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A new breed of lawyer is practicing criminal defense in China. Dubbed the “die-hard lawyer” by the press, but sometimes self-eschewing the label, these new lawyers say they are simply representing their clients zealously, advancing their interests by whatever legitimate means are at hand. What is being said of them in the press? What do they say about themselves? How do they compare with the American civil rights era cause lawyer?

In my 2013 book, The American Legal Profession in Crisis, I wrote a chapter on the new breed of American lawyer in the civil rights era and the organized bar’s unwelcoming response to them. During a visit to China in summer of 2014, I was fortunate enough to meet and discuss the phenomenon of the Chinese die-hard criminal defense lawyer with self-identifying lawyers, with judges, with prosecutors, and with more traditional defense lawyers. I was struck by the similarities between the emerging Chinese die-hard lawyer and the American civil rights era cause lawyer. Each has been derided by the traditional elements of their professions; each was occasionally incarcerated by the government; each used previously unused, aggressive methods to challenge the status quo. The aggressive lawyering of the civil rights era cause lawyer eventually became one of several accepted ways of lawyering. The developments in China

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1 James Moliterno, Vincent Bradford Professor of Law, Washington & Lee University
2 Meet China’s Swaggering, ‘Diehard’ Criminal Lawyers
BY ALEXA OLESEN ON MAY 18, 2014; China’s All-Star Legal Team Pleads for Defendants’ Rights On Social Media
BY YUERAN ZHANG ON JULY 25, 2012
3 In July 2014, I met and interviewed two of the more prominent new breed of Chinese lawyers.
remain to be seen. But there is no question of the stir that has been created by the die-hard lawyer. Like that of the American civil rights era cause lawyer, it is a stir that is being felt at the highest levels of government and established power structures.

**Who Or What Is the “Die-hard” Chinese Lawyer?**

The “die-hard” lawyer model, though not the name, may have started at least as early as 2007-08, but perhaps in truth as early as Tiananm Square, when some of today’s die-hard lawyers were cutting their social-consciousness teeth. Although the die-hard moniker has only been applied to criminal defense lawyers, they are surely the close relative of the slightly earlier-appearing group of Chinese lawyers taking up social causes in the public interest, such as representation of families of victims of the toxic baby formula produced by Sanlu Milk Co. in 2008. Criminal matters, sometimes against organized crime suspects may appear unlike the cases against a politically well-connected milk company or cases undertaken by American civil rights lawyers who did criminal representation of protestors and activists, school desegregation, voting rights and all manner of politically-charged cases. But in China, all high profile criminal prosecutions are political. The affront implicit in challenging the state’s will, even in an otherwise not politically-charged criminal matter, is a far different phenomenon than an American lawyer fighting hard for her routine criminal defendant client.

In May 2014, “Pu Zhiqiang, a Beijing-based civil rights lawyer, was detained by Beijing police . . . on the charge of provoking troubles . . ..” Pu [appears to have been] disbarred and jailed for “crossing the line” between lawyer and activist by daring to attend Tianemen Square commemorative events. Indeed the events commemorate his own actions as he was there on June 5.

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4, 1989.” Lawyers such as Pu seem to be the forerunners of today’s die-hard criminal defense lawyers. An editorial explains:

The problem is some of them have deliberately crossed the bottom line of the rule of law. It was reported that Pu was detained after he attended an anniversary event to commemorate the June 4th incident. Whether there is a connection has not been officially confirmed, but it is obvious that such an event, which is related to the most sensitive political issue in China, has clearly crossed the red line of law.7

The problem, of course, is that the word “law” has two distinct meanings in China. On one hand, it is the words of the law-makers written in official codes. But law also appears to mean whatever is today’s will of those in power. It is this later sense in which Pu clearly crossed the line, and Chinese activists and scholars are sensitive every day to where that line may be. The accuracy of their perceptions and judgments in this regard is what keeps them out of jail.

The current term, die-hard lawyer appears to have originated in connection with a high-profile criminal defense in 2012.

The term originated from a discussion . . . in Guiyang, the capital of Southern China’s Guizhou province, in July 2012. Yang [Xuelin, who identifies himself as a diehard lawyer on his Weibo page] and a colleague named Chi Susheng were part of a team of lawyers from around China who had come to the city to defend a former property tycoon accused of gang-related crimes. Over lunch on the first day of the trial, Chi complained the trial was already not going well. It was riddled with procedural problems, she said, and the team was going to have to “firmly fight to the bitter end,” using the northern slang term sike — which roughly means to fight to the bitter end, or to die hard.8

The name stuck and has become a sensitive topic in China. What identifies a die-hard lawyer?

