spontaneous activity, love and work, which unite him again with the world, not by primary ties but as a free and independent individual" (Fromm, 1994a, p. 35). Such realization is a realization that this is not a moral quest, a description of some wishful state, but a description of the only constructive option a free individual has for healthy relationship and communication with the world.

Mediation may aim at achieving freedom from the shackles of the dispute in the common space as well as freedom to engage in a dialogue with the others who are taking part in that common space. In fact, there are various mediation models that emphasize the promise embedded in the mediation process to help disputants regain healthier interaction and a more complex sense of the dispute and people involved.[11] It is important to note that in none of these models nor in the description provided in this chapter, mediation is about curing pathologies; the mediator's role is not that of a therapist. However, the mediation process holds the potential to thoroughly

change the conflict interaction while helping disputant transform the authoritarian tendency that often develops during a dispute.

Given the authoritarian quest for outer authority, it is foreseeable that parties to a mediation process might expect the mediator to assume an authoritative role, and as described – reality proves that this is indeed what happens in most cases. In the light of this expectation, Fuller's assertion that "a mediator, claiming no authority, can help the parties give order and coherence to their relationship" (Fuller, 1971, p. 315, see page 140 above) can be read as holding two separate meanings of "claiming no authority." In one sense, "claiming no authority" is about what the mediator should *not* do: that is, the mediator should not, out of his own impulse to help the parties, claim authority; In another sense, the phrase signifies what the mediator *should* do, by describing an active role that the mediator should take: that is, to claim "no authority" in regard to the issues in dispute, when asked by the parties to take that role.

Authoritarianism, according to Fromm, arose as a central pathology of the western world in the twentieth-century, in part due to the lack of social institutions that would help balance the process of individuation and support the freedom to engage in spontaneous dialogue. Since the early 1970s, mediation has emerged as an alternative form of dispute resolution that holds the potential to thoroughly deal with the authoritarian pathology. Given the increasing tendency toward adversary and litigiousness in recent decades, the concurrent rapid expansion and wide acceptance of the mediation alternative may well be an expression of deep dissatisfaction with this tendency and part of a quest to develop a social institution that would support the freedom to engage in spontaneous dialogue.

The mediator, as suggested, could help parties regain their authority and their freedom in its complex sense, and thereby offers a profound alternative. By seeing through the symptomatic adversarial behavior and dealing with its root causes, the mediator can help set the terms for utterly changing the game, on both the interpersonal and social levels. As mentioned, this analysis is not meant to question the central role of the law and the legal system in a democratic society. This is an attempt to inquire into the social dynamics that induce the court to play a role that was not originally intended to play in the first place and that lead to a search for a profound alternative. In recent decades, prominent figures within the legal system, as this chapter presents, have encouraged the use of alternative dispute resolution processes at large and mediation in particular, not only because the courts cannot technically handle the sheer expanding volume of litigation. It is important to note that the bulk of that encouragement – coming mostly from senior judges and law

professors – does not dismiss the important legal role that courts play, but focuses on alternatives that would help disputants manage, in many circumstances, their conflicts in a more efficient and constructive manner. The dynamic expansion of litigation in the late twentieth century, I suggest, is an expression of the inappropriate conscription of the legal system as an authoritarian escape mechanism. Over-emphasizing the time and cost burdens of the overloaded court dockets and its corresponding time and cost burdens, and characterizing mediation as a means to help manage the quantitative aspects of litigation, would unfairly dismiss the qualitative benefits of the mediation process. Moreover, these quantitative considerations alone do not explain why mediation, of all the alternative processes offered on the Alternative Dispute Resolution continuum,[12] has become the most attractive and promising.

The mediation process is located on a decision-making continuum between direct negotiation with no third-party assistance at one end, and litigation (with its request for a binding decision in favor of one of the parties) on the other end. Parties that arrive at mediation – especially if they are referred to the process after filing a legal claim – might well expect the mediator to manifest the authoritarian tendency. However, the authoritarian tendency also may be invoked without the actual act of addressing the legal system institutions, when conflicts arise during negotiation processes. It is important to note that the search for alternative dispute resolution processes does not mean a search only for alternative manners for third-party intervention, but first and foremost a search for new models and techniques for negotiation.

As mentioned earlier, this chapter attempts to reexamine common tendencies in a culture quick to resort to adversarial processes, and these tendencies are common to inter-personal interactions and negotiations. Addressing the underlying mechanisms and dealing with the tendencies that lead to adversarial mindsets and behavior may be helpful not only for a neutral third party in conflict resolution processes but also for the parties themselves, by improving conflict *prevention* awareness and skills. Such awareness and skills can be applied during virtually any human interaction in which conflicting issues in a common dialogic space invoke the authoritarian tendency, leading to copartners to adopt an adversarial mindset, even without referring to an outer authoritarian reference point. Understanding these mechanisms, tendencies, impulses and patterns, and realizing that authoritarianism may be invoked in many more subtle ways, may also help address these tendencies in earlier stages of a dispute. Addressing the tendencies before their manifestation – thus preventing the

authoritarian patterns from taking over and dictating an adversarial approach – may help parties constructively deal with the complexity of the conflict, and exhaust the opportunity of the conflict without it becoming a dispute.[13] At the practical level, understanding the authoritarian pathology may therefore help not only in mediation settings but also in the inter-personal conflict management dynamics of negotiations.

It may help restore disputants' ability to relate spontaneously to the world in the genuine expression of their emotional, sensuous, and intellectual capacities, and to find new forms of unity with nature, their fellow humans, and themselves.

## CONCLUDING REMARKS

Mediation is a relatively new process, becoming established in the western world only within the past three decades. Some describe its expansion in terms of a revolution. However, there is also suspicion and skepticism towards mediation and its efficiency as a process. In order for it to be accepted and perceived as a respectable process with unique proficiency, and in order for people to see mediation as a legitimate and prioritized alternative to litigation, its unique qualities should be further explored.

In this chapter, I explored some of the existential reasons that led to the establishment and expansion of mediation. I suggest that mediation's added values go beyond the need to deal with the quantitative aspects of the litigation surfeit, as it addresses some basic human needs and tendencies that drive disputants to litigate in the first place. I do not intend to present authoritarianism as "the source of all evil" and the sole cause of adversarial modes of negotiation; nor do I intend to claim that mediation developed only for its ability to better deal with authoritarian patterns. This article does not pretend to supply a historical or sociological analysis of the early days of ADR and mediation. However, I do suggest that seen in the context of the social and intellectual changes in modern and postmodern western society and of the human needs that these changes brought, mediation may be understood as offering a possible response to some basic needs that had not been thoroughly addressed. In this context, mediation can be seen as a social institution that may help recover some of the lost balances in modern and post-modern times. If not met and managed during the mediation process, these un-answered needs can get in the way of achieving some of the qualitative advantages of mediation.

With no intention to suggest that authoritarian pathology, when deeply embedded in an individual's mental structure and requiring therapeutic intervention, can be dealt with thoroughly through mediation, I suggest that mediation may offer an alternative process with added values that help deal thoroughly with both the tendency and its adversarial manifestations, as they arise during inter-personal conflicts. Mediation, as suggested, is a process designed to help "change the game" of adversarial human interaction, on both the personal and the social level. Understanding the causes that lead to the development of the adversarial mindset and its dynamics, may help mediators to help disputants make that shift. Viewing the emergence of mediation in light of the described social dynamics can illuminate the deeper layers of individuals' needs that mediation may address, as well as the philosophical bases of that practice.

## NOTES

1. Known as the "Frankfurt School," which focused on critical cultural analysis in the beginning and middle of the twentieth century. In addition to Fromm, its prominent thinkers included Theodor Adorno, Max Horkheimer, and Herbert Marcuse.

2. *Ibid*., p. 29. In a later book, *On Being Human*, Fromm argues that his revision of Freud's theory is that "the main problem is not the fight of ego versus passions, but the fight of one type of passion against another type of passion" (Fromm, 1994b, p. 21). The situation described earlier presents a fight between two types of passions.

3. Alongside the authoritarian pattern and as an outcome of it, a different mechanism evolves: a non-selective and strict adoption of outer values offered by culture. Man thereby becomes an automaton and acts as an automaton, surrendering his sense of self. Instead of thinking independently and critically, consciously examining each situation and checking its reference to one's needs, thoughts and wishes, one adapts himself to unifying routines and habits defined from the outside. The utterances "I want" or "I need" seem to be expressions of a free individual making his or her own choices, but are actually constructed in the light of such dulling routines, while entrenching the uniformity and determining the escape from freedom.

4. And mediation, as will be later shown, can be perceived as such institution, being established in the past three to four decades, an institution that may help disputants balance conflicting wishes and tendencies.

5. Similar criticism is expressed by political thinkers who seek alternative to the individualistic premises they find central to the liberal thought, looking for a less individualistic and more complex experience of freedom. Avineri and De-Shalit (1992, p. 2) write: "In liberal thought, *Moralitat* is a higher level of morality, tying it with the notion of the abstract and the universal individual who stands as an entity unto herself, the free and rational person." The underpinnings of the communitarian

alternative suggest that the individualist image of the self is ontologically false. Michael Sandel's notion of the "unencumbered self," for example, suggests that the liberal notion of the self is based on Kantian philosophy that finds the moral law in the subject, a subject capable of an autonomous will, in which she experiences her freedom. That self is "understood as prior to and independent of purposes and ends" (Sandel, 1984, p. 18; for further reading see Sandel, 1982, in particular pp. 64–65). Alasdair MacIntyre (1984, p. 52) criticizes liberalism for being rooted in a view which "views man as having as essence which defines his true end." Charles Taylor (1985, p. 32) seeks to rethink what he calls "political atomism," which inherited a vision of society "as in some sense constituted by individuals for the fulfillment of ends which were primarily individuals." Atomism, he explains, "affirms the self-sufficiency of man alone or, if you prefer, of the individual" (*Ibid*.). Christopher Lasch, in his best-selling book *Culture of Narcissism: American Life in an Age of Diminishing Expectations* (1982), describes American current life as times of narcissism in which the worldview emerging among Americans centers solely on the self and his individual survival as its sole good. Similar description is found in another best-selling book from the 1980, which criticized the individualistic worldview – *Habits of the Heart: Individualism and Commitment in American Life* (Bellah, Madsen, Sullivan, Swidler, & Tipton, 1985; see in particular Chapter 6). Carol Gilligan's (Gilligan, 1982) view as presented in length in her book *In a Different Voice*, brings a developmental perspective, stating, with regard to the aspects that are valued and emphasized in modern culture, that "there seems to be a line of development missing from current depictions of adult development, a failure to describe the progression of relationships toward a maturity of interdependence."

