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**Public Interest Lawyers and Resistance Movements**

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# Public Interest Lawyers and Resistance Movements

Sameer M. Ashar<sup>†</sup>

## INTRODUCTION

A major strand of social justice activism, both within and outside the U.S., finds purpose in opposition to the economic, political, and social conditions of globalization and neoliberalism. In these campaigns, targeting both the state and powerful private entities, these numerous, loosely-linked movements of resistance<sup>1</sup> both confront and creatively make use of legal structures, including courts, elected officials, and regulatory agencies.<sup>2</sup> The adversarial campaign for

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1. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 763-64 (1994) (citing EDWARD SAID, *CULTURE AND IMPERIALISM* 209-20 (1993) (defining "resistance culture" as including both the reconstitution of the culture and identity of a subordinated population and an intervention into the dominant culture in efforts to transform it)).

2. Critics call this structural framework "liberal legalism." See Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM/LEFT CRITIQUE* 5-25 (Brown & Halley eds., 2002) [hereinafter *LEFT LEGALISM*]. The framework is animated by the political vision of classical liberalism—"democratic constitutionalism rooted in abstract individualism," *id.* at 5—and married to the implementing force of legalism, which "translates wide-ranging political questions into more narrowly framed legal questions." *Id.* at 19.

immigrant workers in New York against a corporate chain of high-end restaurants that began in August 2003 and lasted eighteen months, is the subject of this article. It included a range of legal and extralegal pressure tactics initiated by both sides, including direct action protests, lawsuits in state and federal court, and charges before the National Labor Relations Board. It ended with the negotiation of a comprehensive settlement agreement between the worker-members of the Restaurant Opportunities Center of New York (ROC-NY)—a worker center based in Manhattan—and the corporation.

Part I offers a brief description of the socio-economic landscape in which immigrant workers labor in U.S. urban centers, with a particular focus on workers in the restaurant industry. Part II describes the key players—the ROC-NY organizers, the lawyers and law students of the CUNY Immigrant and Refugee Rights Clinic, and the restaurant workers themselves—and provides a short history of the campaign. Embedded in this section is a discussion of the limits and promise of legal remedies in improving the conditions of work for immigrant labor. In Part III, I define the parameters of the role that public interest lawyers played in the campaign. This role definition is of particular interest to me because progressive public interest lawyers have struggled in recent years with critiques of their work from both ends of the political spectrum<sup>3</sup> and have received diminished institutional support for the legal representation of the poor.<sup>4</sup> Other scholars have described encounters between resistance movements and law in great detail and with rich analysis.<sup>5</sup> While the broader implications and limitations of “liberal legalism” inform the backdrop of this article, this article primarily focuses on progressive public interest lawyers—the conflicted agents of the legal system, sympathetic to the methods and goals of resistance movements but bound by the forms of the legal establishment. This article offers a study of one campaign in which lawyers collaborated with a resistance movement and examines both the dangers and the promises of this approach to public interest lawyering.

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3. See Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143 (2002-2003) (discussing the challenges to progressive public interest lawyers in the present historical moment); Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996).

4. See Marc Galanter, “*Old and In the Way*”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WISC. L. REV. 1081, 1103-04 (1999) (“In the course of fifteen years [between 1982 and 1997], the relative share expended on civil legal services for the poor was halved.” *Id.* at 1104.).

5. See, e.g., Balakrishnan Rajagopal, *Limits of Law in counter-hegemonic globalization: the Indian Supreme Court and the Narmada Valley struggle*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 183-217 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) [hereinafter LAW AND GLOBALIZATION FROM BELOW]; JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978).

## I

## IMMIGRANT LABOR IN U.S. URBAN CENTERS

*A. The Restaurant Industry in New York City*

Unlike many other sectors of the service economy, the restaurant industry is an important site for worker organizing due to its size and because it offers poor immigrant workers access to living wage jobs. The industry is the largest private sector employer in the U.S. and one of the largest contributors to job growth in New York. It encompasses a wide range of business establishments, from small proprietorships to multinational corporate entities, at both the high- and low-ends of the market.<sup>6</sup> Immigrant workers from the global South—Latin America, Africa, and South and East Asia—provide the industry with the bulk of its workforce. This is true especially in the low-skill, low-wage strata, and in the high-end segment of the industry as kitchen workers (or the “back of house” workers), table bussers, and runners between the kitchen and the dining floor (or the “front of the house”).<sup>7</sup> Restaurant work provides a basic level of income, in which even “back of the house” workers earn salaries that may keep them above the poverty line and allow them to support their families. Eventually, some workers transition to other higher-paying occupations within the industry.

The path to employment in the industry is undefined and informal. Employers recruit workers mostly by word-of-mouth and training is largely on-the-job. There is a very low rate of union penetration in the industry<sup>8</sup> and organizing workers is difficult in part because of the high turnover—new workers constantly arrive and workers are fired or change jobs frequently. Some employers use the workers’ immigration status to maintain control over the workforce, resist organizing drives, and keep wages and benefits low—a practice particularly prevalent for the “back of the house” work that immigrants of color are generally relegated to the high-end segment of the industry.

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6. National Restaurant Association, *Restaurant Industry Facts*, May 25, 2007, [http://www.restaurant.org/research/ind\\_glance.cfm](http://www.restaurant.org/research/ind_glance.cfm) (last visited Aug. 14, 2007).

7. See RESTAURANT OPPORTUNITIES CENTER OF NEW YORK & NEW YORK CITY RESTAURANT INDUSTRY COALITION, BEHIND THE KITCHEN DOOR: PERVERSIVE INEQUALITY IN NEW YORK’S THRIVING RESTAURANT INDUSTRY 5-8 (2005) [hereinafter BEHIND THE KITCHEN DOOR], [www.rocny.org/documents/RocNY\\_final\\_compiled.pdf](http://www.rocny.org/documents/RocNY_final_compiled.pdf) (last visited Aug. 14, 2007).

8. Less than one percent of the workforce in the restaurant industry in New York is unionized. See Sarumathi Jayaraman, *ROCing the Industry: Organizing Restaurant Workers in New York*, in THE NEW URBAN IMMIGRANT WORKFORCE: INNOVATIVE MODELS FOR LABOR ORGANIZING 143 (Sarumathi Jayaraman & Immanuel Ness eds., 2005) [hereinafter THE NEW URBAN IMMIGRANT WORKFORCE].

*B. Undocumented Workers and the Decline of Unionization*

Immigrant labor supports the restaurant industry in New York and a large portion of the workforce is undocumented. As of March 2004, there were 11.1 million undocumented immigrants.<sup>9</sup> Just over seven million undocumented immigrants were in the workforce, constituting about 4.9 percent of all U.S. workers.<sup>10</sup> Over sixty percent of undocumented workers work for less than twice the minimum wage, in contrast with only a third of all U.S. workers.<sup>11</sup> Undocumented workers constitute just under 10 percent of the forty-three million low-wage workers in the U.S.<sup>12</sup> Although there are cases of “super-exploitation” in which workers are enslaved or assaulted by their employers, most undocumented workers operate in everyday sweatshop conditions, including consistent underpayment of wages for regular hours and overtime, health and safety violations, and hierarchical relationships of power in the workplace marked by low-intensity verbal abuse, and racial and sexual harassment.<sup>13</sup>

Although undocumented immigrants have been a part of the U.S. workforce throughout its history, the movement of workers across national borders has accelerated since 1982 as a result of economic crises in the global South and the growth of the service economy in the U.S. in the 1990s. These intensified migration patterns are one thread in the phenomenon of “economic globalization,” which, according to economist Jagdish Bhagwati, “constitutes integration of national economies into the international economy through trade, direct foreign investment (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology.”<sup>14</sup> Most critiques of globalization are rooted in opposition to the “neoliberal” vision of globalization (also called the “Washington Consensus”), derived from the 1980s agreement between the International Monetary Fund, the World Bank, and the U.S. Treasury Department on a general set of policies imposed upon borrower nations in the developing world. The neoliberal program is one of fiscal austerity and cutbacks in social programs, privatization of nationalized industries, often in the area of natural resources such as water and precious metals, and market liberalization through lowered trade barriers

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9. JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 1 (2006), <http://pewhispanic.org/reports/report.php?ReportID=61> (last visited Aug. 14, 2007).

10. *See generally id.*

11. JEFFREY S. PASSEL, ET AL., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 2 (2004), [http://www.urban.org/uploadedPDF/1000587\\_undoc\\_immigrants\\_facts.pdf](http://www.urban.org/uploadedPDF/1000587_undoc_immigrants_facts.pdf) (last visited Aug. 14, 2007).

12. *See generally id.*

13. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 14-15 (2005).

14. *See* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 3 (2004).

and less government intervention in the workplace and in transactions between private actors.<sup>15</sup> As a result, economic and social conditions in developing nations have deteriorated since the program's inception. This "pushed" migrants north, largely to the U.S. and Europe.<sup>16</sup> The structural economic shift in receiver countries from manufacturing to service production combined with the strategies used by U.S. businesses to weaken labor solidarity have "pulled" migrants across borders without documentation.<sup>17</sup> Further, the growth of the "informal economy"<sup>18</sup> in tandem with the expansion of service production in large urban cities created strong demand for low-wage workers in jobs characterized by contingency and insecurity.<sup>19</sup>

This form of neoliberal globalization helped create the immigrant low-wage sector of the U.S. economy. The U.S. and other countries of the north undercut worker protection regimes at home and abroad. While the Washington Consensus was imposed by the IMF and the World Bank on the countries of the global South, governments in the global North reduced regulation of employment relationships and undercut collective bargaining;<sup>20</sup>

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15. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 53 (2002). During the transition from colonialism to independence, many countries in the global South adopted economic programs that were a mix of free market and governmental command and control policies. These newly independent nations sought to provide income support and other social benefits to the people, to control their own natural resources and essential industries through public ownership, and to aggressively intervene in relationships between employers and workers, especially in industries marked by prior colonial exploitation. Through a combination of internal failure due to corruption and cronyism, external pressure by private entities and lending institutions in the U.S. and Western Europe, and the collapse of the patron states of the Communist bloc, these countries suffered through a succession of economic crises. Policy-makers, economists, and multinational corporations in the global North were hostile to the efforts of these nations to erect legal walls around industries, natural resources, and cheap labor and gained the leverage necessary to impose the conditions of the Washington Consensus in the 1980s and 1990s.

16. See Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL'Y 791, 797-801 (1995); Alejandro Portes & Jozsef Borocz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 INT'L MIGRATION REV. 606, 607-09 (1989) (describing current migration as a product of historical patterns of contact and penetration between sending and receiving countries and criticizing push-pull theories that focus solely on contrasts in living standards or governmental action).

17. See Frank Munger, *Conclusion: Democratizing Poverty*, in *LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY* 295 (2002).

18. See Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994).

19. See *id.* at 2294-99 ("The groups of service industries that were the driving economic force in the 1980s were characterized by greater earnings and occupational dispersion, weak labor unions, and mostly unsheltered jobs in the lower-paying echelons." *Id.* at 2294.).

20. See Bruno Caruso, *Immigration Policies in Southern Europe: More State, Less Market*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 299, 303 (Joanne Conaghan, et al. eds., 2002) (describing the interaction between enforcement of labor laws and immigration in southern versus Northern Europe) [hereinafter *LABOUR LAW IN AN ERA OF GLOBALIZATION*]. The Reagan Administration made no secret of its antipathy to organized labor and accelerated deregulatory

simultaneously, undocumented immigration came to underpin the informal economy.<sup>21</sup> In receiving countries, employers use pre-existing gender and ethnic hierarchies for structuring the workplace and creating relations of inequality between groups of workers.<sup>22</sup> To avoid expulsion, undocumented immigrants often refrain from attempts to enforce their labor rights, while employers do not report undocumented workers to immigration authorities.<sup>23</sup> This informal, often unstated, mutual agreement between employer and employees works through word-of-mouth recruitment processes to perpetuate the chain of undocumented immigration to the global North.<sup>24</sup>

The movement of immigrants to the U.S. coincides with the growth of the economy unregulated by the government—that is the informal sector—in terms of worker protection, taxation, and, in some cases, even consumer protection. Legitimate employers subject to the full range of government regulation are increasingly intertwined with and resemble businesses in the informal sector, especially in the low-wage segment of the economy.<sup>25</sup> This change in the relationships between employers and employees in both the regulated and

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initiatives in various industries. Funding of federal labor law enforcement in the U.S. has not kept up with inflation and increases in the numbers of covered employees and businesses. ANNETTE BERNHARDT & SIOBHAN MCGRATH, ECONOMIC POLICY BRIEF: TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR, 1975-2004, (Sept. 2005), [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_8423.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_8423.pdf) (last visited Aug. 14, 2007) (“Our analysis indicates that over the past three decades, enforcement resources and activities of the U.S. Department of Labor have either stagnated or declined, at the same time that the number of workers and workplaces in the country has expanded. In combination, these two trends indicate a significant reduction in the government’s capacity to ensure that employers are complying with the most basic workplace laws.” *Id.* at 1.).

21. See Gordon, *supra* note 14, at 46 (“[U]ndocumented immigrants’ fear of deportation and their lack of legal status make them particularly likely to gravitate toward the underground economy, made up of businesses that operate on cash with little regard for government regulations.” *Id.* at 46.).

22. Occupational segregation was a focus of a successful deportation defense in *In re Herrera-Priego*, U.S. D.O.J. E.O.I.R. July 10, 2003 (Lamb, Immigration J.), available at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web428.pdf> (last visited Aug. 14, 2007) and discussed further by lead attorney Michael J. Wishnie, *Introduction: The Border Crossed Us*, 28 N.Y.U. REV. L & SOC. CHANGE 389, 389 (2004). The workplace was composed of Latino, Chinese, and Polish workers who did different kinds of work and were subject to varying levels of attention by immigration enforcement authorities during a workplace raid. See Laura Ho et al., *(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383 (1996) (discussing the low status of women workers on the economic ladder). See also Julie A. Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 411 (1998) (describing the challenge of bridging Thai and Latino garment workers in opposition to exploitative employers).

23. See Michael J. Wishnie, *supra* note 23, at 389-94 (describing the correlation between labor disputes in workplaces and immigrant enforcement raids); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 401 (2001).

24. See Caruso, *supra* note 21, at 311-12 (describing the situation in Italy).

25. See Gordon, *supra* note 14, at 48.

unregulated sectors of the economy is a result, at least in part, of the weakening union movement in the U.S. The declining power of labor unionism in the workplace throughout the second half of the twentieth century hinged on at least two factors: (1) the mobility of corporations and the implicit use by employers of a large mass of unorganized workers in developing countries to gain bargaining leverage over American unions, and (2) the transformation of manufactured production from fixed geographic contexts to more flexible, contingent, and multi-jurisdictional forms of production.<sup>26</sup> As capital has flowed south and highly unionized segments of the American economy has relocated to nations with cheaper labor costs, the importation of migrant workers from developing nations has become the de facto policy of the U.S.<sup>27</sup> and accelerates the de-unionization of a workforce with limited collective bargaining power.<sup>28</sup> The state simultaneously constructs heavily-policed borders<sup>29</sup> and adopts a schizophrenic tolerance of undocumented workers in the U.S.<sup>30</sup> The specter of indiscriminately enforced immigration laws meets the needs of employers and weakens collective action among workers.<sup>31</sup> Finally, immigrant workers are excluded from full protection of U.S. labor laws or are hired under temporary work and subcontractor employment arrangements, further undermining organizing and preventing workers from holding deep-

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26. BEVERLY J. SILVER, *FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870* 3-5, (2003) (describing and then criticizing "race to the bottom" arguments). Although Silver argues against the inevitability of weakened labor movements, she indicates that the fundamental shift in the world economy, which prevents profits in the corporate centers of the global North from reaching mobilized working classes in newly industrialized nations of the global South may sow unrest and preempt labor-management cooperation regimes in manufacturing. *Id.* at 168-70. Labor in the service industries of the global North, such as restaurant workers, will instead achieve some measure of countervailing power through creative mobilization against highly profitable target employers, like high-end restaurant chains. *Id.* at 170-73.