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6 Legal activists must also respect rule of law
By Shan Renping Source:Global Times Published: 2014-5-8 0:38:02
7 Legal activists must also respect rule of law
By Shan Renping Source:Global Times Published: 2014-5-8 0:38:02
8 Swaggering
If there were a checklist for China’s “diehard lawyers faction” it would probably read something like this: Must be combative, dramatic, and have a flair for social media; must not be intimidated by authority; and must be willing to spend time under house arrest or in jail.⁹

It sounds like civil rights cause lawyers, Bill Kunstler, for example, would qualify.

The die-hard lawyer seems less concerned about the particular client than the cause, and the cause is the advancement of justice and the rule of law in the Chinese criminal justice system. They care about procedural matters and about fundamental criminal defense rights. They care about the accurate application of the written law, as opposed to the law-of-the-moment as determined by the wishes of the state. And the state is paying attention.

They take cases where legal rights are being flouted, regardless of the client. Their opponent is the court establishment, namely the police and even the judge. This adversarial stance has caught the attention of China’s second highest justice. “We are now seeing a very strange phenomenon,” wrote Shen Deyong, the executive vice-president of the Supreme People’s Court, China’s highest court, in a May 2013 essay published in the Communist Party-run People’s Court Daily. “[Defense] lawyers are not in a confrontation with prosecutors, but instead are having confrontations with the presiding judge in the case,” he complained.¹⁰

The state prefers that lawyers be technically-sound practitioners who understand that their place is not to challenge the will of the state. Chinese authorities strongly prefer that “lawyers behave like dentists.” In other words, the government thinks attorneys should be “good technicians and not involve themselves in cases of political-legal injustice.” But it appears that crackdowns against activist lawyers are only breeding new activist lawyers and gaining them a public following.¹¹

Stories of harassment and even physical violence against activist lawyers has become frequent. Threats, subtle and overt, physical beatings, and even “disappearance” have occurred.

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⁹ Meet China’s Swaggering, ‘Diehard’ Criminal Lawyers
BY ALEXA OLESEN ON MAY 18, 2014
¹⁰ Swaggering.
¹¹ Quoting highly respected China expert Jerome Cohen of NYU.
The numbers of such lawyers appears to be growing and despite the jailings and physical violence, they stay at the work.

What most impedes our work, though, is the revocation of our licenses to practice law. China's cities and provinces have "lawyers' associations" that appear to be modeled after the bar associations of Western countries, and these groups decide annually who is qualified to practice law. This is a good example of where pretense and reality diverge in China's legal world. The lawyers' associations are, in fact, puppets of the government whenever a political question arises. Last year my license to practice law was revoked.\(^\text{12}\)

*New Methods Used by the Die-hard Lawyer*

In one sense, die-hard lawyers are simply more intense than their traditional Chinese counterparts. A traditional Chinese defense lawyer manages the defense-side evidence and makes technical legal arguments. A somewhat more aggressive form of traditional lawyer deeply and intensely analyzes the civil law articles and makes incisive arguments about their application to the defendant. But both traditional defense lawyers and their slightly more probing, technical compatriots yield when it becomes clear that the judge cannot or will not accept their arguments, sometimes with the tacit understanding that the judge is being controlled by forces outside the courtroom.

The die-hard lawyer is certainly more aggressive in the first instance. He or she does all that the technically-oriented traditional lawyer does, but also voraciously pursues arguments about the legality of the prosecution’s evidence and methods. The die-hard lawyer challenges judges’ rulings on evidence admission and procedural rights and does so vociferously. And the die-hard lawyer does so even after it is clear that the judge will not be permitted by others to rule in the defense’s favor. But in addition to being more aggressive and more persistent, the die-hard lawyer uses tactics that are outside the walls of the courtroom and its procedures.

In particular, the die-hard lawyer uses social media as a tool of advocacy. During the Li Qinghong trial, an “all-star team” of defense lawyers blanketed the Chinese social media with news of the proceedings, commenting on everything from errors in the indictments to the disparate volume of the defense and prosecution microphones. The media work was so intense that weibo (Chinese version of the banned Facebook and Twitter) updates were being sent live from the courtroom by defense lawyers, and large segments of the population were riveted to the news.