6. It is worth mentioning in this context Martin Buber's distinction between two primary words, two conceptual pairs that signify relations: the combination I–Thou and the combination I–It. The former, claims Buber, establishes the world of relations. In relations there is no "it" as an object, a thing that serves as a means to an end to the I, who sees "it" only partially, in accordance with his needs. "The relation to the Thou is direct. No system of ideas, no foreknowledge, and no fancy intervene between the I and Thou. The memory itself is transformed, as it plunges out of its isolation into the unity of the whole. No aim, no lust, and no anticipation intervene between I and Thou. Desire itself is transformed as it plunges out of its dream into the appearance" (Buber, 1987, p. 11). In a later essay ("Dialogue"), Buber characterizes the different modes of relationships in the following manner: "There is genuine dialogue – no matter spoken or silent – where each of the participants really has in mind the other or others in their present and particular being and turns to them with the intention of establishing a living mutual relation between himself and them. There is technical dialogue, which is prompted solely by the need of objective understanding. And there is monologue disguised as dialogue, in which two or more men, meeting in space, speak each with himself in strangely tortuous and circuitous ways and yet imagine they have escaped the torment of being thrown back on their own resources. The first kind, as I have said, has become rare; where it arises, in no matter how 'unspiritual' a form, witness is borne on behalf of the continuance of the organic substance of the human spirit. The second belongs to the inalienable sterling quality of 'modern existence'" (Martin Buber, *Dialogue*, 2002, p. 22). Thus, it is only in the I–Thou relation that genuine dialogue occurs. The other two types may be attributed to the I–It primary speech, its prevalence being the crisis

of modern times according to Buber. The I–Thou relationship, claims Buber, demand effort and strength, and this strength is rapidly exhausted, missing in modern human life. Addressing an "It" demands much less effort or strength.

7. Sander then turns to suggest alternative dispute resolution processes as a possible solution, his first option being mediation. While describing the uniqueness of mediation, he says: "A mediator or conciliator usually has no coercive power and the process in which he engages also differs from adjudication in the other two respects just mentioned" (Sander, 1976, p. 69). The other two respects that he mentioned earlier are "the usually 'win or lose' nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties" (Sander, 1976, p. 70). He then chooses to quote Fuller's description of the central quality of mediation (see page 2 above), claiming that "Professor Fuller puts this point well" (Sander, 1976, p. 70).

8. "What happens psychologically to people in the crisis of protracted conflict," explains mediator and psychologist Lois Gold, "is that all context is lost. Crisis narrows perspective; the domain of the self reigns. A myopia sets in, at the center of which is the individual's sense of self – what is owed, the damages done, the redress or retribution sought. There are three levels of disconnection and subsequent disempowerment. The first is from the relational field, which is what mediation traditionally addresses" (Gold, 2003, p. 185). When also addressing that withdrawal and entrenchment in a one-dimensional sense of self, Winslade and Monk (2000, p. 132) write: "It is very common in conflict situations for one party's descriptions of the other party to narrow considerably. Whereas the two parties may have previously had all sorts of experiences of each other, under the influence of a dispute the experiences of the other person that fit into that person's participation in the dispute tend to get selected for remembering. The complexity of experience tends to get reduced to a small range of words that are applied to the exclusion of other possibilities. They come to represent the totality of that person." Sara Cobb (1994, p. 54) also presenting a narrative perspective of mediation, states that "conflict stories are notoriously rigid, readily reenacted, and recalcitrant to change, not because persona are unwilling to resolve conflicts but, rather, because the conflict stories themselves are self-perpetuation – they exhibit 'closure.' Narrative closure refers to the autopoetic process through which narratives seal off alternative interpretations to themselves." Cobb (1993, p. 251) writes elsewhere that "[i]n mediation, narrative closure or coherence is problematic because it stabilizes the description of the problem in ways that delimit its transformation."

9. "In virtually all the legal writings of Jerome Frank," write Zelermyer and Kauffman (1965, p. 121), "the essential element has been a violent attack upon the urge to find certainty, and through certainty, security and predictability in the legal system. In the "legal neurosis" that Frank describes, claim Llewellyn, Adler, and Cook (1931), "instead of facing reality, which is contingent and precarious, the childishly motivated mind […] builds a fantasy world for itself in which order and certainty are the surrogate for the desired father authority."

10. Unfortunately the mediation process is most commonly harnessed to serve as an authoritarian escape mechanism. Vast literature was published describing how instead of serving as a profound alternative to the more authoritative mechanisms, the market demand is for mediation to be used more as a transactional process that

does not relate to these deeper layers presented in this paper (see, for example, Bush, 1996b; Della Noce, 2002; Folger & Bush, 1994; Hensler, 2001; Bush, 2002). The authoritarian tendencies described in this chapter provide a good explanation for the market demand, showing why it is natural yet not constructive.

11. For example, the Transformative Approach to Mediation, as presented by Baruch Bush and Joseph Folger in "The Promise of Mediation" (1st edition 1994, 2nd edition 2005), which aims at transforming individualistic tendencies that solely emphasize human autonomy and separation to a relational view of human interaction, where both the human need for separation and the sometime contradictory human need for connectedness are both emphasized; another example is the Narrative Approach to Mediation, already mentioned earlier (see Note 8), where the mediator's role – following postmodern philosophy – is to help disputants deconstruct the narrative they have crystallized in solitude, and instead to narrate the conflict story anew in a more complex and inclusive manner; See also Mark Umbreit's "Humanistic Mediation," which he describes as dialogue-driven approach, an approach that "embraces the importance of spirituality, compassionate strength and our common humanity" (Umbreit, 1997, p. 204); Another approach that fosters healthier interaction is the understanding-based model, where Jack Himmelstein and Gary Friedman establish the motivation among the parties to work together and to deepen the discussion through developing a multi-layered understanding of what is important to the other person without judgment (Friedman & Himmelstein, 2008).

12. That includes various types of processes, for example, binding arbitration, non-binding arbitration, early neutral evaluation, mini-trial, and others. For more on the various processes and each one's unique advantages see Sander and Goldberg (1984) or Sander and Rozdeiczer (2006).

13. I here follow Folberg and Taylor's distinction between "conflict" and "dispute." They write: "A dispute is an interpersonal conflict that is communicated or manifested. A conflict may not become a dispute if it is not communicated to someone in the form of a perceived incompatibility or a contested claim." Using their vocabulary, addressing a conflict in the earlier stages could help prevent the conflict from becoming a dispute (Folberg & Taylor, 1984, p. 19).

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# IT TAKES ALL KINDS: OBSERVATIONS FROM AN EVENT-CENTERED APPROACH TO CAUSE LAWYERING

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## ABSTRACT

*Taking both an event-centered and a process approach to cause lawyering, the chapter asks: (1) if, when, and how working with movements can lead to one being functionally seen as a cause lawyer and (2) whether researchers should include "hired gun" and state attorneys in the cause lawyering conversation. These questions are addressed by seeing how various cause lawyer qualities are exhibited by a range of attorneys involved in anti-abortion protest regulation cases. The research suggests that reasons exist to view previously excluded attorneys through the cause lawyering lens, and to continue pursuing the cause lawyer qualities discussed here.*

Austin Sarat and Stuart Scheingold (1998a, 1998b) begin the first in their series of edited volumes on cause lawyers by stating that "cause lawyering is a contested concept … For this reason we talk about the parameters rather than the definition of cause lawyering" (p. 5). Although one may expect to find an established definition one decade later, much of the work in that

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volume, as well as in the duo's five successive edited volumes, returns to the finding that cause lawyering exists along a continuum (Sarat & Scheingold, 2001, 2004, 2005, 2006, 2008). As a result, one can roughly outline cause lawyering's central features, but an uncontested definition remains elusive.

For example, Carrie Menkel-Meadow (1998) argues that,

> cause lawyering is *any activity that seeks to use law-related means or seeks to change law and regulations to achieve greater social justice – both for particular individuals … and for disadvantaged groups …* [T]he goals and purposes of the legal actor are to *"do good" – to seek a more just world – to do "lawyering for the good"*. (p. 37)[1]

This definition helps to introduce how cause lawyering differs from more traditional lawyering, but it also illustrates why the definition is contested. At its core cause lawyering is distinguished from traditional lawyering in that it is done in the service of a political or social cause that seeks to rearrange existing state or social power relations. That is, it is lawyering typically done on behalf of marginalized groups in the interest of realizing a certain conception the good.

If, however, cause lawyering is understood as "lawyering for the good," one can see that the category's borders shift dramatically depending on such interrelated factors as how one defines the good; how directly one's lawyering activities relate to achieving that good; and whether or not one believes in, or is just working on behalf of those who believe in the good that is sought. These issues highlight why the definition remains amorphous and somewhat problematic.

Definition issues aside, research on cause lawyering has focused on a broad range of topics. Some of the more common themes include the tensions between cause lawyering and the professional norms of traditional lawyering; how cause lawyers relate to the movements they work for or with; what motivates these lawyers; and what institutional and social factors influence whether cause lawyers are effective. This research has largely progressed along two separate tracks. In the more established research tradition, one starts with a working definition of cause lawyers, and then identifies and studies a set of attorneys that match the given definition. This can be referred to as a lawyer-centered approach.

The other research option is to take an event or struggle-centered approach to cause lawyering. By starting with the cause rather than the lawyer, this approach attempts to circumvent some of cause lawyering's definitional problems in the interest of being more inclusive and offering "the possibility of developing a complex picture of the social movement itself" (Barclay & Marshall, 2005, p. 198). Restated, cause lawyers are

identified in the event-centered approach not by their specific personal attributes or beliefs, but rather by the fact that they work, or have worked, for or with a given movement or cause during a specific event. In doing so, the event-centered approach initially casts a wider and less discriminate net that one might see as diluting the cause lawyer and lawyering categories. However, by looking at a broader spectrum of actors this approach embraces the ideas that cause lawyers exist along a continuum, and that movements use different types of lawyers in differing ways. Accepting this, though, does not eliminate the question of whether all of these attorneys should be considered cause lawyers.

This chapter intends to add to this less common event-centered strand of cause lawyering research. Given this, the chapter takes a series of three anti-abortion activism regulation cases – *Christine Williams v. Planned Parenthood Shasta-Diablo, Inc*. 520 US 1133 (1997), *Schenck v. Pro-Choice Network of Western New York* 519 US 357 (1997), and *Hill v. Colorado* 530 US 703 (2000) – as its starting point.[2] Much of the chapter is descriptive in nature to offer a more detailed depiction of the competing social movements and conflicts that form the study's center. As will be briefly discussed later, these cases are relatively unique with respect to those typically studied in relation to social movements and therefore encourage expanding the discussion of social movement litigation.

Beyond "developing a complex picture" of these movements and litigation, the chapter identifies, categorizes, and discusses assorted attributes of the lawyers involved on both sides of these conflicts. These details allow the reader to consider the limits of the cause lawyering category and analytical frame, as well as the opportunity to critique the event-centered approach itself. The chapter's main question is whether or not cause lawyering in the United States should include the study of lawyers typically excluded from this class. The chapter specifically asks whether researchers should include "hired gun" and state attorneys in the cause lawyering conversation. The place of hired gun lawyers is already a topic of some discussion in the literature (McCann & Silverstein, 1998), whereas the place of government lawyers as cause lawyers in the United States has largely been overlooked until very recently (Berenson, 2009; Woods & Barclay, 2008).[3] This chapter approaches both groups to ask if, when, and how work with movements can lead to one becoming a cause lawyer. By doing so, the chapter takes a process approach to understanding cause lawyering and the cause lawyer identity.