27. See *infra* text accompanying notes 43-47.

28. Frances Raday, *The Decline of Union Power—Structural Inevitability or Policy Choice*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION*, *supra* note 20, at 353, 361-62 ("It is no secret that the concept of employment is a legal construct with a status element not wholly determinable by agreement between the parties. Hence, the possibility of using workers' services without entering into an employment relationship with them is as much a consequence of law as of economic factors") (citing George Gonos, *The Contest Over "Employee" Status in the Postwar U.S.: The Case of Temporary Help Firms*, 31 *LAW & SOC. REV.* 81, 83 (1997)).

29. David Graeber, *The New Anarchists*, in *A MOVEMENT OF MOVEMENTS* 202, 206 (Tom Mertes ed., 2004) ("[T]he neoliberal vision of 'globalization' is pretty much limited to the movement of capital and commodities, and actually increases barriers against the free flow of people, information, and ideas—the size of the US border guard has almost tripled since the signing of NAFTA. . . . This is another thing to bear in mind when people talk about the decline of 'sovereignty' in the contemporary world: the main achievement of the nation-state in the last century has been the establishment of a uniform grid of heavily policed barriers across the world." *Id.*).

30. See *infra* note 42.

31. See Graeber, *supra* note 29.

pocketed employers liable for violations of labor and employment laws.<sup>32</sup>

### C. Immigration Enforcement and Immigrant Workers

While undocumented workers like those ROC-NY organized often do not enjoy the protections of the labor and employment laws, they find themselves subject to increasingly stringent enforcement by immigration statutes. Recent enforcement initiatives by government agencies threaten immigrant workers with arrest and detention (local police authority to enforce federal immigration law),<sup>33</sup> termination of employment (Social Security Administration's new proposed "no match" rules),<sup>34</sup> and loss of the ability to drive to work (federal

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32. See *infra* text accompanying notes 120-124; Laura Ho et al., *supra* note 22, at 409-10; Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 997-1002 (1999) (describing the vertical disaggregation of the garment industry for the purpose of avoiding liability for legal violations).

33. In 2002, the Department of Justice reversed its long-held view that immigration enforcement is exclusively a function of the federal government and deemed local law enforcement officials to have "inherent authority" to enforce immigration law. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090-91 (2004); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 1003 (2004) (The DOJ's position "creat[es] a thousand borders—the result of allowing local authorities to decide for themselves whether to enforce immigration laws and then having those local authorities be bound by different state laws that affect their enforcement authority." *Id.*); After joint local-federal immigration raids, immigrant communities remain distrustful of local government agencies, including the police. Terry Golway, *Back Into the Shadows*, N.Y. TIMES, Feb. 20, 2005, § 14NJ, at 1; Local agencies are increasingly invoking the 1996 changes in the Immigration and Nationality Act to request federal training in immigration enforcement and are reporting non-citizens with minor offenses to immigration officials. Paul Vitello, *Path to Deportation Can Start With a Traffic Stop*, N.Y. TIMES, Apr. 14, 2006, at A1; Some police officers oppose such deputization practices. Joe Cantlupe, *Proposal Targets Migrants' offenses; Police Say They Lack Resources to Make Arrests*, SAN DIEGO UNION-TRIB., Nov. 29, 2003, at A1; The FBI database—to which state and local police have access—now holds immigration information in addition to criminal activity; police officers are encouraged to make immigration arrests, whether the infractions are criminal or civil, including arrests of student-visa violators. Wishnie, *State and Local Police Enforcement*, *supra* note 33, at 1095-97. The Court held in *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975), that "Mexican appearance" was a "relevant factor" in an INS stop. Such racial profiling, a widespread practice in immigration enforcement, is extended to local police who cooperate with the federal government. Wishnie, *State and Local Police Enforcement of Immigration Laws*, *supra*, at 1102-05; Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 371, 374 (2004) ("Local law enforcement officers, untrained in the complexities of immigration regulations, are more likely to use race or ethnicity as a substitute for reasonable cause." *Id.*).

34. In June 2006, U.S. Immigration and Customs Enforcement (ICE) proposed new rules regarding employers' responsibilities upon receipt of a letter from the Social Security Administration (SSA) indicating the lack of a match between an employee's social security number and government records. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281-01 (June 14, 2006) (to be codified at 8 C.F.R. § 274(a)). Under the pending rules, employers would be required to take a number of steps possibly leading to the termination of an employee. National Immigrant Law Center, DHS Announces It Has Finalized

and state changes in eligibility for driver's licenses).<sup>35</sup> The 1996 amendments to the Immigration and Nationality Act,<sup>36</sup> as well as the heightened profile of immigration enforcement in local communities since 9/11, accelerated the detention and deportation of immigrants.<sup>37</sup> Deportations rose 12 percent between 2005 and 2006 to 189,924, part of an overall 75 percent increase between 2000 and 2006.<sup>38</sup> Since the 1996 amendments, immigration enforcement authorities focus on the detention and deportation of immigrants with criminal convictions, including legal permanent residents. This disproportionately impacts communities targeted by police enforcement activity.<sup>39</sup> After 9/11, the government targeted male Arab and South Asian Muslim immigrants through a series of enforcement initiatives with collateral effects in other communities.<sup>40</sup> Most recently, immigration authorities re-

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"Safe Harbor Procedures for Employers Who Receive a No-Match Letter" Rule, Aug. 10, 2007, [http://www.nilc.org/immsemplmnt/SSA\\_Related\\_Info/ssa002.htm](http://www.nilc.org/immsemplmnt/SSA_Related_Info/ssa002.htm) (last visited Aug. 15, 2007). If these steps are not taken within a certain period of time, the employer is assumed to have "constructive knowledge" of an employee's lack of authorization to work in the U.S. and could face fines and penalties. *Id.* These rules, if adopted, will provide employers with a legal justification for the termination of immigrant workers involved in organizing. Under current law, SSA is not permitted to share "no-match" data with ICE. However, DHS is seeking access to SSA records for the purpose of more efficient border patrol enforcement. *See* Press Release, Office of the Press Secretary, U.S. Department of Homeland Security, DHS Announces Federal Regulations to Improve Worksite Enforcement and Asks Congress to Approve Social Security "No Match" Data Sharing (June 9, 2006), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0925.shtml](http://www.dhs.gov/xnews/releases/press_release_0925.shtml) (last visited Aug. 14, 2007).

35. The Real ID Act requires that states confirm social security numbers or proof of ineligibility prior to issuing drivers' licenses. Pub. L. 109-13 § 202(c)(1)(C) 106 Stat. 231 (2005). *See* Raquel Aldana & Sylvia R. Lazos Vargas, "Aliens" in our Midst Post 9/11: Legislating Outsiderness Within the Borders, 38 U.C. DAVIS L. REV. 1683 (2004) (discussing fear of arrest and deportation in immigrant communities as a result of passage of Real ID Act); María Pabón López, *More than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. Ill. U. L. J. 91 (2004) (survey of state restrictions on immigrant access to driver's licenses).

36. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

37. *See* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1197 (2002); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 297-98 (2002); Approximately 13,000 Arab and South Asian Muslims have been placed in deportation proceedings since 9/11. Andrea Elliot, *Study Finds City's Muslims Growing Closer Since 9/11*, N.Y. TIMES, Oct. 5, 2004, at B4.

38. Nina Bernstein, *Immigrants Go from Farms to Jails, and a Climate of Fear Settles In*, N.Y. TIMES, Dec. 24, 2006, § 1, at 21 (describing increased immigration enforcement activity).

39. *See* Morawetz, *supra* note 36, at 1945-46 ("The likelihood of deportation is greater in communities that are subject to elevated levels of police activity and in which people are more likely to be arrested and prosecuted." *Id.*).

40. *See, e.g.*, 66 Fed. Reg. 48334-48335 (Sept. 20, 2001) (to be codified at 8 C.F.R. § 287.3(d)) (detention extended from 24 hours to 48 in general and to a "reasonable period of time" during national emergencies); Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19,508- 19,511 (Apr. 22, 2002) (to be

focused on undocumented workers, mostly Latino, with an aggressive program of workplace raids.<sup>41</sup>

Aggressive immigration enforcement policies and a weakened worker protection regime resulting from accelerated neoliberal globalization in the last twenty years left immigrant workers vulnerable to both the state and exploitative employers. Immigrant workers are trapped by their need to migrate across national borders for survival, as nations attempt to wall off their territorial boundaries and bear down upon those who have already crossed over. The enforcement-only legislation adopted in late 2006<sup>42</sup> is a continuation of a failed immigration policy. The U.S. Border Patrol doubled the number of

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codified at 8 C.F.R. §§ 236 and 241) (in comunicado detention for legitimate law enforcement purposes); U.S. Immigration and Customs Enforcement, Fact Sheet, Changes to National Security Entry/Exit Registration System (NSEERS) (Dec. 1, 2003); Akram & Johnson, *supra* note 37, at 331 (noting that approximately 1000 immigrants were swept into custody in the days following 9/11); Ashar, *supra* note 37, at 1186-91 (describing arrest of detainee in a mosque); Elliot, *supra* note 37; Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003) (describing effects of recent enforcement initiatives in Latino immigrant communities); 78 No. 46 Interpreter Releases 1809, 1816 (Dec. 3, 2001) (“voluntary” interviews of 5000 young men from certain countries); James Sterngold & Diana Jean Schemo, *A Nation Challenged: Foreign Students; 10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001, at B1 (first arrests of immigrant students for violations of their visas); Dan Eggen, *Deportee Sweep Will Start with Mideast Focus*, WASH. POST, Feb. 8, 2002, at A01 (arrest of 6000 men from certain countries with final orders of deportation); DOJ Office of Inspector General, *The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders*, Report No. I-2003-004, Appendix B (Feb. 2003) (immigration violations entered into national criminal database to facilitate local enforcement of immigration law); 8 C.F.R. § 264.1 (forced registration of non-immigrants from certain countries); Nurith C. Aizenman & Edward Walsh, *Immigrants Fear Deportation After Registration: Number of Mideast, Muslim Men Rises Sharply*, WASH. POST, July 28, 2003, at A01 (around 80,000 men submitted to “Special Registration” and thousands put into deportation proceedings); Rights Working Group, *Secret Hearings and Detentions*, <http://www.rightsworkinggroup.org/?q=SecretHearings> (last visited Aug. 14, 2007) (hundreds of immigrants deported without due process).

41. See, e.g., Bernstein, *supra* note 38; Julia Preston, *U.S. Raids 6 Meat Plants in ID Case*, N.Y. TIMES, Dec. 13, 2006, at A24; Nicholas Riccardi & Nicole Gaouette, *Employers’ immigration pains*, L.A. TIMES, Dec. 17, 2006, at 37. The crackdown on undocumented immigrants coincided with deliberation in Washington, D.C. on comprehensive immigration reform and as the Bush Administration’s guest worker proposals were attacked from the right by anti-immigrant politicians and organizations. Political performance, rather than actual threats to national security, seems to drive immigration enforcement at this time. See Muneer Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1261, 1317-27 (2004) (discussing the effect of post-9/11 governmental racial profiling on private hate crime perpetrators); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 954-59 (2002) (discussing sacrifice of the liberties of a minority group to further the purported security interests of the majority); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582-83 (2002) (describing signals sent to the public by government law enforcement). Cumulatively, post-9/11 enforcement initiatives have eroded workers’ right to free association and their ability to organize in the workplace. See also Ruben J. Garcia, *Labor’s Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283 (2006); Wishnie, *supra* note 33, at 1104.

42. See Secure Fence Act, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

agents in the Southwest region from 4,000 to 8,000 between 1994 and 1998.<sup>43</sup> During this time, the death toll of migrants at the border increased, the duration of migrants' stay in the U.S. increased, unauthorized immigration increased, and the use and cost of immigrant smugglers increased.<sup>44</sup> Heightened intensity of immigration enforcement is a cyclical phenomenon, dependent upon a number of factors, including the state of the economy and actual and imagined threats to national security.<sup>45</sup> However, the basic framework of national territoriality remains unchanged,<sup>46</sup> even as neoliberal globalization lowered barriers for the movement of capital and goods across borders.

## II

### A CASE STUDY OF ORGANIZED RESISTANCE: THE RESTAURANT OPPORTUNITIES CENTER OF NEW YORK

The organizers and worker-members of ROC-NY, with the essential contributions of public interest lawyers, attached the face of a discrete corporate entity to the abstract macropolitical conditions described in the preceding part. The ROC-NY campaign against the restaurant corporation involved a number of actors and took many turns. A description of the main players in the campaign and the conduct of the campaign follows in the next sections.

#### A. *The Organizers*

The ROC-NY organizers envisioned the campaign with the workers who approached them and drove its progress through the eighteen month duration. They arose from the ashes of the World Trade Center to pursue an ambitious program of worker activism in the restaurant industry in New York City. The organizers drew from strategies established by preceding worker centers, especially in their use of law and lawyers, but also originated novel direct action and law reform techniques to advance their cause.

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43. See THOMAS R. ELDRIDGE ET AL., *9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S.* 99 (Aug. 21, 2004).

44. See BELINDA I. REYES ET AL., PUBLIC POLICY INSTITUTE OF CALIFORNIA, *HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION* viii-xi (2002), available at <http://www.ppic.org/main/publication.asp?i=158> (last visited Aug. 14, 2007).

45. See Kevin R. Johnson, *Open Borders*, 51 *UCLA L. REV.* 193, 244 (2003).

46. See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (“[T]he interstate system, aimed at achieving order and peace, was based on ‘crustacean’ borders. That changed, among other things, how nation-states regulated migration. Rigid border controls, passports, and state restrictions on entry and exit became the norms for governing emigration and immigration.” *Id.* at 10.).

*1. The Origins of ROC-NY*

In the aftermath of 9/11, the local of the Hotel Employees and Restaurant Employees International Union (“HERE”), which represented restaurant workers at Windows on the World at the top of the World Trade Center, started a support group for surviving workers and families. The leaders of the group transformed it from a source of emotional support to a model of collaboration between workers, organizers, and lawyers. Immigrant labor organizer Saru Jayaraman and three surviving Windows on the World workers<sup>47</sup> agreed in 2002 to lead the new organization on the condition that they could undertake aggressive and targeted workplace justice campaigns. Additionally, the leaders expressed interest in originating a worker-directed research and public policy program.

The union recruited Jayaraman because she created an innovative model of organizing and advocacy at the Workplace Project, founded by Jennifer Gordon in 1992.<sup>48</sup> The story of immigrant workers in exurban Long Island, New York, embodied in the creation and development by Gordon and her colleagues of the Workplace Project, gained resonance in law and organizing circles as the phenomenon of immigrant labor spread to all corners of the U.S. and the labor movement grew to view immigrant organizing as necessary for its survival and growth. Jayaraman created a program that built on Gordon’s original vision, drawing on an extensive study of various models of law and organizing across the country, and with her new colleagues at ROC-NY adapted her team-based organizing model for New York’s restaurant industry.<sup>49</sup>

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47. ROC-NY Deputy Director Fekkah Mamdouh was a key member of the leadership team, a leader in the workplace at Windows, and a complement to Jayaraman, who had limited experience in the industry prior to 2002.

