

POWER WITH:
PRACTICE MODELS FOR SOCIAL JUSTICE LAWYERING

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Public interest lawyers seeking justice for marginalized groups cannot succeed by working alone. Meaningful social change occurs when marginalized and dispersed peoples unite and organize to take power into their own hands. Such groups benefit greatly by forming relationships with lawyers and including them in their organizing processes. However, existing attorney-client models are inadequate to structure such relationships between lawyers and people in the process of organizing. Traditional paradigms of group representation are designed either for fully-formed, established, and hierarchized groups (e.g., corporate representation) or for constituencies who remain atomized and relatively passive throughout representation (e.g., impact litigation and class actions). The inadequacy of existing models hinders public interest lawyers' imaginations and makes it difficult for them to structure efficacious, accountable relationships with the groups with whom they work. This paper addresses that inadequacy by defining and illustrating five concrete models of practice for lawyers representing groups in the process of organizing for power and social change.

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INTRODUCTION

"[B]ewildered by the shipwreck of the singular, we have chosen the meaning of being numerous."¹

For as long as lawyers have thought to work for social justice, they have aligned themselves with groups such as political parties, civic organizations, charities, government agencies, and churches. After lessons from decades of social struggles, lawyers are turning their attention to the process of organizing itself—by which new and countervailing power groups are built amongst people with little or no power—and are finding roles for themselves as lawyers supporting, protecting, extending, and even initiating the organizing process. Today, “law and organizing” is a robust topic among practitioners and scholars alike, but traditional paradigms of “lawyer,” “client,” “claim,” and even “victory” are inadequate to structure the dynamic relationships necessary to be a lawyer with a group of people in the process of organizing. Traditional paradigms of lawyering with and for groups assume that either the client group is fully organized, incorporated, and hierarchized, as in corporate representation, or completely dispersed and passive, as in class actions or impact litigation. Groups in the midst of social struggle are neither of these two extremes. Rather, through the process of organizing and struggle, they are moving themselves from the latter toward the former. Accordingly, lawyers who support them in their struggles must develop new models of representation appropriate to this difficult dynamic.

The purpose of this paper is to provide concrete models of practice for lawyers who work with marginalized groups in the process of organizing for power. As Corey Shdaimah writes, “[w]hile every mobilization effort is unique, each story can offer a valuable strand to the ongoing discussion.”² This paper cannot, and does not try to, set forth a universal theory of law and organizing. Instead, this paper proposes a vocabulary to describe the range of innovative and ever-mutating practices of my colleagues around the world. Those practices have been the subject of increasing scholarly attention recently; the “strands” have, hearteningly, grown

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¹ GEORGE OPPEN, *Of Being Numerous*, in *NEW COLLECTED POEMS* 162, 166 (Michael Davidson ed., 2002).

² Corey S. Shdaimah, *Lawyers and the Power of Community: The Story of South Ardmore*, 42 J. MARSHALL L. REV. 595, 607 (2009).

numerous.³ At the same time, the practice and theory of law and organizing has become the subject of a growing number of law school courses and academic events.⁴ The discussion of law and organizing is reaching a critical moment, both in practice and in the academy. I hope that this

³ Recent books and articles analyze specific law and organizing practices. See generally Jennifer Gordon, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); Sebastian Amar & Guy Johnson, *Here Comes the Neighborhood: Attorneys, Organizers, and Immigrants Advancing a Collaborative Vision of Justice*, 13 N.Y. CITY L. REV. 173 (2009); Monika Batra, *Organizing in the South Asian Domestic Worker Community: Pushing the Boundaries of the Law and Organizing Project*, in *THE NEW URBAN IMMIGRANT WORKFORCE* 119 (Saramathi Jayaraman & Immanuel Noss, eds., 2005); Chesa Boudin & Rebecca Scholtz, *Strategic Options for Development of a Worker Center*, 13 HARV. LATINO L. REV. 91 (2010); Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715 (2010); Allison Harper, *Building on Traditional Lawyering by Organizing Parent Power: An Emerging Dimension of Early Childhood Advocacy*, 14 GEO. J. ON POVERTY L. & POL'Y 339 (2007); Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181 (2010); E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213 (2009); Zenobia Lai, Andrew Leong, & Chi Chi Wu, *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L.J. 1 (2000); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007); Nadia Marin-Molina & Jamie Vargas, *The Role of Legal Services in Workers' Organizing*, 13 N.Y. CITY L. REV. 195 (2009); Victor Narro, *Finding the Synergy Between Law and Organizing: Experience from the Streets of Los Angeles*, 35 FORDHAM URB. L.J. 339 (2008); David R. Rice, *The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle*, 26 ENVIRONS: ENVTL. L. & POL'Y J. 187 (2002-03); Shdaimah, *supra* note 2; Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389 (2010); John N. Tye & Morgan W. Williams, *Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans*, 44 HARV. C.R.-C.L. L. REV. 255 (2009). Some law journals have dedicated issues or symposia to law and organizing. See e.g. *Public Interest Practice Section*, 13 N.Y. CITY L. REV. 171-232 (2009); Symposium, *Organizing and Law in the Obama Era: Commemorating the 100th Anniversary of Saul Alinsky's Birth*, 42 J. MARSHALL L. REV. 595-836 (2009); Symposium, *Race, Economic Justice, and Community Lawyering in the New Century*, 95 CALIF. L. REV. 1821-2146 (2007). See also Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000-01) (providing an excellent bibliography of writing on law and organizing published before 2000).

⁴ Courses on law and organizing have recently been taught at numerous prominent law schools. See, e.g., *Community Economic Development*, FORDHAM LAW SCHOOL, <http://law.fordham.edu/clinical-legal-education/5420.htm> (last visited Sept. 26, 2011) (describing a clinic focused on social justice and sustaining effective organizations); *Immigrant Rights Clinic*, N.Y.U. LAW SCHOOL, <http://www.law.nyu.edu/academics/clinics/Year/immigrantrights/index.htm> (last visited Sept. 26, 2011) (describing clinic in which students represent immigrants and community organizations); *Immigrant Tenant Advocacy Clinic*, ST. JOHNS UNIVERSITY SCHOOL OF LAW, http://www.stjohns.edu/academics/graduate/law/academics/clinics/immigrant_tenant_advocacy_clinic.stj (last visited Sept. 26, 2011) (describing clinic in which students engage in community organization and represent tenants); *Law and Organizing*, C.U.N.Y. LAW SCHOOL, <http://www.law.cuny.edu/clinics/practices/LawandOrganizing.html> (last visited Sept. 26, 2011) (describing alternate forms of advocacy, including organization of community-based groups, taught by clinic faculty); *Law, Social Movements and Social Change*, HARVARD LAW SCHOOL, <http://comm-org.wisc.edu/syllabi/ganz/LawandSocialMovements/syllabus.htm> (last visited Sept. 26, 2011) (providing syllabus for class on law and social change); *Lawyering for Social Change: Group Advocacy and Systemic Reform Clinic*, HASTINGS COLLEGE OF LAW, http://w3.uchastings.edu/piomclli_01/Group-Syllabus.htm (last visited Jul. 12, 2007) (providing syllabus for class on lawyering as a social activity working with community groups to bring about change); and Yale Law School (syllabus unavailable).

The Association of American Law Schools also featured a panel discussion on law and organizing in legal education at its 2004 Annual Conference on Clinical Legal Education. Program of Annual Conference on Clinical Legal Education, *Law and Clinics and Law and Organizing*, ASS'N OF AM. LAW SCH., <http://www.aals.org/clinical2004/program.html>. See also Samccr M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008) (offering a typology of clinical approaches and describing an emergent clinical model for public interest law).

paper helps gather the many strands and makes them available to both seasoned practitioners reflecting on their rich field, and to students trying to find their way into a difficult but increasingly central practice.

Discussions with law students about law and organizing, particularly in the context of a course on law and social movements that I was privileged to help teach several years ago with Lani Guinier, Marshall Ganz, and Gerald Torres, formed the original impetus for this paper.⁵ I found students had little difficulty embracing the theories of community lawyering, but they often struggled to imagine just what a lawyer who works with an organizing effort actually does. The students' struggle was a microcosm of the challenge of finding a common vocabulary to describe law and organizing at all levels. At a Harvard symposium dedicated to the practice of law for social change in 2007, seasoned practitioners, activists, and scholars struggled to find common language with which to discuss their experiences. In my own practice as a legal services attorney, my colleagues and I have difficulty articulating the roles we play in neighborhood organizing efforts and imagining the roles we might play but have not yet undertaken. In a discussion group for attorneys to discuss work with community organizations, the agenda includes legal tactics, recent decisions, and campaign news, but we are not talking about the roles we as lawyers are playing in the organizing process—how we are affecting the development of local leadership and power, for good or for ill. Housing lawyers, labor lawyers, civil rights lawyers, for-profit plaintiff-side lawyers—we are all speaking different languages. Though law and organizing as a practice and a field of research has developed rich accounts of experiences and analysis, we lack a common vocabulary through which we can compare and relate our diverse experiences, and by which we can describe the field as a whole to potential funders, judges, institutional partners, students, and the media. This paper attempts to address that struggle by laying the foundation for a concrete vocabulary of law and organizing, setting out five models of legal practice with and in support of community organizing.

This paper also arises from the ten years I have worked as a community organizer and legal services lawyer, and my struggle, shared with many colleagues, to put lawyering at the service of community organizing. These experiences, both rewarding and profoundly unsettling, have left me with the conviction that, in order to be truly effective and sustainable, social justice lawyering must do more than win individual victories. Social justice lawyering must support the development of new leadership and organized power amongst the marginalized, so that the formerly powerless develop the ability to advocate for, claim, and achieve their own victories.

This paper is organized in three parts. Part I introduces the necessity of developing practice models for lawyers to work with groups in the process of organizing. It discusses prevailing models of legal representation of groups and limitations of traditional paradigms (such as corporate representation, which is designed to work with groups that are fully-formed, incorporated, and hierarchized, unlike most marginalized people), and impact litigation and class action, which are designed to work with dispersed and passive constituencies, but do nothing to address that dispersion and powerlessness. In response to the limitations of these traditional paradigms, I next introduce the law and organizing paradigm, in which lawyers work with groups of people who are to some extent marginalized but are in the process of organizing to overcome their marginalization and powerlessness. I argue that this process is the basis for meaningful social change, and that lawyers have valuable resources to contribute to it, if they can figure out how to do so.

Part II addresses the central question of this paper: how, concretely, can and do lawyers

⁵ See *Law, Social Movements and Social Change*, *supra* note 4.

work with groups in the process of organizing? Part II answers this question by presenting five models for such relationships: (1) the transactional "Corporate" Model; (2) the "Legal Services as M*A*S*H Unit" Model, in which lawyers provide direct legal services to individual participants in organizing efforts, protecting participants from backlash and retaliation and freeing leaders' energies for leadership; (3) the "Political Enabler" Model, in which lawyers provide litigation, research, and drafting in direct support of the organizing process itself, securing and enhancing the group's right to organize, and helping identify strategies and access points to the political process; (4) the "Organizing on the Scaffolding of Litigation" Model, in which large-scale litigation provides opportunities and structure for nascent organizing initiatives, as well as opportunities for individuals to testify, negotiate, and plan; and (5) the "Lawyer as Organizer" Model, in which the lawyer activates his or her own network of client relationships and attempts to transform them into the basis for an organization. The five models are listed and briefly summarized in chart form in Appendix A. Each of the five models in Part II is illustrated using examples from my own practice, from experiences shared by my colleagues and predecessors, and from rich written histories of social struggles such as the Civil Rights Movement and the Farm Worker Movement. I move between these examples within each model. I also consider the needs, resources, benefits, and risks associated with each of the five models.

Part III analyzes lawyers' choices among these models, both as a response to external conditions and as a framework for transcending those conditions. In this section I again provide narratives from my own and others' experiences to ground my analysis and to illustrate my conceptual framework for organizing our raw experiences.

I: PARADIGMS OF LAWYERING WITH AND FOR GROUPS

Why struggle for a different vocabulary to articulate lawyers' work with groups in the process of organizing? Why not simply use the well-developed rules and terminology of corporate representation, class action, or impact litigation? This Part answers these questions and sets the stage for the practice models that will be illustrated in Part II. I first discuss the importance of public interest lawyers working with groups of marginalized people, rather than with individual clients in isolation. I review the history of lawyers' work with groups: how the traditional paradigms developed to facilitate that work fail when applied to marginalized groups that are not fully "incorporated" and thus may be less able to relate easily to lawyers. I then introduce and define "organizing" as an alternative better suited to social change work. This Part argues for the importance of law and organizing as a practice for exercising and building power. It is my hope that Part I's exploration of these predicate questions will be thought provoking for all readers.

A. Traditional Models of Lawyering with Groups

1. Corporate Lawyering

Far from being a specialized practice, the legal representation of groups is the overwhelming norm in the legal profession today. Established institutions, both public and private, employ lawyers extensively to consolidate their power and advance their agendas. This is not a recent phenomenon. Lawyers have been representing groups at least since Paul Cravath, who developed the modern law firm with its business model and corporate practice over the first

ownership opportunities with local banks.⁶¹ The poorest tenants, those still struggling to find even stable rental housing, for whom even a soft second mortgage lay well over the horizon, were marginalized in the agenda-setting process because they did not make up a large enough part of the organization to affect the consensus. It was the lawyers at ECCO's ally, Neighborhood Legal Services, who constantly needed and agitated the organization on behalf of its clientele of highly marginalized, often unemployed and substance-addicted or HIV-positive rooming-house tenants. The lawyers rightly pointed out that their clients' interests were drowning in the organization's mass democratic decision-making process, just as they did in governmental and electoral decision-making processes. Even as community organizers—including myself—scoffed at "rights talk," these legal services lawyers acted as the conscience of a mass organization, preventing its leaders from forgetting the most marginalized among them.⁶²

Finally, lawyers are survivors. Their skills, their profession, and, yes, their privilege, mean that they have a lower attrition rate from social movements than organizers and leaders. Public interest law organizations such as the Center for Constitutional Rights or the National Lawyers' Guild survive to work with new generations. And as survivors, they carry much of the memory in movements whose only history may be oral. Like it or not, lawyers, like academics, are the lucky ones who often outlive their comrades and must be responsible for their transformation into history.

Groups of marginalized people struggling to become powerful by organizing cannot afford to give up the resources and value that lawyers bring to the table. Conversely, lawyers who seek sustainable, structural social change must learn to work with groups that are organizing, developing leadership, and gaining power. *Lawyers, like community leaders, fundamentally need to be in relationships with others, and the extent, strength, and deliberateness of our relationships define our power.* But canonical models of lawyer-group relationships often provide little guidance where client groups are still in the process of forming, and cannot yet easily engage in the unambiguous mechanisms of representation and accountability on which those models rely. Lawyers attempting to do this work fall into a gap in the lawyering paradigm. In the next section, I explore five different concrete models of lawyers working constructively with groups who are still in the process of organizing.

II. MODELS

The purpose of this paper is to address the challenges faced by lawyers working in situations that are often poorly defined, unpredictable, and unfamiliar: the support and representation of inchoate, marginalized groups that are in the process of organizing to become more powerful. In this section, I illustrate five models of lawyer participation in groups that are in the process of organizing. These are not intended to be job descriptions. Nor are they competing strategies. It would be very unwise, if not impossible, to attempt in practice to hew to

⁶¹ Lynn, *Brockton Gain Housing-Program Funds*, BOSTON GLOBE, Nov. 2, 1995, at 51.

⁶² See Lisa Capone, *Helping the Homeless: New Mission to Lift Families Out of Poverty*, BOSTON GLOBE, Dec. 17, 2000, at 1; Coco McCabe, *Amid Roaring Riches, a Quiet Crisis: Families Scrambling to Find, Keep Affordable Rental Units*, BOSTON GLOBE, Aug. 6, 2000, at 1 (explaining that the legal services lawyers brought their clients to ECCO meetings, and helped them make use of the group's formal decision-making procedures to make themselves heard. As a result, ECCO included in its agenda the creation of new affordable rental housing, and also launched a campaign to organize users of state-run "one-stop" job centers, who were being forced into minimum-wage temporary jobs. Legal services clients told their stories at public actions for both campaigns.).

one or another, or perhaps even to know in the moment which model one is practicing. Indeed, a single action may be understood through the lenses of several different models. The value of naming them and setting them out is to provide a vocabulary and a set of landmarks to help lawyers (and those about to become lawyers) imagine how to act and, having acted, reflect on what they have done. I propose these five models as starting points for reflection, argument, and mutation.

The five models I will explore in this section are (1) the transactional "Corporate" Model; (2) the "Legal Services as M*A*S*H Unit" Model, in which lawyers provide traditional direct legal services, but target them to an organization's leaders in order to give them protection in their organizing; (3) the "Political Enabler" Model, in which the lawyer provides litigation, research, and drafting in direct support of the organizing process itself; (4) the "Organizing on the Scaffolding of Litigation" Model, in which large-scale litigation provides opportunities and shelter for nascent organizing initiatives; and (5) the "Lawyer as Organizer" Model, in which the lawyer turns to her own web of client relationships as an organizing base in itself. A chart illustrating these models is included as Appendix A.

A. Corporate Model

Though, as I discussed above, the set of rules and protocols developed for representation of private corporations are ill-suited to the complexities of working with a dynamic constituency in the process of organizing, both lawyers and clients will and should try to make what use they can of established roles when possible. The lawyer and the group are engaging in the Corporate Model to the extent that the group has developed an organizational process capable of defining group interests and values, and to the extent that the lawyer represents these interests rather than the legal needs of individual group members.

Further, the Corporate Model is characterized by a strong separation of "core" organizational strategies, from which the lawyer is segregated, and legal circumstances which are the conditions and consequences of "incorporation" as an organization. Here I mean "incorporation" in the broad sense of "becoming united or combined into an organized body,"⁶³ rather than the technical sense of becoming a legal corporation, though the former may indeed sometimes involve the latter. Much of this work is transactional, though the lawyer may sometimes litigate offensively or defensively to protect and preserve the organization's incorporated status.

For example, Wiley Branton, a noted African-American attorney, native Southerner, and collaborator with Thurgood Marshall, drafted bylaws, incorporated, and administered the Congress of Federated Organizations (COFO) and the Voter Education Project (VEP), the civil rights umbrella organizations created to channel federal funding through a minefield of tax-exemption laws and competing organizations.⁶⁴ When COFO's founders were arrested on trumped-up charges by Mississippi police upon leaving their first organizational meeting, Branton advocated for their release.

When Neighborhood Legal Services of Lynn partnered with ECCO, the relationship was for a long time only vaguely defined, but all parties agreed that the lawyers should advise

⁶³ AMERICAN HERITAGE COLLEGE DICTIONARY 688 (3d ed. 1997).

⁶⁴ See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 635-36 (1988); Judith Kilpatrick, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. ARK. LITTLE ROCK L. REV. 641, 659-65 (2004).

ECCO's leadership on how to avoid legal liability. For example, NLS lawyers reviewed and revised ECCO's personnel policies, and helped the organization re-apply for tax-exempt status. While lawyers, organizers, and the organization's leadership continued to eye one another warily and jockey for turf—sometimes in open confrontation—around other aspects of their relationship, this transactional work felt relatively “innocent” to all sides.

Indeed, the Corporate Model may be simply those interactions that are possible between a highly organized constituency and a lawyer when there is minimal trust or familiarity between the two. Its innocence makes it attractive to organizers and leaders who are especially wary of lawyers, and the apparent clarity of the lawyer's role makes it an obvious first answer to the theoretical conflicts between traditional lawyering and organizing.⁶⁵ But its simplicity ultimately limits growth of strong relationships between the lawyer and the members of the organization, preventing either from becoming more skillful at relating to the other, as discussed more fully in the conclusion. The limited relationship prevents the organization from getting all the value it can from the lawyer. There is no provision in this model for the lawyer to interact with the organization's membership in their daily struggles to continue organizing and exercising power, so if the lawyer has skills and knowledge that could be relevant to that process, it will never be known. The transactional work may make use of the lawyer's relationships with institutional players, but not her relationships with other clients. And the lawyer's values and critical eye, developed through personal experience as well as learned from a long tradition of lawyers struggling for social change, are not welcomed. The lawyer is largely a technician.

Perhaps the purest articulation of the Corporate Model is the strict circumscription of the lawyer's role in ACORN Law, the legal office of the former Association of Community Organizations for Reform Now, a grassroots membership organization made up largely of low-income people of color, organized into local, city, and state chapters across the country.⁶⁶ Though ACORN lawyers are required to take training in community organizing, most do not play a role in formulating the organization's issue agenda and strategies.⁶⁷ While ACORN is a famously combative organization, with each chapter usually involved in several issue struggles and negotiations with multiple adversaries simultaneously, its lawyers perform almost entirely supportive work. “At ACORN the legal work is devoted to keeping the corporate machinery oiled and preserving associational rights through court action. Our job is to maintain a structure through which organizers can organize.”⁶⁸ By policy, ACORN as an organization does not use impact litigation to achieve social change, and by culture it is extremely wary of allowing lawyers to dominate, or even participate in, group decision-making, identity-forming, and public

⁶⁵ See Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 *FORDHAM URB. L.J.* 873, 882 (1998) (explaining that the “innocence” of the corporate model also makes it well-adapted to the use of legal aid organizations whose work is constrained by funding restrictions and describing the innovative transactional work done by Brooklyn Legal Services Corporation to support the development of community institutions without running afoul of the political restrictions attached to federal Legal Services Corporation funding).

⁶⁶ While ACORN chapters have recently dropped the name ACORN and rebranded following negative publicity campaigns against them, I continue to use the name ACORN here because there is otherwise no organizational name that covers the shared history, strategies, tactics, and structures of all of these chapters. “ACORN” remains an organizing model, if no longer a corporate entity.

⁶⁷ Steve Bachmann, *ACORN Law Practice*, 7 *LAW & POL'Y* 29, 35 (1985). Bachmann also described ACORN's experiment with locating its lawyers both inside and outside the organization, including, for a period, in a separate private but affiliated for-profit law firm. *See id.* at 35.

⁶⁸ *Id.* at 34.

representation processes.⁶⁹ ACORN Law makes clear in its recruiting materials that lawyers looking for the glory of being in the center of the stage of social struggle need not apply.⁷⁰ In the words of ACORN founder and Chief Organizer Wade Rathke, “[y]ou know, it is not necessarily a colorful area of law, but there is a tremendous amount of work that needs to be done in areas like access to public records and opening up payroll and other deduction systems.”⁷¹ Indeed, as Rathke notes, transactional work can be innovative and risky. In 1967, the United Farm Workers’ brand new in-house counsel, Jerry Cohen, filed papers to set up a new union, the United Peanut Shelling Workers of America. The union had exactly nine members—peanut shellers who worked in a small shed on a UFW-owned ranch. Until then, these nine workers’ membership in the UFW had brought the entire union under the National Labor Relations Act’s (NLRA) prohibition on secondary boycotts, even though the rest of the union’s membership—thousands of farm workers—were not covered by the NLRA as agricultural workers. As a result, the UFW faced loss of one of its most successful tactics. Simply by reincorporating these nine workers into a separate union, Cohen freed the UFW to lead a national boycott of California table grapes over the next three years.⁷² By 1971, the UFW had contracts with nearly all California grape growers, and its membership had grown to 70,000.⁷³

Clever lawyers with a deep understanding of organizing who are willing to take risks may begin in this model, but move into the Enabling Model, below, as they discover ways to open opportunities for organizing in even the most seemingly technical projects.

I do not mean to suggest that all or even some lawyers do or should adopt these models’ boundaries as their role boundaries. In nearly all cases in which lawyers collaborate with organizing efforts, they are expected to play the corporate role to some extent, even when they are also simultaneously engaged in activities described under another one of the models below. But they are acting as corporate representation insofar as they are engaging in the fundamental action of *recognizing* the organization, of seeing individuals first in their organizational capacity as group members, leaders, and representatives, rather than as individuals with personal needs. As always in organizing, recognition is a crucial step that calls for enormous respect for the organization. For that reason, it is inappropriate and inauthentic where the group has not progressed through the organizing process to the point where the group members themselves have recognized the organization. This means more than simply that they have named it and pledged allegiance to it. Rather, the leaders must be disciplined in standing for the whole, their constituency equally disciplined in holding their leaders accountable; all must to some extent recognize the difference between their private selves and their public organizational selves. When a group is not practicing organization in this way, a lawyer who attempts to engage in the Corporate Model is practicing fantasy.

I have described above how organizing is an endless process; a group that strays from that discipline is an inappropriate partner for the Corporate Model, even though it might be

⁶⁹ *Id.* at 33–34.

⁷⁰ *Id.* at 34.

⁷¹ Quigley, *supra* note 43, at 461.

⁷² See Jennifer Gordon, *Law, Lawyers and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 15–16 (2005) [hereinafter Gordon, *Law, Lawyers and Labor*]; see also MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT, 216–17 (2009).

⁷³ *UFW Chronology*, UNITED FARM WORKERS, http://www.ufw.org/_page.php?menu=research&inc=_page.php?menu=research&inc=history/01.html (last visited Nov. 6, 2011).

venerable in age and have all the trappings of organization, e.g. hierarchies, titles, handshakes. It is not only when approaching the new, inchoate group that the lawyer must be honest and critical before engaging in corporate lawyering. Indeed, one of the shortcomings of the traditional commercial corporate lawyering model is that it does not provide for this moment of approach, the reckoning of whether authentic recognition is possible.

B. Legal M*A*S*H Unit

Organizing often generates legal casualties—leaders arrested for civil disobedience or in retaliation; opponents suing the organization or leaders; leaders or organizers who make mistakes when venturing into unfamiliar institutional territory. In addition, participants in organizing efforts are often already facing legal liabilities such as eviction, benefit termination, and bankruptcy. The M*A*S*H Lawyer in this model handles short-term legal “first aid” to keep the leaders up and organizing. Like the corporate lawyer, the M*A*S*H Lawyer does not directly advance the core goals of the organization—his legal claims are not the same as the constituency’s principal demands. Unlike the Corporate lawyer, this lawyer relates directly to individual members of the constituency. Indeed, the M*A*S*H Model shares many assumptions with what William Simon has named the “conservative” understanding of law: that legal needs are, like medical needs, a detour from the productive sphere (in this case, the public, political sphere), to be “solved” by the lawyer with minimal distraction to the client.⁷⁴ Nevertheless, the M*A*S*H Model is not to be confused with traditional delivery of legal services to individuals. Crucially, over time, M*A*S*H lawyering is targeted to indirectly support the constituency’s organizing capacity by freeing up leaders to address their core goals—it is more of a field hospital than a civilian emergency room.

Jennifer Gordon writes how The Workplace Project, a combined legal services and immigrant worker organizing project in Hempstead, Long Island, developed a triage system to handle workers who walked in the door with immediate crises, such as denied paychecks, work-related injuries and threats of arrest or deportation.⁷⁵ The worker might first sit with a lawyer, who, playing the traditional legal services role, could attempt to find an immediate solution that would at least put food on the worker’s table that night or assuage his fears of deportation.⁷⁶ Only after the immediate heat was off would the worker talk to an organizer and be recruited to participate in organizing efforts to change the root conditions that had led to his predicament. The Workplace Project has recognized that, while the comfortable do not organize, neither do the panicked, the terrified, or the incapacitated.⁷⁷

Similarly, Make the Road New York, formerly Make the Road by Walking, is a community organization based in New York City that employs lawyers, legal interns, and legal advocates to provide legal services to organization members.⁷⁸ Not only does this service help

⁷⁴ Simon, *supra* note 46, at 472–73.

⁷⁵ Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 430, 437 (1995) [hereinafter Gordon, *We Make the Road by Walking*].

⁷⁶ *Id.* at 442.

⁷⁷ *Id.*

⁷⁸ See *Legal and Support Services*, MAKE THE ROAD NEW YORK, http://www.maketheroad.org/howwork_legal.php (last visited Sept. 19, 2011) (describing the holistic approach of Make the Road’s legal services department); see also Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to*

keep community leaders on their feet and organizing, it also serves as a recruiting tool. New potential leaders join the organization to get access to the exclusive legal services, then stay and work on organizing.⁷⁹ This aspect of M*A*S*H lawyering—its restriction to group members (formally or informally defined), and therefore its requirement that individuals join the organizing effort if they want legal services—is its sharpest break with traditional legal services' value of "access for all."

Some critics see this requirement as a form of unethical compulsion, noting that the better off can obtain legal services without pledging servitude to their lawyers.⁸⁰ Such criticism rests on two incorrect assumptions. The first is an insistent view of poor or marginalized clients as bundles of weakness and need, so that all power and resources in the lawyer-client relationship must flow from the lawyer. The "liberal asking" lawyer, in William Simon's terminology, reinforces her own power by adopting a pose of benevolent giving, but in the process also enforces the client's powerlessness and dependency.⁸¹ To ask the client for something in return requires the lawyer to appreciate the knowledge, skills, and resources that even the most marginalized client brings to the table (even when the client himself may not see them), as well as to acknowledge the limits of the lawyer's own power. Such a reversal can be more generous and imaginative than the pure charity of the traditional legal services model. The second assumption relied on by critics of the membership-for-services requirement is the expectation that participation in organizing is something unpleasant, a cost exacted on the client. But organizing can be an opportunity for those who participate, which is why the poor and marginalized have been doing it *for free* for thousands of years. It is simply not true that for the organization to gain something from the individual, the individual must lose something to the organization. Organizing works because both parties to a relationship gain power. This is precisely what Loomer means by "relational power."⁸²

The M*A*S*H Model makes great use of lawyers' special access to the courtroom. It may also mobilize lawyers' relationships and knowledge of institutions, if the lawyers are repeat players in the fair hearings, housing courts, and criminal courts in which leaders find themselves tangled. Lawyers indigenous to the community where the organizing effort takes place can act as "fixers," eradicating small problems to enable leaders to concentrate on larger issues. Lawyers may also be freer to incorporate some of their values than in the Corporate Model. If, as at The Workplace Project or Make the Road, they are an entry point for leaders into the organization, their focus on the neediest and most disempowered individuals can pressure the organization into comprehending and accommodating these souls who otherwise would not float to the top of a rough-and-tumble group formation process.

On the other hand, this model is more vulnerable to the distractions of legal thinking than is the Corporate Model. The seductive immediate payoff of traditional legal services delivery

Health Care for Poor, of Color and Immigrant Communities, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 35 (2005) (discussing Make the Road's successful integration of legal services and organizing as a model of community lawyering).

⁷⁹ Interview with Andrew Friedman, Director, Make the Road by Walking, in Brooklyn, N.Y. (May 5, 2005); Interview with Deborah Axt, Coordinator of Legal and Support Services, Make the Road by Walking, in Brooklyn, N.Y. (July 14, 2005).

⁸⁰ See, e.g., Scott L. Cummings & Ingrid V. Early, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 495-98 (2001).

⁸¹ See Simon, *Visions of Practice*, *supra* note 48, at 475-76 (critiquing the liberal model of asking a client to define his or her interests).

⁸² Loomer, *supra* note 30.

competes with the long-term power-building of organizing. It is dangerously easy for the lawyers' mission to creep into the core struggles of the organization, until the lawyers are servicing the leaders full-time. Arguably, this has happened in many labor unions, where the "servicing model" and grievance processing have eclipsed organizing as the primary, and often only, ways that members experience the power of the union.⁸³

C. Lawyer as Political Enabler

The Enabling Model bears some resemblance to the Corporate Model, in that the lawyer is concerned with group interests and organizational formation. But this model is distinct from the Corporate Model in that it is concerned specifically with the group's interest in continuing to organize and to build power.

The Enabling Lawyer may engage in the full range of lawyering activities, such as litigation, negotiation, advocacy, drafting, and research, but always toward the goal of facilitating or opening spaces for organizing and the exercise of relational power. For example, the lawyer may work to defeat injunctions against organizing or demonstrating; find creative loopholes in existing law into which community leaders can fit their demands; uncover the legal leverage which organizations can use to target their organizing; use litigation to attack particular figures or institutions that are collaterally attacking the organization and preventing it from engaging with its real political target; and file lawsuits to slow down institutional processes and give organizing processes time to work. The Enabling Lawyer will rarely, if ever, style the group's ultimate demands as legal claims. Rather, she will use her practice to enable the group to make its own demands and seek its own victory through political, economic, social or cultural means.

Jennifer Gordon's study of the role of United Farmworkers' General Counsel Jerry Cohen is a concrete and moving portrait of the Enabling Lawyer in action.⁸⁴ The UFW was the first widely successful and sustainable union organized among the migrant workers of California's agricultural valleys. In the 1960s and 1970s, they used an innovative hybrid of labor and civil rights movement strategies to win industry-wide collective bargaining agreements and change power relationships in the grape, lettuce, and other major agricultural industries. The UFW rarely attempted to achieve its goals—higher wages, worker safety, hiring halls, dignity and self-determination—by suing for them. Rather, they mobilized their power—developed through years of exhaustive face-to-face relationship building, recruitment and training of thousands of individual farm workers—into strikes, boycotts and dramatic nonviolent action.⁸⁵ They forced their opponents to the negotiating table using economic, political, and cultural strategies. But throughout their struggle, the UFW legal department engaged in a frenzy of litigation: overturning injunctions that outlawed picketing, challenging "backdoor contracts" by the rival Teamsters Union, exposing conspiracy agreements signed among growers, and defending the legality of secondary boycotts. Rather than replacing the farm workers' relational power with legal power, Cohen and his colleagues used legal power to clear the paths for the farm workers themselves to

⁸³ See Trevor Colling, *What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights*, 35 *INDUS. L.J.* 140, 146-47 (2006); Christina Cregan, *Can Organizing Work? An Inductive Analysis of Individual Attitudes Toward Union Membership*, 58 *INDUS. & LAB. REL. REV.* 282, 283-84, *passim* (2005); Matthew W. Finkin, *Bridging the "Representation Gap."* 3 *U. PA. J. LAB. & EMP. L.* 391 (2001).

⁸⁴ See generally Gordon, *Law, Lawyers and Labor*, *supra* note 72.

⁸⁵ For robust tellings of the UFW's early organizing, see JACQUES LEVY, *CESAR CHAVEZ: AUTOBIOGRAPHY OF THE LA CAUSA* 258-59 (2007); see also GANZ, *supra* note 72, at 258-60.

mobilize and win.

Notably, the UFW in its early years may not have had a level of formal organization and stability that would have justified a Corporate approach. Nor was its legal department cabined from the movement's core activities, as in the Corporate Model. Rather, Cohen frequently sat at the table with Chavez, Dolores Huerta, and other lieutenants and organizers, helping to plot strategy and brainstorm tactics. He was also at the negotiating table with growers, hammering out the details of union contracts. He was simultaneously in the thick of things and yet never in the way of the organizing itself.⁸⁶

Research and education are among the most frequent activities of the Enabling Lawyer. Jack Minnis, legal researcher for the Student Nonviolent Coordinating Committee (SNCC), was playing this role when he wrote Stokely Carmichael in 1965 to point out that "Alabama Law says it is possible to bring into existence a totally new political party," provided that it choose a visual symbol that does "not resemble in any way" the white rooster of the Alabama Democratic Party (student volunteers in Lowndes County chose a black panther).⁸⁷

Because this role is not modeled on a traditional lawyering role, such as corporate counsel or legal aid, its boundaries are less well defined than the boundaries of the Corporate or M*A*S*H Models. Its indeterminacy is both a danger and an opportunity. On the one hand, a lawyer so closely involved in the core organizing process may begin to dominate decision-making and agenda-setting in exactly the way that organizers like Ron Chisom fear.⁸⁸ Additionally, with the lawyer taking such a prominent public role, she can easily come to be seen as the spokesperson for the organization. The lawyer certainly must represent the organization and tell its story in court, where her portrayal of the organization can be frozen into legal reality if, for example, the court lifts an injunction to allow the organization to picket only as long as its activities and demeanor match those described by the lawyer in her argument. Perhaps the most notorious example of this kind of legal-tail-wagging-the-organizational-dog was Martin Luther King's painful turnaround at the foot of the Pettus Bridge during the second aborted Selma-to-Montgomery march. There, lawyers had represented the SCLC's nonviolence to a federal judge as a desire to *avoid* violence, rather than to expose state violence; as a result, the judge partially lifted an injunction in order to allow activists to march just far enough to avoid provocation, but not far enough to create the kind of moral drama they needed.⁸⁹

Similarly, intertwining lawyers into a group's core activities means that lawyers' missteps can tactically impede organizing. Cohen himself tells of Chavez's disappointed outrage when Cohen triumphantly announced that he had defeated an injunction forbidding the farm workers from using bullhorns in public. Chavez had seen the injunction as a golden opportunity to make headlines with a graphically unfair arrest. Cohen's "victory" ruined Chavez's tactic and foreclosed what could have been an important experience for participating farm worker leaders.⁹⁰

On the other hand, the indeterminacy of the Enabling Lawyer's role presents opportunities for the lawyer to activate the full range of her skills, knowledge, access, and

⁸⁶ See generally Gordon, *Law, Lawyers and Labor*, *supra* note 72, at 46–50; GANZ, *supra* note 72, at 234–35; LEVY, *supra* note 85, at 261, 313, 316, 339, 345, 479, *passim*.

⁸⁷ TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS* 316 (2006).

⁸⁸ See Quigley, *supra* note 43, at 457–58 (discussing the risks of lawyers creating dependency as leaders of organizations).

⁸⁹ DAVID GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 75, 112 (1978).

⁹⁰ Gordon, *Law, Lawyers and Labor*, *supra* note 72, at 16 n.47.

relationships. The organizers, leaders, and organizing participants who can handle such a complicated relationship can get the full value of lawyers with whom they associate. Just as importantly, the multiple points of contact and the need to be conscious of constructing the relationship at every point provide opportunities for learning and growth. Where the Corporate Model lawyer is quarantined from the organizing process, the Enabling Lawyer must learn a great deal about organizing. If the lawyer does not come to dominate and reframe discussion, she will learn to think outside of the traditional litigation box. It will often be useful for the lawyer to bring unwinnable actions in order to advance political goals by attracting public attention or forcing opponents to commit resources and reveal information about themselves (UFW counsel were especially talented at this).⁹¹ Similarly, if the participants in the organizing effort do not simply either defer to or shun the lawyer, they can learn something of the lawyer's knowledge and way of seeing systems. Perhaps more importantly, they have the opportunity to learn and perform a new role: that of partners in power with the lawyer, where previously they may have approached lawyers only in weakness or fear.

When both sides are willing to question their roles and learn from one another, they can begin to work as a more powerful whole. For example, when ECCO organized unemployed workers to demand reform of the state's "One-Stop Career Center" for the unemployed, lawyers from Neighborhood Legal Services advised leaders on how to translate their grievances into the language of the regulations governing the Center. But the lawyers' first draft of demands was unsatisfying to the workers, because the lawyers had, acting from habit, drafted demands that would make the Center easier for *legal services lawyers* to act *on behalf of clients*. Demands such as "inform all users of their right to be accompanied by legal counsel when they meet with an agency officer," and "post in a visible place the guidelines governing the Center's use of funds" left workers dissatisfied. For their part, the lawyers, with their knowledge of the system, pointed out that the center's director would never agree to worker demands that would force her to violate federal regulations and risk losing the center's funding. After a contentious meeting, the lawyers came back with a draft set of rules requiring the center to spend all of its job training funds for any given quarter (the center was routinely sending most of its funds back to the state, unused), and the leaders enthusiastically planned a successful action to pressure the center director to agree to the rules. If the lawyers had negotiated alone with the center director, they could easily have won a set of reforms meaningless to the center's users. If the workers had gone in without the lawyers, they might never have understood the institutional and legal pressures pushing them back out the door. The agenda crafted by workers and lawyers together was faithful to the real goals of the workers—to gain access to job training and decent job opportunities—while being legally savvy enough to be winnable. And, more importantly in the long run, each learned how to relate to the other, enabling even more nuanced and intricate collaborations in the future.

