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INTERNATIONAL BOOK ESSAY

Lawyering in Hard Places: Comparative Dispatches from the Margins of Legality

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What do Lawyers do when Legality Unravels?

Lawyering is nowhere easy, but in liberal democracies governed by the rule of law, we know what effective lawyers look like: part of an independent bar, these professionals keep clients within the bounds of the law, persuade judges to win disputes in court, and promote the public interest via pro bono work. But not all lawyers find themselves in such favorable contexts. What of lawyers working in hard places at the margins of the rule of law or where legality unravels into violence? Consider two examples and ask yourself: where are we, and how do these contexts challenge conventional lawyering? In the first example, the president of a national supreme court under attack by a hostile government travels abroad to meet with fellow judges and deliver a cry for help: in their home country, the rule of law is under siege:

> [T]here seems to be no hope ... judiciary panels [are] manipulated in response to expectations of the governing party. The Minister of Justice is also Prosecutor General ... he has staffed over one-half of the National Council of the Judiciary with people without constitutional mandates, who now owe him everything. The party machine can crown or destroy anyone and everyone at the whim and will of those in rule.

In the second example, after packing his country's supreme court, a corrupt ex-president lawyers up and goes for the kill. Preparing to regain executive office,

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he makes it publicly known that he wants unfettered power—even to assassinate his political opponents—and calls on his judicial allies to make it all legal:

> Judge 1: "I'm going to give you a chance to say if you stand by it. If the president decides his rival is a corrupt person and he orders the military or orders someone to assassinate him, is that within his official acts for which he can get immunity?"
>
> President's lawyer: "We can see that could well be an official act." …
>
> Judge 2: "[Y]our ask is absolute immunity, isn't it? I mean, that's …"
>
> President's lawyer: "That's our principal position, yes."

You might think that these two scenes are drawn from contexts far away from the liberal rule-of-law societies that have historically attracted most socio-legal research on the legal profession (Abel and Lewis 1988, 1989, 1995).[1] Not so. The first speech was delivered in July 2018 in Karlsruhe, Germany, by the president of the Polish Supreme Court, who detailed the alarming constitutional breakdown of Poland (quoted in Sadurski 2019, 96). The second is an excerpt of oral arguments before the US Supreme Court in April 2024, wherein the lawyer representing former US President Donald Trump appealed to the Court's conservative supermajority to bestow absolute immunity on his client and enable him to assassinate political rivals should he recapture the presidency.[2]

I open with these unsettling scenes to make the point that it is not just readers interested in autocracies or places stricken by violent conflict that have much to learn from Kieran McEvoy, Louise Mallinder, and Anna Bryson's thought-provoking new book, *Lawyers in Conflict and Transition*. As the authors persuasively argue, drawing lessons from "other contexts that have experienced the very real consequences of violence, human rights abuses and authoritarianism and the role by lawyers in enabling or resisting such impulses has never appeared less exotic" (303–4). After all, the boundaries separating liberal democracies and rule-of-law polities from their autocratic, violent, and transitional counterparts are more fragile and permeable than we once thought (Scheppele 2018; Levitsky and Ziblatt 2019). If the "ideals and institutions" undergirding the rule of law "that appear robust and unassailable can falter and fracture in a stumbling retreat," then it behooves us to better understand how lawyers stretch, flip, and abandon conventional lawyering as they dangle at the margins of legality (Halliday 2020, 187).

Hard Places and their Cause Lawyers: Data, Methods, and Positionality

For this enterprise, there is no better place to start than *Lawyers in Conflict and Transition*, a pathbreaking study based on comparative fieldwork and 131 extended interviews with cause lawyers across six cases: Cambodia, Chile, Israel, Palestine, South Africa, and Tunisia. Three of these cases capture messy democratic transitions

[1] For a more encompassing recent overview, see Abel et al. 2022.

[2] *Trump v. United States*, Case no. 23-939, April 25, 2024, Transcript of Oral Argument, 9, 13, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_f2qg.pdf.

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from authoritarian rule (Chile during and after military rule of Augusto Pinochet, South Africa during and after apartheid rule by the Nationalist Party, and Tunisia during and after authoritarian rule of President Ben Ali); one case captures a failed democratic transition and relapse to authoritarianism (Cambodia after the Khmer Rouge); and two cases capture an enduring violent conflict alongside the construction of a "dual state" (Palestine and Israel) (Fraenkel [1941] 2017; Meierhenrich 2017, lxiii). Despite their diversity (the jurisdictions span "across the principal 'legal families'" [11–13]), all six cases experienced authoritarian rule, violent conflict, resistance struggles, and calls for transitional justice.