Lawyers’ online activities can be traced back to the influential case of Li Zhuang, a lawyer falsely prosecuted with perjury in Chongqing, in 2010. While the voices of the official media framing and blaming Li were dominating public opinion, the defense had no choice but to tell the other side of the story via social media.

Such use of media to offset public information that cuts against a defendant may cause some to think of Model Rule 3.6, and in particular the Gentile v. Nevada State Bar, the Supreme Court case that trimmed the rough edges from the earlier version of the Model Rule and established the propriety of self-defense use of public statements. But that quick leap would be mistaken. The U.S. law on the subject is an effort to balance free speech with fair trial, and specifically to protect the jury pool from undue factual contamination regarding celebrated cases, while respecting free speech rights of lawyers and media. By contrast, the Chinese use of this balancing concept has nothing to do with non-existent jury pools and ensuring an impartial lay fact-finder. Instead, the Chinese use of social media by defense lawyers is an effort to combat raw power of those in control of the justice system, both judges and so-called “higher-ups.”

This use of social media to create public pressure and possible embarrassment of “higher ups” seems odd to some Americans, simply because such a technique would be so unlikely of

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13 All-Star Team.
14 All-Star Team
success in the U.S. Ironically, it is the lack of judicial independence in China that makes the technique viable. The well-founded expectation of Chinese criminal defense lawyers in high profile cases is that judges are told what to do by people often referred to as “higher ups.” These higher ups are party officials whose will is being done by local judges and prosecutors. Such orders, while not entirely unheard-of in an independent court system, are both rare and, we would expect, ineffectual. In such an independent court system, nothing much would be gained in an individual case by generating public opinion. But the taste of the Chinese public seems to have been whetted for news of injustice, and the “higher ups,” while they wield mostly unchecked power, do care about stirring the public ire. This is just the trend and tendency that is being banked on by the die-hard lawyer in the use of social media. The same phenomenon allows, but does not ensure, that they will stay out of jail.

The battle has been joined between the die-hard lawyers and the state. “These activist lawyers, who have wild intentions to challenge and change the law, have deviated from what their jobs are supposed to entail,” a state-oriented editorial said. The editorial leveled a warning at the group, who must “realize that they are not commandos or the authoritative forces behind improvements to rule of law in China.” Such challenges seem only to further embolden the die-hards and their followers.

Comparisons with the American Civil Rights Cause Lawyer

Fifty years ago, a new breed of lawyer was born in the United States. These lawyers cared about the “cause” as much or sometimes more than did their clients. These lawyers viewed their role as more than that of a traditional lawyer who represented, but was separate from, their

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16 The phone call reference to an alj from my article.
17 Quoting from Global Times, Legal activists must also respect rule of law
By Shan Renping Source:Global Times Published: 2014-5-8 0:38:02,
http://www.globaltimes.cn/content/859107.shtml
clients. These lawyers also stirred the pot, as are the Chinese die-hards. They faced intense government and bar association repression and reproach. Their work largely started in the South, in the effort to press toward racial equality, and spread to causes opposing the War in Vietnam, discrimination against women, mistreatment of the institutionalized, and organization of workers, tenants and consumers.

Especially in school desegregation cases, these new lawyers drew the ire and reproach of traditional lawyers and the organized bar. Following Brown, a strategy of fending off its mandate emerged in the South, alternately called The Southern Manifesto or Massive Resistance. A central theme of this strategy was to resist desegregation on the local level despite the Brown mandate, forcing an almost county-by-county enforcement by desegregation activists. The only path to the enforcement of Brown was for NAACP and other activist lawyers to go to community gatherings in small towns to discuss the possibilities for a local desegregation law suit. Coming out from behind their desks to meet prospective clients, these lawyers offended traditional sensibilities, not to mention the politics and social preferences of traditional lawyers, especially southern white lawyers. They were doing what their clients needed, and they used means that were more aggressive and outside common practice. The backlash was intense, with bar associations and government authorities accusing these lawyers of unethical conduct: solicitation of clients, stirring up litigation, and the like, all in violation of newly-modified-to-the-task barratry and champerty laws. Like today’s die-hard Chinese lawyers who are using social media to reach outside the traditional lawyer-advocacy-in-court mode, these lawyers were breaking molds that produced negative, sometimes angry response from government and their profession.
Harassment of Southern lawyers who represented civil rights workers was fierce. A very few white Southern lawyers were willing to represent civil rights workers in the deep South. Among the few who did, at least one was disbarred in Mississippi. A Black lawyer representing school desegregation plaintiffs in Mississippi was harassed by a federal district judge regarding his professionalism, threatened with findings of professional misconduct, and interrogated long enough to fill 118 pages of transcript. The harassment continued until the court of appeals said that the district judge was creating “humiliation, anxiety, and possible intimidation of a . . . reputable member of the bar.” The claims against the lawyer were entirely baseless. “All of the testimony taken in this matter . . . completely exonerates Brown from any improper conduct.”

