

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.”<sup>1</sup>*

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.”<sup>2</sup> 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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<sup>1</sup> GEORGE OPPEN, *Of Being Numerous*, in *NEW COLLECTED POEMS* 162, 166 (Michael Davidson ed., 2002).

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

numerous.<sup>3</sup> 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.<sup>4</sup> The discussion of law and organizing is reaching a critical moment, both in practice and in the academy. I hope that this

<sup>3</sup> 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 Ness, 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 100<sup>th</sup> 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).

<sup>4</sup> 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](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](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/piomelli\\_01/Group-Syllabus.htm](http://w3.uchastings.edu/piomelli_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* Sameer 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.<sup>5</sup> 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

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<sup>5</sup> 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

decades of the twentieth century.<sup>6</sup> A century ago, the rise of the corporation as client presented novel problems. How would lawyers represent large collections of heterogeneous interests? How would they be held accountable to their incorporated clients? Would a lawyer answering to many masters in fact answer to none? For decades, lawyers worked to develop conceptual frameworks for this new practice, to formulate rules grounded in those frameworks, and, most importantly, to institutionalize those rules. On the public side, courts responded to lawyers and legal scholars who argued for a modern corporate jurisprudence developed from simple agency law. The analogization of the corporation to the individual, in addition to granting corporations the rights and protections of citizens, simplified the lawyer-corporation relationship and provided enforceable means of holding lawyers accountable to corporate clients.<sup>7</sup>

By the middle of the twentieth century, lawyers for corporate constituencies had well-defined roles, clear chains of command, and steady work.<sup>8</sup> Though many cursed (and continue to curse) an ever-enlarging workload and the rise of intricately measured billable time, it is precisely that reliable flow of neatly bounded client need that guarantees them a role, therefore ensuring their survival and measuring their identity. Lawyers respond to both the money and the existential shelter that are Paul Cravath's legacy: many prominent and powerful efforts of the legal profession are dedicated to representing the financial interests of incorporated bodies. A 1982 study of lawyers in Chicago found that the deepest fissure in the profession, the variable more likely even than race to predict lawyers' relationships, home neighborhood, and social milieu, was whether the lawyer predominantly worked with individual clients or with corporate clients.<sup>9</sup> Sixty-nine percent of 2003 law graduates nationwide who did not go straight into judicial clerkships went to work for law firms or private businesses.<sup>10</sup> Another 12.7% entered government jobs, for a total of 82% working for the most well-organized constituencies in American society.<sup>11</sup>

In short, lawyering with and for groups is nothing new. Many, if not most, lawyers in the United States today work with incorporated groups. Likewise, lawyers seeking to develop countervailing forces to well-organized establishment institutions also must work with groups. However, the constituencies with whom they must work are often marginalized in the state and private corporate structures for which there are clear, well-defined models of the lawyer-client relationship. Concrete models are needed for structuring relationships between lawyers and unorganized or partially organized constituencies. Many lawyers, organizers, and community leaders have already realized this, and their struggles to innovate, as well as their successes and failures, guide the models developed in this paper.

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<sup>6</sup> See ROBERT T. SWAINE, 2 *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1948: THE CRAVATH FIRM SINCE 1906*, at 10 (1948) (describing the Cravath firm practice as a civil business practice that served corporate and banking clients).

<sup>7</sup> See, e.g., Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 141–45 (2004) (discussing the treatment of the corporation as an individual).

<sup>8</sup> David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney–Client Relationship*, 78 FORDHAM L. REV. 2067, 2077–78 (2010).

<sup>9</sup> JOHN P. HEINZ & EDWARD O. LAUMANN, *The Hemispheres of the Legal Profession: Summary and Speculation*, in CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 127, 127–28 (Northwestern Univ. Press rev. ed. 1994).

<sup>10</sup> AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 44 (Wendy Margolis et al. eds., 2006 ed. 2005).

<sup>11</sup> *Id.*

Social justice lawyers and organizers can and have adapted some lessons from corporate lawyering. For example, the “Corporate Model” in Part II mimics the basic structures of the in-house counsel to a for-profit corporation. Indeed, corporations were themselves once a novel and insurgent form of organization, and lawyers seeking to develop countervailing power structures today can learn from their success. In reality, though, the possibilities for mimicry are limited: the corporate form may once have been new, but the constituencies that adopted it in the late nineteenth and early twentieth centuries were well-resourced and well-organized, even when their hierarchies were cruder than they are today.<sup>12</sup> Their struggle to institute better legal treatment for their pre-existing enterprises is quite different from the struggle of marginalized groups that have never been legally recognized and may not have any organizational structure. The corporate lawyer is trained to work only with well-organized constituencies. In fact, the shapers of corporate practice also developed the rules of the legal profession so as to emphasize clarity of role and chains of command, viewing as unethical the messy relationships that are necessary when working with inchoate groups.<sup>13</sup> Whether the pioneers of corporate lawyering were motivated by concern for accountability and authenticity of representation, or by a desire to render disfavored or opposing groups “unrepresentable”, has been the subject of analysis elsewhere.<sup>14</sup> Regardless of the purpose for which lawyers shaped corporate representation, the result has been that marginalized constituencies are excluded from Paul Cravath’s model of corporate representation. As a result, early public interest lawyers developed their own strategies to make their work relevant to large, marginalized groups: impact litigation and class actions.

## 2. Impact Litigation and Class Action

Lawyers seeking to advocate on behalf of unorganized constituencies have long turned to the well-developed strategies of impact litigation and class action lawsuits. However, both of these strategies are problematic in their concentration of power in the hands of lawyers. As a result, they have been criticized both for failing to hold those lawyers accountable to the concerned constituencies, and for leaving those constituencies as marginalized as they were prior to the litigation, though perhaps materially better off.

Impact litigation and class action, as strategies of representing unorganized constituencies in single litigations, developed during the early twentieth century, at roughly the same time as the structures of corporate law. But where the institutions, practices, and regulation of corporate representation were designed in large part by the leaders of corporations themselves, the development of impact and class litigation was often guided by lawyers, judges, and legislators with little involvement by members of the constituencies they sought to represent. Corporate representation was originally an alteration of the traditional lawyer’s practice of individual representation—the simplification of corporate legal standards into a “shareholder

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<sup>12</sup> See MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* 24–26 (1988); see also DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 149 (1995) (describing the incorporation of trade unions as a means of increasing power in a plural society).