These hard places forced lawyers to grapple with extreme forms of violence (genocide, rape, terrorism, and torture at sometimes massive scales), to participate in tense political negotiations under the shadow of armed conflict or military occupation, and to act amidst rapid social and political changes at "critical junctures" — such as the collapse of authoritarianism (Capoccia and Kelemen 2007). Navigating violence, resistance, and mercurial social change prompted lawyers to soul-search as they struggled to maintain some coherent sense of professional identity and ethical commitment. These contexts also provided numerous entry points for lawyers to plunge onto the political stage: from boycotts and contention by resistance movements (chapters 2–4), to political negotiations involving both government and opposition actors (chapters 5–6), to truth commissions and prosecutions accompanying transitional justice campaigns (chapter 7). Across the six cases, McEvoy, Mallinder, and Bryson conducted an average of twenty-two interviews, with most featuring pro-democracy, left-leaning individuals whom we would identify, following Austin Sarat and Stuart Scheingold (2006), as "cause lawyers." Only forty of the 131 interviewees were women: even among progressive cause lawyers, the authors note a "stag effect"—namely, a tendency to privilege masculine forms of lawyering and struggle (101).

These lawyers are fascinatingly difficult to pin down with existing typologies. Although research on politically active lawyers in authoritarian or transitional settings tends to divide them into two camps—progressive lawyers in civil society fighting for political liberalism (Halliday and Karpik 1997; Halliday, Karpik, and Feeley 2007; Liu and Halliday 2016; Pavone 2020) or reactionary lawyers in the state acting as autocratic legalists (Corrales 2015; Scheppele 2018; Pavone, forthcoming)—the lawyers across the six cases tend to eschew this binary. Unlike the lawyers fighting for political liberalism featured, say, in Lucien Karpik's (1999, 2007) study of the Paris bar, the cause lawyers across the six sites sometimes justify and embrace violence as part of a repertoire of resistance, and they are ready to disenchant liberal constitutionalism and international law when their hopes ring hollow (6–8, 22–32). Unlike the autocratic legalists featured in, say, Kim Lane Scheppele's (2018, 2019) studies of state attorneys in Hungary and Russia, these attorneys continue to identify as progressive cause lawyers "from within" even when they become civil servants working for their appointing government.

The authors of *Lawyers in Conflict and Transition* approach their interlocutors with an "ethnographic sensibility" (Schatz 2013, 6): they are self-consciously part academic lawyers and part "committed human rights activists . . . directly involved in trying to find lawful and human rights-compliant solutions to deal with the legacy" of the thirty-year violent conflict in Northern Ireland (2). The virtues of this positionality

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are that the authors could tap a network of connections across the six field sites and embody the "double consciousness" to relate to interviewees who play by the rules at one moment and – snap! – disrupt those very rules in the next (Matsuda 1987, 338; McCann 1994, 232–33). It empowered McEvoy, Mallinder, and Bryson to amplify cause lawyers' experiences, "warts and all," as those of "'real people' working in very difficult circumstances" (1, 314).

The limit to this ethnographic positionality is that it appears to ethically commit the authors to at times overvalue the granular and dissonant idiosyncrasies of their interlocutors: to "make sense of difference" and avoid "making generalizable claims" (130, 137, 227). Sifting through the book's thick descriptions, one may experience some of the conflicting feelings suffusing immersive fieldwork: a stimulating bombardment from all angles of sought and unsought insights, as well as the struggle to pull out a narrative thread to make sense of it all. Readers hoping to find this parsimonious thread of substantive takeaways in the introductory or concluding chapters of *Lawyers in Conflict and Transition* will instead have to roll up their sleeves and do much of that work for themselves.

As someone who has conducted extensive fieldwork centered on lawyers, I sympathize with the ethical and practical challenges of splicing a messy "field" into neat analytic bites (Pavone 2022a). But since I have more critical distance from the places and interviewees at the heart of McEvoy, Mallinder, and Bryson's study, I can take greater liberties in deriving broad-brushstroke comparative lessons from the empirical materials so transparently presented in *Lawyers in Conflict and Transition*. I will follow a similar logic to John Stuart Mill's method of agreement by focusing on common patterns (Pavone 2022b, 145): we would expect social actors to behave differently across dissimilar authoritarian, conflictual, and transitional contexts, so probing similarities across these sites can help us grasp the essence of cause lawyering in hard places.