Once Northern lawyers began to undertake representation and organization of Southern civil rights clients and causes, new forms of professional harassment emerged.

Among the lawyers whose work acted as a lightning rod for organized bar criticism was William Kunstler. Kunstler’s identification with his activist clientele broke sharply with traditional lawyer norms of professional separation from clients and earned him a folk hero status among law students and young lawyers. Kunstler went from representing civil rights workers including Mississippi Freedom Riders and other protesters in the South, to Black Panthers, to the Chicago Seven. Kunstler was not a large firm, New York lawyer who took up civil rights causes. His early practice in the 1950s was characterized by undistinguished representation in

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19 In re Brown, 346 F.2d 903, 908 (5th Cir. 1965).
20 Id.
21 Id. at 909–10.
will, domestic relations, and real estate closing matters, with one ironic exception: referred by classmate Roy Cohn, Kunstler drafted a will for the soon-to-be-infamous Joseph McCarthy.

As a traveling civil rights activist lawyer, Kunstler needed pro hac vice admission in various courts to represent his clients, which was not always freely given.\(^{23}\) Interestingly, Kuntsler regarded himself as a modern-day, “itinerant lawyer in the colonial tradition.”\(^{24}\) The image of Lincoln, riding circuit with his colleagues from rotating court-day to court-day is not one that traditional lawyers would have attached to Kunstler. And to be sure, the political nature of their practices bears no comparison whatever. But in another sense, the comparison to a 17\(^{th}\) or 18\(^{th}\) century lawyer traveling from court to court to meet his clients and represent them, is apt. The mode of transportation and its speed and capacity had changed dramatically, but it was true that Kunstler seemed to be everywhere, especially throughout the South in the 1960s. Between the time of colonial lawyers and later Lincoln’s circuit-riding and Kunstler’s traveling civil rights lawyer show, UPL (unauthorized practice of law) restrictions on cross-border law practice had become far more stringent.

The Chicago Seven representation won him national attention and, in some circles, derision. The circus nature of the Chicago trial, and especially Kunstler’s openly hostile, two-way war with Judge Julius Hoffman, produced four years’ worth of contempt citations which were later reversed by the Seventh Circuit.\(^{25}\) The bar reaction to his ferocious representation in Chicago was strikingly swift. The Association of the Bar of the City of New York so anxiously

\(^{23}\) See John Kifner, Kunstler Upheld by Appeals Court, N.Y. TIMES, May 19, 1973, at 34, for a description of a district court’s refusal to admit Kunstler. Kunstler needed permission to represent a client in prison for refusing induction, having been transferred because of participation in a prison protest led by Rev. Daniel Berrigan. After excluding Kunstler, the district judge appointed the former Indiana state chairman of the Republican Party to represent the defendant.

\(^{24}\) DAVID J. LANGUM, WILLIAM KUNSTLER: THE MOST HATED LAWYER IN AMERICA (1999), at 65.

\(^{25}\) In re Dellinger, 461 F.2d 381 (7th Cir. 1971) (reversing district court’s imposition of 4 year, 13 day sentence for contempt).
awaited the opportunity to discipline Kunstler that it began proceedings before the Chicago Seven trial had ended, violating its own rules of procedure.26

In the end, confession came, as some elements within the organized bar realized that repressive mistakes had been made, especially in the context of efforts to chill zealous representation of the so-called “new left”. The bar had “misconstrued . . . the dimensions and causes of courtroom disorders, . . . confus[ing] zeal in the defense of clients with revolution . . . [in its movement to] intimidate defense counsel.”27