<sup>13</sup> See generally Kenneth De Ville, *New York City Attorneys and Ambulance Chasing in the 1920s*, 59 *HISTORIAN* 291, 298–304 (1997) (discussing limiting the contingency fee and personal injury fee awards of plaintiffs’ lawyers).

<sup>14</sup> *Id.* See also Elihu Root, Address of 15 January 1916, in *N.Y. ST. B. ASS’N PROC.* 473–81 (1916) (discussing the need to protect individual liberty in the face of government and majoritarianism).

primacy rule,” and a “business judgment rule,” under which courts are unwilling to look into the intricacies and opposing forces within corporate decision-making, helped flatten the otherwise heterogeneous corporation into an entity capable of treatment as an individual.<sup>15</sup>

While corporate lawyers responded to the unruliness of group representation by subsuming it within the familiar business client relationship—treating the corporation as an individual client writ large—such a strategy was unavailable to early social change lawyers who sought to represent inchoate or marginalized groups. Instead, those lawyers reached back to and adapted a different strand of the nineteenth century lawyer’s experience: the “public service” of attorneys who sat on professional and governmental advisory boards, purportedly representing the interests of all sectors of society.<sup>16</sup> Out of this elite public-mindedness came the notion that lawyers, either by training, logic, proximity to justice, or sheer civility, could zealously represent the interests of constituencies to whom no legal mechanisms held them accountable. Thus, for some historians, impact litigation has always been a form of paternalism, even *noblesse oblige*.<sup>17</sup> A competing history of impact litigation suggests that the first impact litigators were in fact grounded in organized constituencies—such as the National Association for the Advancement of Colored People and the labor movement—that could indeed hold them closely accountable by intricate social and organizational mechanisms.<sup>18</sup> According to this history, impact litigators became detached from their bases only later, during a general professionalization of political advocacy in the 1960s and 1970s.<sup>19</sup> But both versions of the rise of impact litigation leave us with the same problems of accountability and power.

The representation of marginalized constituencies by lawyers who are not themselves marginalized, though they may be members of the constituency, makes clear this problem of accountability. This is especially true when, as is usually the case, there are insufficient structures

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<sup>15</sup> See Chen & Hanson, *supra* note 7 at 42–46 (arguing that Milton Friedman’s case for shareholder primacy was a turning point in corporate legal theory and that the basic script of shareholder primacy is still a relevant doctrine). For a statement of the business judgment rule, see, for example, *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127–28 (Del. 2003).

<sup>16</sup> See, e.g., ALEXIS DE TOCQUEVILLE, *The Temper of the Legal Profession in the United States, and How It Serves as a Counterpoise to Democracy*, in 1 DEMOCRACY IN AMERICA 272, 273 (Vintage Books ed., 1990) (describing lawyers as an elite class in society, superior in intellect and judgment); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L. J. 1445 (1996) (describing Brandeis as a harmonizer of conflicting social interests who pursued activities in the public interest without the constraints of the attorney-client relationship).

<sup>17</sup> See DE TOCQUEVILLE, *supra* note 16, at 276 (arguing that lawyers in the United States and England both have an aristocratic character and serve the popular cause, and act as a connecting link between the two).

<sup>18</sup> See Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L. J. 999 (1989) (describing the role of litigation within the Montgomery Bus Boycott and the Civil Rights Movement); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L. J. 256 (2005) (highlighting the achievements of NAACP lawyers leading up to the Supreme Court’s decision in *Brown v. Board of Education*); see also ERNST, *supra* note 12 (discussing the role of lawyers working with and against organized labor).

<sup>19</sup> For discussions of the professionalization of political advocacy, see ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 151 (2000); J. Craig Jenkins, *Nonprofit Organizations and Political Advocacy*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 317 (Walter W. Powell & Richard Steinberg, eds. 2006); Robert Cameron Mitchell et al., *Twenty Years of Environmental Mobilization: Trends Among National Environmental Organizations*, in AMERICAN ENVIRONMENTALIST: THE U.S. ENVIRONMENTAL MOVEMENT, 1970 – 1990, at 21–24 (Riley E. Dunlap & Angela G. Mertig eds., 1992) and Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 988–89 (2004).

by which the constituencies can determine their group values and enforce them upon the lawyer. Such anxiety is manifest in the recent trend towards limitations on the class certification and the awarding of legal fees.<sup>20</sup> Public officials who remain unmoved by the lack of voting power of poor people, immigrants, and people of color in their own districts become suddenly stricken at the thought that these same people might be caught up in nonconsensual “virtual representation” by a nonprofit or plaintiff-side lawyer.<sup>21</sup> As a result, there is no shortage of attention to the accountability problem in impact litigation and class action.

But it is not primarily due to the lack of accountability that lawyers increasingly turn away from impact litigation and class action. As I will discuss below, accountability can similarly fail when lawyers work with well-organized constituencies<sup>22</sup> (indeed, even with the strict lines of accountability in corporate lawyering, most employees of a corporation are prohibited from holding the corporation’s lawyers accountable to their interests—clarity does not equal authenticity). Certainly, lawyers engaged in traditional impact litigation are no less accountable to marginalized constituencies than are any other elites (and battles over tort reform and the restraints on class action lawyers are primarily political struggles between liberal and conservative elites). Rather, public interest lawyers’ growing dissatisfaction with impact litigation is dissatisfaction with its *limits*, specifically its failure to change the unorganized status of its beneficiaries: it leaves behind no new relationships, operating institutions, or increased ability for marginalized people, and their lawyers, to act effectively together. Indeed, that is why corporations do not rely on impact litigation to advance their core missions. An automaker that, instead of manufacturing and marketing cars, simply sued the federal government for the realization of the right to “a car in every garage,” would never begin to exist as a sustainable, profitable operation—even if, by legal genius and favorable judicial climate, the suit were successful (or perhaps *especially* if the suit were successful). A marginalized constituency that wins a benefit through litigation at a distance is simply a marginalized constituency with a benefit. I am troubled less by ethical concerns about the power of unaccountable lawyers than by the powerlessness of marginalized constituencies that are forever reliant on lawyers’ assistance.