This is my purpose for the rest of this review article: how does a comparative analysis of lawyering at the margins of legality unsettle conventional narratives and reveal what I did not know? Why must we flip our assumptions about lawyering to understand how legal professionals navigate authoritarian, violence-stricken, and transitional settings?

Flipping the Script: Lessons from the Margins of Legality

Amongst the stylized facts about the politics of lawyers derived from research in democratic, rule-of-law settings, at least three stand out:

- When it comes to professional politics, bar associations can serve as autonomous sources of collective action and animating hearts of the legal complex: lawyers identify with and defend bar associations, and, in turn, these associations may facilitate lawyers' mobilization (Halliday 1987; Karpik 1999; Karpik and Halliday 2011).
- When it comes to social movement politics, lawyers are inherently conservative, rejecting and taming violent and contentious tactics: they push clients and movement leaders to act within the confines of legality and co-opt radical claims with rights talk (Scheingold 1974; Abel 2004; McCann 2014).

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- When it comes to judicial politics, effective lawyers mobilize sufficient resources, substantive knowledge, and process expertise to persuade judges and win cases via strategic litigation (Kritzer 1990, 1998; Miller, Keith, and Holmes 2015).

The cause lawyers interviewed by McEvoy, Mallinder, and Bryson across Cambodia, Chile, Israel, Palestine, South Africa, and Tunisia flip these conventional wisdoms on their head. Their behaviors might seem unrecognizable, unethical—unlawyerly!—until we realize that the usual assumptions do not hold in more challenging sites. To wit:

- Because the state in authoritarian, conflictual, and transitional settings may infiltrate and undermine bar associations, cause lawyers may find themselves defying the bar and mobilizing against the bar's obstruction or in spite of the bar's foot-dragging.
- Because social movements in authoritarian and conflictual settings are more likely to embrace law-breaking and violence as a necessary means of resistance, cause lawyers will sometimes embrace radical contentious tactics by defending violent clients and mobilizing as outlaws themselves.
- Because courts in authoritarian and conflict-ridden settings may be packed and weaponized as tools of state repression, lawyers may boycott the judiciary, intentionally convert legal proceedings into show trials to attract media attention, and memorialize the complicity of judges by not trying to win cases in court.

First, let us consider the role of lawyers and bar politics. Even in democratic countries, there is variation in the degree to which the bar is independent of the state. Where the legal profession developed before the state consolidated power—as in the United States and Britain—bar associations have acted with greater political autonomy than where state formation preceded professionalization—as in Germany and France (Rueschemeyer 1986, 1973; 433–44). Yet, as Karpik (1999) demonstrates, even in state-centric France, lawyers launched strikes and carved political spaces to found bar associations that "became the first secular, self-governing bodies outside of the state" (Pavone 2020, 419).

Not so in some authoritarian and transitional countries where "cause lawyers often have a deep distrust of their own bar associations (and that feeling is typically mutual)" (24). For autocratic leaders may meddle directly in bar politics to secure political loyalty, blacklist cause lawyers, and thwart collective action. The Ben Ali regime surveilled the Tunisian Bar Association (ONAT) to identify cause lawyers, charge them with bogus crimes in court, and fix bar elections to secure a pro-regime leadership that would demobilize the legal profession. It was only after years of outside "pressure from local branches and prominent cause lawyers" that ONAT endorsed and then spearheaded collective action against Ben Ali in the democratic revolution of 2011 (61, 68; see also Gobe and Salaymeh 2016). Even so, when a group of one hundred cause lawyers lodged corruption complaints against Ben Ali and his inner circle, they "did not receive support from the Bar Association," which distanced itself from more "politicized" causes (289).