D. Organizing on the Scaffold of Litigation

This model flips the organizing-lawyering relationship of the first three models on its head. Here, litigation is the principal strategy for achieving the constituency's demands, but litigation is conducted in such a way as to maximize opportunities for organizing in the shadow or margins of the case. I approach this model warily, as its most common form is a weak version in which sympathizers are mobilized to engage in quick, superficial displays in support of lawyer heroes. Beltway public interest firms on both the right and left have grown adept at busing in

⁹¹ *Id.* at 21.

supporters to picket outside the Supreme Court whenever the firms' lawyers are arguing their impact cases inside.⁹² These activities give the appearance of an organizing effort, but in fact they fulfill none of the criteria of organizing. They provide little or no learning and development to demonstrators, and they build no relational structures amongst participants, other than the relationships that develop incidentally between demonstrators passing the time with conversation—no more than would be developed at any supermarket with long checkout lines. In addition, they are ephemeral, with demonstrators rarely seeing one another again, let alone continuing to operate a lasting organizational structure that they can apply to other struggles. The organization's staff develops the capacity to mobilize demonstrators, but those demonstrators have no say in the strategy of the demonstration itself, let alone the legal strategy. Demonstrators may discover a shared identity as proponents of a common issue, but this shared identity is as superficial as cheering for the same baseball team—they will separate as soon as the next issue comes along.

This model concerns the use of litigation—not merely argument—as a process that provides a timeline, forum, and focal point for authentic organizing. For example, in the late 1980s, The American Center for Law and Justice (ACLJ), a conservative Christian public interest firm, won a series of high-profile cases establishing the right of religious groups to use school facilities for their activities. The ACLJ, in coalition with grassroots evangelical groups such as the Christian Coalition, conducted mass organizing during this litigation—but *not* to turn out busloads of supporters to the Supreme Court. Instead, they conducted a broad grassroots organizing campaign, "Ripe for the Harvest," creating a network of hundreds of high-school bible study groups in towns across the country, ready to either take advantage of newly opened school buildings or conduct pray-ins outside of still-closed ones.⁹³ This was impact litigation that grew the movement at the grassroots, strengthened local church congregations, and developed hundreds of student leaders. When scattered schools resisted the Supreme Court's order to open their doors to religious groups, this robust, multi-state network of organized students stepped up to push for enforcement of the law, turning one of impact litigation's weaknesses, difficulty of enforcement across broad areas, into an opportunity for public attention and leadership development.⁹⁴

In some instances, as with the ACLJ above, high-profile litigation helps galvanize a national movement, focusing and mediating local groups. But small-scale litigation may be even more effective as scaffolding for the development of local organizing. Micro-litigation in municipal bread-and-butter forums such as housing, small claims, and family court, with their quick pace and relative informality, provides a surprising number of opportunities for group action and the emergence of individual leaders. More importantly, municipal and local courts are often already familiar, even integral mechanisms in low-income people's day-to-day life and relationship-making struggles. For better or worse, housing court is no rarified place of retreat for the resolution of extraordinary disputes that threaten to disrupt residential life; it is more often than not the meeting place of first resort for landlords and tenants to work out routine bookkeeping and maintenance issues. It is not uncommon in many neighborhoods for a tenant

⁹² See e.g. CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* 182 (2003) (describing the hero lawyer emerging from the Supreme Court building after arguing in favor of school vouchers: "Our rally dwarfed theirs . . . I plunged into the crowd, shaking dozens of hands and exchanging high-fives along the way."); cf. Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88).

⁹³ HANS J. HACKER, *THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION* 25 (2005).

⁹⁴ *Id.*

who has never met her landlord to be on a first-name basis with her landlord's lawyer.

As public spaces, in my experience, these courts do not work well. They are strictly and often abusively regulated according to arcane procedural rules by frustrated judges appointed by local elites. But their centrality to community power relations means that litigation there presents opportunities to alter those relations, and that lawyers for low-income people play an important role in the transformation of these public spaces.

My own experiences with organizing on the scaffolding of litigation have taken place in New York City Housing Courts. The state created these courts in the early 1970s, in response to pressure by the tenant movement, to provide a space for the recognition of tenants' rights to repairs and decent living conditions. After forty years of domination by the professional landlords' bar, the Housing Courts have been reshaped to quickly facilitate the enforcement of landlords' rent claims against tenants en masse, often making it easier and cheaper for a landlord to litigate a month's late rent or a ledger anomaly than to confront a tenant in person. What is left from the original vision is one Housing Court part (out of ten parts in each borough) where tenants can sue their landlords for the correction of housing code violations. This part (redundantly called the "HP," or "Housing Part,") is a frequent haunt of lawyers from Legal Services or Legal Aid, as well as of the more vocal, angry, informed (or, as the landlords' bar refers to them, "problem") tenants. Importantly, the HP part is the only Housing Court part in which tenants can bring group actions with multiple plaintiffs.⁹⁵

"HP" actions seek injunctions ordering landlords to perform repairs, but they can also result in costly civil fines to landlords whose buildings have deteriorated considerably, or who refuse to comply with court orders. Unlike large-scale civil rights litigation, HP actions are often resolved in one or two court appearances, the law involved is relatively straightforward, and cases are heavily fact-based.

Professional landlords have long ago learned how to ignore or neutralize traditional tenant organizing efforts. They send low-level service employees to take the heat at angry building lobby meetings, while the actual owners remain anonymous behind generic shell corporations.⁹⁶ Tenants looking to take the fight to where their landlords live and work end up gathering impotently at one of the notorious mailbox stores where most building owners keep the post office boxes that are their only registered address. Tens of thousands of tenants in Brooklyn know their landlords only through a single address—199 Lee Avenue—a tiny post office supply store in Williamsburg, whose owner is legally prohibited from giving out information about box-holders.⁹⁷

Thus, organized tenants find that the traditional public spaces of building lobbies and streets have been evacuated of power. But in the HP part of the Housing Court, as with all civil litigation, landlords can be subpoenaed and forced to appear, or at least to send representatives fully authorized to agree to demands and be held accountable. Often, when a landlord refuses to meet with a nascent tenant organization, and a legal services attorney initiates an HP action on the organization's behalf, the first court appearance becomes, in effect, the meeting that the tenants had originally sought.

In one such instance, I represented a newly-organizing group of tenants from a severely

⁹⁵ See N.Y. CITY CIV. CT. ACT § 110 (McKinney 2011); ADMIN. CODE OF THE CITY OF N.Y. § 27-2115(h).

⁹⁶ See Nekoro Gomes, *Who's In Charge Here Anyway*, CITY LIMITS (Oct. 19, 2009), <http://www.citylimits.org/news/articles/3823/who-s-in-charge-here-anyway> (discussing the anonymity of landlords in New York City and potential legislation that would require building owners to register their names, residences and business addresses).

⁹⁷ *Id.*

deteriorated building. The building had recently been bought by an abstractly business-minded investor landlord whose goal was to concentrate on renovating vacant apartments into luxury units and attracting high-income renters, while making no investment into the dilapidated apartments of the long-term rent stabilized (and thus, less profitable) tenants. Following the usual real estate naming system, the landlord was known only as “[address of building] LLC.” The registered address was a post office box. The property deed on record with the city was signed by someone with a common name. I had joined in a few of the tenants’ early meetings and met with a number of them in their apartments, where they pointed out the leaks, broken door locks, smoking light fixtures, and sagging ceilings that had accumulated over months of the landlord’s neglect. The tenants had requested a meeting with the landlord, but been refused: he would meet with any of them individually, but never together.

Facing immediately hazardous conditions in their homes, the tenants asked me to represent them in an HP action. As an attorney, I drafted and filed the papers necessary to start the case and lay foundations for later arguments, and served them on the landlord’s post office box. I also filed a subpoena requiring a principal of “[building address] LLC” to appear. At the next tenant meeting, tenants signed up to attend the next court date, at which we would directly confront the landlord. On that date, half a dozen tenants arrived in court with photographs and other evidence from their apartments—Elizabeth M brought a pill jar full of dead bedbugs she had collected from her children’s bedroom. The judge, eyeing the group nervously in anticipation of a long afternoon of testimony, sent us off to a conference room to talk settlement. Suddenly, the half-dozen tenants were sitting around a long table with their landlord, having the meeting he had refused earlier. They explained their photographs, with a court staffer interpreting between Spanish and English. As they met, other court staff gathered around the edges of the room to watch. When Elizabeth held up her bedbug jar, the staffers gasped; when the landlord blustered, they laughed at him. When the landlord filibustered, as a group we stood up, threatening to walk away from the table to go see the judge. Knowing he was beaten, the landlord signed a consent agreement—enforceable as an order of the court—to perform all the repairs. More importantly, he also agreed to meet personally with the tenant association every month from then on. If he failed to do so to the tenants’ satisfaction, they and he knew that they could drag him back into court for contempt.

This was an organizing victory, not a litigation victory. An organized group confronted their powerful landlord face-to-face, winning concrete demands, including, most importantly, recognition of their tenant association and a commitment to meet and deal with them in person at their building from then on. This commitment reinvested the traditional space of the building lobby as a meaningful public space where the tenant association could grow and tenant leaders could do public business with the landlord in the future.

But this was more than simply bargaining in the shadow of the law. The HP proceeding created the only public space in which such bargaining was even possible. Its status as a legal forum forced the landlord to the table, while its informality allowed the tenants to take charge once there. And the building lobby was not the only space transformed and reinvested; the Housing Court—which had been, and would continue to be, an unfortunately repeating part of low-income tenants’ lives—was transformed; the tenants had taken over one of its rooms, the court staff had been reduced to spectators, and the tenants had begun to understand the courthouse as a place where tenants far outnumber landlords, lawyers and judges.

The litigation supported the tenants’ organizing in other ways as well. By forcing them to follow a timeline, it helped these tenants to overcome their inertia and tendency to put off or avoid confrontation. The looming court date created a sense of urgency as tenant leaders worked

to mobilize their neighbors to attend. The expedition to the courthouse heightened the importance of the meeting there. Tenants dressed up and prepared their statements, rather than merely venting their anger as they comfortably did when meeting in their own building. The same (limited) formality that usually makes Housing Court an education in confusion and impotence was, in this case, a lesson in how to conduct public business in a public place. In other words, the litigation provided opportunities for the tenants to develop their public leadership skills, strengthening their organization and equipping them to better advocate for themselves in future conflicts.

By way of contrast, I observed one of the worst misapplications of this model during the legal and political battles leading up to a crucial Supreme Court argument on affirmative action. A group of student leaders, catalyzed by the court case, were organizing in support of affirmative action. They had recruited fellow students to the cause by interviewing them for a documentary on what affirmative action meant to them in their lives; they had then invited all interviewees together for a screening of the documentary and a discussion. As a law student at the time, I was there for the screening. The effect of seeing ourselves on the screen gave students a similar experience to Mr. Domingo's upon hearing his voice amplified at ECCO's campaign action. Students took ownership of the meaning of affirmative action and began to articulate a group definition in which we were publicly invested as a group. Unfortunately, the process was interrupted by a lawyer involved in the actual litigation, who would leave for Washington the next day to help the defense team prepare oral arguments. "You're all *wrong*," he said after receiving a round of well-earned applause for his work on the litigation. "Affirmative action is about giving university administrators the freedom to craft a diverse student body. That's all it's allowed to be about, and that's all you should be talking about." The discussion was over. At the start, there had been a large turnout of students who opposed affirmative action—not to heckle or bring down the meeting, but to watch themselves as part of the documentary. They had been part of the discussion, a few even saying that they felt they could support the group definition of affirmative action being developed there. Once the lawyer took the floor, they left, along with all the supporters who already understood the legal argument and were bored to hear it again. Though affirmative action in university admissions most directly affects students, the lawyer relegated students to the role of cheerleaders. By disrupting the student organizing process, the lawyer ensured that the high profile case would leave behind only legal precedent, with little relational power available for exercise outside of court. He ensured the students' dependence on lawyers.

But this experience also shows that impact litigation *can* catalyze organizing, by providing a dramatic public story in which individual stories can take on a larger meaning. Before the Supreme Court agreed to hear the affirmative action cases, there was ample interest among students in organizing to preserve, expand, or improve affirmative action. But there had been few moments when one could organize on one campus and know that thousands of others were organizing at the same time across the country. The litigation, because it was trans-local, helped occasion a movement.

It is dangerous to rely on high-profile events to get people to organize, for the same reason it is dangerous to rely on charismatic leaders—the catalyzing event or person will pass, and in the meantime the followers do not develop the self-reliance to continue on. But high profile impact litigation can nurture organizing when both lawyers and organizers organize deliberately around what will come *after* the final decision (rather than organizing *for* the decision), as in the case of the ACLJ's conservative Christian litigation discussed above. Like many of the strategies considered in this paper, there is nothing necessarily innovative or cutting edge about such mindful use of litigation. It has been a common practice for decades, though it is

often overlooked when it comes time to draw lessons.

Indeed, the practice of organizing for the aftermath of judgment existed at the heart of what has become a common example of supposedly pure impact litigation: the LDF's school desegregation campaign of the 1940s and 1950s. In fact, that campaign was conducted in such a way as to nurture dozens of local organizing efforts through (often contentious) coordination with the NAACP's grassroots membership. The dozens of black teachers' associations organized across the south in order to act as plaintiffs in teacher pay equalization suits brought by LDF are often neglected in the narrative of the litigation campaign.⁹⁸ High profile lawyers such as Thurgood Marshall or Spotswood Robinson would quickly win a local lawsuit, and then transfer control to the local teachers' association to continue negotiating the implementation of the court's order.⁹⁹ Teachers who had never in their careers protested their conditions now learned political skills necessary to keep their groups together, achieve consensus, and bargain with white officials—Marshall would often drop in unexpectedly to criticize their tactics and brusquely train them on how to play political hardball.¹⁰⁰ Indeed, one of these teachers, Septima Clark, went on to pioneer the Citizenship Schools movement through which thousands of local people became involved in the Black freedom struggle throughout the South.¹⁰¹ Notably, LDF attorneys did not do any organizing themselves. Instead, they used their special access to legal forums and the promise of the sweeping power of litigation to enliven local citizens and create an institutional context into which organized teachers could plug themselves (it would have made little sense for black teachers to organize and attempt to negotiate with white officials before the materialization of the legal stick). Again, litigation provided the scaffolding on which a group could organize and advocate for itself.

The Scaffolding Model shares an uneasy border with the Enabling Model; both lawyers engage in large-scale litigation and group representation, and both hope to carve a path for organizing to follow. But unlike Enabling Lawyers, Scaffolding Lawyers do not shy away from naming the constituency's central demands among their legal claims. The power they wield in litigation is greater than what has been to that point developed by the organization or movement. The constituency grows its power and takes possession of the victory in the course of enforcing it.

This model is attractive to many lawyers because it places them in a high-profile, challenging role. It is also popular with movement strategists because of its potential for catalyzing sweeping, trans-local movement activity. Impact victories also tend to have great expressive effect, asserting rights in the best sense of the word—as invitations to those on the margins to be included as “first-class citizens” in the community. But this model also comes the closest to overwhelming the core values of organizing. Issues are cut, timing is chosen, goals are defined, arguments are formed, and plaintiffs' stories are told at the lawyers' discretion. Of

⁹⁸ MARK TUSHNET, *THE NAACP LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950*, at 18-19, 43-45, 58-60 (1987).

⁹⁹ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 213-15 (Alfred A. Knopf ed. 2004).

¹⁰⁰ *Id.*

¹⁰¹ “While living in Columbia [South Carolina], during World War II, she had joined the teacher-salary equalization campaign of the National Association for the Advancement of Colored People (NAACP), an act she characterized as her first ‘radical’ act, ‘the first time I worked against people directing the system for which I was working.’” Katherine Mellen Charron, *We've Come A Long Way*, in *GROUNDWORK: LOCAL BLACK FREEDOM MOVEMENTS IN AMERICA* 116, 119 (Jeanne Theoharris & Komozi Woodard eds., 2005) (quoting Septima Clark, *ECHO IN MY SOUL* 81, 82 (1962)).

course, lawyers may consult with community leaders, but consultations with disorganized constituencies may be costly or impossible, and nothing holds lawyers accountable to any consultations they stoop to undertake. The idea of lawyers taking it upon themselves to be movement-makers clashes with the bottom-up, power-shifting nature of relational organizing. Community leaders may control the mechanisms of enforcement of the legal victory, but they organize only within the bounds set by the lawyers' claims. Perhaps the most attractive feature of this model is how easily it can be adopted by legal organizations that are designed for engagement in traditional impact litigation or legal services provision. It does not require that the lawyer learn new skills or even operate in an unfamiliar forum, but it does require that she act with mindfulness and discipline. And this may mean conflict with funders, nonprofit boards, and pro bono partners—the litigator's more immediate "constituency." For this reason, the Scaffolding Lawyer is the most vulnerable to diversion both by capture and by self-delusion.

E. Lawyer as Organizer

This model does not refer to lawyers who quit lawyering altogether and become organizers. In the Lawyer as Organizer Model, lawyers initiate their organizing through the structural context of direct delivery of legal services. The base of the organizing effort is often some subset of the lawyer's client base. Agenda-setting begins when the lawyer notices patterns among the issues that clients bring to her, and the motivation to organize may come from limitations the lawyer encounters in her ability to resolve client issues through legal means alone.¹⁰² Indeed, the growth of attorney-founded Workers' Centers may be evidence that this model is gaining popularity.¹⁰³ Increasingly, lawyers are caught in the conflict between the ideals of legal service provision—equal justice and individual rights—and its frustrating reality—pyrrhic victories, resource shortages, and political restrictions attached to funding.¹⁰⁴ Under such pressure and limitations, attorneys may increasingly turn their practice towards organizing.

Jennifer Gordon documents a transition from service provision to relational organizing in her narrative of the development of The Workplace Project.¹⁰⁵ The Workplace Project began as a one-lawyer storefront legal services provider for immigrant laborers. As Gordon looked beyond the limited fixes available through litigation, she gradually developed a "Workers' Committee" consisting of clients and former clients facing common issues.¹⁰⁶ As the Workers' Committee's organizing activities made up a larger and larger part of the Project's practice, she hired a full-time organizer.¹⁰⁷ The Committee eventually changed the Project's mission so that organizing was foregrounded and legal services were relegated to a M*A*S*H role.¹⁰⁸

Ideally, this model is not a static structure, but transitions from pure legal services

¹⁰² See, e.g., Gordon, *We Make the Road by Walking*, *supra* note 75, at 438, 443.

¹⁰³ See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 426 (2005–2006) (discussing the emergence of worker centers and evaluating the various worker center models).

¹⁰⁴ See, e.g., Tom Condon, *Equal Justice for All Becomes More Elusive*, HARTFORD COURANT, Dec. 22, 1996, http://articles.courant.com/1996-12-22/news/9612220188_1_legal-aid-society-legal-advocates-neighborhood-legal-services.

¹⁰⁵ Gordon, *We Make the Road by Walking*, *supra* note 75, at 428–30.

¹⁰⁶ *Id.* at 430.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 446.

delivery to one of the models discussed above. Unfortunately, not all such efforts are as successful as the Workplace Project. The organizing effort can become stunted by the centrality of the lawyer (and perhaps his limited competence as an organizer), so that the lawyer, rather than decreasing the constituency's dependence on him as a lawyer, has only added a further dependence on him as an organizer. The lawyer has "his" group of plaintiffs, which engages in "extra-legal tactics." This is the paradox of the Lawyer as Organizer Model: while at first it appears the most radical enactment of the core values of organizing, in practice it often aggrandizes and foregrounds the lawyer. Additionally, this model may produce organizations dependent on a central figure who is doubly mystified—once as a lawyer, and again as a visionary. This problem is often caused by an error typical of trained lawyers: when confronted with obstacles, lawyers are trained to rely on their own counsel and develop their own solutions. This reflex may prevent lawyers from searching for already existing organizing efforts and community leaders, and expanding the resources available to the organizing process.

But what about situations where there is no readily available organizing effort for the lawyer and client to work with? What if the lawyer's perception that she is on her own is not the result of a self-aggrandizing reflex, but of an informed analysis? Or what if the only available organizations are corrupt or unresponsive to the client and his interests? Certainly a lack of powerful, democratic organizing amongst marginalized constituencies is more the rule than the exception in most parts of the United States. There indeed the lawyer must begin with what she has—her relationship with her clients—but should work toward differentiating the roles of lawyer and organizer as soon as possible, as Gordon did when she hired a full-time community organizer. The lawyers who began *Make the Road by Walking* also mitigated their own leadership somewhat by immediately seeking out relationships with community leaders (in particular with the popular local parish priest), rather than basing the organization entirely on their own client networks.¹⁰⁹ From the start, there were always leaders in the organization who were not dependent on the lawyers either for legal services or for their relationships with other leaders. Additionally, *Make the Road's* staff structure was decentralized from its beginning, so that it was impossible for lawyers to make organization-wide decisions except via a board that also included community leaders.¹¹⁰ Community members recruited through legal services were directed to a different staff person from the person who had originally recruited them, making the process of transformation from client to leader dependent on the entire organization, rather than on one lawyer.¹¹¹ Some of the founding lawyers ceased acting as lawyers entirely, taking on both the title and work of organizers.¹¹² After seven years of operating as a "collective," staff members decided in 2005 to establish a bounded "legal department" in order to foster accountability and clarity of roles.¹¹³ With strong relationships developed through seven years of shared experience, lawyers in the "legal department" need not stay cabined from either the organizers or the members, and in fact they can often be found participating in organizing meetings, working one-on-one with leaders, walking picket lines, and cooking for parties.¹¹⁴ But it is still made clear that they are lawyers, that their principal job is to do the things that non-lawyers cannot, and that the organization must be able to survive (even with its power reduced) without them.

¹⁰⁹ Interview with Andrew Friedman, *supra* note 79.

¹¹⁰ Interview with Deborah Axt, *supra* note 79.

¹¹¹ *Id.*

¹¹² Interview with Andrew Friedman, *supra* note 79.

¹¹³ Interview with Deborah Axt, *supra* note 79.

¹¹⁴ *Id.*

III. CHOOSING AMONG MODELS

These models vary by the level of pre-existing organization required of their client constituency, and by the concrete provisions of accountability of the lawyer to the group. These are familiar concerns whenever lawyers work with groups, and each of the models balances those concerns differently. More importantly, the models also vary in terms of the opportunities for lawyers and group members to develop the kinds of rich, experience-based relationships that Duncan Kennedy has called "intersubjectivity."¹¹⁵ These relationships ultimately provide the opportunity to address the concerns of organization level and accountability directly.

A. *Model Selection as Recognition of the Constituency*

The horizontal organization of models across this spectrum is partly an expression of the differing needs of constituencies at different stages of organization. For example, the Corporate Model requires a fully formed organization with its own internal mechanisms for translating heterogeneous interests into straightforward directives to the lawyer, as does the private corporation on which it is based. At the other end of the spectrum, the Lawyer-Organizer creates an organization she hopes will hold her accountable. In the middle, lawyers approach constituencies in various stages of organizing and become involved in the organizing process itself. The Scaffold Lawyer is not an organizer, but sparks or nurtures organizing, perhaps by emphasizing the inherent spaces in the formal justice system available for organizing. The Enabling Lawyer and the M*A*S*H Lawyer do not take responsibility for the initiation of an organizing process, but work to support and sustain the already-initiated process.

But it is an oversimplification to suggest that a lawyer simply takes the constituency as she finds it, already laid out in a visible state of organization or disorganization. In fact, all constituencies are at the same time organized and disorganized: the janitors in a high-rise office building are organized—often efficiently—by the contractor who employs them. At the same time, they may be a non-union workforce and therefore not organized around any interests they do not share with their employer—such as wage maximization or workplace dignity. Residents of a neighborhood participate in multiple levels of organization—social life, parish, extended family, landlord-tenant relationships—yet may still have no organization through which they can project their common interests in the political sphere. A lawyer hoping to find a constituency easily identifiable as "organized," "unorganized," or "partially-organized," so that she can pick the matching model, is in for confusion. In reality, lawyers choose the level of organization they are willing to recognize, rather than simply accepting the level of organization they find. Lawyers, like any public actors, must own their own values and decide what their own goals are in seeking to work with others. For this reason, the choice among models above is not merely a technical choice. First, it is a choice of what *ends*—what constituencies, what policies, what demands—toward which the lawyer wants to work. For a lawyer who is committed to creating profit through the terms of individual employment contracts, the corporation is the only organization that is needed; for a lawyer who values redistributing more economic resources to workers, some kind of collective labor organization may be the critical type of organization.¹¹⁶ Second, the choice to

¹¹⁵ Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law*, 41 MD. L. REV. 563, 567 (1982).

¹¹⁶ See generally Cynthia Mark & Evonne Yang, *The Power-One Campaign: Immigrant Worker Empowerment Through Law and Organizing*, 36 CLEARINGHOUSE R. 264, 264-65 (2002-2003) ("The Power-One case

recognize or spurn a particular organization (or organizing process) is also a choice of what *means* can be used most powerfully to create social change. As I have argued in Part I, lawyers should seek out and work with organizations and processes that fulfill the criteria of relational organizing, despite the presence or absence of other characteristics of organization.

To further complicate the role of the lawyer, the selection among organizing processes is almost never without confrontation. If the lawyer chooses not to recognize a particular form of organization with which the constituency is engaged, she does not simply operate on a separate, neutral plane of benign non-interference with it. As the organizer Ernesto Cortes has said, "All organizing is disorganizing and reorganizing."¹¹⁷ The organizing process with which the lawyer allies herself will compete for resources, attention, and power with other organizations. Indeed, such confrontation may be deliberate and clear, as in the opposition between company lawyers and lawyers supporting a union organizing effort. It may also be politically messy, such as when lawyers working with the Association for Union Democracy provided support to union members challenging their own union's leadership as unrepresentative of their interests.¹¹⁸ In these cases the models delineated in this Article are still operative. The lawyer's choice to recognize or not to recognize different forms of organization is more visible and more vulnerable to public criticism when the lawyer elects not to work with prominent organizations, but in reality it is no different than when lawyers choose their allies along less confrontational lines. The lawyer's primary relationship is with the leading participants in the organizing process she recognizes.

B. Model Selection as Definition of the Lawyer's Role

These models vary not only by level of prior organization, but also by the lawyer's influence in the core organizing process. Again, the models vary across a continuum from the secure cabining of the lawyer in the Corporate Model, to her complete immersion in the organizing process in the Lawyer-Organizer Model. If the only threats to the integrity of the organizing process were those attached to the lawyer, it would simply be a matter of balancing the value the lawyer can add to any particular part of the organizing process against the lawyer's potentially distorting effect on that process. But to adopt this simplified calculus would be to idealize the organization as much as the impact litigation model idealizes the lawyer. In fact, as the organization itself takes form, there is always the risk that its own internal forces will cause it to depart from the core criteria of relational organizing. Indeed, organization carries dangers, just as lawyers do. Organization by definition means differentiation between people (division of labor and roles, as well as division into "inside" and "outside"), an action that social justice lawyers commonly treat as presumptively unjust. Organizations usually create hierarchies as a way of facilitating action, decision-making, and accountability. But hierarchy is only a tool and can be used to stifle all three of those desirable ends. Negative examples of hierarchy abound in activists' experiences: the union in bed with management; the neighborhood organization committed to keeping out the ethnically different "newcomers;" and the medieval mysteries of

demonstrates how legal services programs, by means as simple as community legal education and administrative advocacy, can contribute to major, long-term gains for our clients when we partner with community organizers and we give immigrant workers the power to voice their demands and fight for themselves.").

¹¹⁷ Ernesto Cortes, Jr., Southwest Regional Director, Industrial Areas Foundation, Presentation to General Assembly of Unitarian Universalist Association (June 28, 2004), available at <http://archive.uua.org/ga04/0001.html>.

¹¹⁸ HERMAN BENSON, *REBELS, REFORMERS AND RACKETEERS: HOW INSURGENTS TRANSFORMED THE LABOR MOVEMENT* (2004).

academia.

Both lawyering and organizing threaten the goal of connecting the value added by the lawyer to the interests of the constituency. No model can remove this threat simply by the way it structures the lawyer-constituency relationship. Risk is shifted back and forth, trading the danger of the unrepresentative, hierarchical organization for the danger of the unrepresentative, hierarchical lawyer-client relationship as the models move across the spectrum. At one end of the spectrum, the Corporate Model keeps the lawyer in her place, but perhaps over-relies on the organization's structure and leadership, maximizing the danger that they will become unaccountable to their constituency. At the far end, no organizational leadership mediates between the Lawyer-Organizer and the constituency—minimizing the danger of organizational ossification and unaccountability, but lionizing the lawyer and maximizing the danger that her leadership poses to a truly democratic effort. This could be described as a “law of preservation of risk,” so that the dangers of unaccountability are irreducible no matter where they are structurally located.

C. *Dynamic Relationships Within Models*

Indeed, the threat of unaccountability remains as long as both the lawyer and the organizing effort are viewed as static entities. While at the start of the relationship between the two, it may be necessary to treat them as static, once a relationship is formed between a lawyer and a constituency, neither party can help but be changed by it, so that the conditions in which they find each other also change.¹¹⁹ Because of this change, the lawyer-group relationship is not a zero-sum game.

Parties in a working relationship grow dozens of minute checks and balances that allow them to become more closely intertwined without overwhelming each other. Duncan Kennedy has called this kind of complex, experience-based relationship “intersubjectivity,” arguing that its presence can disarm some of the elements social change lawyers find destructive in their relationships, such as paternalism.¹²⁰ Jerry Cohen and Cesar Chavez modeled such a process after Cohen's well-intentioned challenge to an anti-union injunction inadvertently pulled the carpet out from under Chavez's planned civil disobedience of the injunction:

So I bop in one day, after going up to the appellate court in Fresno, and say
“I've got this writ of prohibition. We're getting our bullhorns back.”

“Oh, fuck!” he screams . . . “I can't—”

I said, “Well, Cesar, you know, you better be straight then . . . If you wanted to violate, let me know.”

“Well, I didn't think you were going to get your writ.”

I said, “Well, it was pretty clear.” And I told him how I got the writ. So from

¹¹⁹ Loomer, *supra* note 30 (defining “relational power”).

¹²⁰ See Kennedy, *supra* note 115, at 647.

that point on, it was like, "Okay, I'll level with Jerry." You know, so we're on the same page.¹²¹

If they welcome growth through conflict, as Chavez and Cohen did, lawyers and members of a constituent group learn by tangling with each other. They teach each other how to work together. The result is yet another relationship in a mobilized network of relationships.

The relationship between lawyers at Neighborhood Legal Services (NLS) and leaders at ECCO were similarly both contentious and dynamic.¹²² I have described how lawyers and low-income workers learned to synthesize their somewhat mismatched analyses and frame a common agenda in their campaign against a state-run career center.¹²³ Ross Dolloff, then the Executive Director of NLS, has written candidly of his initial resistance to, and later appreciation of, ECCO's organizing process.¹²⁴ Dolloff describes not only learning to appreciate new points of view, but also developing a new competence necessary to work outside the familiar frameworks of direct legal services delivery. Significantly, he developed both intersubjectivity and competence through long-term relationships with other leaders involved with ECCO. As a non-lawyer staff organizer on the opposite side of the relationship, I experienced a similar learning curve. During my first month working with Ross, I tried to push him to introduce me to NLS's clients, so that I could recruit them for ECCO's organizing campaigns. Ross, constrained by rules of confidentiality for which I had little appreciation, pushed back. In a lengthy meeting several days later, after we had each reflected on the other's position, we more soberly worked out a strategy in which NLS lawyers would host a voluntary meeting for interested clients. During this meeting, the staff lawyers (not including Ross) would guide the discussion; the clients could then decide for themselves whether they wanted to pursue a further relationship with ECCO. By taking the time to develop this process, and by going through the process together, Ross and I developed our relational competence. This competence not only made it easier for us to deliberate together in the future, but also made it less necessary for us to lean on formal structures while doing so. Once we had a better sense of what the other had to say, we no longer sought rules to limit the other's speech.

As should be evident from both of these examples, intersubjectivity can only be developed through shared experience. Such experience will often be contentious, passing through periods of confrontation that test the commitment of all involved, followed by opportunities for reflection and learning. Studies of such successful relationships are invaluable because our own experience is always slow and costly and we cannot yet count on institutions of legal education to provide such experiences for their students.¹²⁵

¹²¹ Gordon, *Law, Lawyers and Labor*, *supra* note 72, at 16 n.47.

¹²² Ross Dolloff & Luke Hill, *Collaboration with Broad-Based Organizing Projects – The Legal Services Staffer and Organizer Perspectives*, MGMT. INFO. EXCHANGE J., Fall 2000, at 3.

¹²³ See *supra* Part II.3 (discussing the lawyer as Political Enabler).

¹²⁴ Dolloff & Hill, *supra* note 122, at 3.

¹²⁵ Existing deep studies, in addition to those already cited, include MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973* 5 (1993); PENDA HAIR, *Reflections on Community Lawyering: The Struggle for Parcel C*, in *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE* 120 (2001) (describing the various roles played by legal services lawyers in a community coalition fighting with redevelopment authorities over land use in Boston's Chinatown); PENDA HAIR, *Seizing a Voice in Democracy: The Mississippi Redistricting Campaign*, in *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE* 62 (2001) (describing a campaign in which a coalition of impact litigators worked with the grassroots organization Southern Echo to win a redistricting battle as well as to increase voter participation in the Mississippi Delta);

Even ACORN, with its public endorsement of the Corporate Model and extreme wariness of lawyers' distorting potential, privately puts faith in lawyers' capacity to learn: at least one ACORN leader began the training of new lawyers by having them support organizers in the field for up to a month.¹²⁶ As lawyers begin to understand and respect the organizing process—not only to endorse it, but to gain an authentic sense of its rhythms and vulnerabilities—they are introduced to less technical work with leaders and organizers in a relationship structured more by experience than by rules. The lawyer-constituency relationship works insofar as the model is only a cradle. The organization in fact structures a measured pathway that enables the lawyer to engage with all of her value, including that value that cannot be separated from her personhood.

IV. CONCLUSION

The reality of the legal profession today is that the majority of lawyers work for groups. Legal education, firm organization, rules of ethics, and substantive law are structured to facilitate lawyers' support of the most well-organized, powerful groups in society. The challenge, then, for lawyers with a calling to work for social change, is to create structures that facilitate lawyering with and for un- or partially-organized constituencies. Such constituencies have not yet completely developed the mechanisms by which to hold lawyers accountable and lack formal recognition by the law. I have argued that lawyers seeking to work with marginalized groups must be concerned not only with ethical questions of accountability and paternalism, but with maximizing the power available to those groups. In other words, lawyers contribute the greatest value when they work with groups that are in the process of organizing.

With the challenge thus set and bounded, I have outlined five models that facilitate this work. These models respond to different conditions, including the stage of the organizing process, the competencies of the lawyer, and the level of trust between parties. But static models do not adequately describe the dynamic process by which a lawyer and a group of people, once brought into relationship with each other, generate power that neither had before. When Bernard Loomer speaks of "relational power" or "power with," he does not simply mean the aggregation of skills, knowledge, and energy. "Power with" refers not only to "the power to produce . . . an effect," but also the power to "undergo an effect."¹²⁷ It is not only combination, but also transformation. Both the lawyer and the client are changed by each other (if they so allow), so that relational power *creates* new skills, knowledge, energy, and, finally, power.

My goal in beginning to set out lawyer-organizing typologies was to provide a vocabulary to help lawyers reflect on the roles in which they find themselves and on the struggle to transform those places. Such reflection is a critical part of "undergoing the effect" of struggle along with people in the process of organizing. This is where the lawyer should be. Though I have used the word "constituency" throughout my argument, I have not meant to suggest that lawyers have constituencies. Lawyers do not have constituencies; leaders have constituencies. Lawyers have relationships with, and responsibilities to, clients. As such, they are like bottles

Richard Klawiter, *¡La Tierra es Nuestra! The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625, 685-86 (1990) (providing a first-person account of the author's experience with the campesino struggle over land rights in El Salvador); Mark & Yang, *supra* note 116 (describing the Power-One Campaign, in which a legal services organization worked with community organizers to give immigrant workers a voice to fight for themselves).

¹²⁶ Quigley, *supra* note 43, at 459-61 (quoting Wade Rathke, founder of ACORN).

¹²⁷ Loomer, *supra* note 30.

with narrow mouths—they cannot swallow the broad entropy of a rainstorm. Rather, they need funnels—relational structures that collect heterogeneous interests into focused, shared movement with which the lawyer can relate. The lawyer supports the organizing process, which in turn structures her role and relationships. It is a cycle, rather than a transfer of power, and therefore relational, sustainable, accountable, and powerful.

APPENDIX A: FIVE PRACTICE MODELS FOR SOCIAL JUSTICE LAWYERING

Model	Nature of legal work	Relationship to organizing process
Corporate	Transactional	Provides transactional support for maturing organizations
Legal services as M*A*S*H Unit	Direct legal services to individual participants in an organizing effort	Protects participants from backlash and retaliation; frees leaders to concentrate energy on organizing
Lawyer as Political Enabler	Litigation, research, drafting, training	Secures and protects group's right to organize; helps identify goals and issues; provides access to political forums
Organization on the Scaffolding of Litigation	Litigation, negotiation	Provides visible rallying and polarizing points for movements; provides roles and forums for individuals to testify, negotiate and plan; provides structure and timelines as scaffolding for nascent campaigns
Lawyer as Organizer	Direct legal services, training, organizing	Lawyer's own client base becomes the base for organizing; training and legal services serve as recruitment tools

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LAW, LAWYERS, AND LABOR: THE UNITED FARM WORKERS' LEGAL STRATEGY IN THE 1960S AND 1970S AND THE ROLE OF LAW IN UNION ORGANIZING TODAY

I. Introduction

In the 1930s and 1940s, it was an article of faith that the National Labor Relations Act ("the Act" or "the NLRA") and the National Labor Relations Board ("the Board" or "the NLRB")--the federal statute and agency governing union organizing--were a tremendous boon to the labor movement.¹ Statistics bore out the intuition. Union membership exploded *2 from four million workers in 1936, the year after the NLRA's passage, to fourteen million a decade later, representing over 35% of the private workforce.² Yet today, and for at least the past two decades, it has equally become labor's credo that the NLRB and the NLRA (as amended by Congress and interpreted by the NLRB and the federal judiciary) are massive impediments to unionization.³ Again, numbers tell a stark story. While unions currently count 15.8 million workers as members,⁴ this represents less than 8% of the private workforce, a dramatic decline. And 80% of the three million people who became union members between 1998 and 2003 did so outside of the NLRB-supervised election process.⁵

What does law offer labor? It depends. The specifics of the law in question are critical, as are the make-up and funding of the agency that is charged with implementing it and the economic strength, political clout, and strategic creativity of the unions and employers that it governs. Today's discussions of the NLRA from the union perspective are tinged with desperation about what law does for and to organizing--a desperation that is born of labor's sense that it has lost too many important battles before the NLRB and the courts over the interpretation of the NLRA. In despair, however, workers and their institutions risk losing sight of critically valuable lessons that emerge from a long view of the labor movement about the varied ways that law can interact with collective efforts to improve working conditions. This Article seeks to draw out some of those insights, both through a brief overview of the changing *3 relationship between the labor movement, law, and lawyers during the twentieth century, and, more deeply, through an exploration of fifteen years in the specific experience of one union, the United Farm Workers ("the UFW"), whose history, while unique in many regards, recapitulates and sharpens the points of the larger story.

