

## GOVERNMENT LAWYER AS CAUSE LAWYER: A STUDY OF THREE HIGH PROFILE GOVERNMENT LAWSUITS

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### INTRODUCTION

Since at least the early part of the twentieth century, lawyers have attempted to use the law, litigation, and courts as tools to effectuate social change. The best-known early examples are the campaigns by the NAACP to end segregated schools and the ACLU for women's and reproductive rights. By the 1960s and 1970s, politically left-of-center lawyers were engaged with a wide range of community-based and other organizations, using both familiar and new tactics in an effort to extend the social change-through-law efforts of their predecessors. And, by the late 1980s and 1990s, activist lawyers situated politically on the right began to engage in similar activities, often mimicking overtly the tactics of their predecessors on the left. The result, at present, is an extremely broad and deep array of lawyers who use an equally vast array of approaches and tactics to achieve social and political goals across the ideological spectrum.

About a decade ago, legal sociologists Austin Sarat and Stuart Scheingold gave name to this broad group of lawyers who seek to use legal means in order to achieve social change. In a series of collections now numbering five, Sarat and Scheingold have demonstrated the impressive range of the work of what they refer to as "cause lawyers."<sup>1</sup> In keeping with that diversity, the editors, along with those who have contributed to their project, have avoided a rigid and all-purpose definition of "cause lawyering." Nonetheless, at least one observation can be made after briefly surveying the range of contributions to the cause lawyering

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1. CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter Sarat & Scheingold, GLOBAL ERA]; CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Sarat & Scheingold, CAUSE LAWYERING]; CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006) [hereinafter Sarat & Scheingold, SOCIAL MOVEMENTS]; THE CULTURAL LIVES OF CAUSE LAWYERS (Austin Sarat & Stuart Scheingold eds., 2008) [hereinafter Sarat & Scheingold, CULTURAL LIVES]; THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005) [hereinafter Sarat & Scheingold, STRUCTURE AND AGENCY]. The editors also offered their own mid-stream assessment of the cause lawyering project in STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004) [hereinafter SCHEINGOLD & SARAT, SOMETHING TO BELIEVE].

series. While a small number of the contributions in the series focus on the work of government lawyers, these all involve the work of lawyers in “emerging democracies,” or regimes in which the rule of law is not well established.<sup>2</sup> Indeed, none of the contributions to the series which focus on the work of lawyers in western democracies, where the rule of law is well established, focus directly on the role of government lawyers.<sup>3</sup> Thus, one of the two major questions addressed by this paper is whether it may be appropriate, in some circumstances, to treat government lawyers in regimes where the rule of law is well established, such as the United States, as cause lawyers.

At first blush, it would appear that the answer to this question should be no. After all, in some of their roles, government lawyers would appear to be the antithesis of cause lawyers. When they defend government officials and agencies charged with wrongdoing, or defend existing statutes and regulations against legal challenges, government lawyers would appear to be the ultimate defenders of the status quo. And government lawyers certainly lack the “outsider” status that appears to be a hallmark of many cause lawyers.

On the other hand, in other contexts, certain government lawyers do appear to invoke the law, litigation, and courts to achieve social change. First, where the government itself or its entities are engaged in pursuing a progressive social change agenda, government lawyers’ defense of that agenda looks similar to the work of non-governmental cause lawyers who represent and defend activists who pursue social change outside of the government.<sup>4</sup> Additionally, government lawyers may invoke their public authority to initiate their own legal campaigns designed to alter some aspect of the social, economic, or political status quo. Indeed, in doing so, the work of these latter government lawyers often bears more than a faint resemblance to the work of the first generation of cause lawyers identified above. Thus, a closer look at the work of government lawyers who overtly use the law and their government positions to achieve social change is warranted.

The method used to achieve this goal will be familiar to those acquainted with the cause lawyering series: the case study. More particularly, Part I of this paper will begin with relatively detailed descriptions of three legal actions initiated by government lawyers which appear to

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2. See, e.g., Yoav Dotan, *The Global Language of Human Rights: Patterns of Cooperation Between State and Civil Rights Lawyers in Israel*, in Sarat & Scheingold, *GLOBAL ERA*, *supra* note 1, at 246 (discussing cooperation between Israeli civil rights lawyers and lawyers within Israel’s Attorney General’s office in an effort to protect the civil rights of Palestinians in the Occupied Territories); Lucie White, *Two Worlds of Ghanaian Cause Lawyers*, in Sarat & Scheingold, *GLOBAL ERA*, *supra* note 1, at 35 (discussing elite lawyers who work within government agencies on matters of economic development policies in an effort to raise Ghanaian standards of living).

3. See Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 *LAW & SOC. INQUIRY* 657, 661 n.5 (2004) [hereinafter Hilbink, *Categories*] (noting the absence).

4. Thanks to my colleague Eric Mitnick for pointing this out to me.

have fairly transparent social change objectives.<sup>5</sup> The first case described will be Mississippi Attorney General Mike Moore's lawsuit against the tobacco industry.<sup>6</sup> The second case described will be the City of Chicago's lawsuit against the gun industry.<sup>7</sup> And the third case described will be then New York Attorney General Eliot Spitzer's legal action against financial services firm Merrill Lynch, relating to conflicts of interest regarding research analyst information provided by the company.<sup>8</sup>

Once these cases are presented, an effort will be made to situate these legal actions within the cause lawyering literature.<sup>9</sup> First, a general comparison between government lawyers and certain cause lawyers will be drawn.<sup>10</sup> Next, the paper will rely on political science Professor Thomas Hilbink's typology of cause lawyering,<sup>11</sup> as well as Sarat and Scheingold's own typology, offered in their mid-series synopsis regarding the cause lawyering project,<sup>12</sup> to further compare the government lawyers studied here and cause lawyers more generally. After conducting these comparisons, the conclusion will be reached that despite distinctions with paradigmatic cause lawyering efforts, the three government legal actions presented here may appropriately be considered a form of what Hilbink describes as "elite/vanguard" cause lawyering.<sup>13</sup>

This conclusion, however, raises a second major question for this paper to address. Even assuming that government lawyers, in some circumstances, may appropriately be categorized as cause lawyers, the question arises as to how effective they may be acting in that role. In a similarly broad and deep literature that overlaps with the cause lawyering project, commentators have questioned the effectiveness of cause lawyers generally in achieving their social change objectives. Perhaps the best-known work to raise this argument is Professor Gerald Rosenberg's *The Hollow Hope: Can Courts Achieve Social Change?*<sup>14</sup> In this volume, Rosenberg relies on large amounts of data to contend that some of the best known elite/vanguard cause lawyering campaigns, including

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5. See *infra* Part I.A.

6. See *infra* Part I.A.1.

7. See *infra* Part I.A.2.

8. See *infra* Part I.A.3.

9. See *infra* Part I.B.

10. See *infra* Part I.B.1.

11. See *infra* Part I.B.2; Hilbink, *Categories*, *supra* note 3, at 661.

12. See *infra* Part I.B.3; SCHEINGOLD & SARAT, *SOMETHING TO BELIEVE*, *supra* note 1, at 98, 101, 107.

13. See *infra* Part I.C; Hilbink, *Categories*, *supra* note 3, at 673.

14. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1st ed. 1991) [hereinafter ROSENBERG, *THE HOLLOW HOPE*]. A second edition of the book was recently published. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008) [hereinafter ROSENBERG, *THE HOLLOW HOPE 2*]. The second edition differs from the first only in adding two new chapters dealing with the legal campaign to achieve same-sex marriage rights. See *id.* at xi. For that reason, references throughout the remainder of this paper will be to the first edition, unless otherwise stated.

some of those identified at the outset of this paper, failed to achieve their objectives.

By contrast, a number of other writers, including Sarat,<sup>15</sup> Scheingold,<sup>16</sup> and most frequently, University of Washington political science Professor Michael McCann,<sup>17</sup> have challenged Rosenberg's conclusions. They suggest that the aggregate and quantitative approach taken by Rosenberg fails to capture the entirety of the ways in which social change can come about through law, and suggest an alternative "cultural approach" in order to recognize what are often subtle and nuanced changes that can result from legal action.

In Part II, this paper will rely primarily on the work of Rosenberg and McCann to evaluate the effectiveness of the three government litigation actions described in the previous Part. After describing the work of these authors generally,<sup>18</sup> the three cases that are the focus here will be analyzed through the frames offered by these authors.<sup>19</sup> The primary question will be whether some of the factors that cause government lawyers to fit uneasily within the category of cause lawyers, might nonetheless allow such lawyers to transcend some of the limits described by Rosenberg and others on the effectiveness of cause lawyers in achieving their social change objectives.<sup>20</sup> The conclusion will be that while government lawyers may enjoy some advantages in achieving their social change objectives that other cause lawyers do not, nonetheless, such lawyers still face significant limitations in their ability to achieve broad social change objectives through litigation.<sup>21</sup>

By demonstrating that it is appropriate in some circumstances to think of government lawyers as cause lawyers, it is hoped that some social change oriented lawyers will be convinced to pursue their objectives through government service. On the other hand, the final part of this paper provides a caution to such lawyers that government service will not absolve them of making the difficult strategic judgments required of all successful cause lawyers.

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15. See, e.g., Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. (SPECIAL ISSUE) 3, 7, 11 & n.39 (2001).

16. See, e.g., Stuart A. Scheingold, *Essay for the In-Print Symposium on the Myth of Moral Justice*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 47, 47 (2006) (reviewing THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR SYSTEM FAILS TO DO WHAT'S RIGHT* (2004)).

17. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 716 (1992) [hereinafter McCann, *Reform Litigation*] (reviewing ROSENBERG, *THE HOLLOW HOPE*, *supra* note 14); Michael W. McCann, *Causal Versus Constitutive Explanations (or, on the Difficulty of Being So Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 477-78 (1996); see Michael W. McCann, *Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research*, in *LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE* 319, 328-29 (David A. Schultz ed., 1998).

18. See *infra* Part II.A.1-2.

19. See *infra* Part II.B.

20. See *infra* Part II.C.

21. See *infra* CONCLUSION.

## I. CAN GOVERNMENT LAWYERS BE CAUSE LAWYERS?

This Part of the paper begins by offering descriptions of three high-profile government litigation campaigns which arguably fall within the category of cause lawyering. Next, it compares government lawyering to cause lawyering more generally, and then analyzes the three cases under discussion in conjunction with the typologies of cause lawyering offered by scholars Thomas Hilbink, and Austin Sarat, and Stuart Scheingold. It ends by concluding that the three cases in question offer examples of government cause lawyering.

A. *The Cases*

This section of the paper offers presentations of three high-profile government legal campaigns, each of which appears to have been motivated by social change objectives. The cases presented are Mississippi Attorney General Mike Moore's lawsuit against the tobacco industry, the City of Chicago's lawsuit against the gun industry, and New York Attorney General Eliot Spitzer's actions against financial services firm Merrill Lynch, regarding conflicts of interest in the provision of research analyst information.

## 1. Michael Moore v. American Tobacco Company

On May 23, 1994, Mississippi Attorney General Mike Moore filed what became the first of many lawsuits by states against the tobacco industry.<sup>22</sup> For Moore, the lawsuit was clearly about social change. To him, the tobacco industry was to blame for a public health crisis caused by cigarette smoking.<sup>23</sup> Yet to date, the industry had gotten a free ride—avoiding all responsibility for the harm it had caused.<sup>24</sup> Moore also viewed the situation in personal terms. He was offended by what he saw as efforts by the tobacco companies to attract young children, like his own, to become smokers.<sup>25</sup> However, Moore was not interested in a high-profile public relations campaign against the industry, a new push for increased regulation, or other effort that might cause the industry to change its practices.<sup>26</sup> Rather, Moore turned to litigation and the courts

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22. See CARRICK MOLLENKAMP, ADAM LEVY, JOSEPH MENN & JEFFREY ROTHFEDER, *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS* 30 (spec. ed. 2006) [hereinafter MOLLENKAMP, *THE PEOPLE*]; DAN ZEGART, *CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY* 141 (2000) [hereinafter ZEGART, *CIVIL WARRIORS*]; Complaint, *Moore v. Am. Tobacco Co.*, No. 94-1429 (Jackson County Ch. Ct. May 23, 1994), available at <http://www.library.ucsf.edu/tobacco/litigation/ms/2moore.html> (last visited Dec. 22, 2008).

23. See MOLLENKAMP, *THE PEOPLE*, *supra* note 22, at 30.

24. See *id.*

25. See ZEGART, *CIVIL WARRIORS*, *supra* note 22, at 140.

26. See *id.* at 141.

to force the tobacco companies to accept responsibility for their prior conduct and change their practices.<sup>27</sup>

Of course by this time, the tobacco industry was far from being new to litigation. For decades, individual and groups of smokers had sued tobacco companies on a variety of theories.<sup>28</sup> Such theories included negligence, breach of express and implied warranties, deceit, failure to warn, and strict liability.<sup>29</sup> However, prior to the filing of the Mississippi suit, no plaintiff was successful in having a jury verdict sustained against a tobacco company.<sup>30</sup> Early on, plaintiffs had difficulty proving a causal link between cigarette smoking and disease.<sup>31</sup> Later, cigarette companies contended that they could not reasonably have foreseen the harm that could be caused by cigarettes.<sup>32</sup> Though the Surgeon General's 1964 report linking cigarette smoking and cancer would greatly diminish these defenses,<sup>33</sup> the 1965 Federal Cigarette Labeling and Advertising Act,<sup>34</sup> which among other provisions, compelled placement of the well-known warning label on cigarette packages and advertisements,<sup>35</sup> preempted most failure-to-warn claims.<sup>36</sup> Perhaps the most successful defense offered by the cigarette manufacturers involved variations on the assumption of risk doctrine—the argument that smokers chose to smoke despite awareness of potential adverse health effects, and therefore were legally responsible for their own illnesses.<sup>37</sup>

Aside from the legal defenses asserted by the tobacco companies, their manner of litigating cases was perhaps an even greater impediment

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27. See MOLLENKAMP, *THE PEOPLE*, *supra* note 22, at 30 (demonstrating Moore's desire to see the tobacco companies pay what they owe); see also ZEGART, *CIVIL WARRIORS*, *supra* note 22, at 141 (challenging the other lawyers to see the litigation through to the end).

28. See Stephen D. Sugarman, *Comparing Tobacco & Gun Litigation*, in *SUING THE GUN INDUSTRY* 196, 215 (Timothy D. Lytton ed., 2005) [hereinafter *SUING THE GUN INDUSTRY*].

29. See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 *STAN. L. & POL'Y REV.* 63, 71 (1997); Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 *CORNELL L. REV.* 1334, 1338-40 (2001); John J. Zefutie, Jr., Comment, *From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 *SETON HALL L. REV.* 1383, 1387-88 (2004).

30. See Kelder & Daynard, *supra* note 29, at 76; Robert L. Rabin, Essay, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *STAN. L. REV.* 853, 854 & n.11 (1992).

31. Kelder & Daynard, *supra* note 29, at 71; Peter Pringle, Essay, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 *WM. MITCHELL L. REV.* 387, 389 (1999); Zefutie, *supra* note 29, at 1387.

32. Jensen, *supra* note 29, at 1339 (discussing *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963)); Rabin, *supra* note 30, at 860-61 (discussing *Lartigue*, 317 F.2d 19).

33. See PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. 1103, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* 229-32 (1964).

34. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965).

35. Jensen, *supra* note 29, at 1340-41.

36. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992); see also Jensen, *supra* note 29, at 1342-43 (discussing *Cipollone*).

37. Kelder & Daynard, *supra* note 29, at 71; Zefutie, *supra* note 29, at 1389.

to the ability of plaintiffs to recover from the companies. The tobacco companies resorted to a “scorched earth” style of litigation, in which they were able to exploit their vastly superior resources to those of the plaintiffs and the plaintiffs’ lawyers who challenged them.<sup>38</sup> The tobacco lawyers filed every conceivable motion, contested every conceivable issue, took every imaginable deposition, and demanded every arguably relevant document.<sup>39</sup> The result was, in many cases, simply outlasting the plaintiffs and their lawyers. Indeed, in *Cipollone v. Liggett Group, Inc.*,<sup>40</sup> even after the U.S. Supreme Court allowed most of the plaintiffs’ legal theories to go forward,<sup>41</sup> plaintiffs’ attorneys abandoned the case,<sup>42</sup> nearly a decade after it had originally been filed,<sup>43</sup> and nearly \$3 million worth of attorney and paralegal time and approximately \$150,000 in out-of-pocket expenses had been advanced by plaintiffs’ attorneys.<sup>44</sup>

Despite this history, Moore’s case on behalf of Mississippi offered the potential to sidestep the challenges that had derailed previous lawsuits against the tobacco industry. First, the Mississippi lawsuit was based upon a novel theory of law involving a claim for reimbursement of the State’s Medicaid program for funds expended treating Mississippi residents for smoking-related illnesses.<sup>45</sup> Journalists attribute the development of this theory to Mississippi personal injury lawyer Mike Lewis, who arrived at the theory after visiting the dying mother of a friend of his, who was suffering from cancer after a lifetime of heavy smoking.<sup>46</sup> Lewis noted the tremendous amount of money the State of Mississippi was paying, through its Medicaid program, to treat such smokers, who had exhausted their personal resources in battling their illnesses.<sup>47</sup> Though Lewis is credited with bringing the Medicaid reimbursement theory to his law school classmate Mike Moore’s attention, Southern Illinois University law professor Donald Garner had advanced a similar theory in an obscure law review article published more than a decade and a half earlier.<sup>48</sup> Regardless of its origin, the genius of the Medicaid reimbursement theory was that it deprived the tobacco companies of their strongest defense—namely that the party suing them had chosen to

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38. See Jensen, *supra* note 29, at 1339; Kelder & Daynard, *supra* note 29, at 71; Rabin, *supra* note 30, at 868.