As they had to Kunstler, responding to outsiders with law practice restrictions was a key measure for southern lawyer-dominated legislatures. Five southern states enacted harsher restrictions on client getting, unauthorized practice, and community organizing activities, in an effort to prevent outside lawyers (especially NAACP lawyers) from organizing and recruiting plaintiffs for school desegregation cases that would force compliance with Brown v. Board. The Virginia bar’s efforts to keep outside lawyers outside resulted in the Supreme Court’s entry into the fray in NAACP v. Button.28 The NAACP and its affiliate, the Legal Defense Fund (LDF) had chapters in Virginia. Through these chapters, Virginia residents were informed of the possibility of pursuing school desegregation suits by retaining NAACP and LDF lawyers. Lawyers affiliated with the NAACP were paid a per diem during such representation, but often without any other form of compensation. The Virginia State Bar proceeded against these lawyers and the NAACP on the ground that their conduct amounted to inappropriate solicitation of business and, in particular, that the NAACP, which was not a party to the various school desegregation

26 Tom Goldstein, Bar Group Withdraws Charges Against Kunstler, N.Y. Times, Feb. 21, 1974, at 34.
litigation, had unlawfully interjected itself into litigated matters by soliciting plaintiffs and supplying lawyers. The Virginia courts held that the NAACP lawyers had acted unethically. The Virginia courts asserted that the statutes’ purpose was to uphold high standards of the legal profession by

strengthen[ing] the existing statutes to further control the evils of solicitation of legal business . . . Solicitation of legal business has been considered and declared from the very beginning of the legal profession to be unethical and unprofessional conduct.

Eliminating the activities of the NAACP at that juncture would likely have spelled an end to school desegregation in Virginia for the foreseeable future. The Supreme Court reversed the Virginia courts’ treatment of the issue, holding that such an application of the solicitation rules violated expression and association rights under the First and Fourteenth amendments.

David Mays was an example of a moderate segregationist lawyer, whose views of civil rights lawyers would today be regarded as extreme. Mays was congratulated and thanked repeatedly for his Gray Commission role at a 1955 Virginia State Bar meeting, the same meeting at which the organization adopted a resolution condemning the Supreme Court for its invasion of states’ rights in Brown.

Mays, the moderate who was praised by his fellow lawyers for stabilizing the radical segregationists, referred to W. Hale Thompson of Newport News as that “unbelievably arrogant .

29 The Virginia Supreme Court held that the actions of the NAACP constituted "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control." NAACP v. Harrison, 202 Va. 142, 155, 116 S.E.2d 55, 66 (1960).
30 Harrison, 202 Va. at 154.
31 Other “association” cases followed, arising largely from a new ethos of cause or issue lawyering that accompanied the first federally funded legal aid programs.
. . nigger lawyer.” Thompson had dared to suggest in a Gray Commission public hearing that “Thomas Jefferson, James Madison and Patrick Henry would be ashamed of some members of the General Assembly.”\textsuperscript{33}

When Mays described the pleasure of having two former FBI men play surreptitiously-made recordings of NAACP lawyer conversations with plaintiffs in the Prince Edward County case and the Charlottesville case, he made no mention of whether he was listening to an intrusion on the lawyer-client relationship. Instead he said, “These may prove very helpful in probable proceedings by the [Virginia State Bar] against Oliver Hill [a preominent school desegregation lawyer] and possibly others.” No evidence appears to exist that Hill was ever charged, but his colleague Samuel Tucker was repeatedly brought before bar authorities and charged with misconduct.\textsuperscript{34} Mays openly favored the bills introduced by Charles Fenwick and Harrison Mann, which he thought was meant to “harass the NAACP.”\textsuperscript{35}

\textsuperscript{33} Id. at 85–86.
\textsuperscript{34} Id. at 191; See interview with Senator Harry L. Marsh III at http://www.library.vcu.edu/jbc/speccoll/civilrights/marsh01.html; S.J. Ackerman, The Trials of S.W. Tucker, WASH. POST, June 11, 2000, at W14.
\textsuperscript{35} MAYS, supra note 32, at 158.
In correspondence with Sidney Carleton, a former President of the Mississippi State Bar, ABA President Lewis Powell, long regarded as a voice of moderation in the profession and later on the Supreme Court, registered his views on Northern lawyers who represented Southern Blacks. Carleton, in an angry response to National Lawyers Guild representation in Mississippi, said:

[T]here has never been a time when the lawyers of the state of Mississippi have not stood ready, willing, and able to represent those in need of legal representation. It has not, however, been the policy of either the Mississippi State Bar nor of its members to violate public policy or to engage in the unethical practices or to become accessories before the fact by agreeing in advance to represent persons in criminal proceedings arising from contemplated actions not then having occurred.\(^{36}\)