In terms of the discussion of the lawyers' attributes, the list includes some features and concerns that have not been fully or significantly discussed elsewhere in the cause lawyering literature. In particular, this chapter hopes

to encourage further research into two areas related to a range of cause lawyering and social movement litigation issues. The first, and more general, is the effect of cause casework on the lawyers' political beliefs. This is relevant because it relates to the potential formation or strengthening of a cause lawyer identity, as well as the possibility for such lawyers to become reliable movement resources. Like the place of hired gun lawyers, this issue is beginning to be discussed in the literature (Hilbink, 2006a), but there is still a need for more research.

Second, and more unique, is the interest in cause lawyers' adoption of movement rhetoric over, or in addition to, legal rhetoric. The adoption of movement rhetoric is of interest because it highlights the tension between cause and traditional lawyering norms and practices; it may be an indicator of the effect that such casework has on the lawyers' beliefs, identities, and dedication to causes; and because it alters the standard discussion of lawyers' effects on movement framing. Given this, the adoption of movement rhetoric is an attribute that deserves further study.

Finally, this chapter also contributes two other elements to cause lawyering literature. First, research on cause lawyers tends to focus on one side of a cause, and therefore one set of lawyers. This chapter instead looks at lawyers from opposing sides of these conflicts, providing an immediate contrast that is not seen in the existing literature. Second, researchers have only recently begun analyzing lawyers who serve conservative causes (Den Dulk, 2006; Southworth, 2005, 2008; Teles, 2008). As just under half of the lawyers studied in this project work on behalf of such causes, this chapter contributes to this growing body of literature.

The chapter will now proceed with a brief overview of the research methods employed in the study. This will be followed by outlining the details of the events that led to each case, highlighting when and why lawyers entered each conflict, and how these cases fit within the broader political struggle over abortion. The chapter then shifts and concludes with a discussion of the selected lawyers' attributes.

## METHODS

The primary data for this project are a collection of semi-structured interviews with 13 lawyers involved in the *Williams*, *Schenck*, and *Hill* cases. As such, this is a US-centric study of cause lawyering. Six of these lawyers represented anti-abortion activists, whereas the remaining seven worked on behalf of the clinics' interests. This data was originally collected as part of

another project that focused on whether 51 activists, lawyers, and legislators experienced an "ideological dilemma" in response to these events and cases.[4] The *Williams*, *Schenck*, and *Hill* cases, as will be discussed in the following section, were selected because they represent both the range of street-level anti-abortion activism, and the responses to such activism. These cases were also selected because they were all appealed to the US Supreme Court and thus have a significant precedent value.[5]

All interviews took place between January and November of 2004. Participants were initially contacted via recruitment letters and e-mails. These documents told the recipients that the interviews would concern their account of the events surrounding the court cases they were involved in, as well as their views about the limits of free speech. All lawyer interviews were conducted and recorded by the author either in person or via the telephone.

The first set of lawyer interviewees in this study were selected by contacting those listed on the various briefs filed in these cases. Starting with the case filings obviously skews the sample towards lawyers that were involved in litigation, as opposed to other movement activities. Additional lawyers, however, were later contacted that were not listed on the formal court filings, but who were referenced by other interviewees (both lawyer and non-lawyer interviewees) as having played significant parts in either these or related movement activities. Although this sampling method does not account for all lawyers who may have been involved with these various activist organizations and the events that form the center of this study, the snowball sampling does begin to correct for the initial bias.

The lawyer interviews began with general questions about the interviewees' educational and work background, what motivated them to become lawyers, and if they had ever been involved in political activism. After this, interviewees were asked to respond to a series of hypothetical scenarios about the limits of acceptable protest and government regulation.[6] The remainder and majority of the interview focused on the respondents' recounting and understanding of the events and cases that they were involved in. This section involved such topics as: how and why the interviewees became involved in the cases; how they characterized the issues and events that led up to the cases; the nature and character of their activities in relation to the cases, the clients, and (if applicable) the movements more generally; how they categorized the cases; how they understood their opponents' actions; whether they ever felt conflicted about their legal arguments and strategies; the degree and nature of client involvement and interaction; if they considered their work on these cases to be a form of activism; and whether and how the cases affected their careers.

Since these were open-ended interviews, questions were largely used to initiate conversations. The interviewee was therefore given a significant amount of control over the direction of the interview. Interviews ranged in length between 35 and 127 min, with the average interview lasting just over an hour.[7] All of the lawyer interviews were recorded and later transcribed.

After numerous readings, interview responses were coded and put into spreadsheets according to interviewee identification (i.e., case and party affiliation, primary practice identification) as well as more substantive cause lawyer themes (e.g., role played in case and broader movement, activist self-identification, adoption of movement rhetoric, etc.). The majority of the substantive cause lawyer themes were taken from the existing literature and sought in the interviews. The categories "Effect on Views of Abortion Politics" and the "Adoption of Movement Rhetoric or Frame," however, sprang from observing trends in interviewee responses. The categories and interviewee labels are reflected in Table A1 in the appendix. Quotes are given in the text to illustrate how interviewees demonstrated the various characteristics. The specifics and significance of each category will be discussed more fully in the following sections.

Finally, a range of materials beyond the interview data were used to understand the context that each of these cases took place in. This material included court decisions and filings; clinic, abortion-rights, and anti-abortion movement materials; organizational newsletters from both sides of the movement; audio recordings of Colorado legislative hearings and debates; the Pro-Choice Network of Western New York archives at SUNY Buffalo; and local newspaper accounts of the street-level activism, cases, and legislative actions.

## THE ABORTION CONFLICT AND ACTIVISM-REGULATION CASES

### *Background*

Clinic-front sidewalk activism was one of the anti-abortion movement's identifying hallmarks in the 1980s and 1990s (Blanchard, 1994; Meyer & Staggenborg, 1996; Risen & Thomas, 1998; Staggenborg, 1991). Faced with this direct and at times aggressive form of activism, abortion providers and their supporters appealed for help from the state. Abortion-rights advocates occasionally attempted to use the state to throw a knockout punch against their adversaries by trying to criminalize specific anti-abortion organizations.[8]

More commonly, abortion-rights advocates sought to obtain court orders and legislation that governed how anti-abortion activism could occur (e.g., establishing specific distances that needed to be maintained between activists and their target audience). Although abortion-rights groups succeeded in securing some injunctions and other regulatory measures against their adversaries, anti-abortion activists did not cower from fighting back. Instead, anti-abortion activists began challenging these regulatory mechanisms in court by arguing that such measures violated their Constitutional right to free expression.

The US Supreme Court has heard and written opinions for eight such cases since they began arriving in the late 1980s.[9] In addition to the cases that the Court has heard, individual Justices have gone out of their way to write two concurring and three dissenting opinions for five *denials* of certiorari.[10] With these included, members of the Court have responded with opinions to a total of 13 cases related to the regulation of street-level anti-abortion movement activity in less than 20 years. This chapter focuses on lawyers involved in three of these cases – *Christine Williams v. Planned Parenthood Shasta-Diablo* (1997), *Schenck v. Pro-Choice Network of Western New York* (1997), and *Hill v. Colorado* (2000).

These three cases were in part selected because they demonstrate the types of regulations imposed on anti-abortion activists, as well as the range of events that led to such regulations. *Williams v. Planned Parenthood* and *Schenck v. Pro-Choice Network of Western New York* both involve the constitutionality of injunctions that create distance regulations and limited or no-entry zones for anti-abortion activists. *Hill v. Colorado* involves the constitutionality of a state law that regulates forms of acceptable activism in addition to the distance at which such activism must take place when in front of health care facilities.

The events preceding *Williams v. Planned Parenthood* began in late 1989 with small, weekly gatherings in the parking lot and on the sidewalk in front of a Planned Parenthood clinic in Northern California. These activists, known as the Solano Citizens for Life (SCL), engaged in protesting and offering "sidewalk counseling" to those seeking to gain access to the clinic.[11] As the SCL grew to a core of roughly 30 people, sidewalk counseling became a particular concern for the clinic employees who saw it as a means of intimidation, misinformation, and obstruction. At the same time that this was occurring, the clinic also became the victim of various forms of intimidation. For example, bent nails were found scattered around the parking lot, anti-Semitic flyers were left on the clinic's outdoor lunch benches, and individual staff members received harassing home-phone calls.

As a result of these collective factors, Planned Parenthood sought to take legal action against the SCL (Estes, 2004; Rouche, 2004).

The clinic manager, Heather Estes, contacted the Oakland Feminist Women's Health Center (FWHC) asking for an attorney reference. The FWHC suggested Karen Anderson Ryer – an attorney with significant connections to various reproductive rights groups and experience crafting injunctions (Ryer, 2004).[12] Ms. Ryer and the clinic considered various options – from targeting specific activists with personal injury suits, to filing civil harassment lawsuits against local churches and activists. Planned Parenthood ultimately decided to pursue an injunction to protect their clients from having to testify in court (Ryer, 2004).

Faced with the lawsuit, the SCL set to work raising funds at local churches and finding an attorney who could take the case. "I think I had met … [the] head of Life Legal Foundation. And, they have a list of lawyers who will do pro bono work for Pro-Lifers. So she gave me John Street's number, and that's how we got started" (Williams, 2004). John Street, a lawyer who describes his practice in the Marin County bedroom community of Novato as consisting of "trusts, wills … personal injury work, and … a smattering of other things," set to work on the case that proceeded through the California Court System and was eventually appealed to, but not heard by, the US Supreme Court (Street, 2004). Although John Street remained the primary lawyer for the SCL throughout the case's life, Planned Parenthood eventually replaced Karen Ryer with a team of attorneys from a large firm that had more appellate experience. In the end, the clinic secured an injunction that limited anti-abortion activities to the opposite side of the four-lane street that ran in front of the clinic.

Similar events led to *Schenck v. Pro-Choice Network of Western New York*, but they occurred on a much larger and more aggressive scale. Instead of relatively small, but significant, recurrent activism at one clinic, the *Schenck* case involved large-scale repetitive protests known as "Rescues" at a number of clinics in Western New York. Rescues involve a range of peaceful and aggressive activities and are named for their association with the nationwide anti-abortion group Operation Rescue. In addition to traditional protests and sidewalk counseling, Rescues are specifically intended to close targeted clinics. To achieve this end, activists in Western New York employed tactics such as massive and prolonged sit-ins that blocked clinic entrances and exits; shooting glue into clinic keyholes; and staging "invasions" where activists would rush into a clinic, lock themselves to fixed objects, and swallow the keys.

A coalition of clinic supporters and abortion providers known as the Pro-Choice Network of Western New York (PCN) organized in response to

these Rescues and other anti-abortion activism. The PCN began by arranging teams of volunteers to work as "escorts" for those trying to access targeted clinics. Escorts would typically stand on either side of a person who sought to enter a clinic to work as a buffer between the person and the anti-abortion activists.