39. See Kelder & Daynard, *supra* note 29, at 71.

40. 505 U.S. 504 (1992).

41. Jensen, *supra* note 29, at 1343.

42. Kelder & Daynard, *supra* note 29, at 72.

43. See *Cipollone*, 505 U.S. at 509; Kelder & Daynard, *supra* note 29, at 72.

44. Kelder & Daynard, *supra* note 29, at 72.

45. Jensen, *supra* note 29, at 1344; Kelder & Daynard, *supra* note 29, at 73; Zefutie, *supra* note 29, at 1392.

46. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 25; Pringle, *supra* note 31, at 392; ZEGART, CIVIL WARRIORS, *supra* note 22, at 92.

47. See MOLLENKAMP, THE PEOPLE, *supra* note 22, at 25; Pringle, *supra* note 31, at 392; ZEGART, CIVIL WARRIORS, *supra* note 22, at 92.

48. Pringle, *supra* note 31, at 393 (discussing Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269 (1977)).

smoke despite knowing of the related health risks.<sup>49</sup> While the individual smoker may have made a “choice” to smoke, the State of Mississippi, which was paying for the smoker’s care, surely had not.<sup>50</sup> Additionally, the theory squared with Mike Moore’s sense of the equities of the situation: the tobacco companies had caused the harm, but the State of Mississippi was paying the cost.<sup>51</sup>

Secondly, though the State of Mississippi would not be able to equal the resources the tobacco companies would bring to bear on the lawsuit, a state party could certainly come closer to matching the industry’s resource advantage than the private litigants who had previously sued the industry. Further, in order to bolster the resources available to support Mississippi’s lawsuit, Moore entered into contingent fee agreements with a number of private attorneys, who in turn agreed to front many of the out-of-pocket costs that would be needed to pursue the case.<sup>52</sup> Among the lawyers who worked on the tobacco litigation with Moore were Mississippi personal injury attorneys Don Barnett, Ron Motley, and Dickie Scruggs.<sup>53</sup> Each of these lawyers had been highly successful in lawsuits involving the asbestos industry, and was anxious to apply what he had learned from asbestos litigation to tobacco litigation.<sup>54</sup> Moreover, their successes in the asbestos suits provided these lawyers’ firms with the resources they would need to take on big tobacco.<sup>55</sup>

Despite potentially having neutralized tobacco’s strongest defense and its historical resource advantages, Moore nonetheless faced other daunting challenges in pursuing the tobacco companies. For example, the politics of a major lawsuit against the tobacco industry were complex for an elected official such as Moore. Though Mississippi was not a major tobacco growing state, it was a conservative southern state, and public opinion was favorable to the tobacco companies.<sup>56</sup> Despite Moore’s status as a rising star on the political scene, he was a Democrat in an overwhelmingly Republican state. Indeed, the political fault lines implicated by Mississippi’s tobacco suit were clearly exposed when Republican Governor Kirk Fordice sued Moore after the lawsuit was filed, challenging his authority to bring the suit on behalf of the State of Missis-

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49. *See id.* at 393-94.

50. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 25, 29.

51. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 30.

52. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 28.

53. *See* ZEGART, CIVIL WARRIORS, *supra* note 22, at 88, 92-93.

54. *See id.* at 93; Pringle, *supra* note 31, at 389.

55. ZEGART, CIVIL WARRIORS, *supra* note 22, at 94; Pringle, *supra* note 31, at 389.

56. Indeed, in the fall of 1993, Dick Morris, who would later achieve notoriety as a political advisor to President Clinton, polled potential jurors in Pascagoula, Mississippi, and found that sixty percent supported the tobacco companies in a potential suit by the State. ZEGART, CIVIL WARRIORS, *supra* note 22, at 140. As a result, the case was eventually filed in Chancery Court, where jury trials were not available. *Id.*

sippi.<sup>57</sup> In any event, it was doubtful that Moore's political star would survive a high profile, unpopular, expensive lawsuit, in the event it was unsuccessful.

On the other hand, at the national level, public opinion had turned strongly against the tobacco companies by the time Moore filed his suit. Already, numerous municipalities had passed ordinances limiting smoking in public places and placing other restrictions on tobacco use.<sup>58</sup> In February 1994, David Kessler, then chairman of the U.S. Food and Drug Administration (FDA), announced that he was considering changing decades of FDA policy and asserting the agency's jurisdiction to regulate tobacco as a drug.<sup>59</sup> Just a few days later, the ABC television news magazine show "Day One" aired a segment charging that cigarette manufacturer Phillip Morris had manipulated the level of nicotine in its cigarettes in order to make its product more addictive.<sup>60</sup> In April, the House of Representatives' Energy and Commerce Subcommittee on Health and the Environment held hearings regarding the tobacco industry.<sup>61</sup> During these hearings, each of the CEOs of the world's seven largest tobacco companies testified under oath that they did not believe that nicotine was addictive,<sup>62</sup> despite overwhelming scientific evidence to the contrary.<sup>63</sup> Indeed, documents produced through tobacco litigation and by whistleblowers from within the tobacco companies subsequently demonstrated both that the companies had long been aware of nicotine's addictive properties, and that they had taken extreme steps to obfuscate public awareness of that fact.<sup>64</sup>

Though Moore's suit on behalf of Mississippi was the first suit by a state against the tobacco companies, it was far from the last. In the end,

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57. *In re Fordice*, 691 So. 2d 429 (Miss. 1997). Fordice argued that as the executive branch official charged with responsibility for the State's Medicaid program, only he could sue on its behalf to recover money expended to treat tobacco-related illnesses. *Id.* at 430. However, the Mississippi Supreme Court declined to exercise its jurisdiction to issue an order preventing Moore from going forward with the tobacco case. *Id.* at 435.

58. Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex-Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1168 (1998); Jody Hodgdon, Notes/Comments, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire*, 3 PIERCE L. REV. 49, 51 (2004) (discussing municipal ordinances that prohibit smoking in restaurants); Jennifer McCullough, Note, *Lighting Up the Battle Against the Tobacco Industry: New Regulations Prohibiting Cigarette Sales to Minors*, 28 RUTGERS L.J. 709, 731-32 (1997) (discussing municipal ordinances in New Jersey regulating tobacco use).

59. See ZEGART, CIVIL WARRIORS, *supra* note 22, at 113; Pringle, *supra* note 31, at 394. The U.S. Supreme Court later ruled that the FDA lacks such authority. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

60. ZEGART, CIVIL WARRIORS, *supra* note 22, at 116-18. Phillip Morris subsequently sued ABC for libel as a result of the allegation. *Id.* at 122. ABC settled the case by issuing a public apology to Phillip Morris for the charges. *Id.* at 180. However, later evidence would more than substantiate the allegation of nicotine manipulation. Kelder & Daynard, *supra* note 29, at 77.

61. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 50.

62. *Id.* at 50-51.

63. E.g., U.S. DEP'T OF HEALTH AND HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL (1988).

64. Kelder & Daynard, *supra* note 29, at 76-77; Pringle, *supra* note 31, at 387-88.

a total of more than forty states brought actions against the tobacco companies.<sup>65</sup> Additionally, around the time the Mississippi case was filed, a new “wave” of private litigation was launched against the tobacco companies.<sup>66</sup> Leading the charge was flamboyant New Orleans personal injury lawyer Wendell Gauthier.<sup>67</sup> Gauthier was the lead attorney in the first nationwide class action lawsuit filed against the industry, *Castano v. American Tobacco Co.*<sup>68</sup> Though the substantive claims raised in the *Castano* case were similar to those that had been raised against tobacco companies previously,<sup>69</sup> the plaintiffs’ lawyers believed that the recently uncovered documents and other evidence regarding the defendants’ malfeasance might yield a different result.<sup>70</sup> Moreover, in order to neutralize the tobacco companies’ resource advantage, Gauthier signed up sixty of the nation’s top plaintiffs’ personal injury firms to participate in the case, each of whom put up \$100,000 to help finance the litigation.<sup>71</sup> Though the U.S. Court of Appeals for the Fifth Circuit eventually denied certification of the nationwide class,<sup>72</sup> the *Castano* lawyers would go on to file statewide class actions in numerous states following the Fifth Circuit’s decision.<sup>73</sup>

The above-described shift in public opinion, the prospect of federal regulation, and the wave of new lawsuits that threatened to bankrupt the industry, achieved something never achieved before: it brought big tobacco to the negotiating table.<sup>74</sup> Mike Moore became the chief negotiator on behalf of a large coalition of tobacco’s foes in pursuing the possibility of a “global settlement” with the industry.<sup>75</sup> Moore was squeezed from both sides in pursuing settlement talks. Public health advocates such as David Kessler, anti-smoking groups, and at least one State Attorney General were against settling, which they believed would let the de-

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65. UNIV. OF CAL. SAN FRANCISCO, TOBACCO CONTROL ARCHIVES, LAWSUIT SUMMARY CHART, <http://www.library.ucsf.edu/tobacco/litigation/summary.html> (last visited Dec. 22, 2008).

66. See Jensen, *supra* note 29, at 1338-43; see also Kelder & Daynard, *supra* note 29, at 71-72 (identifying three “waves” of tobacco related lawsuits); Pringle, *supra* note 31, at 389; Zefutic, *supra* note 29, at 1387-92.

67. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 73; ZEGART, CIVIL WARRIORS, *supra* note 22, at 149-50.

68. 84 F.3d 734 (5th Cir. 1996); see MOLLENKAMP, THE PEOPLE, *supra* note 22, at 73-74. The named plaintiff was a friend of Gauthier’s who had died from smoking related illness. *Id.* at 73.

69. See *Castano*, 84 F.3d at 737-38; MOLLENKAMP, THE PEOPLE, *supra* note 22, at 73.

70. See Pringle, *supra* note 31, at 388-89.

71. *Id.* at 391.

72. See *Castano*, 84 F.3d at 737.

73. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 74; ZEGART, CIVIL WARRIORS, *supra* note 22, at 201; Kelder & Daynard, *supra* note 29, at 72-73; Pringle, *supra* note 31, at 395; Zefutic, *supra* note 29, at 1391.

74. Pringle, *supra* note 31, at 387-88.

75. In March 1996, Liggett Group, one of the smaller tobacco companies, broke ranks with the rest of the industry and settled with Mississippi and four other states for approximately \$26 million. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 57. Liggett was struggling financially and feared that judgments in the lawsuits or the terms of a global settlement would bankrupt it. *Id.* at 58.

defendant tobacco companies off too easily.<sup>76</sup> The companies, in turn, were demanding concessions the plaintiffs were not prepared to give, including immunity from all future lawsuits, whether by public or private parties.<sup>77</sup>

Eventually, after nearly a year of intense, behind-the-scenes negotiations, and merely weeks before the Mississippi case was scheduled to go to trial,<sup>78</sup> Moore announced that a settlement had been reached with the tobacco companies (hereinafter, Master Settlement Agreement or MSA).<sup>79</sup> The settlement called for a payment by the tobacco companies of the staggering sum of \$386.5 billion in order to settle all existing tobacco litigation.<sup>80</sup> In addition to the cash payment, the settlement required numerous changes to the way the tobacco companies did business. Among the changes to be required were the following: banning all outdoor advertising including billboards; limiting magazine ads to black-and-white text in periodicals with no more than fifteen percent youth readership; prohibiting distribution of tobacco through vending machines and free samples; forbidding brand-name sponsorship of cultural and sporting events; prohibiting the industry from paying to place its products in movies or to be named in pop songs; empowering the FDA to regulate the manufacture and sale of tobacco products; and penalizing the industry further if teen smoking rates did not decline to meet specific targets.<sup>81</sup> In exchange for these concessions, in addition to settling existing lawsuits, the industry was to receive an elimination of class-action tobacco lawsuits, a ban on punitive damages awarded based on past actions by the tobacco companies, and a limit on the total amount of damages the industry could be liable for in future lawsuits by smokers to \$5 billion annually.<sup>82</sup>

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76. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 72; ZEGART, CIVIL WARRIORS, *supra* note 22, at 271-72. Minnesota Attorney General Hubert "Skip" Humphrey, III was the most vociferous opponent of settlement within the AG camp. See MOLLENKAMP, THE PEOPLE, *supra* note 22 at 72; ZEGART, CIVIL WARRIORS, *supra* note 22, at 272. However, Humphrey eventually settled his State's suit against tobacco as well, though four months into trial. ZEGART, CIVIL WARRIORS, *supra* note 22, at 321.

77. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 105.

78. On the same day the Mississippi Supreme Court denied Governor Fordice's challenge to the Mississippi suit, the court rejected a similar challenge by the tobacco company defendants to Moore's authority to pursue the Medicaid reimbursement suit in chancery court. See *In re Fordice*, 691 So. 2d 429, 235 (Miss. 1997); *In re Corr-Williams Tobacco Co.*, 691 So. 2d 424, 425-26 (Miss. 1997).

79. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 230-31; ZEGART, CIVIL WARRIORS, *supra* note 22, at 270. Actually, by the time the Master Settlement Agreement was reached, four states, Florida, Mississippi, Texas, and Minnesota, had reached separate settlements with the tobacco companies. See Steven A. Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 NEW ENG. J. MED. 293, 294 (2004).

80. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 236. This amount was to be paid out over a twenty-five-year period. See Zefutie, *supra* note 29, at 1397.

81. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 236-37.

82. *Id.* at 237. A complete copy of the MSA appears in *id.* at 267-317.

However, because federal law governed many of the areas that were addressed by the Master Settlement Agreement, Congressional approval would be required in order to implement the terms of the settlement. Though Senator John McCain sponsored legislation to implement the MSA, the legislation never made it through Congress, due to “lukewarm support by the Clinton administration, ambivalence on the part of the public health community, and vigorous opposition from the tobacco industry . . . .”<sup>83</sup> Eventually, in November 1998, the Attorneys General of the forty-six states that hadn’t yet settled entered into a revised MSA with the tobacco companies.<sup>84</sup> The revised MSA avoided subjects that would require federal legislation, thereby sidestepping the issue of Congressional approval (such as FDA regulation of tobacco, advertising restrictions, etc.). The settlement provided for a sharply reduced payment of \$206 billion to be paid to the states over twenty-five years.<sup>85</sup> It also provided for the dissolution of certain industry promoting entities such as the Tobacco Institute, and prohibited advertising targeted at young people (such as the infamous “Joe Camel” ads).<sup>86</sup>

## 2. Chicago v. Beretta, U.S.A

By 1998, after the tobacco MSA had been entered into, Wendell Gauthier and his colleagues who had collaborated on the *Castano* nationwide class action, the numerous mini-*Castano* suits filed in state courts following the Fifth Circuit’s denial of certification of the nationwide class, and who had also played prominent roles as co-counsel in many of the Medicaid reimbursement suits brought by states, were looking for a new focus for their efforts.<sup>87</sup> The gun industry was a logical choice, as many of the theories pled in the *Castano* tobacco cases might be said to apply equally to the gun industry.<sup>88</sup> Though only about half of the firms who signed on for the tobacco litigation agreed to join the effort against the gun industry,<sup>89</sup> and at a considerably smaller financial stake than was put up in the prior effort,<sup>90</sup> Gauthier was nonetheless able to attract an impressive array of plaintiffs’ firms to join the “Castano Safe Gun Litigation Group.”<sup>91</sup>

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83. Schroeder, *supra* note 79 at 294.

84. *Id.*

85. *Id.*

86. *Id.*

87. See HOWARD M. ERICHSON, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 28, 129, at 129-30, 136.

88. *See id.* at 136.

89. *Id.*

90. Unlike the \$100,000 bounty each firm was required to post to take on the tobacco companies, Bob Van Voris, *Gun Cases Use Tobacco Know-How: New Orleans, Chicago Lead the Charge. Is Alcohol Next?*, NAT’L L.J., Dec. 7, 1998, at A1, the gun litigation only required a pledge of \$50,000, with an initial cash outlay of \$2,500, ERICHSON, *supra* note 87, at 136.

91. ERICHSON, *supra* note 87, at 129-30.

The group wasted little time in filing suit against fifteen gun manufacturers on behalf of Gauthier's home city of New Orleans on Halloween 1998.<sup>92</sup> Eventually, members of the group would also file suits against the gun industry on behalf of the cities of Atlanta, Cleveland, Cincinnati, Newark, and Wilmington.<sup>93</sup> Nonetheless, the focus of the following discussion will not be on any of these cases, but rather on a different lawsuit brought against the gun industry by the City of Chicago and Cook County, Illinois. Unlike the cases brought on behalf of the cities mentioned above, the bulk of the work performed on the lawsuit brought on behalf of the City of Chicago was performed by lawyers within the City Attorney's office, rather than by outside attorneys working pursuant to contingent fee agreements with the various cities.<sup>94</sup> Thus, the Chicago case may present a "purer" example of government lawyers engaged in arguably social-change oriented litigation. Additionally, and perhaps because of the nature of the lawyers involved, the Chicago suit was based expressly on a legal theory that was only available to the plaintiffs by virtue of their status as public entities—namely, public nuisance.<sup>95</sup> By contrast, even when litigating on behalf of municipalities, the *Castano* lawyers nonetheless focused on the same product liability theories that they had focused on in the tobacco cases and had relied on for years in bringing cases on behalf of private parties.<sup>96</sup>

Of course, increases in gun violence had been a major concern for urban municipalities such as Chicago in the decade leading up to the lawsuits filed against the gun industry.<sup>97</sup> Indeed, Chicago had been particularly hard hit by the combination of gangs and guns.<sup>98</sup> In the year prior to the filing of its gun lawsuit, Chicago led the nation with 570 gun homicides.<sup>99</sup> This was despite the fact that Chicago had a significantly smaller population than other major cities.<sup>100</sup> As a result, Chicago's gruff Mayor Richard M. Daley decided that the City needed to pursue

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92. *Id.* at 137.

93. *Id.* at 129.