* * *

~~The percentage of workers organized by unions has been in a slow-motion freefall for decades. The challenges labor faces are complex. The structure of the economy has changed dramatically over the past fifty years: employers have moved the union bulwark of full-time manufacturing jobs overseas, and service~~

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Even where workers were unable to sustain direct pressure for long, the UFW continued to wrest all of the leverage it could from the perishable nature of the crops that its members harvested by cutting off the labor supply at key moments, beginning with its first strike in 1965.

Given the difficulty of winning contracts for mobile, replaceable farm workers through strikes, the UFW also sought to create a social climate in which the existing treatment of farm workers was seen as unjust. The UFW used that climate to generate moral, economic, and political pressure on growers to recognize the UFW as the legitimate representative of farm workers. To supplement and at times replace field organizing, the Union called on middle-class consumers around the country to boycott non-Union fruits and vegetables. This served as an effective year-round economic weapon that worked in complementary ways with the Union's on-the-ground organizing, particularly between 1965 and 1970 (the first grape *13 boycott) and at various times during the 1970s and 1980s (boycotts of other produce and wine as well as grapes). The combination of union and social movement strategies proved successful for the UFW in its early days. By early 1973, the Union could boast an unprecedented 150 contracts with California growers, covering 50,000 workers.³⁶

A. The United Farm Workers' Early Legal Strategy

Although the general outline of the UFW's story is well known, the role of lawyers in that story has remained nearly unexplored in published sources.³⁷ Yet the creative use of law played an important role in the Union's success. At its peak, the UFW legal department had seventeen lawyers and forty-four paralegals, high numbers indeed in the context of a leanly-staffed and financially-struggling movement.

In the Union's first years, it parceled out its legal work to volunteer lawyers and outside counsel. The volunteers, mostly recent law graduates, largely counseled and represented farm workers on individual matters.³⁸ Chavez also experimented with hiring a staff lawyer whose principal responsibility was to provide members with services. He became overwhelmed by the volume of work and only lasted for a brief period.³⁹ *14 For more complex legal matters, Chavez turned to outside labor lawyers. But these experiences, too, were frustrating. Farm workers were exempt from the NLRA, but the labor lawyers whom the union consulted were often so mired in its restrictions that they could not respond creatively to the unique possibilities and needs of a farm labor organizing campaign.

Starting in 1966, Chavez began to seek legal support from the newly-founded California Rural Legal Assistance corporation ("CRLA"), one of the first federally-funded legal service organizations. Although CRLA was explicitly prohibited by the terms of its federal funding from representing any union, sympathetic attorneys within CRLA found ways to pursue Chavez's goals through impact litigation. Not unpredictably, this collaboration soon unraveled in the face of tension about goals and strategies. CRLA sought to make decisions about legal tactics that would lead to a victory in court. The Union, on the other hand, often preferred a course of action that was riskier in legal terms but that it judged more likely to advance its long-term organizing goals. But the Union could not be CRLA's client; therefore, it had no official say in the matter.⁴⁰ While sporadic collaboration would continue over the years, it was clear by 1967 that CRLA could not consistently provide the UFW with the sort of representation it needed. As Chavez realized, the Union had reached a point where it needed its own sophisticated legal strategist.⁴¹

For the Union's first general counsel, Chavez chose Jerome "Jerry" Cohen, who had graduated from Boalt Hall and gone to work at CRLA just *15 months earlier. As a basketball player at Woodrow Wilson High School in D.C., Cohen had sought to abolish fraternities after hearing that a teammate had been beaten during an initiation rite, a battle he continued once he reached Amherst College. By the time he reached law school in Berkeley in 1963, he was primed to enter the current of movement sweeping campuses all over the country. At Boalt Hall he became active in the

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Free Speech Movement and the resistance to the Vietnam War, and spent a summer at the Meiklejohn Civil Liberties Library, cataloguing civil rights cases so movement attorneys would be aware of what was going on in trial courts around the country. When he joined the UFW, he had already developed a powerful combination of strategic legal thinking, passion for social change, and a love for a good fight. Over the next thirteen years, Cohen and his staff would break new frontiers in their exploration of how law could protect, open opportunities for, and advance the Union's external organizing goals.⁴²

Under Chavez's supportive direction, Cohen soon grew into a broad role within the UFW. He gained Chavez's trust swiftly. In 1967, shortly after Cohen began work, an outside labor lawyer working for the UFW had made a practice of automatically signing consent decrees with the National Labor Relations Board on the Union's behalf, agreeing that the Union would not engage in secondary boycotts (that is, boycotts of stores carrying boycotted grapes).⁴³ Although the NLRA bans secondary boycotts for the unions it covers, the flip side of the exclusion of agricultural work from the NLRA's protections was that farm workers were not bound by the NLRA's rules. In this case, however, there was an argument that the NLRA applied, since nine workers in a commercial peanut shed on one of the ranches were NLRA-covered employees.⁴⁴ One of Cohen's first contributions to the Union was to create a new union called "United Peanut Shelling Workers of America," with the AFL-CIO's support, and move the shed employees into it. Once the UFW no longer represented these NLRA-covered workers, it was once again free to use the secondary boycott.⁴⁵ This insight *16 had eluded more established labor lawyers, and it earned Cohen Chavez's respect, sparking a sense of confidence that grew over the ensuing years. After seeing "The Godfather" in 1973, Union staff jokingly came to refer to Cohen as Chavez's "consigliere."⁴⁶

Chavez worked with Cohen to develop an approach to lawyering that put the achievement of organizing goals above the achievement of legal victories. For example soon after Cohen started work for the UFW a judge took away the Union's right to use bullhorns in an early strike against the Giumarra company. Cohen proudly returned from appellate court with a writ of prohibition blocking the order, but he received a cold response from Chavez, who believed that the best organizing use of the situation would be to use a bullhorn in violation of the judge's order, get thrown in jail, and attract publicity and support for the cause.⁴⁷ Through a series of similar encounters, Cohen and Chavez honed their communication. This process was replicated as Cohen brought new attorneys onto the Union's legal staff, each of whom brought his or her own strengths but who also had to be *17 immersed in the culture of UFW legal and organizing strategy before beginning to work effectively as an integral part of it.⁴⁸

Cohen strategized with Chavez not just about the legal aspects of the Union's work but about its overall direction. He and the attorneys he hired led the fight against restrictive farm labor legislation in several states. They negotiated contracts with growers. But most of all, in the UFW's early years, Cohen and his staff litigated. They went to court to defend the Union, its volunteers,⁴⁹ and its members. They went to court to establish legal protections for farm worker organizing. And they went to court to spread the word about the UFW and to bring public pressure to bear on opponents in various ways.⁵⁰ In each situation, the question was never only "what are our rights here?," but "how can we best turn this legal situation to the Union's organizing advantage?"

1. Defending the Union

Before long, Cohen hired a few young lawyers to work with him.⁵¹ Much of their daily work involved defending the Union and its members. Like all effective organizing efforts, the UFW generated a strong legal backlash. Pickets were stopped with injunctions, protesters were arrested (sometimes unexpectedly, sometimes en masse after the UFW launched

civil disobedience campaigns involving up to thousands of workers at a time), striking workers were evicted from farm labor camps, and the Union *18 was slapped with grower lawsuits intended to slow down its efforts.⁵² It was the legal department's responsibility to mount a defense against these onslaughts.

To facilitate this, during the harvest season staff lawyers lived close to the areas where organizing was most active. In major strikes, a law student was assigned to every picket captain to document how strikers were treated and to negotiate with police.⁵³ Lawyers were on call when organizers needed them to go to the fields because a sheriff had restricted picketing beyond what was delineated in an injunction. A UFW lawyer or paralegal standing by the side of a road bordering the fields, typewriter balanced on the hood of a car, taking affidavits from workers, became a common sight.⁵⁴

Just as lawyers responded to organizers' calls, so organizers turned members out for hearings. Former staff attorney Barbara Rhine recalls,

[W]hen we went to court . . . we would just pack the courtroom. Boy, were things different if . . . every time the judge had to make a ruling, he was facing an absolutely crowded courtroom, with faces wreathed in wrinkles and hard work, and three languages that had to be spoken, seeing the effect of the way the law works on ordinary people. And we could do that. We could get those people out. . . . But it depended not only on a hotshot legal department, which we certainly had, but also on the hundreds of people on the ground every day.⁵⁵ *19 In the process, many UFW lawyers and law students built strong relationships with the organizers in their area. Rhine describes it as "a . . . partnership . . . a wonderful marriage between what was happening on the ground and in the courts."⁵⁶ Organizer Jessica Govea agreed. "[O]ur legal team was . . . just on . . . [T]hey were there, [and] . . . they worked hard. . . . [T]hey had a role."⁵⁷

Among other aspects of the collaboration, attorneys responded to calls from organizers to free workers from jail or INS detention. They sometimes ended up detained themselves. Attorney Sandy Nathan was jailed in 1975 when he demanded access to a group of workers just arrested by the INS from a Salinas ranch where their votes were crucial in winning an upcoming election. The INS refused, and called the police when he persisted.⁵⁸ Two years later, the police arrested Nathan again for insisting on access to twenty-five tomato pickers and a UFW organizer being held in a jail cell. As the door to the cell opened so that an officer could shove him in with the others, the organizer smiled and said to the workers, "See, I told you our lawyer would be here!"⁵⁹ On the police report for Nathan's arrest, under the box marked "Weapon," the officer scrawled a single word: "Mouth."⁶⁰

2. Shaping the Law

As UFW lawyers defended the Union in jail and in court, they also sought to wrest from the Constitution a web of rights--to use bullhorns, to picket, to boycott--that could curtail a judge's leeway to use injunctions to shut down strikes and provide a basic framework for farm worker organizing in the absence of NLRA coverage. The UFW's battle with the injunction echoed that of the labor movement in the days before labor law. In the late nineteenth and early twentieth centuries, judges readily issued *20 injunctions barring or severely limiting strikes and pickets, stymieing union organizing efforts.⁶¹ The passage of the Norris-LaGuardia Act in 1932 had effectively ended this practice under federal law, and the Wagner Act three years later put the final seal on its coffin. But since state law offered ample opportunity to restrict farm labor pickets, and since agricultural workers were exempt from the Wagner Act's protections,

the UFW continued to work under a regime of government-by-injunction.⁶² One scene from a documentary made by the UFW about the strikes in the summer of 1973 graphically illustrates the problem. A young Tom Dalzell, a UFW legal worker (and later staff attorney) stands by the side of a narrow road running between two fields, as strikers swirl around him. He explains what has just happened:

About thirty minutes ago Lieutenant Yoxsimer from the Sheriff's Department came over and asked everyone to move over to this side of the street, saying there would be no problems if we did, and then about ten minutes ago he came back and decided that there was also an injunction on this side of the street, so we have to be 60 feet from that property line and 60 feet from this property line, which puts us somewhere up in the air. For all intents and purposes, we have no right to picket.⁶³

In fighting injunctions, victory in court was often important to Cohen and his staff.⁶⁴ Indeed, UFW litigation resulted in a string of important constitutional decisions in California, which to this day guarantee picketers the right to use bullhorns or other amplification to communicate their message to workers in the fields,⁶⁵ prohibit the issuance of temporary *21 restraining orders against picketers (or whenever First Amendment rights are implicated) unless all parties have received notice of the hearing,⁶⁶ and recognize a First Amendment right for organizers and attorneys to have access to migrant labor camps.⁶⁷ These legal victories--as well as the lower-level daily triumphs that delayed eviction by a few days or permitted a picket to continue over a weekend--were concretely useful to the Union's organizers and won the legal department the deep appreciation of leaders such as Dolores Huerta, Gilbert Padilla, and Chavez himself.

3. Using Legal Strategies Offensively to Build Power

As important as legal victory could be, the Union often had other goals for its lawsuits as well, and it litigated aggressively to achieve them. Cohen refers to much of his work during this period as "legal karate and the law of the jungle," using the law as an offensive weapon to advance the UFW's organizing goals and build power for the Union.⁶⁸ The Union threatened and filed lawsuits designed to put collateral pressure on all fronts of its fight: to gain information about particular growers and the industry through discovery, to convince consumers and stores to respect the boycott, to increase the growers' legal bills and weaken their resolve, and to pressure government officials to change their policies and practices.

The UFW recognized that the discovery phase of a lawsuit (in which parties use written interrogatories and oral depositions to gather information from the other side) could uncover otherwise unavailable data about growers, data that could be very useful in planning boycotts and other organizing strategies. Former CRLA lawyer Gary Bellow described one such deposition that he carried out in an early CRLA lawsuit related to a UFW organizing campaign. When a farm worker appeared at the McFarland CRLA office in 1967, angry that he had been fired from the Bernardi grape ranch for his allegiance to the UFW, Bellow brought suit on his behalf alleging that ranch owners' sweetheart contracts with the Teamsters had deprived a UFW member of his rights. Within the framework of the lawsuit, Bellow used depositions as a research tool for *22 the union's ongoing campaign.

[T]he next thing I did was to take depositions of the Bernardis--"What subsidiaries do you have? What do you own? How much grape do you ship? How many workers do you have that were not members of the union?"--because they were relevant to the law suit. And suddenly the union realized that with a lawyer it could get information that it couldn't get any other way.⁶⁹

The UFW continued to use depositions this way over time. Growers would sue the Union for damages from the boycott, claiming that it had damaged their market. In response, during discovery the UFW would ask relevant questions about the grower's client base and its geographic reach. As Cohen describes it, the Union won either way: either the grower dropped the suit to avoid giving up this valuable data, or it answered, handing the boycott much-needed information.⁷⁰

During some court battles, the UFW sought to influence both public opinion and the legal outcome by using the courthouse as a stage on which to publicize the farm workers' plight. At several critical moments, for example, the union mobilized members to conduct vigils, sing and pray in courthouse corridors as the judge decided a case involving the UFW. As Cohen recalls, in one case in 1968 where Chavez, then on the thirteenth day of a fast, was cited for contempt of a growers' injunction, UFW members came to court by the hundreds.

[W]orkers all around the building, workers lining every wall of the courthouse. . . . [T]he workers were singing softly, and they were praying. . . . We hadn't been having too much luck in that courthouse before, because it's really the growers' courthouse. But I think everybody that morning knew it was our courthouse.⁷¹ The grower's lawyer asked the judge to remove the farm workers from the courthouse, but the judge refused, saying "If I kick these workers out of this courthouse, that will be just another example of goddamn gringo justice. I can't do it."⁷² As Cohen reflects, "Things started to shift there. That had nothing to do with legal argument. That had to do with just raw organizing power."⁷³ Another approach was to bring farm workers in to *23 tell their stories in court, or to use affidavits to bring farm workers' experiences in the fields and on the picket line into the courtroom.⁷⁴ Unlike many of the big political trials of the 1960s and 1970s, the UFW was not trying to disrupt the actual court proceedings or to reveal the legal system as a fraud.⁷⁵ The idea was to change the immediate cultural, political, and moral environment in which legal decisions were made. The press played an important role in this strategy, disseminating the Union's message widely and intensifying the pressure on its opponents.

The Union's focus on a broad range of outcomes from its legal work grew from its doubt that justice for farm workers could be obtained directly from a state court system that historically had favored growers (the result both of law that worked to the growers' advantage and of judges who were inclined to see matters from the growers' perspective). Cohen remarks, "I don't think given the courts I was operating in I had a lot of faith that we could win lawsuits."⁷⁶ In addition, court results came years after they were *24 needed to resolve the issues that arose in organizing. For example, when the UFW was organizing in Texas and the Texas Rangers were beating up farm workers who supported the union, a Houston lawyer, Chris Dixie, filed a case to enjoin the practice. Cohen recalls,

I used to call Chris Dixie about this case. [He would say,] "These things take tahm, Jerry." I mean, the strike is long over, and they're still pushing on whether the Rangers should have been enjoined. And the Supreme Court says, by God, five years later, "they should have been." Now there's timely relief for you.⁷⁷

UFW lawsuits often had multiple targets. For example, cases against growers relating to sanitary and health conditions in the field were also intended to pressure regulators to enforce laws on the books, and to convince consumers that it was in their own best interest not to buy grapes. One such suit related to toilets in the fields. Faced with workers' reports

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that they were relieving themselves in the fields because growers did not provide facilities for them, the legal team built a case with three organizing angles. First, of course, the suit pressured the state to enforce laws requiring field toilets, getting the workers what they needed. Second, with the suit as proof, "boycotters could say, 'Hey, do you really want to eat those grapes? Do you know where those people have to go to the bathroom?'"⁷⁸ Third, the combination pushed growers a step closer to seeing a settlement with the UFW on the union issue as a favorable alternative to such pervasive pressure if they resisted.

Similarly, but at much greater length and with tremendous effectiveness, the Union sued the government around issues relating to the use of deadly pesticides in the cultivation of grapes. To understand the role that these lawsuits played requires a brief detour into laws regarding boycotts. Unfettered by the NLRA's ban on secondary activity, the Union was free to call for boycotts of stores that sold non-union produce and products. To clarify, a primary boycott is when the union asks consumers *25 not to buy a particular product grown or manufactured by an employer with which the union has a dispute. A secondary boycott broadens the focus beyond the immediate employer; for example, when the union asks consumers to avoid an entire store because it sells the boycotted product. For the UFW, secondary boycotts were a much more powerful weapon. Consider the task faced by a consumer seeking to support a primary boycott of grapes. Grapes are sold loose, with no markings. To determine whether a particular bunch of grapes for sale at a grocer store was from a union grower, she would need to find a store employee who was willing to scrounge around the storeroom looking for the original crate in which the grapes had arrived, and examine it for the UFW's black eagle stamp. But if the UFW could call secondary boycotts against grocery stores that sold non-union grapes, the consumer's task was made vastly easier: avoid the bad stores and buy at the good. This strategy had the further advantage of magnifying the economic pressure on non-union growers because each supermarket or chain of markets that came to insist on union grapes to avoid the boycott represented the loss of many thousands of dollars in sales, as opposed to the negligible impact from the withdrawal of each individual consumer.

In the context of the grape boycott, highly publicized cases where union members were deprived of basic rights became as important for their effect on the sympathies of potential boycotters as for the outcome of the cases themselves.⁷⁹ One morning, union legal worker--and later lead organizer--Jessica Govea brought in several women who were covered in rashes, nauseated and sweating, talking about a white powder on the vines in which they worked. Cohen was distracted by other crises, but faced with Govea's gentle persistence, he eventually approached the office of the local Agricultural Commissioner to request information about the chemicals sprayed in the fields on their ranch. The spraying company immediately got an injunction forbidding the agency from releasing the information to Cohen. The injunction was upheld in court.⁸⁰ Technically, this was a defeat for the UFW. But as Cohen says, "people know what is going on if they won't show you the records."⁸¹ Cohen brought the problem to the attention of the Subcommittee on Migratory Labor of the United States Senate Committee on Labor and Public Welfare, chaired by Senator Walter Mondale. The controversy heightened when boycott organizers tested grapes for sale at a Washington, D.C., Safeway and discovered that the levels of pesticide on them were dangerously high.⁸² Pesticide-related *26 cases became a major focus of the legal department's work. As with the toilet litigation, they subjected growers to a triple-whammy: the cost of defending the suit, the price of responding to heightened scrutiny from state regulators, and an economic squeeze from disgusted consumers. The combination pushed growers a step closer to seeing a settlement with the UFW on the union issue as a favorable alternative to continued resistance.

As the pesticide claims proceeded, the Union kept up a steady barrage of other types of lawsuits against growers (for example, back wage claims, tort suits for on-the-job injuries, and cases under California's limited Labor Code),⁸³ the government (for example, § 1983 actions against government officials for civil rights violations),⁸⁴ and others.⁸⁵ Meanwhile, although growers and their political allies were the UFW's chief opponents, they were not its only ones.

At times, the UFW's most insidious adversary was another union, the International Brotherhood of Teamsters. The Teamsters saw the UFW's success in organizing farm workers as an opportunity to ally with growers, inviting them to sign so-called "sweetheart" contracts that benefited both the Teamsters and the growers while denying workers many of the benefits and protections of UFW representation.⁸⁶ Teamster contracts were written without worker knowledge or input, and had few mechanisms for worker participation, no protection from pesticides, and inadequate grievance procedures.⁸⁷ Workers who refused to agree to *27 Teamster representation were immediately fired. This arrangement worked to the great advantage of both the employers, who understood that the Teamsters would not be "stirring up" their workforce as the UFW would, and the Teamsters, who took in hundreds of thousands of dollars in dues in exchange for minimal work. When the UFW fought back through strikes and pickets demanding free elections, Teamsters turned out by the busload to hurl racial epithets, throw bottles and stones, and beat farm workers and their supporters.⁸⁸

Lawsuits played an important role--and, in the end, became the determinative factor--in the UFW's strategy to get the Teamsters Union out of the fields. While researching antitrust case law in 1970 as a part of his defense of a suit filed against the Union by Fresno grape growers (their claim was that the Union's grape boycott was a "conspiracy in restraint of trade," a classic violation of the Antitrust Act), UFW attorney Bill Carder began to wonder whether there might be an argument that the Teamsters' and growers' efforts to undercut the UFW's representation by signing sham contracts could be cast as a conspiracy to depress wages and benefits, also an antitrust violation.⁸⁹ The case that Carder developed out of this idea (and its companion § 1983 civil rights action) survived a 1973 motion to dis-miss, entered a massive discovery phase, and eventually settled in 1977 with the Teamsters Union signing a pact in which it agreed to withdraw from farm worker organizing.⁹⁰

Unlike the defensive cases or the constitutional protections that Cohen sought, the point of these particular suits against growers, the government, and the Teamsters was not to win the legal claim through the courts. Here, the Union had as least as much interest in the opportunities the litigation offered along the way as in its legal outcome. Reflecting on the pesticide issue, Cohen notes,

The beauty of working with a movement is that whether you win or lose is sometimes entirely irrelevant, because there's not a *28 defeat you can't turn into some kind of victory. If we had won on that original pesticide thing and gotten the records then we would have had them. But, even if we lose . . . [w]e . . . get to present our case . . . and you begin to talk about pesticides and you begin to drive an issue home So it doesn't matter if they say we can't see the records because then we go to the public and say that they won't show us the records.⁹¹

Such lawsuits were most important as a way to get data, to "illustrate issues" to the public and to increase pressure on merchants to the point where they would assist the boycott, to push the Teamsters to end interference with UFW contracts, and to move ranch owners to agree to unionization. Once the Union had achieved its goal, these claims were often traded or dropped.⁹²

B. The ALRA

In December of 1972, as the UFW's grape contracts approached their expiration date, Teamsters president Frank Fitzsimmons appeared at a function for the Farm Bureau Federation (a growers' organization) and *29 exhorted growers to form an alliance with the Teamsters.⁹³ They listened well. When the UFW contracts expired in 1973, 90%

of the grape growers signed agreements with the Teamsters.⁹⁴ There were no elections; workers were not consulted in the process. The UFW was left reeling, with no more than 6,500 workers remaining under its representation.⁹⁵ It was a dark and bitter time for the Union.

Fast running out of money and desperate to rebuild, the UFW debated whether to seek the passage of a state law that would prevent such raids and create explicit rules for the organization of agricultural workers.⁹⁶ The UFW's staff and volunteers had wavered over the years about whether the Union stood to lose or win in seeking to create a law that would govern its conduct.⁹⁷ On a practical level, the likelihood of wresting a good law from the California legislature seemed dim for many years. More fundamentally, Chavez and others had observed how legislation had seemed to take the wind out of the sails of the civil rights movement in the South.⁹⁸ Certainly wholesale adoption of the NLRA seemed like the wrong solution, given the increasingly evident way that law and the NLRB was coming to shackle the labor unions that it governed.⁹⁹ Some leaders further argued that the UFW's freedom from labor legislation was a key to its success, allowing it to operate as a social movement with a wide range of tactics, free of the bureaucracy of the union establishment.¹⁰⁰ But the AFL-CIO *30 was offering a strike fund of \$1.6 million to the Union on the condition that it make serious efforts to win an agricultural labor relations law.¹⁰¹ And in 1974, victory in such an effort began to seem conceivable when Jerry Brown replaced Ronald Reagan as governor of California. The Union decided that its best hope for rebirth was to create an administrative framework that would guarantee the UFW access to farm workers in the fields, bar sweetheart deals between Teamsters and growers, and set legal rules for elections and bargaining that would allow the UFW to recover the contracts it had lost.¹⁰²

Cohen worked with the Union's organizers and lawyers to develop a set of proposals that reflected what they had learned during the UFW's last hard-fought decade about the sort of protections that would facilitate farm labor organizing. Cohen brought these ideas to Chavez, who later recalled that

Jerry Cohen made a list of all the issues as he saw them. Then he met with the board and with me for many sessions. We went over all the issues. I also met with the field office staffs, the people who had been involved with the strikes, the workers, and we just touched every single base we could. There was tremendous input. So Jerry finally drew up an ideal bill.¹⁰³ One approach might have been to scale down what the Union wanted so it more closely resembled the realm of the possible. Although the Union had sought a minimalist bill the year before, in 1975 Chavez and Cohen did not *31 take that route. Looking at all of the ideas on the table, they decided, "We'll just load up--we'll ask for everything. We'll ask for the whole damn thing."¹⁰⁴ It was not clear how far their political power could take them, but they were unwilling to compromise in advance of discovering the answer.

The initial bill that Jerry Brown introduced, drafted by his Secretary of Agriculture Rose Bird (later Chief Justice of the California Supreme Court), was far from the Union's wish list, indeed so far that the UFW responded with protests around the state. Months of back and forth ensued, as Cohen negotiated with Brown, Bird, and various attorneys. Eventually, Cohen succeeded in convincing Brown to change his bill to reflect most of the UFW's provisions, and the Union gave the measure its full support.

The UFW's cause was aided by some measure of ambivalence about the bill among the Union's usual opponents, the Teamsters and the growers. The Teamsters feared that the bill's prohibition on employer-supported unions could be used

to invalidate its sweetheart contracts with growers who far preferred its lesser demands to those of the UFW. On the other hand, the Teamsters realized that an agricultural labor relations law could also work in its favor. In particular, formal elections could legitimate Teamster contracts in the vegetable fields that had been the subject of fierce and continuous battles with the UFW.¹⁰⁵

For the growers' part, most put their considerable clout to work to defeat the UFW-supported bill. But some of them, too, had reasons to support it. Growers had already been limited by California courts in the degree to which they could retaliate against union supporters, so they had less to lose than one might think. They wanted an end to the UFW's outlaw tactics and they hoped that a law would prohibit the secondary boycotts that had worked so effectively for the Union.¹⁰⁶ In addition, there were important ranches where consumer boycotts, rather than direct worker support for the UFW, were driving the growers' engagement with the Union. If the law passed, unionization would be decided by a worker vote, and the vote on those ranches would likely not be in the UFW's favor. As Cohen himself told Brown during their negotiations, Gallo (owned by one of Brown's college roommates) was such a ranch.¹⁰⁷ Indeed, the Gallo company became one of the bill's strongest supporters among the growers, joined by others who thought that an election system was their best bet for *32 avoiding the constant pressure to recognize the UFW under which they had lived for the previous decade.¹⁰⁸

Farm labor legislation had some other unlikely backers. Supermarket owners, who were tired of the UFW's business-disrupting protests, sought a bill that would ban secondary boycotts and bring customers back to their doors.¹⁰⁹ Some county administrators and sheriffs endorsed the bill, hoping it would free them of the burden of caring for thousands of UFW protesters in their jails as they had the previous summer.¹¹⁰ The backing of this range of usually conservative forces eventually would make it easier for legislators who might otherwise have opposed the bill to vote in favor of it.

There were five other proposals for governing agricultural labor relations in the California legislature in 1975.¹¹¹ To avoid a showdown in the Assembly Labor Relations Committee, Brown made the compromises necessary to win endorsements from enough key players (including grower representatives and conservative legislators) that his version was the one guaranteed to emerge onto the floor.¹¹² Busloads of UFW members and volunteers lobbied in Sacramento. Meanwhile, Cohen worked behind the scenes, negotiating with Brown and Bird to make the final legislation as favorable to the farm workers as possible. Once the bill reached the floor, rural legislators proposed last minute amendments--for example, a ban on strikes during harvest-time--that would have seriously harmed the UFW's cause. The bill amendments were defeated.¹¹³ In a special legislative session called by Brown at Chavez's urging, the bill passed the Senate thirty-one to seven and, three weeks later, the Assembly by a vote of sixty-four to ten.¹¹⁴

The ALRA as passed offered the UFW a powerful new framework for organizing. It did not include all of the UFW's proposals. The law *33 allowed the Teamsters to hold onto its contracts until elections were held, and it banned picketing to enforce a secondary boycott by a union that had not yet been elected to represent the workers in question.¹¹⁵ Nonetheless, the UFW's political clout and Cohen's negotiating acumen were clearly reflected in the bill signed by Brown. Brown would later claim it as "[t]he greatest accomplishment of my administration."¹¹⁶

The law began with an unabashed endorsement of the right of farm workers to organize, with a preamble that explicitly stated the Act's goal as "guaranteeing justice for all agricultural workers."¹¹⁷ The law itself contained provisions that conventional unions could only dream of. It guaranteed farm worker unions a seven-day turnaround for secret ballot elections (compared to the thirty to forty-five days that are standard in the NLRA context), an essential time frame for

such a highly mobile work- *34 force and one that severely limited a grower's ability to run an extended anti-union campaign; where a strike was in progress the turnaround was only forty-eight hours.¹¹⁸ It created more liberal rules for when strikers could vote in elections¹¹⁹ and gave workers much stronger remedies for employer violations than the NLRA, including, the "make-whole" remedy, through which a grower who had failed to bargain with the union in good faith could be required to pay workers the difference between their current wage and what the contract rate presumably would have been after good faith bargaining. This remedy has no corollary in the NLRA. It also established a right to "industrial" bargaining units that grouped workers doing different jobs on the same ranch together for organizing purposes, a configuration that the UFW had favored.¹²⁰

On top of these legislative provisions, the UFW was able to make the law more advantageous by using its political clout to guide the choice of members for the first Agricultural Labor Relations Board (ALRB), resulting in a pro-UFW super-majority of four to one. As it drafted regulations for the ALRA's implementation, that board made key additions to the law, including giving the Union the right to a list of the names and addresses of the workers at each ranch they were organizing (referred to as "Excelsior lists," after the NLRB case that gave rise to the right under the NLRA), putting symbols on the ballots so that farm workers who could not read and write would be able to put their mark next to the UFW's easily- *35 recognizable black eagle, and creating access rules that guaranteed at least two organizers the right to speak freely with workers in the fields at defined times during the work day. The UFW had wanted these provisions from the beginning but felt it would be unable to get the law passed with them included. When the ink dried on the final rules, California could boast only the second pro-organizing farm labor law in the country (the first being the Hawaii Employment Relations Act,¹²¹ passed in 1945 before Hawaii was part of the United States), one that set a gold standard for any other states that cared to follow.¹²²

C. Legal Work in the Wake of the ALRA

For all of its beauty on paper, the UFW recognized that the ALRA would mean nothing unless the Union could generate enough pressure to make it a real tool for farm workers. The UFW had a bare three months between when the law passed and when it went into effect to completely revamp its organizing effort. Meeting the challenge required intensive teamwork between the UFW's legal and organizing departments, the sort of tight coordination that was only possible because of the years of collaboration that preceded it.

In the legal department, a group of lawyers who had prided themselves on their expertise in civil rights law and the battle against injunctions but had little or no experience representing conventional unions suddenly found nothing but a few pages on the calendar between themselves and full-fledged labor law practice. Cohen split the legal department in two, one half to manage ongoing litigation, the other--under the direction of Sandy Nathan--to work on ALRA matters. The department quickly rose to its peak of seventeen lawyers, forty-four paralegals, and a large number of volunteer attorneys playing supporting roles. Nathan set law students to work creating a hornbook on NLRB *36 practice, which the lawyers studied avidly.

In the Union as a whole, organizers were being called back to California from the boycott and deployed in the fields to prepare workers for elections and tell them about their new-found rights. Lawyers, organizers and paralegals strategized on how to approach organizing under this new system. One of the UFW's most important goals for the summer of 1975 was to communicate to farm workers that the ALRA's protections truly shifted the age-old power relationships on the ranch. The Union had "to make the law real in people's experience as something that stood between them and the grower."¹²³ Later, once the ALRB opened, the Union would seek to "maneuver the board into demonstrating its power in relation to the growers."¹²⁴ But in the interim, the onus was on UFW organizers and lawyers, who fanned out

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across the state to talk with workers about their new rights under the law. As they went into the fields, they discovered that the growers were flouting the ALRA's rules about organizers' rights to enter the fields to talk with workers, and the Teamsters were resisting being confined by any legal restrictions at all. The jungle would not so easily be tamed by the proclamation of a law to govern it.

To turn a paper law into a real one, the UFW had to work with the new agency created by the ALRA. The ALRB opened its doors on September 2, 1975. On the surface, it looked to be an ideal partner for the UFW. After all, four of five initial board appointments had reason to favor farm worker interests over growers (indeed, one was former lead UFW staffer LeRoy Chatfield, at the UFW's explicit request), and Brown's pro-UFW views were well known to the general counsel he appointed, Walter Kintz.¹²⁵

Matters on the ground, however, proved considerably less simple. Few ALRB staff spoke Spanish, and according to observers at the time--including a fellow board attorney--many treated farm workers with suspicion or outright distaste.¹²⁶ The new agency was at once utterly disorganized and instantly bureaucratic. As former board attorney Ellen *37 Greenstone recalls, "the first thing they taught us at orientation was how to fill out an expense report."¹²⁷ Many of the ALRB staff (including Kintz) were brought in from the NLRB, and were steeped in its rules and accustomed to its glacial pace, which was ill-suited to a new law requiring that elections be held days-- not months--after workers filed a petition. More than a hundred UFW members were waiting the morning that the board opened to file election petitions from twenty-one different ranches, having spent the previous night in a vigil outside the ALRB office in Salinas.¹²⁸ Many others followed on their heels. The board threatened that processing scores of elections would take months and it sat on hundreds of unfair labor practice petitions the UFW subsequently filed to protest workers fired for their union support.

Meanwhile, growers continued to resist the law with impunity. Three weeks after the ALRB opened for business, Sandy Nathan, the UFW's lead attorney for ALRA matters, commented: "The growers are really lawless at this point. To them it's perfectly permissible to disregard the law and to do everything they can to subvert it. And the board is not recognizing that. . . . They're just looking at it that everybody is a good faith participant." Responding to growers' demands, board staff regularly excluded workers from pre-election conferences; when the board finally responded to UFW pressure to include them, it did so without translation (or with an offer to translate only the "important stuff," leading Sandy Nathan to suggest that they conduct the conference in Spanish and "translate the important stuff into English for the employer").¹²⁹ The board regularly acceded to grower requests that elections be held on grower property and accommodated growers' unsubstantiated claims that the workforce was not yet at peak. Most aggravating, Kintz proved indifferent to the UFW's complaints and its sense of urgency.¹³⁰

The UFW had spent the summer promising workers that the new law would protect them, and with every firing that went unaddressed, every election petition that languished in the ALRB's hands, every organizer denied access, that promise receded.¹³¹ The stakes were high, and the *38 Union responded in its customary style. As Nathan recalls, "We would raise hell Everything was a fight! Everything!"¹³² As before, lawyers and organizers worked closely together. As former lead organizer Ganz recalls, "[S]ometimes it would be a sit in, and sometimes it would be a motion";¹³³ either way, the Union sought to influence the development of board policy and practice. "Every step of every election procedure was contested, fought over--the order in which the regional offices accepted petitions, the scheduling of elections, election rules, worker education, pre-election conference proceedings, unfair labor practice processing, and throwing elections out. The whole process was political and subject to pressure."¹³⁴ The Union carried out sit-ins at ALRB regional offices and in Governor Brown's office, brought workers to protest at pre-election conferences from which the board

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had excluded them, and called the ALRB incessantly to prod it to prioritize the cases where speed was of the essence and to deal with the rest expeditiously. Cohen called for Kintz's resignation at the first ALRB election hearing, and the UFW ratcheted up the pressure when he refused to step down.¹³⁵

By November 1975, Brown, at first a bystander to the chaos, responded to the Union's demands by creating a task force of experienced outside attorneys to train board staff and prosecute growers themselves. The ALRB began working more effectively to enforce the new law.¹³⁶ After the task force was created, the UFW was often successful in drafting ALRB officials on the ground to illustrate the new landscape of power under the ALRA. As Ganz recalls, "the law said that board agents were supposed to advise workers of their rights, and so forth. Well, we insisted that the board agents go out to the ranch, get rid of the foremen and supervisors, have a meeting with the workers, and explain what their rights *39 were." Each time ALRB agents ordered a foreman to leave a meeting or arrived to tell workers about their rights was a small victory on the road to UFW representation.¹³⁷ Elections soared, the board moved quickly on the representation petitions that workers filed, and victories began to pile up. By the UFW's contemporaneous tally, a staggering 45,915 farm workers voted in 382 elections during the first five months after the ALRA's passage: an average of seventy-six elections per month.¹³⁸

These early, exhausting, euphoric months ground to an unexpected halt when the ALRB closed its doors on February 6, 1976. Confronted with a tidal wave of elections, it had run through its annual budget in less than half a year. For the next eight months the ALRB remained closed, as growers (stunned by the over 90% level of union victory in the early elections) and Teamsters (who lost more often to the UFW than they had anticipated) pressured legislators to pass amendments to the legislation before it granted the agency further funding. Lawmakers refused to amend the ALRA, but nor could they muster the two-thirds majority required to pass an emergency appropriation. In the meantime, several pro-UFW members of the ALRB resigned.¹³⁹ During this time, the UFW mounted a large-scale effort to win Proposition 14, which would have guaranteed the ALRB permanent funding and required voters statewide to ratify any proposed changes to the ALRA, thus securing the board a future independent of the state budget process. The UFW spent more than a million dollars on the initiative, but growers poured \$2 million into a campaign to defeat it, and it lost in the fall of 1976 by a considerable margin.¹⁴⁰ In the process, however, the UFW succeeded in pressuring legislators to authorize the budget that the ALRA needed to resume functioning.¹⁴¹

When the ALRB reopened on December 1, 1976, the volume of elections had fallen considerably, although it was still impressive. Over 150 elections took place in each of the following two years, with over 9,000 farm workers voting per year. The UFW won 55% of those *40 elections; the Teamsters won 32%.¹⁴² By January 1978, the UFW had brought 25,000 new workers under contract through ALRA procedures and represented two or three times that number on ranches where growers were resisting negotiating contracts.¹⁴³ The benefits for farm workers were immediate: wages rose by 30% to 50%, and many received health and pension benefits for the first time in their lives.¹⁴⁴ At its height two years later, the UFW had over 50,000 members under contract and as many as 50,000 more "affiliated" farm workers.¹⁴⁵ The Union's reputation stretched across the country and indeed the globe.