Powell replied to Carleton with praise for the Mississippi Bar, in language that implies negative views of NAACP lawyers who had organized the school desegregation plaintiffs at issue in *Button*:

My own view is that your bar took a fine step in its recent resolution on this subject. I think all of the southern bars should do the same thing, and follow them up with actual representation of Negroes—not to foment litigation but to defend those accused of crime. This is the best way I know to keep northerners from ‘invading’ the southern states. I am afraid nothing can keep some of the radicals from defaming the South generally without the slightest recognition that lawlessness in the northern cities is on a larger scale.\(^{37}\)

Because states and local school districts had resisted compliance with *Brown*, it became necessary to pursue litigation community-by-community. To do so, the NAACP and LDF lawyers attended community meetings and informed potential plaintiffs that their school desegregation litigation could be supported by the NAACP, and that lawyers from the

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organization would represent them. The state bars, courts and legislatures (dominated as they
were by lawyers) sought to dampen NAACP efforts by pursuing the lawyers on ethics and
criminal charges.

Meanwhile, labor unions endeavored to provide counsel to their members, and federally-
funded legal aid lawyers organized tenants and farm workers and represented entire classes of
welfare recipients, institutional inmates and others. Still other lawyers sought to represent middle
class clients at lower cost, using office automation and high client-volume generated by
advertising.

In every instance the profession objected. In part, to be sure, the objections were
motivated by opposition to the *causes* advanced by the new style of lawyer, but the objections
were also to the new style of lawyering itself. To the traditional, one-client-at-a-time lawyer,
whose clients found the lawyer through word of mouth in clubs and churches and social
organizations rather than through advertising, this aggressive new style of lawyering was
unprofessional, distasteful and demeaning to the profession generally. For these lawyers, cause
lawyering was not proper lawyering at all, and it had to be stopped.

The profession’s impression of this new form of lawyering was accurate. Attorney
General Nicholas deB. Katzenbach called for "new techniques, new services, and new forms of
intra-professional cooperation . . . to analyze the rights of welfare recipients, of installment
purchasers, of people affected by slum housing, crime and despair." “There are signs, too,” he
noted, “that a new breed of lawyers is emerging, dedicated to using the law as an instrument of
orderly and constructive social change.”\(^{38}\) Charles Hamilton Houston viewed the mission of the

\(^{38}\) *History of Civil Legal Aid, Nat’l Legal Aid & Defender Ass’n,* http://www.nlada.org/About/About_HistoryCivil (last visited Aug. 14, 2012).
Howard Law School, to which he brought respectability and accreditation, as the creation of “social engineers” capable of making real the teachings of sociological jurisprudence that emerged during the first half of the twentieth century.\(^{39}\) It was to be a cause-lawyer school. Neither Katzenbach’s nor Houston’s vision of lawyering meshed with the profession’s status-quo, and it met resistance from the organized bar as a result. Lawyers who were as fully committed to their clients’ cause as were their clients threatened to disrupt the classical image of lawyers as being entirely independent and separate from their clients’ goals.

Fierce criticism of poverty lawyers and civil rights activist lawyers came from the highest levels of judicial, government and bar leadership. Ronald Reagan was openly hostile to legal services lawyers, first as Governor of California and later as President of the United States.\(^{40}\) Warren Burger, in his pleas for civility,\(^{41}\) gave substantial blame for the impending downfall of the profession to lawyers in political trials, or as Burger called them, the “new litigation.” He encouraged the legal profession to apply “rigorous powers of discipline” to the misbehaving lawyers by either the judicial or bar enforcement systems. Failure to do so, he warned, would


\(^{41}\) At the dedication of the Georgetown Law School building in 1971, a most striking contrast was framed by Chief Justice Burger’s dedication speech and William Kunstler’s “counterdedication” speech. Kunstler and others delivered their student-organized counterdedication speeches from the bed of a pick-up truck parked outside the building. *Burger Speaks and Kunstler ‘Counters’*, N.Y. Times, Sept. 18, 1971, at 25.
allow “the jungle [to] clos[e] in on us.” Bar leaders and commentators followed the Chief Justice’s lead.

As ABA President, Powell was a vocal condemnor of civil disobedience, repeatedly decrying the actions of sit-in demonstrators’ and Freedom Riders’ testing of discriminatory laws regulating racial treatment in the South.