94. *See id.* at 134.

95. *See id.* at 132.

96. *See id.* at 137.

97. More specifically, there was a dramatic increase in homicides in large cities between the years 1985 and 1993. *See, e.g.,* JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf> (last visited Dec. 22, 2008). Such deaths subsequently dropped significantly between 1993 and 2000, leveling off after that. *Id.* Most of the deaths recorded during the 1985-1993 "spike" were attributable to handgun violence. *See* JULIE SAMIA MAIR, STEPHEN TERET & SHANNON FRATTAROLI, *A Public Health Perspective on Gun Violence Prevention*, in *SUING THE GUN INDUSTRY*, *supra* note 28, 39, at 44-45.

98. *See* David Barstow, *A Chicago Story of Guns, Gangs and Self-Defense: To Destroy or Defend*, ST. PETERSBURG TIMES, Jan. 3, 1999, at 1.A.

99. *Id.*

100. For example, New York had more than three times Chicago's population, yet had fewer gun homicides. *Id.*

social change by taking action against the gun industry.<sup>101</sup> He turned to Deputy Chicago Corporation Counsel Lawrence Rosenthal to lead the effort.<sup>102</sup>

At first, Rosenthal and his colleagues in the Corporation Counsel's office focused on tort theories similar to those relied on by the *Castano* lawyers in the New Orleans case.<sup>103</sup> However, these theories had been no more successful in their prior uses against the gun industry than they had been in early efforts against tobacco companies.<sup>104</sup> Just as tobacco companies had been able to point to individual smokers' decisions to use tobacco products as negating the companies' liability for health harms to smokers, gun manufacturers had been able to point to the wrongful use of handguns by criminals as breaking the causal chain linking the harm to victims of gun violence back to the gun manufacturers.<sup>105</sup>

There were also other reasons to be more sanguine about the prospects for success of suits against the gun industry than for suits against the tobacco companies. First, while the harms resulting from cigarette smoking are uniformly dispersed geographically, as stated above, the brunt of the harms of gun violence are borne by urban areas.<sup>106</sup> Thus, it is no surprise that cities led the charge against the gun industry, rather than states, as was the case in the legal attack against the tobacco companies.<sup>107</sup> Indeed, not only are rural areas differentially impacted by gun violence, but many rural citizens are passionately attached to their firearms and were supporters rather than opponents of the gun industry.<sup>108</sup> This urban/rural split made the prospect of legislative support for a settlement with the gun industry, along the lines of what would have been required to implement the tobacco MSA, questionable at both the state and federal levels.<sup>109</sup> Second, the gun industry was not nearly as large or financially successful as the tobacco industry. While this may have meant less relentless and effective opposition to litigation against the industry, it also made the prospect of a large financial judgment bankrupting the industry a much more realistic prospect than in the case of the

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101. *Id.* Accord Fox Butterfield, *Chicago is Suing Over Guns From Suburbs*, N.Y. TIMES, Nov. 13, 1998, at A18; Linnet Myers, *Go Ahead . . . Make Her Day; With Her Direct Approach and Quiet Confidence, Chicago Lawyer Anne Kimball Gives Gunmakers a Powerful Weapon*, CHI. TRIB., May 2, 1999, at C12.

102. Barstow, *supra* note 98, at 1A; ERICHSON, *supra* note 87, at 134.

103. ERICHSON, *supra* note 87, at 134.

104. *See id.* at 132.

105. *See* Barstow, *supra* note 98, at 1A; Myers, *supra* note 101, at C12; Van Voris, *supra* note 90, at A1.

106. *See supra* text accompanying note 97.

107. *See* ERICHSON, *supra* note 87, at 149; Van Voris, *supra* note 90, at A1. Only New York Attorney General Eliot Spitzer brought a major lawsuit against the gun manufacturers on behalf of a State. *See* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192 (N.Y. App. Div. 2003).

108. *See* ERICHSON, *supra* note 87, at 148.

109. The likely opposition of the powerful lobbying group the National Rifle Association (NRA) would have been another major impediment. *Id.* at 151.

tobacco industry.<sup>110</sup> Finally, and perhaps most importantly, it was clear that even when used in the manner for which they were intended, cigarettes caused harm to both smokers and bystanders (through passive exposure to cigarette smoke). However, guns, by contrast, were said to cause harm only when used improperly, for criminal purposes, rather than for their proper purposes of sporting use or self-defense.<sup>111</sup>

For all of these reasons, Rosenthal soured on the idea of bringing a traditional tort action on behalf of Chicago against the gun industry.<sup>112</sup> In order to find a more promising theory to advance, Rosenthal and his colleagues began scouring data kept by the Chicago police department regarding the more than 17,000 illegal guns it recovers every year.<sup>113</sup> It turned out that large numbers of these guns could be traced to a small number of gun shops located just outside the city's borders.<sup>114</sup> Multiple guns had been sold to "straw purchasers" who in turn provided the guns to gang members and other criminals.<sup>115</sup> The lawyers became convinced that gun manufacturers and distributors were deliberately oversupplying suburban gun shops with products that, given the lack of demand for them in the suburbs, would naturally end up in Chicago, in violation of the city's ordinance.<sup>116</sup> Rosenthal began to think of the excess supply of guns in terms of air pollution, floating from a smokestack located downwind from the city, but leaving its harmful residue within the city limits.<sup>117</sup> In such circumstances, public nuisance would be the appropriate legal claim to pursue. Once word got out that Chicago was pursuing the public nuisance theory in relation to the gun industry, Rosenthal received an offer of assistance from Temple University Law School professor David Kairys.<sup>118</sup> Kairys had been working with the City of Philadelphia in developing a similar theory on behalf of Philadelphia's efforts to address its growing gun violence problem.<sup>119</sup> Philadelphia had declined to file suit against the gun industry by the time Chicago filed its suit,<sup>120</sup> and

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110. Butterfield, *supra* note 101, at A18; Sugarman, *supra* note 28, at 207; Van Voris, *supra* note 90, at A1.

111. Myers, *supra* note 101, at C12.

112. *Id.*

113. Barstow, *supra* note 98, at 1A. Since 1982, Chicago has had a city ordinance that virtually bans gun ownership in the City. *Id.*; see Butterfield, *supra* note 101, at A18.

114. Barstow, *supra* note 98, at 1A.

115. *Id.*

116. Butterfield, *supra* note 101, at A18; Van Voris, *supra* note 90, at 1A.

117. Barstow, *supra* note 98, at 1A; Butterfield, *supra* note 101, at A18.

118. ERICHSON, *supra* note 87, at 134.

119. *Id.* at 132-33. For an academic presentation of Kairys' version of the theory, see David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175 (2000).

120. Some have speculated that Philadelphia Mayor Ed Rendell backed down from suing the gun manufacturers due to his gubernatorial aspirations and fears that such a suit would alienate the rural and suburban voters whose support Rendell would need in order to be successful. ERICHSON, *supra* note 87, at 133. Rendell's successor would eventually file suit on behalf of the City against the gun industry. See *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419 (3d Cir. 2002).

Kairys ended up working with Rosenthal in putting the Chicago case together.<sup>121</sup>

In order to support the city's public nuisance theory, Rosenthal made use of the City Police Department's investigative resources. City police officers launched an undercover investigation in which they posed as gang members and other criminals, and went to many of the suburban gun shops that had previously been identified to purchase guns for what the undercover officers expressly described to the sellers to be illegal purposes.<sup>122</sup> The undercover officers easily purchased the required firearms. Based on this data, the city filed suit, contending that gun manufacturers, distributors, and retailers engaged in sales, supply, and marketing practices pursuant to which they knowingly caused guns to be imported to and used illegally in Chicago for criminal purposes.<sup>123</sup>

Not surprisingly, the gun industry responded by moving to dismiss the city's complaint. First, the defendants argued that all of the gun sales identified by the city were legal in themselves—compliant with the very broad range of federal and state regulations governing the purchase and sale of guns.<sup>124</sup> As such, they contended, these activities could not properly be deemed a public nuisance. Additionally, the defendants contended that the intervening actions of criminals who improperly used their products broke the causal chain between the manufacture, distribution, and sale of the guns and the harm suffered by the plaintiff.<sup>125</sup> Finally, the defendants challenged the theories of economic recovery advanced by the city.<sup>126</sup>

In a judgment without a supporting opinion, the trial court granted the defendants' motions to dismiss the case.<sup>127</sup> The city and county appealed, and the Illinois Appellate Court reversed, finding that the second

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121. ERICHSON, *supra* note 87, at 134.

122. Barstow, *supra* note 98, at 1A; Butterfield, *supra* note 101, at A18; Myers, *supra* note 101, at C12; Van Voris, *supra* note 90, at A1.

123. Second Amended Complaint ¶ 1, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596).

124. See The Sports Authority's Section 2-615 and 2-619 Motion to Dismiss Second Amended Complaint at II.B., *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596) [hereinafter *Retailers Motion to Dismiss*], 2000 WL 34611549; *Manufacturer Defendants' Section 2-615 Motion to Dismiss Plaintiffs' Second Amended Complaint ¶ 2*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596) [hereinafter *Manufacturers' Motion to Dismiss*], 2000 WL 34017053; *Distributors' Consolidated Motion to Dismiss Counts I and II of the Second Amended Complaint Pursuant to § 2-615 of the Illinois Code of Civil Procedure, at II.1.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596) [hereinafter *Distributors' Motion to Dismiss*], 2000 WL 34017038.

125. *Retailers Motion to Dismiss*, *supra* note 124, at II.D., F.; *Manufacturers' Motion to Dismiss*, *supra* note 124, ¶ 4; *Distributors' Motion to Dismiss*, *supra* note 124, at II.2.

126. *Retailers Motion to Dismiss*, *supra* note 124, at II.G.; *Manufacturers' Motion to Dismiss*, *supra* note 124, ¶ 4; *Distributors' Motion to Dismiss*, *supra* note 124, at II.3.

127. *City of Chicago v. Beretta U.S.A. Corp.*, 2000 WL 35509506 (Ill. Cir.) (Sept. 15, 2000) (Trial Order).

amended complaint did state a cause of action for public nuisance.<sup>128</sup> The defendants, in turn, appealed to the Illinois Supreme Court. In a lengthy opinion, the court reversed the judgment of the appellate court, and affirmed the judgment of the trial court dismissing the case.<sup>129</sup> First, the court determined that in order to state a claim for public nuisance, the plaintiffs would have to show negligent conduct on the part of the defendants.<sup>130</sup> However, the court found the defendants were not negligent for a variety of reasons. First, the court found that the defendant manufacturers and distributors did not owe a duty of care to the public at large “to prevent their firearms from ‘ending up in the hands of persons who use and possess them illegally.’”<sup>131</sup> Additionally, the court concluded that the conduct of the defendants should not be viewed as the proximate cause of the harm alleged by the plaintiffs, where their lawfully sold products were illegally taken into the city and used by persons not under the control of the defendants.<sup>132</sup> After addressing the negligence question, the court also rejected a number of the remedial claims advanced by the plaintiffs.<sup>133</sup> For example, the Court found that under the economic loss doctrine,<sup>134</sup> plaintiffs would not be permitted to recover on a public nuisance theory for purely economic losses of the type alleged in the complaint.<sup>135</sup> The Court also ruled that under the municipal cost recovery rule,<sup>136</sup> the plaintiffs would not be permitted to recover in tort for the public expenditures made in performance of governmental functions of the sort described above.<sup>137</sup> Thus, the City was left with few tangible results from its efforts against the gun industry.

Few of the other cities to file lawsuits against the gun industry were more successful in their efforts than Chicago was. The Ohio Supreme Court ruled that the City of Cincinnati could go forward with its public

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128. *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 31 (Ill. App. Ct. 2003), *rev'd*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). The plaintiffs had not appealed from the dismissal of their claim for negligent entrustment from the First Amended Complaint. *Id.* at 20.

129. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004).

130. *Id.* at 1124.

131. *Id.* at 1126. The Court did not decide the question whether gun retailers owe such a duty to the public at large. *See id.* at 1126-27.

132. *Id.* at 1136.

133. *Id.* at 1143-44. The plaintiffs had claimed more than \$433 million in operating expenses relating the alleged public nuisance created by the defendants during the years 1994-98. *Id.* at 1138. This amount included expenses for emergency communications and response, health care treatment provided to the victims of gun violence, police investigations, and the costs of prosecuting and defending those accused of gun crimes. *Id.* at 1138-39.

134. Under the economic loss doctrine, where a tortfeasor's negligence causes no harm to the person or property of the plaintiff, the plaintiff may not recover for purely economic losses. *See, e.g.*, 65 C.J.S. *Negligence* § 58 (2008).

135. *City of Chicago*, 821 N.E.2d at 1143.

136. Under the municipal cost recovery rule, a government cannot recover the costs of carrying out public services from a tortfeasor who caused the need to provide the services. *See, e.g.*, Barbara J. Van Arsdale, Annotation, *Construction and Application of "Municipal Cost Recovery Rule," or "Free Public Services Doctrine"*, 32 A.L.R. 6th 261 (2008).

137. *City of Chicago*, 821 N.E.2d at 1146-47.

nuisance claims against the gun industry.<sup>138</sup> Despite this fact, Cincinnati dropped its suit a short while later.<sup>139</sup> Similarly, the Indiana Supreme Court ruled that the City of Gary could go forward with its gun lawsuit on a public nuisance theory.<sup>140</sup> However, many courts applied reasoning similar to that of the Illinois Supreme Court and refused to recognize the public nuisance theory as applied to gun sales, marketing, and distribution.<sup>141</sup> New York Attorney General Eliot Spitzer was able to enter into a settlement with a single gun manufacturer, Smith and Wesson,<sup>142</sup> but the company faced a tremendous backlash from gun activists and other manufacturers, and no similar settlements were reached.<sup>143</sup> Additionally, approximately thirty states passed legislation designed to protect the gun industry from similar suits.<sup>144</sup> Then, in late 2005, Congress enacted federal legislation dismissing all pending claims of this type in both federal and state courts, and preempting future such claims.<sup>145</sup>

Though public nuisance claims against the gun industry were barred by the 2005 legislation, skirmishes between cities and the gun industry did not end at that point. Indeed, at the same time the District of Columbia courts were ruling on the District's legal challenge to the gun industry,<sup>146</sup> individual plaintiffs, supported by gun advocates, challenged the District's gun control laws in court.<sup>147</sup> In 2008, the U.S. Supreme Court struck down some of the D.C. laws for violating the Second Amendment, which it held confers an individual right to possess firearms as opposed merely to vesting such a right in state militias.<sup>148</sup>

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138. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142-44 (Ohio 2002).

139. See ERICHSON, *supra* note 87, at 140.

140. *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1234 (Ind. 2003).

141. See *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421-22 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132-33 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001); *Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 195, 198-99 (N.Y. App. Div. 2003).

142. See ERICHSON, *supra* note 87, at 140.

143. See, e.g., Richard A. Nagareda, *Gun Litigation in the Mass Tort Context*, in *SUING THE GUN INDUSTRY*, *supra* note 28, 176, 181 (Timothy D. Lytton ed., 2005).

144. *Recent Legislation, Tort Law—Civil Immunity—Congress Passes Prohibition of Qualified Civil Claims Against Gun Manufacturers and Distributors—Protection of Lawful Commerce in Arms Act*, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (To Be Codified at 15 U.S.C. §§ 7901-7903, 18 U.S.C. §§ 922, 924), 119 HARV. L. REV. 1939, 1939, 1945 n.3 (2006).

145. *Id.* at 1940.

146. See *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 637-38 (D.C. 2005) (rejecting plaintiffs' claims for negligence and public nuisance, but allowing claims to go forward based on D.C. statute imposing strict liability on manufacturers of certain types of guns for injuries caused by those guns).

147. *Parker v. District of Columbia*, 478 F.3d 370, 373, 401 (D.C. Cir. 2007) (striking down gun regulation legislation for violating the Second Amendment to the U.S. Constitution).

148. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799-2800, 2821-22 (2008).

### 3. Spitzer v. Merrill Lynch

In late 2000, Eric Dinallo, the head of the investor protection bureau in the New York State Attorney General's office began to look into possible conflicts of interest within the financial services industry.<sup>149</sup> Dinallo's interest in the matter began nearly a year previously when, during a casual conversation, Dinallo's father posed the question of why so many Wall Street research analysts had continued to issue "buy" recommendations for technology and internet stocks whose prices had been falling through the floor.<sup>150</sup> In early 2001, Dinallo provided his boss, New York Attorney General Eliot Spitzer, with a memorandum outlining his bureau's priorities for the upcoming year.<sup>151</sup> "Investigation of abuses by investment advisors" was number two on the list.<sup>152</sup>

It is not surprising that Spitzer encouraged Dinallo to move forward with this particular investigation. First, both shared backgrounds as prosecutors in the prestigious Manhattan District Attorney's office.<sup>153</sup> Second, Spitzer assumed his role as Attorney General in 1998 with an ambitious vision for the office as an aggressive proponent of progressive legal reform advanced through both litigation and regulation.<sup>154</sup> Spitzer saw states as needing to step into the void created by the "new federalism" that had been advocated by conservatives in Washington in all three branches of government, and become vigorous enforcers of legal protections in a variety of areas including public health, the environment, anti-trust, and public integrity.<sup>155</sup> Moreover, Spitzer already had a fairly dim view of the ethics of Wall Street practice,<sup>156</sup> and was reluctant to countenance what he saw as misconduct going on in his home turf.<sup>157</sup>

Dinallo's investigation got a boost during the summer, when he noticed an item in the Wall Street Journal indicating that Merrill Lynch, one of Wall Street's biggest and best known firms, had paid \$400,000 to a doctor named Debasis Kanjilal to settle claims that Kanjilal had been defrauded into losing hundreds of thousands of dollars by buying and holding stock in an internet company called InfoSpace, which had been touted by Merrill Lynch's celebrity stock analyst Henry Blodget.<sup>158</sup> Kan-

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149. See BROOKE A. MASTERS, SPOILING FOR A FIGHT: THE RISE OF ELIOT SPITZER 75-76 (2006); John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, THE NEW YORKER, April 7, 2003, at 54, 55 available at [http://www.newyorker.com/archive/2003/04/07/030407fa\\_fact\\_cassidy](http://www.newyorker.com/archive/2003/04/07/030407fa_fact_cassidy). Dinallo presently serves as Superintendent of New York's State Insurance Department. See Eric R. Dinallo-Biography, [http://www.ins.state.ny.us/bios/bios\\_ed\\_sup.htm](http://www.ins.state.ny.us/bios/bios_ed_sup.htm) (last visited Dec. 22, 2008).