### *B. Law and Organizing as an Alternative to Traditional Paradigms of Group Representation*

As discussed above, lawyers working for social change cannot work with the fully incorporated, hierarchized, and established groups of Paul Cravath’s corporate representation model. Nor should they limit their work to the atomized, dispersed and passive constituencies of the impact litigation and class action models. Instead, lawyers who seek to build countervailing power must work with people who are *in the process* of transforming themselves from atomized and dispersed to organized and powerful. None of the traditional paradigms of group representation are sufficient to structure lawyers’ relationships with constituencies in the process

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<sup>20</sup> See, e.g., *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155–60 (1982) (emphasizing the importance of carefully evaluating a plaintiff’s claim that he or she is a proper class representative under Federal Rules of Civil Procedure 23(a)).

<sup>21</sup> See, e.g., Bob Dole, Opinion, *Ignore the Lawyers, Help the People: The Powerful Trial Lawyers Lobby Must Not Be Allowed to Stymie Tort Reform*, L.A. TIMES, Apr. 27, 1995, at B7 (arguing that trial lawyers fail to protect consumers and the public); see also Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?* 63 B.U. L. REV. 597 (1983) (arguing that contrary to popular belief, the class action device is more beneficial to defendants than plaintiffs).

<sup>22</sup> See *infra* pp. 19–22 (outlining the challenges lawyers face in community organizing).

of organizing. Instead, practitioners and theorists have begun to develop a new paradigm: the practice of law and organizing.<sup>23</sup>

### 1. Organizing: A Definition

Before it is possible to discuss the practice of law and organizing, it is first necessary to introduce the practice of organizing itself. Organizing is a vast and deep field, the whole of which cannot be done justice in this paper.<sup>24</sup> What I will provide here is only a working definition and some basic criteria essential to the practice.

For the purposes of this paper, I define organizing as the processes by which people build and exercise power by collecting and activating relationships. These processes may come under the rubrics of community organizing, the labor movement, political campaigns and movements, organization of counter-institutions, etc. I am speaking specifically of the combination of people as the primary source of power, not simply any instance in which a few people collaborate to focus their pre-existing power (such as when several lawyers work together on a case). By “organizing,” I mean those processes by which power is created from multiplied relationships—a phenomenon of energy release that civil rights organizer Bob Moses likened to nuclear fusion.<sup>25</sup>

This definition of organizing is grounded in my own experience working as a community organizer before beginning practice as a lawyer. Over the course of six years, I worked for several different organizing projects, including the Association of Community Organizations for Reform Now (ACORN) in Houston,<sup>26</sup> Hartford Areas Rally Together (HART),<sup>27</sup> and the Essex

<sup>23</sup> See *supra* notes 3–4.

<sup>24</sup> There are many excellent resources on the history, theory, and practice of organizing. See, e.g., EDWARD T. CHAMBERS, *ROOTS FOR RADICALS* (2004); CHARLES PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (1995) (analyzing the legacy of community organizing in Mississippi); RINKU SEN & KIM KLEIN, *STIR IT UP: LESSONS IN COMMUNITY ORGANIZING AND ADVOCACY* (2003); GABRIELLE THOMPSON, *CALLING ALL RADICALS: HOW GRASSROOTS ORGANIZERS CAN SAVE OUR DEMOCRACY* (2007); Dave Beckwith & Cristina Lopez, *Community Organizing: People Power from the Grassroots* (1997) (unpublished article), available at <http://comm-org.wisc.edu/papers97/beckwith.htm> (defining action strategies for community organizing); Marshall Ganz, *Organizing: People, Power and Change – Organizing Notes 1* (2006) (unpublished syllabus), available at <http://www.hks.harvard.edu/fs/mganz/teaching.htm> (defining organizing and explaining the general strategies of an organizer).

For examples of contemporary organizations that practice community organizing, see CENTER FOR THIRD WORLD ORGANIZING, <http://www.ctwo.org/index.php?s=23>, (last visited Sept. 26, 2011) (striving to achieve social and economic justice through direct action and grassroots strategies); THE INDUSTRIAL AREAS FOUNDATION, <http://www.industrialareasfoundation.org/who.html> (last visited Sept. 26, 2011) (building power and working for social change through institution based organizing); KENTUCKIANS FOR THE COMMONWEALTH, <http://www.kftc.org/about-kftc> (last visited Sept. 26, 2011) (organizing for just economic policies in Kentucky); MAKE THE ROAD NEW YORK, <http://maketheroadny.org/whatwedo.php> (last visited Sept. 26, 2011) (using community and electoral organizing in conjunction with legal and support services, to promote economic justice in New York); and THE CENTER FOR COMMUNITY CHANGE, <http://www.communitychange.org/page/about> (last visited Sept. 26, 2011) (supporting and mobilizing grassroots groups).

<sup>25</sup> See PAYNE, *supra* note 24, at 367.

<sup>26</sup> 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. For ACORN’s history, structure, and methods, see JOHN ATLAS, *SEEDS*

County Community Organization (ECCO) in Lynn, Massachusetts.<sup>28</sup> As an organizer, it was my job to help the residents of city neighborhoods—usually struggling neighborhoods—form organizations through which they could have the power to influence public decisions. These residents are often excluded from participating in important decisions concerning allocation of resources in their communities. For example, what kind of jobs should the city seek to generate with its employer tax breaks? What kind of housing should be built? Which schools should get more funding, and what should the money be spent on? What should be the priorities of the police? Of public works? Where should incinerators be built? And where should libraries be built? Organizing begins with these issues, and builds power towards participation in the larger systems and frameworks that shape distribution of resources nationally and globally.

The first community groups I organized flared up, won concessions of community policing or street sweeping, and burned out. One neighborhood group in the South End of Hartford could not even celebrate the City Council's adoption of its demanded \$1 million War Against Rats, because the exhausted residents had grown too weary of each other and of me to gather together in one room. No one stayed for the planned evaluation following the Council meeting. They went home instead to wait among the rats for the city exterminators to come around. The article in the newspaper about the drastic shift in city policy made no mention of the neighbors who had driven it, and there was no one who could call to seek a correction. Driving home alone, I swerved too late to avoid hitting an apparently malformed kitten running from behind an open dumpster. A closer inspection made clear the mistake of seeing, and I sat on the curb shaking and wondering how it was possible to win so big and at the same time lose so badly as to be left alone with only a fat, dead rat to share the evaluation.

