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E. Tammy Kim  
*The Cooper Union*

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## LAWYERS AS RESOURCE ALLIES IN WORKERS' STRUGGLES FOR SOCIAL CHANGE

*E. Tammy Kim\**

### PRELUDE

*It's 9:00 a.m., and lower Manhattan wakes to another day of business. As livery trucks and coffee-toting commuters rush down the block, a group of men gathers in the basement of an old brick building. Soon, the space, a nonprofit workers' center, buzzes with brisk conversation in Spanish, English, and Mixteco, an indigenous Mexican language. Around a crowded pair of oblong tables, a community organizer starts the meeting.*

*The men are kitchen workers from a number of restaurants. They have little in common except for their work and their potentially imminent unemployment. Months ago, they organized collectively to demand fair treatment and just compensation from their employers, but their demands have been met with threats. In the latest of a series of retaliatory actions, the employers have issued an ultimatum against the workers—if they do not abandon their organizing and legal claims, then they will be fired. In two hours' time, the earliest shift of workers will face their employers and this fate.*

*Many of these workers are my clients in a federal wage-and-hour lawsuit. I know they are meeting this morning to discuss the situation, but I am not with them. I am in my office, considerably anxious, wondering what will happen. What will the workers decide? How angry, hurt, and worried do they feel? How will they find new jobs in this ailing economy? How will they pay rent and feed their families?*

*I learned just last night about this retaliatory move. In response, I emailed a letter to opposing counsel stating that I interpreted their clients' actions as potentially unlawful retaliation. Beyond that, I could do little. No rhetoric of rights or legal prohibition can prevent workers from actually suffering employers' illegal acts.*

*In contrast to my legal response, the plaintiffs in our case immediately reached out to their friends at related restaurants and requested this morning's meeting with the organizers. Unwilling to give up their fight for respect and legally mandated pay, they face their likely firings while seizing the opportunity to increase awareness among similarly affected*

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\* Staff Attorney, Community Development Project, Urban Justice Center; Adjunct Professor, The Cooper Union. Previously, the author was a Lecturer at Yale University and a Judicial Clerk to the Honorable Janet Bond Arterton, U.S. District Judge, District of Connecticut. The author received her J.D. from New York University School of Law and her B.A. from Yale University.

*workers and to brainstorm creative strategies to combat the bosses' tactics. Despite my availability to attend this morning's meeting, the organizers and workers decided to meet on their own. I understand the wisdom of this, as they have in mind something bigger than legal remedies.*

*It's now 3:00 p.m., and I learn that my clients were all fired. I also learn that they are more determined than ever to contest unfair conditions and to support other workers in parallel struggles. As they press on, we lawyers engage in the daily tasks of litigation, seeking to represent the workers and support their organizing as best we can.*

#### INTRODUCTION

This is community-based workers' rights lawyering as I know it. In the present paper, I draw on my work at the Community Development Project of the Urban Justice Center ("CDP") to present and endorse a model of community lawyering in an organizing context.

In the first section, I trace the contours of the CDP lawyering model and its workers' rights litigation practice, which, in the second section, I characterize as "resource-ally lawyering."<sup>1</sup> In lauding this model's fittingness to workers' rights lawyering, I endorse it over blurrier models that maintain less distinction between the roles of lawyers and organizers. I also discuss how the resource-ally model can lead us out of what Orly Lobel has called the "paradox of extralegal activism," according to which a romantic notion of "activism" has, in the minds of many, come to replace "law" as the primary vehicle for social change.<sup>2</sup> The CDP community lawyering model, I argue, allows lawyers to do what they are best equipped to do, while avoiding the pitfalls of pessimistic self-skepticism or the exaggerated separation and idealization of non-legal activities.

Then, in the third section, I apply the theoretical to the day-to-day, comparing the CDP workers' rights model to that of "in-house" community lawyering, where lawyers and organizers are em-

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<sup>1</sup> The model I propose is a relative of the "facilitative" model. Indeed, Richard Marsico's notion of facilitative lawyering lends itself well to the community organizing context. In his words, "[f]acilitative lawyering contains elements of both collaborative and client-centered lawyering. However, it is somewhat less self-consciously political than full collaborative lawyering and seeks to preserve a more clearly defined role for attorneys as attorneys. Facilitative lawyering recognizes more of a risk to client autonomy in social change lawyering than the client-centered model admits, and carves out an appropriately more limited role for attorneys. In addition, facilitative lawyering includes many of what might be considered more collaborative behaviors." Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 639-40 (1995).

<sup>2</sup> See Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 974 (2007).

ployed by the same community organization or workers' center. I argue for resource-ally lawyering over the in-house model based on the interpersonal, logistical, and ethical demands of our daily work.

#### I. WORKERS' RIGHTS LAWYERING IN THE URBAN JUSTICE CENTER'S COMMUNITY DEVELOPMENT PROJECT

In the CDP, we strive to operate in dynamic relation to the individuals and communities we serve. Our lawyering is imbued with geographic and cultural context as well as a broad vision for social change. At its best, our model takes client partnerships seriously while preserving the lawyer's role, respecting organizing, and being careful not to overreach.

The CDP works on cases and other matters shaped and driven by members of grassroots organizations in the diverse neighborhoods of New York City. Our website describes our mission as follows:

The Community Development Project (CDP) of the Urban Justice Center formed in September 2001 to provide legal, technical, research and policy assistance to grassroots community groups engaged in a wide range of community development efforts throughout New York City. Our work is informed by the belief that real and lasting change in low-income, urban neighborhoods is often rooted in the empowerment of grassroots, community institutions.<sup>3</sup>

Composed of researchers, lawyers, paralegals, development and technical assistance staff, the CDP has grown into a team of nearly 20. Significantly, the CDP has never had any organizers on staff.