150. MASTERS, *supra* note 149, at 76-77; Cassidy, *supra* note 149, at 55.

151. MASTERS, *supra* note 149, at 77; Cassidy, *supra* note 149, at 55.

152. Cassidy, *supra* note 149, at 55; see MASTERS, *supra* note 149, at 77.

153. See MASTERS, *supra* note 149, at 11, 49; Cassidy, *supra* note 149, at 55, 59.

154. See MASTERS, *supra* note 149, at 53; Cassidy, *supra* note 149, at 55.

155. MASTERS, *supra* note 149, at 52-53.

156. See Cassidy, *supra* note 149, at 55.

157. See *id.* at 62-64.

158. MASTERS, *supra* note 149, at 78; Cassidy, *supra* note 149, at 56.

jilal alleged that Merrill had misled investors about InfoSpace's true economic circumstances because the firm was planning on purchasing another company, Go2Net, which was one of Merrill's investment banking clients.<sup>159</sup> Merrill stood to make fees of \$17 million if the deal went through.<sup>160</sup>

Using the Attorney General's authority under New York's Martin Act, the office sent subpoenas both to Kanjilal's lawyer Jacob Zamansky, and to Merrill Lynch, asking the latter for a broad range of documents relating to the company's internet initial public offerings (IPOs), internet stock recommendations, and the compensation of internet stock analysts.<sup>161</sup> The Martin Act is a relatively unique statute<sup>162</sup> which played an integral role in this and Spitzer's future efforts to take on the financial services industry. The statute provides extremely broad authority to the State Attorney General to investigate and prosecute fraud or deception in connection with any security, commodity, or investment advice.<sup>163</sup> Despite its broad sweep, the statute had been little used as a tool to attack the securities industry, though New York Attorney General Louis Lefkowitz had made some use of the statute during the late 1970s.<sup>164</sup> However, Lefkowitz had passed on the results of his investigations to federal authorities, who were traditionally thought to be the primary enforcers with regard to securities violations.<sup>165</sup> Spitzer, on the other hand, used the statute to assert primary authority over securities companies where he believed federal authorities had been lax in protecting investors.<sup>166</sup>

The documents obtained by the Attorney General's office in response to the InfoSpace subpoena included private e-mails which suggested that research analysts such as Blodget were much less enthusiastic about InfoSpace behind the scenes than their public recommendations suggested.<sup>167</sup> For example, even at a time when Blodget had publicly

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159. Cassidy, *supra* note 149, at 56.

160. MASTERS, *supra* note 149, at 78.

161. See MASTERS, *supra* note 149, at 78-79; Cassidy, *supra* note 149, at 56.

162. See generally N.Y. GEN. BUS. LAW §§ 352-359h (McKinney 2008). Subsequent to the Merrill Lynch case, a number of other states passed or considered legislation similar to the Martin Act that would expand these states' authority to regulate the securities industry. See Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 959-60 (2005).

163. See Macey, *supra* note 162, at 960 (citing N.Y. GEN. BUS. LAW § 352 (McKinney 2008)). The Act, which was passed in 1921, originally provided only for civil enforcement. However, in 1955, criminal penalties were added for fraud. Aaron M. Tidman, Note, *Securities Law Enforcement in the Twenty-First Century: Why States Are Better Equipped Than the Securities and Exchange Commission to Enforce Securities Law*, 57 SYRACUSE L. REV. 379, 389 (2007). Spitzer, nonetheless, relied solely on the statute's civil provisions in his pursuit of Merrill Lynch. See Cassidy, *supra* note 149, at 64.

164. MASTERS, *supra* note 149, at 57-58; Jonathan Mathiesen, Survey, *Dr. Spitzlove Or: How I Learned to Stop Worrying and Love "Balkanization,"* 2006 COLUM. BUS. L. REV. 311, 316 (2006); Tidman, *supra* note 163, at 392.

165. MASTERS, *supra* note 149, at 58.

166. See Macey, *supra* note 162, at 952.

167. See MASTERS, *supra* note 149, at 80.

given the stock Merrill's highest possible rating, he was referring to the stock in private e-mails as "a powder keg," and described the stock as having a "bad smell."<sup>168</sup> Yet Blodget did not downgrade the stock's rating until after the deal with Go2Net had been completed, even though by then the stock price had fallen from \$122 per share, when Kanjilal bought,<sup>169</sup> to less than \$10 per share.<sup>170</sup>

A couple of months after issuing the InfoSpace subpoena, the Attorney General's office issued another subpoena to Merrill Lynch under the Martin Act relating to a company called GoTo.com (no relation to Go2Net).<sup>171</sup> Blodget had made that company the subject of one of his rare downgrades in June 2001.<sup>172</sup> The Wall Street Journal had noted that the downgrade came just hours after GoTo.com had chosen Credit Suisse First Boston to handle its upcoming stock offering, rather than Merrill Lynch.<sup>173</sup> The e-mails that turned up in response to this subpoena suggested an even stronger connection between Merrill's banking business and its analysts than was the case regarding InfoSpace. For example, Merrill's initial decision to offer a rating to GoTo.com was based on a promise made by its bankers to arrange for such a rating if GoTo.com would use Merrill for a "private placement" in September 2000.<sup>174</sup> From there, the e-mail trail showed a consistent struggle between Merrill's bankers, who wanted better ratings for the company, and Merrill's analysts, who were uncomfortable issuing such ratings.<sup>175</sup> The results were often compromises between what the bankers wanted, and what the analysts thought was actually justified, based on the company's performance.<sup>176</sup> In any event, the company was not downgraded until after the Credit Suisse deal mentioned above.<sup>177</sup>

After the InfoSpace and GoTo.com subpoenas, the Attorney General's office served Merrill Lynch with yet another subpoena, this one demanding all of the e-mails from its research analysts' internet group.<sup>178</sup> Within the boxes of documents provided in response to the subpoena were additional e-mails suggesting that research analysts had fudged their recommendations in response to pressure from bankers within the company, including one e-mail in which Blodget expressly threatened to start "calling the stocks . . . like we see them" unless he received clearer instructions on how to reconcile "management's demands for down-

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168. MASTERS, *supra* note 149, at 80-81.

169. Cassidy, *supra* note 149, at 56.

170. *Id.*

171. *Id.*

172. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 56.

173. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 56.

174. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 58.

175. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 58-59.

176. Cassidy, *supra* note 149, at 59; *see* MASTERS, *supra* note 149, at 80.

177. *See supra* note 173 and accompanying text.

178. Cassidy, *supra* note 149, at 60.

grades on falling stocks with the investment banking team's demands for good press for its clients."<sup>179</sup>

At this point, Spitzer's team finally believed it had enough evidence to sue Merrill Lynch under the Martin Act.<sup>180</sup> The team initiated discussions with Merrill Lynch in an effort to settle the matter prior to filing suit.<sup>181</sup> However, the negotiations did not go well.<sup>182</sup> A particular sticking point was whether the e-mails and other evidence uncovered through the Attorney General's investigation would become public, or would remain sealed, as was the desire of the company.<sup>183</sup> Spitzer's view, with regard to this and other matters, was that public disclosure was necessary to based legal reform.<sup>184</sup> Thus, confidentiality was off the table as far as he was concerned.<sup>185</sup>

On April 8, 2002, the Attorney General exercised his authority under Section 354 of the Martin Act,<sup>186</sup> to appear *ex parte* before a judge of New York's Supreme Court,<sup>187</sup> and seek an order for a public inquiry regarding alleged violations of the Act, as well as for injunctive relief in support of such an inquiry.<sup>188</sup> The statute appears to provide the Court no authority to refuse to grant such relief upon a showing by the Attorney General that "information and belief that the testimony" of persons alleged to have violated the Act's anti-fraud provisions is "material and necessary."<sup>189</sup> Thus, not surprisingly, Supreme Court Judge Martin Shoenfeld granted the order sought by the Attorney General.<sup>190</sup>

Following issuance of the judge's order, the Attorney General engaged in what would become a hallmark of his future high profile investigations: the outraged press conference.<sup>191</sup> At this, Spitzer referred to Merrill's transgressions regarding its research analyst information as "a shocking betrayal of trust."<sup>192</sup>

One thing that the New York government attorneys were not aware of was a little known provision of the Federal Investment Company Act

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179. MASTERS, *supra* note 149, at 84.

180. Cassidy, *supra* note 149, at 61.

181. MASTERS, *supra* note 149, at 85; *see* Cassidy, *supra* note 149, at 62.

182. MASTERS, *supra* note 149, at 88; Cassidy, *supra* note 149, at 61.

183. MASTERS, *supra* note 149, at 88-89; Cassidy, *supra* note 149, at 62.

184. MASTERS, *supra* note 149, at 89.

185. *Id.*

186. N.Y. GEN. BUS. L. § 354 (McKinney 2008).

187. The Supreme Court is the trial court within the New York State Court system.

188. N.Y. GEN. BUS. L. § 354 (McKinney 2008).

189. *Id.*

190. MASTERS, *supra* note 149, at 92; Cassidy, *supra* note 149, at 62; Order Pursuant to General Business Law Section 354 (Apr. 8, 2002), [http://www.oag.state.ny.us/media\\_center/2002/apr/apr08b\\_02\\_attach.pdf](http://www.oag.state.ny.us/media_center/2002/apr/apr08b_02_attach.pdf); Affidavit in Support of Application for an Order Pursuant to General Business Law Section 354 (Apr. 2002), [http://www.oag.state.ny.us/media\\_center/2002/apr/MerrillL.pdf](http://www.oag.state.ny.us/media_center/2002/apr/MerrillL.pdf).

191. MASTERS, *supra* note 149, at 92; Cassidy, *supra* note 149, at 64.

192. MASTERS, *supra* note 149, at 92.

of 1940<sup>193</sup> that barred securities firms under court order from operating mutual funds.<sup>194</sup> A shutdown of Merrill's mutual fund business would have seriously jeopardized the company, and went far beyond the degree of pressure the Attorney General hoped to bring to bear against the company.<sup>195</sup> Thus, later that afternoon Spitzer sent Dinallo back into court and had him request (successfully) that the judge stay the injunctive part of his order so that Merrill could continue to operate its mutual fund business.<sup>196</sup>

Despite that fact, the adverse publicity from the court order caused serious harm to Merrill. The firm's own stock-market valuation fell more than \$5 billion within a week.<sup>197</sup> Moreover, the SEC, embarrassed at having been beaten to the punch by Spitzer, launched its own investigation regarding research practices.<sup>198</sup> Unwilling to face the continuing public relations nightmare and the prospects of an SEC investigation, Merrill Lynch reached a settlement with Spitzer on May 21, 2002.<sup>199</sup> Among other provisions, the settlement called for Merrill to pay a fine of \$100 million;<sup>200</sup> to provide certain disclosures on its research reports regarding income received from the subject of the report relating to banking activities;<sup>201</sup> to separate research analyst compensation from its investment banking business;<sup>202</sup> to set up a committee designed to safeguard the independence of its research recommendations;<sup>203</sup> and to limit the usage of research analysts or information in conjunction with soliciting banking business.<sup>204</sup>

Upon closure of the Merrill Lynch investigation, the New York Attorney General's office expanded its inquiry regarding research analyst independence to a number of other major Wall Street financial services firms. By the end of the year, Spitzer and other regulators had reached a "global settlement" with ten major Wall Street firms and other regulators.<sup>205</sup> In addition to implementing measures designed to promote research analyst independence, the settlement provided for \$1.4 billion in

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193. 15 U.S.C. § 80a-1.

194. MASTERS, *supra* note 149, at 93; Cassidy, *supra* note 149, at 64.

195. See MASTERS, *supra* note 149, at 93; Cassidy, *supra* note 149, at 64.

196. Cassidy, *supra* note 149, at 64.

197. See MASTERS, *supra* note 149, at 93; Cassidy, *supra* note 149, at 65.

198. Cassidy, *supra* note 149, at 65.

199. See Agreement Between the Attorney General of the State of New York and Merrill Lynch, Pierce, Fenner & Smith, Inc. (May 21, 2002) (hereinafter Merrill Lynch Settlement), [www.oag.state.ny.us/bureaus/investor\\_protection/pdfs/merrill\\_agreement.pdf](http://www.oag.state.ny.us/bureaus/investor_protection/pdfs/merrill_agreement.pdf).

200. Merrill Lynch Settlement, *supra* note 199, ¶ 24.

201. Merrill Lynch Settlement, *supra* note 199, ¶ 5.

202. Merrill Lynch Settlement, *supra* note 199, ¶¶ 7-11.

203. Merrill Lynch Settlement, *supra* note 199, ¶¶ 12-13.

204. Merrill Lynch Settlement, *supra* note 199, ¶¶ 14-15.

205. Cassidy, *supra* note 149, at 72. The ten firms that joined the settlement were Bear Stearns, Credit Suisse First Boston, Deutsche Bank, Goldman Sachs, J.P. Morgan Chase; Lehman Brothers, Merrill Lynch, Morgan Stanley, Solomon Smith Barney, and U.B.S. *Id.*

finest, and a ban on the practice of “spinning,”<sup>206</sup> which Spitzer’s office had also been investigating.<sup>207</sup>

The Merrill Lynch investigation would also form the template for a number of other high profile investigations that Spitzer would launch involving the financial services industry, prior to his election as Governor of New York in 2006, and his shocking resignation in 2008.<sup>208</sup> For example, Spitzer initiated investigations that led to major settlements involving “market timing,” or late trading practices by mutual fund companies.<sup>209</sup> Spitzer also took on insurance industry giants Marsh & McLennan and AIG over allegations of steering clients to insurance companies that paid them kickbacks, and covering the practice up with false insurance bids and similar devices.<sup>210</sup>

### *B. Situating the Three Cases Within the Cause Lawyering Literature*

This section of the paper attempts to situate the above case descriptions within the literature regarding cause lawyering. In order to do so, it will first draw a comparison between the government lawsuits and cause lawyering generally. Next, it will apply the typologies offered by Hilbink, Sarat, and Scheingold to the government litigation actions described here.

#### 1. Cause Lawyering and Government Lawyers Generally

The idea of using law and the legal system to effectuate broad-based social change is not a new one. In America, the idea relates back to at least the early decades of the twentieth century, when the NAACP launched its campaign against segregated schools,<sup>211</sup> and the ACLU undertook a series of law reform suits in areas including women’s rights, abortion, sexual privacy, free speech rights, prisoner’s rights, military law, and amnesty.<sup>212</sup> Then, in the 1960s and 1970s, during this period of

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206. *Id.* The practice of spinning involved reserving certain numbers of Initial Public Offering (IPO) shares for current or future investment banking customers. MASTERS, *supra* note 149, at 108. During the tech boom, when IPO shares frequently doubled or tripled in value shortly after issuance, distributing such shares was tantamount to handing out free money. *Id.* By contrast, ordinary investors found it increasingly difficult to obtain IPO shares during this period.

207. See Cassidy, *supra* note 149, at 68.

208. See Ellen Wulforst, *New York Governor Eliot Spitzer Resigns But More Woes Likely*, REUTERS UK, March 13, 2008, available at <http://uk.reuters.com/article/worldNews/idUKN1216491420080313>.

209. See Macey, *supra* note 162, at 965-66.

210. See MASTERS, *supra* note 149, at 201-219, 227-49.

211. See JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (1975); WARREN D. ST. JAMES, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE: A CASE STUDY IN PRESSURE GROUPS (1958); MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987).

212. Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 213 (1976); see SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990); Ruth B. Cowan, *Women’s Rights Through Litigation: An Examina-*

broad liberal social ferment, left-of-center lawyers in such diverse settings as legal aid offices, law reform oriented “back up centers,” and law school clinical programs, often modeling their efforts on the earlier work of the NAACP and ACLU, engaged in a range of efforts to use law and lawyering to bring about social change.<sup>213</sup> More recently, as the political winds have shifted rightward, conservative lawyers and interest groups have emerged that have begun to use law and legal work to achieve social change in a manner similar to that employed by their predecessors in each of the two periods mentioned above.<sup>214</sup>

Despite this history, the term “cause lawyering” has only recently received broad acceptance, largely due to an ongoing project of legal sociologists Austin Sarat<sup>215</sup> and Stuart G. Scheingold.<sup>216</sup> In an ongoing series, now numbering five volumes, Sarat, Scheingold, and their many contributors, have sought to map the terrain of what they have come to identify as cause lawyering.<sup>217</sup> Sarat and Scheingold acknowledge that the field they seek to describe defies easy identification and is subject to constant shifts in terrain.<sup>218</sup> As a common denominator however, cause lawyering is usually “directed at altering some aspect of the social, economic, and political status quo.”<sup>219</sup> Given this broad parameter, a strong claim could be made that the cases discussed above represent examples of cause lawyering, as each was directed in large measure at altering some aspect of the social, economic, and/or political status quo.

On the other hand, there are a number of reasons why the government attorneys discussed above fit uneasily within the category of cause lawyers. First, while the examples discussed above may present instances in which the involved government lawyers took on the role of

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tion of the American Civil Liberties Union Women’s Rights Project, 1971-1976, 8 COLUM. HUM. RTS. L. REV. 373 (1976).