And so it is not only strategic analysis, but also what a colleague later pointed out was simple loneliness that grounds the criteria by which organizing efforts are evaluated. What was the nature of this organizing failure? To be successful—to truly be *organizing*—an organizing effort must meet three criteria, or core values: (1) it must build the power of the group that is organizing, changing the group's relationships to other, already powerful institutions and groups; (2) it must result in sustainable organizational structures that can be applied to future struggles; and (3) it must result in the development of individual participants' capacities to lead and advocate on their own behalf. These criteria are presented below. Upon setting them out, I realize that, like the rings of a tree, they emerge in reverse nested order: I begin with what is most external and most visible in a successful organizing effort, and come through that to what lies within and produces it.

### *Power*

Organizing, as this paper is concerned with it, is aimed at creating power. The simplest definition of power comes from its Latin root: "to be able." To have power is to be able to

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OF CHANGE (2010) (narrating the story of ACORN); ROBERT FISHER, ed., *THE PEOPLE SHALL RULE: ACORN, COMMUNITY ORGANIZING, AND THE STRUGGLE FOR ECONOMIC JUSTICE* (2009) (assessing the current state of community organizing and the effectiveness of ACORN).

<sup>27</sup> HARTFORD AREAS RALLY TOGETHER, <http://www.hartofhartford.org/> (last visited Sept. 26, 2011).

<sup>28</sup> At the time I worked there (Jan. 2000 through June 2002), ECCO was an affiliate of the Industrial Areas Foundation (IAF), <http://www.industrialareasfoundation.org/> (last visited Sept. 26, 2011). It is now an affiliate of People Impacting Communities through Organizing (PICO), <http://www.piconetwork.org/act/find> (last visited Nov. 14, 2011).

accomplish one's goals.<sup>29</sup> If you cannot accomplish your goals, then you do not have (enough) power. If someone else can accomplish your goals on your behalf, then you do not have power. We each have in our bodies the power to move stones, but if we can coordinate our bodies with other bodies, we have the power to build cities. This, crudely, is why power comes from organizing people. In a civilized society, power may mean the ability to move the levers that control already-existing organizations of people and resources (e.g., to persuade a city council to instruct city officers to order a landlord to clean up his property), or it may mean creating entirely new levers.

There may be more than one way to create power, but for the purposes of this paper, "organizing" means organizing people, developing what Bernard Loomer has called "relational power."<sup>30</sup> Relational power is the power that comes when people combine and coordinate their thoughts, voices, energy, imagination, and other resources.<sup>31</sup> Importantly, relational power is not a zero-sum quantity.<sup>32</sup> If an unorganized constituency becomes organized, this does not necessarily reduce the power of other parties or constituencies (though of course any political player may sometimes enter into zero-sum struggles, such as disputes over the uses of limited funding). The constituency does not have to choose between the power developed through its own organized relationships and the power offered by the lawyer's access to legal forums. As I will further explore below, the lawyer-client relationship is only another relationship through which power can develop. It is a kind of relational power, not an alternative to it.

### *Organizational Development*

But momentary power is not powerful at all if other parties and other constituencies will continue to exercise power every day into the future. The games that marginalized constituencies have always lost are iterated games—winning today only means that you have something to lose tomorrow. As was painfully clear to me that night in Hartford, organizing is not something that happens once—a founding or a meeting—but a constant process of sustaining *organization*. There is no model of organization that is inherently sustainable. Organization is only sustainable as long as deliberate organizing continues. At times, when an organization becomes embroiled in a particular struggle, organizing (the building of new relationships) gives way to negotiation, protest, research, and other tactics of political victory. Paradoxically, it is as the organization approaches and becomes caught up in victory that it is in the greatest danger. And it is at this point—amidst argument and maneuvering—that lawyers often feel most competent.

The power of organized people is sustained into the future by replicated patterns of relationship and action—*organization*. An organization is a structure in which individuals develop as leaders, relate to others, and exercise their power. More importantly, it is the continuation of relational power beyond the horizon of any single issue or the tenure of any particular individual.<sup>33</sup> The difference between a temporary mobilization and a sustainable

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<sup>29</sup> CHAMBERS, *supra* note 24, at 27–31.

<sup>30</sup> Bernard Loomer, *Two Conceptions of Power*, 6 PROCESS STUDIES, No. 1, Spring 1976, at 5–32, available at <http://www.religion-online.org/showarticle.asp?title=2359>.

<sup>31</sup> See Ganz, *supra* note 24, at 16 (defining relational power and explaining its formation based on joint interest in shared resources). See also Loomer, *supra* note 30.

<sup>32</sup> CHAMBERS, *supra* note 24, at 28.

<sup>33</sup> See, e.g., Ganz, *supra* note 24, at 89–101 (describing the tensions and dilemmas inherent in organizational structures, offering advice on how to effectively manage these tensions and dilemmas, and advocating for shared

organization can be elusive, but typically organization is marked by creation of structures, shared identity, and rituals by which these are transmitted beyond the original group of leaders. Organization is performative—it continues to exist as long as people *act it out*. Structures are patterns of action and depend for their lives on continued action.<sup>34</sup> There are forms of reified structure—the organizational chart, the calendar, the building—that, while often present in vibrant organizations, should not be confused with genuine organizational structure itself. The monthly meeting is only a true organizational structure as long as the participants continue to *meet* one another.<sup>35</sup>

Structure—though often conceptualized spatially—is the way organizations exist across time. The Israelites wandering in the Sinai desert first established the rudiments of a calendar of festivals and observances that continued to organize their descendants for thousands of years, even though Israel as a spatially organized territory has existed only for a relatively brief portion of Jewish history.<sup>36</sup> Patterns of behavior can be indestructible and sustaining.

#### *Leadership and Identity Development*

Beyond structure, the essence of organization is the rise of individuals to act on one another—leadership. Leadership for the purposes of organizing is simply the power to move people.<sup>37</sup> Organizations with no leadership do not move. If they do not move, they are no longer organizations (though they will likely continue to be mistaken as such for a long time), because they are no longer patterns of action. Leadership without organization is simply mobilization, and not sustainable; because it does not replicate itself, the movement stops when the individual does.

An organization led by professional organizers has built power not for the powerless, but for the professionals. A struggle won by lawyers accrues spoils to lawyers. Millions of poor people work for corporations, but corporations are not poor peoples' organizations as long as poor people are the ones whose bodies are moved by the corporations, and not vice versa.

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. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.<sup>38</sup>

Thus, an organizing effort must involve the development of leadership from and within the group that is organizing.