Plaintiffs'-side workers' rights litigation is one of the many practice areas in the CDP.<sup>4</sup> The workers' rights lawyers handle mostly group and some individual cases in the areas of wage-and-hour, discrimination, right-to-organize/collective action, and workers' compensation claims. The cases are referred to the CDP by

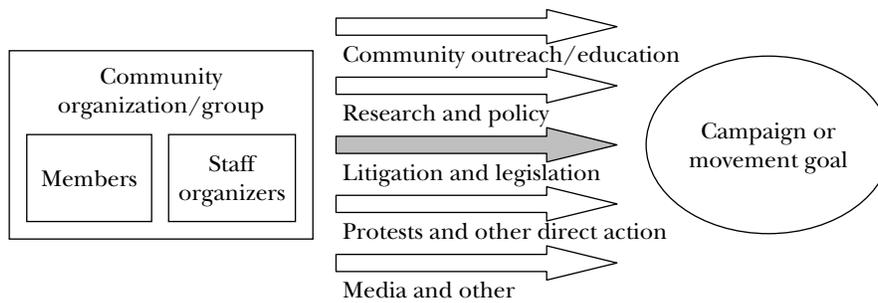
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<sup>3</sup> Urban Justice Center, Community Development Project Home Page, <http://www.urbanjustice.org/ujc/projects/community.html> (last visited Nov. 28, 2009).

<sup>4</sup> The lawyers in the CDP are divided into litigators and transactional attorneys, with litigators working in the substantive areas of workers' rights, consumer debt, housing rights, healthcare access, and foreclosure prevention. To date, CDP workers' rights lawyers have included Molly Biklen, Raymond Brescia (founder of the CDP), David Colodny, Benjamin Holt, Carmela Huang, Tammy Kim, Megan Lewis, Tony Lu, Amy Tai, Haeyoung Yoon. This practice area has been heavily influenced by the lawyering model of the Immigrant Rights Clinic at New York University School of Law, founded by Professor Nancy Morawetz and previously co-directed by Professor Michael J. Wishnie, who now directs a similar clinic at Yale Law School.

community groups—mainly workers’ centers and industry-specific workers’ organizations—that initially meet with the workers to understand their claims and build an organizing strategy. In other words, the organizers and workers have decided on a specific role and purpose for the CDP legal team in advance. The workers’ legal cases fit into larger campaigns for restaurant workers’ rights, women workers’ rights, or increased entitlements for domestic workers, for example, and have the potential to impact caselaw.

Figure 1 illustrates how community groups incorporate our legal services into their multi-pronged campaigns.



While the CDP’s work for these community organizations or groups is significant, litigation is not the sole means or end in a community group’s campaign for social change.<sup>5</sup> In our workers’ rights cases, the community organization, client-members of the organization, and CDP lawyers cooperate to achieve legal and non-legal goals. Ideally, the legal work reflects harmony among clients, organizers, the organization itself, and us lawyers. In tandem with the litigation, the organizers or community group engage in related, non-legal work—from assembling supportive pickets and press conferences to accompanying client-workers to meetings and serving as interpreters. The lawyers do not participate in the formation of organizing strategies; nor are they involved with protests or other direct actions.

The CDP attorneys manage multiple lines of communication between and among participants in this framework: worker-clients, the community group and its organizers, CDP lawyers, and pro bono law firm lawyers, with whom the CDP partners in larger-scale

<sup>5</sup> As Sameer Ashar has observed, “unlike conventional public interest law, the legal work [i]s not central to the larger campaign or to the effort for [in the case of restaurant workers] building organizational capacity to improve working conditions in the restaurant industry.” Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1917 (2007).

federal litigation. (See Figure 2.) While our immediate focus is the case at hand, and while our ethical duty remains to the individual worker-clients, CDP lawyers take into account the community group's organizing goals as much as practicable.

The CDP serves a diverse range of worker-centered community groups. These include the National Mobilization Against Sweatshops, a workers' center located on the Lower East Side of Manhattan and in downtown Brooklyn; the Chinese Staff and Workers Association, a workers' center located in Manhattan and Brooklyn Chinatowns; Domestic Workers United, a group supporting and led by New York City-area domestic workers; Andolan, a Queens-based, mostly domestic workers' group; and the Restaurant Opportunities Center of New York, which supports restaurant workers' organizing.

Many of these organizations epitomize "non-traditional organizing efforts by community-based worker centers"<sup>6</sup> and a "comprehensive effort to build a new labor movement to fight against exploitation of immigrants and other working-class people."<sup>7</sup> While the groups we support are located in and focused on New York City, they are conscious of large-scale social, political, and economic conditions,<sup>8</sup> and "conceptualize [their] work as opposed to the forces of neoliberal globalization"<sup>9</sup> and the "worsening conditions created by deregulated market forces."<sup>10</sup>

The CDP is distinct from agencies with organizers on staff (represented in this volume by CASA de Maryland), as the crux of the CDP model is the extralegal partnership between CDP attorneys and community groups or organizations. To be sure, each model has its joys and challenges. On balance, however, and as fleshed out in the following sections, I argue that the CDP's model has distinct advantages from the perspective of workers' rights lawyering and community-based legal advocacy.

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<sup>6</sup> Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences From the Streets of Los Angeles*, 35 *FORDHAM URB. L.J.* 339, 341 (2008).