Outside of direct action strategies, individual clinics in the PCN had previously sought and failed to win relief through the New York state courts. These failures initially kept the PCN from seeking an injunction. The idea of using the courts resurfaced when Lucinda Finley, a Yale Law School professor who was spending a year at SUNY Buffalo Law School, joined the Network as an activist (i.e., not as a lawyer). Professor Finley had been tracking some related cases and attended a lawyer brain-storming session organized "under the auspices of the Center for Constitutional Rights in New York and maybe the NOW [National Organization of Women] Legal Defense Fund" (Finley, 2004). Convinced that the group might have grounds for a federal injunction, she brought the idea to the PCN.

Members of the PCN initially expressed concern about pursuing a legal strategy. The arguments against the strategy centered on a healthy distrust of the state, as well as a concern with the associated costs of a legal strategy – opportunity costs, financial costs, and a free rider problem with various clinics. Supporters of the plan addressed these concerns and the Network Board eventually voted 13-1 to start the process, and 12-1-1 to cap their initial financial commitment at $1,000 (PCN Board of Directors, 1990, p. 3). With the help of Isabelle Marcus (another lawyer and SUNY Buffalo professor), Lucinda Finley crafted the original temporary restraining order that led to the eventual injunction.[13] The injunction created fixed restricted-entry buffer zones around the clinic entrances and exits, and floating restricted-entry buffer zones around those seeking access to the clinics.

Over the next year, skirmishes continued on the street as well as in the courtroom. The PCN enlisted the help of a local trial lawyer, Glenn Murray, to enforce violations of the injunction. Project Rescue, Operation Rescue, Project Life of Rochester, and the various individually named in the injunction primarily relied on the help of two local attorneys – James Duane and Lawrence Behr – to defend violators and eventually to challenge the injunction on free speech grounds.

As the anti-abortion activists' local legal options dried up, the decision was made to bring in additional outside lawyers to appeal the case up the legal chain. The first of two Second Circuit Court opinions in the case lists a total of eight lawyers working against the injunction. The group's second time in front of the Second Circuit saw the addition of a ninth lawyer to

their legal team. Most notable in their legal ranks were Jay Sekulow and James Henderson of Pat Robertson's conservative public interest law firm the American Center for Law and Justice (ACLJ).

On the other side of the dispute, Lucinda Finley sought to hand the appeals case off to full-time litigators so that she could concentrate on her academic commitments. She, however, was not able to. In her words, the local legal community was "very risk averse, very unwilling to push the legal envelope, very unwilling to stick their necks out … [The PNC] got a lot of, 'Gee, I'd love to help you, but I have partners who are anti-abortion' … Another lawyer at another firm said, 'We'd love to help you but we have the diocese as a client'" (Finley, 2004). Beyond not being able to find a replacement, Isabelle Marcus, the other lawyer and SUNY Buffalo professor that had contributed to the original complaint, pulled out of the case due to her academic obligations. This left the PCN with a two person legal team that consisted of Lucinda Finley handling the appeals process, and Glen Murray managing the related local trail work. The US Supreme Court eventually heard the challenge to the injunction. It struck down the floating, and upheld the fixed, buffer zones.

The final case, *Hill v. Colorado*, was a response to a Colorado law governing activism within 100 ft of the entrance of a healthcare facility. The regulation, known as the "Bubble Bill," prohibited approaching within eight feet of another person without permission "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person" (Colo.Rev.Stat. Section 18-9-122(3) (1999)). The bill was proposed by a freshman State House member named Diana DeGette. DeGette had been involved with Planned Parenthood before being elected to office. Now that she had secured a seat in the legislature she quickly sought to advance Planned Parenthood's interests.

> I really wanted to do some pro-choice legislation when I was elected because as I say, we hadn't had any for many years. And then I called the pro-choice groups and they told me that, they told me that what we really needed was legislation to, at that time, right at that time we were having all these protests at clinics where, where protestors would actually block patients and healthcare workers from going in and out of the clinics. And it was getting to a, kind of a dangerous tension, and it was preventing people from getting healthcare. So that the pro-choice groups told me what they really needed right then was, was legislation to help access the clinics. (DeGette, 2004)

A collection of events that spanned the spectrum of anti-abortion activism accompanied the Bubble Bill's creation and passage. Colorado hosted both small and large scale anti-abortion protests. The State, along with the rest of the nation, had also recently witnessed a series of massive and extremely

contentious Rescues, dubbed the "Summer of Mercy," in neighboring Kansas. Finally, while the Colorado Legislature debated the Bubble Bill, Dr. David Gunn, an abortion provider in Pensacola, Florida, was shot and killed by a radical anti-abortion activist.

The spokesman for Colorado Operation Rescue and other anti-abortion activists unsuccessfully organized to challenge the Bubble Bill at open legislative hearings. Once the bill became law, Leila Jeanne Hill, one of the activists who spoke against the bill at the legislative hearings, contacted the ACLJ to challenge the Bubble Bill in court.[14] Ms. Hill had previously been introduced to many of the members of the ACLJ through her involvement in another anti-abortion activism lawsuit. The ACLJ took the case and worked with Ms. Hill to recruit two other anti-abortion activists who collectively brought a suit challenging the Bubble Bill's constitutionality.

The case was primarily handled by members of the ACLJ legal staff, but they also relied on assistance from a local Colorado attorney, Roger Westlund, who had a history of representing anti-abortion protestors. Since these activists were challenging a state law, they faced off against state lawyers as opposed to those hired directly by a clinic or who worked on behalf of an abortion-rights group. In spite of this, one can still see the state lawyers as working to forward the interests of the abortion-rights groups that had encouraged Rep. DeGette to create the Bubble Bill. The case ended with the USSC upholding the bill's constitutionality.

## *Situating the Cases*

Much of the work on social movement litigation generally, as well as on cause lawyers specifically, focuses on attempts to use major precedent setting cases to achieve a movement's ultimate goals.[15] The interest in this type of litigation naturally leads to questions concerning the propensity for legal action and lawyers to detrimentally distract movements. That is, for movement litigation and cause lawyers to be analyzed in relation to "the myth of rights" (Scheingold, 2004).[16] For example, the concern with the myth of rights is clearly reflected in Barclay and Marshall's (2005) definition of cause lawyers as attorneys who "*construct new rights* and challenge institutionalized oppression on behalf of disadvantaged groups" (2005, p. 197).[17]

The *Williams*, *Schenck*, and *Hill* cases, however, show that significant movement litigation is not limited to a group's primary goals. The cases examined in this chapter represent the use of litigation to achieve important, but secondary, objectives for each side of the struggle. That is, instead of

seeking to establish significant precedent in relation to the legality of abortion, these cases are disputes over the regulation of a movement's hallmark street-level tactics.[18] In the words of Meyer and Staggenborg (1996), *Williams*, *Schenck*, and *Hill* are set apart from the bulk of social movement tactics generally, and I argue litigation tactics specifically, in that they are the product of the rival movements' "sustained interaction with one another and not just [with] the state" that controls the ultimate movement goals (p. 1629).

The unique position of these cases within the broader category of movement litigation provides a context in which one can complicate or move beyond the "myth of rights" understanding and analysis of movement litigation and cause lawyers. It is therefore an interesting avenue for future research. In terms of this chapter, however, these atypical cases are combined with the wide net cast by the event-centered approach to cause lawyering to further the discussion of what qualities one should consider when studying cause lawyers.

Although these cases provide these opportunities, they also come with a complicating cost. When one discusses cause lawyers the cause that the lawyers serve is typically obvious. The secondary nature of these cases, however, muddies the clarity of the cause. In terms of their roots, the desire to control abortion policy is the cause that gives rise to these cases. Restated, these cases are the result of an evolution in tactics in the ongoing struggle over abortion policy. At the legal level, however, these cases concern free speech. The cause, as a result, can therefore be protecting the ability to protest, to regulate threatening forms of activism, or to control one's property. The ambiguity of the cause cannot be avoided, and it thus complicates identifying who is, and who is not, a cause lawyer. Given, however, that the cases are firmly embedded in a high profile and ongoing movement-countermovement struggle, and that the individuals and organizations that sought legal help and hired the lawyers define themselves in terms of abortion politics, the control of abortion policy will be understood here as the cause behind these cases.

## OBSERVATIONS

As mentioned in the chapter's introduction, the event-centered approach taken in this project has yielded a collection of attorneys that includes those that would, and would not, traditionally be considered cause lawyers. Specifically, the event-centered approach's has ensnared three types of

lawyers that have traditionally been excluded from the cause lawyer category in the United States – conservative legal activists, "hired guns," and state attorneys. Before simply accepting these and all attorneys who work with movements as cause lawyers, however, it is necessary to determine whether or not it makes sense and is fruitful to do so. This determination lies at the center of this chapter. Although this project's sample size is too small to make any conclusive or causal claims, the interview subjects are compelling in that they provide a grounded starting point for discussing the event-centered approach specifically, as well as the limits of cause lawyering more generally.

Before this discussion can begin, however, there is a need to address the variability in the definition of cause lawyering and lawyers. Simply put, a benchmark needs to be set to determine the usefulness of the event-centered approach and the inclusion into the cause lawyering discussion of heretofore excluded lawyers. This benchmark is provided by briefly considering why scholars are interested in cause lawyers. If one understands the purpose of the cause lawyer category and frame, one can rationally determine if it is beneficial to introduce previously excluded categories of lawyers captured by the event-centered approach.

Part of the interest in studying cause lawyers is simply to observe and categorize. As Hilbink (2006b) notes, however,

> While it may be important just to know that there are distinct types of lawyering, the inquiry does not end with such an observation. Rather, once the distinctions are made, the question becomes Why? Why do some types of lawyering thrive when others wilt? What is it about the environment that has shaped the development and evolution of these types? (690-1).

The question of "why" leads to seeing that the study of cause lawyers and lawyering is part of the larger interest in the relationship between law and social change. When one studies cause lawyers and lawyering, one is looking at the varying parts lawyers play in social change processes, and when, how, and why they are helpful, a hindrance, or insignificant.

I argue that cause lawyers are distinguished from a potentially larger pool of lawyers involved with social movements and social change because they are lawyers who play particularly important, useful, and/or repeat roles in these political processes. Lawyers are resources for movements, and cause lawyers are those with a high degree of utility for, and/or are often used by their respective causes. The question of whether or not certain lawyers should be included in the cause lawyering discussion, then, is a question of whether or not the targeted lawyers significantly add to our understanding

of the interaction between social movements, social change, lawyers, and litigation or other legal work. Do the typically excluded lawyers play a significant and or frequent part in social movements and change, or are they marginal actors who, as a result, do not warrant further study?

This section of the chapter proceeds by considering seven external and substantive attributes to probe whether or not the lawyers involved in these cases are, or could be, significant parts of each movement's goals, strategies, and behavior. The majority of these elements are rooted in past cause lawyering research, whereas the final two – "Effect on Views of Abortion Politics" and the "Adoption of Movement Rhetoric or Frame" – are relatively or wholly new additions to be considered by the field. Each of these attributes will be discussed in terms of its relationship to measuring a lawyer's utility for a movement, and thus the appropriateness of considering each lawyer as a cause lawyer. The interview subject's attributes are summarized and displayed in Table A1 (see appendix).