This dynamic generalizes to authoritarian contexts beyond Tunisia. During the early years of Pervez Musharraf's rule in Pakistan, the president of the Supreme Court Bar

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(SBCA) met with Musharraf to pledge political loyalty in exchange for more funding. It was only after years of organizing—and the dramatic arrest of the chief justice of the Pakistani Supreme Court—that anti-regime lawyers captured the SBCA leadership and turned it into a vector of opposition politics (Ghias 2010, 1002–8; Munir 2012). A similar dynamic characterized pre-1980s Taiwan where "the organised bar associations were conservative and inactive" and "rejected" oppositional politics, forcing cause lawyers to organize secret "alternative bar association[s]" "to avoid the gaze of the late authoritarian state" (Ginsburg 2007, 47, 52, 57). Far from being catalysts of cause lawyering and collective action, bar associations in more authoritarian and transitional contexts may (at least initially) prove obstacles instead.

Second, as cause lawyers represent "violent politically motivated movements and individuals" (17) in conflict-stricken settings, some may contingently embrace violence as a necessary means of resistance. Many of the lawyers featured in *Lawyers in Conflict and Transition* did not self-identify as liberals taming social movements via rights talk but, rather, as radicals forged through contentious politics. This was most evident with South African attorneys identifying as "struggle lawyers." As one puts it, "I have lived simultaneously as a lawyer and an outlaw," working "through the law in the public sphere, and against the law in the background" (22). Some have acted as couriers between prison inmates and the African National Congress and its militant wing, uMkhonto weSizwe (MK) (32, 36). Others have provided military advice, as recounted by a "self-deprecating" struggle lawyer: "I once said to Joe Slovo [MK leader] … that if somebody used our building they could fire mortars onto Parliament. I was a bit disappointed when he turned down the idea, on political grounds that somehow the objective wasn't to kill civilians in Parliament" (37). The "irony" is that leaders of "the 'terrorist' or revolutionary movement" were as likely to "kee[p] struggle lawyers on the 'straight and narrow'" as the reverse! (37).

Most struggle lawyers did not embrace violence themselves, but even those who kept to the straight and narrow recognized that enabling confrontations could transform movement leaders into the martyrs and political prisoners that attract media sympathy and public outrage. One struggle lawyer recounted learning this lesson:

> There was a protest by a women's organisation and the police vans pulled up in front. As they [the police] were putting them in the vans … we took them out of the vans, making a lot of noise about the human rights. … One of the comrades who had organised it was screaming, "These damn lawyers, why are they doing that? The point of the protest is for the women to be arrested, you are being a counter-revolutionary." (50)

As the interviews in *Lawyers in Conflict and Transition* demonstrate, lawyers did feel the urge to reconcile their professional role and the violent tactics of their clients. One of McEvoy, Mallinder, and Bryson's most consistent findings is that lawyers justified their relationship with violent clients by emphasizing the need for someone to relate to militants as "full human beings" deserving of empathy and dignity, especially since many were victims of "torture, isolation, and other forms of ill-treatment" (46–48). They became sympathetic ears in addition to defense attorneys.

Third, far from being litigation-driven actors seeking to persuade judges, cause lawyers in hard places often do the precise opposite. Some organize boycotts of the

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courts. Lawyers in Gaza went on strike for a full year in 1989 to highlight judicial complicity in repressing Palestinians. What else is a cause lawyer supposed to do when representing a client before Israel's military courts, where the conviction rate is above 99 percent (65–66)? When everyone knows that the fix is in, going to court is no longer an obvious avenue for a cause lawyer (for similar examples from Malaysia, see Harding and Whiting 2012).

Other cause lawyers took on a different tact, using the public nature of judicial rituals to orchestrate what we might call *show trials from below*: "turning legal settings into sites of 'contentious performance'" (81). As one Tunisian cause lawyer explained, "[w]e were not pleading to either convince the judge or defend our clients. … We always use[d] these cases as an opportunity … to denounce the regime and its practices to the audience, to the wider public, international [actors] and the media as well … to transform these cases against political activists as cases against the regime" (310). Even when the fix is in, opposition and social movement leaders—like Nelson Mandela and co-defendants in the Rivonia trial—constructed show trials to exercise their agency, appealing to domestic and international audiences to "transfor[m] themselves into the subjects of history" (88). "Political trials had a particular role to play," one struggle lawyer explained, to enable "high-profile cadres … to further their political positions" (39). This is a pathbreaking insight: political scientists often construe show trials as either concessions to legality (Ginsburg and Moustafa 2008, 5–7) or as a tool for autocrats to project power and maintain elite cohesion (Shen-Bayh 2022). These cause lawyers turned the tables: they converted prosecutions into show trials neither as paeans to legality nor to enable autocrats to flex their muscles but, rather, to attract international indignation and empower their clients to denounce oppression.