<sup>7</sup> *Id.* at 342.

<sup>8</sup> For example, some of the groups supported by the CDP belong to the national Break the Chains Alliance, which calls for the elimination of the punitive employer sanctions provision under the Immigration Reform and Control Act of 1986. See Break the Chains, Employer Sanctions, <http://www.breakthechainsnow.org/employer%20sanctions.htm> (last visited Nov. 28, 2009). See also Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: the Experiment Fails*, 2007 *U. CHI. LEGAL F.* 193 (2007).

<sup>9</sup> Ashar, *supra* note 5, at 1923.

<sup>10</sup> *Id.*

II. USING A RESOURCE-ALLY LAWYERING MODEL TO MOVE BEYOND  
TRADITIONAL LEGAL SERVICES AND THE CRITIQUE  
OF EXTRALEGAL ACTIVISM

In the last 75 years, perceptions of public interest lawyering and the progressive function of law have shifted dramatically. The middle of the twentieth century saw an acceptance of the primacy of law in enacting social change.<sup>11</sup> Impact litigators were highly visible, and the legislature and courts were receptive to their progressive ideas—indeed, the paradigmatic proofs are the oft-cited New Deal Labor and Civil Rights movements.<sup>12</sup> Legal services attorneys enjoyed a trickle-down ascendancy; they could take heart in their connection to the large-scale cases that seemed to be transforming America. Individual and community clients were grateful to secure representation from these attorneys.

During the following decades, critical evaluation justly problematized this view.<sup>13</sup> Most of us are now familiar with these criticisms, which have hardened into the stereotypical image of an authoritative, domineering attorney, single-minded in his adherence to legal solutions. This attorney always wears a suit, remains in his office, and condescends to clients and their agendas. He believes strongly that the vindication of legal rights is the culmination of struggle.

Two parallel strands of thought emerged in reaction to this traditional mode of rights lawyering. First, on the micro-level, came Gerald López's "rebellious lawyering" critique, which jolted individual lawyers from their entrenched practices.<sup>14</sup> Rebellious lawyering gave rise to productive self-reflection and external critiques, resulting in the now canonical models of collaborative lawyering, client-centered lawyering, and critical lawyering.<sup>15</sup> In addition to revising our thinking about the lawyer-client relationship, rebellious lawyering led to the development of alternative lawyering models, including community-based law offices, lawyering con-

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<sup>11</sup> See Lobel, *supra* note 2, at 946.

<sup>12</sup> *Id.* at 942.

<sup>13</sup> *Id.* at 948.

<sup>14</sup> See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

<sup>15</sup> See, e.g., Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 416 (1986); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 740-42 (1988); Marsico, *supra* note 1, at 639-40; Narto, *supra* note 6, at 339 n.1. For a comprehensive bibliography of literature on law and organizing, see generally 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).

nected to community organizing, and community development advocacy. These models reflected a distrust of the law and a “view that the law is not capable of protecting the interests of the poor and subordinated.”<sup>16</sup>

On the macro-level, the “critique of rights,” as articulated by Mark Tushnet, warned against overreliance on potentially pyrrhic legal victories.<sup>17</sup> At the heart of the critique of rights was an epistemic legal indeterminacy thesis—that “nothing whatever follows from a court’s adoption of some legal rule,”<sup>18</sup> and that “[p]rogressive legal victories occur . . . because of the surrounding social circumstances.”<sup>19</sup> This critique, like its rebellious counterpart, reoriented public interest attorneys, bringing community members, community organizers, and social and political factors into daily practice concerns.

In recent years, decades after the rebellious and rights-based critiques first emerged, thinkers and practitioners are revisiting them. Commentators observe that, driven to their logical conclusions, these critiques have led to an unproductive pessimism about the law and “role confusion” on the part of community lawyers.<sup>20</sup> Lawyers are now unduly skeptical of their own discipline and too eager to take up other mantles, including organizing and strategic planning. As one scholar has pointed out:

The new scholarship chides poverty lawyers to be reflective—indeed humble—about their own pretensions to change the world . . . . Yet at the same time, the new vision of collaboration can be understood to authorize well-meaning lawyers to intrude into the few spaces where poor people can work out their own strategies and priorities.<sup>21</sup>

As lawyers qua lawyers, according to this argument, we have abdicated our status as “autonomous agent[s], [who] also ha[ve] views and principles that deserve recognition and expression,”<sup>22</sup> yet we feel free to advise on other matters. Our devaluing of the legal

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<sup>16</sup> Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 107 (2000).

<sup>17</sup> Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 24 (1993).

<sup>18</sup> *Id.* at 32.

<sup>19</sup> *Id.*

<sup>20</sup> Regarding lawyers and clients, the rebellious call to reject lawyer-client hierarchy and to respect the cultural and communal factors that shape our lawyering remains important. Social justice lawyers must be vigilant against the creep of privilege (whether based on education, class, race, gender, sexuality, or language) and the temptation to dominate the client.

<sup>21</sup> Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 159–60 (1994).

<sup>22</sup> Diamond, *supra* note 16, at 114.

realm may have also produced an overly optimistic view of extralegal activism, which assumes a clear separation between legal and non-legal spheres and takes for granted that non-lawyers are immune to the dangers of cooptation and other threats to progress.<sup>23</sup>

So where are we now, given this vacillating trajectory? If scholars are correct in calling “community lawyer” a “highly recognizable catchphrase [that] masks a series of philosophical problems as well as some very complicated practical ones,”<sup>24</sup> then are we forced to choose between an orthodox but clear-cut legal services model and a fuzzy, undefined community model?