48. See Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 Harv. C.L.-C.R. L. Rev. 407, 428-37 (1995) (describing the founding of the Workplace Project).

49. See Saru Jayaraman, *La Alianza Para La Justicia: A Team Approach to Immigrant Workers Organizing*, in THE NEW IMMIGRANT URBAN IMMIGRANT WORKFORCE, *supra* note 8, at 85-104. Like Gordon, Jayaraman used popular education methods at the Workplace Project to expand the scope of what workers understood to be possible through solidarity and collective action. She also made clear that public policy reform, with the leadership of the workers themselves, was an explicit and early goal of her work at the Workplace Project, just as it had been for Gordon. See *id.* at 90-91; Gordon, *supra* note 13, at 115-41 (detailing Gordon’s work). However, at the Workplace Project Jayaraman departed from a drop-in law clinic model in favor of more focused campaigns. Jayaraman organized teams of immigrant workers from multiple workplaces by industry. She proposed that a consensus be reached on a larger public policy campaign through discussion across teams. Individual workers would bring campaign proposals to the team, which would in turn consider several proposals and decide whether to initiate a given campaign. These were not the easiest cases or those that ensured the highest degree of worker self-help. Rather, they were chosen because the problems addressed were prevalent and oppressive in the industry, because the worker or workers who proposed the campaign compelled others to support them through their contributions and commitment to the group, or if the target employer was a bad actor of whom an example could be made through media work to raise rights

The organization produced several successful early campaigns. In July 2002, a few months after the founding of ROC-NY, it launched its first campaign against the owner of Windows on the World. After 9/11, the owner moved quickly to open a new non-union restaurant in Times Square.<sup>50</sup> The surviving formerly unionized Windows on the World workers were not welcomed at the Times Square establishment because it was a non-union restaurant. ROC-NY moved quickly and used a combination of direct action and media advocacy tactics to pressure the owner into hiring some of his former workers from the World Trade Center with a similar package of wages and benefits. Then, the organization worked with attorneys at the Puerto Rican Legal Defense and Education Fund (PRLDEF) and with the New York University Immigrant Rights Clinic (NYU-IRC) to target a famous diner frequented by prominent New Yorkers on the Upper Eastside. The parties also worked together for improving the working conditions at a greengrocer in Brooklyn. In both cases, ROC-NY and its allies obtained good results. The organizers and workers' committees of ROC-NY soon signaled the scope of their ambition by adding new strategies to their work. They moved forward with plans to open a worker-owned high-end restaurant. The cooperative would demonstrate the viability of a business model in which profits are shared throughout the job hierarchy.

Early in ROC-NY's existence, and based on their analysis of the industry and their experience with the early campaigns, the organizers decided to focus their workplace justice campaigns on the high-end portion of the sector in New York, especially the corporate chains, on the theory that aggressive standard-setting at the top would have an industry-wide effect.<sup>51</sup> In tandem with the workplace justice campaigns, ROC-NY proposed legislation in the City Council that would strengthen enforcement of wage and hour laws in the restaurant industry. ROC-NY issued a 50-page industry analysis with policy recommendations in 2005, which provided the basis or "findings" for the legislation.<sup>52</sup> On the basis of the report, the organization initiated a dialogue

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consciousness in immigrant communities and standards of employment in the industry. Jayaraman also organized support from within the legal and labor fields for the Workplace Projects' goals. She recruited pro bono and public interest attorneys to support the campaigns through litigation and administrative advocacy. In addition, she worked extensively with the Association for Union Democracy against locals that were not responsive to complaints made by immigrant workers at union shops.

50. *See id.* at 145-46.

51. ROC-NY members were also key participants in the "\$5.15 is Not Enough" Coalition with the Working Families Party, which succeeded in raising the minimum wage in New York in 2004 in spite of a gubernatorial veto. *See* Restaurant Opportunities Center of New York, Programs-Policy Work, <http://rocny.org/programs-policywork.htm> (last visited Aug. 15, 2007).

52. *See* ROC-NY, Proposed Responsible Restaurant Licensing Bill (Jan. 2007) (on file with author); BEHIND THE KITCHEN DOOR, *supra* note 7. *See generally* ROC-NY, Programs-Research Work, <http://rocny.org/programs-researchwork.htm> (last visited Aug. 15, 2007).

with an employers' group, the New York State Restaurant Association.<sup>53</sup> The legislation would allow workers to use violations of wage and hour laws to make the case for revocation of restaurant licenses granted by the city. The organization's ambitious agenda and its power grew quickly with each successive initiative and campaign.

## 2. *The Worker Center Movement in the U.S.*

Upon its founding in 2002, ROC-NY joined a growing worker center movement in the U.S., composed of community-based non-profit organizations that pursued localized economic justice campaigns outside the legal framework of the National Labor Relations Act (NLRA).<sup>54</sup> Worker centers cropped up at the margins of the workforce, vastly dwarfed by the financial and political power, and legal standing of the unions. Organizers and workers came together in some cases in explicit opposition to unions—which remained officially anti-immigrant through the 1990s<sup>55</sup>—and in other cases to fill the empty space left by an institution in decline and under attack by employers and the state. Many worker centers harnessed cultural and ethnic solidarity within immigrant communities<sup>56</sup> to propel campaigns for social and economic justice. Organizers, without the institutional standing and outside of the regulatory framework limiting unions,<sup>57</sup> adopted more confrontational direct action tactics

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53. See Steven Greenhouse, *In \$8 Billion Restaurant Industry, a Study Finds Mostly 'Bad Jobs'*, N.Y. TIMES, Jan. 25, 2005, at B7. See also Leslie Casimir, *Say Minorities get Worst Eatery Jobs*, N.Y. DAILY NEWS, Jan. 25, 2005, at 9.

54. See 29 U.S.C. §§ 151-69 (2000); JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2005). Boaventura de Sousa Santos notes the turn in the global North from working class parties and labor unions toward a plurality of modes of organization and methodologies with social transformative goals. Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in *LAW AND GLOBALIZATION FROM BELOW* 29, 43 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

55. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1775, 1828-29 (2001); Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 533 (2005-06); The pro-immigrant stance of organized labor coincided with the election of John Sweeney in 1995. Peter T. Kilborn, *Why Labor Wants The Tired and Poor*, N.Y. TIMES, Oct. 29, 1995, at E3. Unions are now actively seeking immigrant members, directly and through immigrant organizations. See also Stephen Franklin, *Farm union helps in recruiting and hiring immigrant workers*, HOUS. CHRON., Apr. 19, 2006, § Business, at 3; Steven Greenhouse, *Labor Federation Forms a Pact with Day Workers*, N.Y. TIMES, Aug. 10, 2006, at A18.

56. See Fine, *supra* note 54, at 5 (indicating that the worker center classification includes a range of organizations, including those serving African-Americans, mixed immigrant and non-immigrant populations, and workfare recipients but that the vast majority of the organizations serve immigrant communities).

57. See 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, 410-16 (2004) ("[T]he [NLRA]'s strict regulation of organizing tactics may present

against employers, including public demonstrations and media advocacy targeted at customers and neutral suppliers and buyers.<sup>58</sup> Additionally, worker centers were unafraid to engage in intra-community campaigns, challenging immigrant employers who used race (or skin color), class, and caste-based hierarchies to keep workers in line.<sup>59</sup> Over time, unions adopted some of the workplace and community organizing methodologies of worker centers, as well as their emphasis on organizing immigrant workers and their use of confrontational tactics against employers, especially the unions that form the new Change to Win coalition.<sup>60</sup> Worker centers have been innovative at the margins of the field, outside of the bureaucratic strictures and biases of unions and the regulatory regime established by business and government to contain labor organizing.

Law school clinics were among the first legal organizations to collaborate with worker centers.<sup>61</sup> In New York, the clinic in which I work—the City University of New York School of Law Immigrant and Refugee Rights Clinic (CUNY-IRRC)—has been engaged by worker centers such as Andolan Organizing South Asian Workers,<sup>62</sup> Domestic Workers United,<sup>63</sup> ROC-NY,

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difficulties for a workers' center, and even undermine the ability of a campaign to meet the center's overall goals. The NLRA prohibits secondary boycotts under most circumstances, places restrictions on picketing, and also limits the way in which racial issues can be addressed in union certification election campaigns." *Id.* at 410 (citations omitted)).

58. Congress, the courts, and the NLRB have sought to regulate labor organizations' secondary boycott, *see* 29 U.S.C. §158(b)(4)(B) (prohibiting union actions against third parties), and picketing activities. *See also Int'l Hod Carriers Local 840*, 135 N.L.R.B. 1153 (1962) (interpreting 29 U.S.C. §158(b)(7) as placing restrictions on the time and purpose of pickets). Worker centers have successfully evaded the labor organization classification, and the corresponding legal limits placed on their campaign tactics, through effective defensive advocacy before the NLRB. *See infra* note 129.

59. The white male leadership of most unions through the 1990s downplayed race and gender-based concerns within the movement and at worksites. *See Pope, supra* note 56, at 530 ("Most union officials shied away from alliances with social movements like the civil rights movement and the women's movement, viewing them as threats both to the stability of collective bargaining relationships and to their own job security as aging white men at the helm of increasingly diverse and female organizations." *Id.* (citation omitted)). This stance together with the antipathy held by unions against immigrants, ensured that worker centers, such as Chinese Staff and Workers Association and Andolan Organizing South Asian Workers, would lead the fight against intra-community racism, classism, and caste-ism.

60. For background on Change to Win campaigns, *see, e.g.,* William Glanz, *Union Targets Janitors for Organizing*, WASH. TIMES, Jan. 26, 2006 at C10; Jim Newton, *Hotel Campaign Signals Labor's Ascent in L.A.*, L.A. TIMES, Mar. 27, 2006, at 1.

61. The model of providing worker centers with outside legal counsel on federal litigation through clinical legal education was originated by Michael J. Wishnie and Nancy Morawetz, law professors and co-directors of the NYU School of Law Immigrant Rights Clinic (NYU-IRC), in early collaborations with Chinese Staff and Workers Association, National Mobilization Against Sweatshops, and Andolan. *See also infra* note 63.

62. Andolan, which means "movement" in several South Asian languages, is a community group of low-wage immigrant South Asian workers. Andolan seeks to empower its members by educating them about their workplace rights, advocating for living wages, raising public awareness surrounding abusive industry conditions—particularly in the areas of domestic,

New York Taxi Workers Alliance,<sup>64</sup> and the Workplace Project in campaigns against exploitative conditions of work. Organizers enjoy working with law school clinics because students bring a high level of energy, focus, and progressive political commitments to the work. I have found that most collaborations with worker centers have significantly advanced my learning goals with students: (1) building a knowledge base in a substantive area of law;<sup>65</sup> (2) developing students' capability to define their role between the parameters set out in the rules of professional responsibility and the needs presented by the clients and organizers with whom we work; and (3) preparing students for contemporary public interest practice, including strategic campaign development and media and policy advocacy.<sup>66</sup> Overall, these collaborations have benefited all parties involved and the students have experience early in their careers with some of the complexities of the use of law to advance the

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restaurant, and retail work, and litigating against exploitative employers. *See* Andolan, About Us, <http://andolan.net/about-us.htm> (last visited Aug. 15, 2007). *See also* Albor Ruiz, *Battling Diplomatic Abuse of Workers in Homes*, N.Y. DAILY NEWS, Oct. 7, 2004, at 4 (highlighting Andolan's campaign against diplomatic immunity, which shields diplomats from prosecution when they employ housekeepers and nannies and violate labor laws).

63. Domestic Workers United (DWU) represents members in an industry that includes more than 600,000 women in the greater New York Metropolitan area. DWU was founded by workers and organizers with the Women Workers Project of Committee Against Anti-Asian Violence. DWU engages in a variety of organizing and lobbying activities, including recent efforts to promulgate a standard domestic worker contract throughout New York that would provide for a living wage and dignified employment. *See* Chisun Lee, *Domestic Disturbance*, VILLAGE VOICE, Mar. 19, 2002, at 31-32, 35 (profiling DWU's attempts to organize domestic workers during recent rights awareness campaign); Ai-jen Poo & Eric Tang, *Center Stage: Domestic Workers Organizing in the Global City*, in THE NEW URBAN IMMIGRANT WORKFORCE 105-18, *supra* note 8; DWU Homepage, <http://www.domesticworkersunited.org/> (last visited Aug. 15, 2007).

64. The Taxi Workers' Alliance was founded in 1998 when it coordinated a massive 40,000 driver strike in New York City. *See* BIJU MATHEW, TAXI!: CABS AND CAPITALISM IN NEW YORK CITY (2005); Somini Sengupta, *Deploring Giuliani Proposals, Cabbies Shun Fares for a Day*, N.Y. TIMES, May 14, 1998, at A1; Hilary Russ, *Making Change: Organizing Drivers*, CITY LIMITS MAGAZINE, July-Aug., 2002, available at [http://www.citylimits.org/content/articles/viewarticle.cfm?article\\_id=2787](http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=2787) (last visited Aug. 15, 2007). Currently, the Alliance represents approximately 6,000 members and works to promote economic and civil rights for taxi drivers. In 2004, the Alliance successfully lobbied the NYC Taxi and Limousine Commission to increase taxi fares by 26%. *See* Michael Luo, *Taxi Commission Backs a 26% Rise for Fares in City*, N.Y. TIMES, Mar. 31, 2004, at A1. The alliance is currently involved in a campaign to block the installation of GPS trackers in all NYC taxi cabs. *See* Pete Donohue, *DOI To Delay launch of Space Age Cabs*, N.Y. DAILY NEWS, Mar. 20, 2006, at 3. The alliance was invited to join the New York City Central Labor Council in 2006. *See* Steven Greenhouse, *Taxi Workers' Alliance May Join Labor Group*, N.Y. TIMES, Nov. 14, 2006, at B3.

65. Wage and hour law is quite accessible to law students and relatively uncomplicated at its core. Further, the cases have allowed students to gain incremental proficiency in more challenging parts of the field, such as anti-discrimination law and the intersection of employment and immigration law.

66. There is much more to say on the benefits and challenges of these collaborations for clinical legal education and the development of public interest law and these arguments are partly the focus of my other scholarly work.

interests of poor people.

### 3. *Worker Centers and Lawyers*

Organizers, and the public interest lawyers with whom they work, view the use of law to advance collective action and social change with ambivalence and sometimes even hostility.<sup>67</sup> Worker centers' use of lawyers has been conditional and experimental, partly due to this shared skepticism about how law might undermine collective action, and it is therefore difficult to generalize about a single model of collaboration. For example, when organizers observed that lawyers and individual legal action take workers' attention away from larger campaigns, the relationship is altered in both current and future campaigns.