### *Professional Positioning and the Introduction of Substantive Factors*

Various researchers have noted that professional positioning is a significant factor in terms of studying and defining cause lawyers (Barclay & Marshall, 2005; Jones, 2005; McCann & Silverstein, 1998; Shdaimah, 2006; Southworth, 2005). In brief, practice type matters because it affects lawyers' abilities to pursue cases of their choosing and their abilities to identify as cause lawyers. These are significant considerations in terms of determining if one should be seen as a cause lawyer because freedom to pursue movement cases and the development of a cause lawyer identity both potentially influence a lawyer's utility for a cause. An attorney that identifies as a cause lawyer and who can freely pursue cause cases is more likely to be able to develop a standing relationship with a movement and consequently become relied on by, integrated into, and important within an activist organization.

Of the 13 lawyers who participated in this study, just over half (seven) primarily worked as sole practitioners or in small firms while they were involved in these cases. One of these seven lawyers was also affiliated with the Rutherford Institute – a conservative legal organization. Outside of these lawyers, one interviewee held an academic position, one was employed as a member of a conservative public interest law firm, two were government employed attorneys for the state of Colorado, and two worked at a large law firm with offices in three countries.[19]

Solo practices, small firms, academic positions, and public interest organizations are all professional locations that have a high potential for allowing lawyers to pursue cases, and therefore causes, that interest them. These positions also potentially do not hinder, and may in fact provide institutional support that facilitates the development of cause lawyer self-identification (Jones, 2005; Southworth, 2005). Some of the interviewees stated that they had specifically sought positions that offered these qualities. For example, one attorney noted that he had left a position in a large insurance firm for solo practice largely so that he could pursue cause-related cases.

> I didn't have, you know, the right to do what I wanted … In the mid 1980s, with the approval of a senior partner in the department, my firm took on the representation of the students at a local high school, who were being … prevented from holding after school bible study groups … We took on their case … But I was forced to-my firm was forced to drop the case because of backlash from the community, from the clients. (Behr, 2004)

Solo practice allowed this lawyer to pursue cases that satisfied his desire to practice law in a way that comported with his deeper beliefs. This lawyer quickly exercised his newfound freedom by volunteering for the *Scheck* case and eventually becoming the President of Western New York Lawyers for Life.

The two lawyers that worked for the state of Colorado, as well as the two housed in a large firm, were not similarly well situated to pursue activism and construct identities as cause lawyers. Although these four lawyers reported that they were given the choice of whether or not they wanted to work on these cases, they were not in positions that allow them to freely seek out cause cases. This is especially true for the government lawyers. Large private firms with pro bono programs give their lawyers some ability to occasionally seek out cause cases that they are interested in. Such opportunities largely do not exist for state lawyers in the United States.

In addition to the limits on the ability to freely seek out cause cases, the state and large firm lawyers work in environments that strongly encourage them to embrace the role of the neutral professional advocate. As a result, these lawyers are specifically discouraged from developing cause lawyer identities. The above combined workplace limitations illustrate why these lawyers have traditionally been excluded from the cause lawyering category. Professional positioning, while an important part of understanding a cause lawyer's abilities and identity, is, however, not the only attribute that should be considered when determining the limits of the cause lawyering category.

Studies on the construction and location of cause lawyer identity, for example, have argued for the significance of other factors such as one's commitment to a cause as well as one's connectedness within wider movement networks (Barclay & Marshall, 2005; Halliday, 1999; Jones, 2005; McCann & Silverstein, 1998; Shdaimah, 2006; Southworth, 2005). These qualities have the potential to increase one's motivation to work with a cause, and thus to increase a lawyer's dependability and utility for that cause. It is through these more substantive factors that one can see an overlap between the more traditionally positioned cause lawyers, and those in government and large firms. Since one's commitment to a cause and the degree to which one is integrated into wider movement networks are related, this chapter combines the two into the broader category of "substantive commitment."

The remaining substantive factors that will be used to gauge the appropriateness of analyzing each lawyer through the cause lawyering lens include the following: (1) the reasons for becoming a lawyer; (2) self-identifying as an activist through lawyering; (3) involvement in other legal work related to abortion politics; (4) integration into, or using, wider movement networks; (5) the cases' effect on personal beliefs or understanding of abortion politics; and (6) the adoption of abortion politics rhetoric. Although all of the lawyer will be discussed in relation to these categories, the government and large firm lawyers who have traditionally been excluded from the cause lawyer conversation will be the primary subjects of inquiry for the remainder of this chapter.[20]

### *Early Motivation*

Ann Southworth (2005) notes that the prototypical cause lawyer enters law school with service to a given cause in mind (p. 100). Broadening this from a specific to a general commitment to service or cause oriented lawyering, the data here show a fairly even split between those who entered law school with the notion that they "would be able to change the world, or at least make a dent," and those who did not (Ryer, 2004). The overwhelming majority of the idealistically or cause-motivated law students clustered on the clinic interests side of these cases. The same pattern emerges when looking at political activism beyond abortion politics – another possible indicator of one's willingness to become involved with movements. All but two of the lawyers that represented clinic interests referred to other forms of political activism that they had been involved in, whereas only one anti-abortion lawyer did the same.

Interestingly, the clinic side of these conflicts also includes the four state and large firm lawyers. Within this group of non-traditional cause lawyers, three of the four went to law school pursuing some form of idealism. This initial interest, as one of the large firm lawyers put it, "in the law as an instrument of social change" leads one to speculate about the receptivity of these attorneys to cause lawyering, and accordingly increases the interest in viewing them through a cause lawyering lens (Robinson, 2004).

Beyond the motivations for attending law school, the two state lawyers also referred to other forms of political activism that they had been involved in. The combination of these qualities in these actors is not surprising. Classic cause and state lawyers are similar in that both are likely to be motivated to work for some conception of the good – be it a cause-specific understanding of the good or a more general notion of the need to serve the greater good through public service (Den Dulk, 2006; Jones, 2005; Menkel-Meadow, 1998; Shdaimah, 2006; Southworth, 2005). One would also expect that this motivation would likely lead both types of lawyers to be politically active. These common underlying qualities strengthen the idea that one can consider certain state lawyers in relation to cause lawyers and lawyering.

Southworth (2005) also notes, however, that idealism or cause motivation going into or developed during law school is not a prerequisite for becoming a cause lawyer, and that many lawyers that she interviewed "emphasized the absence of deliberation in the path that led to their current positions" (p. 100). This delayed and indirect path to cause lawyering is seen in many of the interviewees who are most easily recognized as cause lawyers. For example, the majority of the lawyers that supported the anti-abortion activists, as well as the local litigator and self-described "pit bull down in the trenches" hired by the PCN, were relatively late in coming to cause lawyering work (Murray, 2004). All of these lawyers have since developed deep relationships with their respective movements – working with them in both law-related and other contexts.[21]

Although speculative, the delayed arrival of a large, organized, and active conservative legal movement – from law school clinic offerings up to the establishment of a significant number of sizable, well-funded public interest firms and organizations – may help to explain the late-comer status of two-thirds of the anti-abortion lawyers (Den Dulk, 2006; McCann & Dudas, 2006; Southworth, 2008; Teles, 2008). In short, since cause lawyering on the right was not as institutionally established as cause lawyering on the left, it is not surprising that conservatives did not enter law school with an idea of serving the causes that interested them.

*Self-Identification: Linking Legal Work and Activism*

Although there is a general interest in how cause lawyers construct and maintain identities as activists, the concern with self-identification here is related to what this factor reveals about whether or not a lawyer is, or could be, a significant part of a movement's goals, strategies, and behavior. In short, if a lawyer sees herself as part of a movement vis-à-vis her legal work, then it is quite possible that she is formally integrated into the movement, or at least that she is dedicated to a given cause. Either way, the self-identifying cause lawyer is likely to be a dependable part of a movement, and therefore a subject who can add to our understanding of law, social movements, and change.

Given the nature of these cases, one might also expect to find a correlation between those who pursued law degrees for cause or idealistic reasons and those who saw their work on these cases as a form of activism. This, however, was not the case. When asked if they viewed their legal work as a form of activism, all but one of the anti-abortion lawyers clearly agreed, whereas only three of the clinic/abortion-rights lawyers did. Collectively, only three of those who said they went to law school with idealistic motives unequivocally identified their legal work on these cases as a form of activism. This is in comparison with the five attorneys who did *not* attend law school for such reasons, but who did identify their legal work as activism.

It is also worth noting that the two large firm lawyers were the only interviewees to completely reject the notion that their work on these cases was a form of activism. This is probably due to a mixing of the fact that neither lawyer was initially interested in abortion politics, and that the professional norm of neutrality is stressed in large firms such as theirs. Simply put, there is little reason to view this case as anything activist in nature if one lacks a prior interest in the underlying cause and exists in an environment that discourages making such connections. In spite of this separation from the rest of the lawyers in the study, other factors, such as repeat involvement and the effect upon their understanding of and interest in the underlying cause, provide reasons for considering these lawyers through the cause lawyer frame.

It is also worth noting that some interviewees gave conflicted responses in regard to seeing their legal work on these cases as a form of activism. On the anti-abortion side, the one lawyer who felt conflicted about the link between his legal work and activism was in some ways the least likely to equivocate about such things. Of the anti-abortion lawyers, James Henderson has the strongest classic cause lawyer history and credentials. He has an established

history of activism related to various conservative causes; attended a Catholic law school with the help of a fellowship funded by an organization that sought to build a conservative legal movement; served as an editor for a conservative law journal; has a professional record that includes a list of prominent conservative legal organizations and public interest law firms; and explained that he lived in accordance with the idea that "if you believe [abortion is] murder, then act like it is." Mr. Henderson, however, did not see his work on this or other related cases as being a form of anti-abortion activism. Rather, he saw himself and his fellow ACLJ lawyers as "officers of the court and … legal advocates." After further consideration, however, he added that "maybe that's another way of doing it [i.e. engaging in pro-life activism] … but the truth is that our relationship to the pro-life movement is in some ways coincidental rather than direct" (Henderson, 2004). These responses reveal that even though someone can be externally viewed as an archetypal cause lawyer, they may see, or at least portray, their work in more traditionally professional terms.

The muddling or disconnect between legal work and activism here may be due to the ACLJ's desire to be seen as a neutral, broad-based, and thus legitimate, public interest group. For example, the ACLJ is described on its webpage as being an organization that "focuses on constitutional law … [and] is specifically dedicated to the ideal that religious freedom and freedom of speech are inalienable, God-given rights" (http://www.aclj.org/Content/?f = 69). The ACLJ's self-description is broadened even further elsewhere on their webpage to being an organization that works "in the courts and the legislative arena … [and] is dedicated to protecting your religious and constitutional freedoms … [such as] national security, protecting America's families, and protecting human life" (http://www.aclj.org/About/). This language, and the separation of legal work from activist work, reflects McCann and Dudas' (2006) observation that the conservative movement uses legal language to "deflects attention from the specific interests that they promote and instead portray their efforts as defenders of long-standing American values and ideals" (p. 50). In this case, the lawyer may be stressing the professional ethic of neutrality to strengthen the claim that the ACLJ's work is not in service of conservative causes, but is rather in the service of broad American ideals.