D. The Unraveling

The ALRA offered the UFW a remarkable opportunity, and the UFW seized it and held on. And yet within a decade of the ALRA's passage, the UFW was all but dormant, as was the ALRB.¹⁴⁶ Many factors contributed to this decline. On all fronts during the 1980s, organizing became more difficult. An influx of undocumented workers increased competition

and made raising wages harder.¹⁴⁷ Meanwhile, growers fought back against the advantages the ALRA gave farm workers. They used ALRB appeals to delay decisions on elections, and built support in Sacramento for their efforts to re-shape the political landscape that had brought the ALRA into being.¹⁴⁸ But the UFW had faced political opposition, intense labor competition, and grower resistance before, and triumphed. Internal changes in the UFW seem to have played the critical role in its inability to *41 respond effectively to this round of challenges.¹⁴⁹

Beginning in the mid-1970s, Chavez--who was always known for the close eye he kept on even the smallest administrative details of the management of the UFW--began to show signs of intensifying concern that his control over the Union was threatened. Others have explored this turbulent period in the UFW's history in greater depth.¹⁵⁰ For the purposes of this Article, a few factors seem particularly relevant. In 1977, the Teamsters withdrew from farm worker organizing as part of the settlement of the long-running anti-trust lawsuit brought by the UFW. The Teamsters' presence had been a thorn in the Union's side but also a goad to continual organizing.¹⁵¹ With the threat of competition in the fields gone, Chavez turned inward. He required union staff to participate in a psychological game run by the cult-like group Synanon to hash out internal problems, led the union into a retreat from the critical work of field organizing, and funneled increasing amounts of the UFW's money from the fields into direct mail and politics.

Among other concerns, Chavez focused on what he feared were two independent power bases developing within the union: the legal department (located in Salinas rather than at union headquarters in La Paz), which had become increasingly central to the UFW's organizing strategy after the passage of the ALRA; and Salinas-based vegetable workers organized through ALRA procedures by Ganz and Govea among others. Those workers' independence and strength rendered them more confident of their ability to strike for better pay and conditions and therefore less reliant on the social movement strategies that Chavez had to offer than the Union's traditional mainstay, grape workers, who needed considerable outside support (as with the boycott) to prevail against growers.¹⁵² The thousands of new workers brought under UFW contracts through ALRA procedures heightened Chavez's concerns as well. Managing the large number of workers organized under the new law and administering the contracts the Union had negotiated required more sophisticated administrative systems than the UFW had. But to move in that direction, with an increased focus on contract administration and institutionalization, would have meant *42 acknowledging a shift in the UFW's identity from a social movement to a union, something that Chavez in particular was loath to do.¹⁵³

Matters came to a head when Cohen, Ganz and Govea supported a call by organizers and paralegals that they be paid a regular salary, a move away from the "volunteer stipend" system that applied to most field and service staff and toward a more institutionalized system. The lawyers also asked for an increase in their base monthly salary from \$600 to \$1000. Disagreeing on both fronts, Chavez insisted that the UFW needed to go in the opposite direction, returning to its all-volunteer movement roots. He focused on the lawyers' request. In mid-1978, he proposed to the Executive Board that it begin this process by de-funding the UFW's lawyers and requiring that they participate in the volunteer system like most other staff.¹⁵⁴ The board split along generational lines, with younger members opposed to Chavez's proposal (such as Ganz, Govea, and Eliseo Medina) losing to a slim majority of older UFW leaders. Stripped of their income, most of the lawyers left in 1978 and 1979.¹⁵⁵ During the same *43 period, Chavez put down attempts by workers to run their own candidates for the Union's executive board, and he froze out or fired almost all of his most experienced staff, including Ganz, Govea, Medina, and many other key organizers. Cohen stayed in a limited capacity until late 1980, when he too departed. The impact of these changes on the UFW's organizing capacity was immediate. Before any of the transformation of immigration patterns or the political landscape that would mark the 1980s, the ALRB witnessed a steep drop in elections and union election victories starting in fiscal year 1978-1979.¹⁵⁶

Chavez ultimately succeeded in retaining control of the UFW, but at a price. Over the course of the following decade, the Union organized few new workers, and many of its contracts expired unattended. With the 1982 election of Republican Governor George Deukmejian, growers succeeded in changing the state-wide political landscape.¹⁵⁷ Deukmejian appointed David Stirling, a former Republican assemblyman, as General Counsel of the NLRB. Stirling proved so hostile to union interests that he was labeled “the farmer's friend.”¹⁵⁸ The UFW was so angered by the change in the *44 ALRB's focus and strategy that in 1986--the year that Deukmejian appointees came to control a majority of seats on the ALRB--it put its political weight behind an unsuccessful effort to de-fund the agency it had worked so hard to bring into being a mere decade before.¹⁵⁹ At the time of Chavez's death in 1993, the Union had between 5,000 and 10,000 members.¹⁶⁰ In the mid-1990s and early 2000s, the UFW began to regain some vigor under the leadership of Arturo Rodriguez, Chavez's son-in-law. The Union received renewed attention and support from the AFL-CIO for its campaign to organize strawberry workers after John Sweeney's election in 1995, although that effort did not prove successful on a large scale.¹⁶¹ Despite some noteworthy legislative victories, the venerable and embattled UFW has not yet managed to regain the public prominence or the level of worker representation it enjoyed in its heyday.¹⁶²

III. Analysis of a Collaboration

What made the UFW legal strategy so successful? And what insights does the broad sweep of the UFW's experience both outside a formal governing law and within one suggest about what lawyers can offer unions and about the opportunities and obstacles law creates for a labor movement?

As the UFW's story so amply illustrates, good lawyers for labor (or for any movement) have one consistent touchstone: the question “what can legal strategies do to help the union win organizing victories” ? Although the question is a constant, the answer varies tremendously with context. A labor movement has very different opportunities to use the law to advance its goals depending on the legal, political, economic and social environment in which it operates. Important factors include the laws that explicitly or potentially govern its conduct or its opponents', the courts through which its claims are channeled and the judges before whom they are heard, and the receptivity of politicians and government officials at a range of levels to its cause, among others. At the same time, labor's capacity to take advantage of opportunities to use law to build union power depends on the *45 presence of a particular type of lawyer (and a particular type of union leader) and can be dramatically enhanced by a way of structuring the relationship between law and organizing that puts the power-building question, rather than the more common question of “how can we as lawyers win a legal victory,” at center stage.

A. Legal Strategies in the Jungle

A key contextual change over time in the UFW's story is of course first the lack, and then the emergence, of a governing law. It is important to begin this analysis, however, by challenging the concept of the “law of the jungle,” a phrase used frequently by Cohen in discussing the pre-ALRA period and later by AFL-CIO leaders looking back longingly to the time before they became ensnared in the NLRA. “Law of the jungle” implies that at the time in question there is no law at all, that disputes are settled by the brute strength of the powerful and the wiliness of those who might at first glance seem weak. Government, legal rules, and courts all are absent in such an account.

Despite this description, before the UFW was governed by the ALRA it operated in a world where law was very much present, either as a weapon deployed against the Union or as a resource that it came to recognize and of which it took advantage. The state was already an active participant in the struggle between growers and farm workers, and long had

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been. Employers demanded that the courts issue injunctions against picketers, restrict organizers' access to the fields, and evict striking farm workers from labor camps, all for violations of criminal and property law. They called on the police to enforce those orders. Both were consistently responsive. Growers used immigration policy as a tool of labor market control, obtaining extra workers through the bracero program as long as it lasted and through various other temporary immigration programs after that, and hiring undocumented immigrants as strikebreakers with full confidence that the state would not enforce the law against their presence.

For its part, in the period before the ALRA, the UFW drew on a variety of laws--and on its own capacity to pressure those who made and enforced the law-- to build the Union's power. During that time, the UFW won the right to represent workers by generating so much pressure that a grower would agree to a union contract in order to be able to once again harvest and sell its product without interference. The most useful legal work was that which made the greatest contribution to the effort to persuade the grower to give in. Constitutional law, and the very influential example of the then ongoing civil rights movement in using constitutional law to facilitate protest and generate public support, proved critical to the UFW's ability to sustain its strikes, pickets, and marches. It used tort law, *46 wage and hour law, and the minimalist California Labor Code to pepper growers with lawsuits designed both to gain redress for workers and to pressure employers to agree to union representation. It was increasingly creative in its search for new legal theories (grounded in civil rights law, antitrust, and other claims) that could stymie the grower-Teamster collaboration. In ways that were controversial even at the time (and seem more so in retrospect), it demanded that the INS enforce immigration law by hauling undocumented workers out of the fields, calling in reports on workers in particular ranches, publishing a long report on "Illegal Alien Farm Labor Activity in California and Arizona" with detailed affidavits and ranch-by-ranch statistics documenting the INS's failure to act in the face of known undocumented workers in the fields,¹⁶³ and eventually going so far as to set up its own patrol (the "wet line") in Arizona when it felt that the government was doing an inadequate job of policing the border.¹⁶⁴

The so-called "law of the jungle" phase, then, was for the UFW not so much about operation in an ungoverned state of nature as it was about maneuvering to achieve the Union's goals through creative use of a wide range of laws, legal fora, and potential state interventions. This sometimes happened directly (as when the constitutional claims were successful in permitting picketing), but more often indirectly, as when depositions gave the union access to information it needed about pickets, or when a legal defeat such as a judge's refusal to mandate release of information about pesticides became a platform for the union to "raise an issue" and tell its story to the public, or when the sheer weight of the antitrust litigation led to the Teamsters' agreeing to a pact in exchange for its dismissal.

B. The Structure of the Relationship

The UFW's success in integrating law and organizing was not merely the result of creative legal tactics. The internal relationship between the Union's organizing staff and its legal department was very important in facilitating the collaboration, which avoided many of the pitfalls that have plagued similar efforts.

Although it might intuitively seem that the relationship between legal and organizing strategies in an effort to achieve social change should be an easy one--after all, both are important tools in the struggle--it rarely is. Many a would-be collaboration has foundered on the rocks of tension *47 between lawyers and organizers about goals, methods, and leadership, among other issues. A substantial literature lays out the perils. Concern about lawyer domination is a recurring theme. Scholars and activists alike offer a panoply of examples where a lawyer's well-intentioned intervention in an ongoing organizing battle had the effect of de-mobilizing participants, turning the attorney into the "expert" and focusing the group's energy on a court case and its outcome rather than on the need to build power through collective action.¹⁶⁵

Much of the concern about lawyer domination among scholars and activists arises in settings where the organizing effort is relatively young or weak. In such a situation, there is a heightened danger that a lawyer will be seen as the leader and that legal strategies will overtake collective ones.¹⁶⁶ In this regard, it is important that Cohen came to the UFW five years into its history, after it had already become a broad movement with a clearly defined organizing strategy, a highly visible charismatic leader, and several victories under its belt. In the case of the UFW, the Union's strength and clarity about its goals at the time it first brought Cohen on staff--and Chavez's skill at communicating those goals and in teaching Cohen to be the sort of lawyer who could advance them--proved to be critical elements of the successful collaboration. Cohen was also not on the Union's Executive Committee, he did not and could not organize groups of workers, and he did not seek to limit the Union's tactics or control its approach. Chavez respected Cohen greatly, but there was no question that Chavez was in control of the Union.

Another key element of the UFW's success in merging law and organizing strategies was that legal representation was coordinated and in large measure provided in-house. The UFW had experimented with outside lawyers initially and found them wanting. Likewise, its experience *48 with a staff lawyer whose role was largely to service members had been a frustrating one. Once Cohen joined the Union and began to build a legal department, the UFW's effort to deploy legal strategies to enhance the UFW's organizing power took off. No longer were the UFW's lawyers hemmed in by ideas about labor law steeped in the NLRA and its limitations, by government funding restrictions and by the need to represent individual farm workers to get around those restrictions, by the mission of an advocacy group, or by the limitations on time and resources imposed by pro bono attorney's obligations at an outside firm. They could experiment with the broad range of answers to the department's central charge, to put their legal skills to work "to figure out ways of generating the kind of power that's needed."¹⁶⁷

Present as they were every day in the Union's small field offices, in the fields and in local courtrooms, these lawyers became repeat players, at once experienced with the local legal context and imbued with the feel and goals of the UFW's everyday work. All of these factors made them more likely to understand what the Union was seeking to achieve and to perceive where emerging opportunities might lie to use legal strategies to realize those aims. Equally important, having an in-house legal department gave the UFW the ability to deploy lawyers very cheaply by contrast with its opponents, who had to pay for counsel. A UFW staff attorney's annual salary cost roughly the same as two weeks of lawyer time at the rates that the Teamsters and growers had to pay private law firms for representation. While the UFW's opponents' expenses rose with each additional hour their lawyers worked, the Union's costs were both fixed and low. This effect was magnified by the incorporation of large quantities of free outside legal support, from volunteer paralegals and law students to experienced pro bono attorneys.

This in-house work was governed by a clear understanding about what the Union's lawyers were there for: to open the field for organizing and to advance the union's ultimate goal of large-scale farm worker representation. If a lawsuit worked directly or indirectly to build power in these ways, it was brought. If it did not, the Union had no interest. Directed and largely executed by the Union's own full-time lawyers, the UFW's legal strategy skirted much conflict (common in other scenarios where lawyers work to support organizing) about lawyers dictating or dominating or shutting down organizing, and about lawsuits rather than collective action taking center stage. The UFW's legal department built a tremendous amount of power for the Union. Together with strikes and the boycott, it was one of the three legs on which the organizing strategy stood. But the end goal--building a farm workers' movement and union--was *49 always clear, and to that end goal, lawyers were a handmaiden.

Further credit for the smooth integration of law and organizing in the union is due to Chavez's leadership, and to the way the lawyers and the organizers at the union related to each other. Ganz recalls, "Cesar . . . took the responsibility

for making Jerry a respected person in the movement. . . . And Jerry was clear that Cesar was in charge. On the other hand, Jerry was never shy about saying what he thought about stuff. And so that kind of set a tone.”¹⁶⁸ Organizer Jessica Govea concurred,

Cesar . . . didn't hide behind Jerry. [He] didn't hide behind--“Well, we can't do that because of the law, we can't do this because of the law.” Cesar said, “We're figuring out what we have to do and we happen to have the good fortune to have Jerry here who can be . . . a part of the creating of this, because he's got a certain kind of expertise that's important.”¹⁶⁹

In turn, Cohen's attitude toward organizers facilitated the relationship. Govea believed that “Jerry's personality and the way he approached things was very key in how the legal department evolved in the union.”

He wasn't saying, “Okay here's what you must do, and here's what you cannot do.” . . . Jerry was saying, “What do you have to do? Now, let me help you think about your strategy. But I'm not gonna define, I'm not going to create your strategy for you. I'll help think about it. But what's most important is, you do what you have to do and let me as a lawyer figure out how you get it done.” . . . [Another] thing that I think Jerry contributed to the union was . . . instead of saying “what's legal?” [he would ask], “What's right?” And then, “Let's do that.” Or, “What's wrong?,” and whatever's wrong, “Let's fix that.”¹⁷⁰

Cohen himself attributes the ease of collaboration to the self-confidence of lead organizers such as Chavez, Govea, Padilla, Huerta and Ganz, who did not find the law or a lawyer threatening.¹⁷¹ As Govea concluded,

I think you need to have both, right? You need to have someone who's confident enough in their organizational skills and in their leadership position, to give room to the person who brings another kind of knowledge into the thing. And then you need to *50 have this person who brings that other knowledge, in this case, legal knowledge, understand that they're not the president of the union but they have a very important role to play from their perspective.

Finally, the UFW's legal strategy also took advantage of unique opportunities offered by its time and place. The example of the civil rights movement had a critically important influence on the UFW as a whole; the movement's use of law in tandem with organizing similarly inspired Cohen and other attorneys for the Union.¹⁷² So too was the anti-war movement, with its group of lawyers working to facilitate draft resistance and public protest. The culture in the late 1960s and 1970s was particularly receptive to the emergence of a new social movement and to the call to support boycotts and protests, conveyed through legal cases as well as directly. This is not by any means to say that being a lawyer for a farm workers union in the late 1960s and early 1970s was an easy job, or that the legal strategies were obvious. But once Cohen began to develop them, the field was wide open. The convergence of the times and the legal context created a set of opportunities that others had not recognized. The routine use of property and criminal law to stymie pickets was low-hanging fruit, subject to constitutional attack. A law governing farm labor organizing had not been written. Growers did not expect, and for a number of years were unprepared for, the high-level representation that farm workers received. None of these aspects of the UFW's context obviate the tremendous creativity, dedication and persistence of Cohen and

his legal team. But they will be important to keep in mind when we turn shortly to the question of the very different--in many ways polar opposite--context in which labor lawyers are operating today.

C. How Legal Work Is Different under a Governing Law

Once the ALRA passed, the role of the UFW's lawyers changed. Litigation continued, but became much less central. As Cohen reflects in retrospect, before the ALRA,

[W]e were trying to use every for[u]m we could to present, not only to judges but to the public, what the problems were. And *51 the way we saw it . . . since there was no law regulating farm workers, we had to file . . . innovative lawsuits to raise issues. Now, once the law passed the need for doing that passed.¹⁷³ The legal department's core mission was still to facilitate organizing success. But how organizing success was achieved had changed. After the ALRA, the right to represent workers could come only through victory in an ALRA-supervised election. And under those circumstances, legal resources went into shaping the ALRA to the Union's advantage and then to pursuing unfair labor practices, contesting grower appeals, and fighting to guarantee workers' the rights guaranteed them by the law. As former legal department staff (and after Cohen's departure, briefly Legal Department Director) Barbara Macri-Ortiz recalls, "The fierce war between the parties continued. Only now they fought on a different turf, and the weapons had changed: charges, counter-charges, objections, appeals and delays were the new weapons of choice."¹⁷⁴ Lawyers had to document all the ALRA claims that the unions filed, and they had to do it quickly. Cohen notes,

[W]e put ourselves under a tight gun. You had to file your objections in five days, your response in five days. We're talking 400 elections, a huge amount of work. You had to have people getting declarations. We had a lot of hearings. So you have a huge amount of energy into defending those election victories, which is pure legal work.¹⁷⁵ "Once the law [was] passed," Cohen notes, the union suddenly needed "a full time big staff of . . . labor law technicians to work [the] ALRA."¹⁷⁶

The UFW gained a tremendous amount through what it made of the opportunities the ALRA offered. But it is also true that life under a governing law created new obstacles, chief among them delay and backlash. On the ground, growers became increasingly savvy about the potential for postponing a final decision based on appeals under the ALRA, counting on the ALRB's mounting backlog and the temporary nature of farm labor to ensure that the group of workers who had voted to unionize *52 had moved on to another ranch or another state by the time their ballots were certified.¹⁷⁷ Growers reconfigured their businesses to make organizing under the ALRA more difficult, shifting out of certain crops and into others in order to evade coverage, and changing owners and business structures once the UFW prevailed in the hopes of not being labeled a "successor enterprise" required to negotiate with the Union. They also increased subcontracting, which made organizing harder despite the ALRA's recognition of the grower, not the subcontractor, as the legally responsible employer.¹⁷⁸

So long as the UFW retained its vibrancy and its capacity to mobilize outside pressure, however, it could respond creatively to these obstacles. After a majority of workers had voted for the UFW in an election the Union could--and did--still use social-movement style campaigns to convince growers to drop their appeals and begin contract negotiations, just as it did to pressure the ALRB when it was initially ineffective in implementing the law. As one Union volunteer

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(and later UFW attorney) recalls, just after the ALRA passed, union staff heard often the mantra that "the [ALRA] bill gives us representations: the boycott--contracts."¹⁷⁹ And with regard to the growers' battles on the political front, the UFW could--and did--fight back.¹⁸⁰ For example, the union successfully advocated to defeat most grower-sponsored legislation to amend the ALRA, and Governor Brown vetoed every such bill that did pass.¹⁸¹

Chavez, Cohen and others understood that the ALRA would offer them only a brief window of opportunity before growers gained the knowledge and political power they needed to roll back farm workers' new rights.¹⁸² Had the UFW continued to hold up its half of the battle, it would still have had to fight growers on every front. The restructuring of the industry would have continued, to the Union's disadvantage. Delays at the *53 ALRB would likely have persisted. And there might have been nothing that the UFW could have done to forestall the election of a Republican governor. But the vital UFW of the early days had faced grower opposition and Republican administrations before, and had prevailed. Given how many times the UFW had applied its spirit and creativity to develop strategies to stare down defeat in the past, it seems plausible that had it been operating at full strength it could have met these new challenges with an effective response.¹⁸³ Had the Union continued organizing vigorously in the early 1980s, it might have built a base of workers large enough to pull through the hard years that followed. Had so many determined, experienced organizers not been fired or left, they might have been able to work with that base to generate walk-outs that could have pressured growers to withdraw appeals and negotiate a contract to avoid watching produce rot in the fields. Had the UFW maintained its legal department at full strength, it might have been able to continue to use its young attorneys' boundless energy and its low legal costs to out-litigate the opposition, winning enough cases before the ALRB to open up some new organizing possibilities and defend some old ones. The Union might have won another five or ten years of strong organizing before having to retrench and retool its strategy. We will never know for sure.

IV. Labor Law, Labor Lawyers, and Unions Today

The labor movement's current struggles may offer some indication of what the UFW would have confronted had it continued with its legal department in full force through the 1980s, as growers won control of the ALRB and succeeded in sharply reducing the agency's funding. Since John Sweeney and his slate of reformers were elected to run the AFL-CIO in 1995 on their promise of rejuvenating the labor movement, the federation has taken a strong position that organizing is imperative. Sweeney's immediate appointment of Jonathan Hiatt to the General Counsel position was one aspect of this commitment. Hiatt's long history of legal work with the SEIU, which under Sweeney's leadership in the 1980s and early 1990s became one of the AFL-CIO's most innovative and aggressive unions, had primed him for this position. Hiatt and his staff work in tandem with the legal departments of the international unions that belong to the AFL-CIO and their locals, as well as with outside labor lawyers and pro bono supporters. Attorneys for Change to Win Coalition unions are similarly dedicated and creative. But given that most of the field is occupied by a law and an agency that have become sinkholes for unions, not a source of support, the question is: can even the best team of *54 labor lawyers do more than nibble around the edges of the problem?

It is helpful to situate this question briefly in a look at how unions have used law over time. When Jerry Cohen was developing his approach to the law, inspiration for a young political lawyer was much more readily available from the civil rights movement than from labor, whose lawyers seemed staid and "old-school" by comparison.¹⁸⁴ But in an earlier era, lawyers had a rich history of work within the labor movement. In the 1890s and early years of the twentieth century, attorneys were constantly on call to fight the injunctions and criminal proceedings brought against unions who boycotted, picketed or struck.¹⁸⁵ Prior to and just after the Wagner Act's becoming law, during the time of the CIO's birth and greatest strength, labor lawyers--the category was a new one then--played a wide range of roles in supporting labor organizing. Lee Pressman, the Steel Workers Organizing Committee general counsel beginning in 1936 and general

- 36 Ferriss & Sandoval, *supra* note 36 at 188; Majka & Majka, *supra* note 31, at 223.
- 37 A few of the books and articles about the UFW touch briefly on this aspect of the Union's work. See e.g., Taylor, *supra* note 30; Levy, *supra* note 32; Majka and Majka, *supra* note 31. See also Marlise James, *The People's Lawyers* 324 (1973) (Chapter 20, entitled "Jerome Cohen, Attorney, the United Farm Workers Organizing Committee"). There are no comprehensive treatments of the Union's legal strategy. (There are, however, several articles on the ALRA that are also about the UFW's use of that law. See e.g., Wells & Villarejo, *supra* note 32). This Article and my other work on the topic are therefore based on original research, including interviews with CRLA founding attorneys James Lorenz and Gary Bellow; former UFW General Counsel Jerry Cohen; former UFW staff attorneys Bill Carder, Tom Dalzell, Ira "Buddy" Gottlieb, Ellen Greenstone (also a former staff attorney at the ALRB), Peter Haberfeld, Sandy Nathan, and Barbara Rhine; former UFW volunteer attorney Howard Richards; former UFW Executive Committee members and organizers Marshall Ganz, Jessica Govea, Eliseo Medina, and Gilbert Padilla; and former UFW Chief Administrative Officer and Service Center Director LeRoy Chatfield. All quotes in this article are from these interviews unless otherwise attributed, and all references to "interview" refer to interviews carried out by the author unless otherwise indicated. I am also very grateful for access to the Jacques E. Levy Research Collection on Cesar Chavez, held in the Beinecke Library at Yale, and for the primary materials collected by LeRoy Chatfield through the Farmworker Movement Documentation Project, now available online at <http://www.farmworkermovement.org/>.
- 38 Howard Richards, the Union's first volunteer lawyer, also helped the Union protect its funds from grower lawsuits. Telephone Interview with Howard Richards, Former Volunteer Attorney, UFW (June 28, 2004) [hereinafter Richards Interview].
- 39 This was Alex Hoffman, who worked for the UFW briefly in the mid-1960s. Interview with Marshall Ganz, Former Executive Committee Member, UFW, in Cambridge, Mass. (May 25, 2000) [hereinafter Ganz Interview].
- 40 Telephone Interview with James Lorenz, Founding Attorney, CLRA (Mar. 27, 2000) [hereinafter Lorenz Interview]; Interview with Gary Bellow, Founding Attorney, CLRA, in Boston, Mass. (Sept. 10, 1999) [hereinafter Bellow Interview]. At the time of our interview Bellow was a professor at Harvard Law School; in the 1960s he had been a founding attorney at the CLRA. See also Stephen B. Hitchner, "California Legal Services, Inc. (C)", John F. Kennedy School of Government Case Program C24-75-011 (1975) [hereinafter Kennedy School Case], and related case studies (C24-75-009, -010, and -012) (dealing with the founding of the CRLA and its internal conflicts). Although pseudonyms are used for key figures in the Kennedy School Case, and some identifying details have been changed, Bellow recommended it to me as an accurate depiction of the events that it describes. It was generated as a teaching tool rather than as a purely factual analysis; therefore, I have restricted my reliance on it to direct quotes from Bellow and other major figures or to points where it is corroborated by at least one other source. The case was later condensed and adapted with some changes into a chapter titled "Lawyers for a Political Movement" in Philip B. Heymann & Lance Liebman, *The Social Responsibilities of Lawyers: Case Studies* 22 (1988).
- 41 Interview with Jerry Cohen, Former General Counsel, UFW, in Carmel, Cal. (July 22, 1999) [hereinafter Cohen Interview]. "[W]hat Cesar said to workers and what Cesar said to me initially was, 'You are not going to represent individual workers, unless it fits with what you think you need to do to serve the general goal.' So, we downplayed the whole notion of service work." *Id.* "I was going to look at the needs of the Union as a union and I was going to take on only problems related to those needs." James, *supra* note 37, at 326.
- 42 Note the parallels between this approach and "second dimension lawyering" as described by Lucie E. White in *To Learn and Teach: Lessons from Dreifontein on Lawyer-ing and Power*, 1988 *Wis. L. Rev.* 699, 758-60 (1988).
- 43 "They weren't doing anything out of malice. It's just that ... the NLRB is the way they understood things.... [So] you can't secondary boycott, and we sign those orders. And they didn't ask why." Cohen Interview, *supra* note 41.
- 44 If a union includes any employees covered by the NLRA, the union becomes a "labor organization" subject to the NLRA prohibitions on the secondary boycott. NLRA § 2(5) ("The term 'labor organization' means any organization of any kind ... in which employees participate.").
- 45 The UFW repeated this maneuver several times over the following decades, divesting itself of workers in commercial sheds so as not to fall under the NLRA's limitations. In the 1990s, however, the Union made a decision to organize workers outside of

the fields as a part of a decision to broaden its reach into the Mexican community. As soon as one non-agricultural worker was organized, the entire UFW became subject to NLRA prohibitions on secondary boycotts. The sacrifice was blunted by the fact that the boycott was no longer as important a Union strategy by that time. Cohen Interview, *supra* note 41, and subsequent personal communication with the author; Telephone Interview with Ira "Buddy" Gottlieb, Former Staff Attorney, UFW (Mar. 23, 2005) [hereinafter Gottlieb Interview].

46 "Cesar, and Jerry, and a whole bunch of us went to Bakersfield to see *The Godfather*. And of course we loved it. And after that, we all talked *Godfather* for a year, two years, three years. And so Jerry was the consigliere. That's what he was. Because he was clearly part of the action. But he was also in this kind of special role over there." Ganz Interview, *supra* note 39.

47 Cohen Interview, *supra* note 41.

We got some pretty straight communication pretty early in the game because when we struck Giumarra, ... one of the things this one judge did was that he took away our bullhorns. Turns out, you know, you really can't do that. I mean, you have a right to use a bullhorn in rural California ... I thought. So I told Cesar I was going to take a writ. And he didn't have any faith in that. So he, without letting me know, was planning on just going out there and using the horn and getting thrown in jail. So I bop in one day, after going up to the appellate court in Fresno, and say "I've got this writ of prohibition. We're getting our bullhorns back."

"Oh, fuck!" he screams "I can't --"

I said, "Well, Cesar, you know, you better be straight then If you wanted to violate, let me know."

"Well, I didn't think you were going to get your writ."

I said, "Well, it was pretty clear." And I told him how I got the writ. So from that point on, it was like, "Okay, I'll level with Jerry." You know, so we're on the same page.

Id.

48 None of the other attorneys enjoyed the same level of Chavez's trust as Cohen, despite Cohen's effort to facilitate an eventual shift in legal leadership. Cohen recalls:

[W]hen my kids started to get a little older, and I knew I needed to think about ways of actually earning enough money to put them through college, I told Cesar, "At some point, you know, there might have to be a transition [to another general counsel]." He did not like that.... And I would bring Sandy [Nathan, a staff lawyer, to meetings with Cesar]. I thought Sandy had really good instincts. And Cesar once got me aside and said, "You know, it's really chicken shit of you to bring Sandy. I know what you're doing."

Cohen Interview, *supra* note 41.

49 The UFW operated on a "volunteer" basis, under which most staff-- including organizers and paralegals--received a weekly stipend (initially \$5 and later \$10 per week) as well as room and board in lieu of a salary. Exceptions were made for lawyers, who received a monthly stipend that began at \$600 (for a total annual salary of \$7,200), and for a few other professionals. Cohen Interview, *supra* note 41; Taylor, *supra* note 30, at 14.

50 Gary Bellow has written about these functions of litigation as a part of an organizing campaign, a perspective inspired in part by his work with Chavez and the UFW beginning in 1967. Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 *Harv. C.R.-C.L. L. Rev.* 297 (1996).

51 Until 1973-74, when the UFW mushroomed, the legal staff rarely had more than three or four attorneys at a time, supported by paralegals and a steady stream of law students. Cohen Interview, *supra* note 41; Telephone Interview with Sandy Nathan, Former Staff Attorney, UFW (May 3, 2005) [hereinafter Nathan Interview].

52 One example of such a grower lawsuit was a case brought in 1969 by Fresno grape growers against the UFW, arguing that the grape boycott violated antitrust law. Although the growers eventually abandoned the suit, its defense occupied several years of UFW attorney David Averbuck's and later Bill Carder's time. Telephone Interview with Bill Carder, Former Staff Attorney, UFW (Apr. 25, 2005) [hereinafter Carder Interview].

- 53 Ganz Interview, *supra* note 39. By the summer of 1973, when the Union responded to the devastation of its grape contracts by the Teamsters with a massive campaign of protest and civil disobedience, law students were flooding into the UFW, drawn to its fights against poverty and for civil rights and by its anti-Vietnam War position. Many of those same students were hired by the Union after they graduated. Others went on to work as attorneys for the ALRB, and still others continued on to practice labor law on behalf of other unions. Nathan Interview, *supra* note 51; Telephone Interview with Ellen Greenstone, Former Staff Attorney, UFW (Apr. 21, 2005) [hereinafter Greenstone Interview].
- 54 Interview with Jessica Govea, Former Lead Organizer, UFW, in New York, N.Y. (Oct. 13, 1999) [hereinafter Govea Interview].
- 55 Telephone Interview with Barbara Rhine, Former Staff Attorney, UFW (Mar. 27, 2000) [hereinafter Rhine Interview]. See also Alfredo Santos's description of the day in 1974 that he brought Watsonville apple strikers to court in San Francisco where UFW attorney Sandy Nathan was arguing their case. E-mail from Alfredo Santos (July 1, 2004), in Cesar Chavez: The Farmworker Movement 1962-1993 (LeRoy Chatfield ed., Farmworker Movement Documentation Project CD-ROM, 2005), <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "July, 2004" link, then scroll to page 2) [collection hereinafter referred to as The Documentation Project]. The Union prevailed in that case, establishing a right to notice before the issuance of a temporary restraining order. *United Farm Workers of Am. v. Super. Ct. of Santa Cruz County (William Buak Fruit Co., Inc., Real Party in Interest)* 537 P.2d 1237 (1975).
- 56 Rhine Interview, *supra* note 55.
- 57 Govea Interview, *supra* note 54. This symbiosis did not occur in all places or at all times: Most of the lawyers lived separately [from organizers] with one another, and worked separately, with great camaraderie on the law stuff.... [For them] it was more like a typical law office, albeit energetic and full of good motives. Getting up in the morning, and going to work, and doing a lot of law. Rhine Interview, *supra* note 55. Even the lawyers who worked most closely with organizers during the agricultural season spent the winters doing legal "projects" divorced from immediate organizing work.
- 58 Nathan Interview, *supra* note 51.
- 59 *Id.*
- 60 *Id.*
- 61 William Forbath, *Law and the Shaping of the American Labor Movement* 201 (1991).
- 62 "[T]oday we still have more injunctions than we have letters of the alphabet." Levy, *supra* note 32, at 155. See also James, *supra* note 37, at 327 (describing injunctions in the context of the Giumarra grape strike of 1967).
- 63 *Fighting for Our Lives: The United Farm Workers' 1973 Grape Strike* (United Farm Workers of America, 1974) [hereinafter UFW, *Fighting for Our Lives*].
- 64 The UFW was aided in its battle with injunctions by the California Supreme Court's *In re Berry* decision, 436 P.2d 273 (1968), which holds that those adversely affected by an injunction can test its constitutionality by violating it. However, if the court eventually finds that the injunction was valid, the violator can be punished. This offered the Union a measure of protection, at least when Cohen and the other attorneys were right in guessing which injunctions would ultimately be held unconstitutional. *In re Berry* put a premium on the UFW legal department's capacity to determine in advance which injunctions would ultimately be held unconstitutional. Chavez recognized the benefits of this work and gave Cohen the time he needed to immerse himself in the relevant law. Recalls Cohen, "Bill [Carder] and I spent hours reading anti-trust law and civil rights law." Interview by Jacques Levy with Jerry Cohen in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library., (September 20-21, 1993) [hereinafter 1993 Levy Interview with Cohen].

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- 65 United Farm Workers Organizing Comm. v. Super. Ct. of Kern County, 62 Cal. Rptr. 567 (1967).
- 66 United Farm Workers of Am. v. Super. Ct. of Santa Cruz County (William Buak Fruit Co., Inc., Real Party in Interest) 537 P.2d 1237, 1244 (1975).
- 67 *Id.* at 1242. UFW litigation later played an important role in clarifying the scope of California's Moscone Bill, a so-called "Little Norris-LaGuardia Act" signed into law in 1976 to echo on a state level the federal protections against labor injunctions. Cal. Civ. Proc. Code § 527.3 (West 1979).
- 68 Cohen notes that his ability to use the law offensively, not just defensively, depended on the funding that Chavez provided his department. "[O]nce Cesar saw things could work, by about '75, I had a lot of resources to deal with." Cohen Interview, *supra* note 41. Thus they could attack as well as protect.
- 69 Kennedy School Case, *supra* note 40, at B-14.
- 70 1993 Levy Interview with Cohen, *supra* note 64.
- 71 Levy, *supra* note 32, at 280-81 (quoting Jerry Cohen). In this, as in so many other of its strategies, the UFW and its attorneys were inspired by the civil rights movement, where participants also came to witness court proceedings and to pray and sing in courthouse corridors and yards as a way of changing the atmosphere in which legal decisions were made.
- 72 *Id.* at 281 (Cohen quoting Judge Walter Osborne).
- 73 Cohen Interview, *supra* note 41. The Union used similar techniques at other times. Taylor describes a different occasion in 1970 during the Union's fight against the grower Bud Antle:
 On December 4th the UFWOC turned out 3,000 farm workers; they ringed the Monterey County courthouse, in Salinas, they lined the front entryway and the hallways. Kneeling or standing, they remained absolutely silent as Chavez and Cohen went inside. The hearing lasted three and a half hours, and, when Chavez refused to call off the Antle boycott, as ordered, the judge ordered him jailed. As he was being led away Chavez shouted, "Boycott the hell out of them."
 The UFWOC workers set up a "vigil" around the jail, union priests said a Mass and were arrested by the police for failing to get city permits for public meetings. The UFWOC held rallies, and the widows of Robert Kennedy and Martin Luther King, Jr., came to visit Chavez in his cell....
 By December 24th even Judge Campbell had had enough; the thought of what Chavez's supporters might do if their leader was still in jail on Christmas Day helped the judge make up his mind to release Chavez, pending the outcome of the appeals filed by the union's attorney.
 Taylor, *supra* note 30, at 260-61. Courtrooms were not the only places farm workers packed. As a part of the effort to win the ALRA, the UFW brought members to legislative committee hearings, lobbying meetings, and voting sessions. For example, Cohen describes the farm worker presence at one early committee hearing on the bill as "jam packed and in the hall." Interview by Jacques Levy with Jerry Cohen, Sandy Nathan, and Tony Gaenslen in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library (June 19, 1975) [hereinafter 1975 Levy Interview with Cohen, Nathan, and Gaenslen].
- 74 Telephone Interview with Peter Haberfeld, Former Staff Attorney, UFW (Mar. 28, 2000) [hereinafter Haberfeld Interview].
- 75 See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982-83) (describing the political trial approach). For the memoirs of one of the most famous proponents of the approach, see William M. Kunstler & Sheila Isenberg, *My Life as a Radical Lawyer* (1994) (chronicling Kunstler's life and his work as a lawyer for social movements).
- 76 Cohen Interview, *supra* note 41. Cohen felt comfortable in the face of the accusation that he too readily accepted the limitations of the court system--that he should instead have been fighting to reform it. In his inimitable style, he told one interviewer in the early 1970s that he agreed that the courts were in need of reform, "[b]ut you can't chop down a redwood tree with your dick. What you have got to do is isolate the problems you can work on and change and, if you can change that one, then move

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on to the next one." James, *supra* note 37, at 335. In addition, over time (and particularly through lengthy appeals), Cohen did prevail in many cases. See *supra* notes 65 to 67 and accompanying text.

77 Cohen Interview, *supra* note 41.

78 *Id.* UFW lawyers brought a similar case during the Gallo strike in 1973, which they referred to as the "shitty water suit," and which dealt with the presence of chloroform bacteria in the water supply for Gallo labor camps. Pictures and publicity related to the suit were used in the boycott. Haberfeld Interview, *supra* note 74.

79 Taylor, *supra* note 30, at 211.

80 Cohen v. Super. Ct. of Kern County (Atwood Aviation Co., Real Party in Interest) 72 Cal. Rptr. 814 (1968).

81 James, *supra* note 37, at 331.

82 Taylor, *supra* note 30, at 241. Senator George Murphy then accused Cohen of having "doctored" the grapes sent in for testing. When Cohen was vindicated, the UFW's credibility in the public eye soared. Telephone Interview with Jerry Cohen, Former Attorney, CLRA (Mar. 30, 2005) [hereinafter 2005 Interview with Cohen].

83 Other examples of lawsuits brought to pressure growers are described by former UFW attorney Chuck Farnsworth. In one instance, an irrigation district was sued by two union members who claimed that publicly subsidized water was being distributed to growers beyond their 160-acre legal allotment. In another suit, the union itself charged that the California Table Grape Commission was funding anti-union efforts, rather than mere advertising. Both suits were later settled before trial. Memoir of Chuck Farnsworth, Documentation Project, <http://farmworkermovement.org> (follow "Essays" link, then "Essays by Author" link, then "Chuck Farnsworth 1969-1973" link).

84 Former UFW attorney Bill Carder notes that this is another example of the way that the UFW's legal strategy "took a page from the book of the civil rights movement's lawyers." Carder Interview, *supra* note 52.