Filings, reports, and studies of worker centers indirectly reveal the wide range of lawyering activities nested, to varying degrees, within larger organizing strategies. These activities can be roughly classified into three categories of legal work: claim-centered, organizing-centered, and policy advocacy-centered. Lawyers did claim-centered work—legal advocacy with the aim of winning damages for individual or groups of workers who worked under unlawful conditions—in the earliest collaborations with worker centers and continue to do so with great success. Increasingly, lawyers have done organizing-centered work—legal advocacy to promote and defend workplace organizing and the tactical use of direct action protests against target employers—as worker centers have undertaken more ambitious campaigns with more sophisticated adversaries. Lawyers continue to engage in policy advocacy-centered work—legal analysis, drafting of reports and petitions, and lobbying to government agencies and elected officials—both at the behest of, and independent of, worker centers. The following examples are meant to illustrate rather than provide an exhaustive survey of the field:<sup>68</sup>

#### (a) Claim-centered legal work

Heightened awareness of degraded working conditions and the creative use of law to drive direct action and media campaigns by worker centers led to the revived enforcement of the Fair Labor Standards Act (FLSA)<sup>69</sup> and state wage and hour laws. Numerous worker centers collaborated with lawyers to bring wage and hour actions on behalf of their members in federal, state, and local courts.

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67. See Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 Nw. U. L. REV. 1251, 1277-81 (2006); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 450-60 (2001).

68. Please note that this is a partial list and does not reflect all of the dedicated attorneys and organizations working to protect the rights of immigrant workers.

69. See 29 U.S.C. § 201 *et seq.*

Attorneys at the Asian American Legal Defense and Education Fund (AALDEF), working with the Chinese Staff and Workers Association (CSWA)<sup>70</sup> in New York, and the Asian Pacific American Legal Center, working with the Garment Worker Center<sup>71</sup> in Los Angeles, successfully litigated to expand manufacturers' liability for wage and hour violations by subcontractors in the garment industry.

Lawyers, especially staff attorneys at the Legal Aid Society-Employment Law Center of San Francisco (LAS-ELC), limited the scope of the application of the 2002 *Hoffman Plastic* decision.<sup>72</sup> There have been parallel efforts to limit the applicability of *Hoffman* in the context of employment discrimination cases.<sup>73</sup>

(b) Organizing-centered legal work

Lawyers filed Unfair Labor Practice charges pursuant to the NLRA against employers engaged in retaliatory actions against workers participating in worker center campaigns. Lawyers also attempted to defend nascent independent union organizing drives under the NLRA.

First Amendment attorneys at the New York Civil Liberties Union and from several private law firms defended the rights of worker

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70. See generally Peter Kwong, *Chinese Staff and Workers' Association: A Model for Organizing in the Changing Economy?*, 25 SOC. POL'Y 30 (1994). See also Steven Greenhouse, *Lawsuit Accuses Fashion House of Running Sweatshops*, N.Y. TIMES, June 8, 2000, at B10, (CSWA organized with the named plaintiffs to bring a class action lawsuit filed by AALDEF against Donna Karan); Andrew Hsiao, *100 Years of Hell-Raising: the Hidden History of Asian American Activism in New York City*, VILLAGE VOICE, June 23, 1998, at 67 (CSWA instigated demonstrations against Street Beat, a sportswear company, in conjunction with a lawsuit filed by AALDEF).

71. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 471-81 (2005-06).

72. See *Singh v. Jutla & C.D. & R.'s Oil, Inc.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002) (plaintiff represented by LAS-ELC, National Immigration Law Center, and pro bono attorneys from Brobeck, Bribeck, Phleger & Harrison, LLP; *Hoffman Plastic* does not bar undocumented immigrants from recovering back pay for work already performed); Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compound, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L. J. 473, 496 (2005) (discussing cases that limit the *Hoffman Plastic* holding in context of FLSA, Workers' Compensation, and tort cases). See also *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D.N.Y. 2002) (plaintiff represented by Urban Justice Center and civil rights firm Koob & Magoolaghan); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F.Supp.2d 191 (S.D.N.Y. 2002) (plaintiff represented by AALDEF & employment firm Outten & Golden).

73. See *Rivera v. NIBCO, Inc.*, 364 F.2d 1057, rehearing and rehearing en banc denied, 384 F.3d 822 (9th Cir. 2004), cert. denied, 544 U.S. 905 (2005) (LAS-ELC represented plaintiffs and NELP and National Employment Lawyers Association submitted amicus briefs; discovery of immigration status would chill immigrant workers' exercise of legitimate right to remedies under Title VII); Ho & Chang, *supra* note 72, at 497-517 (discussing Title VII cases interpreting *Hoffman Plastic* and legal theories to limit its holding).

centers to engage in public demonstrations and also defended defamation actions using state provisions prohibiting “strategic lawsuits against public participation,” or Strategic Lawsuit Against Public Participation (SLAPP) suits.<sup>74</sup>

Lawyers and law students at CUNY-IRRC participated in “know your rights” programs with immigrants to help them enforce their own rights through negotiations with employers and *pro se* actions in small claims court.<sup>75</sup>

Lawyers at the MALDEF and the American Civil Liberties Union (ACLU) litigated on behalf of the National Day Laborer Organizing Network against anti-solicitation and anti-loitering laws in numerous localities.<sup>76</sup>

(c) Policy advocacy-centered legal work

Attorneys at organizations such as the National Employment Law Project (NELP) and the National Immigration Law Center (NILC) led impact litigation (both affirmative and defensive, in the instance of *Hoffman Plastic* and the cases that have followed) and policy-making initiatives. Additionally, they documented the activities of worker centers and the impact of legal changes on immigrants.<sup>77</sup>

Attorneys and law students with NYU-IRC and CUNY-IRRC served as legislative counsel to worker centers such as Domestic Workers United<sup>78</sup> and ROC-NY, respectively.

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74. See N.Y. C.P.L.R. 3211, 3212 (McKinney 2007); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2007).

75. We have partnered with the Latin American Workers Project in Brooklyn and the Queens Community House ESL program in Jackson Heights, New York.

76. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 487-95 (2005-06).

77. See, e.g., NELP, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006), <http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor%20Epdf> (last visited Aug. 15, 2007) (providing data on violations common to specific industries and suggesting recommendations for legislative and organizing campaigns); NELP, *Analysis of Certain Key Provisions of HR 4437 (Sensenbrenner-King) Impacting Worker Centers* (2006), <http://www.nelp.org/docUploads/analysis%20of%20certain%20key%20provisions%20Epdf> (last visited Aug. 15, 2007) (highlighting an expanded definition of smuggling and preemption of state and local laws designed to support day labor centers among other provisions). See generally NELP, *Immigrant Worker Project*, <http://www.immigrant-nonstandard.org/page.php?section=immigrant&page=index> (last visited Aug. 15, 2007); NILC *Immigrants & Employment Index*, <http://www.nilc.org/immsemplymnt/index.htm> (last visited Aug. 15, 2007) (including a *Hoffman* amicus curiae brief and resource material for immigrant workers, organizers, and legal advocates).

78. NYU-IRC provided legislative counsel to DWU on a new municipal law that strengthened local regulation of employment agencies for nannies. See Steven Greenhouse, *New Protections for Nannies are Approved by Council*, N.Y. TIMES, May 15, 2003, at B3.

Attorneys at NELP,<sup>79</sup> ACLU,<sup>80</sup> NYU-IRC,<sup>81</sup> and a student labor rights organization at Yale Law School<sup>82</sup> collaborated on petitions with worker centers on behalf of workers before international organizations, such as the Inter-American Court of Human Rights, and tribunals created under procedures set out in trade-based treaties, such as the labor side agreement to the North American Free Trade Agreement.<sup>83</sup> These attorneys also litigated international law claims on behalf of immigrant workers in domestic courts through the Alien Tort Claims Act.<sup>84</sup>

The collaborations produced particular dynamics in the tripartite relationship between organizers, workers, and attorneys with varying levels of associated collective action, client empowerment, and lawyer accountability.<sup>85</sup> In some cases, lawyers developed strategies pursued by worker centers. In other cases, organizers and workers led the way. Worker centers employed lawyers both affirmatively and defensively. Nearly all of the lawyers involved in the early collaborations with worker centers were public interest lawyers,

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79. See Inter-American Court of Human Rights (IAC) OC-18 (2003), translated excerpt of decision available at <http://www.immigrant-nonstandard.org/page.php?section=immigrant&page=human-rights-translated> (last visited Aug. 15, 2007) (amicus brief filed by NELP, Professor Sarah Cleveland of University of Texas School of Law, Professor Beth Lyon of Villanova University School of Law, NILC, and Northwest Worker Justice Center; case brought by Mexico against U.S. in reaction to the Supreme Court holding in *Hoffman Plastic* and the consequent limits on rights of immigrant workers in U.S.).

80. See Petition Alleging Violations of the Human Rights of Undocumented Workers by the U.S. (Nov. 1, 2006), available at [http://www.aclu.org/images/asset\\_upload\\_file946\\_27232.pdf](http://www.aclu.org/images/asset_upload_file946_27232.pdf) (last visited Aug. 15, 2007) (filed with IAC by ACLU, University of Pennsylvania Transnational Legal Clinic, and NELP on behalf of immigrant workers pursuant to the Universal Declaration of Human Rights).

81. See Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 543-57 (2002); Mexico NAO No. 01-01 (Feb. 2002) (petition filed pursuant to North American Agreement for Labor Cooperation [NAALC] by CSWA and National Mobilization Against Sweatshops [NMASS] against New York State Workers' Compensation Board due to delays in the adjudication of injured workers' claims).

82. See Mexico NAO No. 9804 (1998), Canada NAO No. 9802 (1998) (petitions filed pursuant to the NAALC by workers' rights coalition against the collaboration between U.S. immigration and labor enforcement agencies).

83. See Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1024-25 (1995) (critique of cross-border monitoring approach used in NAALC). The International Labor Rights Fund (ILRF), which collaborates extensively with organized labor, and Professor Lance Compa of the Cornell School of Industrial and Labor Relations were important progenitors of the use of international law and tribunals on behalf of U.S. workers. See generally Lance Compa, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE U.S. UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2004); ILRF campaign materials, available at [www.laborrights.org](http://www.laborrights.org) (last visited Aug. 15, 2007).

84. See Wishnie, *supra* note 81, at 538-43.

85. These categories are derived from the analysis set out by Cummings and Eagly, see *supra* note 67, *After Public Interest Law* at 1268-82.

employed by non-profit organizations or associated with law school clinics.<sup>86</sup>

### *B. The Lawyers*

After organizers are approached by individuals or groups of workers with grievances that advance the larger organizational goals, formulate a campaign, and develop the legal components of the planned initiative, they survey the landscape and usually scramble to identify effective and politically progressive lawyers with whom to collaborate. I highlight the identity and commitments of members of the legal team in the ROC-NY campaign, the broader landscape of public interest law in which organizers recruit lawyers, and the legal constraints under which the campaign operated to further develop an understanding of the collaboration between organizers, workers, and lawyers in this instance.

#### *1. Clinic as Lawyer*

In August 2003, ROC-NY approached CUNY-IRRC about joining the campaign and representing the workers from the corporate restaurant chain in a wage and hour action. The employment law landscape at public interest legal organizations was fairly limited at that time. PRLDEF and AALDEF had individual attorneys focused on employment matters. However, the Legal Aid Society of New York (the largest provider of legal services to the poor in the city), the New York Legal Assistance Group, and Legal Services of New York (a provider with offices throughout the city) had yet to start employment law units. NELP was involved in a large grocery delivery workers case and national support activities (discussed above), but could not offer individual representation for worker center campaigns. ROC-NY confronted a limited choice of legal counsel in part because of federal prohibition on funding for legal services for undocumented immigrants and for any kind of litigation other than direct service provisions to individual clients.<sup>87</sup> The strategic and triaged focus of legal services on benefits issues for the very poor, rather than employment law matters for the working poor, exasperated the prohibition on

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86. This is changing as more private law firms become involved in class action wage and hour litigation. *E.g.*, Outten & Golden, Shelly's New York/Fireman Hospitality Group Withheld Tips, Minimum Wages, and Overtime Case, <http://www.outtengolden.com/firm/practice/class-actions/#225> (last visited Aug. 15, 2007) (Outten & Golden and co-counsel AALDEF are currently representing worker-members of ROC-NY in a class action against an upscale Midtown Manhattan restaurant); Leiff Cabraser, Practice Areas: Employment Law, [http://www.lieffcabraser.com/practice\\_areas.htm#employment](http://www.lieffcabraser.com/practice_areas.htm#employment) (last visited Dec. 26, 2006) (describing 2002 case in which the firm represented assembly line workers at Perdue Farms chicken plants and settled for \$10 million). However, public interest lawyers will remain attorneys of first resort for worker centers for reasons set out in Section III.B, *infra* (noting willingness of lawyers for worker centers to resist conservative interpretations of the professional responsibility rules).

87. See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 220-26 (2003).

funding for legal services.<sup>88</sup> NELP and NILC were in the midst of a challenging reinvention from serving as back-up centers for legal services offices to becoming independent, self-funded providers of legal services. Additionally, the legal defense funds modeled on the formative NAACP-LDF example focused on civil rights issues, such as employment discrimination and school desegregation, before focusing more centrally on legal services for immigrants and workers.

Although other state law schools were under pressure to abandon confrontational legal advocacy that departed from individual direct service provision,<sup>89</sup> and the Pataki and Giuliani administrations tried to curb the progressive bent of the CUNY School of Law,<sup>90</sup> administrators, faculty, and students at CUNY Law as well as other progressive allies in New York encouraged the clinics to engage in creative public interest advocacy.<sup>91</sup> CUNY-IRRC included immigrant labor cases on its docket due to the efforts of former Dean Kristen Booth Glen, who viewed organized labor as an important stakeholder in a public law school, and the advocacy of the Labor Coalition, which was comprised of students who worked within the labor and immigrant rights movement prior to law school.

The students were the lead attorneys on this case. Although I helped them prepare for performance moments in litigation, such as initial client interviews, reviewed all of their work, and led discussions about our legal strategies, the students developed primary relationships with the workers and organizers, negotiated with opposing counsel, and spoke in court and to the NLRB. After the clinic agreed to represent ROC-NY, three third-year clinic students<sup>92</sup> began interviewing workers and collecting documentation about their claims.<sup>93</sup> I note

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88. See Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J. L. & POL'Y 201, 225 (2006) (discussing the need to adapt legal services for individuals pushed into the low-wage labor market by welfare reform).

89. See Luban, *supra* note 87, at 236-41.

90. Conservative media outlets, such as the NEW YORK POST and the CITY JOURNAL (a quarterly issue by the Manhattan Institute), regularly called on Governor Pataki, Mayor Giuliani, and the CUNY Board of Trustees to shut down the law school in the last decade. See Heather Mac Donald, *CUNY Could Be Great Again*, CITY JOURNAL, Winter 1998, available at [http://www.city-journal.org/html/8\\_1\\_cuny\\_could.html](http://www.city-journal.org/html/8_1_cuny_could.html) (last visited Aug. 15, 2007) (CUNY Law is "irredeemably rotten" with its "1960s-style curriculum in political organizing and consciousness-raising"); Editorial, *Close CUNY Law School*, N.Y. POST, January 19, 1999, at 28, *CUNY Before the Bar*, N.Y. POST, Dec. 8, 2002, at 24; Editorial, *The School We Don't Need*, N.Y. POST, May 3, 2003, at 14.

91. See, e.g., Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PENN. L. REV. 173, 189-96 (2001) (describing a collaboration between a CUNY clinic and a grassroots organization of welfare recipients).

92. Students ranked the cases on which they wanted to work (in the CUNY-IRRC that year, the choice was between asylum, Violence Against Women Act, and immigrant worker cases) and they were assigned to teams on the basis of those preferences.