Like the lawyer from the ACLJ, the two state lawyers also have mixed responses to the idea that their legal work is a form of activism. Unlike the ACLJ lawyer, however, the state lawyers do not have the immediate external trappings of a cause lawyer. Their responses in the study suggest, though, that while some lawyers can appear institutionally distant from the

traditional cause lawyer, they may have some ability to see themselves as cause lawyers. That is not to say that either government lawyer clearly viewed him or herself as an abortion-rights activist via working to defend the Bubble Bill. Rather, the responses throughout their interviews exposed a conflicted view about their role in the *Hill* case.

Starting with the most basic prerequisite for seeing one's work as being cause related, both government lawyers, at least in part, considered the *Hill* case to be about abortion politics, and that the decision that they won clearly benefited one side of the abortion conflict.[22] Both lawyers also stated or hinted at being previously interested in abortion politics and acknowledged that they were politically in favor of the case outcome. For example, one government lawyer bluntly stated that "it's clearly a prochoice decision … [and] I don't have a problem with that either" (McLachlan, 2004). Beyond simply seeing it as a "prochoice decision," the other state lawyer demonstrated a deeper connection to her work on this case.

> I felt if we lost it would allow intimidation to continue … I worked with the [*Hill*] case for seven years and I sort of felt if we lost, you know, it might have been because I screwed up, you know, and *I didn't want to be the one who screwed up and allowed woman to, you know, continue to be intimidated.* (Angel, 2004)[23]

Both comments, but especially the latter one, reveal a level of connection to the case's substantive effect that one would readily expect from a cause lawyer. Again, this does not demonstrate that these lawyers self-identified as cause lawyers. What it does show, particularly when combined with the other substantive cause lawyer attributes, is that applying cause lawyering frames to state lawyers involved in movement cases seems to offer a potentially interesting line of inquiry for those concerned with cause lawyering and social movements.

### *Related Cause Cases and Situating State Lawyers*

Lawyers' participation in related cause cases, as well as their relationships with greater movement networks, are two areas where many of the interviewees overlap. Given this, these two factors further reveal the potential for considering large firm and state lawyers as cause lawyers. For example, McCann and Silverstein (1998) found that, "a hired gun closely situated within movement organizations over sustained periods of time tended to be a broader movement activist" (p. 280). This finding suggests that hired specialists who are typically considered movement outsiders have

the potential to be integrated into a movement and effectively become active cause lawyers that collaborate on crafting and executing long-term political and legal strategies.

Before exploring this, however, there is a need to discuss the place of state lawyers in relation to causes and the "hired gun" classification. One can easily understand why large firm lawyers are seen as hired guns. In short, these lawyers are specialists that are situated outside of the movements and are brought in to address a specific need. Because they are for hire, movements can view these lawyers as resources that they can return to and use when the need arises. The same is not immediately true for state lawyers. State lawyers may be a type of specialist, but movements cannot directly hire these lawyers. In spite of this, government lawyers can still be viewed as a type of hired gun or resource readily sought by movements.

A central reason why movements appeal to the law, and therefore to the state, is so that they can have the government enact their vision of the good. That is, movements employ state-based strategies – litigation-based and/or legislative in nature – in part to merge the movement's and the state's interests. If a movement succeeds in getting the state to formally adopt its agenda through precedent and/or legislation, the movement has entrusted the state with the duty of defending the movement's interests. In short, if one takes a struggle-centered approach to cause lawyering, state lawyers are a relatively successful movement's ultimate hired guns and cause lawyers. State lawyers are specialists that allow movements to reap the benefits of litigation without directly incurring many of the associated costs.[24]

This acquiring of state resources is illustrated by both sides of the ongoing abortion conflict. When a state passes a restriction on abortion and that regulation is challenged in court, state lawyers are charged with defending that law. When clinics and abortion-rights proponents succeed in moving from obtaining injunctions to securing more broad-based protections such as Colorado's Bubble Bill or the Federal Freedom of Access to Clinics Entrances Act (FACE), government lawyers go to court to defend those laws. In all of these instances, the state is protecting "the people's" interests in a broad sense. In a more specific sense, however, they are acting on behalf of the interests of the respective movements that pushed for the laws' adoption.

How the respective movements and their more immediate lawyers interact with the state's lawyers, as well as large firm hired guns, should interest those that study the interaction of movements and lawyers. Do movements take a more removed approach to the state by filing amicus briefs, do they directly consult and collaborate with these lawyers, or do they do both?[25] If movement actors limit their involvement with state lawyers, or if they keep

large firm hired guns at arm's length, there is little reason to consider either through the cause lawyering lens. If, however, causes rely on and directly, and repeatedly, work with these outside lawyers, then the movements are incorporating these lawyers into broader movement strategy and, potentially, into the broader movement itself. This integration adds to the movement's resources; has the potential to facilitate the creation and maintenance of a type of cause lawyer identity for attorneys that do not work full-time for the respective causes; and raises questions about how these lawyers affect the movements themselves (Jones, 2005; McCann & Silverstein, 1998; Shdaimah, 2006). Again, while the number of state and large firm lawyers interviewed in this study is too small to generalize from, the data from these two groups show the possible fruitfulness of applying cause lawyering frames to such lawyers.

In terms of involvement in other abortion politics cases, all but one of the interviewees either previously or subsequently participated in such cases. Outside of the more traditional cause lawyers, the Colorado Solicitor General was involved in at least one private practice case related to a clinic seeking to regulate protestors. The two large firm hired guns from the *Schenck* case were subsequently involved in multiple abortion politics cases. The only lawyer who did not have other related legal work was a government attorney who lacked significant private practice experience before and after the *Hill* case. As a result, all but this one interviewee had the potential to develop lasting and deeper relationships with the respective movements through their ongoing legal work.[26]

Beyond fostering the potential for continued movement interaction, the large firm attorneys' future cases are examples of how an ongoing movement-countermovement conflict can envelop those who do not seek to become further involved in a political struggle. According to the more senior of the two large firm attorney's, "in the aftermath of this I had two or three other cases that involved anti-abortion protests – one of which resulted in our firm being sued by some of the defendants of the case … [for] malicious prosecution, those kinds of torts" (Robinson, 2004). If lawyers are viewed as resources in the ongoing struggle, a suit for malicious prosecution is a way to attack an opponent's resources. Although the two large firm lawyers did not view their work as cause lawyering, the targets of their work saw it as such and consequently tried to eliminate them as a resource.

The subsequent tort suit is therefore another example of secondary movement litigation. It lends additional detail to the ways in which activists strategically use litigation in ongoing movement-countermovement conflicts; the ways that outsiders can unwittingly become increasingly involved

in such conflicts; and how these related suits present a means for ongoing relationships to develop between lawyers and movements. These are all potential areas of further research for those interested in cause lawyering specifically, as well as social movements and litigation generally.

### *Integration into Wider Movement Networks*

Although the duration and depth of the relationships created by the *Schenck*, *Hill*, *Williams*, and related cases were not specifically probed in the interviews, an indirect gauge of the relationships between the movements and these lawyers are the lawyers' connections to wider movement networks. As mentioned earlier, research on the construction and maintenance of cause lawyer identity, as well as on the availability of cause lawyering resources, has cited the importance of wider network connections (Gould, 2002; Jones, 2005; Shdaimah, 2006). For example, Shdaimah (2006) notes that "Left-activists cause lawyering networks provide significant emotional and professional support, and the two are often combined" (p. 240). By associating with other cause lawyers and/or activist groups, one is more easily able to think of oneself, and to be seen by others, as being a part of a larger movement. As a result, one is also better positioned to continue to engage in, and succeed at, cause litigation.

Connection to wider movement networks is defined in this chapter as interviewee references to working with movement actors beyond one's immediate clients in these cases. For example, Lucinda Finley's (2004) participation in a legal brain-storming session organized "under the auspices of the Center for Constitutional Rights in New York and maybe the NOW [National Organization of Women] Legal Defense Fund" is a strong example of being connected to wider movement networks. On the opposite side of the conflict, numerous lawyers referred to their belonging to groups like the Life Legal Defense Foundation and Western New York Lawyers for Life, or having had contact with other organizations within the broader conservative legal movement. These are all examples of connections to wider movement networks, and they enable these lawyers to create and maintain their identities as cause lawyers, to have access to additional resources, and to remain firmly connected to their respective movements.

The large firm lawyers did not refer to any such contacts. One can presume, however, that they, like the state and other select lawyers involved in these cases, had at least some contact with wider movement networks via amicus briefs. Soliciting and managing amici, however, is a relatively limited

form of interaction with outside networks and is not likely on its own to create strong ties to the wider movement.

Although they also managed amici, the lawyers for the state of Colorado moved beyond this limited form of interaction by working "with a lot of other organizations … [For example, we] previewed the oral argument in front of … NARAL" (McLachlan, 2004). This increased interaction creates possibilities on both sides of the relationship. On the movement side, this type of interaction allows clinics and other abortion-rights actors the opportunity to exercise some control over the state lawyers that represent their interests. It therefore strengthens the idea that state lawyers are resources that the movement can use and rely on.

By pulling on wider movement networks in this way, the state lawyers increased their exposure to the abortion rights movement. As a result, they also increased their potential to be incorporated into this movement. That is, they might begin to see themselves as not only working with, but on behalf of this movement. The increased interaction may also result in becoming more personally invested in the movement itself. As shown earlier, there is some reason to think that these lawyers began to make these connections and become invested. This helps illustrate a two-way relationship between the state lawyers and the movements and again raises interest in viewing these lawyers through a cause lawyer frame.

### *Effect on Understanding of Abortion Politics*

Two final ways of understanding these lawyers as cause lawyers is through the substantive effects that the cases have had on the lawyers themselves. This is measured in two ways in this chapter – through self-reported effects on one's understanding of abortion politics, and through the adoption of movement rhetoric.

All but two of the interviewees stated that their involvement in these cases had an impact on the way that they understood the wider politics of abortion.[27] For example, nine of these lawyers, all of whom had significant preexisting beliefs about abortion politics, reported that involvement in these cases either deepened or confirmed their existing political beliefs. In most cases this translated to affirming the lawyers' resolve to continue working for their respective causes.[28]

For many of the lawyers who represented the anti-abortion protestors the deepening of resolve was accompanied by frustration with the legal system and what they perceived as a bias against their cause. This was often referred

to as the "abortion distortion" – shorthand for abortion politics causing these cases to be treated differently than what they saw as similar First Amendment cases. This frustration contributed to the reasons why one lawyer ultimately left the movement, but for the rest of these lawyers, they understood the "abortion distortion" as part of the larger challenge that they faced.

Interestingly, the two large firm lawyers who attested to not having much interest in abortion politics before being involved in the *Williams* case reported that their involvement with this and future cases helped to form their understanding of abortion politics. For example, one large firm lawyer reported that, "it got me much more aware of the tactics of the protestors … I got much, much more aware of what these guys do, and it ultimately solidified my view" (Guerra, 2004).