85 For example, the UFW sued Safeway in 1973 for selling mislabeled meat. *Avelina Coriell v. Super. Ct. of L.A. County (Safeway Stores, Inc., Real Party In Interest)*, 114 Cal. Rptr. 310 (1974). While Safeway had, indeed, falsely presented low-grade meat as better quality, the Union's primary goal was not to address Safeway's consumer information but to increase the pressure on the grocery chain to respect the grape boycott.

86 Sweetheart contracts, a classic manifestation of union corruption, are ones in which the union and management (who are ostensibly opponents) collude to make an agreement that benefits both of them at the expense of the workers.

87 Majka & Majka, *supra* note 31, at 202.

88 The Teamsters have a long and shameful history of corruption, in which the UFW rivalry is but one chapter. In 1957, the Teamsters union was expelled from the AFL-CIO on corruption charges; it was not brought back into the AFL-CIO for thirty years. For accounts of this and of the effort to reform the Teamsters, see Kenneth C. Crowe, *Collision: How the Rank and File Took Back the Teamsters* (1993); David Witwer, *Corruption and Reform in the Teamsters Union* (2003).

89 Unions covered by the NLRA (such as the Teamsters) are ordinarily exempt from antitrust law. Carder's theory was that the egregiousness of the Teamsters' actions rendered this an exception. The resulting sweetheart agreements between the Teamsters and the growers, he argued, were not normal labor contracts, but evidence of a "conspiracy to artificially regulate the price of work." Interview by Jacques Levy with Jerry Cohen in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library (Oct. 15, 1995) [hereinafter 1995 Levy Interview with Cohen].

90 Carder Interview, *supra* note 52; Majka & Majka, *supra* note 31, at 246.

91 James, *supra* note 37, at 330-31. UFW staff lawyers recall many such instances of the attitude that "all legal outcomes can be organizing victories." For example, staff attorney Barbara Rhine spoke with Cesar Chavez the night before a big hearing in

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which the UFW was fighting the eviction of striking Gallo workers en masse from the Gallo labor camp. Rhine feared that they would lose the injunction, and said as much to Chavez. "He said, '[L]ook, Barbara, don't think of it that way. Think about this: if we lose, we'll get pictures [of the evictions] and how it's going to help the boycott.' In other words, whatever happens, we're going to exploit it for its full advantage as organizers." Haberfeld Interview, *supra* note 74. (Haberfeld, then Rhine's husband, was present at the conversation). The Union did win the injunction that day, but the workers were later evicted individually. Rhine, who was first in her class at Boalt Hall, recalls this ending as an important jolt of realism about the possibilities of change through legal talent. "I bought them a little time, that's all, and the battle went on. The people who own the property get to control who lives there. Not all the Boalt law degrees and Law Review and all the intelligence in the world could make a difference in that." Rhine Interview, *supra* note 55.

92 Though using lawsuits as leverage was often effective, it raised important ethical issues, particularly when claims of individual workers were involved, as they often were. Cohen and the UFW legal team strategically chose cases involving individual workers against whom growers had committed torts or California Labor Code violations, and filed their claims as "bee-stings in the battle." Additionally, claims of individual workers were folded into larger suits such as the pesticides claim. These sorts of cases raise the specter of conflicts of interest, as the outcome the workers wanted as individuals and the outcome the Union sought as an organization were not necessarily the same thing. Cohen dealt with these conflicts by maintaining full disclosure before the fact. He also observed that many workers saw the winning of a union contract as better serving their individual interests than victory in a particular case. Cohen Interview, *supra* note 41. For a fuller discussion of the ethical implications of this issue with regard to individual workers, see Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* 209-11 (2005).

93 UFW, *Fighting for Our Lives*, *supra* note 63.

94 The Teamsters were not bound by the rules prohibiting AFL-CIO unions from raiding each other's worksites, as they had been expelled from the AFL-CIO in 1957 for corruption.

95 Ferriss & Sandoval, *supra* note 35, at 188; Majka & Majka, *supra* note 31 at 223.

96 Jerry Cohen recalls: "I had known enough about the way the rest of the labor movement was operating to know that with a law, eventually down the road comes a whole superstructure of anti-union lawyers. And ... no matter how positive the administration, there's the whole question of getting yourself involved in the administrative nexus. Might be necessary, but until it was, we were having too much fun.... And we were winning." Cohen Interview, *supra* note 41.

97 It is important to remember that the time before the ALRA was not a "lawless" one for the UFW. The Union still worked against a backdrop of formal rules and entitlements (property, contract, criminal, immigration, etc.) that hugely favored growers. Likewise, it is wrong to talk about the pre-ALRA period as one free of state intervention in organizing. The state intervened often, whether to protect growers' property rights or, less often, to permit protest as a constitutional right. To the extent there was favorable law to work with--for example, the post-Civil War amendments to the Bill of Rights-- the UFW often stood on the legal shoulders of movements that had gone before. Thus the ALRA did not create but instead reframed state interventions. It realigned the forces but did not create the force field. For a fuller discussion of this issue see *infra* Part III.

98 Levy, *supra* note 32, at 529.

99 Ronald B. Taylor, *Why Chavez Spurns the Labor Act*, *The Nation*, April 12, 1971, at 454; Cohen Interview, *supra* note 41; Nathan Interview, *supra* note 51.

100 Nathan Interview, *supra* note 51.

101 Cohen recalls: "In '73 we lost all those grape contracts because the Teamsters signed those sweetheart deals. And ... [Cesar] and I had gone back to see Meany about ... getting some help, and Meany sort of conditioned the help on us finally agreeing to some kind of labor law.... [W]hat they wanted was a commitment, a commitment that we'd go for the law." Cohen Interview, *supra* note 41. See also Majka & Majka *supra* note 31, at 221, 223. The AFL-CIO's reasons for seeking to bring the UFW under a labor law were complex. On the one hand was a protective urge, a sense that such a law was the only way for the UFW

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to vanquish the Teamsters and succeed on the mainstream labor movement's terms, by winning election victories, negotiating collective bargaining agreements, and collecting substantial dues. On the other was a desire to control the UFW, to rein it in. The AFL-CIO felt pressure from its member unions most affected by the UFW's secondary boycotts, in particular those covering supermarket workers such as the retail clerks and butchers unions. These unions feared that their members would lose jobs due to the boycott. The retail clerks went so far as to take out full-page newspaper advertisements opposing the UFW boycott. *Majka & Majka* supra note 31, at 230. More generally, there was a sense within the mainstream labor movement that the UFW was disruptive, eating up more than its share of the public's energy and attention. There was friction between the UFW and the AFL-CIO around the UFW's opposition to the Vietnam War (which the AFL-CIO supported), its radicalism, and its social movement approach. The AFL-CIO saw in labor law the possibility of re-shaping the UFW into something closer to the standard labor union mold of the time. Nathan Interview, supra note 51; Cohen Interview, supra note 41.

102 1975 Levy Interview with Cohen, Nathan, and Gaenslen, supra note 73, at 4-5.

103 Levy, supra note 32, at 528.

104 Cohen Interview, supra note 41.

105 In the end the Teamsters also won the right to hold on to those contracts until new elections were held. Wells & Villarejo, supra note 32, at 296. On all of the machinations between the various unions with an interest in the bill, the UFW, and the governor's office, see 1975 Levy Interview with Cohen, Nathan, and Gaenslen, supra note 73.

106 Wells & Villarejo, supra note 32, at 303. For a full discussion of the parameters of secondary pressure eventually permitted under the ALRA, see *infra* note 115.

107 1975 Levy Interview with Cohen, Nathan, and Gaenslen, supra note 73.

108 Cohen, Brown, and former UFW staff LeRoy Chatfield generated a list of the bill's pro-grower features, which Brown used to sell the ALRA to growers: the presence of a "no union" option on the ballot; a prohibition on strikes to demand that the grower recognize the union; giving up the secondary boycott at delivery doors; and the "industrial unit," organizing all workers on a ranch into one bargaining unit rather than a series of sub-divisions by task (arguably advantageous because it protected the grower from serial strikes and disruptions from different units at different times). 1975 Levy Interview with Cohen, Nathan, and Gaenslen, supra note 73.

109 Levy, supra note 32, at 531; Wells & Villarejo, supra note 32, at 9; Cohen Interview, supra note 41.

110 Levy, supra note 32, at 531; Cohen Interview, supra note 41,

111 *Majka & Majka*, supra note 31, at 238.

112 *Id.* at 238-39.

113 Ferriss & Sandoval, supra note 32, at 208.

114 *Majka & Majka*, supra note 31, at 239. The effect of the special legislative section was to permit the law to go into effect in the summer of 1975, rather than waiting for January of 1976. *Id.* The UFW wanted the earlier date so that long-time strikers on the Gallo ranch would qualify to vote in an election under the ALRA "pre-existing strikers" rule. Cohen Interview, supra note 41.

115 Cohen argues that the UFW sacrificed little with regard to its secondary boycott capacity under the ALRA. As he points out, under the ALRA, unions that had not yet been elected were still allowed to call for secondary boycotts, to publicize the call through the media, to carry out "human billboarding," and house meetings, and to distribute literature in front of a grocery store urging consumers to respect the secondary boycott. An elected union could add secondary picketing to its repertoire. See Cal. Lab. Code § 1154(d)(4) (West 2005) (setting out limitations on secondary picketing for unions not yet elected as bargaining representative, but permitting other forms of publicity); Cal. Lab. Code § 1154.5 (West 2005) (setting out permissible range of secondary boycotts). Given all this, and that a boycott succeeds or falls on the strength of its broad community base, not

its picket line. Cohen argues that the prohibition on patrolling before grocery store doors was no great loss. The UFW had also conceded the right to picket supermarket delivery doors to ask that other workers (such as truck drivers) refuse to do business with boycotted markets, but in any case, they had not been getting the cooperation of other unions' members at delivery doors because respecting such a secondary boycott request would have rendered their unions vulnerable to a lawsuit. Telephone Interview with Jerry Cohen, Former General Counsel, UFW (Mar. 30, 2005). For a review of the Act's secondary pressure provisions, see *Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act*, 29 *Stan. L. Rev.* 277 (1977).

Confused by the dense wording of the secondary boycott section, growers at first believed that the ALRA had eliminated it entirely. Cohen recalls,

We structured the boycott so that it took the boycott away, and then in these complicated paragraphs gave it back. So that the grower organ, *The Packer*, wrote this thing congratulating Brown for banning the secondary boycott. And then after the damn thing passed, it was like, "Whoops! We're sorry. We're wrong."

Cohen Interview, *supra* note 41. See also Tracy E. Sagle, *The ALRB--Twenty Years Later*, 8 *San Joaquin Agric. L. Rev.*, 139, 153 (1998) (noting graver confusion): "Secondary Boycott Not Outlawed," *The Packer*, May 31, 1975 (editorial by grower newspaper admitting it had misunderstood the ALRA to prohibit most secondary boycotts).

116 Philip Martin, *Promise Unfulfilled: Why Didn't Collective Bargaining Transform California's Farm Labor Market?* (Ctr. for Immigration Studies Backgrounder, 2004), at 2, <http://www.cis.org/articles/2004/back104.html>.

117 1975 Cal. Stat. and Amendments to the Code, 3d Extraordinary Sess., c. 1, § 1, p. 4013.

118 Cal. Lab. Code § 1156.3(a) (West 2005). Elections had to take place during peak season and could begin as soon as the grower's workforce reached 50% of peak numbers. Cal. Lab. Code §§ 1156.3(a)(1) (West 2005). This was to prevent fewer (but more powerful) year-round workers from making the decision about unionization for migrants.

119 In both the ALRA and the NLRA, workers on strike to protest their employer's unfair labor practices ("unfair labor practice strikers") are permitted to vote in any election at the workplace, but there are limitations on the voting rights of workers who have gone on strike to demand a raise, increased benefits, or a better contract ("economic strikers"). The NLRA limits all economic strikers to voting in elections that occur within twelve months of the commencement of the strike (unfair labor practice strikers are not limited in this way). *W. Wilton Wood, Inc.*, 127 *N.L.R.B.* 1675 (1960). By contrast, the ALRA only disqualifies economic strikers after twelve months if they have been permanently replaced. Cal. Lab. Code § 1157 (West 2005). Significantly, for strikes initiated within 18 months prior to the ALRA's effective date, the ALRA permitted the ALRB to open elections to workers who had been on strike for economic reasons for up to three years prior to the ALRA's effective date. *Id.*

120 Cal. Lab. Code §§ 1140-1166 (West 1960). The UFW favored industrial units (rather than so-called "craft" units, which would have grouped workers by the job they did) because they grouped less powerful migrant workers with more powerful classes of workers such as irrigators and tractor-drivers, thus increasing migrants' chances of moving up to better jobs and permitting the UFW to coordinate bargaining and, if necessary, strikes across a ranch. For further comparisons of the ALRA and the NLRA, see Martin, *supra* note 32, at 94-95; Wells & Villarejo, *supra* note 32, at 293-97; Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 *Me. L. Rev.* 157, 175-79 (2003); Sagle, *supra* note 115, at 139.

121 Hawaii Employment Relations Act, Haw. Rev. Stat. Ann. § 377 (LexisNexis 2004). The Hawaii Employment Relations Act covers almost all workers excluded from the NLRA, including (but not limited to) agricultural workers. Haw. Rev. Stat. Ann. § 377-1(3) (LexisNexis 2004).

122 Cohen notes with amusement the questions he now gets about his tactics in creating the law. That law came from ten years of organizing, boycotting, striking, people going to jail. That's where the law came from. You know I get ... some of these folks doing doctoral pieces. "How did you negotiate the law?" You'd have to be an idiot not to get that law. That law was the result of ten years of pressure. Now, we played it out right, you know. We played what hand we were dealt to get what we needed. But that is the product of all the work that those folks did and Cesar ... was crucial in organizing that.

Cohen Interview, *supra* note 41.

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- 123 Ganz Interview, *supra* note 39.
- 124 See also Wells & Villarejo, *supra* note 32, at 305 (quoting Cohen: "For farm workers to have faith in the law, you have to show them that they can demand enforcement.").
- 125 Kintz, an NLRB attorney, was favored by the growers for the job. Cohen attributes Brown's appointment of him to pressure generated by the growers after they discovered they had been duped into thinking that the ALRA banned the secondary boycott. "Once the growers had good lawyers read this bill, they became unhinged," Cohen recalls. "And so they raised holy hell and ... they were able to convince [Brown]" to appoint Kintz. 1993 Levy Interview with Cohen, *supra* note 64.
- 126 Nathan Interview, *supra* note 51; Jacques Levy Interview with Ellen Greenstone, former Staff Attorney, ALRB (Sept. 25, 1975) (cited with Ms. Greenstone's permission) [hereinafter 1975 Levy Interview with Greenstone].
- 127 Greenstone Interview, *supra* note 53.
- 128 Interview by Jacques Levy with Sandy Nathan in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library (Sept. 24, 1975) [hereinafter 1975 Levy Interview with Nathan].
- 129 *Id.*
- 130 This description of the ALRA's early days is drawn from both Jacques Levy's interviews with UFW attorney Sandy Nathan and ALRB attorney Ellen Greenstone in September of 1975, less than a month after the ALRB opened, and from my interviews with Greenstone, Nathan and Cohen.
- 131 See Posting of Alberto Escalante (Dec. 26, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "December, 2004" link, then scroll to page 168) ("And while you're trying to tell the farm workers to not worry about being fired ... they've just seen a UFW organizer being hauled off to jail for trespassing?").
- 132 1975 Levy Interview with Nathan, *supra* note 128; 1975 Levy Interview with Greenstone, *supra* note 126. "Farm workers' history with laws are that they are on the books and they don't get enforced ... and the trick was to let people know ... this was one law that... was going to be enforced." *Id.* Cohen later noted: "Well, the Democratic administration [of Brown] wouldn't have enforced the law without pressure, and we gave 'em pressure.... It was a war until Brown understood we were damn serious about it." 1993 Levy Interview with Cohen, *supra* note 64.
- 133 Ganz Interview, *supra* note 39.
- 134 Wells & Villarejo, *supra* note 32, at 305 (quoting Ganz).
- 135 Kintz resigned in the winter of 1975-76. Majka & Majka, *supra* note 31, at 245.
- 136 1975 Levy Interviews with Nathan, *supra* note 128; Cohen Interview, *supra* note 41; Greenstone Interview, *supra* note 53. Sam Cohen was appointed to lead the task force; other attorneys included pro-farm worker champions such as CRLA attorney Maurice "Mo" Jourdane. Cohen: "We were constantly pressuring them and that's how we got the task force. That's how we got enforcement of the law." 1993 Levy Interview with Cohen, *supra* note 64.
- 137 Jerry Cohen recalls Mo Jourdane--in his task force role as an ALRB agent--standing up on the bus carrying workers to fields owned by anti-union stalwart Bruce Church and telling the workers they had the right to organize under the ALRA. "This," he observes, "was mighty powerful medicine." 1993 Levy Interview with Cohen, *supra* note 64.
- 138 "United Farm Workers of America, AFL-CIO: Elections Statistical Tally Up to and Including February 6, 1976: Statewide Results," Jacques Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book Library and Manuscript Library, Box 29, Folder 563, File 31.

- 139 Proposed amendments included elimination of the access rule, an extension of the election period from 7 to 21 days, and lower penalties for growers who violated the law. Majka & Majka, *supra* note 31, at 244-45.
- 140 Ferriss & Sandoval, *supra* note 32, at 208.
- 141 Wells & Villarejo, *supra* note 32, at 304.
- 142 *Id.* at 301.
- 143 Theo J. Majka & Linda C. Majka, Decline of the Farm Labor Movement in California: Organizational Crisis and Political Change, 19 *Critical Sociology* 3, 14-15 (1992) [hereinafter Majka & Majka, Decline of the Farm Labor Movement].
- 144 Martin, *supra* note 116, at 2.
- 145 Exact numbers on UFW membership are very hard to obtain. In 1981, the UFW was claiming 108,000 members, while admitting that number represented "every worker who has spent 'one hour to one year' working for a grower under a union contract." Wayne King, Chavez Faces Internal and External Struggles, *N.Y. Times*, Dec. 6, 1981, at 1. Scholars and close observers seem to concur that the Union had from 50,000 to 70,000 workers at its peak in the early 1980s. Majka & Majka, *supra* note 31, at 251; Martin, *supra* note 32, at 91; Wells & Villarejo, *supra* note 32, at 303.
- 146 Jennifer Scholz, Duke's ALRB: The Farmer's Friend, *Cal. J.*, Aug. 1987, at 375; Diane Wagner, Seeds of Change at the ALRB, *Cal. Law.*, March 1987, at 22. See also Majka & Majka, Decline of the Farm Labor Movement, *supra* note 143, at 23-28; Wells & Villarejo, *supra* note 32, at 315 (both discussing ALRA changes under California's Republican governors).
- 147 See Philip L. Martin, *Promise Unfulfilled: Unions, Immigration, & the Farm Workers* (2003), especially Chapter 8; Douglas S. Massey, et al., *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (2003), especially chapters 5 and 6.
- 148 See sources cited *supra* note 146.
- 149 Majka & Majka, Decline of the Farm Labor Movement, *supra* note 143, at 16-23; Wells & Villarejo, *supra* note 32, at 300-08.
- 150 See Frank Bardacke, Cesar's Ghost: The Decline & Fall of the UFW, *The Nation*, July 26, 1993, at 130; Michael Yates, A Union Is Not a "Movement", *The Nation*, Nov. 19, 1977, at 518; Majka & Majka, Decline of the Farm Labor Movement, *supra* note 143; Wells & Villarejo, *supra* note 32.
- 151 Wells & Villarejo, *supra* note 32, at 305-06.
- 152 Cohen Interview, *supra* note 41; Ganz Interview, *supra* note 39; E-mail from Doug Adair (June 2, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "June, 2004" link, then scroll to page 20); Wells & Villarejo, *supra* note 32, at 307.
- 153 See also Cohen Interview, *supra* note 41; Email from Tom Dalzell (June 15, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" Link, then "June, 2004" link, then scroll to page 153).
- 154 The proposal also involved moving the lawyers from Salinas, where most were stationed, to the Union's rural headquarters in La Paz. Chavez asked Cohen to stay on, with full pay, and train a new group of lawyers who would work from La Paz as volunteers; Cohen, considerably less sanguine about the fungibility of legal talent than Chavez, refused. Instead he agreed to remain for eighteen months in a limited capacity to negotiate contracts and argue a pending case before the Supreme Court. Cohen Interview, *supra* note 41.
- Although one interpretation of this turn of events might be that Chavez's proposal represented the erupting of some long-simmering resentment of the Union's lawyers, people who were close to him at the time say that it appeared to be a more immediate response to Chavez's growing fears that some lead organizers were undermining his work, a way of re-asserting his control and cutting off possible legal support for their efforts, than a fundamental belief that the legal work was in tension with

the organizing. Chavez had occasionally expressed concern to Cohen about the level of resources that the legal department consumed, but this was inevitably coupled with his recognition of the power that lawyers helped the UFW to build. Cohen Interview, *supra* note 41; Ganz Interview, *supra* note 39.

- 155 The UFW operated with a considerably smaller legal department in the wake of Cohen's departure, with a few lawyers working from La Paz for the Union's then-standard \$10/week plus room, board, a small clothing allowance and the repayment of school loans. Their efforts were supplemented by outside representation and pro-bono assistance. They continued to do ALRB cases, and also defended the UFW when it was sued by growers or its own members. Gottlieb Interview, *supra* note 45. See also E-mails from Ellen Eggers (May 24, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "May, 2004" link, then scroll to pages 85 and 87) (discussing changes under new legal department and legal strategies); E-mail from Ellen Eggers (June 2, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "June, 2004" link, then scroll to page 27) (discussing changes under new legal department and legal strategies). The need for paid representation eventually reasserted itself, however, and for many years now the UFW has been represented by its current General Counsel, Marcos Camacho, who serves the union through his private firm. Camacho is the graduate of a project that Chavez initiated in 1972, through which the UFW put promising community members into a legal apprenticeship program, after which they were admitted to the practice of law (without ever having attended law school) once they passed the California Bar exam. In 1976, Tom Dalzell became the first UFW-sponsored candidate to pass the bar and enter practice through this program. Telephone Interview with Tom Dalzell, Former Staff Attorney, UFW (June 13, 2005) [hereinafter Dalzell Interview]. See generally Fred Alvarez, Apprentices Take Law Into Their Own Hands, L.A. Times, Oct. 10, 2004, at B1 (discussing the apprenticeship program and the UFW's experience with it).
- 156 Wells & Villarejo, *supra* note 32, at 302 ("In sum, what is most striking about the ALRA election data is the sharp drop in election activity and union wins after 1977-78 (with the exception of the 1980 upswing), coupled with a rise in the proportion of decertification and "no union" -won elections."). Wells and Villarejo go on to remark that the 1977-78 decline came at a time "when political climate, growers' strategies, and labor market conditions were all favorable" to the UFW. *Id.* at 304. "Sharp drops in the number of elections held, votes cast, and union-won elections after that point coincided with a shift in union policy that interrupted the forms of pressure exertion that had proved so effective." *Id.* See also *id.* at 16-17.
- 157 Under Deukmejian and then (to a somewhat lesser extent) his Republican successor Pete Wilson, ALRB members who had seen the law as a tool to encourage farm worker organizing were replaced with others who supported growers. Majka & Majka, Power, Insurgency and State Intervention, *supra* note 32, at 220-21; Wells & Villarejo, *supra* note 32, at 318. Many pro-worker ALRB staff resigned: within eighteen months of Stirling's appointment, forty-two of 107 staff members departed. Scholz, *supra* note 146, at 376. The board began to dismiss a large percentage of unfair labor practice charges filed by the Union against growers. Wells & Villarejo, *supra* note 32, at 310. By this time, however, the UFW had largely withdrawn from the fields, and it is unclear that the UFW would have been in a position to take advantage of the ALRB's protections even had the agency been operating at full capacity.
- 158 Scholz, *supra* note 146.
- 159 *Id.* at 376; Wagner, *supra* note 146, at 23.
- 160 Wells & Villarejo, *supra* note 32, at 303.
- 161 Martin, Promise Unfulfilled, *supra* note 147, at 79-80; Eric Schlosser, Reefer Madness: Sex, Drugs, and Cheap Labor in the American Black Market 103-104 (2003). See generally David Bacon's articles on the UFW strawberry campaign and photographs of strawberry workers collected on his website, <http://dbaon.igc.org/FarmWork/farmwork.htm>.
- 162 The UFW in 2001 and 2002 succeeded in getting two new pro-farmworker bills signed into law in California. One imposed high penalties on growers and contractors who fail to pay farm workers legal wages. The other created a pilot program of first-contract mediation for agricultural workers and their unions.

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- 163 United Farm Workers of America, *Illegal Alien Farm Labor Activity in California and Arizona*, in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library, Box 21 Folder 444; Box 29, Folder 568.
- 164 Jeff Coplon, *Cesar Chavez's Fall from Grace, Part II*, *The Village Voice*, Aug. 21, 1984, at 18; Ferriss & Sandoval, *supra* note 32, at 244.
- 165 Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992) 11-28; Michael J. Fox, *Some Rules for Community Lawyers*, 14 *Clearinghouse Rev.* 1, 5-7 (1980); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *Harv. C.R.-C.L. L. Rev.* 407, 437-41 (1995) [hereinafter Gordon, *We Make the Road by Walking*]; Muhammad I. Kenyatta, *Community Organizing, Client Involvement, and Poverty Law*, 35 *Monthly Rev.* 18, 22-23 (1983); William Quigley, *Reflections of Community Organizers: Lawyering for the Empowerment of Community Organizations*, 21 *Ohio N.U. L. Rev.* 455, 455 (1995); White, *supra* note 42, at 755-57 and n. 209. See also books and articles on law and organizing referenced in Loretta Price and Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 *N.Y.U. Rev. L. & Soc. Change* 615 (2000-2001).
- 166 Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 *Va. L. Rev.* 1103, 1141-42 (1992); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *Fordham L. Rev.* 2449 (1999).
- 167 Cohen Interview, *supra* note 41.
- 168 Ganz Interview, *supra* note 39. As I have noted, Chavez's trust in Cohen did not necessarily translate to confidence in the other staff attorneys. This led Chavez to believe that the legal department staff was basically fungible with any number of other lawyers, a belief that Cohen strongly resisted but which contributed to the ease with which Chavez could suggest letting the legal department go in 1978. Cohen Interview, *supra* note 41.
- 169 Govea Interview, *supra* note 54.
- 170 *Id.*
- 171 Cohen Interview, *supra* note 41.
- 172 For explorations of the grassroots level legal work that accompanied organizing in the civil rights movement (beyond the better-known NAACP strategy), see J. L. Chestnut Jr. & Julia Cass, *Black in Selma: The Uncommon Life of J. L. Chestnut, Jr.* (1990); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 *Law & Soc'y Rev.* 367 (2000); Thomas Hilbink, *The Profession, the Grassroots, and the Elite: Lawyering for Civil Rights in the Direct Action Era* (unpublished paper presented at the Conference on Cause Lawyering and Social Movements on March 4, 2005) (copy on file with journal).
- 173 1993 Levy Interview with Cohen, *supra* note 64.
- 174 Memoir of Barbara Macri-Ortiz (1969-1990), Documentation Project, <http://www.farmworkermovement.org> (follow "Essays" link, then "Essays by Author" link, then "Barbara Macri-Ortiz 1969-1990" link).
- 175 Cohen Interview, *supra* note 41.
- 176 *Id.* Question: "Did you ever see any evidence of law, the way you practiced it, undermining organizing the way the UFW did it?" Cohen: "Certainly not before the law passed, because it was legal karate, and we were hand in glove. After the law passed, it's not that it undermines organizing, but it's that there's such a demand for people's time, testifying at hearings, to sit down for the declarations, piece together what happened in terms of developing our objections and their objections.... So I wouldn't say it undermined it, but it diverted energy." *Id.*

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- 177 The ALRB was hampered by insufficient funding from the very beginning, and accumulated a large backlog of cases within its first year. By early 1977, workers faced prospective delays of up to two years after an election for the board to certify the union as their representative. Majka & Majka, *supra* note 31, at 248.
- 178 Wells & Villarejo, *supra* note 32, at 309. See also Miriam J. Wells, Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture, 21 *Law & Soc. Rev.* 49 (1987).
- 179 Memoir of Mary Mecartney (1974-1993), Documentation Project, <http://www.farmworkermovement.org> (follow Essays link, then Essays by Author Link, then Mary Mecartney 1974-1993 link).
- 180 Majka & Majka, *supra* note 31, at 270.
- 181 Wells & Villarejo, *supra* note 32, at 312.
- 182 They often explicitly cast this analysis in terms of the 12 years of relative freedom that the labor movement enjoyed between the passage of the Wagner Act in 1935 and Taft-Hartley in 1947: "If we have to take the NL[R]A, let's take it with 12 years of the right to boycott.... [W]e want what you got [...] which was 12 years of boycotting and hell-raising." 1993 Levy Interview with Cohen, *supra* note 64.
- 183 Nathan Interview, *supra* note 51.
- 184 Sandy Nathan hadn't even studied labor law in law school. "It didn't have any attraction. I was more interested in the anti-war movement, the civil rights movement, and politics generally. Even though I had grown up in a small PA town where the Steelworkers were dominant, even though my dad was in a union, I didn't see Labor Law as a place I was heading into in 1969." Nathan Interview, *supra* note 51. Bill Carder, by contrast, had been an NLRB lawyer for three years after law school, from 1967-1970, before joining the UFW's legal department. He recalls that the difference between what he saw at the NLRB and at the UFW was "amazing." At the NLRB he handled numerous appeals for unions that were defeated and demoralized after being beaten, and had "handed campaigns over to the lawyers in the hope of the legal process delivering a bargaining order three years late." The UFW, on the other hand, "had a sense of real power. They were not afraid to lose, and they didn't quit." Carder Interview, *supra* note 52.
- 185 See sources cited *supra* note 61.
- 186 I thank Alan Hyde for drawing my attention to this tradition in labor lawyering. See also Gilbert Gall, *Pursuing Justice: Lee Pressman, the New Deal, and the CIO* (1999); Christopher H. Johnson, *Maurice Sugar: Law, Labor, and the Left in Detroit 1912-1950* (1988). On the role of rights in generating and advancing a broad vision of worker organizing within the labor movement in the 1920s, see James Gray Pope, *Labor's Constitution of Freedom*, 106 *Yale L.J.* 941, 1013-19 (1997). On Carol King's work with unions in the 1930s and 40s, see Ann Fagan Ginger, *Carol Weiss King: Human Rights Lawyer, 1895-1952* (1993); see also Arthur Kinoy's description of his own and David Scribner's work with the labor movement during the same period. Arthur Kinoy, *Rights on Trial: The Odyssey of a People's Lawyer* chs. 2, 3, 4, 5 (1983).
- 187 Kinoy, *supra* note 186, at 51-59.
- 188 *Id.* at 57.
- 189 See *supra* notes 44-45 and accompanying text.
- 190 For descriptions of the worker center model see generally Janice Fine, *Workers Centers: Organizing New Communities at the Edge of the Dream* (2006); Gordon, *supra* note 92; Miriam Ching Yoon Louie, *Sweatshop Warriors: Immigrant Women Workers Take on the Global Factory* (2001).
- 191 On the living wage movement, see generally Stephanie Luce, *Fighting for a Living Wage* (2004). On lawyers' roles within the movement, see Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *Stan. L. Rev.* 399, 465-72 (2001); Kathleen Erskine & Judy Marblestone, *The Role of*

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Article

COMMUNITY LAWYERING - THE ROLE OF LAWYERS IN THE SOCIAL JUSTICE MOVEMENT

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Within the past decade there has been a renewed interest in a style of practice we call “community lawyering.”¹ I use the term “renewed” because it involves a return to some of the values and practices of legal advocates in prior mass struggles, such as the labor movement,² the civil rights movement,³ and the earliest *376 stages of federalized legal services.⁴ The term has come to be used very broadly with a myriad of individual descriptions, strains and tendencies, each with their own pedigree. The most unifying feature seems to be a deep unease with the degree to which the representation of poor and working people has been individualized, atomized, depoliticized and divorced from any leadership by real organized constituencies with their own substantive and political goals. It is accompanied by a realization that meaningful systemic change cannot result from this depoliticized and atomized approach. This has resulted in the search for a law practice that recognizes the centrality and leadership of the organized constituency in achieving meaningful change.

The range of descriptions of this type of lawyering varies widely. William Quigley, a long time Professor of Law at Loyola University New Orleans College of Law and former Director of the Center for Constitutional Rights, describes the need for “revolutionary lawyering” and “reflective activism,” which is centered on a series of principles and practices calling for solidarity with others struggling for justice, and a refusal to accept the status quo as a given.⁵ Ellen Hemley, who has developed Continuing Legal Education for community lawyering, describes it as “a wide range of community-building and advocacy-related” activities “through which advocates contribute their legal knowledge and skills to support” community identified initiatives that return power to the community:⁶ “its goal is to support lasting changes that bring about social justice.”⁷

Within the broad range encompassed by these descriptions, many lawyers and legal advocates across the country (and internationally) are working through their own definitions - driven largely by their own history of involvement and their unique relationships with their local communities.⁸ Whatever the *377 individual definition, central to all advocates, is a recognition of the importance of leadership by organized constituent groups within the communities served. Additionally, it is important that the advocates' skills be used not only to gain benefits for those communities but also to consciously build organizational power and community leadership. In implementing these central principles, each advocate confronts similar questions and tries to determine her own answers while maintaining a commitment to these central principles.

While there has been much academic reflection on the need for a renewed commitment by social justice lawyers to support organizing efforts and organized constituencies, there has been less written by legal advocates struggling to put those principles into practice, particularly outside of the narrow clinical context, and even less reflection on the lessons learned

in developing that practice.⁹ Unfortunately, there is often little time in these practices for recording the type of critical reflection described by Professor Quigley. And perhaps there may be too much humility, as practitioners are painfully aware how far their practice strays from ideal community lawyering.

The purpose of this article is not to add to the excellent academic reflections on community lawyering, but rather to report on some of the critical reflections of one small group of advocates struggling to consciously implement a community lawyering practice within a larger traditional public interest context. While much of the article is descriptive, its goal is to pull from these descriptions some prescriptive values and practices that arise from the practical application of our “community lawyering” principles. We understand that there are real and significant differences between communities and their struggles for equality. But we also increasingly understand that there are common lessons that lawyers can learn in their efforts to assist those struggles. In the following descriptions of our work, we attempt to define the common lessons we have observed.¹⁰

***378 I. PUBLIC INTEREST LAWYERS AND SOCIAL JUSTICE**

It seems reasonable that a first step in supporting social change would be to possess an understanding of how social change occurs. Leaders in social change movements are often quoted regarding their understanding of the dynamics of change.¹¹ Unfortunately, many legal advocates, while deeply committed to social justice, have only a vague, largely unexamined notion of how they believe change occurs. These deeply committed advocates generally entered law school with an idea that being a lawyer would somehow make them more central participants in the struggle to achieve social justice. They had been educated to believe that lawyers and the law were integral to social change. They endured the mind-numbing routines of law school as a necessary step in achieving a role in that process. After law school, they may have had the good fortune to be able to practice in a legal services or other public interest practice, often handling numerous individual clients. Some of the clients' legal problems were serious, some trivial, some challenging, and some mundane. All were vitally important to the client.

For the first couple of years, the sheer terror of being trusted with any client's problem was sufficient to fully occupy the new lawyer's time. But, over time, these lawyers would see their clients return again and again with similar problems. Hundreds of new clients appear requesting legal assistance on legal problems identical to those suffered by dozens of previous clients.¹²

***379** Eventually the young social justice lawyer can become very frustrated since she fails to see any real connection between her work and any meaningful change in her clients' communities. Tenants are being evicted simply because they don't have the money to pay the rent.¹³ Using her legal skills, the lawyer can prolong the tenancy, informing the court and the jury about the client's family and the abominable housing conditions. But at the end of the day, the tenant generally leaves, the property remains unrepaired, and the next tenant becomes a potential future client. The initial client/tenant may return in six months threatened with eviction from another abominable apartment.¹⁴ Similar scenarios can be described in cases involving health care, disability, veterans' benefits, etc.¹⁵ Over time these advocates increasingly recognize that the most fundamental problems of their clients may have no legal solution.

Generally, as they become more experienced, most legal advocates also become more specialized in narrow substantive areas that further narrowly limit the number of potential clients.¹⁶ Whether they continue to handle individual cases or “graduate” to handling class actions or other “more important” cases, specialization allows the lawyers to avoid clients they are least likely to be able to assist and to develop greater expertise for those whom they do assist.¹⁷ This substantive

specialization and focus can allow the young lawyer to feel more expert and productive. But it also dramatically restricts the lawyer's contact with people possessing problems outside of the lawyer's area of expertise, and dramatically limits her experience of the clients' *380 larger world.¹⁸ And seldom does it allow the attorney to achieve any meaningful systemic change. For example, a young housing rights lawyer may represent only tenants with federal vouchers. However, she knows most poor tenants are not receiving voucher assistance, are living in substandard conditions, paying most of their income in rent, and being evicted solely because their work hours were cut? they had unexpected bills, lost their job, or lost a partner. Thus, to the extent that she talks to the community, she often sees little correlation between the most serious problems as that community might define them and the narrow housing voucher-related problems that she deals with on a daily basis. She also quickly learns that there is not even a rough correlation between what is legal and what is just.

This presents a fundamental dilemma for any advocate seeking to achieve social justice through her legal practice. After several years of practice, the flow of clients does not change, nor do their circumstances. The committed advocate may simply change her expectations, obtaining satisfaction in helping individuals and families through short-term dilemmas, sometimes obtaining solutions with longer-term individual impacts. Or she may participate in cases, such as class actions, that are intellectually stimulating and offer a possibility of narrowly focused changes in the law or an increase in benefits to a larger group of individuals, but have little or no impact on the imbalance of power, which might prevent such harm in the future.¹⁹

There is sometimes the possibility of actually representing a group of clients? tenants in a building or a mobile home park, or a group of day laborers? and obtaining some longer lasting relief, which is something that begins to look like systemic change. However, these efforts often overwhelm the individual lawyer, with the clients' expectations often far exceeding any potential legal outcome and the group often dissolving long before the end of the legal case.²⁰

Some of these committed new lawyers may have come to law school already possessing an important recognition that *381 fundamental solutions must involve larger social movements.²¹ They participated in marches and organizing efforts in housing rights, immigration reform, and workers' rights struggles in college, law school, and then afterwards. They may have dreamed of participating as lawyers in these efforts. However, as their public interest practice progresses, they often see those dreams as increasingly unrelated to their day-to-day law practice. Seldom are such political activities encouraged as a vital part of a new lawyer's training.²² Lawyers may even be told that their funding renders their participation in these activities illegal.²³ Few advocates are provided with an environment in which lawyering skills in support of such organized efforts are practiced, developed, and encouraged.

These lawyers may feel particularly frustrated because they were raised in a popular culture that glorified the crusading lawyer who singlehandedly changed lives and communities. Older advocates, myself among them, who grew up in the 1960s and 1970s, were indoctrinated with the idea that lawyers and litigation were the keys to all sorts of social change movements. After all, hadn't civil rights lawyers singlehandedly changed society through a series of skillfully crafted courtroom victories?²⁴ The younger generations have been similarly taught that lawyers have singlehandedly won environmental reforms, closed sweatshops, freed wrongly condemned inmates and outed *382 governmental corruption.²⁵ They went to law school aspiring to find their generation's version of *Brown v. Board of Education*,²⁶ which they believe will forever change the social landscape.