The answer is “no.” We should chart a middle ground between regressively traditional, “regnant” lawyering<sup>25</sup> and an unbounded lawyering model comprising the roles of organizer, counselor, and friend. I argue that the CDP resource-ally model, by which lawyers support community organizing through legal representation of members of external grassroots organizations, is ideal for community-minded lawyers. To adopt a well-established term, the CDP sees lawyers as “facilitators” who should perform “work that is supportive of, but not directly involved in, the work the client is seeking to accomplish.”<sup>26</sup> Adding to this facilitative model, I employ the term “resource ally” to denote that the CDP’s model, and our workers’ rights practice in particular, involves third-party community organizers and the attendant demands and benefits of tripartite lawyering.

Operating as resource allies, the lawyers in the CDP avoid role confusion and are able to focus on what they do best. Separated, but not isolated, from non-legal community organizations, lawyers at the CDP provide legal services upon request and as needed. As distinct but accessible entities, therefore, we are able to prioritize our most basic and fundamental duty—to be excellent in our craft.

However, there remains an additional prong of the critique of extralegal activism—that the separation of law and activism romanticizes and overestimates the power of local organizing to effect widespread change, given the oppressive meta-structures of global-

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<sup>23</sup> For example, Orly Lobel warns of the dangers of prioritizing extralegal activism at the risk of excluding possible legal remedies: “the [extralegal] strategies embraced by new public interest lawyers have not been shown to produce effective change in communities, and certainly there has been no assurance that these strategies fare comparatively better than legal reform.” Lobel, *supra* note 2, at 977. This argument is addressed *infra*.

<sup>24</sup> Diamond, *supra* note 16, at 112.

<sup>25</sup> See LÓPEZ, *supra* note 14, at 23–28.

<sup>26</sup> Marsico, *supra* note 1, at 660.

ization.<sup>27</sup> This is an important but hardly fatal criticism. First, one cannot be sure that community groups' local initiatives have as minor an impact on larger structures as the critique of extralegal activism ascribes to them. In our experience, community organizations are conversant in the politics and economics of globalization, and members are encouraged to connect their daily experiences to these realities, fostering activism that has a global vision. Moreover, community groups that prioritize organizing rarely reject the law altogether; rather, they are savvy about deploying the various tools at their disposal, including legal ones, which is where we come in. According to our lawyering model, it is up to workers and community organizers to "identify the diverse ways in which some legal regulations and formal structures contribute to socially responsible practices while others produce new forms of exclusion and inequality,"<sup>28</sup> and up to us to provide legal assistance to resolve discrete legal problems and attack structural injustices. We have found that the CDP's separation of law and organizing offers a pragmatic response to the "myth of law" as much as to the "myth of activism;" our collaborative model neither overemphasizes the law's place in social movements nor pretends that organizing efforts have no need for the law.

### III. THE BENEFITS OF THE CDP MODEL COMPARED TO INDIVIDUALIZED AND IN-HOUSE LAWYERING MODELS

My objective in this section is to compare two approaches to community lawyering. Because of this narrow focus, I do not discuss traditional legal services lawyering; nor do I intend to thereby criticize or undermine it.<sup>29</sup> I will comment briefly, though, on the necessity of private employment litigation and the general benefits of group workers' rights litigation.

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<sup>27</sup> See Lobel, *supra* note 2, at 974.

<sup>28</sup> Lobel, *supra* note 2, at 979.

<sup>29</sup> In praising our model, I do not mean to "exaggerat[e] the ineffectiveness of traditional legal interventions [or] minimize[ ] the significant institutional restructuring that legal advocacy has achieved." Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. REV. 443, 491 (2001). I also recognize that one drawback of community lawyering is that we serve fewer people—potentially an ethical problem given the incredible need for individual legal services. However, I would argue that community lawyering is necessary and, when conducted in balance with traditional legal services, "constitutes a justifiable, justice-based allocation of resources away from clients' short-term needs and in favor of a community's long-term needs." Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 950 (1992).

A. *Litigating Group Workers' Rights Cases*

For a number of socio-political and legal reasons, workers—especially low-wage workers—rely more and more on private legal mechanisms. As others have previously noted,<sup>30</sup> inadequate governmental and union responses to workers' rights violations have made it often ineffectual for workers to seek out “business unions”<sup>31</sup> or agencies like the State Department of Labor and the National Labor Relations Board.<sup>32</sup> Many have opined that “[f]ederal, state, and local governments have no coherent strategy for enforcing the rights of workers who participate in the underground economy.”<sup>33</sup> Thus, low-wage workers, while not forsaking governmental agencies altogether, have turned increasingly to mainstream employment law, bringing wage-and-hour claims under the Fair Labor Standards Act (“FLSA”) and, in our jurisdiction, the New York Labor Law (“NYLL”).

Several factors augur in favor of bringing FLSA/NYLL cases on behalf of groups of workers. First, as suggested in the narrative prelude to this article, workers are strengthened and encouraged by one another to stand up for their rights and to navigate temporal and emotional demands of litigation.

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<sup>30</sup> See, e.g., 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 (1995); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397 (2004); Cummings & Eagly, *supra* note 28. See also Narro, *supra* note 6. “Despite the strong connections to the union movement, workplace law and organizing advocates have been forced to venture outside the scope of conventional labor law practice for a variety of reasons. Most importantly, the declining power of unions, particularly in the low-wage employment sector, has heightened the need for alternative workplace organizing tactics . . . . This effort has been important in industries where labor has a weak presence . . . . These industries are also comprised of large numbers of undocumented immigrant workers who are employed on a part-time or contingency basis and who are particularly vulnerable to employer exploitation.” *Id.* at 340–41.