213. See MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, 2-3 (1993) (describing different legal strategies for practicing poverty law through various organizations); Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 10 (2000) (discussing the history of student law clinics); Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 MCGEORGE L. REV. 603, 606-07, 613-14 (2007) (providing a brief history of legal aid in the twentieth century). See generally Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11 (2003); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

214. See, e.g., Ann Southworth, *Professional Identity and Political Commitment among Lawyers for Conservative Causes*, in Sarat & Scheingold, STRUCTURE AND AGENCY 83-85; Anthony Paik, Ann Southworth & John P. Heinz, *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883, 884-85 (2007); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1224-27 (2005).

215. William Nelson Cromwell Professor of Jurisprudence and Political Science and Five College Fortieth Anniversary Professor, Amherst College.

216. Professor Emeritus of Political Science, University of Washington.

217. See *supra* note 1.

218. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 5, 7; SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 3.

219. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 4.

cause lawyer, such lawyers play the role of conventional lawyer in many other instances. For example, in addition to having broad ranging authority to bring lawsuits in pursuit of the public interest, state attorneys general and city attorneys have statutory and common law responsibilities to defend government actors when they are sued in routine contract and tort matters.<sup>220</sup> Additionally, when such government lawyers are required to defend government entities in lawsuits challenging those entities' policies and procedures, the government lawyers frequently find themselves on the opposite side of cases from paradigmatic cause lawyers who have brought these cases for law reform or other similar objectives.<sup>221</sup> Nonetheless, within Sarat and Scheingold's framework, a lawyer need not act as a cause lawyer at all times, in all settings, in order to claim the characterization at certain times and in certain contexts. For example, two of the main settings that Sarat and Scheingold identify as loci of cause lawyering activity are large corporate law firms, which engage in cause lawyering as part of their pro bono activities,<sup>222</sup> and small private firms, which engage in a mix of cause lawyering and conventional lawyering, the latter often necessary to keep the firms afloat economically.<sup>223</sup> Thus, the mere fact that the government attorneys discussed above were not engaged in cause lawyering on a full time basis does not deprive the particular campaigns addressed above from being characterized as such.

It should be noted that though the range of examples of cause lawyering identified by the contributors to the Sarat and Scheingold series is extremely broad, none of the contributions focus on American government lawyers as cause lawyers.<sup>224</sup> In countries other than the United States, some of the cause lawyers identified do work within the government itself.<sup>225</sup> Perhaps this difference results from the different

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220. See, e.g., Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 346 (2005) [hereinafter Berenson, *Hard Bargaining*].

221. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-39 (2001) (U.S. government lawyers defending restrictions on practice of legal services attorneys against challenge by a broad range of cause lawyers).

222. SCHEINGOLD AND SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 74.

223. *Id.* at 88.

224. See Hilbink, *Categories*, *supra* note 3, at 661 n.5. Perhaps an exception to this might be the legal services lawyers and public defenders whose work is discussed extensively throughout the series. See, e.g., SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 80; Stuart A. Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 229-236 (1998) [hereinafter Scheingold & Bloom, *Politicization*]. However, even though legal services lawyers and public defenders are government lawyers in the sense that their salaries are paid by the government, they are charged with representing individual litigants rather than the government itself. Indeed, such lawyers often represent their individual clients against government entities (that is always the case for public defenders, and frequently the case for legal services lawyers). Thus, for purposes of the following discussion, I do not include these lawyers within the category of government attorneys.

225. See, e.g., Yoav Dotan, *The Global Village of Human Rights: Patterns of Cooperation between State and Civil Rights Lawyers in Israel*, in Sarat & Scheingold, *GLOBAL ERA*, *supra* note 1, at 248-52 (discussing cooperation between Israeli civil rights lawyers and lawyers within Israel's

shape that cause lawyering takes in established liberal democracies, where rule-of-law systems are relatively stable, and emerging democracies or authoritarian regimes, where such systems are not well established. In the latter case, cause lawyering often takes on a largely defensive role—attempting to protect individuals from arbitrary treatment and repression on the part of the state.<sup>226</sup> On the other hand, cause lawyers in liberal states can take a more proactive role vis-à-vis the state.<sup>227</sup> In any event, this absence of discussion of American government lawyers as cause lawyers should not be viewed as being determinative if, as will be contended below, the actions of such lawyers resemble those of paradigmatic cause lawyers in other respects.

Another tension in viewing ranking government lawyers of the type discussed here as cause lawyers has to do with the status such lawyers hold within the profession. As Sarat and Scheingold frequently point out, “cause lawyering is everywhere a deviant strain within the legal profession.”<sup>228</sup> Indeed in large measure, cause lawyers operate at the margins of the legal profession.<sup>229</sup> It is true that the legal profession has reversed its initial overt hostility to cause lawyers.<sup>230</sup> However, the result has been, rather than a full embrace of cause lawyers, what Sarat and Scheingold characterize as a “fragile alliance” between cause lawyers and the broader profession.<sup>231</sup> Indeed, this fragile alliance may be mostly one of convenience, with the broader profession needing the “cover” cause lawyers provide for conventional lawyers’ arguable failure to fully live up to the profession’s stated ideals of providing broad access to justice and serving the good of the public as a whole as well as that of its individual clients.<sup>232</sup> In any event, while government lawyers as a whole occupy something of an intermediate status position within the profession between that of cause lawyers on the low end and corporate lawyers on the high end,<sup>233</sup> ranking government lawyers such as the state attorneys general and the city attorneys discussed above, do in fact enjoy a respected status within the profession. As will be discussed in the following Part of this paper, this status may allow such government lawyers to transcend some of the limitations that have plagued cause lawyers in terms of their effectiveness. But for present purposes, the status of rank-

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Attorney General’s office in an effort to protect the civil rights of Palestinians in the Occupied Territories); Lucie White, *Two Worlds of Ghanian Cause Lawyers*, in Sarat & Scheingold, *GLOBAL ERA*, *supra* note 1, at 59-65 (discussing lawyers who work within government agencies on matters of economic development policies in an effort to raise Ghanian standards of living).

226. Sarat & Scheingold, *CAUSE LAWYERING*, *supra* note 1, at 5.

227. *Id.* at 5-6.

228. *Id.* at 3.

229. SCHEINGOLD & SARAT, *SOMETHING TO BELIEVE*, *supra* note 1, at 4.

230. *Id.* at 29.

231. *Id.* at 44.

232. *Id.* at 49.

233. See, e.g., JOHN P. HEINZ, ROBERT R. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 82-88 (2005).

ing government lawyers does create a tension regarding whether it is appropriate to categorize such lawyers as cause lawyers at all.

On the other hand, there are also strong reasons to place the legal campaigns discussed above within the category of cause lawyering. First and foremost is the overt social change orientation of each of the legal campaigns discussed above. Indeed, each of the government lawyers primarily responsible for initiating these legal campaigns expressly acknowledged and embraced a social change justification in initiating the legal action. For example, Mike Moore expressly saw himself as calling the tobacco industry to account for decades of harm caused to the health of Mississippians and the State's public fisc.<sup>234</sup> Lawrence Rosenthal similarly acted in conformity with his background in public law enforcement in turning to the courts to try to make the city streets of Chicago safer.<sup>235</sup> And Eliot Spitzer plainly viewed himself as policing a securities industry that had victimized ordinary investors while the federal regulators who were responsible for its oversight failed to live up to their responsibilities.<sup>236</sup>

Additionally, Sarat and Scheingold have pointed out that one of the distinguishing features of cause lawyering is the way it blurs what was traditionally considered to be a clear dividing line between legal and political activity.<sup>237</sup> Yet who better than an elected or an appointed state attorney general or city attorney illustrates the confluence between law and politics? Each of these individuals is at the same time a lawyer, legal practitioner, and member of the legal profession, as well as an elected or appointed public official, operating within the thoroughly political milieu of electoral politics.

Finally, Sarat and Scheingold have also focused on cause and conventional lawyers' differing stances toward the legal profession's non-accountability tenet as a critical distinction between them.<sup>238</sup> In short, this non-accountability principle holds that lawyers are not responsible for the ends sought by their clients, as long as the ends sought are legally permissible.<sup>239</sup> As stated in Rule 1.2(b) of the American Bar Association's Model Rules of Professional Conduct, "A lawyer's representation

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234. See *supra* notes 22-27, 50-51 and accompanying text.

235. Barstow, *supra* note 98.

236. See *supra* notes 154-157 and accompanying text.

237. Sarat & Scheingold, STRUCTURE AND AGENCY, *supra* note 1, at 9.

238. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 3; SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 7.

239. David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 90 (David Luban, ed. 1983); Steven K. Berenson, *Institutional Professionalism for Lawyers: Realizing the Virtues of Civic Professionalism*, 109 W. VA. L. REV. 67, 96 (2006); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978). Others commentators have described this as the legal profession's "neutrality" principle. E.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (1978).

of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>240</sup> Thus, the conventional lawyer should be equally at home representing either side in a particular legal dispute.<sup>241</sup> Because lawyers are not to be judged based upon the justice or lack thereof of the positions they advocate, the measure of lawyering effectiveness becomes an assessment of the technical quality of the legal services rendered on behalf of the client.<sup>242</sup>

In contrast to conventional lawyers, cause lawyers reject this non-accountability principle.<sup>243</sup> Not only do cause lawyers embrace the ends that their clients seek, but cause lawyers affirmatively seek out clients and causes with which they can identify in moral, political, and social terms.<sup>244</sup> Indeed, for many cause lawyers, the cause itself takes priority over any individual client.<sup>245</sup> This stance also brings cause lawyers into conflict with the fundamental tenet of the legal profession which demands that lawyers always place their clients' objectives ahead of any personal, financial, or political interests of the lawyers themselves.<sup>246</sup> However, to the extent that cause lawyers' rejection of non-accountability places them on a collision course with the core principles of the mainstream legal profession, cause lawyers embrace this conflict rather than avoid it.<sup>247</sup>

To the extent that government lawyers are engaged in defending government officials or government entities in lawsuits challenging these parties' actions, the government lawyers tend to embrace the profession's

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240. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).

241. Scheingold & Sarat hold out the example of renowned litigator David Boies, who in one case defended IBM against antitrust charges brought by the federal government, yet later represented the United States in its antitrust action against Microsoft. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 8.

242. *Id.*

243. *Id.* at 9.

244. *Id.*

245. *Id.*

246. In an oft quoted passage, Henry Lord Brougham described his representation of Queen Caroline to the British Parliament in 1820 as follows: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others." 2 TRIAL OF QUEEN CAROLINE, 8 (Joseph Nightingale ed., London, J. Robins and Co. Albion Press 1821). Though recent commentators have argued whether Brougham truly intended this statement to represent his assessment of the legal advocate's proper role, compare Fred C. Zacharias & Bruce A. Green, "Anything Rather Than a Deliberate and Well Considered Opinion" – Henry Lord Brougham, *Written By Himself*, 19 GEO. J. LEGAL ETHICS 1221 *passim* (2006), with Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319 *passim* (2006), there is little doubt that both the ethical rules governing lawyers and fiduciary principles require lawyers to place their clients' interests ahead of their own. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002) ("a lawyer shall not represent a client . . . if there is a significant risk that the representation of [the] client[] will be materially limited . . . by a personal interest of the lawyer."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000).

247. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 9.

non-accountability principle.<sup>248</sup> However, in situations such as the cases discussed above, where the government lawyer pursues public protection actions in the name of a particular state, the United States, “the people” of a given state, or some other similar inchoate public entity, the applicability of the non-accountability principle becomes difficult. Of course, the ability of an entity client to articulate the ends its lawyer is to seek pursuant to the non-accountability doctrine is a difficult issue in all instances of entity representation, including conventional representation of corporate entities. However, corporate law establishes clear principles regarding which individuals have “speaking authority” on behalf of the organization, for purposes of giving instructions to its lawyers.<sup>249</sup> By contrast, there are no such clearly established principles for determining the ends a lawyer should pursue when the client is the state, the people, or the public interest.<sup>250</sup> At a minimum, it is clear that in such circumstances, the government lawyer plays a much greater role in shaping and identifying the ends to be sought by the client than is the case with regard to conventional lawyering.<sup>251</sup> And, in circumstances such as two of the three cases discussed above, where the government lawyer is authorized by law to bring an action in his or her own name,<sup>252</sup> the non-accountability principle no longer makes very much sense at all. Indeed, the manner in which government lawyers in these circumstances transcend the non-accountability principle is perhaps the most powerful reason why it may be appropriate to characterize such lawyers as cause lawyers.

## 2. Hilbink’s Typology

In a thoughtful review essay focusing on the first two volumes in Sarat and Scheingold’s cause lawyering project, University of Massachu-

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248. See *supra* note 239. Indeed, in my first job in legal practice, I worked in the office of Massachusetts Attorney General Scott Harshbarger, a liberal Democrat. I worked in the division in the office that was responsible for defending State government agencies when they were sued regarding their programs and policies. Berenson, *Hard Bargaining*, *supra* note 220, at 345. At the time, Republican Governor William Weld was engaged in a draconian program of cutting social spending by the State in an effort to balance the State budget. This required our office to engage in numerous suits in which we defended the various budget cuts against claims by paradigmatic cause lawyers from within the legal services and broader advocacy communities on behalf of disadvantaged persons. General Harshbarger went to great pains to distance himself publicly from the Weld administration policies that his office was legally required to defend, while at the same time lauding the professionalism of the lawyers in his office who, for the most part, were successful in defending the Governor’s policies.

249. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. d (2000).

250. See, e.g., Berenson, *Hard Bargaining*, *supra* note 220, at 362-365.

251. In this regard, the government lawyer acts similarly to the plaintiffs’ lawyer in a class action suit, long a preferred vehicle of cause lawyers. See, e.g., Bryant Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC’Y REV. 237, 241 (1992).

252. See *supra* notes 22 and 186-88. Of course, in these cases the plaintiff was the government lawyer acting in his official, rather than his personal capacity. The Chicago gun case, by contrast, was brought in the name of the City of Chicago and the County of Cook. See Second Amended Complaint ¶ 1, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596).

sets Professor Thomas M. Hilbink offers a useful typology for classifying the various forms of cause lawyering.<sup>253</sup> Hilbink classifies cause lawyers into three broad categories: 1) proceduralist; 2) elite/vanguard; and 3) grassroots.<sup>254</sup> The distinctions between these categories, in turn, are demarcated across three dimensions: a) the lawyers' vision of "the system" within which they live and work; b) the lawyers' vision of the cause for which they work; and c) the lawyers' vision of their job as lawyers.<sup>255</sup>

Hilbink's first category is proceduralist lawyering. Proceduralists view the legal and political systems within which they work as being basically just.<sup>256</sup> They view law and politics as being essentially separate, with the former believed to be neutral and objective, rational and predictable, and therefore superior to politics.<sup>257</sup> Because of their faith in legal systems, as the name implies, proceduralist lawyers focus on procedural, rather than substantive, justice.<sup>258</sup> As such, they are the cause lawyers whose practices most resemble those of conventional lawyers.<sup>259</sup> Not surprisingly, proceduralist lawyers' vision of their cause is similar to their vision of the system. That is, they view their cause in procedural terms.<sup>260</sup> For example, for many legal services advocates during the 1960s, the right to counsel was viewed as an end in itself, rather than a means to particular substantive goals.<sup>261</sup> Finally, with regard to the proceduralist lawyers' vision of their role, proceduralist lawyers accept a traditional conception of the lawyer-client relationship.<sup>262</sup> Thus, the lawyers' obligation to advance the particular interests of the client trump any broader political, social, or economic goals of the lawyer or the broader cause he or she may seek to serve.<sup>263</sup> Thus, proceduralist cause lawyers embrace the non-accountability principle discussed above.

A good example of proceduralist cause lawyering comes from lawyers working with the American Bar Association (ABA) to represent death row inmates.<sup>264</sup> Of course, the ABA is the most mainstream of

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253. See Hilbink, *Categories*, *supra* note 3, at 657-61.

254. *Id.* at 664.

255. *Id.*

256. *Id.* at 665.

257. *Id.* (citing JUDITH N. SHKLAR, *LEGALISM* (1964)).

258. *Id.*

259. *Id.*

260. *Id.* at 667.

261. *Id.* at 667-68 (citing John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in Sarat & Scheingold, *CAUSE LAWYERING*, *supra* note 1, at 183-84).

262. *Id.* at 672 & n.20.

263. *Id.* at 672. In some sense, as Hilbink points out, the broader cause of the proceduralist lawyer is service to the legal system, and to the profession itself. *Id.* at 668 & n.15, 670 (quoting Dotan, *supra* note 2, at 253).

264. See Austin Sarat, *State Transformation and the Struggle for Symbolic Capital: Cause Lawyers, the Organized Bar, and Capital Punishment in the United States*, in Sarat & Scheingold, *GLOBAL ERA*, *supra* note 1, at 189 [hereinafter Sarat, *Capital Punishment*].

organizations that represent lawyers in America. In this instance, rather than advancing substantive arguments as to the death penalty's invalidity on either moral or constitutional grounds, the lawyers involved focused on the procedural aspects of implementation of the death penalty in advancing their clients' interests, e.g., the availability of competent defense lawyers for capital defendants and the availability of adequate opportunities for habeas corpus review of death penalty convictions.<sup>265</sup> Though these lawyers undoubtedly served their clients' interests in avoiding execution, the proceduralist approach had the corollary effects of legitimating both the State's death penalty apparatus (if implemented properly) and the legal profession's paramount role in ensuring the legitimacy of the legal system.<sup>266</sup>

The next category of cause lawyering identified by Hilbink is elite/vanguard lawyering.<sup>267</sup> In terms of their vision of the system, elite/vanguard lawyers share proceduralist lawyers' vision of the legal system as fundamentally just, and elite/vanguard lawyers work within the context of the system rather than outside of it.<sup>268</sup> However, elite/vanguard lawyers reject proceduralist lawyers' sharp distinction between law and politics.<sup>269</sup> Rather, elite/vanguard lawyers view lawyering as a form of politics, albeit a superior one to other forms such as direct action.<sup>270</sup> Also in contrast to proceduralists, elite/vanguard lawyers are concerned about substantive, rather than procedural, justice.<sup>271</sup> What matters is the outcome, not the legal means by which it is achieved.<sup>272</sup>

In terms of their vision of the cause, elite/vanguard lawyers embrace the substance of the causes they represent.<sup>273</sup> "Their goal is not to support professional values or the legal system, but to 'change policy, law, and social systems in such a way that the status of marginalized groups' is improved."<sup>274</sup> Not surprisingly then, in terms of their vision of the lawyer's role, elite/vanguard lawyers reject the profession's non-accountability tenet,<sup>275</sup> in favor of a strong identification with the ends sought by the clients and causes they represent.<sup>276</sup> Additionally, the tra-

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265. *Id.* at 194-96; see also Hilbink, *Categories*, *supra* note 3, at 667.