Unfortunately, most of this adulation of lawyers and litigation in achieving social change is from the point of view of the lawyers themselves, who are often far removed from the communities that they supposedly transformed. To the extent these stories actually describe examples of real, lasting change, they ignore the intense organizing work that was instrumental in actually securing or institutionalizing the change.

Less lawyer-centric examinations have shown that the African American civil rights movement in the United States won far more enduring victories in the streets of Selma than in the Supreme Court. In Professor Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, she describes how racial justice advocacy in the United States, from the earliest struggles to the civil rights struggles, revolved around grassroots organizing and the strategic mobilization of public opinion.²⁷ In fact, integration failed to follow *Brown* and it was not until the next decade during the organized people's movement that actual change began to occur. In Professor Gerald Rosenberg's book, *The Hollow Hope: Can the Courts bring About Social Change?*, he demonstrates that the actual social gains in civil rights for African Americans and women correlate not with the court victories, but rather with the popular struggles.²⁸ This mirrors the early labor movement, which accomplished its victories largely through bloody and generally illegal strikes rather than in the courtroom. These analyses support the idea that significant social change results from organized struggles outside the courtrooms rather than judicial decisions made inside.²⁹

In fact, these legal victories often diverted attention and *383 energy from the real struggles for change. Professor Alexander argues that a mythology resulted from the Supreme Court's *Brown* decision in that litigation and lawyers were the central players in bringing about social change. She then observes: "As public attention shifted from the streets to the courtroom the extraordinary grassroots movement that made civil rights legislation possible faded from public view. The lawyers took over."³⁰ The result was a reliance on the lawyers and a distancing from the grassroots organizing that had brought about those changes in the first place.

Others echoed this view. Lani Guinier, quoted by Professor Alexander, further describes the legal takeover as a participant:

In charge, we channeled our passion for change into legal negotiations and lawsuits. We defined the issues in terms of developing legal doctrines and establishing legal precedent; our clients became important, but secondary, players in a formal arena that required lawyers to translate lay claims into technical speech. We then disembodied plaintiffs claims in judicially manageable or judicially enforceable terms, unenforceable without more lawyers. . . . We not only left people behind; we also lost touch with the moral force at the heart of the movement itself.³¹

Many non-lawyers involved in the day-to-day struggles of social movements are more scathing in their criticism of lawyers. Professor Quigley, in interviewing grassroots organizers in Louisiana, found reactions ranging from healthy distrust to contempt. Ron Chisolm, an experienced organizer, summed up the views of many organizers:

Lawyers have killed off more groups by helping them than ever would have died if the lawyers had never showed up. . . . In my [twenty-five] years of experience, I find that lawyers create dependency. The lawyers want to advocate for others and do not understand the goal of giving a people a sense of their own power. Traditional lawyer advocacy creates dependency and not interdependency.³²

*384 As a result of these harsh observations and critiques, self-reflective legal advocates can find themselves lost without any meaningful road map. If lawyers are not central to social change, if lawyers can be so destructive, then maybe they will do more harm than good by involving themselves as lawyers in social justice struggles.

II. THE COMMUNITY LAWYERING PERSPECTIVE

The central tenet of “community lawyering” is that social change comes about when people without power, particularly poor people or oppressed people, organize and recognize common grievances. Social change can only be lasting when it is led and directed by the people most affected. It is this organizational work, leadership development and power building that is and has been key. This is our theory of social change. It has been demonstrated over and over again in the civil rights movement, the workers' rights movement, the housing movement and the immigrants' rights movement. Community lawyering is supportive of this grassroots organizing and mobilization for social justice. Those involved in community lawyering understand that these organizing efforts may be the only real route to long-term social change.

It follows then that community lawyers believe that leadership must come from within our client/partner organizations. Real, lasting change can only result from an oppressed group itself identifying its grievances and developing demands and a strategy for achieving them. They can decide whether to change their situation, their plan and execute that campaign for change. It is only then that legal advocates can begin a discussion to determine if they can be helpful and if their help is desired.

The understanding that a lawyer's role in change is supporting community organizations and other organized groups of people (i.e., worker/tenant associations, immigrant/community coalitions, and unions), who win benefits and shift power through collective action and strategic campaigns, is central to all types of community lawyering. True sustainable change comes from building large-scale, democratic organizations focused on building the power and conscious leadership of poor and working people. *385 Community lawyering can assist fundamental and long-term change only through supporting grassroots organizing in all its aspects? community education, organizational development, and leadership development.

Those involved in community lawyering practices accept and internalize the criticisms of lawyer-centric advocacy campaigns. We also have seen organizations destroyed and opportunities for significant change lost through lawyer-centric campaigns. However, we strongly believe that there is a role for lawyers in social justice movements and we try to develop practices which incorporate that role. Our legal work is not central, or often even necessary, but it can be important and has historic precedent in the roles lawyers have played and continue to play both here and abroad in workers, housing and immigrants' rights struggles.

Unfortunately, simply removing the lawyer-centric models from our practice, while limiting potential harm, does little to define how we can be helpful. Even a clear understanding of the dynamics of social change does not dictate an affirmative role for lawyers. This intellectual understanding must be backed up by the actual practice. While the intellectual principle may be simple to state, its operation is far more complex. It can be difficult to find ways in which we can be truly helpful to social justice organizing campaigns without falling into the destructive lawyer-centric models glorified in our culture.

The purpose of this article is to chronicle as simply and humbly as possible our struggles to create an intentional, non-lawyer-centric, supportive practice in aid of social justice organizing campaigns. It is an attempt to present our principles, interspersed with some actual applications of those principles. We lay out our choices, not as correct, but simply as the decisions that we made, with the reasoning underlying them and the consequences to the extent that we can see them. However, we believe that certain practices have emerged from our work that are worth considering as applicable in a broader context.

We have found it useful to organize our lessons and our struggles around three basic inquiries? who do we work with, what do we do for them, and how do we do it.

A. Our Partners - Who Do We Work With?

Our work has focused on working with community *386 organizations and other organized groups (i.e., worker/tenant associations, community coalitions, and unions) that are committed to building power through collective action and strategic campaigns.

i. Partners With Organizing Capacity. Our work has been focused on groups who are sophisticated in mounting and directing campaigns and have a history of organizing. We have tried very hard to work with groups and organizers with a clear sense of the dynamics of an organizing campaign. Our experience is that relatively sophisticated organizing groups are able to avoid the pitfalls of working with lawyers, while newer or less experienced groups are much more prone to see lawyers and lawsuits as the “silver bullets,” regardless of the nature of the campaign.

A level of experience with organizing campaigns is also important because the maximum utility of our legal work is in support of an organizing campaign. Without an understanding of the development and implementation of organizing campaigns, it is difficult, if not impossible, to maximize the potential of our legal skills. Of course, as explained later, it is also vitally important that the lawyers have a clear sense of how organizing campaigns work.

Each of the groups we work with strives to be democratic, works in poor communities of color, consciously organizes, and is primarily an advocacy organization. All of these groups ebb and flow in campaigns, staff, and need for legal assistance. As explained in the next section, we work with groups that have a campaign or project in which we can be useful and that we can stay in contact with thereafter.

ii. Partners Without Organizing Capacity. We have worked on several occasions with organizations that have less internal cohesion and direction and, on occasion, tenant groups limited to a single building. While these efforts have generally resulted in positive short-term results, they have rarely resulted in any long-term organizational growth or systemic change. Building organizational strength and cohesion is a difficult process requiring skill and dedication. It rarely happens without dedicated and knowledgeable organizing infrastructure.

We have no organizer on staff. We have tried on a few occasions to operate as both organizer and lawyer when there was *387 no one in the group willing to take responsibility. Because some of our staff had experience organizing prior to law school, we felt empowered to try. Unfortunately, our experience is that such a dual role is almost always a failure. First, both organizing and legal advocacy are full time efforts. Trying to juggle them results in shorting one side or the other. But, more importantly, the roles of a lawyer and an organizer in an organizing campaign are very different. A major role of a community lawyer is attempting to delegitimize all the preconceived notions of the lawyer as savior and litigation as the answer to problems. Thus the lawyer is constantly trying to de-emphasize the centrality of the work of the lawyer and emphasize the importance of organizing and working together. Our observation is that the dual role makes that virtually impossible. Members of an organization are often steeped in our lawyer-centric culture and easily default to a reverence for lawyers and law. Thus any time the lawyer/organizer speaks to a group, they are perceived by the group as a lawyer, which further enshrines the centrality of the lawyers. Any empowerment and leadership development --the core elements of organizing?becomes almost impossible.

iii. Communities Without Partners. Given our paradigm, we have been asked what a legal advocate should do if they work in a poor or working class community without any community organizations. In response, it is initially difficult to imagine a community with no community organizations. Are there no churches, no unions, no student, parent or school related organizations? I would propose that there are always community organizations with indigenous leaders in any community. However, community lawyering demands a very close relationship with the community in order to locate

and relate to the indigenous community leaders/organizers. It requires accepting the community and its organizations as they exist and with the agendas that they have developed.

Sometimes the problem is that an advocate is searching for a community organization focused on a particular substantive area. Thus the expertise or focus of the lawyer dictates an assessment of the level of community organization. However, a community lawyer must respect the decisions of a community. For example, if a community is organizing itself around a struggle with the excessive discipline of their African American children, lawyers have no right to demand people organize around affordable housing. Indeed, it can be destructive to the local leadership. *388 Legal advocates desiring to assist those community struggles must develop expertise that is useful to the struggle or be rendered irrelevant.

iv. Our Capacity. Our initial goal was to become the go-to legal resource for grassroots organizing campaigns involving low-income communities of color in Miami. Thus, the groups we worked with were geographically limited to south Florida and principally Miami-Dade County. This created significant synergy, as many of the organizations and organizers with whom we worked knew each other and worked closely together. We did not expressly limit the substantive goals of the groups with whom we worked. However, much of our initial work focused on either housing/community development related campaigns or immigrant/worker related campaigns. This reflected our own expertise as well as the issues of most serious concern to the community organizations with whom we worked. These communities were suffering from the impact of uncontrolled development and gentrification, demolition of low-income housing, immigration enforcement and criminalization, and exploitation of low wage workers. Thus, those were the substance of the campaigns with which we worked.

Unfortunately, organizations involved in social change generally do not have an agenda that corresponds to a narrow legal specialty. Even those organizations whose work falls within a substantive area, such as landlord-tenant or foreclosure law, often need legal assistance in other areas, such as land use law, environmental law, or Constitutional law, in support of their campaigns. The types of legal expertise required to support these extremely varied demands are a major challenge for a project consisting of only three lawyers.

Organizing campaigns seldom ride on the backs of legal expertise. Most campaigns proceed without lawyers or, if litigation is a necessary component, use pro bono help from major law firms. However, these firms will seldom be sensitive to the larger goals of the campaign and frequently such assistance ends in conflict and confusion. If lawyers are to be helpful, powerful community organizations need legal assistance (as well as all other types of assistance) that will follow them seamlessly through various stages of a campaign and will not be limited by narrow substantive specialties or geography.

For us, while substantive diversity has always been a major *389 challenge, more recently the geographic diversity of our partners and their campaigns has presented an increasing challenge. As these groups have grown more sophisticated they have understood the need to expand their influence to the state level. This is a natural progression from local organizing efforts. For example, groups organizing homeowners in foreclosure in various communities were faced with state legislature attempts to gut the foreclosure process. They were forced to create state level legislative campaigns to defeat these measures.³³ A successful campaign to pass a Wage Theft Ordinance in Miami-Dade County was met with an effort to pass state legislation barring such local efforts.³⁴ Thus the coalition supporting such ordinances was forced to learn about state-level education, coalition building and lobbying. Perhaps most dramatically, immigrant groups were faced with the imminent threat of statewide legislation importing Arizona type anti-immigrant legislation and were forced to mount a massive state level response.³⁵ Each of these initial grassroots lobbying efforts was successful and resulted in some of the most significant legislative victories in recent Florida history.³⁶

These statewide campaigns created a challenge for us. On the one hand, we desperately wanted to continue being of service to these immigrant, wage theft and anti-foreclosure coalitions. Many of the traditional public interest lawyer/lobbyists had difficulty relating to grassroots efforts that did not see lawyers as central. At one televised legislative hearing, the statewide homeowner foreclosure coalition that had brought numerous people to the capitol to testify were calling our office? six hundred *390 miles away?for advice. It forced us to rethink our own limitations and our approach to statewide advocacy. Traditional statewide public interest policy advocacy/lobbying resources have a history of working in parallel formations with constituent groups, but seldom working for these groups. These public interest policy/lobbying advocates are often uncomfortable taking direction from anyone other than themselves or their fellow lawyers, which creates significant difficulty due to the fact that leading and empowering community organizations is a core component of any community organization's philosophy.

An optimum solution could be to add community lawyering resources dedicated to these statewide campaigns. Currently, we are engaged in educating our lobbying colleagues to utilize our skills and relationships with statewide community organizations as a more powerful model of representation than the untethered “public interest” model.³⁷

B. What Do We Do For Our Organizational Partners?

i. Substantive Goals. Substantively, we assist our partners with infinite variety. Depending on the campaign goals and our relationship with a particular organizer/organization, we support a campaign with a variety of tactics including litigation, policy advocacy, research, community education, and infrastructure/institution building. We have: conducted know-your-rights trainings; presented at public forums to advance campaign demands; worked with members to develop their public-speaking and writing skills; litigated individual cases on behalf of workers and residents; litigated actions on behalf of classes of workers, tenant associations or the base-building organizations themselves; assisted groups in drafting or wording policies or legislation; researched and provided technical assistance to develop a campaign strategy; and provided transactional and corporate advice to new and existing organizations.

While public interest/legal service providers tend to focus their representation through substantive priorities and expertise, the problems of communities are not so limited but often present *391 issues far more complex than any narrow substantive area of public interest expertise. Certainly many community advocacy organizations tend to focus on a particular type of member, e.g., organizing public housing tenants or day laborers. But this does not mean that their campaigns will be limited to any specific substantive law claims. For example, we have used environmental law to assist campaigns in opposition to immigration detention centers as well as inner city high rises. We have used relocation law and civil rights statutes to assist campaigns to prevent the demolition of public housing.

Given that there are only three attorneys in our project, the need for varied substantive expertise creates enormous difficulties. It requires attaining and retaining expertise in a wide variety of substantive areas or potentially losing relationships with organizing partners. Within the past several years we participated in the following: a campaign against a proposed immigration detention center, arguing that it was violative of the National Environmental Policy Act (NEPA); a campaign challenging a proposed high end condominium project proposed in a low income neighborhood, based on violations of the local zoning code and also violative of NEPA; drafting a local wage theft ordinance and participated in a campaign to obtain its enactment; a campaign to establish a moratorium on mobile home park conversions utilizing local land use laws; a statewide lobbying campaign to defeat a proposed statute that would dramatically limit homeowners' rights in foreclosure; challenges to the manner in which the state was implementing the minimum wage law; and challenges to the manner in which the City of Miami Beach was implementing its Living Wage Ordinance. We are currently participating in a number of campaigns to improve the working conditions of local taxi drivers - including legislative changes to the relationship between the drivers and the taxicab companies. We are also

currently assisting in the development of a community based organizing strategy designed to preserve communities by assisting in representing tenants in foreclosed buildings, homeowners in foreclosure and other interested neighborhood residents in preserving the human capital of the neighborhood. In each of these we relied, to a greater or lesser extent, on the substantive expertise of committed public interest or pro bono lawyers and, in the course of representation, developed our own expertise. But the bottom line is, if you want to be useful to community organizing campaigns you must be able to adapt to the needs of the campaign and try not to force the *392 campaign to adapt to your expertise.

ii. Campaigns and Organizing. We also believe that in order to be helpful to organizers and organizing campaigns it is extremely helpful to understand the dynamics of organizing. Many “public interest” lawyers have represented groups of clients in class actions or other types of class claims. These seldom involve much interaction with any more than one or two class members regardless of the size of the class. Landlord-tenant representation can sometimes involve closer interaction with groups of tenants living in the same building subject to a mass eviction or substandard conditions. A committed public interest lawyer might leaflet the building and call a meeting to explain basic law to the tenants. There might even be an attempt to get the tenants to attend the court hearings so the judge can witness their interest. Ultimately, the case settles with the tenants either individually or collectively resolving their claims? oftentimes by moving.

While this may provide benefits for the individuals, it is not what we mean by “organizing,” nor does it accomplish the goal of “organizing.” At best, it may be considered “mobilizing,” a term used to describe efforts to get a number of people to attend an event. In contrast, “organizing,” as we use that term, refers to a more sustained process whereby people come to understand and articulate a campaign's goals and empower themselves to continued action on behalf of those goals.

Organizing, like lawyering, follows some well-defined paths and organizers apply a number of fairly common tactics to different factual situations, which must be understood and appreciated by lawyers attempting to work with and support organizing campaigns. Lawyers occasionally utilize some of these tactics, but for different reasons. By understanding the purpose of these tactics, lawyers can adjust their work to maximize its impact. What follows is a brief overview of some of the most commonly used organizing campaign tactics and brief examples of how we have assisted organizers with respect to each.

1. Organizing/Base-Building Tactics

These include a wide array of outreach and member development strategies, including door-knocking, one-on-ones, *393 town-hall meetings, leadership development efforts, and know-your-rights trainings.

Lawyers can be powerful allies in base building. Public interest lawyers often provide “know your rights” trainings for client groups and participate in other public presentations. These trainings and presentations can be used in conjunction with organizational events to introduce the organization, build the organizational power, or simply provide added benefits to the organization members.

In addition, joining these events with organizing work makes them far more interesting and understandable. The “know your rights” events by lawyers are often dry recitations of the law. Many lawyers, in giving these presentations, fail to mention the practical difficulties in implementing these rights, leaving the individuals with a false sense of individual power. Conversely, other lawyers lay out the difficulties in excruciating detail, leaving the individuals with no hope. Both of these approaches can be the natural reaction of lawyers providing advice on rights they fear will be of little practical use in obtaining justice for the individual unrepresented client.

However, by consciously linking these trainings to organizing efforts and always insuring that organizational representatives are included in any public presentations, an attorney can dramatically increase the impact of her work on organizational development.

When presented in an organizing context, lawyers can talk about the dramatic impact of packing a courtroom with neighbors and organizational members. They can segue their talk into discussions of organizational campaigns to obtain both individual results and long term changes. Organizers can add presentations by group members who have prevailed through collective action. Rather than the organizing discussion being an add-on to the lawyer's presentation, it can be central? communicating to the participants that organizing is the central component of effective change.³⁸

Organizing campaigns will also always have an outreach *394 component. Lawyers often have access to outreach resources, such as law students, who often love the opportunity to go door to door and talk to individual families.

2. Communications & Media Tactics

A central component of many organizing campaigns challenging the status quo involves efforts to shift the public debate and reframe it in terms that are friendly to the organizing campaign. These tactics are particularly familiar to lawyers who frequently have heightened access to the press and public spokespeople. While theoretically simple, it is perhaps the most difficult in practice for lawyers to give up their positions of privilege and instead allow the campaign to determine both the message and the messenger.

Lawyers can create forums (through litigation and policy advocacy) and those forums can be utilized to further get the message out. One of those forums is a press conference. The media is accustomed to covering the filing of lawsuits and similar legal demands. Traditionally there is a statement by the lawyer, and possibly the client, a fact handout, and sometimes a background statement. The challenge is to turn that paradigm on its head. The community organization calls the press conference, and the lawyer takes a back seat. The organization explains any legal demands in conjunction with, or instead of, the attorney. The community organization develops talking points and spokespeople. To the extent that the attorney speaks to any media outlet, they subordinate their message to the message or the messenger of the campaign. It means that no messaging - whether leaflets, press releases, blogs, or op-eds - is utilizing the often powerful media resources of the lawyer without the direction of the organizational partner.

Lawyers, who deal so much with language, often feel that they can best develop and deliver any message. However, they ignore that the messenger is the most significant part of any message. It is vital to any organizing campaign that the organized constituency takes leadership in delivering the message. A heartfelt statement by a member, based on their personal experience, is worth infinitely more to the organization and its members, as well as to the public, than any well-drafted lawyers' press release. Similarly, every court hearing, often seen as simply a duel between lawyers, can instead be an organizing event packed with members and a schedule of events and *395 speakers.

Far more important than creating press conference opportunities, lawyers can force public hearings in which the organization itself can participate as a principal. We have successfully fought for a public participation process as part of environmental reviews and zoning hearings. While generally considered relatively meaningless procedural events, they can become major organizing and messaging events in the hands of skilled organizers. By creating political opportunities for a larger community debate, a community lawyer can help the organization influence the outcome, even when the litigation results in no direct impact on a project.

Leadership development is also part of any successful power building campaign. Every event-whether internal, external, public, or private-provides opportunities for organizational leaders to grow. Lawyers spend large parts of their lives in public and private meetings. In the hands of organizers, these events provide opportunities for leadership development and additional events in which the organizational members are seen as the true spokespeople, rather than the lawyers. All meetings with decision makers traditionally handled or headed solely by lawyers should be lead by organizational leaders. But, there are also a myriad of lawyer speaking engagements at law schools, bar groups, or other community leadership groups. Many advocates consider this a chore, but speaking arrangements can be transformed into part of an ongoing communication campaign by including or substituting organization and community leaders. This not only creates new introductions and additional forums, but also makes the event far more interesting to all involved.

We must finally mention that lawyers simply possess a great deal of information regarding existing public forums, such as when the county commission meets, where and when the agenda is posted, and what rules exist regarding speaking and signing up to speak. Simply sharing this information with organizations, which have little experience in these forums, assists them in feeling experienced and being empowered.

3. Policy Advocacy Tactics

Many, if not most, organizing campaigns are designed to influence public policy-whether it be elected government officials or unelected agency heads. These targets wield enormous power *396 over poor and disadvantaged communities and are, at least nominally, democratic institutions, with leadership more subject to public pressure than private corporations. In addition, unlike courts, lawyers are not necessary to participate.

We have all seen public interest lawyers speaking before commissions, school boards, town councils, etc., with little impact. Sometimes there are a few supporters in the audience, sometimes none. Yet there is probably no forum in which community organizing can have a greater impact. Each event can be an opportunity for an organization to exercise its power and leadership by packing the hall, picking the speakers, and otherwise conducting the presentation. This does not mean an attorney cannot speak; there are often important legal points. But the lawyer is speaking as the legal representative of the larger group and not as its spokesperson.

Lawyers should never underestimate the value of their information on what body has power to amend a policy, how often they meet, how their hearings work, who has power within that body, etc. Lawyers, like it or not, are the priests of the current system and possess enormous knowledge about how it works. They can either use that knowledge to preserve their privilege or put it at the service of the communities they serve.

Lawyers can also assist organizations in translating the organization's policy proposals into legislative language, as well as translating the legal language of existing policies into plain English. They can counter legal opinions that hinder proper consideration of the organization's proposals. They can also conduct supportive legal and factual research. But, ultimately, all policy proposals must come from the community's actual experience and must be understood, and defended by the community.

In addition, lawyers must ensure that organizations are aware that the most effective public policy advocacy occurs not in the public arena, but in formal and informal conversations with decision makers. Indeed, it is in these meetings that policy makers gather most of their information. Lawyers, lobbyists and others in power are familiar with these meetings. Lawyers can assist organizations in obtaining these meetings, preparing for the meetings, drafting policy proposals and, if necessary or *397 desired, can even accompany organization members.³⁹ However, to conduct these meetings without

using them to build the organization, its leadership, and its power, does a disservice to both the policy goal and the organization.

4. Direct Action Tactics

Organizations often engage in direct action-including rallies, marches, protests, sit-ins, taking over property, making repairs to buildings?to dramatize or emphasize their demands. Lawyers often shy away from participating in these activities because they may include confrontational activities that can result in arrests. However, experienced lawyers can be invaluable in providing relevant information to minimize any adverse potential before and during the event. While lawyers sometimes negotiate with police, law enforcement personnel, or private security, experienced organizers are often much better at handling security because they are closer to the demonstrators, are often seen as less threatening to police, and are more able to deescalate any unanticipated situation. However, should there be arrests or confrontations, it is essential that there be lawyers in a position to provide assistance.⁴⁰

5. Legal Tactics

Notwithstanding all of the above, organizations regularly employ legal/litigation tactics in organizing. In our experience the role of affirmative litigation, such as class actions, injunctions, etc., is almost always tactical. It creates forums. It can shape public opinion. It can provide a stage for dramatizing and demonstrating issues and demands. Injunctive relief, particularly preliminary injunctions, can delay the progress of a project while the organizing and education around the community's concerns take place. However, seldom does affirmative litigation result in a definitive community victory. Indeed, more often it distracts from the underlying struggle to achieve a lasting political victory. It delays any decision for years and distracts everyone's attention. Litigation often terminates any discussions that may have been taking place between the community leaders and the decision *398 makers. Thus, to undertake litigation without coordinating and supporting a community organizing initiative is often counterproductive, if not irresponsible.

Also, the legal claims in any litigation, while often sounding similar to the community demands, are often legally or practically significantly different. This only becomes apparent to the community at the time of settlement or judicial decision? when the "victory" of the lawsuit fails to address the community's basic demands. Finally, sophisticated defendants are turning litigation against the plaintiffs, using it as an excuse to undertake intrusive discovery into the affairs of the plaintiff organization. With courts increasingly unwilling to protect plaintiffs from these attacks, significant resources are diverted in a defensive struggle.

Nevertheless, the tactical advantages of affirmative litigation should never be overlooked. Most important of these tactical advantages is the potential for delaying an adverse decision while organizing advances the public debate and the possibility of a political victory. Affirmative litigation creates a powerful communication piece to dramatize the underlying debate. Sometimes legal claims can force changes in a project that, although entailing only minor improvements, may render an objectionable project or policy infeasible, but any advantage must always be weighed against the negatives. No matter how much a community is educated that their "victory" will not come through the courts, affirmative litigation has an immediate, powerful, game changing attraction. Yet experience dictates that affirmative litigation, without concurrent political organizing, rarely results in a long-term victory for community demands.

Defensive or protective litigation can often be useful. Protecting tenant leaders from eviction or homeowners from foreclosure can often provide short-term meaningful and symbolic victories. In addition, handling a number of individual cases, such as individual wage claims or evictions, can significantly support an organizing campaign. Most importantly, it

can provide real additional benefits to organizational members, incredibly useful information and statistics, and pressure greatly in excess of major litigation. Similarly, litigation to obtain public records can provide useful information to support a communications or policy campaign.

***399** 6. Other Tactical Help

a. Providing Time

Many organizing campaigns are designed to oppose a planned policy or project that will significantly harm the affected community. Often the affected community is kept in the dark about the details of the project until the last possible moment. Thus, these campaigns are almost always playing catch up. Legal advocates can often create some time for community leaders to educate their fellows and build support by ensuring that the governmental or private powers comply exactly with every procedural and substantive requirement. Often these requirements were placed in the law specifically to require a fuller debate, but have been rendered meaningless by uncaring or unsympathetic decision makers. Many mandate some type of public participation, which, if identified and enforced, can be a powerful tool in the hands of a community organization. At least they can provide additional time to build public opposition to a project.

b. Utilizing Routine Types of Cases

I have often heard comments by advocates to the effect that it would be impossible to import the values of community lawyering into their practice because: (a) they handle a volume of small individual cases, or (b) they are private practitioners who must charge, or (c) some other constraint on their practice prevents them from utilizing these practices. It is important to remember that the essential element of community lawyering is that it is in support of, and lead by, an organizing effort. Any type of advocacy can be adapted to support an organizing effort if there is an intentional and planned effort to do so. Take for example an advocate required by her employer to handle a high volume of landlord-tenant practice. If the advocate is aware of a community organizing effort involving tenants, she can work with a tenant organizing effort and fill her docket with cases associated with that effort. In addition, her community education efforts can be in support of the community organization conducting the organizing and she can provide know-your-rights trainings to the staff and the members. She can even influence the practices of her fellow advocates, further increasing the resources available. All of these efforts, if done in an intentional and supportive manner, can provide priceless assistance to an organizing effort. Thus, while it is easier if you have the freedom to take on cases in different ***400** substantive areas, requiring different levels of resources, you must shape your advocacy, whatever its makeup, to best serve the needs of an empowered community. And do not ever be afraid to simply ask how you might be most useful, with whatever limitations presented.

C. How Do We Work With Our Partners?

As important as what we do, is how we do it. Through every case, we hope to be expanding the collective knowledge skill base within the community organization. We believe that our clients (whether organizational or individual) are partners-not just in name, but in leadership, control and decision-making. The lawyer-client relationship is rife with power dynamics that do not evaporate simply because the long-term goals of the lawyer are aligned with that of the organizer or client. Therefore, we also believe that community lawyers must be engaged in a regular practice of self-scrutiny and self-reflection. If a lawyer wants to practice law in a respectful, responsible and accountable manner, we believe she has to be constantly evaluating her work to determine if it perpetuates the very systems of oppression that she is fighting. Poor communities of color face multiple and intersecting injustices and good lawyering requires a deep understanding of race, class, and power.

This working relationship plays out in some very specific ways that differ dramatically from the manner in which many public interest lawyers work with groups. A typical public interest lawyer may be interested in expanding access to food stamps for low-income immigrant children. She will seek out an organization also interested in food issues and have them find individuals to act as plaintiffs for a potential lawsuit and as examples of needy children. Our work is to assist community organizing campaigns accomplish their campaign goals, including organizational and substantive goals. Thus, the organization must be constantly providing the leadership and the campaign strategy. Consistent with our understanding of the nature of change, a victory is only lasting if it is political, i.e., a result of a shift in the power dynamics. A lawsuit, even a lawsuit that results in an order requiring additional food stamps for immigrant children, is not effective unless it also results in the building of organizational and political strength to maintain and implement the victory.

As a result, we seldom engage in classic “law reform” cases *401 designed to win an all-encompassing legal victory. Frequently, we engage in litigation or advocacy which simply provides forums for highlighting the demands of the organization and building organizational strength. For example, one community organization discovered that the local government had developed a plan to redevelop their neighborhood in a manner which they believed would eliminate most of the local small businesses and would produce no new affordable housing or community friendly uses. The plan, which was already largely completed, was to be financed with federal transportation funds. The community organizations immediately began to mobilize to develop a counter-proposal but needed both time and a process, which would allow consideration of their input. A legal challenge to the perfunctory environmental impact statement, which the local government had produced, resulted in an order from the federal funding agency to redo the environmental analysis. We then worked with the community organization to demand public hearings as part of the environmental process. The community organization used the time to galvanize the local community and effectively used the public hearings to both voice an alternative vision and demonstrate public support for that vision. The end result was a radically different plan with community supported elements.

Our understanding of the campaign strategies of our clients also informs the way we structure our representation. Community organizations with whom we work tend to have fairly clear organizing campaigns, each with fairly set goals and staff. We have tried to be retained for specific campaigns where the community organizations and ourselves can lay out a specific plan of action with specific goals. We have generally not operated as “house counsel” or engaged in open-ended representation with these groups, although we have always maintained ongoing contact through community coalitions and task force work. We have tried to maintain a model in which there are clear parameters to our relationship, as we believe it furthers a model in which the community organization/client controls and leads the fight. It also allows us to shepherd our resources for campaigns where we can provide useful assistance.

Thus, for example, we have worked with a community organization in a multiyear campaign against the demolition of public housing. Within that campaign there were other smaller campaigns to fill vacant units, and to modify the waiting list, all *402 separate from, but related to, the larger struggle. The overall campaign, as well as each smaller one, had its own goals, strategies and tactics. The overall campaign lasted for over ten years and involved every aspect of an organizing campaign? outreach, media, local and national advocacy, and coalition building, etc. We assisted the organization throughout the campaign with litigation, education, advocacy, etc. However, there was always a clear understanding that we were working on the Save Our Homes campaign, or one of the other smaller campaigns and not on other actions or the internal work of the organization. Similarly, we assisted an immigrant coalition in a fight against the construction of a massive immigration detention facility in South Florida. Again, while we have a close working relationship with the organization, we had a clear understanding as to the parameters of our employment. Candidly, this model has been less rigid and less successful with less sophisticated organizations in which our role has been more ongoing and less well defined. This has led to increasing demands on our services and far less clear differentiation of roles.

Our Own Agenda A fundamental question that we have struggled with throughout our existence is whether we, as an organization, have an agenda other than the agenda of our organized partners. Flowing from our work to support the campaigns of our partners, there is a strong tendency for us to argue that we have no agenda of our own. If we are professionals then we serve our clients and their organizing agendas. Following that view we are just like doctors or automobile mechanics, largely technocrats, making our skills available to serve our client constituencies.

Our initial adherence to this principle was also partly a reaction to the strong substantively driven agendas of more traditional public interest organizations. These organizations are often extremely cautious in working in coalitions of member driven organizations. While they will ascribe this caution to protecting the independence of their client representation, it more often appears that it is simply a fear of loss of control over their narrow substantive agenda. They fear any loss of independence in advocating strongly for these very specific goals, which might result from working with (or for) broad based, democratic organizations.⁴¹

***403** Our experience is that many community organizations strongly oppose working in concert with, or being represented by, legal organizations that have an independent substantive agenda. Many community organizations have had experiences where their larger goals are trivialized or ignored by the lawyers? both in litigation and in the public arena. Many are approached by lawyers requesting a specific type of person, injured by a specific policy in a specific way, solely to facilitate the lawyer's legal challenge to that policy. Strangely, our view that our work must be accountable to actual organizational constituencies that have the strength to lead and direct that work is much closer to the traditional lawyer-client relationship than many of the "public interest" models in which clients are only nominally involved.

However, while we have argued that we are not driven by a substantive agenda, we do choose the groups we work with and we choose the campaigns we provide legal support to, so it is disingenuous to describe our work as solely a representation of organized constituencies. We ultimately must take responsibility as political actors making choices with real world consequences. As a step in providing some principles for our decision-making process, we developed a set of criteria by which we evaluated our choices. These included, among others, the degree to which the campaign would result in tangible benefits received by low income families and communities, the degree to which the campaign built the power of the community organizations, the degree to which it was likely to change the terms of the debate in favor of the needs of low income minority communities, the degree to which it helped build the next generation of community lawyers, and the degree to which it sustained our organization. One could certainly debate the legitimacy of this criteria and the legitimacy of the determination. One of our next steps is to create a community board to assist with the determination of these criteria.

This same conflict arises in another area. We, as attorneys, are significant repositories of knowledge and experience. We may have dozens of years of experience interacting with local, state, and national governmental bodies and their policies. How do you make that knowledge available without further reinforcing the centrality of lawyers? While that information may indeed be useful to a campaign, it is almost impossible to divorce the message from the messenger. Time and again I find myself not opening my mouth because I know that whatever I say will be ***404** given a weight far beyond its worth and, more dangerously, will undercut the leadership development of the organization. On the other hand, it is important that all useful information be taken advantage of. Where to draw this line has been a fundamental and long-standing struggle. Perhaps my best advice is to develop sufficient mutual trust that allows for information flow in a partnership fashion through the organizers. But, I am not at all comfortable that I have any clear or satisfactory response to this other than to say, "When in doubt keep your mouth shut."

III. CONCLUSION

Throughout the country there is increasing sophistication to grassroots social justice activism. Contrary to popular culture, lawyers are not seen as central, or even necessary, to these social justice movements. Social justice lawyers must struggle to remain relevant and helpful.

This article attempts to describe the practice of one group and the principles they have extracted from that struggle. While the practice does not elevate the role of the lawyer, it nevertheless requires the most sophisticated of legal skills. It is not limited to any substantive area or type of practice. Rather its principles are adaptable to all practices. It also requires lawyers to learn the practice and ideology of organizing and the organizers with whom it works. It rejects legal labels and constructs, such as “service” or “impact” cases, and instead adopts the goals and language of the organizers.

This article is not so much a prescription as it is an invitation for social justice lawyers to reflect on their own practice, determine to what extent the principles that we describe are relevant and/or helpful, and to further refine and develop those principles. It is hoped that it can further the discussion among experienced practitioners and encourage young lawyers to reflect on and improve their practices.

“The radical, committed to human liberation. . . does not consider himself or herself as the proprietor of history or of all people, or the liberator of the oppressed, but he or she does commit himself or herself, within history, to fight at their side.” --Paulo Freire, *Pedagogy of the Oppressed*

Footnotes

^{a1} Director of Community Justice Project of Florida Legal Services, J.D. University of Southern California, B.S. St. Joseph's University. The author has been a lawyer since 1972, practicing in California and Miami. In 2006, I was joined in that practice by two young committed lawyers and the three created the Community Justice Project of Florida Legal Services in Miami to undertake a conscious, self reflective “community lawyering” practice. Many of the reflections of this article come from the experiences of that project, the original lawyers, and their successors, as well as the prior experiences of the author. I would like to express my gratitude to Amy Duncan and the associate editors who worked on this article for their excellent suggestions and encouragement. I also want to particularly thank my current and former colleagues in the Community Justice Project, including Purvi Shah, Jose Rodriguez, Jennifer Newton and Meena Jagannath for their inspiring work and their insights and reflections on the work, many of which are reflected in this article.

¹ There are literally hundreds of excellent articles on various aspects of what we call “community lawyering,” a few of which present topics discussed in this article and reference many other relevant articles. See, e.g., William P. Quigley, Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth, 20 Wash. U. J.L. & Pol'y 101 (2006); William H. Simon, Introduction: Lawyers and Community Economic Development, 95 Calif. L. Rev. 1821, 1823 (2007); Scott L. Cummings, The Pursuit of Legal Rights--And Beyond, 59 UCLA L. Rev. 506 (2012); Jennifer Gordon, Concluding Essay: The Lawyer is Not the Protagonist: Community Campaigns, Law, and Social Change, 95 Calif. L. Rev. 2133 (2007); Purvi Shah & Chuck Elsesser, Community Lawyering, Organizing Upgrade (June 1, 2010), [http:// www.organizingupgrade.com/index.php/modules-menu/community-organizing/item/71-purvi-amp-chuck-community-lawyering](http://www.organizingupgrade.com/index.php/modules-menu/community-organizing/item/71-purvi-amp-chuck-community-lawyering); Anthony V. Alfieri, Fidelity to Community: A Defense of Community Lawyering, 90 Tex. L. Rev. 635 (2012); Lucie E. White, To Learn and Teach: Lessons From Driefontein on Lawyering and Power, 1988 Wis. L. Rev. 699, 700-01 (1988); Angelo N. Ancheta, Community Lawyering, 81 Calif. L. Rev. 1363, 1366 (1993); Zenobia Lai et al., The Lessons of the Parcel C Struggle: Reflections on Community Lawyering, 6 Asian Pac. Am. L.J. 1, 2 (2000). I would further recommend anything by William Quigley, Gary Bellow or Lucie White as my personal inspiration.