<sup>31</sup> The goals of workers' centers contrast with those of a “business unionism” model that focuses on serving dues-paying members, immediate material interests, and using the political process to protect jobs and economic interests.” Rivchin, *supra* note 30, at 401. However, there is movement toward bridging the divide between unions and workers' centers. For example, in 2008, the New York City Central Labor Council, a union umbrella group, embraced the Taxi Workers Alliance and Domestic Workers United, two non-union workers' organizations. See Steven Greenhouse, *Labor Needs to Improve Conditions for Nonunion Workers, Official Warns*, N.Y. TIMES, June 23, 2008, available at <http://www.nytimes.com/2008/06/23/nyregion/23workers.html>.

<sup>32</sup> This is to say nothing about the forces of globalization and the criminalization of certain categories of immigrants in the United States, which are areas beyond the scope of this article. *But see* Gordon, *supra* note 30, at 424–27 (describing the threat of globalization on workers' rights in the domestic U.S. context).

<sup>33</sup> *Id.* at 416–17.

Second, because federal wage-and-hour litigation can be costly and time-consuming, it is more efficient to do multiple-plaintiff cases. Similarly, the attorneys' fees provisions of the NYLL and FLSA make group cases (with greater potential damages) more appealing to plaintiffs'-side lawyers hoping to recover for their time.

Third, and on a more principled note, pursuing group cases allows us to overcome the "sustained 'internal' progressive critique:"<sup>34</sup> that the "atomistic nature of remedies offered by public interest lawyers"<sup>35</sup> undermines collective action and disperses social conflict.<sup>36</sup> By lawyering on behalf of groups of workers in community contexts, we avoid perpetuating the separation and isolation of workers and defeating possibilities for mass mobilization and resistance. Moreover, to the extent group litigation connects to organizing, we lawyers can view wage-and-hour cases "not [as] endpoints but rather moments in broader campaigns to stimulate collective action and leverage political reform."<sup>37</sup> We learn about developments in labor organizing from our community partners, and, after earning their trust, are often asked to engage in a diversity of lawyering tasks beyond litigation, including legislative and policy work. There is a related, underappreciated benefit: our multifaceted interactions with community groups and individual clients prevent burnout and mitigate boredom, neglected but significant professional hazards.

Yet group representation also poses difficulties, since our responsibility as lawyers flows to each individual. Members of a plaintiff group rarely share the same employment histories, claims, and litigation goals. And when divergent views arise, we must manage client conflicts and occasionally find alternate counsel for those whose interests require separate advocacy. Moreover, in cases involving dozens of workers and multiple languages, the banal tasks of communication, coordinating meetings, and group decision-making become formidable challenges. To mitigate these problems, a group of workers may designate representative plaintiffs for purposes of making settlement decisions and communicat-

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<sup>34</sup> Ashar, *supra* note 5, at 1904.

<sup>35</sup> *Id.*

<sup>36</sup> Cummings & Eagly, *supra* note 29, at 455 (citing Richard Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 5 (1985)). We also avoid the crisis-oriented "inherent rescue preference in neighborhood legal services offices," which keeps "poverty lawyering . . . more or less conservative." Tremblay, *supra* note 29, at 970.

<sup>37</sup> Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 102, 105 (forthcoming 2009), available at <http://escholarship.org/uc/item/5k94h2nk>.

ing general information to the lawyers.<sup>38</sup> For our part, we prioritize individual lawyer-client relationships while staying attuned to group dynamics. By maintaining this orientation, we maximize the overall benefits of group litigation.

*B. Lawyering in Support of Organizing: Why CDP Isn't "In-House" Counsel*

To date, "law and organizing" has occupied a fractional space in the community-lawyering discourse. While there are now a handful of articles and books describing law and organizing practices and fleshing out their challenges, none have offered a typology of law and organizing structures or discussed their benefits and drawbacks. The literature has assumed an "in-house" model of law and organizing, where lawyers and organizers are employed by the same organization and coexist under one umbrella.<sup>39</sup> This assumption is perhaps due to the fact that the Workplace Project (represented in this volume),<sup>40</sup> which began with an in-house structure, has been the touchstone for legal discussions of law and organizing.<sup>41</sup> Instructively, the founder of the Workplace Project has since criticized the in-house provision of legal services, stating that after two years of hosting a legal clinic: "[w]e have come to realize that this is not how we want the Project to function. Instead, we now see organizing immigrant workers as both our end goal and our core strategy."<sup>42</sup>

As described above in Section I, the CDP resource-ally model can be conceptualized in the following diagram:

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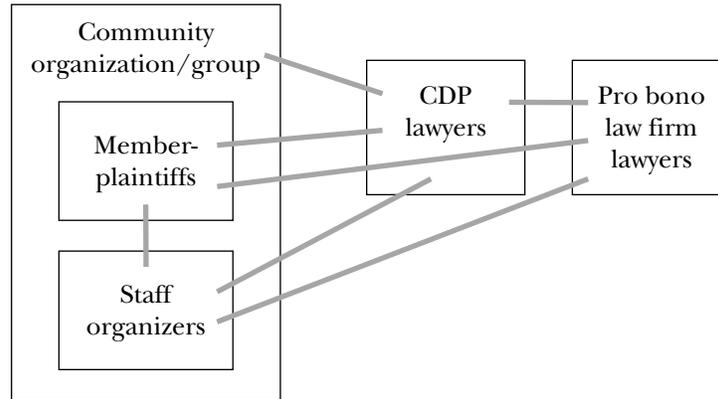
<sup>38</sup> However, a lawyer representing multiple clients must receive informed, written consent in order to make a settlement in the aggregate on behalf of the group of clients. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009).