The effect of the cases on the majority of the interviewees is important in terms of viewing these lawyers as potential ongoing movement resources. The forming or deepening of beliefs and resolve can translate into the formation or strengthening of a cause lawyer identity. This identity, or just the heightened understanding of the political conflict, can lead to an increased willingness to participate in future cause cases, and thus an increase in the usefulness of these lawyers to each movement. In short, the effect that these cases have on the lawyers' beliefs can lead to their becoming clearly identifiable cause lawyers and dependable movement resources. But, as the lawyer who left the anti-abortion movement illustrates, the effect of these cases on personal beliefs can also potentially lead to disengagement. Either way, the effect on personal beliefs is an important part of understanding cause lawyers and their involvement with movements. As of yet, the cause lawyering literature does not appear to consider the relationship between working on cause cases, the development of political beliefs, and one's dedication to a cause. Given that many of these lawyers, and the lawyers in Southworth's sample, came to cause lawyering late and indirectly, the effects of these cases on beliefs and dedication should be a significant area of concern and research.

### *Adopting Movement Rhetoric*

A second related and novel measure of the substantive effect of these cases on the lawyers comes via analyzing the language that the lawyers use when discussing these cases. One of the concerns that researchers have about the relationship between law and movements is how law and lawyers affect the framing of movements (Benford & Snow, 2000; Jones, 2006; McCann, 1994;

Marshall, 2003; Snow et al., 1986; Snow & Benford, 1992). This line of inquiry typically looks at the effect that the introduction of law and lawyers has on the primary movement actors' frames and language. Although not apparently used in other cause lawyer studies, I argue that there is value in reversing the view and noting the degree to which the lawyers that work with movements adopt their clients' frames and rhetoric. Restated, do these lawyers view and discuss the conflicts more like lawyers or activists? This question takes seriously the notion that movements can change lawyers as much or more than lawyers can change movements (Hilbink, 2006a, p. 63). The question also provides a loose measure for the degree to which lawyers internalize aspects of the causes they represent – another potential gauge of their connectedness and commitment to a movement.

In terms of this chapter, adoption of movement rhetoric and frames is seen in how the lawyers generally discuss and classify these cases. Do they use language and frames that are commonly employed by their clients, or do they largely discus these cases using detached legal language and frames? To answer this question, one must first have a general understanding of the rhetorical styles employed by each side of the conflict. Generally speaking, ground-level activist rhetoric on both sides of the conflict is defined by demonizing the opposition and situating these cases, as well as one's actions, within a larger movement context.[29] The basic distinction between movement and legal rhetoric is that the former is normatively charged, while the latter is more dispassionate and technical.

The clinic/abortion-rights side of the conflict has a less pronounced rhetorical style than their opponents, but it is still identifiable. Clinic members and supporters demonized anti-abortion activists by wholly defining them through the language of violence and religious fanaticism, as well as overtly questioning the sincerity of their motives (both generally and in relation to the legal claims made in these cases). They also tended to refer to their opponents in terms that clumped all anti-abortion activists into one coordinated movement. Reflecting the latter trait, these cases were not seen as discrete or local events. Rather, they, and the events leading up to them, were part of a highly coordinated effort aimed not only at ending abortion, but at the imposition of conservative religious ideals on the general public.

On the other side of the conflict, anti-abortion activists have a distinct rhetorical style that is marked by normative absolutism. They present these conflicts as being part of a wider war between good and evil that largely justifies their own actions and demonizes clinics and their supporters. This style reflects the general observation that Christian conservatives "wish to construct a conception of the world that is secure, unambiguous, where

there are good people and bad people, and where they themselves are clearly on the side of the good and true'' (Stein, 2001, p. 115). Specific examples of this can be seen in the assumption that anti-abortion activists' are incapable of causing harm to others, and the belief that the clinics, portrayed as wholly motivated by greed, will indiscriminately use whatever means are available to protect their financial interests. More generally, anti-abortion activists also employ a distinct vocabulary (e.g., using the words ''abortuary'' and ''abortionist'' in place of ''clinic'' and ''doctor'') and, by virtue of their use of morally charged civil disobedience, often present themselves as being the present-day correlates of the Abolitionist or Civil Rights movements.

Seven of the 13 lawyers interviewed for this project clearly used movement style rhetoric in the discussion of these cases. The passionate zeal that marks anti-abortion movement rhetoric is clearly seen in the following interviewee quotes:

> I think the most valid thing would be to weld up the doors of places like this so that nobody could go in and out of them. That would be the most valid thing. It could be done. There are lives being destroyed. Mothers lives, and human lives … babies being killed … . (Behr, 2004)

> I think that if you can do it, sure … The admission is made that: ''Well, no, no one was hurt. Well no, no one was assaulted. No one was battered'' You boil it on down to … what it boils down to is ''We're Planned Parenthood and we don't like people standing out front of our clinic on the days when we have abortions scheduled to tell women that they should rethink the whole subject. We just don't like it. And why don't we like it? Well, because that's what they're in business to do.'' I mean, abortion, doing abortions is a high profit margin for any abortion provider. Because it's quick and easy money. (Westlund, 2004)

The same is seen in the following quotes from clinic lawyers:

> And I felt that first of all 15 feet was an incredibly mild restriction that really did not impair anybody's ability to get their message across … And anyone who insisted that they had to get closer than 15 feet simply wanted to obstruct, impede, interfere, and harass. (Finley, 2004)

> But generally speaking, their object was to cause economic harm. Their object was to close the clinics. Their object was not to be just talking about abortion. And uh, their object was not just expression of their fundamental right to say 'don't do that.' Their object was to make people upset, make people sick from the stress they were causing, and cause physical damage to the clinic and to the various doctors who performed procedures. They were bent on closing the clinics … It wasn't a pro-life message. That wasn't so much that was important. (Ryer, 2004)

Bolstering the argument for this measure's usefulness in cause lawyering research, the interviewees that tended to use the strongest movement-style

rhetoric were also those that are most clearly seen as classic cause lawyers. These lawyers have spent the most time with, and have the strongest connections and commitments to their clients and the wider movement. As with many of the other categories in this chapter, however, the more interesting findings concerning language relate to those who are less readily seen as cause lawyers.

The state lawyers continued their trend of showing signs of being similar to cause lawyers, but not as committed. As seen earlier, these lawyers framed the case as being, in part or in whole, about abortion politics. They also had conflicted views about what their work on the *Hill* case meant in terms of activism. This conflict was again reflected in the language that they used to discuss the cases generally. Like the street-level activists, the state lawyers saw the case and the Bubble Bill as being directed at protesters who were "trying to impose their religious views on people." Their opponents, and the targets of the Bubble Bill more generally, were seen as "absolutely over the top aggressive protestors. People who were sometimes physically violent, who were … part of the movement that had expressed the avowed intention of shutting down abortion providers" (Angel, 2004). They also saw anti-abortion activists as disingenuous, "in my opinion they fabricated the chilling thing … none of them were willing – I mean unlike just about any other protest in the history of the human race – none of them were willing to even try and violate [the Bill] and get arrested" (McLachlan, 2004).[30]

Although this language clearly echoes the street-level activists, the state lawyers tempered this rhetoric with frames that provided distance from the case's more political aspects. For example, one lawyer countered the activist view of the case by stating that "it's not really about abortion rights because it's not – I think of it as a First Amendment case" (Angel, 2004). Regardless, the mixing of activist rhetoric and detached legal frames highlights the potential for analyzing state lawyers through a cause lawyer frame.

The same cannot be said for the large firm lawyers from the *Williams* case. Even though these lawyers had ongoing relationships with these movements via related cases, and the cases significantly affected their understanding of abortion politics, they did not adopt movement-style rhetoric to describe these cases. Rather, these cases remained like any other and were discussed in dispassionate, detached professional/legal terms.

> The interesting thing of being involved in a case like this, as a lawyer, you have to do your best job regardless of your own personal views as to the merits of the cause. (Robinson, 2004)

> [M]y job was to establish that there was sufficient evidence at the trial level. At the appellate stage we really didn't get into arguments over First Amendment principles so much as the sufficiency of the evidence to sustain the trial court injunction. So it really focused immediately on the adequacy of the evidence as opposed to who's right and who's wrong in this particular case. So it was more, much more, immediately it was much more of a technical debate over who testified as to what? What was the nature of their testimony? Did the trial court have enough evidence to support certain findings that they made? So it really became technical and going through the record and finding what was said. (Guerra, 2004)

These quotes reflect a dedication to the view of the lawyer as a neutral professional and the case as a dispassionate technical affair. Such a view does not encourage one to consider a client or an opponent's motivations, or the wider political and legal implications of a case. For example, one lawyer flatly stated "I was just doing my job of representing a client in a unique fact situation, and really, frankly, wasn't concerned with the precedential values that I was establishing" (Guerra, 2004).

Although all of the lawyers discussed the cases in detached legal terms at some point, a lawyer that adamantly sticks to such a frame seems to lack the ability to self-identify as a cause lawyer. This engrained detachment, especially if it is accompanied by a belief in the virtue of such detachment, could limit the lawyer's dedication to a cause, and might increase the chances of bringing the oft discussed negative elements of lawyers and litigation to a movement. This commitment to a professional and neutral frame does not prohibit causes from continuing to view hired guns as resources, but it does speak to the potential limits of their dedication and thus their desirability.

## CONCLUSION

Although multiple interests related to social change and the law gave rise to this chapter, two specific concerns give it its form. The first is a desire to test the traditional limits of cause lawyering by taking an event-centered approach to the subject. As has been noted, this method yielded a collection of lawyers that have heretofore been largely excluded from the cause lawyering category. The second motivation is to test the usefulness of the event-centered approach by asking whether or not it is fruitful to include these previously excluded attorneys in the cause lawyering conversation.

Answering the latter question required discussing the purpose of creating a separate cause lawyering category. This led to the proposal that cause lawyers

should be thought of as movement resources. In terms of this chapter, cause lawyers are distinguished from other attorneys that may be involved in social and political change efforts because they play particularly important, useful, and/or repeat roles in the change processes. Restated, cause lawyers are movement resources with a high degree of utility for, and/or are frequently use by causes. Like previous attempts to define cause lawyers and lawyering, this one is not perfect. It does, however, focus the ongoing cause lawyer definition discussion on the category's purpose of forwarding our understanding of the interaction between movements, law, and change.

In terms of this broader interest, the events studied here provide an example of how social movements can and do appeal to litigation for reasons beyond the desire to establish significant precedent aimed at achieving primary movement goals. Rather, the *Williams*, *Schenck*, and *Hill* cases show that movements also use litigation in relation to more immediate concerns. The example here is of litigation used in an attempt to control the context in which street-level activism takes place. Although the exploration of secondary movement litigation specifically, and movement-counter-movement conflicts generally, were not the chapter's main focus, they are mentioned because they are interesting avenues for continued research that can expand the study of movements, law, and change.

With regard to the chapter's primary goals, the lawyers involved in these conflicts were considered in relation to established and emergent cause lawyer qualities. The process of seeing whether or not these attorneys exhibited specific cause lawyer qualities helped to introduce two variables that should be of interest for those who study cause lawyers – the effect of movements upon the lawyers' political beliefs (which has begun to be discussed elsewhere in the literature), and lawyers' adoption of movement rhetoric and frames. Both of these qualities are of interest, in part, because there is reason to believe that they can act as measures for lawyers' potential and actual dedication and integration into a movement. The exploration of these qualities also illustrates and draws attention to a process approach for understanding cause lawyers.