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- 2 See Drew D. Hansen, The Sit-Down Strikes And The Switch In Time, 46 Wayne L. Rev. 49, 50 (2000).
- 3 See, e.g., Taylor Branch, Parting the Waters: America in the King Years 1954-63 524-56 (1988) (discussing C. B. King's work).
- 4 See Earl Johnson, Justice and Reform: The Formative Years of the American Legal Service 21-35 (1974).
- 5 See William P. Quigley, Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth, 20 Wash. U. J.L. & Pol'y 101, 148-66 (2006).
- 6 Ellen Hemley, Supporting Local Communities Through Community Lawyering, 45 Clearinghouse Rev. 505, 505-06 (2012).
- 7 Id.
- 8 See, e.g., Richael Faithful, Toward The Heart Of Justice, 69 Nat'l Law. Guild Rev. 239 (2012).
- 9 See, e.g., Cummings, *supra* note 1, at 1617. See Lai, *supra* note 1, at 2.
- 10 See Lucie White, Paradox, Piece-Work, and Patience 43 Hastings L.J. 853, 855 (1992) (stating, "theory becomes a habit of ongoing conversational reflection about how to describe problems, make alliances, devise strategies and thus move together toward a better world"). This article is an attempt to heed this admonition from Professor White.
- 11 See, e.g., The Publ'ns Div., New Delhi, The Collected Works of M.K. Gandhi 241; See also <http://www.gandhitopia.org/forum/topics/a-gandhi-quote> ("If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him."); Dr. Martin Luther King Jr., Letter from Birmingham City Jail (April 16, 1963) ("[F]reedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."); Cesar Chavez, Address to the Commonwealth Club in San Francisco (Nov. 9, 1984) ("Once social change begins, it cannot be reversed. You cannot un-educate the person who has learned to read. You cannot humiliate the person who feels pride. You cannot oppress the people who are not afraid anymore."); Paulo Freire, Pedagogy of the Oppressed: 30th Anniversary Edition 65 (2006) ("It is only when the oppressed find the oppressor out and become involved in the organized struggle for their liberation that they begin to believe in themselves. This discovery cannot be purely intellectual but must involve action; nor can it be limited to mere activism, but must include serious reflection[.]").
- 12 See Gary Bellow, Turning Solutions Into Problems: The Legal Aid Experience, in NLADA Briefcase 106 (Aug. 1977), available at <http://www.garybellow.org/garywords/solutions.html>. See also Marc Feldman, Political Lessons: Legal Services for the Poor, 83 Geo. L.J. 1529 (1995). While these authors' observations support my general descriptions of what is often termed "public interest" practice, the descriptions contained in this article are based largely on my own experiences and observations throughout my past forty years of practice.
- 13 Matthew Desmond, Eviction and the Reproduction of Urban Poverty, 118 Am. J. Soc. 88, 101 (2012).
- 14 See generally Bellow, *supra* note 12. See Feldman, *supra* note 12, at 1548-49.
- 15 See generally Bellow, *supra* note 12. See Feldman, *supra* note 12, at 1543-44.
- 16 Antoinette Sedillo Lopez, Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training, 7 Clinical L. Rev. 307, 308-11 (2001).
- 17 For an excellent critique of the false and harmful dichotomy of "service" versus "impact" cases which underly much of the lawyer-centrist work criticized in this article see Rebecca Sharpless, More Than One Lane Wide: Against Hierarchies Of Helping In Progressive Legal Advocacy, 19 Clinical L. Rev. 347, 358-59 (2012).
- 18 Lopez, *supra* note 16, at 318-21.
- 19 See sources cited *supra* note 12.

- ²⁰ See Scott L. Cummings & Ingrid V. Eagley, A Critical Reflection On Law And Organizing, 48 UCLA L. Rev. 443, 493-96 (2001) (describing the role that confusion and contradictions inherently plays in lawyers acting as organizers).
- ²¹ See Bellow *supra* note 12. See also William P. Quigley, Letter To A Law Student Interested In Social Justice 1 DePaul J. Soc. Just. 7 (2007).
- ²² *Id.*
- ²³ Many funding sources, including the Legal Services Corporation (LSC), have severe restrictions on who can be represented and how they can be represented. For example, LSC prohibits organizing, soliciting, representing incarcerated individuals, conducting class action lawsuits, and lobbying by lawyers funded in whole, or in part, with LSC funds. Alan W. Houseman, Restrictions By Funders And The Ethical Practice Of Law, 67 Fordham L. Rev. 2187, 2188-2193(1999); see also Selena Spain & Jean Wiley, The Living-Wage Ordinance: A First Step in Reducing Poverty, 32 Clearinghouse Rev. 252, 266 (1998) (examining the tensions created by funding restrictions in trying to work in campaigns that involve influencing local governments); see William P. Quigley, The Demise Of Law Reform And The Triumph Of Legal Aid: Congress And The Legal Services Corporation From The 1960's To The 1990's 17 St. Louis U. Pub. L. Rev. 241, 264(1998) (discussing a more pessimistic, but no less realistic view of the impact of the LSC restrictions on the practice of community lawyers).
- ²⁴ See Michelle Alexander, The New Jim Crow; Mass Incarceration in the Age of Colorblindness 225-27 (2012); Derrick Bell, Law, Litigation, And The Search For The Promised Land, 76 Geo. L. J. 229, 232 (1987) (describing the belief that the civil rights gains of the 1960s were the result of carefully planned litigation).
- ²⁵ See A Civil Action (Touchstone Pictures 1998); Erin Brokovich (Universal Pictures 2000); Amistad (DreamWorks Pictures 1997); The Chamber (Universal Pictures 1996); Conviction (Fox Searchlight Pictures 2010); Raymond H. Brescia, Line In The Sand: Progressive Lawyering, "Master Communities," And A Battle for Affordable Housing In New York City, 73 Alb. L. Rev. 715, 724-29 (2010).
- ²⁶ Brown v. Bd. of Educ., 347 U.S. 483 (1954).
- ²⁷ Alexander, *supra* note 24, at 225-27.
- ²⁸ See generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring about Social Change? (2008).
- ²⁹ See Hansen, *supra* note 2, at 50.
- ³⁰ Alexander, *supra* note 24, at 225.
- ³¹ Alexander, *supra* note 24, at 226.
- ³² William P. Quigley, Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations, 21 Ohio N.U. L. Rev. 455, 457-58 (1994) (quoting Ron Chisom's reflections on the role of lawyers in community organizations).
- ³³ See Peter Phillips, PICO United Florida rips foreclosure bill, Pico Nat'l Network (Feb. 12, 2013), <http://www.piconetwork.org/news-media/coverage/2013/pico-united-florida-rips-foreclosure-bill> (describing the statewide effort of PICO United Florida).
- ³⁴ See Wage Theft Preemption, Fla. Retail Fed'n, [http:// www.frf.org/index.php/government-affairs/legislative-issues/loss-prevention/63-wage-theft-preemption](http://www.frf.org/index.php/government-affairs/legislative-issues/loss-prevention/63-wage-theft-preemption) (last visited Mar. 21, 2013).
- ³⁵ In 2011, the Florida Immigrant Coalition led a statewide campaign that opposed passing legislation, modeled after Arizona law, that would dramatically restrict immigrants' rights in Florida. The campaign in opposition included almost daily events at the State Capitol in Tallahassee, as well as an unprecedented statewide grassroots lobbying campaign. Ultimately, despite passing several committees, the bill was defeated. Eduardo Garcia, FAILED: Florida Not Yet Becoming the Next Police State, Campus Progress (May 9, 2011), http://campusprogress.org/articles/breaking_news_florida_inches_closer_to_becoming_the_next_police_state/.

36 Id.

37 See John Bouman, Power of Working with Community Organizations: The Illinois FamilyCare Campaign?Effective Results through Collaboration, 38 Clearinghouse Rev. 583 (2005) (describing the tensions of working with community organizations that have separate agendas).

38 Some organizers don't like lawyers participating in their meetings. Nevertheless, lawyers can operate as a draw and the lawyer discussions can be handled outside of the regular meeting.

39 It is extremely difficult and requires significant preparation for a lawyer to attend these meetings without becoming the focus of the meetings.

40 Our project does not provide criminal defense assistance and has only very rarely been involved in advising groups over civil disobedience resulting in unanticipated arrests.

41 Bouman, supra note 37.

The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change

Gabriel Arkles
Pooja Gehi
Elana Redfield

INTRODUCTION

We are at a critical moment in the movement for social justice for transgender¹ (trans) communities and particularly for thinking critically about the role of lawyers in that movement. A decade ago, almost no institutionalized legal advocacy around trans issues existed. Mainstream lesbian, gay, bisexual, and transgender (Lgb“T”)² legal rights organizations almost entirely excluded transgender people and issues, and no transgender-specific legal organizations existed. Now, there are several transgender-specific legal organizations including the Sylvia Rivera Law Project (SRLP); the Transgender Law Center; the Transgender, Gender Variant, and Intersex (TGI) Justice Project; the Transgender Legal Defense and Education Fund; Massachusetts Transgender Legal Advocates; the Imprinta Transgender Law Project; and the Transformative Justice Law Project of Illinois. Additionally, mainstream Lgb“T” organizations have begun to engage in more litigation on behalf of transgender individuals. The authors of this article are three attorneys who work at SRLP³ in the areas of direct services, impact litigation, policy reform, and public education.

In our work at SRLP, the question of how best to use our privilege and skills as lawyers to help improve our clients' health, safety, and life chances⁴ without reinforcing systems and structures that hurt and disempower our clients has constantly challenged us. We often find

ourselves in disagreement with larger LGB“T” legal organizations when answering these questions. In particular, we have faced conflict when trying to bring the experiences and leadership of low-income trans people of color to the table to set the agenda for the movement.

Underlying much of this conflict is a question about the role of legal advocacy in empowering transgender and gender-nonconforming people who are low income and/or people of color. Broadly speaking, almost all national LGB“T” legal advocacy since its inception in the 1970s has focused on attaining “formal legal equality” in legislation and court decisions, particularly in the areas of sodomy laws and gay marriage.⁵ The common framing is that gay people are just like everybody else—they deserve the same rights and entitlements as straight people.⁶ This approach reinforces the idea that the entitlements of capitalism and democracy (such as privacy, property, independence, the pursuit of wealth, and formal marriage), as they exist in our current neoliberal economic system, are the things that we all (including gay and lesbian people) want, and that these entitlements benefit us more than any other goals we might otherwise pursue.⁷ Furthermore, this thinking assumes or implies that homophobia, transphobia, violence, and premature death of trans and queer⁸ people would be mitigated by the (hetero) normalization of gay identity within the narrative of consumerism, privacy, national security, and safety that the law embodies and protects.⁹

However, this same system of government results in countless forms of injustice. An alarmingly disproportionate number of African American, Native American, and Latin@ people are incarcerated as a result of the exponential expansion of prisons since the 1980s and “tough on crime” initiatives, such as the War on Drugs and the War on Poverty, which criminalize poverty and scapegoat communities of color.¹⁰ Our private healthcare system is unaffordable and profit centered, and our public healthcare system fails to provide basic healthcare to those enrolled,¹¹ particularly transgender people seeking access to gender-affirming care.¹²

Increased gentrification of our cities results in the displacement of low-income communities through eviction, foreclosure, and increased policing.¹³ Immigrant communities are racialized and scapegoated as terrorists and freeloaders.¹⁴ Structural barriers, such as criminalization and incarceration, lack of identification, and transphobia in families and schools, make access to education functionally inaccessible.¹⁵ Transgender and gender-nonconforming low-income communities and communities of color are increasingly unable to obtain shelter, jobs, public benefits, safety, or survival.¹⁶

These experiences directly impact the communities we serve. We believe these circumstances are foundational and essential to our legal system, rather than incidental to it.¹⁷ Capitalism and American democracy operate on a presumption of scarcity:¹⁸ if resources or the benefits of society are scarce, then they must be conferred upon some and denied to others. Thus, law privileges the “deserving” and oppresses the “undeserving.”¹⁹ Whiteness, maleness, richness, greediness for wealth, Christianity, non-disabled bodies, heterosexuality, and gender normativity are some of the values privileged by American laws and social policies, and people with the most privilege have the most power in determining future laws and policies. A legal strategy that merely extends existing rights and values to include gays, lesbians, bisexual people, and transgender people without looking at the racism, classism, ableism, homophobia, transphobia, xenophobia, and corruption that maintain capitalism will only protect the structures of empire that oppress poor people and people of color.

Conversely, our analysis centers on the idea that the structures that result in decreased life chances for members of our communities, and for all people of color, poor people, trans people, queer people, and people with disabilities, are deeply rooted in and inextricably linked with the legal system as we know it. If the problems faced by our communities are rooted in and enforced by the legal system, then meaningful change would have to come from outside of it. As such, we believe in a theory of change based in

mass mobilization of communities, rather than elite (strictly legal) strategies. This belief comes from an understanding that significant change for those on the bottom has never been granted from those on top. We believe that the most significant, lasting, and sustainable way to make change is through community organizing that mobilizes those persons directly impacted. Nonetheless, we believe there are many important ways for lawyers to support social movements.

SRLP has long participated in spaces such as roundtables, conferences, and law school symposia, where lawyers may identify, discuss, adopt, and pursue various strategies for advancing the rights of queer and trans people. However, all too often, these spaces exclude nonlawyers²⁰ from participation and these spaces recreate the very forms of oppression we must dismantle to achieve social justice. This article explores the problems these exclusions cause.

As transgender legal work continues to develop and grow, we believe it is crucial to consider what lessons we can learn from lawyer participation in other social movements. In particular, we examine the ways in which lawyers may intentionally or unintentionally consolidate power in social movements and undermine the potential for systemic change and social justice. Applying these considerations to transgender legal advocacy, we offer alternative frameworks that permit lawyers to participate in and support social movements without replicating structures of oppression. These frameworks are rooted in the creation of spaces of collaboration, with community-organizing principles at their heart.

First, we discuss the history of lawyer-only spaces in the LGB⁺T⁺ movement and explore our own participation, or lack of participation, in three particular spaces: the Lavender Law Conference, the LGBT Litigators' Roundtable, and the Transgender Roundtable. We offer examples of our experiences, hopes, and concerns in these spaces.

We then seek to situate these experiences in a broader context, by looking at some of the roles lawyers have played in other social justice movements.

We will identify some patterns of public interest lawyers working in social movements and the limits they impose on those movements. We end this section with a discussion of the ways in which lawyers have (often negatively) impacted the agenda and outcomes of the LGB“T” movement.

Next, we explore alternative ideas for how lawyers may participate in social movements. We begin by discussing a framework for social change, with a focus on community-organizing principles. Then, using an “empowerment” lawyering model for public interest lawyers, we discuss the ways in which lawyers can take leadership from, and support the goals of, community-organizing projects, particularly in the context of trans liberation.

Last, we discuss three examples of agenda-setting by the most impacted communities—the campaign to end trans discrimination at New York City’s Human Resource Administration, the prison-abolitionist work of the Transforming Justice Alliance, and the People’s Movement Assemblies of Project South—as means for setting movement goals. We explain the ways that lawyers have participated in those projects, and argue that these models can guide us as legal advocates toward supporting a truly radical movement for transgender liberation.

I. ~~LAWYER-ONLY SPACES IN THE LGB AND TRANS MOVEMENT~~

~~Lawyer-only spaces²¹ are common within the legal profession. Events at law schools typically function as a space in which only current and future members of the profession converge to share information, discuss, debate, and strategize around a specific area of law.²² Since we began practicing, we have spoken at many law symposia as well as other, smaller panel discussions at law schools. At almost all of these discussions, every panelist has been either a lawyer or law professor. As we prepare for these discussions, we anticipate an all-lawyer audience with an all-lawyer panel that is centered on all-legal rhetoric.~~

B. How Lawyer-Centered Leadership has Co-Opted the Struggles of LGB“T” Communities

Agenda-setting is one of the most critical moments for recognizing and taking leadership from the most-affected members of a vulnerable group. Unfortunately, attorneys engaged in LGB“T” movement work have certainly done no better, for the most part, than attorneys engaged in other forms of social justice work. As a group, we do not seem to have taken seriously many of the critiques of traditional models of public interest lawyering or lessons learned in struggles for racial and economic justice. Throughout the history of the LGB“T” “movement,”¹³⁹ lawyers have co-opted grassroots trans and queer organizing in an attempt to cohesively move (our) goals forward. These goals—mainly overturning anti-sodomy laws, securing anti-discrimination and hate crimes legislation, and more recently, legalization of same-sex marriage¹⁴⁰ are not, and have never been, reflective of the needs of trans and queer people who are most marginalized.¹⁴¹ As Dean Spade and Rickke Mananzala explain:

Countless scholars and activists have critiqued the direction that gay rights activism has taken since the incendiary moments of June 1969 when criminalized gender and sexual outsiders fought back against police harassment and brutality at New York City’s Stonewall Inn. What started as street resistance and nonfunded ad hoc organizations, initially taking the form of protests and marches, institutionalized in the 1980s into non-profit structures that became increasingly professionalized. Critiques of these developments have used a variety of terms and concepts to describe the shift, including charges that the focus became assimilation, that the work increasingly marginalized low-income people, people of color, and that the resistance became co-opted by neoliberalism and conservative egalitarianism. Critics have argued that as the gay rights movement of the 1970s institutionalized into the gay and lesbian rights movement in the 1980s—forming such institutions as Gay and Lesbian Advocates and Defenders, the Gay and Lesbian Alliance Against Defamation, the Human Rights Campaign (HRC), Lambda Legal Defense and Education Fund,

and the Gay and Lesbian Task Force—the focus of the most well-funded, well-publicized work on behalf of queers shifted drastically.¹⁴²

The assimilation and co-optation of the LGB“T” movement is easily detectable through the ways in which trans and queer people are and are not presented in the media—which people are hyper visible, which people are made invisible, and how various identities are portrayed.¹⁴³ Nowhere is there a discussion of discrimination against trans and queer people of color or the ways in which homophobia and transphobia intersect with other forms of oppression. Rather, the most common images are of (mostly) white, wealthy, monogamous, same-sex, non-trans, gay or lesbian couples struggling for “equal rights,” but never housing, healthcare, jobs, or education.¹⁴⁴ Not coincidentally, the same rights model portrayed in U.S. media is replicated, almost exactly, in the legal landscape. In this context, however, it is named a “movement,” rather than “popular culture.”

For example, gay marriage is a “movement” topic that receives a large amount of publicity, funding, and hours of legal work within the mainstream LGB“T” rights framework.¹⁴⁵ However, many scholars and activists have critiqued the quest for marriage inclusion from feminist, racial justice, anti-capitalist, anti-ableist, and other critical perspectives. Securing the right for GLB people to participate in this institution only replicates already existing capitalist structures. As Marlon Bailey explains, the gay marriage movement is led by white, middleclass gays and lesbians who would largely benefit from it. Because these people already have a fair amount of societal privilege, marriage is “the icing on the cake.”¹⁴⁶ However, that movement has thus far failed to address the needs of disenfranchised people of color.¹⁴⁷ Winning the right to same-sex marriage will not help trans or queer people—unless they are already privileged in our society or if they are partnered with people who already have access to privileges, such as wealth, immigration status, jobs, healthcare, and housing.

Most large, well-funded LGB⁺T legal organizations only engage in impact litigation and commonly select priorities based on conversations with other attorneys. Some LGB⁺T impact litigation organizations even have language in their retainer agreements to permit them to withdraw from representation if the client takes a position that the organization, in its sole judgment, determines to be detrimental to the social justice goals of the organization. By doing this, these organizations explicitly set the attorneys' views of what would best promote social change over the view of their client, who is also presumably the person most impacted by the outcome of the case.¹⁴⁸

As in other movements, legal victories for LGB⁺T communities sometimes have disappointingly limited impact. For example, *Lawrence v. Texas*¹⁴⁹ appears to be an extraordinary litigation victory, overturning virulently homophobic case law that allowed state law criminalizing sodomy to stand. However, if one hope for *Lawrence* was that it would decriminalize consensual queer sex, it has fallen woefully short. While many (white) queers celebrated the victory in the streets, and we (queer attorneys) congratulated our colleagues on their outstanding work, conditions did not improve for many thousands of trans and queer people. For example, low-income and homeless individuals are criminalized for surviving through sex work;¹⁵⁰ youth are criminalized for consensual sex through selective enforcement of age of consent laws;¹⁵¹ people without access to safe private spaces are criminalized for having public sex;¹⁵² people in prison are punished with solitary confinement and loss of good time for consensual affectionate or sexual contact with other prisoners;¹⁵³ HIV-positive people are criminalized for having sex with HIV-negative people;¹⁵⁴ and people of color are arrested for literally no reason other than transphobia, racism, and homophobia.¹⁵⁵ While *Lawrence* ended certain anti-sodomy laws, it resulted in the false impression that the criminal justice system was no longer homophobic. Thus, the law shifted to make the

system look facially neutral while continuing and preserving the status quo.¹⁵⁶

Not unlike other movements, legal victories on behalf of our communities may ultimately work against the very same communities. A good example is hate crimes legislation.¹⁵⁷

We are deeply concerned with hate violence perpetrated against our communities, whether by the state or individuals. We are keenly aware that transgender women of color and other queer and trans people experiencing multiple forms of oppression are particularly vulnerable to being murdered for being who they are. Many queer and trans people in our communities are in fear for their lives. Our communities need and deserve real support for survivors of violence and means to prevent further violence.

Hate crimes legislation purports to reduce violence against vulnerable communities, but in reality the legislation only increases the resources of the criminal punishment system and expands the prison industrial complex, without any proven effect on limiting violence against vulnerable communities.¹⁵⁸ In fact, hate crimes legislation is often used to punish members of the same vulnerable communities (people of color, queer people, and transgender people) for acts allegedly committed against members of non-vulnerable groups (white people, straight people, and non-trans people), increasing the incarceration, vulnerability, and death of members of those groups, and thus perpetuates the same systematic oppression it is purported to protect against.¹⁵⁹

For this reason, SRLP opposed the federal Matthew Shepard/James Byrd, Jr. Hate Crimes Prevention Act (HCPA) in conjunction with community groups both locally and nationally.¹⁶⁰ Nonetheless, the bill was passed, and many other "trans inclusive" hate crime laws exist or are being proposed on the state level. Those who support these types of laws are often from communities that, because of race, class, gender, and/or other privilege, perceive law enforcement and prisons as protecting, rather than targeting them; these are the voices that our legal system is designed to hear and

accommodate. Thus HCPA, which notably includes no funding for antiviolenace education or support for survivors of hate violence, but does earmark funds for expansion of the wars in Iraq and Afghanistan, is a typical example of how the needs of trans and queer low-income communities and communities of color cannot be met by traditional legal advocacy.¹⁶¹

We challenge lawyers to consider these examples, and to think about the ways that legal service provision, impact litigation, and policy negotiation offer only limited solutions that remain entrenched in a context of structural violence against poor communities, trans and queer communities, and communities of color. For a truly transformative social justice movement, we as lawyers must recognize that we do not belong at the center of leadership; directly impacted communities should govern the agenda and we should follow their lead.

III. RETHINKING THE ROLES OF LAWYERS IN THE MOVEMENT FOR TRANS LIBERATION

While agenda-setting by lawyers can lead to the replication of patterns of elitism and the reinforcement of systems of oppression, we *do* believe that legal work is a necessary and critical way to support movements for social justice. We must recognize the limitations of the legal system and learn to use that to the advantage of the oppressed. If lawyers are going to support work that dismantles oppressive structures, we must radically rethink the roles we can play in building and supporting these movements and acknowledge that our own individual interests or even livelihood may conflict with doing radical and transformative work.¹⁶²

A. Community Organizing for Social Justice

When we use the term *community organizing* or *organizing*, we refer to the activities of organizations engaging in base-building and leadership development of communities directly impacted by one or more social

problems and conducting direct action issue campaigns intended to make positive change related to the problem(s). In this article, we discuss community organizing in the context of progressive social change, but community-organizing strategies can also be used for conservative ends.

Community organizing is a powerful means to make social change. A basic premise of organizing is that inappropriate imbalances of power in society are a central component of social injustice. In order to have social justice, power relationships must shift. In *Organizing for Social Change: Midwest Academy Manual for Activists* (hereinafter, "the Manual"),¹⁶³ the authors list three principles of community organizing:¹⁶⁴ (1) winning real, immediate, concrete improvements in people's lives; (2) giving people a sense of their own power; and (3) altering the relations of power.¹⁶⁵

Before any of these principles can be achieved it is necessary to have leadership by the people impacted by social problems.¹⁶⁶ As Rinku Sen points out:

[E]ven allies working in solidarity with affected groups cannot rival the clarity and power of the people who have the most to gain and the least to lose . . . organizations composed of people whose lives will change when a new policy is instituted tend to set goals that are harder to reach, to compromise less, and to stick out a fight longer.¹⁶⁷

She also notes that, "[I]f we are to make policy proposals that are grounded in reality and would make a difference either in peoples' lives or in the debate, then we have to be in touch with the people who are at the center of such policies."¹⁶⁸

We believe community organizing has the potential to make fundamental social change that law reform strategies or "movements" led by lawyers cannot achieve on their own. However, community organizing is not always just and effective. Community-organizing groups are not immune to any number of problems that can impact other organizations, including internal oppressive dynamics. In fact, some strains of white, male-dominated

community organizing have been widely criticized as perpetuating racism and sexism.¹⁶⁹ Nonetheless, models of community organizing, particularly as revised by women of color and other leaders from marginalized groups, have much greater potential to address fundamental imbalances of power than law reform strategies. They also have a remarkable record of successes.

Tools from community organizers can help show where other strategies can fit into a framework for social change. The authors of the Manual, for example, describe various strategies for addressing social issues and illustrate how each of them may, at least to some extent, be effective.¹⁷⁰ They then plot out various forms of making social change on a continuum in terms of their positioning with regard to existing social power relationships.¹⁷¹ They place direct services at the end of the spectrum that is *most accepting* of existing power relationships and community organizing at the end of the spectrum that *most challenges* existing power relationships.¹⁷² Advocacy organizations are listed in the middle, closer to community organizing than direct services.¹⁷³

The Four Pillars of Social Justice Infrastructure model, a tool of the Miami Workers Center, is somewhat more nuanced than the Manual.¹⁷⁴ According to this model, four “pillars” are the key to transformative social justice.¹⁷⁵ They are (1) the pillar of service, which addresses community needs and stabilizes community members’ lives; (2) the pillar of policy, which changes policies and institutions and achieves concrete gains with benchmarks for progress; (3) the pillar of consciousness, which alters public opinion and shifts political parameters through media advocacy and popular education; and (4) the pillar of power, which achieves autonomous community power through base-building and leadership development.¹⁷⁶ According to the Miami Workers Center, all of these pillars are essential in making social change, but the pillar of power is most crucial in the struggle to win true liberation for all oppressed communities.¹⁷⁷

In their estimation, our movements suffer when the pillar of power is forgotten and/or not supported by the other pillars, or when the pillars are seen as separate and independent, rather than as interconnected, indispensable aspects of the whole infrastructure that is necessary to build a just society.¹⁷⁸ Organizations with whom we work are generally dedicated solely to providing services, changing policies, or providing public education. Unfortunately, each of these endeavors exists separate from one another and perhaps most notably, separate from community organizing. In SRLP's vision of change, this separation is part of maintaining structural capitalism that seeks to maintain imbalances of power in our society. Without incorporating the pillar of power, service provision, policy change, and public education can never move towards real social justice.¹⁷⁹

B. Lawyering for Empowerment

In the past few decades, a number of alternative theories have emerged that help lawyers find a place in social movements that do not replicate oppression.¹⁸⁰ Some of the most well-known iterations of this theme are "empowerment lawyering," "rebellious lawyering," and "community lawyering."¹⁸¹ These perspectives share skepticism of the efficacy of impact litigation and traditional direct services for improving the conditions faced by poor clients and communities of color, because they do not and cannot effectively address the roots of these forms of oppression.¹⁸² Rather, these alternative visions of lawyering center on the empowerment of community members and organizations, the elimination of the potential for dependency on lawyers and the legal system, and the collaboration between lawyers and directly impacted communities in priority setting.¹⁸³

Of the many models of alternative lawyering with the goal of social justice, we will focus on the idea of "lawyering for empowerment," generally. The goal of empowerment lawyering is to enable a group of people to gain control of the forces that affect their lives.¹⁸⁴ Therefore, the goal of empowerment lawyering for low-income transgender people of

color is to support these communities in confronting the economic and social policies that limit their life chances.

Rather than merely representing poor people in court and increasing access to services, the role of the community or empowerment lawyer involves:

organizing, community education, media outreach, petition drives, public demonstrations, lobbying, and shaming campaigns . . . [I]ndividuals and members of community-based organizations actively work alongside organizers and lawyers in the day-to-day strategic planning of their case or campaign. Proposed solutions—litigation or non-litigation based—are informed by the clients' knowledge and experience of the issue.¹⁸⁵

A classic example of the complex role of empowerment within the legal agenda setting is the question of whether to take cases that have low chances of success. The traditional approach would suggest not taking the case, or settling for limited outcomes that may not meet the client's expectations. However, when our goals shift to empowerment, our strategies change as well. If we understand that the legal system is incapable of providing a truly favorable outcome for low-income transgender clients and transgender clients of color, then winning and losing cases takes on different meanings.

For example, a transgender client may choose to bring a lawsuit against prison staff who sexually assaulted her, despite limited chance of success because of the "blue wall of silence," her perceived limited credibility as a prisoner, barriers to recovery from the Prison Litigation Reform Act, and restrictions on supervisory liability in §1983 cases. Even realizing the litigation outcome will probably be unfavorable to her, she may still develop leadership skills by rallying a broader community of people impacted by similar issues. Additionally, she may use the knowledge and energy gained through the lawsuit to change policy. If our goal is to familiarize our client with the law, to provide an opportunity for the client

and/or community organizers to educate the public about the issues, to help our client assess the limitations of the legal system on their own, or to play a role in a larger organizing strategy, then taking cases with little chance of achieving a legal remedy can be a useful strategy.

Lawyering for empowerment means not relying solely on legal expertise for decisionmaking. It means recognizing the limitations of the legal system, and using our knowledge and expertise to help disenfranchised communities take leadership. If community organizing is the path to social justice and “organizing is about people taking a role in determining their own future and improving the quality of life not only for themselves but for everyone,” then “the primary goal [of empowerment lawyering] is building up the community.”¹⁸⁶

C. Sharing Information and Building Leadership

A key to meaningful participation in social justice movements is access to information. Lawyers are in an especially good position to help transfer knowledge, skills, and information to disenfranchised communities—the legal system is maintained by and predicated on arcane knowledge that lacks relevance in most contexts but takes on supreme significance in courts, politics, and regulatory agencies. It is a system intentionally obscure to the uninitiated; therefore the lawyer has the opportunity to expose the workings of the system to those who seek to destroy it, dismantle it, reconfigure it, and re-envision it.

As Quigley points out, the ignorance of the client enriches the lawyer’s power position, and thus the transfer of the power from the lawyer to the client necessitates a sharing of information.¹⁸⁷ Rather than simply performing the tasks that laws require, a lawyer has the option to teach and to collaborate with clients so that they can bring power and voice back to their communities and perhaps fight against the system, become politicized, and take leadership. “This demands that the lawyer undo the secret wrappings of the legal system and share the essence of legal advocacy—

doing so lessens the mystical power of the lawyer, and, in practice, enriches the advocate in the sharing and developing of rightful power."¹⁸⁸

Lawyers have many opportunities to share knowledge and skills as a form of leadership development. This sharing can be accomplished, for example, through highly collaborative legal representation, through community clinics, through skill-shares, or through policy or campaign meetings where the lawyer explains what they know about the existing structures and fills in gaps and questions raised by activists about the workings of legal systems.

D. Helping to Meet Survival Needs

SRLP sees our work as building legal services and policy change that directly supports the pillar of power.¹⁸⁹ Maintaining an awareness of the limitations and pitfalls of traditional legal services, we strive to provide services in a larger context and with an approach that can help support liberatory work.¹⁹⁰ For this reason we provide direct legal services but also work toward leadership development in our communities and a deep level of support for our community-organizing allies.

Our approach in this regard is to make sure our community members access and obtain all of the benefits to which they are entitled under the law, and to protect our community members as much as possible from the criminalization, discrimination, and harassment they face when attempting to live their lives. While we do not believe that the root causes keeping our clients in poverty and poor health can be addressed in this way, we also believe that our clients experience the most severe impact from state policies and practices and need and that they deserve support to survive them.¹⁹¹ Until our communities are truly empowered and our systems are fundamentally changed to increase life chances and health for transgender people who are low-income and people of color, our communities are going to continue to have to navigate government agencies and organizations to survive.

Therefore, we provide direct services with two goals in mind: helping our communities survive and helping our communities organize. Toward the first end, we represent people in name-change hearings, public benefits “fair hearings,” and immigration proceedings; we advocate with state and local agencies, criminal courts, homeless shelters, and prisons; and we litigate cases when doing so is consistent with our values and the values and interests of our clients. Toward the second end, we strive to provide direct services in a way that helps stabilize lives, build political analysis, and share knowledge, while connecting clients and community members with organizing projects that address their concerns and interests.

E. Supporting Community Organizations

In order to shift power to the experts at the intersections of oppression, we must be willing to take leadership from those with the most at stake. Lawyers can play important roles in supporting community-organizing projects, as long as we are careful to support their work in the ways that they identify as helpful, rather than slip into a role where we begin telling (or “advising”) organizations what they should or should not do to achieve social justice, or speaking for the organization to the media or public.¹⁹²

Quigley points out that litigation can be appropriate when it is *defensive*.¹⁹³ The need for defensive legal action can arise in a number of contexts, such as when police or immigration raids target the organization’s leaders or when a landlord seeks to evict the organization from its offices.¹⁹⁴ In these cases, lawyers can serve an incredibly important and appropriate role in defending the organization against attacks on its ability to function and achieve its social justice goals.¹⁹⁵ Transactional work representing organizations may also be helpful and appropriate.¹⁹⁶ The Manual, for example, cautions organizers against getting lawyers involved in campaigns, but encourages organizers to seek professional advice about organizational legal and financial matters.¹⁹⁷

Lawyers can also appropriately support affirmative campaigns of community-organizing projects, which is another area where SRLP is active. For example, community organizers often seek legal support for direct actions. Lawyers and other legal workers can play key support roles as legal observers and/or on-call criminal defense attorneys, in order to provide back up should police attack and/or arrest participants in the action. Lawyers can also help share information about legal systems that will be directly useful in the campaign. We can also provide community members who access our services with a direct link to community-organizing projects. At SRLP, we strive to offer this resource to community members in a variety of ways, such as referring them to become active participants in a campaign, encouraging them to come to a meeting to hear about fighting back against injustices that affect them, or offering them the opportunity to fill out a survey or sign a petition.

While a considerably more delicate role, in some cases community organizations may ask attorneys to attend meetings with targets in positions of power, such as agency administrators, corporate executives, and/or elected officials, without taking a major role in the negotiations with them. The goal may simply be to use the lawyer's presence, privilege, and consistent, even conspicuous, deference to community members to promote their leadership in the eyes of the target. Another goal may be for the lawyer to respond to certain topics should they arise, such as to rebut a target's claim that the community's demand is a "legal impossibility," and otherwise remain silent and observe. These forms of lawyer participation, as long as they are supportive and collaborative, rather than monopolizing and domineering, can also help promote social justice.

IV. THREE TRANSFORMATIVE MODELS FOR SETTING THE SOCIAL JUSTICE AGENDA

By avoiding the pitfalls and working around the limitations of lawyers' roles in social movements, we can achieve extraordinary results, including

genuine liberation and justice in our communities. Below, we discuss three examples of trans social justice work in which lawyers are involved and play important roles—but not the *most* important roles. We begin with a local campaign where lawyers worked to support community members and organizers work on a specific issue that impacted low-income trans communities of color. Next, we describe a national conference and alliance focusing on issues of transgender imprisonment led mainly by formerly incarcerated transgender people of color. Finally, we discuss the People's Movement Assemblies developed by Project South. This grassroots strategy builds momentum by utilizing the issues on a regional level, finding resolutions for action, and sharing those resolutions with other groups on a national level to find solidarity and develop shared political analysis.

We offer these examples to illustrate our belief that lawyers have a place in social justice movements, and our hope that we can continue to work with our allies toward a truly accountable and revolutionary movement for trans liberation.

A. Legal Support for a Community-Organizing Campaign: NYC Human Resources Administration Campaign

The Human Resources Administration (HRA) administers the welfare system for New York City, including cash assistance, food stamps, Medicaid, and HIV and AIDS services.¹⁹⁸ Because there was no policy directive on how to work with transgender people, case managers treated transgender people in highly inconsistent and (almost always) disrespectful ways. While some would honor a client's gender identity and preferred name at least some of the time, others would vehemently refuse to acknowledge the existence of transgender people. Some clients were ejected from HRA offices for using the restroom, some were told to return "dressed like a man,"¹⁹⁹ and some were told that "only God can change gender."²⁰⁰

In 2004, three white transgender professionals with a tremendous amount of experience working with low-income transgender community members,

including an SRLP attorney, were appointed as “experts” to compile a “best practices” guide to help the HRA work more effectively with transgender communities. Together, the three compiled a document with many outstanding policy proposals, tentatively entitled “Best Practice Guide for working with Transgender and Gender NonConforming Individuals.” The document, unfortunately, languished for years due to HRA bureaucracy. Later, the Audre Lorde Project, Queers for Economic Justice, and Housing Works decided to bring a campaign to address HRA’s discrimination against trans people.

Early in the effort, SRLP lawyers were called in for two main purposes: (1) to review revised policy proposals from a legal perspective; and (2) to observe several direct actions outside and inside the HRA offices. We also played a few additional support roles. For example, the organizers created a postcard campaign to urge HRA to pass the new policy and we distributed those postcards in our office. The organizers also sought documentation of harassment and discrimination instances in HRA offices and worked with several interested SRLP clients to document their experiences in the way the organizers had requested. We also offered information and encouragement for those clients who wanted more involvement in the campaign. SRLP attorneys attended the regular meetings for the campaign steering committee and participated in advocacy strategizing discussions. However, the decisions regarding action steps were all made by members of the campaign—trans people of color—most of whom were eligible for the benefits HRA administers. They considered input from SRLP attorneys, but a “legal agenda” did not dominate.

On December 23, 2009, the HRA implemented a new procedure for working with transgender clients, which prohibits most of the abuses that trans people experience when trying to access public benefits.²⁰¹ Thanks to the efforts of the Audre Lorde Project, Housing Works, and community members, with the legal support of SRLP, HRA has made a formal commitment to end the transphobia experienced by its clients.²⁰² The

resulting policy is likely superior to anything we could have achieved through litigation or through lawyer-led policy advocacy work alone. Even more importantly, the process built leadership in the communities directly affected and contributed to shifting the balance of power in the ways we need to succeed in the big picture.

*B. Lawyers at the Table with the Most Impacted Community Members:
Transforming Justice*

Transforming Justice is another excellent example of ways that lawyers can work with community activists to set and work toward movement goals. SRLP began this work in 2006 through contacting activists and attorneys across the country, including the TGI Justice Project, Critical Resistance, Justice Now, Communities United Against Violence, NCLR, and Lambda Legal, to start a national conversation about issues of transgender imprisonment. The momentum picked up and the Transforming Justice convening was held in San Francisco in 2007. As the organizers describe:

[A] vibrant coalition of local and national organizations came together to plan Transforming Justice, the first-ever national gathering of LGBTIQQ former prisoners, activists, attorneys, and community members to develop national priorities towards ending the criminalization and imprisonment of transgender communities . . . Over 250 people from 14 states attended . . . with over 100 participating for the entire event. Twenty scholarships to low-income former prisoners were distributed. Approximately 60% percent of the conference attendees were transgender and gender nonconforming people who had at some point in their lives been in prison, jail, or juvenile or immigration detention. Though the conference was free, simultaneous translation, childcare, and meals were provided.²⁰³

At the convening, lawyers and community organizers worked together with community members to discuss how to deconstruct the systems of poverty and homelessness, criminalization, and incarceration that impact

their lives. Led by community members, the participants agreed on the following points of unity:

- We recognize cycles of poverty, criminalization, and imprisonment as urgent human rights issues for transgender and gender non-conforming people.
- We agree to promote, centralize, and support the leadership of transgender and gender-nonconforming people most impacted by prisons, policing, and poverty in this work.
- We plan to organize in order to build on and expand a national movement to liberate our communities and specifically transgender and gender-nonconforming people from poverty, homelessness, drug addiction, racism, ageism, transphobia, classism, sexism, ableism, immigration discrimination, violence and the brutality of the prison industrial complex.
- We commit to ending the abuse and discrimination against transgender and gender-nonconforming people in all aspects of society, with the long-term goal of ending the prison industrial complex.
- We agree to continue discussing with each other what it means to work towards ending the prison industrial complex while addressing immediate human rights crises.²⁰⁴

The above determinations laid the groundwork for the following action steps:

- Develop a national platform on transgender immigrant rights issues and ask others to sign on to it;
- Foster local conversations about responding to anti-LGBTQQ²⁰⁵ and interpersonal violence without relying on the prison industrial complex;
- Create and strengthen local resources for transgender and gender-nonconforming people coming out of prison and jail;

- Create a national coalition that can support local transgender organizing to end the cycles of poverty, criminalization, and imprisonment.²⁰⁶

When the participants left the conference, they had a clear sense of action priorities because their solutions came from outside the existing power structures. The space effectively shifted vision and power to many communities while creating multiple opportunities for lawyers and activists to support the movement. Were it not for the combination of local grassroots community building, regional and geographic collaboration, and connection with national issues and organizations, Transforming Justice could not have effectively achieved such a meaningful shared analysis.