93. Emily Grajales, William Massey, Johnnda Powers, and, later, Jesse Gribben constituted the first student team from CUNY-IRRC to work on this case and draft the complaint.

their backgrounds here because it is relevant to their commitment to a cause that is larger than the lawsuit or their own experience in the clinic. One of these students had been an organizer with 1199 SEIU, the activist affiliate of the Service Employees International Union (SEIU) in New York, and had spent time working on political solidarity campaigns in Central America. All three students worked for law firms during the school year, one with workers' compensation lawyers and the other two with the firm representing the local of the Communication Workers of America (CWA). Two of the students were White and one was Latina; two of the students were bilingual Spanish/English speakers and one only spoke English.<sup>94</sup> Within the clinic, two other students worked on a new wage and hour case with five worker-members of a nascent worker center at Asociación Tepeyac—a social services organization composed of Mexican-Christian congregations in New York City and led by a priest featured in numerous news reports discussing the loss of undocumented people at the World Trade Center on 9/11.<sup>95</sup> That case, also on behalf of restaurant workers, was filed in state court in December and settled shortly thereafter. One of those students also had a background as a labor organizer prior to law school, and joined the team working on the ROC-NY case as it moved into discovery. All four students on the case in that academic year understood why the clinic was engaged in this collaboration with ROC-NY. The students with labor backgrounds recognized that the litigation would advance the campaign to improve the conditions of work at a prime target restaurant in the high-end segment of the industry, rather than viewing the campaign as adjunct to the litigation. One student, who had a part-time job with a workers' compensation firm, was won over by the emphasis on collective action after attending her first protest in front of the restaurant. This student buy-in was an essential element of the collaboration's success, the result of their prior political commitments and the public interest-oriented environment of CUNY Law. The students worked relentlessly on the case against a big law firm.

As a first step, students drafted memoranda on the applicable legal framework and possible claims under FLSA, New York wage and hour law,<sup>96</sup> common-law tort and contract claims, and the National Labor Relations Act. The three-student team started a grueling schedule of interviews with the sixteen workers who participated in the ROC-NY campaign against their employer. These interviews took place before and after the weekly meeting of the workers' committee at the organization, often simultaneously in multiple

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94. Hollis Pfitsch, Sebastian Riccardi, and Greg Sharma-Holt constituted the second team and negotiated the settlement agreement. This team was composed of a student with a background in organized labor, another who had worked with immigrant workers at a non-profit in the Northwest prior to law school, and a third student who had worked with ACORN.

95. See, e.g., Edward Lewine, *Making Mexicans His Mission*, N.Y. TIMES, Apr. 5, 1998, at 14-1.

96. See N.Y. LAB. LAW §§ 650-665; 12 NYCRR 142.

rooms, with the English-only speaker either focused solely on the English-speaking workers or working in tandem with a ROC-NY interpreter. The team synthesized the evidence gleaned from interviews and studied the workers' documents, including piles of pay stubs dating back up to ten years and copies of weekly time schedules substantiating workers' names and assigned shifts. On the basis of this partial factual record, the team calculated unpaid wages over the duration of each worker's employment. Their analysis demonstrated that while the workers consistently worked eight to ten hours per shift, they only received pay for a seven-hour shift. The students determined that the workers could recover for unpaid overtime pay under federal and state statutory claims and for unpaid straight-time wages under common-law contract claims. Though we could not fully substantiate a racial discrimination claim in this suit, we learned that the head chef at the restaurant allegedly called the workers "stupid Mexicans" and arbitrarily threatened their jobs.

The students estimated that unpaid wages and corresponding liquidated damages totaled approximately \$360,000. The consistency of underpayment of a few hours of wages every day for each worker (a seemingly informal system used by the bosses to exploit their least-paid employees and maximize corporate profits) gave us confidence we could prove these wage violations. We were unsure if a court would award our clients the entirety of liquidated damages to which they were entitled under state and federal law. The employer's systemic violations seemed an indication of a lack of good faith (the standard for liquidated damages under the federal statute), though we understood that courts may hesitate in awarding non-wage income to workers. Because we did not deem that punitive damages for our less central tort claims held much promise for our clients at trial and because these damages were indeterminate, we did not include them in our initial estimate. The team also researched the employer's corporate structure and identified the parent corporation and its officers, who were then named as joint defendants with the lower-level managers in the restaurant. The students developed a unified factual narrative that described the conditions for all of the back-of-the-house workers at the restaurant, as well as individual factual narratives for each worker in the suit. At the end of this initial phase of interviewing, legal analysis, and narrative development, the team filed a thirty-page complaint against the employer with five claims in federal district court.

## *2. The Promise of Law—Legal Underpinnings of the ROC-NY Litigation*

To a certain extent, the law offered the workers relief that justified a litigation strategy in the campaign. The lawsuit underpinning the campaign in the ROC-NY case study stemmed from violations of four sets of laws: FLSA, New York State wage and hour law, state contract and tort common law, and the NLRA. Additionally, two governmental agencies became implicated in the campaign, the U.S. Department of Labor (U.S. DOL) and the NLRB. Together,

these laws and agencies (and a few others not implicated in the campaign such as the state labor enforcement agency and federal and state health and safety regulations) form the web of legal protection offered by the state to low-wage workers, including immigrants. Congress passed FLSA in 1938, setting a floor for wages and a ceiling on hours for non-unionized workers.<sup>97</sup> The statute delegated enforcement authority to U.S. DOL but also provided for a private right of action in federal courts; there was no administrative exhaustion requirement.<sup>98</sup> New York State designated the state Department of Labor and the N.Y. Attorney General's office to enforce its wage and hour law. Currently, New York State requires employers pay a higher minimum wage than that required under FLSA.<sup>99</sup> Both the federal and state statutory wage and hour scheme stem from common-law contract and tort law, including breach and unjust enrichment, though the statutory schemes do not preempt common-law claims. The NLRA passed for the protection of workplace campaigns for collective bargaining, followed by the Taft-Hartley amendments to the Act passed at the behest of employers.<sup>100</sup> A number of legal academic commentators indicate that the pro-labor provisions of the NLRA are rendered ineffective by interpretations of the Act by the court.<sup>101</sup> Additionally, commentators note the overall ineffectiveness of the administrative agencies charged with enforcing labor laws.<sup>102</sup> These critiques have shaped the

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97. See 29 U.S.C. § 201 *et seq.* The statute also included prohibitions on child labor and retaliation by employers against employees who complain of violations. FLSA specifically excluded agricultural and domestic labor, largely as a result of compromise with senators from the South where African-Americans constituted the vast majority of workers in these sectors. See also Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1041-43 (2002) (discussing historical exclusions and limitations of FLSA in light of its grounding in the Commerce Clause rather than the anti-slavery Reconstruction Amendments); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *TEX. L. REV.* 1335, 1371-80 (1987) (discussing FLSA legislative history).

98. See 29 U.S.C. § 216.

99. The minimum wage in New York is \$7.15 as of January 1, 2007. See N.Y. LAB. LAW § 652.

100. See generally Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 *HOFSTRA LAB. L.J.* 1 (1994); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1533-34 (2002); Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 *CATH. U. L. REV.* 763 (1998).

101. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *HARV. L. REV.* 1379, 1412-30 (1993); Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 *GEO. WASH. L. REV.* 262, 298 & n.163 (1987); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 *TEX. L. REV.* 1563, 1575-1580, 1588-1591 (1996) (summarizing Supreme Court decisions which restricted the collective bargaining process—particularly after 1970, and theorizing the Court's refusal to adhere to NLRA policy); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265, 291-93 (1978).

102. E.g., Marc Linder, *Closing the Gap Between Reich and Poor: Which Side is the Department of Labor On?*, 21 *N.Y.U. REV. L. & SOC. CHANGE* 1 (1993) (criticizing the DOL's

advocacy strategies used by workers centers and lawyers.

### 3. *The Limits of Law – Undermining Collective Action*

Apart from the specific critiques of labor law and enforcement agencies, many commentators, in and out of the academy, make a broader critique of the atomistic nature of remedies offered by public interest lawyers. The sustained “internal” progressive critique<sup>103</sup> has spurred marked shifts in practice, as have the theoretical critiques emanating from the legal academy. Impact litigation and legal services strategies were built on a foundational commitment to rights and “rights talk,” which gained importance in public interest lawyering as a result of the expansive interpretations of rights offered by the Warren Court and successive legislative victories in the areas of employment discrimination, fair housing, and voting rights. Critical legal scholars, such as Duncan Kennedy and Roberto Unger, spearheaded a critique of adjudication and questioned its centrality in the construction of social systems.<sup>104</sup> Building on the work of legal realists, they argued that all legal arguments are reducible to policy arguments, including both legal and normative-rights reasoning.<sup>105</sup> Thus, lay-rights discourse, or “rights talk,” slipped into politically-contingent indeterminate balancing.<sup>106</sup> In light of the inherent indeterminacy of legal reasoning, using adjudication to define and resolve social and economic disputes by left lawyers had the effect of legitimizing and reinforcing an established political structure,<sup>107</sup> the same structure constructed for managing and oppressing poor

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regulatory definition of FLSA’s salary test). *See also* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 531-33 (1992) (summarizing the problems of agency enforcement of labor laws, including Title VII, NLRA, FLSA, OSHA, and Workers Compensation); *Id.* at 545-46 (“Government agencies are too often hobbled by budget limitations and too vulnerable to political appointees who are unsympathetic to the substantive rights meant to be protected.”). There are approximately eighty million workers covered by FLSA, and only 946 DOL investigators; federal enforcement alone is not enough to enforce FLSA to the fullest extent possible. *Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants, Bailey v. Gulf Coast Transp., Inc.* 280 F.3d 1333 (11th Cir. 2001) (No. 01-12379), available at [http://www.dol.gov/sol/media/briefs/baileyvgulfcoast\(A\)-6-10-2002.htm](http://www.dol.gov/sol/media/briefs/baileyvgulfcoast(A)-6-10-2002.htm) (last visited Aug. 15, 2007) (supporting a private right of action for FLSA’s anti-retaliation provision). *See also* Bernhardt & McGrath, *supra* note 20.

103. The conservative critique of public interest law is well known and well documented (even as right-wing movements have entered the arena of impact litigation for social change). *See generally* Luban, *supra* note 87.

104. *See generally* DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997); Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567-76 (1983) (setting forth critiques of objectivism and formalism in legal thought and process).

105. *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM*, *supra* note 2, at 196-97.

106. *See id.* at 212.

107. *See* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1581-86 (1984) (“[E]xisting rights-thinking attributes a ‘falsely concrete’ or frozen character to what are always contingent or merely possible social phenomena.” *Id.* at 1581).

people. The dependence of public interest lawyers on rights-strategies was also dangerous because the judiciary would turn against less powerful segments of the populations, such as poor people, when the underlying politics turned against those populations.<sup>108</sup> Mark Tushnet argued that legal victories and losses endangered progress in the political realm and that rejected rights claims would drop out of the political sphere.<sup>109</sup> Political scientist Stuart Scheingold, laid the basis for this critique with his work *The Politics of Rights* in which he drew on case studies of legal reform movements to conclude that the dependence of progressive movements on incremental rights-based strategies would imperil more fundamental political shifts achievable through collective action.<sup>110</sup> Critical labor scholars have focused on the negative impact of individualized rights claims on collective organizing strategies in the workplace.<sup>111</sup> Twenty-five years of multi-pronged and powerful criticism directed at legal rights based strategies convinced many public interest lawyers that such strategies were politically contingent, imperiled long-term success, and preempted collective action.<sup>112</sup>

Out of the critique of rights evolved the critique of litigation. The poverty lawyering literature of the 1980s and early 1990s related stories of individual resistance in remote forums, such as the local legal services office or the

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108. The welfare rights movement suffered through this political dynamic, in which advocates successfully used judicial action to create a right to due process when the government attempted to end subsistence payments to poor people, *Goldberg v. Kelley*, 397 U.S. 254 (1970), which process was later proscribed by efficiency concerns when the progressive moment passed in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

109. See Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 27-29 (1993). But see Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave Same Sex Marriage Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 84-100 (Austin Sarat & Stuart Scheingold, eds. 2006) (discussing the positive effects on a grassroots movement of an unsuccessful litigation strategy).

110. See STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* (1974). Gerald Rosenberg made a similar critique from a different political position and argued that the legalization of political movements has ultimately disserved political movements and impaired legal institutions. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

111. See, e.g., Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHIC. REV. L. 575, 638 (1992).

112. It is important to note that critical legal scholars were centrally focused on the advancement of left causes within and outside the legal academy and the debate was, on an underlying theoretical level, about strategy and tactics rather than goals. Some scholars incorporated the insights of the critical legal scholars in their work while arguing for continued engagement in concrete projects for social justice. See, e.g., Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (documenting the interrelationship between rights and politics from experience in a particular social movement); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984) (challenging critical legal scholars to reconnect their doctrinal analysis to progressive social movements).

individual welfare hearing.<sup>113</sup> These narratives were presented as evidence of a new kind of resistance strategy, in which clients reversed the traditional power dynamic and led lawyers in advocacy efforts on the basis of their knowledge, dignity, and courage.<sup>114</sup> The central moving force in narratives of poverty lawyering was no longer that of idealistic lawyers of the NAACP Legal Defense and Education Fund who entered Southern courthouses and racked up legal victories.<sup>115</sup> These figures were replaced by clever and courageous clients and organizers who out-manuevered agency personnel, lawyers, and judges,

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113. Two scholars who skillfully deployed client narratives to facilitate theoretical interventions into public interest practice were Gerald Lopez and Lucie White. In *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1989), Lopez criticized lawyers representing poor communities for undercutting community leadership and minimizing lay knowledge. See generally GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1989). Lawyers in poor communities set out to do good, but as a result of their own race and class assumptions and the dominant assumptions of the legal profession, their work only exacerbates the conditions of powerlessness felt by their clients. Lopez effectively brought Derrick Bell's race and class critique of the *Brown v. Board of Education* impact litigation strategy to frontline legal services offices. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976). Lopez developed a set of tactical changes that could transform poverty lawyering and advance a community empowerment agenda with a foundation in lay lawyering and leadership. Meanwhile, White internalized critical legal scholarship and applied the insights of feminist theory and postmodern political and literary thought in her analysis of selected case studies. Such cases include an African-American woman who speaks truth to power in her welfare hearing, see Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990), or the plaintiff class in a welfare suit that used speak-outs and the homeless people who used street theater to build community. See Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 535, 546-63 (1987-88). See also Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *N.Y.U. REV. L. & SOC. CHANGE* 369 (1983). These legal academic interventions had a sustained and widespread impact on public interest law, from impact litigation to frontline legal services offices, both directly through the work itself and indirectly through the internalization of their insights by law students filtering into varied practice settings. See generally Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *CLINICAL L. REV.* 427 (2000) (analyzing the theoretical insights of Lopez, White, and Anthony V. Alfieri, refuting critiques, and surveying applications of the work). However, the impact was also uneven, as the extension and application of the ideas and the implementation of innovative tactics and strategies were left to a wide range of practitioners. It cannot be said that lawyering is no longer "regnant." It seems predestined that there will always be regnant lawyers who pursue established modes of practice and rebellious lawyers who deliver legal services in new forms to more effectively achieve social justice ends. In considering innovative approaches to public interest law in the current context, it is essential to understand the pervasive influence of these scholars on the evolution of practice over the last two decades. See Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 *LAW & SOC'Y REV.* 697 (1992); Cummings & Eagly, *A Critical Reflection on Law and Organizing*, *supra* note 67, at 456-60.