Leadership requires skills that can be developed through experience.<sup>39</sup> “Leadership

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responsibility within an organization).

<sup>34</sup> CHAMBERS, *supra* note 24, at 80 (quoting Saul Alinsky as saying “[a]ction is to the organization as oxygen is to the body.”).

<sup>35</sup> See MICHAEL GECAN, GOING PUBLIC 131 (2002) (arguing that organizations often squander the time and energy of their participants).

<sup>36</sup> ABRAHAM JOSHUA HESCHEL, THE SABBATH: ITS MEANING FOR MODERN MAN 2-12 (Noonday Press ed. 1989) (discussing Judaism as a “religion of time” that sanctifies and creates an architecture of time).

<sup>37</sup> See Ganz, *supra* note 24, at 28–41 (outlining strategies of effective organizational leadership development).

<sup>38</sup> Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

<sup>39</sup> See Lindsey P. Walker-Estrada, *The Education and Liberation of the Poor in Community Organizing*

development” means both the development of leaders (the introduction of people to new relationships), and the development of leadership (the development of skills, knowledge, habits, and experience).<sup>40</sup> Practically speaking, this makes up the bulk of time spent by any group of people who are organizing. It was not what I had spent my time doing in Hartford; rarely in the course of that campaign had I helped any of the residents act as more than aggrieved neighbors who were moved by events, and so when they won their victory they returned to passively await the services to which they were entitled. None of them had acquired the habit of thinking about the group or the skills to gather their neighbors in exhaustion. More deeply, none of them owned the group. Because I had been the one to push and pull them to City Hall, it was not their organization to worry about.

I wrote above that each of these criteria—power, organizational development, and leadership and identity development—depends for its existence on the one below it, so that leadership development enables organization formation. This provides for sustained action, which is the way to build power in the iterated game of politics. But in fact, organizing is cyclical—having power is not only the end result of organizing but also a transformative experience through which individuals become leaders, starting the cycle anew.

Take, for example, the story of Mr. Domingo, a 40-year-old Guatemalan immigrant living in Lynn, Massachusetts. In the ten years since his arrival, he had worked a series of dead-end minimum wage jobs. He was surviving, but he had no savings to buy a car, pay for a house, or support a family. His pastor asked him to tell his story at a mass community meeting organized by the Essex County Community Organization. He agreed, but only reluctantly, because, as he later admitted, he considered himself a failure. The night of the meeting, he spoke third on a program of five speakers. He spoke of working full time for ten years, showing up on time, never taking sick days, getting the job done, but never getting anywhere, never keeping a job for more than a year, and never saving enough to buy a car or make a down payment on a home. At the end of ten years, he said, he was embarrassed and ashamed to find that he had gotten nowhere. The two speakers before him told similar stories of hard work, patience, and little to show for it. The speaker after him, a more experienced leader in the organization, spoke about city economic development policies. He described how the city offered job-creation tax incentives to employers without guidelines as to the nature of the jobs or any oversight to monitor whether those employers were creating any jobs at all—leading to the temporary, minimum wage job market in which Mr. Domingo was trapped. The last speaker asked the assembled members of the Lynn City Council to change the tax program to provide incentives for employers to provide jobs with career ladders and decent wages. In the audience were three hundred parents and workers, making up the largest group to gather for any political event in the city’s municipal campaigns that year. Pushed by the organized numbers, the Council Members agreed to ECCO’s changes.<sup>41</sup> Later that night, at the organizational evaluation, Mr. Domingo thanked the other leaders present for helping him “to tell my story for the first time in a way so that I wasn’t ashamed of it, to see that I am not a failure, but that I have been held back.”<sup>42</sup> Leadership helps

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(2003) (unpublished paper), available at <http://comm-org.wisc.edu/papers2004/walker.htm> (discussing research on personal transformation that takes place in the process of organizing).

<sup>40</sup> See Ganz, *supra* note 24, at 28–41 (outlining strategies of effective organizational leadership development).

<sup>41</sup> Kathy Ehrich, *Residents Demand Affordable Housing*, LYNN DAILY ITEM, May 15, 2001.

<sup>42</sup> Larry McNeil, an organizer for the Industrial Areas Foundation, tells a similar story about the collapse of his father’s business. Larry McNeil, *Congregations for the New Millenium 4* (unpublished manuscript) (on file with

build power, but the all too rare experience of power in turn transforms people into leaders.

This section began with two questions: “what is organizing?” and “why organizing?” I will let Mr. Domingo’s words stand as the final answer to both.

## 2. The Value of Lawyers to Organizing

Given the power that can be unleashed through organizing, why are lawyers necessary to the process at all? As I discuss below, the involvement of lawyers in organizing does pose some well-documented risks. But lawyers provide resources in the form of knowledge, skills, relationships, access to legal forums, and, perhaps surprisingly, values and traditions, all of which can be valuable to groups in the process of organizing.

Organizers and community leaders traditionally distrust lawyers as threats to the complex, sometimes fragile process of organizing and individual leadership development.<sup>43</sup> Lawyers, they worry, stifle the development of leaders by taking people’s struggles away from them, diverting them into the restricted fixing grounds of the courts. A plaintiff in traditional impact litigation or legal services makes few decisions, rarely or never speaks on her own behalf, and engages in little or no work requiring her to practice new skills or strengthen old ones.

Forty years ago, criticism of top-down impact litigation as a social change strategy was insurgent. Today, while impact litigation continues to command prestige and attention, the domineering “hero lawyer” with hands of lead is increasingly a straw man. In my experience, attorneys at the ACLU and the Legal Defense Fund strain to build and sustain coalitions; legal services lawyers prize opportunities to work with community organizations. But increased self-awareness and changing ideals of practice have not brought lawyering into harmony with organizing, in large part because the dissonances between the two practices were never simply a result of disrespect or ignorance. The dissonances were, and remain, structural. Where organizing requires networks of relationships, the fundamental particle of legal action is individual relationships shielded by confidentiality.<sup>44</sup> Even in class action or impact litigation, the lawyer typically mediates all relationships in the group—plaintiffs relate to the lawyer, never directly to one another. It is difficult to develop a shared identity if the articulation of group interests and group story is entirely in the hands of the lawyer. Further, if victory means legal victory, then that story must be crafted to suit the exigencies of the legal argument. In a legal system that understands action exclusively as redress of injury, the common story told by a legal argument must be one of weakness and incompleteness, and the aggregation of plaintiffs’ stories an amplification of weakness. In contrast to Mr. Domingo’s experience, class members find only echoes of their own lack in their co-plaintiffs, never answers to their common problems.