We have witnessed, over the past decade, the development of a heresy that could threaten the foundations of our system of government under law. This is the doctrine that each person may determine for himself what laws are ‘just,’ and that laws and court orders are to be obeyed only so long as this seems ‘just’ to the individuals or groups concerned . . . . In 1965 many people believed that ‘civil disobedience of orders and laws deemed to be unjust is a legitimate means of asserting rights and attaining objectives. Indeed, it is not too much to say that this form of civil disobedience—and its own unique tactics of demonstrations, sit-ins, life-downs and mob pressure—has become the principal weapon of certain minority and dissident groups . . . . But our Constitution and tradition contemplate the orderly assertion of these rights.”

He did not mention states and state bar associations that were resisting the Brown mandate, ostensibly because they were of the view that it was unjust.

Professional opposition and harassment of legal aid lawyers proceeded in part on the ground that state bars and powerful institutional interests saw their economic and political

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42 Fred P. Graham, Burger Assails Unruly Lawyers, N.Y. TIMES, May 19, 1971, at 1 (quoting and excerpting from speech).
44 See, e.g., “The President’s Annual Address: The State of the Legal Profession”; August 9, 1965; Miami Beach, FL; Annual Address; reprinted from ABA Journal, September 1965 (calling civil disobedience “a dangerous trend”); John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 210-11(Charles Scribner’s Sons, NY, 1994).
45 Id. at 1–3.
interests threatened by the lawsuits and legislative lobbying being done by cause lawyers on behalf of their clients.46

State and local bar associations in California, Texas, Florida, Pennsylvania and Washington D.C. unsuccessfully sued the Office of Economic Opportunity (OEO), claiming it was violating ethical canons.47 They claimed that legal services lawyers were engaged in unauthorized practice and were unlawfully soliciting clients.48 In doing so, they were largely protecting local practitioners’ turf.

Perhaps the most vociferous fight between legal aid lawyers and a coalition of business and government interests was spawned by the California Rural Legal Assistance organization and representation of farm workers.49 CRLA moved in a variety of ways to increase wages for farm workers and demand government services for them. These lawsuits drew the ire and outrage of then Governor Ronald Reagan and Senator George Murphy, speaking and acting on behalf of the California agribusiness industry.50 At the time, state governors had the power to veto funding for their state’s federally funded legal aid programs, but that veto could be overridden by the OEO Director. Only once was a California governor’s veto sustained: in 1970, Governor Ronald Reagan vetoed the funding and the veto was sustained by then-OEO Director

48 JOHNSON, supra note 47 at 91.
49 HOUSEMAN & PERLE, supra note 40, at 15–16.
Donald Rumsfeld.\textsuperscript{51} Unsuccessful efforts by Murphy would have placed full control of legal services programs in the hands of governors, localizing control to suppress locally unpopular legal aid activities, and would have prohibited legal aid suits against the government.\textsuperscript{52} The latter effort was a part of a national affront to the successes of legal aid lawyers in various government-defendant matters, especially in the arena of welfare reform.\textsuperscript{53}

In some instances, courts refused to certify legal aid organizations whose community organizing went beyond traditional law service bounds. A New York Appellate Division objected to certifying more than one legal services provider for a particular county, for fear of their “unseemly competition” for representation of non-paying clients, and out of worry that the court could not maintain minimum standards of conduct. The court also expressed concern about the applicants’ mixing of community action goals and legal service.\textsuperscript{54}

Along with labor union lawyers, federally funded legal aid lawyers were a significant part of the new style of lawyering, cause or group lawyering, that did not go unchallenged by the organized bar and, acting through the bar, powerful economic interests. The standard one-client-at-a-time model of lawyering did not suit the goals of legal aid lawyers and union lawyers. Their strength lay in collective action that allowed a marshaling of modest resources in pursuit of a cause. The standard bar obstruction first took the form of unauthorized practice restrictions and later advertising and solicitation rules.