<sup>39</sup> See, e.g., Gordon, *supra* note 30; Narro, *supra* note 6. Sameer Ashar and Richard Marsico also analyze dynamics between community groups, worker-clients, and lawyers, but do so in the law school clinical, pedagogical context. See generally Ashar, *supra* note 5; Marsico, *supra* note 1. The literature also includes important case studies that illuminate the concerns faced by lawyers working in law and organizing contexts. However, these articles do not explore relational models of lawyering in depth. See, e.g., Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998).

<sup>40</sup> See Nadia Marin Molina & Jaime Vargas, *The Role of Legal Service in Workers' Organizing*, 13 N.Y. CITY L. REV. (2010).

<sup>41</sup> See Gordon, *supra* note 30. Virtually all subsequent writing on law and organizing cites Gordon's articles in some capacity.

<sup>42</sup> *Id.* at 430. Gordon also notes, "[b]y continuing to offer legal services to anyone who will sign the contract, perhaps we have done little more than create a façade of collective action. Instead, we should build an organization with a culture of organizing rather than a culture of legal services, to which workers could come when they were ready to fight for better working conditions." *Id.* at 445.



The CDP workers' rights attorneys, in partnership with pro bono co-counsel, develop relationships and interact continuously with the overlapping entities of member-clients, staff organizers, and the community group itself. These are not always easy connections to maintain, but they are ultimately fruitful and rewarding.

In the next section, I discuss the practical and methodological benefits of our resource-ally model over the in-house counsel model. For the sake of clarity, I simplify certain distinctions and assume that the overall lawyering responsibilities of both sets of lawyers are basically equivalent.

### 1. Excellence and Role Confusion

Lawyers working in-house at community organizations will tend to be pulled in many directions. Sharing the same office with organizers, their physical space will be energetic but potentially distracting, as members of the community organization arrive for meetings, workshops, classes, and other events. If organizers are short-staffed, they may ask the lawyers to help with a variety of tasks.

Although this is an exciting environment, it can make lawyering difficult. There are times, when meeting with clients at workers' centers, that I have occasion to babysit, color posters, and set up tables and chairs. I am grateful to do this work and be made welcome in these spaces. Yet, at the end of the day, I can return to my office and to tackle research, writing, and other quotidian legal tasks. After all, I have been hired for a reason, and I must respect my clients' "right to choose to retain an attorney to perform certain tasks."<sup>43</sup>

<sup>43</sup> Marsico, *supra* note 1, at 657.

The spatial boundary inherent to the CDP model prevents us from engaging in activities we are not trained to do. Generally speaking, law school does not train us “to deal with the non-legal aspects of social or economic problems or, for that matter, with any form of multi-dimensional problem-solving,”<sup>44</sup> and while we should learn to think in broader, more diverse ways, we should also be humble about how much we can realistically accomplish. In-house lawyers, working so intimately and on a daily basis with organizers and members, may find it difficult to resist contributing organizing strategies or press and policy ideas, or responding to clients’ crisis situations.<sup>45</sup> Even when a community group tries to maintain separation between in-house lawyers and organizers, it may be impossible, as a practical matter, to do so.<sup>46</sup>

Separation can also benefit the clients. As noted above, individuals in a group of plaintiffs may disagree on case strategies or harbor personal apprehensions related to the litigation. Conflicts may also emerge over organizing tactics surrounding a lawsuit. To the extent clients perceive a demarcation between lawyers and organizers, they are more likely to express concerns and anxieties—to lawyers about organizing, or to organizers about lawyering.

## 2. Resource Allocation

The reality of public interest organizations is that activities may be planned and ranked according to available funding. For an in-house organization, funding streams for legal services and organizing may overlap. Due to the relatively higher salaries of lawyers and the considerable costs of litigation, organizations may tend to provide more resources to in-house lawyering than organizing.

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<sup>44</sup> Diamond, *supra* note 16, at 76.

<sup>45</sup> Even in situations with organizational separation, lawyers may be tempted to fulfill social services tasks. Scott Cummings describes how Julie Su, the primary lawyer for the imprisoned Thai workers in the El Monte sweatshop campaign, recruited volunteer English as a Second Language (“ESL”) teachers, made doctor appointments for her clients, and helped them find housing and jobs in addition to her legal work on the case. Cummings, *supra* note 37, at 121. We should acknowledge that lawyers usually have neither the training nor the resources to provide for their clients in this manner.

<sup>46</sup> Organizers and directors of organizations, nevertheless, try their best to institute a separation between the group’s legal and organizing work. Cummings and Eagly cite Make the Road New York as one example of an organization that pursues this approach. See Cummings & Eagly, *supra* note 29, at 509 n.271 (quoting a telephone interview with Andrew Friedman, co-director of Make the Road New York (“MRNY”), about MRNY’s decision to separate legal and organizing work by not allowing organizers to participate in legal cases).

While the CDP occasionally fundraises jointly with community-group partners, it is responsible only for its own operations. As resource allies unengaged in organizing, the CDP lawyers are spared the challenge of choosing between handling another workers' rights case and hosting an additional day of pickets against a bad employer. The client-community group members and the CDP team of attorneys can therefore make separate, strategic decisions about resource allocation.