Other cause lawyers turned to politically captured courts to advance a more subtle, long-term strategy. The goal was not public spectacle but to establish a paper trail of complicity in human rights abuses that could be picked up by future lawyers after authoritarian rule. This future-looking strategy was vividly highlighted by Chilean cause lawyers. They knew full well that justice was rigged under Pinochet's rule: judges granted only ten out of 8,700 (0.1 percent) habeas petitions that cause lawyers filed on behalf of political prisoners (239). So why did they do it? Is this not just bad lawyering? Not so, as a Chilean lawyer explained: "One of the key resources we had in Chile was the work of lawyers *during* the dictatorship … they gathered and shared evidence and testimonies and they kept the legal doors open until the state and the legal system was ready to do its duty" (264; emphasis in original).

Let me share one final inversion: we presume that defense lawyers should secure their clients' innocence, not labor to establish their guilt! Yet, as part of the transitional justice process in South Africa, the Government of National Unity established an Amnesty Committee to grant amnesty for political offenses committed during apartheid in return for "full disclosure" (245). One lawyer secured amnesties for 246 police officers by flipping his role: "The whole situation was reversed. Your normal instinct is you plead your client's innocence. … But I said to my clients, don't hold back, no claims of self-defence … it was tough on the victims … but that is why almost all my clients got their amnesty" (255–56). Lawyering in hard places can be a dizzying affair, forcing lawyers to act as if up was down and down was up.

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Pathways for Future Research

There are many more empirical insights in *Lawyers in Conflict and Transition* that can be picked up and elaborated in future research. First, this comparative study struck me as more agent and process driven than focused on explaining specific events or outcomes. We learn much about lawyering in hard places but less about the degree to which cause lawyers impact democratic revolutions, the radicalization of social movements, backlash to legal mobilization, or the effectiveness of transitional justice. By surfacing underappreciated exercises of agency by lawyers, McEvoy, Mallinder, and Bryson have enabled socio-legal researchers to now pick these up to help explain a broader politics of authoritarian and transitional rule.

Second, scholars could use paired comparisons to probe variation in cause lawyering in hard places (Tarrow 2010)—treating lawyers as outcomes of interest (see, for example, Halliday, Karpik, and Feeley 2012). For instance, consider how cause lawyering in South Africa differs from Chile. McEvoy, Mallinder, and Bryson uncover that cause lawyers self-ascribe different identities across these two sites: South African lawyers prefer the radical identity of "struggle lawyers," whereas Chilean lawyers prefer the liberal identity of "human rights lawyers." What is it about the organization of the legal profession, the nature of social movements, and the degree of conflict or repression across these two cases that explains this variation? In South Africa, cause lawyers also proved keener to publicize their roles—by orchestrating show trials from below and televising truth commission hearings—than in Chile, where lawyers focused on documenting rights abuses and organizing closed-door truth commissions. What explains the more performative nature of cause lawyering in South Africa compared to the more legalistic approach of cause lawyers in Chile?

Finally, social scientists could leverage evidence of how lawyering works differently in authoritarian, violent, and transitional settings to rethink theories of "rule by law" (Ginsburg and Moustafa 2008) and lawyers' links to political liberalism (Halliday and Karpik 1997; Halliday, Karpik, and Feeley 2007). How should we revisit the role of judicial repression when capturing courts and orchestrating show trials not only serves the interests of autocrats but can also create opportunities for cause lawyers to expose and denounce state oppression? How do we make sense of lawyers who—like liberals—fight for democracy and the rule of law but who—unlike liberals—embrace more transgressive and violent tactics to achieve their ends? Do liberal ends justify illiberal means?

These are the stimulating questions that came to mind as I grappled with the voices and experiences of cause lawyers working under extremely difficult circumstances. Hard places beget hard choices, and the protagonists of *Lawyers in Conflict and Transition* were forced to make many difficult decisions that their counterparts in democratic and rule-of-law settings might find unintelligible, unethical, and counterproductive. Instead of shaking our heads, those of us privileged to work in more favorable contexts would do well to embrace the ethnographic sensibility demonstrated by McEvoy, Mallinder, and Bryson and avoid the complacent naïveté that we will never have to make hard choices ourselves—or that we would do better when the time comes.

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