266. Sarat, *Capital Punishment*, *supra* note 264, at 194-95, 200.

267. Hilbink, *Categories*, *supra* note 3, at 673.

268. *Id.* at 676 (citing Stuart Scheingold, *Cause Lawyering and Democracy in Transnational Perspective*, in Sarat & Scheingold, *GLOBAL ERA*, *supra* note 1, and Ronen Shamir & Nita Ziv, *State-Oriented and Community-Oriented Lawyering for a Cause: A Tale of Two Strategies*, in *GLOBAL ERA*, *supra* note 1, at 298). The above description of "the system" includes legislative and administrative forums in addition solely to courts. *Id.* at 677.

269. *Id.* at 673.

270. *Id.*

271. *Id.*

272. *Id.* at 674.

273. *Id.* at 675.

274. *Id.* (quoting Kilwein, *supra* note 261, at 189).

275. See *supra* notes 238-52 and accompanying text.

276. Hilbink, *Categories*, *supra* note 3, at 679.

ditional agency relationship between attorney and client<sup>277</sup> is practically inverted in the case of elite/vanguard lawyering.<sup>278</sup> Rather than doing the bidding of clients who have sought out legal representation, elite/vanguard lawyers often seek out particular clients and causes for purposes of finding the litigants best situated to advance the goals sought by the lawyers.<sup>279</sup>

Given elite/vanguard lawyers' reliance on formal legal systems to effectuate social change, along with their view of lawyering as a type of politics of superior means, it is not surprising that such lawyers place a high value on the technical legal skills needed to achieve such results.<sup>280</sup> Thus, the name elite/vanguard lawyering was chosen at least in part to reflect the extraordinary skills of the lawyers who succeed through this approach. Given the primacy of the lawyers within this approach, it is not surprising that elite/vanguard lawyering reflects a "top down" approach, with lawyers often dictating appropriate strategies and tactics as well as the substantive goals to be pursued.<sup>281</sup>

The legal campaigns of the NAACP and ACLU that were mentioned previously,<sup>282</sup> are perhaps the paradigmatic examples of elite/vanguard lawyering. With regard to the NAACP's legal campaign to end segregated schools, lawyers pursued a campaign of litigation within the courts, rejecting direct action such as sit-ins and boycotts.<sup>283</sup> The NAACP lawyers recruited plaintiffs for their cases based on the parties' ability best to represent the legal claims the lawyers sought to advance.<sup>284</sup> The lawyers then litigated the cases in the manner the lawyers thought best for the broader cause of desegregation (which the lawyers, of course, wholeheartedly embraced), even where doing so may have been in tension with the individual interests of the clients being represented in a particular suit.<sup>285</sup> Of course, lead lawyers Thurgood Marshall, Charles Hamilton Houston, and others would become revered figures within the legal profession.

The final category of cause lawyering identified by Hilbink is grassroots lawyering.<sup>286</sup> Grassroots lawyers have a different vision of the legal system than lawyers in the previous two categories addressed. Grassroots lawyers reject the fundamental fairness of the legal system. Rather,

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277. See *supra* notes 262-63 and accompanying text.

278. Hilbink, *Categories*, *supra* note 3, at 679.

279. *Id.* at 679-80.

280. *Id.* at 678 (citing MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 26 (1986)).

281. *Id.* at 677, 683.

282. See *supra* notes 211-12 and accompanying text.

283. Hilbink, *Categories*, *supra* note 3, at 676.

284. *Id.* at 681.

285. *Id.* at 680; see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 471 (1976).

286. Hilbink, *Categories*, *supra* note 3, at 681.

they view the legal system as, at best, ineffective in terms of achieving justice for their clients, or, at worst, overtly hostile or corrupt with regard to their clients' interests.<sup>287</sup> Because of this view, grassroots lawyers often seek extra-legal means in order to advance their objectives.<sup>288</sup> In terms of their vision of the cause, grassroots lawyers do embrace the social change objectives of the clients they work with.<sup>289</sup> However, because legal approaches, such as litigation, are disfavored within grassroots lawyering, the particular skills of lawyers are less valuable and valued within this type of cause lawyering.<sup>290</sup> This fact has implications for grassroots lawyers' vision of the lawyer's role as well. Because lawyers' skills are less important to the approaches undertaken in grassroots lawyering, lawyers play less of a primary and more of a subordinate role in the representation. Rather than the "top down" style of lawyering prevalent in elite/vanguard representation, grassroots lawyering is "bottom up." Grassroots lawyers collaborate with and assist based movements working for social change, often playing a subordinate, rather than a directive role.

When one looks at the government lawyer campaigns discussed above in relation to Hilbink's typology, it becomes clear that these campaigns fit rather neatly into Hilbink's elite/vanguard lawyering category. First, not surprisingly, the elected and appointed government lawyers who initiated the legal campaigns view the legal system as fundamentally just and efficacious, and it is similarly not surprising that they targeted their reform efforts at the courts, rather than utilizing other means.<sup>291</sup> Second, it is also understandable why these individuals who at the same time served as lawyers and as public officials would reject a sharp distinction between law and politics. Indeed, these officials' professional existence is itself evidence of a blurred distinction between law and politics.

In terms of their view of the cause, the lawyers profiled above each embraced an explicit social change orientation with the campaigns they initiated. As stated above, the lead lawyers involved in each were at the very highest reaches of the legal profession in terms of status. While earlier this was offered as a tension with the outsider status of many cause lawyers,<sup>292</sup> it fits perfectly with Hilbink's description of the role of

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287. *Id.*

288. *Id.* at 685.

289. *Id.* at 683.

290. *Id.* at 688 (citing Stuart Scheingold, *The Struggle to Politicize Legal Practice: Left-Activist Lawyering in Seattle*, in Sarat & Scheingold, *CAUSE LAWYERING*, *supra* note 1, at 125). In reality, cause lawyers divide less neatly than Hilbink's categories would suggest. For example, Scott Cummings contends that many grassroots lawyers are less reluctant to pursue legal remedies, particularly in conjunction with other approaches, than Hilbink argues. Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62 (2007).

291. *See supra* notes 27, 101, 154 and accompanying text.

292. *See supra* notes 228-33 and accompanying text.

lawyers within elite/vanguard lawyering. Additionally, with regard to the vision of the lawyer's role in the cases discussed above, given the amorphous nature of the "clients" represented in the government lawyer cases,<sup>293</sup> it seems clear that the campaigns took on a lawyer-centric approach similar to that of the classic elite/vanguard lawyering representations addressed here.<sup>294</sup>

### 3. Sarat and Scheingold's Typology

Similarly to Hilbink, Sarat and Scheingold have offered their own typology of the cause lawyering examples discussed in their collections.<sup>295</sup> Cause lawyers are broadly divided into those who work in support of liberal democracy,<sup>296</sup> and those who work against it.<sup>297</sup> Within the category of cause lawyers who work in support of liberal democracy, Sarat and Scheingold identify three subcategories: 1) neoliberal lawyers; 2) libertarian lawyers; and 3) left liberal lawyers.<sup>298</sup> Neoliberal lawyers primarily work "to defend and extend property rights in order to transfer 'power from government regulators to landowners and entrepreneurs.'"<sup>299</sup> They often work in the areas of tort reform, environmental regulation, and land use planning.<sup>300</sup> Well-known organizations that fall into this category include the Pacific Legal Foundation, the Manhattan Institute, and the Mountain States Legal Foundation.<sup>301</sup>

Libertarian lawyers, by contrast, "look beyond property rights and the protection of business interests to individual liberties in the social and cultural spheres."<sup>302</sup> Libertarian cause lawyers work in areas such as school choice, welfare reform, and interracial adoptions, while supporting decriminalization for "victimless" crimes such as drug use and pornography.<sup>303</sup>

Left liberal cause lawyers, in turn, seek to "defend the public, as well as the private, [first generation] rights of individuals."<sup>304</sup> Thus, such

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293. See *supra* notes 262-63, 275-79, 287-89 and accompanying text.

294. See *supra* notes 275-79 and accompanying text.

295. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 101.

296. *Id.* at 107.

297. *Id.* at 113. Sarat and Scheingold identify liberal democracy in conjunction with representative government, the rule of law, individual rights, and an autonomous, open, and pluralistic civil society. *Id.* at 102. The individual rights recognized in such regimes are civil and political, of the type enshrined in the Bill of Rights to the U.S. Constitution, as opposed to the social and economic rights, which are recognized in social democratic alternatives to liberal democracy. *Id.* at 102-04. Sarat and Scheingold refer to the former category of rights as "first generation" rights, and the latter category as "second generation" rights. *Id.* at 102-103.

298. *Id.* at 102.

299. *Id.* at 108 (quoting John P. Heinz, Anthony Paik & Anne Southworth, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5 (2003)).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 109.

304. *Id.* at 110. See *supra* note 290 for a description of first generation and second generation rights.

lawyers seek to encourage “a robust and inclusive form of political and social citizenship,” as opposed to a broad sphere of negative liberty from government interference, as is the case with regard to neoliberal and libertarian cause lawyers.<sup>305</sup> Of course, the ACLU is the paradigmatic left liberal cause law firm in America.<sup>306</sup> However, in addition to the sexual freedom, free speech, and electoral accountability cases that the ACLU is known for, other left liberal cause lawyers focus on issues such as immigration reform, the death penalty, police violence, employment discrimination, the right to die, tenants rights, and abortion rights.<sup>307</sup> The primary difference between these lawyers and lawyers on the left who work against liberal democracy, and who will be discussed below, is their basic stance toward “the system,”<sup>308</sup> to echo Hilbink’s typology from above.<sup>309</sup> While these left liberal lawyers work to achieve social change within the bounds of the existing legal system, the lawyers discussed below work to change the system itself.<sup>310</sup>

Within the category of cause lawyers who work against liberal democracy, Sarat and Scheingold identify three additional subcategories: 1) evangelical democratic; 2) social democratic; and 3) emancipatory democratic.<sup>311</sup> Evangelical democratic cause lawyers work defensively to use first generation negative liberty rights to carve out a broad space for religious expression.<sup>312</sup> However, evangelical democratic lawyers also work “offensively” to seek a radical transformation of the liberal democratic society toward a theocratic society.<sup>313</sup> Social democratic cause lawyers, in turn, also seek to transform the liberal democratic state, this time in the direction of a more inclusive and egalitarian distribution of wealth, and an orientation toward equality of outcomes, rather than equality of opportunity, which is at least a formal hallmark of the liberal democratic state.<sup>314</sup> And while emancipatory democratic cause lawyers agree with the ends sought by social democratic cause lawyers, they differ as to the means that should be used to achieve those ends. For example, social democratic cause lawyers are more favorably inclined toward the state than their emancipatory counterparts, who mistrust the state and seek broad diffusion of power and political participation.<sup>315</sup>

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305. *Id.* (citing DANIEL C. KRAMER, PARTICIPATORY DEMOCRACY: DEVELOPING IDEALS OF THE POLITICAL LEFT (1972)).

306. *Id.*

307. *Id.* (citing MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATION OF PRACTICE 145-63 (1994)).

308. *Id.* at 111 (quoting Scheingold & Bloom, *Politicization*, *supra* note 224, at 230).

309. *See supra* notes 253-294 and accompanying text.

310. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 111, 113.

311. *Id.* at 102.

312. *Id.* at 115.

313. *Id.* at 116.

314. *Id.* at 103, 113.

315. *Id.* at 113, 121.

Naturally, within the major division between those cause lawyers who work in favor of liberal democracy and those who work against it, the government lawyers profiled above fall within the group working *for* liberal democracy. After all, these are elected and appointed officers of the state we are talking about.<sup>316</sup> Moreover, each of the cases discussed above falls on the left hand side of the political spectrum. Thus, it would appear that within Sarat and Scheingold's typology, the government lawyers discussed above would be characterized as left-liberal cause lawyers working in favor of liberal democracy.

Because Sarat and Scheingold's typology offers more categories than Hilbink's, it perhaps better reflects the complex realities of the world of practice than the latter. Nonetheless, this complexity limits the effectiveness of Sarat and Scheingold's typology as a heuristic device. Therefore, the balance of this paper will focus on Hilbink's typology, as opposed to that of Sarat and Scheingold.

### C. *Government Lawyer as Cause Lawyer—Conclusion*

Based upon the foregoing discussion, the conclusion here is that the three government legal campaigns described above should be considered examples of cause lawyering. It is true that the lawyers involved in these cases did not always act in the role of cause lawyer and lacked the outsider status that is a hallmark of cause lawyers. Yet, as pointed out above, many cause lawyers do not operate as such at all times, and the high level of professional status enjoyed by the lawyers involved here is consistent with that attained by Hilbink's elite/vanguard lawyers, who have sometimes become icons within the legal profession as a result of their social change oriented lawyering. Also similar to Hilbink's elite/vanguard lawyers, the lawyers in the cases discussed here both blurred the line between law and politics and rejected the profession's non-accountability tenet in conjunction with these cases. Rather, the lawyers involved embraced as their own the substantive causes of tobacco and gun control or investment research analyst independence. Therefore, the three campaigns discussed above may appropriately be described as examples of elite/vanguard cause lawyering. Given this conclusion, it is this author's hope that some social change oriented lawyers will consider government service as an appropriate professional path to take in which to pursue their objectives.

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316. Note however that Scheingold & Sarat characterize the private personal injury lawyers who worked as co-counsel in some of the above-described matter as social democratic transformative cause lawyers, given the manner in which they use the courts to attack the abuse of corporate and private power against the interests of individual citizens. *Id.* at 119-20; *see also* Tim Howard, *Cause Lawyers and Cracker Culture at the Constructive Edge: A "Band of Brothers" Defeats Big Tobacco*, in Sarat & Scheingold, *CULTURAL LIVES*, *supra* note 1, at 79.

## II. CAN GOVERNMENT CAUSE LAWYERS TRANSCEND THE LIMITATIONS THAT CONSTRAIN THE EFFECTIVENESS OF OTHER CAUSE LAWYERS?

Having determined that the lawyers involved in the government legal campaigns addressed in Part I may appropriately be characterized as cause lawyers within that context, the next question to be addressed is whether such government lawyers can act effectively in that role.

### A. Two Approaches to Evaluating Cause Lawyer Effectiveness

The following section summarizes two broad approaches to evaluating the effectiveness of cause lawyering efforts. The first, which is exemplified by Professor Gerald N. Rosenberg's book *The Hollow Hope: Can Courts Bring About Social Change?*,<sup>317</sup> is described here as the actuarial approach. The other, which is exemplified by the work of political science Professor Michael McCann, is described here as the cultural approach.

#### 1. The Actuarial Approach: *The Hollow Hope*

The starting point for an assessment of the effectiveness of the legal campaigns discussed above should be Professor Gerald N. Rosenberg's seminal work, *The Hollow Hope: Can Courts Bring About Social Change?*<sup>318</sup> In *The Hollow Hope*, Rosenberg challenges conventional wisdom regarding the effectiveness of the type of litigation campaigns described by Hilbink as elite/vanguard lawyering.<sup>319</sup> For example, Rosenberg questions the effectiveness of the NAACP's legal challenge to segregated schools which resulted in the U.S. Supreme Court decision in *Brown v. Board of Education*.<sup>320</sup> He similarly questions the effectiveness of the campaign for abortion rights that led to the decision in *Roe v. Wade*.<sup>321</sup> And, in the recently-released second edition of the book,<sup>322</sup> Rosenberg challenges the effectiveness of the campaign for same-sex marriage rights that culminated in the Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health*.<sup>323</sup>

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317. *Supra* note 14.

318. *Id.*

319. *See supra* notes 267-285 and accompanying text.

320. 349 U.S. 294 (1955); *see* ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 42-169; Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 809 (2006) [hereinafter Rosenberg, *Courting Disaster*]; Gerald N. Rosenberg, *Substituting Symbol for Substance: What Did Brown Really Accomplish?*, 37 PS: POL. SCI. & POL. 205 (2004) [hereinafter Rosenberg, *Substituting Symbol*].

321. 410 U.S. 113 (1973); *see* ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 175-201; Rosenberg, *Courting Disaster*, *supra* note 320, at 810; Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions*, in CONTEMPLATING COURTS 390 (Lee Epstein ed., 1995).

322. *Supra* note 14.

323. 798 N.E.2d 941 (Mass. 2003); *see* ROSENBERG, THE HOLLOW HOPE 2, *supra* note 14, at 339-419; Rosenberg, *Courting Disaster*, *supra* note 320, at 812.