At the same time, resource conflicts arise from the fact that the CDP serves many different community groups with substantial litigation needs. Resource shortages are endemic to public interest offices generally, and the CDP is no exception. To maximize our effectiveness, CDP attorneys may select cases based on likelihood of success or legal impact. The CDP workers' rights team also relies on community organizations to prioritize potential cases for litigation.

### 3. Ethics

Writers have already commented on the numerous ethical issues that arise in the context of community lawyering generally, and law and organizing in particular.<sup>47</sup> My contribution to this scholarship is to argue that, while these issues affect both in-house lawyers and resource-ally lawyers, the separation afforded by the CDP model makes our ethical worries less acute.

One frequently discussed ethical issue concerns the prohibition against communicating with a represented party.<sup>48</sup> Consider the following hypothetical: in a workers' rights case, a demonstration is held in front of the defendant-employer's home. The defendant's attorney raises this issue with the presiding judge, who immediately reproaches the plaintiff's public interest attorney for having orchestrated the protest. The judge accuses plaintiff's counsel of having used the protesters as agents to "communicate" with the represented defendant-employer during the protest, in viola-

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<sup>47</sup> See, e.g., Cummings & Eagly, *supra* note 29, at 502–16 (describing ethical considerations of establishing an attorney-client relationship, confidentiality, conflict of interest, scope of representation, and avoiding unauthorized practice of law for lawyers who use a law and organizing model); see generally Ashar, *supra* note 5.

<sup>48</sup> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES OF PROF'L CONDUCT R. 4.2(a) (2009).

tion of ethics rules, even though the demonstration had been planned by the workers' center to which the plaintiff belongs.

Were a CDP lawyer faced with this situation, she would have no qualms explaining that the CDP is distinct from the workers' center and that the CDP was uninvolved in coordination of the protest. Indeed, CDP attorneys do not organize, attend, or otherwise take part in any direct actions connected to CDP cases. But how would in-house lawyers defend themselves against such a charge, however ill-founded? A judge would likely be incredulous at the in-house lawyers' disassociation from their organizer-coworkers, as the protest would have been organized in the name of the community group that employs both the organizers and lawyers.

A second important ethical concern is attorney-client privilege.<sup>49</sup> The presence of community-group organizers, like anyone else, at client meetings ordinarily pierces attorney-client privilege. However, this is not true when organizers serve as interpreters, which they are often needed to do. Lawyers in the CDP routinely rely on bilingual organizers to interpret from, for example, Spanish to English and vice versa, and we make clear that the organizers are there to play this interpretive role. By comparison, in the in-house lawyering context, because of the fluidity and spatial coincidence of legal and extralegal interactions, organizers present at lawyer-client meetings may initially begin as interpreters but then slip inadvertently into an organizing posture, endangering attorney-client privilege. This only infrequently arises in the CDP's cases, since the meetings we attend with our clients tend to have a deliberately legal tenor.

Another issue is that of third-party influence. Ethical rules limit outside influence over client decision-making by requiring lawyers to take direction only from their clients and by prohibiting lawyers from receiving payments from third parties.<sup>50</sup> In an organization that coordinates both in-house litigation and organizing

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<sup>49</sup> For a discussion of how the City University of New York School of Law's Immigrant & Refugee Rights Clinic addressed concerns about attorney-client privilege in a workers' rights organizing campaign with the Restaurant Opportunities Center of New York, see Ashar, *supra* note 5, at 1910.

<sup>50</sup> See Trubek, *supra* note 15, at 434. The Model Rules of Professional Conduct also provide guidance on a lawyer's duty to a client when payment for legal services is made by a party other than the client. "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6." MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2009).

campaigns, could certain legal decisions be influenced or determined by the timing and aim of the organizing work? The answer is presumably “yes,” and in-house attorneys must be vigilant to preserve client autonomy in decision-making. The CDP, too, has faced such situations: there have been instances when a community group wants to schedule a press conference to announce the filing of a workers’ rights case when the court complaint is not yet ready, posing potential harms to the workers’ legal claims while potentially benefiting the organizing campaign. The ensuing conversation among workers, organizers, and attorneys can be difficult, as we lawyers must prioritize our clients and the integrity of their complaint. Whether working as resource allies or in-house counsel, “we could either reject the influence of the organizers or learn to discern the boundaries between lawyer-client, lawyer-organizer, and client-organizer decision-making.”<sup>51</sup> In general, we choose the latter path, navigating these relationships and weighing priorities to find workable solutions compatible with our duty to the clients.

The ethical prohibition of unauthorized practice of law (“UPL”) is a fourth challenge. A public interest practice will invariably involve some counseling over the telephone, conducting know-your-rights workshops, and engaging in various forms of community education. With this comes the possibility of UPL by unsupervised paralegals, organizers, and other non-attorneys, who may have extensive legal knowledge and insight into clients’ problems but are nonetheless prohibited from practicing law—that is, applying law to facts.<sup>52</sup> Because the CDP has relationships with non-legal groups, we know that advocates and organizers in those groups may find it difficult to distinguish between lawyering and talking to workers about their claims in general terms, especially when it comes to seemingly straightforward matters like statutes of limitations or potential damages. Organizations where in-house counsel and organizers work together, faced with staff members’ overlapping spheres of action and possible confusion on the part of clients, may find it that much harder to prevent instances of UPL by organizers and other non-attorney staff.

Finally, in extreme situations, ethical issues could arise from

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<sup>51</sup> Ashar, *supra* note 5, at 1910.