114. See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991).

115. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2004).

often in spite of their own attorney's inaction or mistaken strategic choices.<sup>116</sup> The underlying theory (or implication) of social change was that poor people could transform communities and entrenched legal systems through their assertions of power against bureaucrats and lawyers. The themes of the legal academic literature were manifested in the field by a move away from professionalism to "lay lawyering"<sup>117</sup>—poverty lawyers and community advocates less focused on litigation and law reform as a means of redress and instead oriented toward participation in local, non-legal efforts for social change. It also signaled a departure from formal legal norms to softer informal "normativities,"<sup>118</sup> through which it is assumed that nongovernmental organizations, rather than the state, would generate norms that advance social justice. Scholars emphasized extralegal activism rather than litigation or legislative strategies and decisively rejected established narratives about the centrality of the public interest lawyer in movements for social change.<sup>119</sup> This significantly influenced the construction of the role of the public interest lawyer and, for some, sowed doubts in the minds of public interest lawyers about their own efficacy and nurtured the fear that they quell, rather than nurture, collective action.

Adjudication and law reform, particularly in the area of immigrants' rights, has only confirmed the suspicions of progressive activists about the viability of law as an instrument for social justice. In the 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>120</sup> the Supreme Court found that the NLRB could not impose its most effective penalties—reinstatement of employees who terminated in retaliation for involvement in organizing as well as lost wages for the time that they would have been employed absent the retaliatory termination—against employers if the prevailing workers were undocumented.<sup>121</sup> Although the *Hoffman Plastic* decision has been interpreted narrowly by immigrant worker advocates and most governmental agencies and courts,<sup>122</sup> the decision could alternatively be read to fit into the broader trend of

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116. See White, *Subordination, Rhetorical Survival Skills and Sunday Shoes*, *supra* note 113.

117. See Orly Lobel, *The Paradox of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 959-62 (2007) (critically discussing the concept of "lay lawyering").

118. See *id.* at 978-82 (discussing the perils of a retreat by progressives to the extralegal sphere).

119. See Cummings and Eagly, *supra* note 67.

120. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (foreclosing the NLRB from awarding backpay to undocumented workers).

121. See *id.*

122. See National Labor Relations Board, *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.* (July 19, 2002), <http://www.nlr.gov/gcmemo/gc02-06.html> (last visited Aug. 15, 2007); Employment Standards Administration Wage and Hour Division, U.S. Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic decision on laws enforced by*

weakened statutory protection for vulnerable communities.<sup>123</sup> By denying a particular remedy to undocumented workers, five justices of the Supreme Court have weakened employment protections for “unauthorized workers,” which might force immigrant workers to rely on individual contractual arrangements with their employers, rather than collective action or statutory protection.<sup>124</sup> The decision is part of a broader movement to take labor disputes out of the public and collective sphere and put them into the realm of private law.<sup>125</sup> Employers gain greater power over workers when labor disputes are individualized and the state remains on the sidelines.

In the ROC-NY campaign, we attempted to mobilize sometimes hostile state power, both through adjudication and agency enforcement against the employer. CUNY-IRRC brought the case on behalf of the ROC-NY worker-members in federal court rather than state court because discovery guidelines were more stringent, federal judges had lower caseloads since they try to move

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*the Wage and Hour Division*, <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm> (last visited June 18, 2005) (“The Department’s Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA.” *Id.*).

123. In the U.S. specifically, the Supreme Court has used a series of techniques to strip private individuals of their ability to enforce civil rights laws, such as by expanding the scope of sovereign immunity and the scope of compelled arbitration under the Federal Arbitration Act, while reducing the availability of implied rights of action and attorneys fees. See Pam Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003). Sylvia Law analyzed the federalism “revolution” in Supreme Court jurisprudence and surveyed the negative impact on workers and other vulnerable populations. See Sylvia Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002). In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court decided that individuals do not have a private right of action for discriminatory disparate impact on the basis of race, ethnicity, or national origin against recipients of federal funding under Title VI. The *Buckhannon* (2001) court curtailed the private enforcement of civil rights statutes by imposing a narrow definition of “prevailing party” for the purpose of determining defendant’s liability for plaintiff’s attorneys’ fees. See *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). In *Alden v. Maine*, 527 U.S. 706 (1999), the Court denied a private claim under the Fair Labor Standards Act against the State of Maine on the basis of state sovereignty. Each of these cases narrows the range of civil rights litigation that may be brought by private litigants.

124. See WILLIAM B. GOULD, *INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY* (Robert J. Flanagan & William B. Gould IV eds., 2003) (“[The Hoffman Plastic] ruling which creates an incentive for American employers to employ workers to whom labor law protection is denied constitutes a compelling argument in favor of the proposition that the West, and particularly the U.S., is not concerned with the plight of vulnerable immigrant workers who hail from the poor nations but rather the interests of entrepreneurs within our borders.” *Id.* at 95).

125. See Marianne Staniunas, *All Employees Are Equal, But Some Employees Are More Equal Than Others*, 6 U. PA. J. LAB. & EMP. L. 393, 399-400 (2004) (noting that employers seek out undocumented workers because of their inability to seek enforcement of statutory labor protections). See generally Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (arbitration has successfully removed labor disputes from the public sphere, preventing the development of a more vigorous class consciousness in the labor movement).

cases off their dockets as quickly as possible, and federal magistrate judges usually took charge of discovery and issued schedules and orders quite expediently.<sup>126</sup> However, some federal judges resented having simple wage and hour cases on their dockets, especially in the Southern District of New York.<sup>127</sup> Additionally, judges were averse to the direct action and media advocacy methodologies used during the campaigns of which the litigation was a part, especially if evidence existed of coordination between organizers, plaintiffs, and lawyers.<sup>128</sup> The hostility of the courts to these methods is likely to increase as use of coordinated litigation and organizing strategies spread.

Our opponents attempted to use the Taft-Hartley provisions of the NLRA to curb the direct action methods of organizers, including the protests in front of the restaurants. The corporation engaged ROC-NY in negotiations at one point during the campaign, only to break them off after drafting a joint memorandum of understanding that included improved conditions for all workers. Shortly after ROC-NY returned to the front of the restaurants with signs and megaphones, the employer filed a charge with the NLRB alleging violation of the Taft-Hartley provisions. The NLRB fast-tracked investigation of the charge, as they are required to do for employers under the provision (the workers' Unfair Labor Practice charges alleging surveillance and intimidation had been filed months earlier and did not receive fast-track treatment by the agency). Under those provisions, entities that do not represent a majority of the employees in a workplace cannot demand improved wages and benefits for all workers through protests.<sup>129</sup> It is viewed as illegitimate to work towards improving conditions for all workers when one only represents a minority of the workforce. The standard emphasis on official worker representation (and

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126. Additionally, and not of minor significance for a law school clinic, expedient discovery advanced pedagogical goals in exposing the student team to pre-trial procedure during the time that they were in the clinic. Michael J. Wishnie, Clinical Professor of Law at Yale Law School, shared this insight with me based on his experience at NYU-IRC.

127. One federal judge lectured the attorneys and parties in a wage and hour case, that I litigated with NYU-IRC, about the fact that he was used to adjudicating large-scale corporate litigation and that we did not belong in his courtroom. In spite (or because) of his feelings, he took a personal role in settlement negotiations and pushed the parties hard to come to an agreement, in a way that could be said to have benefited the immigrant worker plaintiffs.

128. In a recent CUNY-IRRC wage and hour case on behalf of a domestic worker, a federal magistrate judge, who delayed adjudication of our motions to compel discovery, acted quickly when defendants complained to the court about demonstrations in front of a small business that they own. The worker was ordered to appear before the judge for an evidentiary hearing in which she was questioned about her membership in the worker-center that was organizing the protests as well as her prior knowledge of the events. Defendants did not allege a specific legal theory that would allow the court to prohibit First Amendment activities, but the court was quick to impute a jury-tainting theory, which it ultimately rejected on the basis of clear contrary precedent in the district. *Lopez v. Meluzio et al.*, No. 05-00009 (E.D.N.Y. Aug. 23, 2006) (order adopting report and recommendation of magistrate denying defendants' motion for injunctive relief).

129. See 29 U.S.C. §158(b).

the corresponding barriers to establishing union representation through elections) operates here to prevent activist workers and worker centers from demanding better conditions for all. ROC-NY negotiated a settlement of the charge with the NLRB and adjusted its direct action strategy to engage in the labor-intensive activity of distributing leaflets during lunches and dinners at the restaurant entrances, which was permitted under the NLRA.<sup>130</sup> Federal court hostility to direct action and media advocacy and the NLRB's diligent investigation of allegations against worker centers are only two examples of the general antipathy of legal institutions towards the use of legal tactics to advance collective action as well as extralegal tactics coordinated with litigation.

In the ROC-NY campaign, the concern about the limits placed by law on collective action was resolved by the construction of a tripartite relationship between lawyers, workers, and organizers. The organizers were essential in helping the legal team gather evidence to mount an effective case, in ensuring client participation in the litigation, and in preventing employer cooptation of the workers over the long course of litigation. These challenges were compounded as the number of plaintiffs in the litigation increased. The rules of professional responsibility individualize the lawyer-client relationships by, for example, prohibiting the influence of third-parties (organizers) in legal decision-making and by creating an attorney-client privilege that a third party risks piercing when present at meetings.<sup>131</sup> This individualized construction is deeply embedded in popular and legal culture.<sup>132</sup> The presence of the organizers as a kind of political and practical intermediary between lawyers and clients in the ROC-NY campaign test the boundaries of the traditional lawyer-

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130. One of the CUNY-IRRC students linked ROC-NY with an experienced labor lawyer, Dan Clifton, who successfully defended the organization before the NLRB. He recently achieved a significant victory for the organization and worker centers around the country by convincing the NLRB that ROC-NY is not a labor organization and thus is not required to meet the filing burdens under the Labor-Management Reporting and Disclosure Act. 29 U.S.C. § 401 *et seq.* (1959) (amended 1987); 29 U.S.C. § 402(i) (defining "labor organization"), §§ 431-441 (setting forth reporting requirements). More importantly, worker centers are not bound by the NLRA's constraints on secondary boycotts and picketing. *See supra* note 58.

131. *See, e.g.*, N.Y. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule (DR) 5-107 [1200.26] (B) ("Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101[1200.19](B)." *Id.*).

132. The Code also prohibits lawyers from taking cases in which their exercise of professional judgment may be affected by their own personal interest. *See id.* at DR 5-101. Applied stringently, this rule would be grounds for disciplinary sanctions against most public interest lawyers, on both the right and the left. However, the organized bar seems to accept some degree of deviation from the formal rules to accommodate public interest legal activities that legitimize the profession and mitigate the public perception that lawyers serve a fundamentally mercenary and amoral function in society. *See* AUSTIN SARAT & STUART SCHEINGOLD, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3-5 (1998).

client relationship. While CUNY-IRRC was careful in meeting the formal requirements of the rules and keeping legal decision-making within the relationship between lawyers and clients, we also understood that the organizers had developed the overall campaign strategy with the workers' consent. In delineating lawyer-client decision making, 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. We chose the latter. This naturally led to multiple communications and complications, including disagreements between the lawyers and organizers as to the timing and terms of settlement initiatives to be taken on behalf of the workers. We were careful not to influence workers against their prior political commitments to ROC-NY and the larger campaign and actually tried to promote such values within our decision-making structure. The workers seemed to understand these dynamics, partly due to their prior experience and worker leadership of the campaign.

### *C. The Workers*

While the lawyers and organizers planned, drafted, argued, and negotiated from within the confines of our offices and in courtrooms and agency conference rooms, the workers worked. They continued coping with difficult and unlawful conditions, as well as pressure from both the organizers to participate in the campaign and from their bosses to desist. ROC-NY and the lawyers needed to rely on leadership from amongst the worker-members in the campaign and the leaders' ability to nurture a critical mass of workers willing to withstand the short-term benefits offered by the employer and stay in the fight through completion.

#### *1. Leaders*

There was a dividing line in the restaurant: immigrants of color worked in the "back of the house"—in lower-level positions in the kitchen and as bussers and runners on the main floor—and mostly white employees worked in the front of the house tending directly to diners. The immigrant employees at the restaurant were largely from Mexico and Central America. They had varied levels of English proficiency and of experience in the industry, though they were required to demonstrate skills or to have been endorsed by other trusted workers to be hired. They had decent salaries that were well above poverty line wages. They ate restaurant food standing up during short breaks and the chef would make some of the workers hamburgers at the end of the night depending on his mood. Floriberto Hernandez was one of the fluent English speakers amongst the workers and a favorite of the bosses. It was also Mr. Hernandez who accompanied another worker to file a complaint against the bosses with the U.S. DOL and when there was no action by U.S. DOL, he led a group of

workers to ROC-NY to protest about the lack of overtime and straight-time pay at the restaurant. He calmly and clearly communicated their complaints about management and the ways in which the working conditions were unjust. The ROC-NY organizers quickly understood that he had the respect of the other workers and that he understood the organization's broader goals, which went beyond improving conditions at a single restaurant. As the campaign progressed, Mr. Hernandez, working closely with Siby Sekou, a ROC-NY organizer who had the initial contacts within the restaurant, helped maintain the morale of workers. When workers at another restaurant owned by the parent company approached ROC-NY, organizers conferred with Mr. Hernandez on how to expand the campaign while maintaining group cohesion and the allegiance of the original workers, who were being challenged by adverse working conditions and the public demonstrations on their behalf in front of the workplace.

## *2. Retaliation and Cooptation*

After the employer received a demand letter but prior to filing the complaint, managers attempted to convince individual workers to sign release agreements provided by the U.S. DOL that would prevent them from filing private causes of action in court. The workers indicated that the agency arrived at the restaurant with advance notice to the employer and interviewed a very small number of workers. They said that the chosen interviewees were coached by the head chef and the personnel manager to provide employer-friendly testimony (one of the plaintiffs had been asked to interpret for the managers during those coaching sessions). After the restaurant noticed that some of the workers retained the clinic as their legal counsel and that a lawsuit would be filed in federal district court, the head chef and personnel manager met with individual workers to sign the release agreements (written in both English and Spanish) indicating that their sole means of redress for wage and hour violations would be through the agency and not through a private right of action in court. Some of our clients signed the release agreements, others took the papers home with them to show the organizers and lawyers, and still others refused to sign on the spot (Mr. Hernandez was one such worker). Essential for momentum in court and in the overall campaign, the legal team developed a viable theory under which all of the workers could remain in the suit through the common-law claims in spite of some having signed the U.S. DOL release agreements. We thought that while the subset who signed the agreements were now precluded from pursuing federal and state wage and hour claims in court, they could still sustain contract and tort claims and remain part of the plaintiff group.

The workers told us that individuals involved in the campaign were being given fewer hours of work, that they were under heavier surveillance than usual by agents of management, and that a few of them had been interrogated about

their involvement with ROC-NY. As a result of these reports, the student team filed unfair labor practice charges with the NLRB on the grounds that these practices were intended to retaliate against workers for their involvement in “concerted activity,” which is explicitly protected under federal law.<sup>133</sup> Conscientious NLRB staff initiated an investigation of the employer, though it remained unclear throughout the campaign whether the agency could impose penalties of any significance. At worst, the team viewed the NLRB charges as another legal front in the campaign with the consequence of increasing the cost to the employer of legal services.<sup>134</sup> The consequences of retaliation were more severe for one of our clients, who was fired by the corporation on the basis of his inclusion in a letter from the Social Security Administration (SSA) indicating that his name did not match the social security number in their database. Though the team generated legal arguments against termination on the basis of a no-match letter, it served as a source of prima facie legal leverage that the employer could use to intimidate workers involved in organizing campaigns, which has only gotten worse as SSA proceeded to draft more stringent no-match rules.<sup>135</sup> Students quickly learn that one of our key legal roles in these campaigns was to undertake rapid response to allegations of retaliation by the workers, including interviewing the affected worker and organizers who usually first learn of the incident and communicating quickly and strongly with opposing counsel. Workers who feel that lawyers and organizers will not leave them completely vulnerable (because they remain quite vulnerable despite our best efforts) are more likely to participate in campaign activities and resist employer coercion.