Rosenberg's methodology is largely quantitative—he analyzes large amounts of data of various types to try to measure the effect of these landmark court decisions. For example, with regard to *Brown's* effectiveness, he points to data showing that even a decade after *Brown*, almost 99% of African-American children in the eleven states of the former confederacy still attended segregated schools.<sup>324</sup> And, with regard to *Roe*, Rosenberg points out that the rate of increase in abortions in America actually slowed following the Supreme Court's decision.<sup>325</sup>

Rosenberg's analysis may not be precisely on point for purposes of our discussion. Rosenberg's primary focus in the book is the inability of courts, acting on their own, to foster progressive social change, rather than the lawyers who appear before them.<sup>326</sup> Rosenberg explains this inability on a number of grounds. First, Rosenberg points out that throughout their history, with the possible exception of a couple of decades during the middle of the twentieth century, American courts have been opponents, rather than supporters, of progressive social change, and that courts have been defenders of, rather than challengers to, the economic, political, and social status quo.<sup>327</sup> Second, Rosenberg offers four explanations for why this is so. The federal judicial appointments process, particularly as it relates to Supreme Court Justices, requires broad acceptability on the part of judicial appointees.<sup>328</sup> Thus, progressive social reformers are unlikely to be appointed to the federal bench.<sup>329</sup> Next, the Constitution itself is a constraint on liberal social reform, with its recognition of first generation political and civil rights, to use Sarat and Scheingold's terminology discussed above,<sup>330</sup> and with its failure to recognize economic, social, and cultural rights,<sup>331</sup> which might alter the presently existing balance of wealth and power in society. Additionally, courts are constrained from pushing too far ahead of the other branches of government in introducing reforms, because courts need the assistance of the other branches to implement and enforce court decisions.<sup>332</sup> And finally, courts themselves lack the power to implement and enforce their own decisions.<sup>333</sup>

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324. Rosenberg, *Courting Disaster*, *supra* note 320, at 809 (citing Rosenberg, *Substituting Symbol*, *supra* note 320, at 205).

325. *Id.* at 810. To be fair, it is hard to image that the goal of abortion rights advocates was an increase in the number of abortions performed.

326. ROSENBERG, *THE HOLLOW HOPE*, *supra* note 14, at 1.

327. Rosenberg, *Courting Disaster*, *supra* note 320, at 797. Rosenberg discusses Supreme Court decisions in areas including civil rights, *id.*, civil liberties and dissident speech, *id.* at 802, and economic regulation, *id.* at 806, to illustrate his point.

328. *Id.* at 808.

329. *Id.*

330. *See supra* notes 295-316 and accompanying text.

331. Rosenberg, *Courting Disaster*, *supra* note 320, at 808.

332. *Id.*

333. *Id.*

Though courts may be the primary focus of Rosenberg's critique, he does not spare from his ire what he would describe as the naïve cause lawyers who over-rely on litigation as a means to achieve their goals. Not only are such lawyers misguided in their belief in litigation's ability to achieve social reforms, but they also, in his view, harm the very causes they champion by pursuing litigation as a means. First, resorting to the courts tends to replace the building of social movements and the kind of community support that Rosenberg believes is crucial to achieving and sustaining progressive social reform.<sup>334</sup> Second, court decisions in favor of progressive reformers may result in mobilization of opposition forces which can have the effect of preventing successful implementation of the court decision. For example, Rosenberg points to massive popular resistance in the South to forced desegregation following the *Brown* decision as hindering, rather than helping, the cause of desegregation.<sup>335</sup> And, Rosenberg similarly points to *Roe v. Wade* as leading to the rise of the "right to life" movement in the United States, which has so vigorously opposed abortion and abortion rights over the past three decades.<sup>336</sup> The fact that numerous states passed either statutes or constitutional amendments banning same-sex marriage in the immediate aftermath of *Goodridge* provides further support for Rosenberg's "backlash" thesis.<sup>337</sup> Note that Rosenberg suggests that conservative activists may have an easier time achieving success through social change oriented litigation than liberal or progressive activists.<sup>338</sup> That is because conservatives generally ask courts to preserve the status quo, or to dismantle precedents that were achieved during the brief reign of progressive judicial decision-making during the mid-twentieth century, each of which courts are more inclined to do than to effectuate liberal social change.<sup>339</sup> In any event, Rosenberg contends that progressive social reformers would do well to avoid resorting to courts alone and to seek other avenues to pursue their social change objectives.

## 2. The Cultural Approach: Michael McCann

Despite the force of his arguments, critics have contended that Rosenberg's analysis fails to apprehend at least some benefits that may be associated with social reform litigation. More particularly, these critics suggest that litigation may have impacts that go beyond the outcome of particular cases, and that Rosenberg's quantitative approach may miss

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334. *Id.* at 796-97.

335. *Id.* at 809; Rosenberg, *Substituting Symbol*, *supra* note 320, at 207.

336. Rosenberg, *Courting Disaster*, *supra* note 320, at 811.

337. *Id.* at 812-13. Note that Rosenberg's writings regarding *Goodridge* predate the decision of the California Supreme Court similarly recognizing a right to same-sex marriage under the California Constitution. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

338. Rosenberg, *Courting Disaster*, *supra* note 320, at 814.

339. *Id.*

some of the qualitative impacts litigation may have in shaping social consciousness and social practices.<sup>340</sup>

Perhaps the most persistent of Rosenberg's critics has been Michael McCann, a professor of political science at the University of Washington.<sup>341</sup> McCann suggests that Rosenberg's court-centered, "top-down" view of social change through law fails to capture the entirety of what is provided by adding a de-centered,<sup>342</sup> "bottom-up" approach to analyzing social change through law. The latter approach recognizes that very few disputes are actually resolved by courts, and that very few actors who are influenced by, and implement, legal decisions are in fact bound by, or participants in, the actual case itself.<sup>343</sup> Thus, the interpretations communities attach to legal decisions become more important than the actual decisions themselves. As stated by McCann:

[T]he decentered view emphasizes that judicially articulated legal norms take on a life of their own as they are deployed in practical social action. This points to what many analysts refer to as the *constitutive* capacity of law: Legal knowledge prefigures in part the symbolic terms of material relations *and* becomes a potential resource in ongoing struggles to refigure those relations.<sup>344</sup>

Thus, what appears on the face of a judicial decision to be a defeat for the legal reformers who brought the suit might turn out to be something entirely different in practice. A good example of this comes from McCann's own research regarding the pay equity movement.<sup>345</sup> McCann points out that many of the arguments advanced by pay equity advocates were not ultimately accepted by courts.<sup>346</sup> However, what appeared to be litigation defeats were utilized by pay equity advocates including unions and feminist groups to organize and mobilize grassroots support for their claims.<sup>347</sup> This support helped pave the way for legislation in support of pay equity.<sup>348</sup> Moreover, lawsuits were used to create leverage for collective bargaining and other agreements between unions, employees, and

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340. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 394-95 (citing Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1140 (2002) and Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 134 (2000)).

341. See *supra* note 17.

342. McCann, *Reform Litigation*, *supra* note 17, at 730.

343. *Id.* at 730-33.

344. *Id.* at 733.

345. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

346. See SCHEINGOLD & SARAT, *SOMETHING TO BELIEVE*, *supra* note 1, at 119; McCann, *Reform Litigation*, *supra* note 17, at 737-38.

347. McCann, *Reform Litigation*, *supra* note 17, at 738.

348. See *id.* at 738-39.

employers that led to greater advances in pay equity than either the lawsuits or negotiations alone could have led to.<sup>349</sup>

McCann identifies four different axes along which his approach to analyzing the effectiveness of law reform tactics differs from that of Rosenberg's. The first has to do with the symbolic power of the law.<sup>350</sup> While Rosenberg essentially views legal arguments as either being successful or unsuccessful in court, McCann suggests that even an "unsuccessful" legal argument may have important symbolic value beyond its acceptance or non-acceptance in court.<sup>351</sup> The next difference has to do with causality and power.<sup>352</sup> Rosenberg views causality and power in a linear fashion, measuring for a direct link between judicial action and discernable impacts in the social world.<sup>353</sup> McCann, by contrast, views causality and power multi-directionally, with the impacts of judicial decisions flowing back and forth in many different directions, with many different, often difficult to discern effects.<sup>354</sup> The third axis of difference has to do with research methods.<sup>355</sup> While Rosenberg focuses on aggregate, quantifiable data, McCann focuses on more qualitative analysis, usually in the form of detailed case studies of narrowly targeted populations or institutional venues.<sup>356</sup> The final axis of difference has to do with the scholars' definitions of what constitutes "significant" social change.<sup>357</sup> Rosenberg views significant social change in terms of based, national, statistically measurable changes in official policies.<sup>358</sup> McCann, by contrast, contends that significant social change may be episodic, uneven, and difficult or impossible to measure.<sup>359</sup>

In fairness, both Rosenberg and McCann concede that their varying approaches may "argue past" each other, rather than colliding head-on.<sup>360</sup> As mentioned above, Rosenberg's focus is on nationally-based, large-scaled social reform movements that culminated with decisions from the United States or State Supreme Courts.<sup>361</sup> Given this broad lens, it makes sense that Rosenberg would focus on aggregate and quantifiable measures of litigation success. By contrast, McCann's focus is much narrower, on small-scaled and local efforts at social reform through law.<sup>362</sup> In such circumstances, it makes sense that the more qualitative

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349. *Id.*

350. *Id.* at 741.

351. *See id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 741-42.

357. *Id.* at 742.

358. *Id.*

359. *Id.*

360. *See id.* at 720; Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feely and McCann*, 17 L. & SOC. INQUIRY 761, 777 (1992).

361. *See supra* notes 320-25, 335-37 and accompanying text.

362. *See supra* notes 347-49, 356 and accompanying text.

measures of effectiveness advocated by McCann would do a better job of capturing complex realities than the approach advocated by Rosenberg.

Extending this analysis to our earlier discussion of typologies of cause lawyering, it may well be the case that Rosenberg's actuarial approach does a better job of measuring the effectiveness of the type of cause lawyering identified by Hilbink as elite/vanguard lawyering<sup>363</sup> than McCann's cultural approach, given the broad scale of most elite/vanguard lawyering campaigns. Because such campaigns aspire to nationally recognizable impacts, the broad and aggregate measures employed by Rosenberg may be the most accurate measures of the reformers' success or failure in achieving their broad goals. On the other hand, McCann's cultural approach may do a better job of capturing the effects of what Hilbink describes as grassroots lawyering,<sup>364</sup> or what Sarat and Scheingold describe as lawyering against liberal democracy,<sup>365</sup> than Rosenberg's broader-based, more quantitative approach. Because the goals of such grassroots legal reformers are local and small-scaled, the aggregate measures utilized by Rosenberg may fail to identify successes achieved by such reformers. By contrast, McCann's narrower focus and qualitative methods may identify such successes where Rosenberg's methods cannot. Indeed, Hilbink has insightfully pointed out that the very limitations Rosenberg has identified regarding the effectiveness of elite/vanguard lawyering have driven increasing numbers of cause lawyers to move in the direction of grassroots, rather than elite/vanguard, approaches.<sup>366</sup>

For present purposes, because the government legal campaigns that are the focus here fall within the category of elite/vanguard lawyering, it may well be the case that Rosenberg's aggregate approach offers a more promising avenue through which to assess the effectiveness of the campaigns than McCann's constitutive approach. Nonetheless, in the interests of thoroughness, the following section of the paper will attempt to evaluate the effectiveness of the three litigation campaigns under discussion here utilizing elements from both Rosenberg's actuarial approach and McCann's cultural one.

#### *B. Evaluating the Government Cause Lawyer Cases Under the Two Different Approaches*

The following section attempts briefly to evaluate each of the cases studied here utilizing both an actuarial and a cultural approach. We begin with an assessment of the Mississippi tobacco case from an actuarial perspective. Assuming a correlation could be proven, the most important

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363. See *supra* notes 267-85 and accompanying text.

364. See *supra* notes 286-90 and accompanying text.

365. See *supra* notes 311-15 and accompanying text.

366. See Thomas Hilbink, *The Profession, The Grassroots, and the Elite*, in SARAT & SCHEINGOLD, *SOCIAL MOVEMENTS*, *supra* note 1, at 63.

positive impact of the Mississippi tobacco case would be a reduction in smoking rates. And indeed nationally, smoking rates among adults did decline significantly during the years immediately following execution of the MSA. In 1997, overall smoking prevalence in the United States among adults was 24.7%.<sup>367</sup> By 2004, that rate had declined to 20.9%.<sup>368</sup> The number has been relatively stable since then, measured at 20.8% in 2006.<sup>369</sup> The reduction in youth smoking, which was a major target of those who brought the suit,<sup>370</sup> was even more dramatic. Use of tobacco by high school students nationally declined from 36.4% to 23% from 1997 through 2005.<sup>371</sup> Within Mississippi itself, there was a similar decline in youth tobacco use during the relevant period.<sup>372</sup> On the other hand, adult tobacco use in Mississippi did not decline subsequent to execution of the MSA.<sup>373</sup> Of course, as will be discussed below, many factors beyond the tobacco lawsuit may have contributed to these figures.

Probably the most direct relationship that can be claimed between the litigation and the decline in smoking rates has to do with the economic impact of the settlement. Though this impact was significantly reduced given the eventual settlement of \$206 billion as opposed to the original \$368 billion agreed upon, the economic impact was nonetheless noticeable. Most experts attribute about a forty to forty-five cent per pack increase in the price of cigarettes to the MSA.<sup>374</sup> Given established figures relating to the price elasticity of cigarette sales,<sup>375</sup> it is possible to attribute most of the reduction in cigarette use to the price increase resulting from the MSA. Of course some of the money from the tobacco

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367. Centers for Disease Control and Prevention, *Cigarette Smoking Among Adults—United States, 2006*, 56 MORBIDITY & MORTALITY WKLY. REP. 1157, 1160 (2007), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5644.pdf>.

368. *Id.*

369. *Id.*

370. See *supra* notes 25, 81 and accompanying text.

371. Centers for Disease Control and Prevention, *Cigarette Use Among High School Students—United States, 1991-2005*, 55 MORBIDITY & MORTALITY WKLY. REP. 724, 725 (2006), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5526.pdf>.

372. See OFFICE OF HEALTH DATA AND RESEARCH, MISS. STATE DEP'T OF HEALTH, TOBACCO USE TREND AMONG MISSISSIPPI YOUTH: FINDINGS FROM THE 1998 TO 2006 YOUTH TOBACCO SURVEY 1 (2008), available at <http://www.health.ms.gov/msdhsite/index.cfm/31,2557,303.pdf/YTSTobaccoTrends1998-2006.pdf> (current tobacco use among Mississippi high school students declined from 30.3% in 1998 to 18.7% in 2006).

373. The adult smoking rate in Mississippi in 1997 was 23.2%. Centers for Disease Control and Prevention, *State-Specific Prevalence Among Adults of Current Cigarette Smoking and Smokeless Tobacco Use and Per Capita Tax-Paid Sales of Cigarettes – United States, 1997*, 47 MORBIDITY & MORTALITY WKLY. REP. 922, 923 tbl.1 (1998), available at <ftp://ftp.cdc.gov/pub/Publications/mmwr/wk/mm4743.pdf>. In 2005, that figure was 25.1%. Centers for Disease Control and Prevention, *State-Specific Prevalence of Cigarette Smoking Among Adults and Quitting Among Persons Aged 18-35 Years—United States, 2006*, 56 MORBIDITY & MORTALITY WKLY. REP. 993, 994 tbl.1 (2007), available at <http://www.cdc.gov/MMWR/PDF/wk/mm5638.pdf>.

374. See Schroeder, *supra* note 79, at 295; see also F A Sloan, C A Matthews & J G Trogdon, *Impacts of the Master Settlement Agreement on the tobacco industry*, 13 TOBACCO CONTROL 356, 359 (2004) [hereinafter Sloan, *Impacts*] (citing W. KIP VISCUSI, SMOKE-FILLED ROOMS 18 (2002)).

375. Schroeder states that for every 10% increase in the price of cigarettes there is about a four percent decrease in demand. Schroeder, *supra* note 79, at 295.

settlement went to fund an unprecedented level of smoking cessation programs,<sup>376</sup> as well as to fund counter-advertisements by the American Legacy Foundation against tobacco use.<sup>377</sup> On the other hand, states have found it increasingly difficult to avoid the temptation of utilizing the tobacco settlement funds allocated to them for purposes other than tobacco control.<sup>378</sup> Also, while the main purpose of the initiators of the litigation was not necessarily to punish the tobacco companies, it at least seems incongruous that the tobacco parties to the settlement have flourished financially following the settlement.<sup>379</sup> This result is certainly not consistent with the rhetoric of the government attorneys during the course of the tobacco suits vilifying the tobacco defendants.

Next, we turn to an analysis of the results of the tobacco case from a cultural perspective. It would seem that the state tobacco lawsuits at least in some ways contributed to building the public narrative that developed around the time of the lawsuits demonizing the tobacco industry and isolating smokers within society. However, that narrative had been developing since at least the 1950s, with major contributions coming from the Surgeon General's landmark 1964 Report,<sup>380</sup> and a spate of local regulations banning smoking in public places and limiting the sale of cigarettes to minors.<sup>381</sup> Closer to the present, media coverage, including the Day One report discussed above,<sup>382</sup> contributed much to increase public awareness of nicotine addiction, as well as the lengths gone to by the tobacco industry to obfuscate both nicotine's addictiveness and the other health harms caused by smoking.<sup>383</sup> Many of the documents which demonstrate the industry's efforts to conceal the harmful effects of smoking were disclosed by whistleblowers independent of the states' lawsuits, though certainly some documents were brought to light through the litigation that would not otherwise have become available.<sup>384</sup> Further, it seems clear that it was the weight of the possibility of lawsuits brought by all fifty states that brought big tobacco to the negotiating table for the first time in its history.<sup>385</sup>

Critics of the tobacco settlement have suggested that it will have negative impacts of a qualitative nature that will far outweigh any posi-

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376. A recently released study shows a positive correlation between expenditures on state anti-tobacco programs and declines in smoking prevalence. See Matthew C. Farrelly, Terry W. Pechacek, Kristin Y. Thomas & David Nelson, *The Impact of Tobacco Control Programs on Adult Smoking*, 98 AM. J. PUB. HEALTH 304, 304 (2008).