<sup>52</sup> Trubek, *supra* note 15, at 435. Again, the Model Rules of Professional Conduct comment on the unauthorized practice of law by non-lawyers. “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2009).

workers' decisions to engage in unlawful protest actions.<sup>53</sup> The ethical rules tightly circumscribe lawyers' counseling of clients as to intended illegal acts, but, from an organizing standpoint, aggrieved workers may feel the need to resort to such strategies. With organizers and lawyers in the same group, the in-house lawyers would likely learn about and be forced to counsel workers against even relatively minor illegalities, such as trespass or disorderly conduct, which could constrain organizing options. As resource allies, by contrast, CDP lawyers are generally not consulted about organizing strategies and therefore avoid facing this dilemma (although we would similarly have to counsel against unlawful actions if pressed).

#### 4. Power and Hierarchy

It is well recognized that individual legal services can be used as a "draw" to bring members into organizing, as clients may perceive that "[f]inding a lawyer to resolve the problem presents the least risk and the biggest possible benefit."<sup>54</sup> A worker may initially be drawn to a group or organization because of her own legal problem, but then become interested in the larger organizing campaigns run by that group or workers' center. However, workers seeking individual legal services may not always wish to participate. Organizing is hard work, and it presents no sure path from A to B. It also requires a lot of time and personal energy, as opposed to entrusting a case to a lawyer for litigation.

Some of the organizers I work with are selective about inviting lawyers to meetings and other gatherings, observing that workers may rely too much on lawyers and possess an inflated trust in the legal system. A separation between law and organizing, therefore, can promote opportunities for leadership development and the mutual strengthening of groups of workers, a particularly important goal in hostile political climates.<sup>55</sup> The resource-ally model also mitigates the perception that lawyers are driving the organizing agenda or that legal and organizing authority is vested in the

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<sup>53</sup> Diamond, *supra* note 16, at 125. The Model Rules of Professional Conduct state: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist client to make a good faith effort to determine the validity, scope, meaning or application of the law." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

<sup>54</sup> Gordon, *supra* note 30, at 439–40.

<sup>55</sup> Sameer Ashar notes that especially in an anti-immigrant environment, "active participation in rights-based campaigns and in organization-building strengthens the sense of membership in American communities and the solidarity of some of the immigrant workers." Ashar, *supra* note 5, at 1921.

same person.<sup>56</sup> We can apply what we have learned from critiques of legal services to this scenario: “[j]ust as poverty lawyers must be careful not to use their technical sophistication and legal knowledge to disempower clients, they must also guard against reifying the concept of organizing and using it to advance a social change agenda that does not reflect the needs and desires of client communities.”<sup>57</sup>

The rejoinder to my view is that the CDP’s separation of law from organizing represents a return to the disengaged traditional legal services model. As one critic has noted: “[a] key component of the [legal services] model to serve the poor is a separate staff attorney office that provides services for no cost; this aspect relates to the concept that the poor are a unified group and require attorneys with specialized knowledge.”<sup>58</sup> Could this criticism—that separation between lawyerly professionals and community groups reifies identity and power disparities—apply to the CDP’s resource-ally model as well? Perhaps, but it is equally possible that the group affirmation facilitated by community groups acts as an antidote to these hierarchical threats. Moreover, our generation of community lawyers is more sensitive to these potential drawbacks. In the CDP, for example, while remaining secure in our role as lawyers, we relate to our clients on a personal level, wearing street clothes, avoiding legalese, and speaking in our clients’ languages (Spanish, Chinese, and Korean, among others) as much as possible. We meet with clients at the community organizations and workers’ centers to which they belong. We also attend our partner groups’ social events, where we meet clients’ and organizers’ families and friends, and bring ours along, too.

None of these measures eliminate barriers completely, but this is not necessarily a bad thing. Again, as explained above, our clients enlist CDP attorneys to work on their cases and campaigns precisely because we bring something different to the table. Our professional knowledge and skills allow us to play a partnering role

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<sup>56</sup> See Diamond, *supra* note 16, at 124 (“When the functions of attorney and organizer are combined in one person, several difficulties may surface. For instance, the group may lose the benefit of the independent perspectives provided by the lawyer and the organizer. Indeed, there may be no other person to provide an effective counterpoint to the lawyer/organizer’s positions. Without this counterpoint, the visibility and centrality of a lawyer increases, along with his or her ability to influence group decision-making.”). *Id.*

<sup>57</sup> Cummings & Eagly, *supra* note 29, at 497.

<sup>58</sup> Trubek, *supra* note 15, at 436.

in their struggles, and it is a pleasure and honor to do so, even in a limited manner.

#### IV. CONCLUSION

In this article, I make a theoretical and practical case for why lawyers should consider using a resource-ally lawyering model in the workers' rights context. I begin by outlining this model as practiced by the CDP. Second, I attempt to explain the historical context in which community lawyering has developed and how the resource-ally model fits into this framework, and argue that the CDP model responds effectively to the paradox of extralegal activism. In the third section, after a brief note on group litigation, I advocate for the resource-ally model over in-house community lawyering along the axes of specialization, resource allocation, ethics, and power dynamics.

By arguing for resource-ally lawyering, my intention is not to criticize the important work of in-house lawyers and their community organizations. I seek instead to deepen our understanding of different models of tripartite lawyering, a topic deserving nuanced analyses and an enlarged presence in legal scholarship. Above all, I hope to engage community lawyers in productive reflection and dialogue about our work, with the goal of advancing our clients' interests and greater social change.