Even lawyers committed to “rebellious” (to use Gerald Lopez’s term,<sup>45</sup> now itself a seasoned rallying cry for lawyers critical of dominant practice) find it difficult to avoid these negative effects, as their clients often participate vigorously in disempowering themselves and

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author).

<sup>43</sup> See, e.g., William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455 (1994) (arguing that lawyers do not understand community development, and consequently their organizing efforts often leave communities worse off).

<sup>44</sup> See MODEL RULES PROF’L CONDUCT 1.6 (1983).

<sup>45</sup> GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VIEW OF PROGRESSIVE LAW PRACTICE* *passim* (1992).

empowering the lawyer. The specialized knowledge purportedly possessed by lawyers has been so mystified that clients habitually defer to the lawyer's judgment.<sup>46</sup> Meanwhile, the legal institutions to which the lawyer must answer demand the speedy, specialized responses that militate towards a unitary responder; there is little room for group deliberation or multiple voices in the courtroom. If clients are less well-organized or powerful than the court as an institution (and if they are not, why would they seek the court's ruling?), then the lawyer, and thus the strategy and goals of the litigation, will be pulled more by the court than by the clients. Even before a lawyer sets foot in court, the clients' values and goals must become causes of action—a sometimes violent process. And, of course, any legal claim must recognize and exalt the power of the court and the legitimacy of the existing law (or that law which can be handily extrapolated from it).

Not only the structure of legal process, but its strategies can also do violence to relationships and leadership. Lawyers advise clients to freeze all activity related to the issue, such as public speaking, negotiation, transaction, so as to better preserve it for legal argument. This is not merely a bad habit; it is in fact often part of *good strategy* for winning in court. A public statement by a litigant may waive a privilege, undermine or contradict testimony, or make the other side's case for them, as when a Brooklyn landlord sued for failure to make repairs bragged to a reporter that he intended to "let [the tenants] suffer."<sup>47</sup> It is not the insensitive lawyer, but the dynamics of litigation itself that insist that the lawyer-client relationship be maintained to the exclusion of all other relational power.

Still, it is no surprise that many critics continue to accuse lawyers of "de-radicalizing" their clients' demands. William Simon notes that lawyers begin to reconstruct clients' interests even as they "innocently" seek to find out what those interests are.<sup>48</sup> Indeed, it could not be otherwise; as Loomer defines it, relational power is always "the capacity both to influence others and to be influenced by others."<sup>49</sup> The presence of the lawyer will *always* alter the client's subjectivity; the failure of the traditional legal services model is not that it is unable to negate this effect, but that it does not acknowledge and take responsibility for it. If organizing is about developing "power with," then litigation seems to be about aggrandizing "power over" in exchange for its momentarily favorable exercise.<sup>50</sup>

There is truth to these criticisms. As Bill Quigley quoted one veteran organizer, "In my 25 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."<sup>51</sup> But there is also overreaction. The radical critique of lawyering at times approaches superstition, as if lawyers were black holes, inexorably warping any organizational space into which they enter. In fact, some alarmist narratives so perpetuate the mystification of lawyers as to contribute to the

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<sup>46</sup> William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990).

<sup>47</sup> Helen Klein, *Tenants Stage Protest Outside Landlord's Home*, N.Y. POST, Mar. 8, 2010, [http://www.nypost.com/f/print/news/local/%E2%80%A6/tenants\\_stage\\_protest\\_outside\\_landlord\\_6YJjsBL5hlqt5DgAwWNchP](http://www.nypost.com/f/print/news/local/%E2%80%A6/tenants_stage_protest_outside_landlord_6YJjsBL5hlqt5DgAwWNchP).

<sup>48</sup> William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 475-76 (1984) [hereinafter Simon, *Visions of Practice*].

<sup>49</sup> Loomer, *supra* note 30.

<sup>50</sup> *Id.*

<sup>51</sup> Quigley, *supra* note 43, at 458 (quoting interview with Ron Chisom).

effects they decry; when lawyers do arrive on the scene—perhaps representing opponents, perhaps opportunity—organizers and leaders are conditioned to overreact, automatically mistrust, and shun relationship where a relationship might be politically appropriate.

Surrender to the destructive dynamics of lawyering is not inevitable. Neither is transformation of the lawyer's role and impact a simple matter of renunciation, no matter how emphatic. It is, like all transformations, a long and daily struggle. And, like all powerful struggles, it must be relational. It will take lawyers and non-lawyers working together to re-imagine and re-mold the lawyer-client relationship. To assume that lawyers can do so unilaterally is to begin with the very assumption sought to be transcended—that all power flows from and all responsibility accrues to the lawyer.

Why, with all of the narrative danger swirling around them, should we even bother with lawyers? If it is true that “poverty will not be stopped by people who are not poor,”<sup>52</sup> why not concentrate on organizing the poor and leave lawyers out of it? The answer, of course, is that once we clear away the mystification, lawyers, like any other participant in organization, have both value and values that can be amplified when they come into relationship with other people. As discussed below, lawyers bring specific knowledge and skills, relationships with powerful institutions, access to legal forums, and traditions of individual worth and equality. This list is by no means an exhaustive picture of what lawyering may be or has been. My purpose in offering it here is to prepare a framework for evaluation of the lawyer-constituency relational models in the following section, so that it will be possible to ask of each model: “what aspects of lawyering are engaged in this relationship? To what extent is the lawyer entering into the relationship *as a lawyer?*”

### *Knowledge & Skills*

Lawyers famously possess unique knowledge and skills uniquely adapted to the public arena. Just as Mr. Domingo's storytelling abilities took on new value when he used them in relation with the other leaders with whom he shared the stage, so the value of lawyers' special knowledge and skills multiplies in the context of group action. Sometimes the lawyer may simply do what she knows best how to do. At other times, the lawyer may replicate her knowledge and skills by teaching others. These knowledge and skills can be important tools, as long as the lawyer and the constituents do not confuse them for strategies in and of themselves, or allow group goals to be shaped by their easy availability.