\textsuperscript{51} Hiestand, \textit{supra} note 50, at 182.
\textsuperscript{52} Robb, \textit{supra} note 50, at 329–30.
\textsuperscript{53} See, \textit{e.g.}, King v. Smith, 392 U.S. 309 (1968); \textit{see also}, Shapiro v. Thompson, 394 U.S. 618 (1969).
Having failed in its efforts to restrict the activities of school desegregation lawyers, the Virginia State Bar worked to stifle opportunities for labor unions to provide counsel to their members. And the Illinois Bar initially prevented the United Mine Workers from hiring inside, house counsel. Each of these efforts was rejected by a Supreme Court whose decisions fostered the accumulation of power through collective legal action. “Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” The Court’s rejection of the bar’s insistence on the traditional one lawyer-one client notion of lawyering laid the legal groundwork for legal aid lawyers’ representation of causes, groups, and social issues, rather than individual clients. This sort of representation presented the shocking circumstance for powerful economic interests and government agencies, not used to having to deal with poor people on so nearly an equal footing. As the lawyer in charge of OEO programs in California put it, “What we have created in CRLA [California Rural Legal Assistance] is an economic leverage equal to that of large corporations. Clearly that should not be.” The mere concept of such power residing in poor people and their lawyers seemed foreign to the legal profession.

Lawyers representing causes could not simply wait in their offices for the causes to arrive in the personage of an eligible client. While Attorney General, Nicholas Katzenbach tried to deter bar application of advertising and solicitation restrictions against poverty lawyers when he

55 Button, supra note 28.
57 UMW v. Ill. Bar Ass’n, 389 U.S. 217 (1967) (The Bar had claimed this to amount to the unauthorized practice of law).
59 Robb, supra note 50 at 330–31; HOUSEMAN & PERLE, supra note 40, at 10.
60 AUERBACH, supra note 18, at 274.
announced that lawyers should “go out to the poor rather than wait . . . To be reduced to inaction by ethical prohibitions is to let the canons . . . serve the cause of injustice.”

An uneasy measure of conditional cooperation regarding federally-funded legal aid eventually emerged from the organized bar at the national level. Even as the ABA began to cooperate with federally funded legal services, its best and most able spokespersons continued to put an unduly positive face on the organization’s prior record of opposing meaningful legal services for the poor. William McCalpin, who was truly instrumental in shaping the ABA’s more enlightened position on legal services, prefaced his strong advocacy for support of legal services by imagining an ABA previously unaware of the legal needs of the poor: “Recently we have begun to be aware of the possible legal needs of 40,000,000 disadvantaged citizens.” The prior month’s issue of the same ABA Journal featured an article by Marvin Frankel that began with a statement more reflective of reality outside the walls erected by the ABA: “It is no new discovery that the promise of equal justice is a hollow one for people too poor to retain counsel.”

The ABA adopted a resolution of support for the new federal legal services program as long as its lawyers would operate within “the ethical standards of the legal profession.”

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62 In later years and controversies, the ABA grew to be almost unerringly supportive of legal services programs, fighting against, for example, President Reagan’s proposal to zero-fund the Legal Services Corporation in 1980. Houseman & Perlé, supra note 40.
64 Marvin E. Frankel, Experiments in Serving the Indigent, 51 A.B.A. J. 460 (1965)(hoping against some of the early evidence that the ABA would allow new, OEO funded legal services offices to be established rather than merely pressing for additional funding for the traditional legal aids under the supervision of NLADA). Ironically, some years later in an oral history of his ABA involvement, McCalpin himself described the unfortunate, introspection practiced by the ABA in dealing with difficult issues. Interview by Olavi Maru with F. William McCalpin (Aug. 22, 1975). Visited March 10, 2004 http://www.abf-sociolegal.org/oralhistory/mccalpin.html. Tape MCA-1-B.
65 McCalpin, supra note 63, at 551; Richard Pious, Congress, the Organized Bar, and the Legal Services Program, 1972 Wis. L. REV. 418, 420–21 (discussing the political background for the ABA resolution).
announced constraint was no constraint at all; legal aid lawyers, like any lawyers, would of course be expected to comply with lawyer ethics rules relating to confidentiality, conflicts, and the like. But the rules regarding solicitation, not yet reformed by later court decisions, would dampen the envisioned activism and would subject legal aid and other cause lawyers engaged in community organizing to continued harassment by bar authorities for direct solicitation of clients.

Fifty years later, some wounds of the war on civil rights lawyers remain, but such lawyering is no longer so far outside the mainstream. Although this reality continues to distress some with long memories of what they consider more civil times, there is no doubt that the more aggressive style of lawyering created by the cause lawyers of the 1960s and 70s is a part of today’s American legal profession. How will Chinese lawyering look in fifty years?

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66 In re Primus, 436 U.S. 412 (1978). In later adopting the Model Rules, the ABA accounted for its inability to propose enforceable rules on soliciting lawyers who lacked financial gain incentives. See, MODEL RULES OF PROF’L CONDUCT, R. 7.2.