Leadership and preservation of critical mass were two key attributes that sustained the workers through the 18-month campaign. The organizers focused on leadership identification and development and worked closely with Mr. Hernandez until he passed away in July 2004. CUNY-IRRC was especially focused on the cohesion of the plaintiff group, though we only had an indirect role subsidiary to that of the organizers in nurturing our clients’ collectivity. We worked hard to prevent law and legal process from splitting the group apart. The fact that we acted defensively after the employers had apparently co-opted the U.S. DOL investigation and convinced workers to sign release agreements indicates to me, in retrospect, that neither the organizers nor the lawyers had effectively nurtured cohesion and accountability until later in the

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133. See 29 U.S.C. § 158(a).

134. The team was not aware of the nature of the fee arrangement between the employer and the large law firm that it used. It is possible that the firm was receiving flat fees for services rather than billing by the hour. The senior attorney on the case, who was also the managing attorney of the firm’s New York office, had a long-term relationship with the founder and C.E.O. of the parent company and related this to the team to indicate his delegated authority in negotiations.

135. See *supra* note 34.

campaign.

#### *D. The Campaign*

Both sides ground out the struggle, exchanging the advantage at various points in 2004. While CUNY-IRRC tended to the federal litigation and the NLRB investigation, ROC-NY was building a campaign to bring the workers' complaints to the full attention of the employer and the public. The organization put together a series of raucous demonstrations in front of the restaurant with the support of student groups and allied worker centers. The organizers met with the workers in the campaign on a regular basis, usually on Sunday afternoons, to develop consensus around their demands and the means by which the campaign would be conducted.

The students negotiated a discovery schedule with defense counsel, striking a compromise between our speedier schedule and their lengthened timeline. The team drafted and transmitted interrogatories and document requests for the defendants. They also interviewed the plaintiffs and drafted responses to interrogatories and document requests on their behalf. Defense counsel asked virtually the same questions of each of the sixteen workers but chose to scramble the interrogatories and document requests so that the team could not prepare a single template response to their discovery requests. Defendants refused to answer our clients' discovery requests without a confidentiality agreement that would forbid the legal team and the workers from sharing any information provided by the restaurant to ROC-NY or HERE, the restaurant worker's union with which ROC-NY was associated. Defendants seemed most resistant to providing employee rosters and wage levels for workers at the restaurants because of their fear that such information would serve to unionize their workforce. In response, CUNY-IRRC moved to compel discovery responses without the confidentiality agreement. At the second status conference, the federal judge expressed puzzlement over our clients' refusal to sign the broad confidentiality agreement proposed by the defendants;<sup>136</sup> he referred the issue to a magistrate judge and directed us to negotiate provisions to which our clients could agree.<sup>137</sup> The court confirmed its hostility to any

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136. We counseled our clients to refuse to sign a broad confidentiality agreement for political reasons – because they may choose to reveal information that they acquire in civil litigation to ROC-NY or HERE – and for practical reasons – because organizers might help them interpret and understand materials turned over by defendants.

137. It was at this hearing that the judge—angered at one point by his perception that plaintiffs were being unreasonable and having recently been assigned a related case about work conditions at another of the parent company's restaurants—lectured the legal team on what he viewed as its role. He said derisively that the lawyers were not to use a case in his court to advance a cause or to transform overall conditions in the industry. He instructed the team to litigate the individual case and not to be unreasonable in negotiations. I was momentarily speechless since the primary reason we had taken the case was to transform conditions in the industry.

kind of public law agenda in this suit when it refused to allow us to depose any managers other than direct line supervisors in the restaurant. Our theory was that this system of underpayment was a corporate policy and had been implemented in multiple restaurants owned by the same corporation. Additionally, the C.E.O. of the corporation was a man who was in the news frequently and maintained a positive reputation in New York and international social and political circles despite these conditions of employment at his restaurants. From the beginning, the organizers focused on attaching a corporate face to unlawful conditions of employment and these discovery skirmishes represented our effort for preserving that possibility and defending against the individualization and privatization of the litigation.

While the legal team was engaged in discovery disputes with defense counsel, ROC-NY continued its program of demonstrations in front of the restaurant. Additionally, workers from other restaurants owned by the parent company started speaking with the organization about more egregious wage and hour violations, as well allegations of employment discrimination and the creation of a hostile environment for some workers. These workers included both back and front of the house workers and ROC-NY was able to identify attorneys for these new groups of workers.<sup>138</sup>

The defendants engaged in negotiations sporadically, depending on the legal and political leverage they felt they had in the moment. The restaurant filed a defamation case against ROC-NY and its individual staff in state court on the basis of signs and statements made by organizers during the demonstrations. An attorney with the Urban Justice Center Community Development Project, who was also ROC-NY's nonprofit corporate counsel, located an excellent pro bono First Amendment attorney from the New York office of Davis, Wright & Tremaine to defend the organization in state court. The attorney filed a strategic lawsuit against public participation motion<sup>139</sup> in opposition to the suit and defeated the restaurant's attempt to secure a preliminary injunction against the demonstrations. The Taft-Hartley charge that the corporation filed against ROC-NY and the consequent legal imperative for the NLRB investigation<sup>140</sup> caused the corporation to suspend negotiations. After the charge was settled with the assistance of experienced pro bono labor counsel,<sup>141</sup> ROC-NY was able to devise new direct action methods against the restaurant, and as it came closer to the time when their managers would be deposed, the corporation seemed more amenable to settlement negotiations.

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138. Tony Lu and Haeyoung Yoon with the Community Development Project of the Urban Justice Center filed a second wage and hour suit and Alex Reinert, an associate with the private civil rights law firm of Koob & Magoolaghan, represented workers before the Equal Employment Opportunity Commission on discrimination grounds.

139. See *supra* note 75.

140. Discussed *supra* Sec. II.B.3.

141. See *supra* note 130.

The retention of experienced pro bono counsel and their successful defense neutralized the corporation's efforts to attack ROC-NY on new fronts.<sup>142</sup>

After a year of direct action, media advocacy, and legal offense and defense, the campaign against the parent company and the counter-campaign initiated against ROC-NY were taking a toll on both sides. Tragically, five days after he was deposed in the federal case, 38-year-old Floriberto Hernandez passed away from dehydration caused by a diabetic condition of which he was unaware. His co-workers and the organizers at ROC-NY were hit hard by the loss and brought a poster-sized picture of him to each Sunday worker meeting, hoping to inspire and animate the campaign. Lawyers on both sides started moving toward a basic agreement on major issues, after it became clear that the principals were interested in resolving the conflict. A new student team initiated a series of conference calls with opposing counsel and drafted an omnibus settlement agreement on behalf of our clients, as well as the groups of workers at the other subsidiary restaurants. The settlement agreement was fairly unique for a worker center to win through a campaign because, in addition to \$164,000.00 in unpaid wages for the workers (both for our clients and those from the other restaurants who had joined later in the campaign), ROC-NY secured guaranteed sick days and paid vacation for all employees of the restaurant and some measure of job security for our clients for one year following the execution of the agreement. The identity of the high-end restaurant corporation and these broader benefits brought press coverage of the settlement in the *New York Times*.<sup>143</sup>

The campaign was far from a victory march, even with the favorable outcome we secured. Workers were in and out of the campaign, and the organizers were juggling multiple priorities and were attacked—through legal and non-legal means—throughout the eighteen month period. The lawyers were constantly scrambling to maintain capacity and coordinate amongst a large, legal team stitched together as a result of new developments. As a lawyer and a teacher of law students, I felt challenged by the scope of the work and the unorthodox structure of our relationships with workers, organizers, and co-counsel. We also felt energized by our involvement in something larger than a single case before a skeptical judge and we tried to harness that energy and construct a role for ourselves in relation to the resistance movement.

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142. The corporation also tried to pressure ROC-NY through less formal means. The well-known C.E.O. sent letters to ROC-NY's funders, emphasizing that the sympathetic support center for 9/11 workers and families had morphed into a Marxist activist group. These letters had no discernible effect on the organization's sources of funding, though it was hard for ROC-NY to know whether reduced grants or severed funding relationships were the indirect result of the restaurant's corporate campaign against the organization.

143. See Steven Greenhouse, *Two Restaurants to Pay Workers \$164,000*, N.Y. TIMES, Jan. 12, 2005, at B3. See also Lynda Richardson, *Public Lives: For the Kitchen Help, She Stands the Heat*, N.Y. TIMES, Jan. 21, 2005, at B4.

### III IMPLICATIONS FOR PUBLIC INTEREST LAW

In this part, I draw a set of modest conclusions based on the description of the role of public interest lawyers in the campaign described above. The scope of our participation in the collaboration was highly contingent and context-specific and that is why I call these conclusions “modest” and possibly limited in application to other sites and subjects of struggle. However, it is also clear to me that an understanding of the complexities of this collaboration between public interest lawyers and a modern resistance movement can help shape our practice going forward, just as past interventions have shaped practice up to this point. To that end, first, I note some of the discontinuities with the established definition of the role of public interest lawyers, second, I revisit the literatures describing lawyer domination of clients and the critique of rights and rights-talk in light of our experience in the campaign, and, third, I discuss the specific role of public interest lawyers in relation to globalized social movements. Though there is no certain path to efficacy for public interest lawyers, it undoubtedly runs through the work of ambitious and energized movement organizations.

#### A. *Discontinuities*

Legal scholarship celebrates the role of lawyers and judges in social justice movements while social science research remains ambivalent.<sup>144</sup> Even self-critical legal scholarship, in the Gerald Lopez/Lucie White thread, emphasizes the importance of lawyers and amplifies the impact of the mistakes that they make in relationships with poor clients and social justice movements. Undoubtedly, articulating legal violations and filing complaints and charges in this campaign formed essential steps in conferring legitimacy on the complaints of the worker-members of ROC-NY. However, unlike conventional public interest law, the legal work was not central to the larger campaign or to the effort for building organizational capacity to improve working conditions in the restaurant industry. The organizers and workers themselves defined the problem area, chose targets within the industry, and directed public protest and media advocacy with lawyers supporting these activities through affirmative and defensive legal action. Another distinction between this campaign and more traditional social justice advocacy by lawyers is that government was not the target of litigation and direct action.<sup>145</sup> Instead, the resistance campaign was built around protest against a corporation that engaged quite directly in the

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144. See Rajagopal, *supra* note 5, at 184-85.

145. Louise Trubek marked this transition in public interest law in the context of her discussion of the changing work of the Center for Public Representation in Wisconsin. See Louise Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 *FORDHAM URB. L.J.* 1739 (2001).

exploitation of immigrant workers. This must increasingly be the case, as government social welfare functions are stripped or outsourced and individuals are coerced into the market for low-wage labor.

Somewhat paradoxically, litigation and protest against private actors advanced initiatives to bring the state back into the relationship between workers and employers in the restaurant industry.<sup>146</sup> Both within the clinic and among the organizers, we regarded the state—represented by city council members and governmental agency personnel—as an audience of the campaign. Organizers and lawyers viewed the state as unreliable for a variety of reasons, including their general perception that the government was hostage to private interests on account of political patronage concerns and a pervasive ideological affinity for the ascendancy of the “free market” among policymakers and judges. The workers did not rely on the state for various reasons, including their experience with the U.S. DOL in this campaign and the overarching fear of immigration enforcement. However, the lawyers and organizers understood that ultimately only the state could check the power of a large number of employers in an industry that was largely non-unionized. The workplace justice campaign also supported ROC-NY’s research agenda in spotlighting violations of state and federal laws in the industry, which in turn supported its legislative agenda to empower the state to revoke restaurant licenses because of wage and hour law violations. Each of these distinct campaigns reinforced the other and fit into a larger effort to reconfigure the allocation of power in the industry. ROC-NY launched these initiatives to change the incentive structure in the restaurant industry, which was biased heavily against workers, and to encourage state intervention on the side of workers. The lawyers used their expertise, with an understanding of larger political and economic shifts, in service of this greater resistance agenda.

Though the context of the legal work in the campaign may have been discontinuous with certain traditional modes of public interest legal advocacy (impact litigation, legal services, lawyer as organizer), the core legal work remained the same, whether nested in a resistance campaign or in one of the more traditional modes. It may be that a lawyer’s knowledge and skills base are modified in accordance with the identity of the targets of a campaign and the relative sophistication of those targets. But the instinct to provide zealous advocacy in an adversarial context remains constant and is perhaps, in light of the relative diminishment of the state’s role in economic relationships, more important than in any preceding moment in recent history.

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146. For examples of the legislative successes of worker centers in New York, see Greenhouse, *supra* note 79 (Domestic Workers United campaign); Michael Luo, *Taxi Commission Backs a 26% Rise For Fares in City*, N.Y. TIMES, Mar. 31, 2004, at A1 (NY Taxi Workers’ Alliance campaign).

*B. Accountability to Clients*

The fear pervading progressive legal practice, that lawyers would dominate their clients and social justice movements, has encouraged efforts to move social justice work out of law offices and the courts.<sup>147</sup> In this campaign, unlike in many of the stock stories from the poverty lawyering literature, government was not the target of legal action. Lawyers were less likely to subordinate clients on behalf of the welfare or criminal justice systems.<sup>148</sup> Instead, organizers and workers held lawyers accountable, and we were relatively free to engage in the work without inhibition and fear that they would dominate their individual or organizational clients.<sup>149</sup>

To be sure, this redirection of power was not easy or unproblematic.<sup>150</sup> There were times during the campaign when some members of the legal team resorted to assertions of the professional responsibility rules to ensure that the workers were not subverted by the organizers, especially in legal decision-making. When we approached the organizers mid-campaign in disagreement with their decision not to open negotiations with the employer, we felt caught between our professional obligations, our intuitions, and the larger goals for

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147. See Lobel, *supra* note 117.

148. See *supra* text accompanying notes 114-117.

149. Gary Bellow best captured the possibilities of a dynamic and committed relationship between lawyer and client to which the team aspired:

Alliance seems as good a word as any to describe this relationship because alliances generate bonds and dependencies and are grounded, at least in aspiration, in forms of respect and mutuality that are far more personal and compelling, for many of us who do political legal work, than the demands of some notion of client-centered lawyering, no matter how strongly held. Alliance also seems to offer an ideal that permits us to talk seriously about purposive judgment—when and whether to intervene or to seek influence—in situations in which one has unequal power in a relationship. The ideal of alliance avoids oversentimentalized and categorical attitudes—my client, the victims, the hero—toward clients. Such an orientation seems necessary in any honestly mutual relationship and is especially important when working with groups in which issues of which faction one serves constantly arise, and where humor, patience, and a genuine fondness for and realism about the individuals involved are often all one has to maintain one's bearings until some particular storm subsides.

Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 303 (1996) (citations omitted). An additional consideration that arises in this context is whether lawyers are in-house with their client organization or situated in an independent practice setting. The lawyers in this campaign were based in offices outside of the movement organization and, thus, had limited power in organizing and organizational capacity-building, though the team was cognizant of the opportunities and constraints facing the organization. Cf. 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. PENN. J. LAB. EMPL. L. 1, 47-49 (2005) (discussing creation of the union's legal department five years after its establishment and thus subordinate to the union's larger goals; in-house legal department strengthened rather than weakened lawyer accountability).