The lawyer interviews offer descriptions of ways in which experiences with social movements can shape and deepen the sense of commitment that traditional and non-traditional cause lawyers feel toward a particular cause or movement. Much cause lawyering research assumes that the lawyers come to their work already committed to their particular cause, and that the commitment remains relatively constant over time. The lawyers studied here suggest that, at least for some cause lawyers, their commitment to the cause is an ongoing and ever-changing process.

For example, these cases demonstrate how movement outsiders can, to varying degrees, become increasingly dedicated to causes and incorporated into movements. The large firm hired gun attorneys from the *Williams* case were not interested in the politics of abortion and did not seek to become parties to the ongoing political fight. They were, however, repeatedly involved in movement-related litigation through their supposed one-time participation in the *Williams* case. This involvement had an effect on their political beliefs and pushed them closer to being understood as cause lawyers. Lawyers for the State of Colorado were also not specifically cause motivated, but they too developed certain cause lawyer qualities through their work on the *Hill* case. Finally, a more complete conversion is seen in Glen Murray who came to the *Schenck* case without an activist's motivation, but who eventually became deeply involved in the Pro-Choice Network of Western New York.

Given the sample size and the nature of the questions asked in the interviews, conclusive causal claims cannot be made concerning the importance of the emergent cause lawyer qualities, the continual and ever-changing process of dedication and integration, or the utility of the event-centered approach to cause lawyering. In spite of this, the chapter has much to offer regarding each of these areas. First, the discussions of how the emergent and established qualities bear out in the selected lawyers give reasons to believe that the emergent qualities can provide fruitful lines of inquiry into cause lawyering and its relationship to movements. This chapter has also shown that there is value in studying legal movement outsiders through the cause lawyering lens. State and hired gun attorneys were important parts of these conflicts and had varying degrees of actual and potential connection to the abortion-rights movement. The question of whether state and hired gun lawyers can be more fully incorporated and become dependable movement actors, as well as more generally determining what accounts for variations in commitment and integration, is worth further study. Finally, considering the above, the chapter gives reason to believe that the event-centered approach to cause lawyering, when critically employed, produces interesting findings concerning the relationship between lawyers, movements, law, and change. As a result, it is a method that should continue to be used and developed.

## NOTES

1. Emphasis in original.
2. I have chosen to refer to the opposing sides of this conflict as "anti-abortion" and "abortion-rights" as opposed to the "Pro-Life Movement" and the "Pro-Choice

Movement.'' Although these labels are less common, they are more directly related to the subject of contention – the legality of abortion.

3. The role of state lawyers as cause lawyers has, however, been more formally studied in other countries. See, for example, Courtis (2006) and Grinover (2009).

4. See Wilson (2006). ProQuest Dissertations & Theses Database. Publication Number AAT 3254265, ProQuest ID Number 1283960381.

5. Precedent value was an important consideration in the original research project.

6. Like precedent value, the hypothetical scenarios were part of the original project and not much of a concern in relation to the current study.

7. 67 minutes to be precise.

8. For example, the National Organization for Women's attempt to use Federal anti-racketeering laws against anti-abortion activists.

9. The eight cases heard by the Court are *Frisby v. Schultz*, 487 US 474 (1988), *Bray v. Alexandria Women's Health Clinic* 506 US 263 (1993), *National Organization for Women, Inc. v. Scheidler*, 510 US 249 (1994), *Madsen v. Women's Health Center, Inc.*, 512 US 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 US 357 (1997), *Hill v. Colorado*, 530 US 703 (2000), *Scheidler v. National Organization for Women* 537 US 393 (2003), and *National Organization for Women v. Scheidler*, 547 US ___ (2006).

10. The three dissenting opinion are *Winfield v. Kaplan*, 512 US 1253 (1994), *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 US 1133 (1997), and *Cloer v. Gynecology Clinic, Inc.*, 528 US 1099 (2000). Justice Scalia authored, and was joined by Justice Thomas in all three of these opinions. Justice Kennedy joined Scalia and Thomas in *Winfield* and *Williams*. The two concurring opinions, both authored by Justice Scalia, are *Lawson v. Murray*, 515 US 1110 (1995), *Lawson v. Murray*, 525 US 955 (1998).

11. ''Sidewalk counseling'' refers to the attempts by anti-abortion activists to distribute materials (in this case, pamphlets and small plastic fetuses) and talk directly with the people going in and out of the clinic.

12. I use the term ''reproductive rights groups'' because Karen Ryer was involved with more than just abortion-rights groups. For example, she did significant work related to ''alternative reproduction … sperm banks … [and] lesbian custody rights'' (Ryer, 2004).

13. Professor Marcus was not interviewed for this study.

14. In the interest of making another connection between the cases, Ms. Hill, the named plaintiff in the Colorado case, authored a pamphlet on how to conduct sidewalk counseling that was used in instructing anti-abortion activists in Western New York.

15. Prominent examples of the former can be found in the work of Michael McCann and Gerald Rosenberg (McCann, 1994; Rosenberg, 1991). Examples of the latter are also easily found in much of the cause lawyering literature (e.g. Barclay & Marshall, 2005). The reason for this is simple. One of the most intuitive and safest places to find clearly defined cause lawyers is in precedent setting cases pursued by established movement organizations.

16. When a movement pins its hopes to a precedent setting case, the potential for an all-or-nothing ruling significantly raises risks and has the potential to produce few benefits. For example, the strategy is expensive and draws resources away from other

movement options; there is a definite threat that the largely non-inclusive nature of litigation will result in the lawyers becoming the movement's central figures, leaving the movement's rank-and-file, and potentially its traditional leaders, feeling excluded and unnecessary; and any change that is won via the courts is likely to be piecemeal, challengeable, and in need of support to be enforced.

17. Emphasis added.

18. *Roe v. Wade* (1973), *Webster v. Reproductive Health Services* (1989), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Gonzales v. Carhart* (2007) by contrast, are examples of cases that more directly address the social movements' primary aims. As a result, one can consider the *Williams*, *Schenck*, and *Hill* cases to be secondary movement litigation. Labeling them as secondary movement litigation does not deny that these cases are high stakes, politically passionate affairs that are intimately entwined with broader abortion politics. In the eyes of anti-abortion activists, defeat could mean the effective end to the most visible and participatory aspect of their movement. For the clinics and their supporters, defeat would signal not only the persistence of the perceived standing threat to the individuals at clinics, but it could also foreshadow a general threat to the security of abortion rights within the Unites States. Jurisprudentially, however, the outcomes of these cases determine the means by which *any* activists can pursue their cause and the extent to which the targets of their activism can use state power to fight back. As such, these cases reflect the movement-countermovement nature of the dispute, and are a good example of an interesting and often overlooked way in which movements can strategically employ litigation, and thus lawyers.

19. Lucinda Finley was a law professor while she worked on the *Schenck* case. James Duane left small firm private practice for an academic position with Regent Law School – a conservative Christian law school closely affiliated with the American Center for Law and Justice – midway through the *Schenck* case. In spite of his current academic position and connection to the ACLJ, he is included in the small firm category since that is the position that he held while working on the *Schenck* case.

20. As aforementioned, conservative cause lawyers have also been largely excluded from the cause lawyer research. I argue that this has more to do with a scholarly oversight and the previous lack of organized conservative movements and public interest law firms than it does with the inherent qualities of such lawyers. The remainder of the chapter will illustrate that the conservative lawyers interviewed here are fairly easily identified as traditional cause lawyers. As a result, they will not be highlighted to the same degree as government and large firm lawyers.

21. Glen Murray, for example, has become a sort of Pro-Choice Network spokesman and historian – often appearing in articles and keeping his own detailed records of the organization's activities.

22. This is worth noting since some respondents did not see the case as primarily concerning abortion politics.

23. Emphasis added.

24. Entrusting the state with protecting one's interests in court, however, comes with the costs of not having direct control over litigation.

25. Kevin Den Dulk briefly addresses the options that cause lawyers face when state lawyers represent the movement's interests from the anti-abortion cause lawyer's perspective (Den Dulk, 2006, pp. 212–214).

26. Admittedly, the lack of past- and future-related casework for the state lawyer who remained with the government exposes a possible serious problem for considering state lawyers as potential cause lawyers.

27. Sufficient information on the matter was not present for two of the interview subjects.

28. The one state lawyer who reported that she was interested in abortion politics before this case, and that her beliefs were intensified by her experience of working on the *Hill* case, is excluded from this group since she did not see herself as an abortion-rights cause lawyer and she did not have further opportunities to work on similar cases.

29. For a more extensive discussion of movement language within these cases, see Wilson (2006).

30. This quote directly reflects the frustration expressed by a ground level activists involved in the *Schenck* case concerning what she saw as the unwillingness of the protestors to challenge the moral authority of the injunction by accepting the penalty for breaching it. "I think making your stand and taking it on the chin is the way to do it … I didn't have much respect for them … And that in a way made it all the more aggravating that they were getting away with stuff" (Conant, 2004).

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# APPENDIX

***Table A1.*** Measures of Substantive Cause Lawyer Qualities.

| Lawyer, Case, and Interest Represented | Professional Position at the Time of Case | Idealistic or Cause-Motivation for Becoming a Lawyer | Self-Identify as an Activist Through Legal Work | Other Abortion Politics-Related Legal Work | Connection to Wider Movement Network | Effect on View of Abortion Politics | Adoption of Movement Rhetoric or Frame |
|---|---|---|---|---|---|---|---|
| Behr (*Schenck*, anti-abortion) | Solo/small firm | No | Yes | Yes | Yes | Yes | Yes |
| Duane (*Schenck*, anti-abortion) | Solo/small firm | No | Yes | Yes | Yes | Yes | Yes |
| Secola (*Schenck*, anti-abortion) | Solo/small firm and public interest affiliated | No | Yes | Yes | Yes | Yes | No |
| Street (*Williams*, anti-abortion) | Solo/small firm | No | Yes | Yes | Yes | Yes | Yes |
| Westlund (*Hill*, anti-abortion) | Solo/small firm | Yes (general and abortion) | Yes | Yes | Yes | Yes | Mixed |
| Henderson (*Hill*, anti-abortion) | Public interest | Yes (to serve God) | Conflicted | Yes | Yes | Unknown | Yes |
| Murray (*Schenck*, clinic) | Solo/small firm | No | Yes | Yes | None reported | Yes | Yes |
| Finley (*Schenck*, clinic) | Academic | Yes (general) | Yes | Yes | Yes | Yes | Yes |
| Ryer (*Williams*, clinic) | Solo/small firm | Yes (general) | Yes | Yes | Yes | Yes | Yes |
| Robinson (*Williams*, clinic) | Large firm | Yes (general) | No | Yes | None reported | Yes | No |
| Guerra (*Williams*, clinic) | Large firm | No | No | Yes | None reported | Yes | No |
| McLachlan (*Hill*, clinic/state) | State | Yes (general) | Conflicted | Yes | Yes | Unknown | Mixed |
| Angel (*Hill*, clinic/state) | State | Yes (general) | Conflicted | No | Yes | Yes | Mixed |