### *Relationships*

As discussed above, organizing, at its core, consists of the building and mobilization of deliberate relationships. Lawyers, like pastors, shop stewards, teachers, block captains, grandparents, etc., tend to have relationships with many people. In a poor community, the local legal services lawyer may be the only relationship that numerous tenants, benefit recipients, or laid-off workers have in common. The lawyer is the first to see changes in the local community or economy in the pattern of clients coming through the door. In addition, because lawyers so often mediate between their clients and powerful institutions, they know the local decision-makers and resource controllers.<sup>53</sup> Experienced lawyers walk around with robust power maps in their heads,

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<sup>52</sup> Wexler, *supra* note 38.

<sup>53</sup> Ross Dolloff, *Community Leadership as Advocacy – A Different Advocacy Model for Legal Services*

developed through repeated interactions with institutions; they know the *real* procedures by which agencies make decisions—who is influential, what their values and interests are, who is coming up, and who is on their way out—in addition to the official written procedures that community leaders can discover through diligent research.

Once it may have been the parish priest who played these roles. And it may bode poorly for our society if they have shifted to the lawyer. But the answer, rather than delivering eulogies for civil society, must be to draw lawyers out into networks of relationship and interdependency, to enable them to share their hoard of social capital—a hoard many do not want to keep to themselves, but simply do not know how to redistribute. The lawyer, like the priest, is often the loneliest person that knows everybody, and this ought to have any decent organizer salivating.

### *Access to Legal Forums*

The lawyer's privileged access to courtrooms and other institutional forums is a scarce resource that they alone can make available to organizing efforts. Most people do not have to be told how valuable this resource can be; even organizers who scorn litigation cannot entirely avoid criminal charges, collateral civil attacks, and the transactional requirements of group development. More fundamentally, all organizing efforts at some point seek recognition,<sup>54</sup> and recognition is often formal, whether legal (as when a union is recognized by the National Labor Relations Board) or private but rule-bound (as when a corporation allows a proxy organization onto the agenda of its shareholders' meeting). Formal recognition is often an important step in exercising power (though it is unfortunately almost as often confused with power itself), and lawyers are given privileged access to its processes. Under current law, at least, lawyers cannot simply give this access away to nonmembers of the bar. The only way they can redistribute their privilege is to enter into relationships through which their access is mobilized and held accountable by a group decision-making process.

### *Values and Traditions*

Perhaps it is surprising to find “values” under a reckoning of what lawyers have to offer people struggling for change, but the legal profession has been the site of a unique valorization of the worth and equality of individuals that can be a powerful counterpoint to organizers' necessary focus on collective action and identity.

Beyond easy stereotyping of lawyers, both practitioners and theorists of relational power have specific and thoughtful critiques of the “rights talk” that arises when lawyers talk values.<sup>55</sup> Too often, “rights” in litigation are synonymous with grievances, so that those who claim them (or on whose behalf lawyers claim them) are defined by their weakness and need for state intervention. Moreover, as courts have increasingly rejected doctrines of group rights in favor of personal injury models of redress,<sup>56</sup> to talk in terms of rights is to atomize individuals.

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*Providers*, MGMT INFO. EXCHANGE J., Spring 1999, at 10, 10–12.

<sup>54</sup> Recognition should not be confused with approval, friendship, or sanction. Recognition is merely the acceptance of the organization as representative of its constituency, and as a legitimate actor in the public arena.

<sup>55</sup> See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE *passim* (1991) (critiquing the use of rights-based language as the main way the American public discusses right and wrong).

<sup>56</sup> GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, EMPLOYMENT DISCRIMINATION: LAW AND THEORY 561 (2005).

While there is a great deal of cautionary truth to this critique, critics of rights have overlooked another, older understanding of legal rights, one that has informed struggles for dignity and recognition throughout American history. Long before the Supreme Court narrowed legal discrimination claims to individual demands for money damages, Blacks standing at the doors of southern registrars' offices demanded the right to vote as a birthright of "first-class citizenship"—a rite of recognition and inclusion in public life.<sup>57</sup> Jennifer Gordon has described the transformative effect on immigrant workers of the realization that the legal rights to safe working conditions and fair wages applied to them as well as to Anglo-Americans:

For immigrants, it is the jolt of a change in how others see you: If I have rights then the government recognizes me as being here after all. If I have rights then I exist here in a way I did not when I thought I had no rights. More profoundly still, it is a change in how you perceive yourself. Being seen as a person with rights opens the possibility of seeing yourself differently, and then of acting differently – of acting like the sort of person who has rights.<sup>58</sup>

For much the same reason, labor unions across the country push for local governments to pass "right to organize" resolutions; these resolutions are purely expressive (they grant no rights not already included in federal labor law).<sup>59</sup> Why does the labor movement—perhaps the greatest repository in American political culture for the lesson that power rather than words makes change—choose to devote so much energy to a mass movement of announcing rights? Because the legal right to organize is a recognition of their existence. More importantly, by codifying this right into municipal law, local governments make a real commitment of solidarity with local unions. Rights are collective commitments.

Thoughtful public interest lawyers also curate a powerful ethos of valuing individuals and stubbornly refusing to forget the most powerless and the most marginalized members of society.<sup>60</sup> This commitment strikes creative tension with organizing efforts whose emphasis on group consensus and shared interests often pushes out those least able to afford compromise or to find numerous others in the same position as themselves. To give one example, in the mid-1990s, the Essex County Community Organization (ECCO), a church-based community organizing effort in Lynn, one of Massachusetts' poorest cities, conducted a yearlong process of house meetings and individual conversations to discover the shared concerns and interests of its low-income members. The largest demographic group in the organization's base consisted of blue-collar, working-poor families whose chief hope was to be able to afford a down payment on a home. As a result, the organization successfully organized this base to develop affordable home

<sup>57</sup> See Fannie Lou Hamer, Vice-Chair, Mississippi Freedom Democratic Party, Testimony Before Credentials Committee, Democratic National Convention (July 22, 1964), available at <http://www.calvin.edu/academic/cas/programs/pauley/voices/fhamer.htm> (last visited Oct. 23, 2011).

<sup>58</sup> JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 169 (2005).