377. Sloan, *Impacts*, *supra* note 374, at 356; see also Schroeder, *supra* note 79, at 294. Funding for the American Legacy Foundation expired five years after the settlement. *Id.*

378. *Id.* at 294-95.

379. See, e.g., Sloan, *Impacts*, *supra* note 374, at 356.

380. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DePaul L. Rev. 331, 352 (2001) [hereinafter Rabin, *Tentative Assessment*].

381. *Id.* at 350.

382. See *supra* note 60 and accompanying text.

383. Rabin, *Tentative Assessment*, *supra* note 380, at 352-53.

384. *Id.*

385. See *supra* note 74 and accompanying text.

tive ones. Some theorists have suggested that the MSA sets a dangerous precedent from a constitutional law perspective, violating core principles of separation of powers and amounting to “regulation through litigation.”<sup>386</sup> Others have been particularly critical of the use of contingent fee arrangements with private attorneys in order to bring such large scale, social reform lawsuits.<sup>387</sup> While it is too early to determine whether such harms, which would likely only be discernable over long periods of time, have ensued, it is worth noting that the flood of “copycat” lawsuits anticipated by critics of the tobacco litigation, against industries ranging from fast food, to lead paint, to health care, have largely failed to materialize.<sup>388</sup>

It is also possible to evaluate the effectiveness of the Chicago gun case from an actuarial perspective. Looking at the Chicago gun case from a similar point of view as that applied to the tobacco case above, perhaps the best quantitative measure of success of the gun lawsuits would be a reduction in gun violence. As mentioned above, the number of gun homicides nationally declined in the two years immediately following the filing of the Chicago suit.<sup>389</sup> However, that was a continuation of a steep decline that had begun years prior to the filing of the Chicago suit, and that leveled off beginning in 2000.<sup>390</sup> In Chicago itself, gun homicides did decline in the year following the suit, but then began to creep back upwards.<sup>391</sup> In any event, it would be extremely hard to tie any decrease in handgun violence, either nationally, or in Chicago particularly, to a lawsuit that was wholly unsuccessful from a legal perspective. Indeed, the broad academic consensus seems to be that the gun lawsuits as a whole were similarly unsuccessful.<sup>392</sup>

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386. E.g., W. Kip Viscusi, *Overview to REGULATION THROUGH LITIGATION* 1,7 (W. Kip Viscusi ed., 2002); Michael E. DeBow, *The State Tobacco Litigation and Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 563-65 (2001); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1143-44 (2001); Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 449-50 (2000).

387. E.g., John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: *Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 252 (2001); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingent Fee*, 51 DEPAUL L. REV. 315, 323 (2001); Little, *supra* note 386, at 1183.

388. Indeed, on July 1, 2008, the Rhode Island Supreme Court reversed a jury verdict in favor of the State of Rhode Island against manufacturers of lead paint and dismissed the State’s public nuisance case against the industry. See *State v. Lead Indus. Ass’n*, 951 A.2d 428, 434-35 (R.I. 2008).

389. See *supra* note 97 and accompanying text.

390. See *supra* note 97 and accompanying text.

391. In 1999, gun homicides in Chicago numbered 460, down from 569 in 1997 and 536 in 1998. RESEARCH & DEV. DIVISION, CHICAGO POLICE DEPT., CRIME SUMMARY—CHICAGO 2003, [http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/03YEHomicide\\_1.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/03YEHomicide_1.pdf) (last visited Jan. 12, 2009). However, in 2000, the number climbed to 472 and to 514 in 2001. *Id.*

392. See Allen Rostron, *Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 486 & n.31, 487 (2006) (reviewing SUING THE GUN INDUSTRY, *supra* note 28) (citing authorities). However, Rostron himself chal-

Furthermore, the gun litigation seems to offer a vivid illustration of Rosenberg's backlash thesis.<sup>393</sup> The gun lawsuits appear to have brought together a new alliance between the NRA and the gun manufacturers themselves that had not previously existed.<sup>394</sup> The result was both state and federal legislation that dramatically reduced the likelihood of successful lawsuits against the gun industry in the future.<sup>395</sup> Additionally, the Supreme Court's ruling in *Heller*<sup>396</sup> seems likely to significantly inhibit further efforts of gun control advocates.

The gun cases were not much more successful from a cultural perspective than from an actuarial perspective. On the one hand, the cases did go a long way toward publicizing the marketing and distribution practices of gun manufacturers that seemed to increase the likelihood that guns would fall into the hands of those who would use them illegally.<sup>397</sup> However, gun control advocates seem to have had only limited success in leveraging the legal arguments rejected in the Chicago case into gains in other forums. Indeed, at least as much momentum for the cause of gun control came from highly publicized shootings such as those at Columbine High School,<sup>398</sup> and from their aftermath,<sup>399</sup> as from the gun litigation. In the end, the country remains deeply polarized over its views regarding firearms,<sup>400</sup> in sharp contrast to the emerging consensus against tobacco.<sup>401</sup>

In terms of actuarial measures of success, the results of the New York Attorney General's case against Merrill Lynch fall somewhere between those of the tobacco and gun cases. Though the \$100 million penalty paid by Merrill is nothing to sneeze at, it was, of course, minute as compared to the tobacco settlement. It also amounted to little more than a slap on the wrist given the capitalization of Merrill Lynch, and critics have pointed out that none of the money went directly to reimburse investors who were harmed by Merrill's tainted research information.<sup>402</sup>

In addition to the monetary aspect of the Merrill Lynch settlement, the company did agree to a number of reforms that resulted in a separa-

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lenges this view, and attributes greater success to the lawsuits than most other commentators. *Id.* at 485.

393. See *supra* notes 335-37 and accompanying text.

394. See PETER HARRY BROWN & DANIEL G. ABEL, *OUTGUNNED* 48 (2003) [hereinafter BROWN & ABEL *OUTGUNNED*]. Prior to this round of suits, the NRA had viewed itself primarily as a representative of gun owners, rather than gun manufacturers. *Id.* at 32.

395. See *supra* notes 144-45 and accompanying text. Even champions of the gun lawsuits such as Rostron concede this point. Rostron, *supra* note 392, at 508.

396. See *supra* note 148 and accompanying text.

397. See Rostron, *supra* note 392, at 490-93.

398. See, e.g., BROWN & ABEL, *OUTGUNNED*, *supra* note 394, at 81-103.

399. See, e.g., BOWLING FOR COLUMBINE (Alliance Atlantis Communications 2002).

400. See Rostron, *supra* note 392, at 505-06.

401. See *supra* notes 58 and accompanying text.

402. MASTERS, *supra* note 149, at 101.

tion between Merrill's research and banking businesses.<sup>403</sup> Also, as discussed above, similar settlements were reached with ten additional brokerage firms,<sup>404</sup> essentially implementing these reforms industry wide. This must certainly be viewed as a success, at least in terms of achieving the objectives set by the government attorneys prior to initiating the lawsuit. On the other hand, one must question whether these measures have led to the ultimate consumer protection goals that Spitzer and his colleagues pursued. Though Rosenberg does not focus directly on this point, other critics of the use of litigation to achieve social reform have pointed out that the "law of unintended consequences" appears to apply with force to court orders obtained through litigation.<sup>405</sup> Thus, even where the specific measures desired are in fact realized through litigation, the results flowing from those measures may not be as predicted. Fordham Law School Professor Jill Fisch argues that this has been the case with regard to the research analyst settlements.<sup>406</sup> More particularly, Fisch contends that the economics of providing research information are such that it is not profitable for brokerage firms to provide this information independently from their banking businesses.<sup>407</sup> Thus, the result of the settlements has in fact been a net decrease in the amount of research analysis available to independent investors.<sup>408</sup> Other commentators have reached similar conclusions.<sup>409</sup>

The Merrill Lynch settlement remains a mixed bag from a cultural perspective as well. On the one hand, Spitzer seems appropriately to have raised consciousness that financial services firms are worthy targets of consumer protection advocates' concern. Prior to initiation of Spitzer's actions, few consumer advocates focused much attention on Wall Street.<sup>410</sup> On the other hand, many commentators have raised questions regarding the impact of Spitzer's actions on principles of federalism, and correspondingly, the health of the financial markets. As mentioned above, traditionally, regulation of the securities markets was handled at the federal level.<sup>411</sup> Critics have contended that if other state officials follow Spitzer's lead, the financial services industry will face the crippling prospect of having fifty separate sets of rules to comply with.<sup>412</sup>

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403. See *supra* notes 199-204 and accompanying text.

404. See *supra* note 205 and accompanying text.

405. See, e.g., Little, *supra* note 386, at 1180.

406. Jill E. Fisch, *Does Analyst Independence Sell Investors Short?*, 55 UCLA L. REV. 39, 39 (2007).

407. *Id.* at 43.

408. *Id.* at 39. Fisch points out that the firms have continued to provide adequate levels of research information to their institutional clients, who are large enough to demand such information. *Id.* at 42.

409. See, e.g., MASTERS, *supra* note 149, at 267.

410. Spitzer's actions seem particularly prescient in light of the economic collapse that effected Wall Street and the nation in the Fall of 2008.

411. See *supra* note 165 and accompanying text.

412. See MASTERS, *supra* note 149, at 268-69 (quoting University of Chicago Law Professor Richard Epstein and American Enterprise Institute Scholar Michael Greve); Christopher R. Lane,

Some commentators, in turn, have contended that “Spitzerist” interventions in the financial markets do not threaten “balkanization” or the health of the financial markets.<sup>413</sup> A middle ground position suggests that Spitzer’s actions served a useful purpose in “awakening” the SEC and other federal regulators to assert their proper, primary enforcement role with regard to the financial services scandals of the early 2000s.<sup>414</sup> In any event, though the worst fears regarding “balkanization” appear not to have come to pass,<sup>415</sup> it remains to be seen whether “Spitzerism” can survive the shocking downfall of its namesake.<sup>416</sup>

*C. The Effectiveness of Government Cause Lawyering—Transcending Limitations*

Professor Rosenberg does not rule out entirely the possibility that litigation might form the basis for progressive social change. However, he does outline a stringent set of conditions that must be satisfied in order for elite/vanguard cause lawyers to achieve their objectives. First, there must be adequate support in legal precedent for the change sought by the reformers.<sup>417</sup> Second, there must be support for the change from legislative and executive officials.<sup>418</sup> Finally, there must be at least some citizen support for (or minimal citizen opposition to) the change sought,<sup>419</sup> along with satisfaction of at least one of the following four conditions: 1) positive incentives offered to induce compliance;<sup>420</sup> 2) costs imposed to induce compliance;<sup>421</sup> 3) court decisions allowing for market implementation;<sup>422</sup> or 4) non-judicial actors who are willing to use court orders as a tool for leveraging additional resources or for hiding behind when such persons decide to act.<sup>423</sup>

A quick comparison between the cases described above and Rosenberg’s conditions for elite/vanguard lawyer success suggests that

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*Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators*, 39 NEW ENG. L. REV. 317, 339 (2005); Mindy Olson, Note, *The Securities Fraud Deterrence and Investor Restitution Act: More Effective Than Current Regulation?*, 30 J. CORP. L. 425, 441-42 (2005); Steve A. Radom, Note, *Balkanization of Securities Regulation: The Case for Federal Preemption*, 39 TEX. J. BUS. L. 295, 322-23 (2003); John C. Coffee, *Competitive Federalism: The Rise of the State Attorney General*, N.Y.L.J., Sept. 18, 2003, at 5; Michael G. Oxley, Letter to the Editor, *Who Should Police the Financial Markets?*, N.Y. TIMES, June 9, 2002, § 3, at 11.

413. See Jonathon Mathiesen, Survey, *Dr. Spitzlove or: How I Learned to Stop Worrying and Love “Balkanization,”* 2006 COLUM. BUS. L. REV. 311, 313-14 (2006); Tidman, *supra* note 163, at 399.

414. See Macey, *supra* note 162, at 957, 973.

415. Tidman, *supra* note 163, at 398.

416. See *supra* note 208 and accompanying text.

417. ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 31. This argues in favor of incrementalism, preferring small and gradual changes over dramatic ones. *Id.*

418. *Id.*

419. *Id.* at 31-32.

420. *Id.* at 32.

421. *Id.* at 33.

422. *Id.*

423. *Id.* at 33-35.

while the governmental positions of the lawyers initiating the campaigns may be adequate in themselves to satisfy some of the conditions, nonetheless, other conditions will remain a challenge to social change oriented litigation campaigns initiated by government attorneys. For example, with regard to Rosenberg's second condition, legislative or executive support, that condition by definition will be satisfied when a government attorney initiates an elite/vanguard lawsuit. By the same token, it is likely that if a government lawyer is initiating an action, Rosenberg's third condition, at least a minimal degree of public support for the action, will be satisfied as well. After all, given the political nature of the positions of the attorneys involved in initiating such suits, it is hard to see them getting so far "out in front" of public opinion with regard to a particular issue as to fail to achieve the minimal level of support required by Rosenberg's fourth condition.

On the other hand, the governmental nature of the plaintiffs will not necessarily transcend Rosenberg's first condition, at least adequate precedential support for the change sought. Thus, the Chicago gun suit ultimately foundered on the Illinois Supreme Court's unwillingness to extend the tort of public nuisance to the gun distribution context.<sup>424</sup> On the other hand, the tobacco lawsuit was able to achieve considerable success with what many commentators described as a questionable legal theory.<sup>425</sup> Both the legitimacy of the Attorneys General who brought the suits, as well as the ample resources they were able to bring to the litigation, may well have made up for what was lacking in terms of the doctrinal strength of the claims. It is also worth noting that government litigants may have substantive claims available to them which are more favorable than those that are available to private litigants. For example, it is quite clear that the relaxed procedural and substantive standards under the Martin Act contributed mightily to the New York Attorney General's success against Merrill Lynch.<sup>426</sup>

Finally though, Rosenberg's last four conditions often are likely to be outside the control of the government actors initiating the elite/vanguard litigation. For example, the State Attorneys General initiating the tobacco lawsuits have not been able to prevent many state officials from "raiding" the tobacco settlement monies for purposes other than tobacco control.<sup>427</sup> And, market forces may have deprived the research analyst settlements from having their intended effect of improving the research offerings available to independent investors.<sup>428</sup>

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424. See *supra* notes 129-31 and accompanying text.

425. E.g., Little, *supra* note 386, at 1159; but see Rabin, *Tobacco Litigation*, *supra* note 30, at 866 ("The second obstacle-finding an effective legal theory-appeared somewhat less formidable by the early 1980s, in light of the continuing evolution of products liability law.").

426. See *supra* notes 162-63, 166 and accompanying text.

427. See *supra* note 378 and accompanying text.

428. See *supra* notes 405-08 and accompanying text.

## CONCLUSION

The foregoing analysis suggests that each of the government legal campaigns described above should be considered an example of cause lawyering. It is true that the government attorneys involved in these campaigns do not at all times act in the role of cause lawyer, and the prominent professional status of these lawyers is at odds with the outsider status of most cause lawyers. Nonetheless, the clear social change objectives that drove these lawyers in their resort to the courts provide an obvious connection to cause lawyering. Additionally, the very nature of the public offices held by these lawyers blurs the line between law and politics in a way that is a hallmark of cause lawyering. Similarly, the lawyers' obvious personal embrace of the social change objectives of their actions represents a clear rejection, in the circumstances of each case, of the profession's non-accountability tenet. Moreover, the lack of an easily identifiable client in each of the cases led to an inversion of the typical lawyer-client relationship, in a manner that is consistent with elite/vanguard cause lawyering.

Despite the factors that distinguish them from prototypical cause lawyers, the government attorneys involved in the cases discussed here were not able to transcend entirely the constraints that have traditionally limited elite/vanguard cause lawyers from achieving the full extent of their objectives. On the one hand, the high professional status of the government attorneys involved clearly lent a degree of legitimacy to their cases that increased their likelihood of success. Additionally, the cases benefited from the availability of certain legal claims that are only available to government litigants. On the other hand, each of the cases demonstrated the continuing existence of the above-mentioned traditional constraints.

For example, in the tobacco case, the full effects of the MSA originally agreed to by Attorney General Mike Moore were substantially limited by Congress's unwillingness to pass the federal legislation that would have been needed to implement the MSA in its entirety. And, Moore has been similarly unable to prevent certain state legislatures from "raiding" the proceeds of the tobacco settlement for use in balancing budgets and for additional purposes besides tobacco control. Likewise, the lawyers in the Chicago City Attorney's office were stymied by the Illinois Supreme Court's unwillingness to extend the legal doctrine of public nuisance to the context of gun distribution and sales. Moreover, the lobbying effectiveness of the NRA and other interests supporting rural gun owners resulted in legislation at both the state and federal levels that severely set back the objectives of the advocates of gun control. Finally, market forces have seriously limited the benefits to ordinary investors intended by New York Attorney General Eliot Spitzer's efforts to ensure research analyst independence in the financial services industry.

None of this should be read to contend that government attorneys ought to avoid entirely efforts to use the law and courts to effectuate social change. To the contrary, at least two of the cases discussed here were at least partially successful in achieving their objectives. The tobacco lawsuit likely did at least contribute to the nationwide decline in smoking rates that followed the MSA. And, Attorney General Spitzer did help bring about major reforms within the financial services industry that served to insulate research analysts from the influence of investment bankers. And, given the cultural perspective discussed above, it is likely that all three of the cases influenced legal consciousness and actors in ways that are difficult to measure but may well result in social change over the long term. On the other hand, given the limitations mentioned above, it behooves government attorneys to think carefully about the means they wish to pursue in seeking to bring about based social change, and to think hard about the constraints that have historically limited the effectiveness of elite/vanguard cause lawyering.