150. For a discussion of similar problems, see Austin Sarat & Stuart A. Scheingold, *What Cause Lawyers Do For, and To, Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 109, at 2-3 (discussing constraints imposed by social movements on affiliated lawyers).

which we were fighting. Optimizing the balance of power between lawyers, workers, and organizers is of course a project that is far from resolved, especially in light of the challenges that the rules of professional responsibility pose for these relationships. Difficulties in this area have arisen in all of the collaborations between lawyers and worker centers in which the model has predominated. Although the instances of conflict we faced were difficult (and perhaps exacerbated by the rapidity of developments and the small size of ROC-NY's organizing staff) it was our overall sense that the plaintiffs in the legal cases understood the methods and goals of the larger campaign, the importance of organizational capacity-building, and that recovery of unpaid wages was the central component of an overall strategy. The lawyers who drew on the experience of labor lawyers<sup>151</sup> rather than the experience of a conventional public interest lawyer focused on an individual client or a class of individual clients were better able to cope with the shifting balance of power between lawyers, organizers, and workers. The collective representation frame allowed lawyers to temper the formalism of the professional responsibility rules and to weather the periodic marginalization of lawyers within campaign decision-making.<sup>152</sup>

### *C. The Role of Rights and Rights Talk*

The lawyers and organizers in the campaign were familiar with the perspective of critical race theorists such as Patricia Williams and Kimberle Crenshaw, and the participants' actions reflected their more abstract conceptual perspective of the broader socio-economic challenges they faced. They had an understanding of the constructed and contingent nature of law slanted in favor of power, but they refused to give up rights and rights talk, which helped them win protections and gains for the workers.<sup>153</sup> Such a focus on entitlements is inconsistent with parts of the legal and political science literatures on the efficacy of rights and rights talk.<sup>154</sup> That body of work underemphasizes the

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151. It is necessary to represent groups of relatively powerless people rather than individuals and that this devotion to collective representation did not disempower individuals but was necessitated by the adversarial context in which we fought. See Gordon, *supra* note 149, at 10-44 (describing the collaboration between UFW organizers and lawyers).

152. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992) (Ellmann discusses the challenges of group representation in a non-union context and develops tactics with which to approach the problem of collective representation in a highly individualized profession. It is important to do more work along these lines (as well as the work being done by Jennifer Gordon to map the collaborations between lawyers and activist unions) to alter the professional self-conception of public interest lawyers).

153. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

154. See *supra* Sec. II.B.3.

role that the particular cultural, economic, and political contexts play in determining the appropriateness of an entitlement-based approach.<sup>155</sup> Our campaign continuously centered its attention “on the importance of political mobilization for the success of rights-centered strategies.”<sup>156</sup> Contrary to the argument against adversarial models of lawyering made by advocates of governance models,<sup>157</sup> this style of lawyering places rights within the context of a larger political struggle and is a necessary prerequisite to the participation of workers and organizers in less adversarial and more deliberative political structures, such as policy-making bodies and non-governmental organizations, with representatives of the state and private entities.<sup>158</sup>

Further, in the specific case of immigrant workers, the assertion of rights through litigation can, at least partly, compensate for their lack of legal status as they attempt to assert countervailing power<sup>159</sup> in their workplaces and communities. Aggressive immigration enforcement makes it more difficult for immigrant workers to claim a form of “de-nationalized” citizenship through social and economic participation.<sup>160</sup> However, 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.<sup>161</sup> Rights-based campaigns advance the goals of organizers to motivate and unite immigrant workers while also enabling lawyers to draw

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155. See Rajagopal, *supra* note 5, at 170. *But see* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (“Nonetheless, I worry about criticizing rights and legal language just when they have become available to people who had previously lacked access to them. I worry about those who have, telling those who do not, ‘you do not need it, you should not want it.’ But, rather than trash rights, I join in the efforts to reclaim and reinvent them. Whether and how to use words to constrain power are questions that should be answered by those who lack it. For this task, rights rhetoric is remarkably well-suited. It enables a devastating, if rhetorical, exposure of and challenge to hierarchies of power.” *Id.* at 1910).

156. de Sousa Santos & Rodriguez-Garavito, *Law, Politics, and the Subaltern in Counter-hegemonic Globalization* in LAW AND GLOBALIZATION FROM BELOW, *supra* note 5 at 15 (2005).

157. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); William Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

158. de Sousa Santos & Rodriguez-Garavito, *supra* note 156, at 16.

159. See generally Karl Klare, *Countervailing Workers’ Power as a Regulatory Strategy*, in LEGAL REGULATION OF THE EMPLOYMENT RELATION, Ch. 3 (Hugh Collins et al. eds., 2000).

160. See Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 461-62 (2000) (“Yet, the fact that aliens enjoy these rights does not mean that their formal or nominal legal status vis-à-vis the political community in which they reside has changed. When citizenship is understood as formal legal membership in the polity, aliens remain outsiders to citizenship: they reside in the host country only at the country’s discretion; there are often restrictions imposed on their travel; they are denied the right to participate politically at the national level; and they are often precluded from naturalizing. Furthermore, they symbolically remain outsiders to membership in the polity.” *Id.* at 462 (citations omitted)).

161. See Gordon, *supra* note 14, at 156-73 (discussing the solidarity effects of rights talk and assertion and the creation of a new, more collective, immigrant identity).

on sub-cultures of resistance to alter the legal and political process, sometimes in ways that might make social justice more attainable in subsequent campaigns.

#### *D. Social Movements*

There would have been no campaign in which public interest lawyers could participate in the absence of the movement organization in this case study. Movements complicate and amplify the work of public interest lawyers. We provide essential functions to movement organizations and we depend upon them for the nurturing of cohesive groups of people willing to fight to improve their workplaces and communities. Public interest lawyers and movement organizations have much to gain from collaboration but it is important to think carefully about the role that each will play in the other's work and for there to be a common set of political commitments and approaches. The understanding of the lawyer's role and the set of commitments shared in the ROC-NY campaign are delineated below.

##### *1. Lawyers as Intermediaries Between Movements and the State*

Lawyers can help movement organizations resist cooptation by the state and facilitate fragile collaborations with agencies.<sup>162</sup> In this campaign, lawyers represented the worker-members of ROC-NY in federal court; the organization never appeared before the judge, who appeared uncomfortable with the idea that an individual lawsuit might be nested in a larger organizing campaign involving direct action and media advocacy. ROC-NY could draw on the legitimacy of a legal complaint for underpinning its direct action and media advocacy program, without submitting to the court's jurisdiction and its rules. Lawyers were also essential in defensive litigation when ROC-NY was named as a party in cases before a state court and the NLRB.

Worker centers may resist using lawyers as intermediaries with governmental agencies, as organizers may seek to decentralize lawyers in campaigns and gain recognition from legislators and other political actors as the leading representatives of workers. It is shortsighted, however, to do so, as lawyers, in addition to possessing technical skills that can be of use in policy advocacy, can help movement organizations maintain distance from governmental and private entities, which in turn might help organizations remain oppositional and retain movement vitality.<sup>163</sup> If lawyers understood and

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162. See Lobel, *supra* note 117, at 942-59.

163. See FRANCES FOX PIVEN AND RICHARD CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 1-40 (1979) (describing how protest movements lose power through institutional accommodation and coercion). Lobel accurately depicts the fear of cooption as a driving force in the acceptance or rejection by movement organizations of social

were properly trained in law school clinics and public interest organizations to act as intermediaries between movement organizations and the state, those organizations might feel more comfortable entrusting them with this essential role.

## 2. *A Global Transformative Paradigm of Social Change and Cross-racial Solidarity*<sup>164</sup>

Worker centers such as ROC-NY embrace a new paradigm of social change and cross-racial solidarity.<sup>165</sup> The civil rights movements, anti-colonial liberation struggles, and the radical labor movements are the historical antecedents of these organizations, which frequently turn to their forebears for inspiration and guidance. But in terms of their organizational structure and issue selection, contemporary organizers use an original approach that reflects cognizance of current conditions. Conceptually, the paradigm is global—linked to networks of advocates in multiple areas and across national borders<sup>166</sup>—and transformative, rooted in a radical democratic vision of the participation of

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justice strategies. Cooption has driven organizers and lawyers toward extralegal activism. However, I would not characterize the campaign described in this article or many of the legal collaborations with worker centers as a retreat from the law and toward civil society, as Lobel does. *See* Lobel, *supra* note 117, at 961-62. In fact, movement organizations usually prevent their lawyers from yielding to the psychosocial allure of softer informal normativities (which characterize the non-adversarial and discursive governance structures advocated by Lobel and others, *see supra* note 157). For most people, even lawyers, public confrontation is a more challenging enterprise than collaborative negotiations and the solidarity and direct action tactics of movement organizations embolden lawyers. Correspondingly, lawyers represent movement organizations in courts and legislatures on basic terms set by organizers and workers and allow the organizations to resist cooption while remaining engaged in law reform projects. *See* Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 826-41 (1998) (illustrating the potential dialectic between political participation/law reform and transformative movement politics in the context of an environmental justice case study).

164. The ideas in this section in part reflect the work of Families for Freedom (FFF), a movement organization with which CUNY-IRRC collaborates but that is not a workers center. Founded in 2002, FFF is a New York-based non-profit organization that defends and supports immigrant communities against the federal government's aggressive detention and deportation policies. *See* FFF website homepage, <http://www.familiesforfreedom.org> (last visited Aug. 15, 2007).

165. Angela Harris describes this paradigm from a legal theoretical standpoint, in which default identity characteristics, such as race, gender, and sexual orientation, are neither ignored nor do they serve as the central organizing principle of social movements. *Supra* note 1, at 783-84. Instead, as Robert Chang argues, "people of color" solidarity in the service of a progressive agenda must be built on the basis of a new subject position, one that comes with political commitments and through struggle. *See* Robert Chang, *The End of Innocence or Politics After the Fall of the Essential*, 45 AM. U. L. REV. 687, 690-94 (1996). This substantive radical democratic project is central to the movement organizations described in this article, *see id.* at 692.

166. *See* Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in a Global World*, 150 U. PA. L. REV. 353, 405-11 (2001) (setting forth an aspiration for globalized social movements in the U.S.).

members, which includes citizen and non-citizen and largely people of color, in politics.<sup>167</sup> Most worker centers conceptualize its work as opposed to the forces of neoliberal globalization, which adversely affects poor people by constructing ways in which their very presence in a location is illegal, by effectively forcing them to labor under worsening conditions created by deregulated market forces. The centers are in ideological, if not actual, communion with activists who oppose a World Bank-sponsored dam in India, indigenous people demanding economic and social rights in Chiapas, and AIDS activists in South Africa fighting for access to affordable generic drugs.<sup>168</sup> These movement organizations demolish the false dichotomy advanced by the Old Left between radical politics and identity politics<sup>169</sup> by focusing on the *interaction* between racial, economic, and political subordination.<sup>170</sup>

The membership itself is global and in some cases constituents have direct ties to movements in their countries of origin. Their project includes leadership development so that their members may testify as to their own conditions of life and work and demand remedies in courts and legislatures. They make strong and constant efforts to maintain a diverse membership; their members are allies who work to realize common aims, not components of a coalition with contingent common interests.<sup>171</sup> The organizations search for groups of plaintiffs in litigation or witnesses in legislative efforts across racial and immigration status lines. Though the late addition of new groups of workers in the ROC-NY campaign complicated matters by allowing some workers to benefit disproportionately from the longer participation and endurance of other workers, the organizers pushed hard to include the new workers—both for attacking the parent corporation at multiple restaurants and because the new groups included not just Latino but also South Asian immigrants, and therefore more accurately represented the workforce of the corporation.

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167. Movement organizations such as ROC-NY, pursue the radical democratic engagement of its members in politics, not in grassroots activism outside of the sphere of the political process. See Lobel, *supra* note 117, at 963-64 (discussing the robust political engagement of the “M-stream” from the desiccated extra-political self-organization of the “L-stream” to define “civil society” and consigning grassroots activists to the latter) (citing Charles Taylor, *Invoking Civil Society*, in WORKING PAPERS AND PROCEEDINGS OF THE CENTER FOR PSYCHOSOCIAL STUDIES 1-17)).

168. See generally de Sousa Santos and Rodriguez-Garavito, *supra* note 158.

169. See, e.g., TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1996).

170. See Penelope Andrews, *Globalization, Human Rights, and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER RACE & JUST. 373, 395-99 (2000) (discussing critical race feminism application in international human rights); Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990).

171. See generally Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-sacrifice, Stewardship, and Anti-subordination*, 50 VILL. L. REV. 823 (2005) (discussing the difficulties of coalition-building and proposing first principles that might overcome those challenges).

Worker centers such as ROC-NY have a clear picture of the way in which immigration status or constructed illegality<sup>172</sup> harms their membership and weakens their organizing efforts, but they view this as a condition to challenge and change, rather than a limit on the issues and members they may embrace. Though deportation and detention remains a possibility for most of the membership, the organizers attempt to keep workers engaged in political struggle and endeavor to protect members when immigrant enforcement is used as a tactical offensive. Leaders make every effort to minimize distinctions between members based on their legal status, because organizers recognize that the restaurant worker detained after going to a Special Registration interview is no more “innocent” or “guilty” than the janitor who committed a crime and already served time in a state prison.<sup>173</sup> They see these individuals and families as part of a united struggle against a system of constructed illegality and racial subordination—and their organizational structures and targets of social change reflect that central mission.

The global, transformative paradigm expands the scope and ambition of public interest lawyers.<sup>174</sup> As in corporate law, the global alliances and ambitions of clients cause lawyers to think and act globally, for example, by filing complaints on behalf of worker-members with international tribunals and including international law claims in federal complaints.<sup>175</sup> These collaborations with global, transformative organizations may also encourage more substantive interaction between public interest lawyers across borders, which has remained limited to date, with American lawyers tending to use international mechanisms unilaterally but failing to engage progressive legal allies outside of the U.S.<sup>176</sup> The expansive and energized political vision of networked social movement organizations has much to offer public interest lawyers. It is up to us to identify and develop relationships of trust with specific organizations and to collaboratively advance successive campaigns of resistance.

#### CONCLUSION

Far from signaling a retreat from the legal and political process, the

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172. See Ngai, *supra* note 46, at 56-90 (discussing the construction of illegality through deportation policy).

173. See *supra* text accompanying notes 34-43.

174. Lucie White describes an aspirational “third dimension” model that sets a benchmark for what public interest lawyers can hope to achieve in collaboration with movement organizations. See Lucie White, *To Learn and Teach: Lesson from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 760-68 (1988).

175. See *supra* notes 80-85.

176. See generally Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59 (1998) (discussing the potential impact of international law applications in the U.S.).

changing dynamic between public interest lawyers and resistance movements reflects a healthy mutual engagement—one with the potential to achieve both parties' substantive goals more effectively than traditional models of public interest lawyering would allow. Even as the state and powerful private entities assert the entrenched prejudices of liberal legalism against resistance movements, these movements reshape public interest lawyering, and law more generally, through innovative collaborations. There is tension and stress in these relationships, as is to be expected in any partnership between hard-headed and driven actors operating within a set of firmly established constraints. Public interest lawyers can negotiate professional constraints in collaborations with resistance movements and collectively it is within our capacity to carry out our moral and professional responsibility for the advancement of justice. I hope that this description and interpretation, in some small way, evokes faith in our potential to achieve justice in an otherwise callous and heartbreaking historical moment.