<sup>59</sup> Dwight King-Leatham, *Lafayette Averts Union Pickets at Mayors' Meeting*, TRI-VALLEY HERALD, Nov. 3, 2011; *This is the "Right to Organize Resolution Aldermen will Consider" July 21*, THE JOURNAL-TIMES, Jul. 12, 1998, [http://www.journaltimes.com/news/article\\_2220c724-7aa7-5ac8-a566-9f24a96df325.html](http://www.journaltimes.com/news/article_2220c724-7aa7-5ac8-a566-9f24a96df325.html); *Work in Progress*, AFL-CIO, Feb. 28, 2000, <http://www.aflcio.org/aboutus/thisistheafclcio/publications/wip/wip02282000.cfm?RenderForPrint=1>.

<sup>60</sup> STEVE BACHMANN, *LAWYERS, LAW AND SOCIAL CHANGE* 84 (1984) ("The lawyer involved in social change must therefore watch the processes by which the class-in-itself becomes a class-for-itself. Will it be an authoritarian or democratic process? The lawyer, with her training in matters of justice, fairness, and procedures for implementing them, may have a contribution to make beyond diminishing lawyerly elitism.").

ownership opportunities with local banks.<sup>61</sup> 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 needled 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.<sup>62</sup>

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

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

<sup>62</sup> 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,”<sup>63</sup> 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.<sup>64</sup> 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

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<sup>63</sup> AMERICAN HERITAGE COLLEGE DICTIONARY 688 (3d ed. 1997).

<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.”<sup>68</sup> 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

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<sup>65</sup> 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).

<sup>66</sup> 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.

<sup>67</sup> 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.

<sup>68</sup> *Id.* at 34.

representation processes.<sup>69</sup> 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.<sup>70</sup> 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.”<sup>71</sup> 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.<sup>72</sup> By 1971, the UFW had contracts with nearly all California grape growers, and its membership had grown to 70,000.<sup>73</sup>

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

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<sup>69</sup> *Id.* at 33–34.

<sup>70</sup> *Id.* at 34.

<sup>71</sup> Quigley, *supra* note 43, at 461.

<sup>72</sup> 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).

<sup>73</sup> *UFW Chronology*, UNITED FARM WORKERS, [http://www.ufw.org/\\_page.php?menu=research&inc=\\_page.php?menu=research&inc=history/01.html](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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> Not only does this service help

<sup>74</sup> Simon, *supra* note 46, at 472–73.

<sup>75</sup> 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*].

<sup>76</sup> *Id.* at 442.

<sup>77</sup> *Id.*

<sup>78</sup> See *Legal and Support Services*, MAKE THE ROAD NEW YORK, [http://www.maketheroad.org/howwework\\_legal.php](http://www.maketheroad.org/howwework_legal.php) (last visited Sept. 19, 2011) (describing the holistic approach of Make the Road’s legal services department); see also Rose Cuisson 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.”<sup>82</sup>

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

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*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).

<sup>79</sup> 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).

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

<sup>81</sup> 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).

<sup>82</sup> 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.<sup>83</sup>

### 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.<sup>84</sup> 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.<sup>85</sup> 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

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<sup>83</sup> 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).

<sup>84</sup> See generally Gordon, *Law, Lawyers and Labor*, *supra* note 72.

<sup>85</sup> 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.<sup>86</sup>

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).<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup>

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

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<sup>86</sup> 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*.

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

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

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

<sup>90</sup> 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).<sup>91</sup> 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 busying in

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<sup>91</sup> *Id.* at 21.

supporters to picket outside the Supreme Court whenever the firms' lawyers are arguing their impact cases inside.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup>

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

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<sup>92</sup> 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).

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

<sup>94</sup> *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.<sup>95</sup>

"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.<sup>96</sup> 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.<sup>97</sup>

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

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

<sup>96</sup> 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).

<sup>97</sup> *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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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

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

<sup>99</sup> 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).

<sup>100</sup> *Id.*

<sup>101</sup> “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.<sup>102</sup> Indeed, the growth of attorney-founded Workers' Centers may be evidence that this model is gaining popularity.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

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

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

<sup>103</sup> 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).

<sup>104</sup> 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](http://articles.courant.com/1996-12-22/news/9612220188_1_legal-aid-society-legal-advocates-neighborhood-legal-services).

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

<sup>106</sup> *Id.* at 430.

<sup>107</sup> *Id.*

<sup>108</sup> *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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> Some of the founding lawyers ceased acting as lawyers entirely, taking on both the title and work of organizers.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.

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<sup>109</sup> Interview with Andrew Friedman, *supra* note 79.

<sup>110</sup> Interview with Deborah Axt, *supra* note 79.

<sup>111</sup> *Id.*

<sup>112</sup> Interview with Andrew Friedman, *supra* note 79.

<sup>113</sup> Interview with Deborah Axt, *supra* note 79.

<sup>114</sup> *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.”<sup>115</sup> 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.<sup>116</sup> Second, the choice to

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

<sup>116</sup> 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."<sup>117</sup> 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.<sup>118</sup> 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

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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.").

<sup>117</sup> 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/ga/ga04/0001.html>.

<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> 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

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<sup>119</sup> Loomer, *supra* note 30 (defining “relational power”).

<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> Ross Dolloff, then the Executive Director of NLS, has written candidly of his initial resistance to, and later appreciation of, ECCO’s organizing process.<sup>124</sup> 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.<sup>125</sup>

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

<sup>122</sup> 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.

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

<sup>124</sup> Dolloff & Hill, *supra* note 122, at 3.

<sup>125</sup> 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.<sup>126</sup> 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."<sup>127</sup> 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

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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).

<sup>126</sup> Quigley, *supra* note 43, at 459–61 (quoting Wade Rathke, founder of ACORN).

<sup>127</sup> Loomer, *supra* note 30.

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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

| <b>Model</b>   | <b>Nature of legal work</b>  | <b>Relationship to organizing process</b>  |
|--|--|--|
| <b>Corporate</b>                                     | Transactional  | Provides transactional support for maturing organizations  |
| <b>Legal services as M*A*S*H Unit</b>                | Direct legal services to individual participants in an organizing effort | Protects participants from backlash and retaliation; frees leaders to concentrate energy on organizing   |
| <b>Lawyer as Political Enabler</b>                   | Litigation, research, drafting, training                                 | Secures and protects group's right to organize; helps identify goals and issues; provides access to political forums   |
| <b>Organization on the Scaffolding of Litigation</b> | 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 |
| <b>Lawyer as Organizer</b>                           | Direct legal services, training, organizing                              | Lawyer's own client base becomes the base for organizing; training and legal services serve as recruitment tools   |