This project is a testament to non-lawyer-centered empowerment strategies. While lawyers played an important role in this conference and participated in all aspects of knowledge sharing, consensus building, and priority setting, formerly incarcerated transgender people of color comprised the majority of leaders and participants. The relationships, learning, and analysis that occurred as a result of the gathering and subsequent work were more informed, accountable, and transformative than what we had experienced in any lawyer-led gathering. Using the four action steps from the convening, SRLP gained direction and found an opportunity to use our resources. We have worked to incorporate the information gleaned from these communities into our bigger picture analysis, direct services provision, and impact litigation. Furthermore, the developing alliance has new pathways for community members to take on decisionmaking and leadership roles within local and national organizations.

C. Priority Setting by the Most Impacted Communities: Project South and People's Movement Assemblies

“The People’s Movement Assembly was the culmination of a process of convergence, integration, and declaration and occupies a unique location as

a method that could be evolved to cohere both local movements and mass scale."²⁰⁷

The United States Social Forum is a biannual convergence intended to develop solutions to economic and ecological crisis, drawing activists from a wide range of disciplines and causes.²⁰⁸ In this space, groups build relationships and develop points of unity with one another. Challenges that organizers and participants have considered include: (1) maximizing the participation of members of impacted communities who cannot attend the convergence in person, (2) building toward real consensus and solidarity, and (3) optimally utilizing a space where representatives from local and national organizations converge and discuss political analysis and strategy.²⁰⁹

In 2007, an organization called Project South decided that it would coordinate a series of "People's Movement Assemblies" to develop resolutions that articulate clear political positions from local and regional groups, and to build momentum in anticipation of the Social Forum that year. As Project South explains:

The People's Movement Assembly process is part of the organizing methodology we developed to complement and strengthen the potential of the Forum's open space. Assemblies can bring political and tactical forces together to take action in an open space—drafting a blueprint for change from the grassroots.²¹⁰

Regional or "sector" caucuses of Project South were convened prior to the Social Forum. In each region or sector, organizers explained how the Social Forum worked, and helped each caucus develop a list of demands, resolutions, and tactics on issues that were based in the respective regions. For example, one regional caucus demanded freedom for the Cuban Five, a group of men incarcerated for four life sentences for attempting to defend Cuba against planned bombings by right-wing groups in the United States;²¹¹ another group called for an end to evictions of people from public housing in Atlanta.²¹²

Representatives read the regional resolutions to the Social Forum attendees in a large assembly and encouraged attendees to carry out the actions beyond the Social Forum. As a result, groups working on a broad range of social justice issues were able to bring national attention to regional issues, find cross-movement support and solidarity, and develop shared political analysis, tactics, and points of unity.

We, as SRLP lawyers, are inspired by this model of priority setting. Not only do the regional caucuses provide an opportunity for community members to freely determine the most important issues they face, but this strategy offers an excellent example of the way that lawyers can be part of a social movement without compromising it. Once regional caucuses develop and pass resolutions, lawyers have a clear charter for movement goals and can follow the lead of the caucuses or organizing bodies that developed the resolutions. Lawyers can do the same on a national scale; thus, national litigation and policy strategy will be determined, not by the existing legal landscape, but by the political visions of those most directly impacted by many pressing social issues across the country.

Since the fall of 2009, SRLP has been working with both local and national organizations to conduct People's Movement Assemblies on queer and trans issues in anticipation of the 2010 Social Forum. We believe that this structure will be a useful and accountable way for lawyers to take direction locally and nationally from the people most impacted by oppression. It is an excellent opportunity to help clarify the policy objectives and set the agenda for trans legal advocacy during the coming years.

CONCLUSION

As attorneys working for trans liberation, as individuals with our own experiences of privilege and oppression, and as activists and scholars committed to building accountable social movements and a more just world, we are constantly experimenting, making mistakes, learning, trying

something else, and struggling to improve. We continue to question our own roles in lawyer-only spaces such as law conferences and roundtables. We make choices about when to participate in the existing spaces, when to critique and collaborate to improve these spaces, and when to step away and invest our time and energy in building other types of relationships and means for accountability. As we conduct our lawyering, we also continue to evaluate our own priorities and methods and seek ways to improve our accountability to the communities we serve. We are not at all convinced that we have always made the most helpful decisions. We *know* that we do not have all the answers.

In this article, we shared how we experienced and learned about pitfalls lawyers face in social movements. The experiences and writing of community organizers and other attorneys committed to community empowerment offer us rich resources to avoid these pitfalls and create structures that will support us in empowering communities experiencing transphobia, racism, poverty, ableism, sexism, homophobia, and xenophobia.

While trans legal advocacy is still relatively young as an institutionalized phenomenon, we have an opportunity to build on the foundations of what others have learned. Already, we and other attorneys in our movements have participated in some alternative frameworks that hold great promise for building trans legal advocacy that can genuinely contribute to shifting balances of power in the ways that are necessary for true justice for our communities. We seek to build alliances and work together in this critical moment toward a new vision of the lawyers' role in the movement for trans liberation.

¹ We use the term *transgender* or *trans* to refer to people who have a gender identity or gender expression different from that traditionally associated with their assigned sex at birth. People use many different terms to describe their gender identity and expression, all of which should be respected. Some examples are femme queen, cross dresser, transsexual, genderqueer, FTM, MTF, A.G., man, woman, or trans. We use the terms

transgender and trans because they are often understood as umbrella terms that encompass many different gender identities. Trans women are people who now identify as women. Trans men are people who now identify as men.

² LGBT is a common acronym for lesbian, gay, bisexual, and transgender. We use Lgb“T” to acknowledge that historically, and to a large extent currently, even organizations that have claimed to work on LGBT issues have actually focused on gay and lesbian issues, with little specific attention to bisexual issues and exclusion or false inclusion of trans issues within organizational priorities.

³ The Sylvia Rivera Law Project (SRLP) works to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence. SRLP is founded on the understanding that gender self-determination is inextricably intertwined with racial, social, and economic justice. To achieve this goal, SRLP represents people low-income people and people of color who are transgender, gender-nonconforming and/or intersex. We provide direct legal services and engage in impact litigation, policy reform, public education, and organizing support. SRLP is a collectively run organization with no hierarchical positions and with majority trans people and majority people of color in leadership positions. The authors of this article are a non-trans woman of color, a white transgender man, and a white transgender woman. For more information, see Sylvia Rivera Law Project, <http://srlp.org/about>.

⁴ Dean Spade, Keynote Address at the State University of New Jersey Symposium: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change (July 1, 2009), in 30 WOMEN'S RTS. L. REP. 288, 292 (citing Ruth Wilson Gilmore, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (2007)).

⁵ See Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J. L. & FEMINISM 139, 140 (2005). See generally Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009) (explaining the case for equal rights through gay marriage).

⁶ See generally Anna M. Agathangelou, M. Daniel Bassichis & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire*, RADICAL HIST. REV., Winter 2008, at 120.

⁷ *Id.*

⁸ While “queer” has been, and still is, used as a pejorative term, many have reclaimed the term and use it to refer to ourselves and our communities. Queer has also been used as a politicized term that avoids implicit support of a binary view of gender and refuses assimilation into dominant straight cultural norms. Here, we use queer as an umbrella term referring to people with sexual orientations other than straight or heterosexual, including gay, lesbian, bisexual, pansexual, queer, and same-gender loving.

⁹ See generally Agathangelou, Bassichis, & Spira, *supra* note 6; JASBIR PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

¹⁰ See generally ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003).

¹¹ See, e.g., MARC PILISUK & JENNIFER ACHORD ROUNTREE, *WHO BENEFITS FROM GLOBAL VIOLENCE AND WAR: UNCOVERING A DESTRUCTIVE SYSTEM* 127 (2007).

¹² See generally Gabriel Arkles & Pooja Gehi, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL'Y 7 (2007).

¹³ See, e.g., Dayo Folayan Gore, et al., *Organizing at the Intersections: A Roundtable Discussion of Police Brutality Through the Lens of Race, Class, and Sexual Identities*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 251 (Andrea McArdle & Tanya Erzen eds., 2001).

¹⁴ See generally Pooja Gehi, *Struggles From The Margins: Anti-Immigrant Legislation And The Impact On Low-Income Transgender People Of Color*, 30 WOMEN'S RTS. L. REP. 315 (2009).

¹⁵ SYLVIA RIVERA LAW PROJECT, SYSTEMS OF INEQUALITY: CRIMINAL JUSTICE, http://srp.org/files/disproportionate_incarceration.pdf [hereinafter SLRP CRIMINAL JUSTICE]; SYLVIA RIVERA LAW PROJECT, SYSTEMS OF INEQUALITY: POVERTY & HOMELESSNESS, http://srp.org/files/disproportionate_poverty.pdf [hereinafter SLRP POVERTY & HOMELESSNESS].

¹⁶ SLRP CRIMINAL JUSTICE, *supra* note 15; SLRP POVERTY & HOMELESSNESS, *supra* note 15.

¹⁷ See generally Agathangelou, Bassichis & Spira, *supra* note 6.

¹⁸ See, e.g., MICHAEL HARDT AND ANTONIO NEGRI, *EMPIRE* 173 (2000).

¹⁹ *Id.* at 193 (explaining "the hierarchy of the different races is determined only by a posteriori, as an effect of their cultures—that is, on the basis of their performance. According to imperialist theory, then racial supremacy and subordination are not a theoretical question, but arise through free competition, a kind of market meritocracy of culture").

²⁰ We use the term "non-lawyer" as a convenient term to describe people who are not attorneys, but not without reservations. "Non-lawyer" as a term can inappropriately insist on the importance of lawyers, dividing the world's population based on their belonging or not belonging in a way that few other professions or occupations use.

²¹ We primarily use the term "lawyer-only spaces" throughout this article. However, we acknowledge that some of the spaces to which we refer include and/or are organized by law students and are at least nominally open to other non-lawyers. By "lawyer-only," we intend to highlight the fact that these spaces are typically only organized by current or future lawyers, and the only audience specifically catered to are other current or future lawyers. Certain spaces, discussed *infra*, are specifically restricted only to lawyers with rare limited exceptions for certain individuals of whom the lawyer organizers specifically approve.

²² See, e.g., American Bar Association, International Rule of Law Symposium, <http://www.abanet.org/rolsymposium/> (last visited Feb. 19, 2010) (the symposium focused on what the legal profession and organized bar can do to promote the rule of law); United Nations University-Institute of Advanced Studies, Polar Law Symposium, http://www.ias.unu.edu/sub_page.aspx?catID=640&ddlID=620#1 (last visited Feb. 19, 2010) ("The purpose of the symposium is to bring together the world's leading scholars in international law and policy to identify emerging and re-emerging issues in international law and policy ... and to map out a research agenda for future research beyond the International Polar Year."); UCLA Law Review, *Symposia, Sexuality and*

Gender Law: Assessing the Field, Envisioning the Future, http://uclalawreview.org/?page_id=46 (last visited Feb. 19, 2010) (“This conference will bring together leading scholars from both inside and outside the field to reflect on how sexuality and gender has changed the law, and how the field itself is likely to change.”).

²³ While our focus here is on LGB+T work, lawyer-only spaces exist to set “the agenda(s)” for other movements as well, such as civil rights, immigration, prisoners’ rights, abortion rights, and domestic violence.

²⁴ Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKLEY WOMEN’S L.J. 17, n.1 (1999).

²⁵ Arthur A. Leonard, *Chronicling A Movement: 20 Years Of Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 415 (2000).

²⁶ *Id.* at 415.

²⁷ *Id.*

²⁸ *Id.* at 416–17.

²⁹ *Id.* at 444.

³⁰ *Id.*; William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 HASTINGS L.J. 1101, 1115 (explaining “[t]hese conferences have provided opportunities for strategizing about lesbian/gay legal rights. But they have also served a professional function, enabling members of the private bar to meet their counterparts throughout the country. Typically, the conferences include workshops devoted to issues such as being out in the law firm and developing lesbian/gay community practices”); *Lawyers Gather for Conference on Gay and Lesbian Issues*, THE OREGONIAN, Oct. 22, 1994, at C07.

³¹ See generally Bryan H. Wildenthal, *To Say “I Do”*: *Shahar v. Bowers*, *Same-Sex Marriage*, and *Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381 (1998); David B. Cruz, *The New “Marital Property”*: *Civil Marriage And The Right To Exclude?*, 30 Cap. U. L. REV. 279 (2002); Phyllis Randolph Frye & Alyson Dodi Mesiselman, *Same-Sex Marriages Have Existed Legally In The United States for a Long Time Now*, 64 ALB. L. REV. 1031 (2001); Jeffery J. Ventrella, *Square Circles?!! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681 (2005); Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, 14 LAW & SEXUALITY 135 (2005).

³² See generally Wildenthal, *supra* note 31; Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L.J. 197 (2005); Arthur S. Leonard, *Thoughts on Lawrence v. Texas*, 11 WIDENER L. REV. 171 (2005).

³³ Duke Journal of Gender Law & Policy, *Harvard Law School Lambda Second Annual Gay and Lesbian Legal Advocacy Conference “Don’t Ask, Don’t Tell,”* 14 DUKE J. GENDER L. & POL’Y 1173 (2006).

³⁴ WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* 234 (2008).

³⁵ *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state statute criminalizing homosexual sodomy as constitutional).

³⁶ ESKRIDGE, *supra* note 34, at 234.

³⁷ See ELLEN ANN ANDERSON, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITIES, STRUCTURE AND GAY RIGHTS LITIGATION* 121 (2006) (explaining how

the “[t]he Litigator Roundtable . . . played an important role in facilitating this decision [of whether or not to incorporate federal constitutional claims into its sodomy cases].” Similarly, Anderson explains, when Lambda needed to revisit the issue of whether or not to ask the Supreme Court to overturn *Bowers v. Hardwick* or to proceed solely with an equal protection claim [in the *Lawrence v. Texas* case], the litigators roundtable was the body of lawyers with whom they consulted. *Id.* at 131.

³⁸ Conversations with Roundtable organizers (approx. Sept. 2008).

³⁹ Invitation list on file with the authors.

⁴⁰ Since 2003, at least one attorney from SRLP has attended almost every one of the semiannual roundtables. This is based on the authors’ observations when we have attended these meetings and conversations with other participants.

⁴¹ This is based on the authors’ observations and conversations. To the authors’ knowledge, during the time in which we have attended these meetings, only one participant has openly identified as HIV-positive and/or disabled. While we acknowledge that there may be more openly HIV-positive and/or disabled participants than we realize, we believe the number would still be small.

⁴² See *infra*, Part II.

⁴³ For example, one conversation at a roundtable in 2007 centered around the ways in which we, as lawyers, need to “control” activism around same-sex marriage so that it would not ruin our litigation strategies.

⁴⁴ This conversation occurred around the spring of 2007.

⁴⁵ Not only are these roundtables “lawyer-only,” but they are also exclusive to a very specific type of impact litigator primarily from well-funded, single issue LGB+T organizations.

⁴⁶ See *infra*, Part I.

⁴⁷ Examples of past topics of discussion with extremely limited relevance to low-income transgender communities of color include: cross-jurisdictional family law disputes involving same-sex couples’ marriages, civil unions, domestic partnerships, and adoptions (2005); federal, state, and local treatment of other jurisdictions’ grant of legal status to same-sex relationships (2005); government censorship and speech (2005); military impact litigation (2005); marriage (2006); polling and messaging (2006); same-sex relationships (2007); marriage equality statutes (2009); new challenges in parenting litigation (2009); and inter-jurisdictional relationship issues (2009).

⁴⁸ These topics have included foster care and juvenile justice issues (2005); youth and HIV confidentiality (2006); prisoners’ rights (2006); sex discrimination claims (2007); responding to attacks from the right on transgender issues (2008); identity documents (2008); class and LGBT issues (2009); and relationships in prison (2009).

⁴⁹ See, e.g., K. Clements-Nolle et al., *HIV Prevalence, Risk Behaviors, Health Care Use, and Mental Health Status of Transgender Persons: Implications for Public Health Intervention*, 91 AM. J. PUB. HEALTH 915 (2001) (noting that transgender women were found to have an HIV prevalence of 35 percent).

⁵⁰ Primarily drawn from the authors’ experiences. See also *Morrill v. Morrill*, 175 N.C. Ct. App. 794, 625 S.E.2d 204 (2006); *Petition in Doe v. Suffolk Co. Dep’t Soc. Serv.*, 18607/05 (Suffolk Cty. Sup. Ct. Aug. 9, 2005) (unpublished decision); *Human Rights*

Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STANFORD J. OF CIV. RTS. & CIV. LIBERTIES (publication forthcoming).

⁵¹ See, e.g., Cathy J. Cohen, *Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437 (1997).

⁵² Email on file with authors (stating “[a] few people who work on transgender rights were talking and decided that it may be time to get together to discuss strategies for advancing the legal rights of transgender persons”).

⁵³ Email on file with author. The authors listed some organizations that we felt should be included such as the Transgender, Gender Variant, Intersex Justice Project (TGIJP), Gender Identity Project, TransJustice, The Audre Lorde Project (ALP), FIERCE!, Gays and Lesbians of Bushwick Empowered (GLOBE), Housing Works, Gay Men’s Health Crisis (GMHC), Queers for Economic Justice (QEJ), The Peter Cicchino Youth Project (PCYP), and Immigration Equality.

⁵⁴ Primarily drawn from author’s conversations with invitees and those not invited. Emails on file with authors.

⁵⁵ Primarily drawn from author’s conversations with invitees and those not invited. Emails on file with authors.

⁵⁶ Agenda and email on file with authors.

⁵⁷ Agenda on file with authors.

⁵⁸ The Peter Cicchino Youth Project has been invited to subsequent roundtables; F.I.E.R.C.E. has not.

⁵⁹ We do not mean to imply that some sessions geared primarily toward lawyers and legal workers could never be appropriate, such as a workshop specifically sharing deposition or voir dire skills in trans cases. However, based on our experiences above, even spaces that claim to be about lawyers sharing skills specific to our profession commonly incorporate elements of setting the agenda for trans law and policy work with other lawyers.

⁶⁰ See *infra* Part III.

⁶¹ See generally Spade, *supra* note 4.

⁶² Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1705 (1995).

⁶³ See generally Paul Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. Rev. 1101 (1990) (discussing the applications of direct services and the use of “triage” strategies to address urgent legal needs); Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, in CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 189, 192 (2004).

⁶⁴ See, e.g., Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1535 (1995).

⁶⁵ *Id.*

⁶⁶ See generally Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311 (1996).

⁶⁷ See, e.g., Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor*, 19 HASTINGS CONST. L.Q. 745, 760 (1992); Feldman, *supra* note 64, at 1535.

⁶⁸ See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); see Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of*

Sexuality, 14 WM. & MARY BILL RTS. J. 1539 (2006) [hereinafter *Political Economy of Sexuality*]; FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971).

⁶⁹ William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 459 (1994) (quoting community organizer Ron Chisom: "The white legal system perpetuates the white power system").

⁷⁰ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (Kimberlé Crenshaw et al., eds. 1995).

⁷¹ *Id.* at 22.

On a normative level, as a description of how the world *ought* to be, the notion of racial equality appears to be the proper basis on which *Brown rests* . . . yet on a positivistic level—how the world *is*—it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites.

⁷² See PUAR, *supra* note 9, at 38–39 (defining "homonationalism" and linking heteronormativity, capitalism, and the nation-state: "gay subjects [are] embroiled in a 'politics that does not contest dominant heteronormative forms but upholds and sustains them' . . . We see simultaneously both the fortification of normative heterosexual coupling and the propagation of sexualities that mimic, parallel, contradict, or resist this normativity") (internal citation omitted).

⁷³ *Dandridge v. Williams*, 397 U.S. 471 (1970).

⁷⁴ *Id.* at 487.

⁷⁵ Redlich, *supra* note 67, at 755.

⁷⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷⁷ See, e.g., Bell, *supra* note 70, at 25; see Alan David Freeman, *Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29 (Kimberlé Crenshaw et al. eds., 1995) ("Under the combined force of *Rodriguez* and *Milliken*, black city residents are thus worse off in terms of legal theory than they were under the "separate but equal" doctrine of pre-*Brown* southern school litigation, where a claim of equivalent resources for black schools was at least legally cognizable"); *Political Economy of Sexuality*, *supra* note 68.

⁷⁸ Bell, *supra* note 70, at 24.

⁷⁹ *Id.*

⁸⁰ Quigley, *supra* note 69, at 462 ("[O]ftentimes lawyers come in with their own reality, their own world view, and think or assume that this is everybody's reality and they just start moving along") (quoting Barbara Major).

⁸¹ Gerald P. López describes this dynamic within the "regnant" approach to lawyering:

This self-regard helps explain, too, how lawyers operating within the regnant idea can, with such apparent aplomb, convert social situations into problems and solutions they 'just happen' to be most familiar with or do best. It becomes

more understandable, for example, how social disputes seem routinely to become litigated cases—with only fitful regard to whether litigation rather than some other strategy or combination of strategies makes more sense, to whether litigation itself might not be reimagined to accommodate greater involvement by subordinated people themselves, or to whether litigation or any other strategy actually penetrates the social situation lawyers hope and often claim to change. Lawyers in the regnant idea seem habitually to equate what they do best, or at least most comfortably, with what most helps the politically and socially subordinated.

Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1610 (1989).

⁸² Quigley, *supra* note 69, at 460–61.

⁸³ *Id.*

⁸⁴ Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, in CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 236, 240–41 (Julie Nice & Louise Trubek eds., 1997).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Quigley, *supra* note 69, at 471; Bell, *supra* note 70, at 20.

⁸⁸ Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Poverty Law Practice*, 100 YALE L.J. 2107, 2125 (1991) (describing the concept of interpretive violence, by which attorneys reshape clients narratives of their experiences by situating the client as inferior and subordinate and excluding normative meanings from the narratives).

⁸⁹ Quigley, *supra* note 69, at 465.

⁹⁰ See, e.g., Redlich, *supra* note 67, at 750; see also Davis, *supra* note 63, at 198.

⁹¹ Redlich, *supra* note 67, at 750–51.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Houseman, *supra* note 62, at 1705.

⁹⁸ This is based on the authors' observations; Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL'Y 53, 57 (2008).

⁹⁹ KIM BOBO, ET AL., ORGANIZING FOR SOCIAL CHANGE: MIDWEST ACADEMY MANUAL FOR ACTIVISTS 12 (3rd ed. 2001) [hereinafter THE MANUAL]. In fact, in its opening description of how direct action organizing gives people a sense of their own power, the authors state, "Direct action organizations avoid shortcuts that don't build people's power, such as bringing in a lawyer to handle the problem."

¹⁰⁰ Quigley, *supra* note 69, at 457–58 (quoting Ron Chisom).

¹⁰¹ Bell, *supra* note 70, at 22.

- ¹⁰² Quigley, *supra* note 69, at 477; *see generally* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).
- ¹⁰³ Quigley, *supra* note 69, at 477, 459 (quoting Ron Chisom).
- ¹⁰⁴ *See* Davis, *supra* note 63, at 198.
- ¹⁰⁵ *Id.*
- ¹⁰⁶ *See generally* Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOCIETY REVIEW 79 (2007).
- ¹⁰⁷ Davis, *supra* note 63, at 195.
- ¹⁰⁸ Mananzala & Spade, *supra* note 98, at 57.
- ¹⁰⁹ *See, e.g.*, Paul Kivel, *Social Services or Social Change?*, in THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 129 (INCITE! Women of Color Against Violence ed., 2007); Dylan Rodriguez, *The Political Logic of the Non-Profit Industrial Complex*, in THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 21 (INCITE! Women of Color Against Violence ed. 2007); Spade & Mananzala, *supra* note 98. Of course, those lawyers who do social change work outside of the NPIC are not immune from financial controls and limitations. Attorneys at law firms doing pro bono work typically face pressure to prioritize work for paying clients. The focus of firms on the bottom line leads pro bono work to be marginalized and isolated. Because firms engage in pro bono work in part in order to improve public relations, politically unpopular clients and politically radical causes may be disfavored and declined. For example, at SRLP, we have had the experience of firms declining our cases because the client was incarcerated. Attorneys in small, plaintiff-side firms have their own financial considerations, which can lead to pressure to serve only wealthy clients or to take only cases that are highly likely to succeed and where either a class action can be brought or particularly egregious legally cognizable injuries have occurred.
- ¹¹⁰ Rodriguez, *supra* note 109, at 21.
- ¹¹¹ 42 U.S.C. § 2996 (1964).
- ¹¹² Houseman, *supra* note 62, at 1705 ("Government today refuses to fund far less threatening activities, such as welfare reform litigation, and foundation support for legal advocacy, which has never been substantial, is not increasing").
- ¹¹³ Kivel, *supra* note 109, at 139-40.
- ¹¹⁴ Bell, *supra* note 70, at 20.
- ¹¹⁵ *Id.* at 23.
- ¹¹⁶ *Id.*
- ¹¹⁷ THE MANUAL, *supra* note 99, at 21.
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.*
- ¹²¹ *Id.*
- ¹²² *Id.*
- ¹²³ *Id.*
- ¹²⁴ John A. Powell, *Race and Poverty: A New Focus for Legal Services*, 27 CLEARINGHOUSE REVIEW 299, 299-300 (1993).
- ¹²⁵ *Id.* at 307.

¹²⁶ *Id.* at 306.

¹²⁷ Trubek, *supra* note 84, at 242–43.

¹²⁸ *Id.* at 243.

¹²⁹ *Id.* at 242.

¹³⁰ *Id.* at 243.

¹³¹ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race & Gender*, 1991 DUKE L.J. 365, 377 (1991).

¹³² Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15, 30 (2009).

¹³³ Similarly, I use the term “issues” with caution because the term is loaded with subjectivity and inappropriately appropriated by professionals within these spaces.

¹³⁴ I use the term “set up” to explain the ways in which the non-lawyer is always going to be an outsider in the all-lawyer space. Lawyer spaces are specifically insular in that there is a shared dialect with specific reference points such as case law, statutes, regulations, specific laws, and even other lawyers and law firms. Regardless of what the non-lawyer expresses, it appears out of place, uninformed, and/or out of context.

¹³⁵ Tokenization occurs in particular at public interest conferences and symposiums when a non-lawyer, who is generally a person impacted by the legal discussion at hand, is added to a panel discussion to get a “personal story.” This is extremely problematic when the one “personal story” is commented and reflected on by “experts in the field.” See also Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703 (2007) (explaining the tokenization of women on corporate boards); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage, & Biopolitics*, 11 WIDENER L. REV. 309 (2005); Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”*: *Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997).

¹³⁶ Symposium of the Women’s Law Journal at UCLA School of Law (2009).

¹³⁷ For a helpful resource on creating law school events and other conferences that support social change rather than reproducing oppressive systems, see Dean Spade, *Tips for Students Interested in Organizing Conferences* (publication forthcoming on SRLP Website, currently on file with authors).

¹³⁸ Quigley, *supra* note 69, at 470.

¹³⁹ See generally Mananzala & Spade, *supra* note 98. As stated,

We have reservations about whether *movement* is an appropriate term for the advocacy, policy, and law reform work that has been engaged over the last 25 years seeking, for the most part, lesbian and gay rights or rights of same-sex couples. The co-optation of the word *movement* itself, to signify work that does not engage in base-building or bottom-up strategies or promote leadership of those vulnerable to the most severe manifestations of heterosexism, is a concern of this article.

See also SUZANNE PHARR, PRESENTATION FOR SESSION ONE: SOCIAL JUSTICE MOVEMENTS AND NON-PROFITS—HISTORICAL CONTEXT, Session held at The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex Conference, Santa Barbara, CA. (Apr. 30, 2004).

¹⁴⁰ Even the term “same-sex marriage” reflects transphobic assumptions legitimizing a binary gender system and often invalidating the gender identity of transgender people.

¹⁴¹ See generally Mananzala & Spade, *supra* note 98.

¹⁴² *Id.* at 59.

¹⁴³ See Helene E. Shugart, *Reinventing Privilege: The New (Gay) Man in Contemporary Popular Media*, 20 CRITICAL STUD. IN MEDIA COMM. 67 (2003); Larry Gross, *Out of the Mainstream: Sexual Minorities and the Mass Media*, in REMOTE CONTROL: TELEVISION, AUDIENCES, AND CULTURAL POWER 130 (Ellen Seiter et al. eds., 1989).

¹⁴⁴ Shugart, *supra* note 143; Gross, *supra* note 143.

¹⁴⁵ See National Center for Lesbian Rights, <http://www.nclrights.org> (listing four features on front page of website that concern marriage) (last visited Jan. 30, 2010); Lambda Legal, Docket, <http://www.lambdalegal.org/our-work/in-court/cases/docket.html?page=1> (listing four pending cases concerning marriage or relationship recognition) (last visited Jan. 30, 2010); American Civil Liberties Union, LGBT Rights, <http://www.aclu.org/lgbt-rights> (listing 11 relationship recognition cases) (last visited Jan. 30, 2010); Gay and Lesbian Advocates and Defenders, Cases: Marriage, <http://www.glad.org/work/cases-browse/c/marriage/> (listing ten marriage cases) (last visited Jan. 30, 2010). In 2006 and 2005, marriage received around 9 percent of foundation grants made for LGBTQ work, nearly \$6 million each year. FUNDERS FOR LESBIAN AND GAY ISSUES, LESBIAN, GAY, BISEXUAL, TRANSGENDER, & QUEER GRANTMAKING BY U.S. FOUNDATIONS (calendar year 2006), at 18–19 (2008), available at <http://www.lgbtfunders.org/files/FLGI%202006.report.final.pdf>. That amount was more than four times the amount of grants made for gender identity work. *Id.* at 19. However, that figure represents only a small portion of the overall funding going toward marriage. Over \$44 million was raised to oppose the ban on gay marriage, Proposition 8, that was passed in California. *Tracking the Money: Final Numbers*, L.A. TIMES (last updated Feb. 3, 2009), <http://www.latimes.com/news/local/la-moneymap,0,2198220.html> story.

¹⁴⁶ Marlon M. Bailey, Priya Kandaswamy, & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in THAT’S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION 87, 91 (Mattilda Bernstein Sycamore ed., 2004).

¹⁴⁷ *Id.*

¹⁴⁸ This is gleaned from the authors’ experiences working with some of these organizations and reviewing their retainer agreements.

¹⁴⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁵⁰ SYLVIA RIVERA LAW PROJECT, IT’S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 15 (2007), available at <http://srlp.org/files/warinhere.pdf>.

¹⁵¹ KATAYOON MAJD, JODY MARKSAMER, & CAROLYN REYES, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 62 (2009), available at http://www.nclrights.org/site/DocServer/Hidden_Injustice.pdf?docID=6701.

¹⁵² Yasmin Nair, *Private Parts & Public Sex*, WINDY CITY MEDIA GROUP, Aug. 1, 2005, <http://www.windycitymediagroup.com/ARTICLE.php?AID=9037>.

¹⁵³ Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 535–36 (2009).

¹⁵⁴ THE CENTER FOR HIV LAW & POLICY, PROSECUTIONS FOR HIV EXPOSURE IN THE UNITED STATES, 2008–2009 1 (2009), available at <http://www.hivlawandpolicy.org/resources/view/456>.

¹⁵⁵ AMNESTY INTERNATIONAL, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 12 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>; see generally Willse & Spade, *supra* note 135.

¹⁵⁶ *Political Economy of Sexuality*, *supra* note 68.

¹⁵⁷ Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000); Lisa A. Crooms, "EVERYWHERE THERE'S WAR": A RACIAL REALIST'S RECONSIDERATION OF HATE CRIMES STATUTES, 1 GEO. J. GENDER & LAW 41, 44 (1999).

¹⁵⁸ See generally KATHERINE WHITLOCK, IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIMES LEGISLATION (2001), available at <http://srlp.org/files/Broken%20Bones-1.pdf>.

¹⁵⁹ *Id.* at 8.

¹⁶⁰ Sylvia Rivera Law Project, *SRLP Announces Non-support of the Gender Non-discrimination Act*, Apr. 6, 2009, <http://srlp.org/genda>; Sylvia Rivera Law Project, *SRLP Opposes the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, <http://srlp.org/fedhatecrimelaw> (last visited Mar. 5, 2010).

¹⁶¹ Matthew Shepherd & James Byrd, Jr. Hate Crimes Prevention Act, H.R. 2647, Pub. L. No. 111–84, Division E (2009).

¹⁶² See, e.g., Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007); Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998); Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

¹⁶³ THE MANUAL, *supra* note 99, at 12–13.

¹⁶⁴ The authors of *The Manual* use the term "direct action organizing" for what we call "community organizing" and describe essentially all efforts for social change done through organizations as "community organizing." For clarity's sake, we use the term "community organizing" as we have defined it above in place of the terms used by the Manual's authors.

¹⁶⁵ THE MANUAL, *supra* note 99, at 11–12.

¹⁶⁶ Quigley, *supra* note 69, at 467 ("If the goal is getting a stop sign, then litigation may well be the superior method to use. If the goal is taking, developing, and sharing power, then litigation is not effective").

¹⁶⁷ RINKU SEN, *STIR IT UP: LESSONS IN COMMUNITY ORGANIZING AND ADVOCACY* 25 (2003).

¹⁶⁸ *Id.* at 18; Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1053 (1970) ("Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together").

¹⁶⁹ SEN, *supra* note 167, at xlix.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² THE MANUAL, *supra* note 99, at 11.

¹⁷³ *Id.*

¹⁷⁴ MIAMI WORKERS CENTER, *FOUR PILLARS OF TRANSFORMATIVE SOCIAL JUSTICE INFRASTRUCTURE 1* (2004) (on file with author) [hereinafter *FOUR PILLARS*].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2–5.

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See generally Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 *N.Y.U. J. LEGIS. & PUB. POL'Y* 35, 37–38 (2004–2005).

¹⁸¹ Villazor does an excellent job summing up the various nuanced approaches to this type of lawyering, and includes seminal works from the various schools of thought. *Id.* at 49–50.

¹⁸² *Id.* at 51.

¹⁸³ See generally Quigley, *supra* note 69.

¹⁸⁴ *Id.* at 455–56.

¹⁸⁵ Villazor, *supra* note 180, at 50. We understand this statement to mean that the lawyer's job may be to do anything that needs doing in order to support community empowerment and action, which may include organizing tactics, not that lawyers should believe ourselves to be somehow automatically skilled as community organizers or that we should take over leadership of those forms of work.

¹⁸⁶ Quigley, *supra* note 69, at 465–78.

¹⁸⁷ *Id.* at 477.

¹⁸⁸ *Id.*

¹⁸⁹ See *FOUR PILLARS*, *supra* note 174.

¹⁹⁰ Mananzala & Spade, *supra* note 98, at 62.

The Four Pillars model allows for recognition of the vital need for all four pillars: Direct services are not simply a Band-Aid, as is sometimes argued, but instead can be understood as an essential aspect to building mass power. Direct services not only allow the base of people affected to survive and politically participate but also can be a road to participation if those services are provided in a politicized context where people come to understand their need for

services as linked to broader political structures that affect many others like them.

¹⁹¹ See generally PIVEN & CLOWARD, *supra* note 68.

¹⁹² We are fortunate to practice in an area where several extraordinary community-organizing projects by and for low-income queer and trans people of color are operating. We realize that in many areas of the country, similar organizations may not exist locally. However, there may still be opportunities for local lawyers to support community organizations. For example, some community-organizing groups not focused explicitly on trans issues narrowly conceived may have strong trans leadership and strong positive impact on trans communities. Lawyers can consider who, if anyone, is doing organizing locally around prison change, HIV/AIDS, reproductive justice, sex worker rights, or other issues. These organizations may already prioritize trans people and issues and may welcome accountable legal support. While less ideal, lawyers can also support community organizations from other localities that are regional or national in scope. Attorneys may be tempted to try to start community-organizing projects themselves. Based on our observations, attorneys who have tried to start organizing campaigns on issues that do not directly impact them have not succeeded in fulfilling community-organizing principles; attorneys have monopolized positions of power and remained in control and/or directly impacted community members have felt abandoned, unsupported, and set up to fail. It is not necessarily impossible for attorneys to responsibly support new community-organizing efforts at their earliest stages, but it is very challenging. If an attorney works with many clients with similar problems who talk about wanting to make change, for example, the attorney may be able to provide initial space for them to meet without charge (and without strings attached), contacts with other community organizers who may be able to provide training or advice, and other accountable support as described above. We encourage attorneys in these positions to be extremely cautious, creative, and mindful of their privilege when considering or making such efforts.

¹⁹³ Quigley, *supra* note 69, at 468.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ THE MANUAL, *supra* note 99, at 318.

¹⁹⁸ See generally NYC Human Resource Administration: Department of Social Services, <http://www.nyc.gov/html/hra/html/home/home.shtml>.

¹⁹⁹ Letter from Z Gabriel Arkles, Staff Attorney, Sylvia Rivera Law Project to Whom it May Concern (Aug. 24, 2006) (on file with author).

²⁰⁰ Personal telephone communication to an SRLP Staff Attorney from an HRA case worker (2009).

²⁰¹ Memorandum from The City of New York: The Human Resource Administration, Serving Transgender, Transsexual and Gender Nonconforming Individuals (Dec. 23, 2009), available at <http://srlp.org/files/HRA%20Serving%20Transgender%20Transsexual%20and%20Gender%20Nonconforming%20Individuals.pdf>.

²⁰² We were not able to achieve every one of our original demands, such as a clear, easy, and accessible process for gender marker change on the benefits card. However, most of our key points were adopted in the agency procedure.

²⁰³ Transforming Justice, Conference Report and Summary, Nov. 29, 2007, <http://transformingjustice.org/summary.html> (last visited Mar. 5, 2010).

²⁰⁴ *Id.*

²⁰⁵ LGBTQQ is an acronym for Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning.

²⁰⁶ *Id.*

²⁰⁷ Project South, People's Movement Assemblies, http://www.projectsouth.org/index.php?option=com_content&view=article&id=10&Itemid=34 (last visited Mar. 5, 2010).

²⁰⁸ US Social Forum, About, <http://www.ussf2010.org/about> (last visited Mar. 5, 2010).

²⁰⁹ This statement is based on conversations the authors have had with organizers and attendees of the U.S. Social Forum.

²¹⁰ Project South, *supra* note 207.

²¹¹ US Social Forum, Resolution on the Cuban Five Political Prisoners and Luis Posada Carriles, http://www.ussf2007.org/en/cuban_five (last visited Mar. 5, 2010).

²¹² US Social Forum, Atlanta Housing Authority Promoting Homelessness, http://www.ussf2007.org/en/Atlanta_Housing_Authority_Promoting_Homelessness (last visited Mar. 5, 2010).