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COMMENTARY

A PRAGMATIC APPROACH TO LAW AND ORGANIZING:

A COMMENT ON "THE STORY OF SOUTH ARDMORE"

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Professor Corey Shdaimah weaves a rich and compelling story about legal mobilization in the context of public school redistricting that offers important insights into the complex choices that face activists in organizing campaigns.[1] As part of this symposium commemorating the birth of Saul Alinsky, it is fitting that her story grows out of her own experiences as a parent in South Ardmore, since one of the central tenets of Alinskyism was that organizing efforts should evolve organically out of the needs of local communities.[2] Shdaimah's article provides an excellent synthesis of the literature on law and organizing, and deftly uses the South Ardmore campaign to illuminate the opportunities and constraints that exist when an organizing group turns to law as one means to pursue its ends. It is a story that is unfinished, so we have only a window into the difficult decisions that organizers have to make about legal strategy and the trade-offs such choices involve. We do not know whether the choices were ultimately justified by the result. Nonetheless, Shdaimah's story adds weight to the evidence that activists often view law as a powerful resource and invoke it as a conscious strategy of social reform, fully aware of its potential pitfalls.[3] She ends with a call for a more "fluid way of thinking about" law and organizing efforts—a position which I share.[4] Toward this end, Shdaimah suggests that we resist a

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

2. SAUL ALINSKY, RULES FOR RADICALS (1971).

3. *See* Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 39 (2007), http://www.harvardlawreview.org/forum/issues/120/feb07/cummings.pdf (reviewing the literature).

4. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 517 (2001) (suggesting that scholars and activists view law and organizing as part of a "pragmatic, multifaceted vision

totalizing theory of law and organizing and, instead, approach the question of what role law can play in social change by asking: "What makes sense to this community? What makes sense in this context?"[5] In this brief comment, I take these questions as an invitation to reflect on the context-specific factors that may influence whether turning to law "makes sense" in an organizing campaign. The list is partial—a preliminary set of variables and questions rather than a systematic framework.

To give this list meaning, it is useful to start by clarifying a central operating premise of the law and organizing framework, which views law as subservient to organizing. It is not self-evident why—in a society suffused with law—legal action should be viewed as requiring justification as a tool of social change. If "law is politics," then why is law seen as an inferior form (at least from the point of view of progressives), while organizing is praised for its political authenticity? I suggest two main answers, each giving rise to a set of important concerns about law as a tool of social change that are commonly raised in scholarly and activist circles.

The first set of concerns revolves around the concept of "accountability" and relates to fundamental notions of democratic practice and the value of unmediated self-governance.[6] Organizing, as an ideal type, aims to empower the poor and marginalized to take control over their lives and speak truth directly to power. As Sanford Horwitt put it in his opening remarks to this symposium, community organizing aims to promote citizen participation that transcends any particular issue around which organizing takes place. I do think that this premise is worth probing. It has always struck me that, when it comes to concerns about accountability, organizers frequently get the benefit of the doubt in that it is presumed that their actions are perfectly aligned with the community's interests. In contrast, lawyers, by virtue of their training and professional status, are presumed to be more prone to client domination.[7] Yet it is not clear that an organizer with a forceful personality like Alinsky does not also pose similar risks of overreaching. Nonetheless, we tend to equate organizing with the promise of direct democracy. Lawyers threaten to break this promise by interposing themselves in a mediating role. Although such mediation is deemed a virtue by structural-functionalists who view lawyers as a "balancing wheel"

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of social change practice").

5. Shdaimah, *supra* note 1, at 627.

6. Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665 (2009).

7. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 101 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFFALO L. REV. 1 (1990).

in social life, modulating the passions of the masses, such a conception is anathema to proponents of direct democracy. Legal action, in this view, may undercut democratic action both because of the drawn-out and esoteric nature of the legal process, and the disproportionate influence that lawyers possess as a result of their monopoly over technical expertise. In the extreme case, lawyers may use their expertise to disregard community wishes in pursuit of their own self-defined cause.

The second objection to law focuses on its effectiveness. Here, the question is: Can law actually deliver social change? As Gerald Rosenberg powerfully argues, a legal campaign may change law on the books, but not practice on the ground[8]—the NAACP LDF's public school desegregation campaign is frequently cited as the classic example of this. Enforcement of legal mandates is often the pivotal part of a social change campaign, yet lawyers may not have the incentives or resources to enforce legal victories over time. Organizing, from this perspective, may be better situated to promote sustained activism and thus be more effective in ensuring long-term change. Moreover, legal action, to the extent that it is viewed as contrary to the majority will, may be more difficult to protect from political backlash than law generated through the democratic process.[9]

Both of these concerns—that of *unaccountable lawyering* and *unenforced law*—are real and there are many examples of how each has hampered social movements. Yet, as Shdaimah reminds us, neither asserts a categorical bar to legal action. Rather, concerns about accountability and enforceability alert us to the risks that reliance on legal action poses. The seriousness of these risks must be assessed on a case-by-case basis and, once calculated, weighed against the benefits of legal action. This is, of course, a very complex process—more art than science. Yet there are common elements that can be identified and basic trade-offs that can be evaluated. Once this is done, we may be able to identify conditions that are conducive to the productive use of legal action and those that are more threatening to organizing aims. In general, we would predict that legal action would be more likely to "make sense" where the risks of unaccountable lawyering were low or the costs associated with it were relatively small. Similarly, we would expect that legal action would be more compelling in situations where legal enforcement either was likely to occur or was not critical to the success of the campaign.

8. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

9. *See* Gerald Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009).

I. CONTEXT FACTORS AFFECTING LAWYER ACCOUNTABILITY

Shdaimah describes two different models of lawyer accountability, one focused on maximizing client control over lawyers (what she terms the "Control Model") and the other ceding some control to lawyers in exchange for leveraging the power of law to change external conditions (the "Relative Control Model").[10] But there are many variations. How accountable lawyers are to organized groups (and how much it matters) depends on a range of factors, including the type of organizing involved, the type of law deployed, the identity of the lawyers, and the composition of the organizing group. In this part, I provide a rough sketch of factors bearing on the issue of lawyer accountability. In setting out the list, I start with a series of basic questions and then offer a brief sketch of the issues, using Shdaimah's case study as an illustration.

A. Type of Organizing

- What is the goal of organizing in a particular situation? Is it a means to an end or is it an end in itself?
- What is the proposed relation of law to the organizing goals?
- Is law deployed to achieve a particular legal outcome (policy change) or to stimulate and sustain collective action?

How law is viewed relative to organizing and the risks it creates are a function of the goals set for the organizing campaign in a particular organizing context. Law can be a spur to organizing or its terminal point (i.e., the creation of law through court order or legislative enactment).

The South Ardmore case Shdaimah describes was one in which law was a vehicle for aggrieved community members to change the outcome of the School Board's redistricting decision. While it may have also served the goal of activating community members for more sustained political involvement on education policy, that was not the primary intent. In this type of a campaign, in which a group mobilizes to achieve a particular policy outcome, relying on lawyers may pose less risk if it is deemed that legal action is the source of greatest political leverage. Since ongoing mobilization is not the aim, ceding power to lawyers does not necessarily pose a significant threat to organizing efforts. This does not mean that the use of law in these circumstances is not without potential costs. As Shdaimah notes, for Lower Merion Voices United for Equity (LMVUE), filing a lawsuit meant forgoing more conciliatory tactics, restricting the speech of group

10. Shdaimah, *supra* note 1, at 602-07.

members, and acceding to legal theories (race and disability discrimination) that did not precisely map onto the group's experience of injustice. Nonetheless, the group's need to control the process was less important than its desire to reverse the redistricting plan.

The South Ardmore campaign may be contrasted with campaigns in which stimulating organizing or establishing an organized collective is the endgame, as in a workplace organizing or popular education campaign. In those instances, turning to law may pose greater risks to organizing efforts since infusing community members with a sense of agency is the aim. This, of course, is also context-specific. As many have noted, litigation can, in the right circumstances, be used to promote collective action.[11] And it can also protect activism from repressive responses.[12]

B. Type of Law

- Does the case involve filing a lawsuit?
- What is the purpose of the suit? Is it an impact suit, aiming to establish a broad legal principle, or is it designed to serve a different purpose, such as enforcing a statute or invalidating a regulation?
- Does the case involve lawyering outside the litigation arena and, if so, what type? For instance, does the case involve fact gathering, counseling, deal making, or negotiation in non-litigation contexts?
- What are the risks to community organizing that non-litigation approaches pose?

Most analyses of law and social change focus on the role of litigation, which is the bogeyman of social movements. Shdaimah's account of LMVUE's decision to retain private counsel to sue the school board for race and disability discrimination is consistent with this pattern. As a social change tactic, litigation looms large

11. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LABOR L. (forthcoming 2009).

12. In Los Angeles, for instance, litigation has been essential in protecting collective action by some low-wage immigrant workers. Day laborers, in particular, have been subject to local ordinances making it illegal to congregate in public for the purpose of soliciting work, on the ostensible grounds that such activities constitute a public nuisance. In response, activists at the National Day Labor Organizing Network in Los Angeles collaborated with lawyers at the Mexican American Legal Defense Fund and the ACLU to successfully challenge ordinances on First Amendment grounds, thus preserving a key form of organized worker activity. Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005-2006).

both because of the iconic power of judicial decrees in the history of social movements and also because litigation—or the threat thereof—is an important negotiating tactic for activists seeking to change the behavior of public and private actors. Yet litigation is only one part of what lawyers do. They also counsel organizations on legal options, draft agreements, and set up organizational structures. Community economic development is one area in which lawyers provide transactional assistance to help groups structure organizations and set up housing and commercial development deals.[13]

In my research on low-wage worker organizing in Los Angeles, I recounted one campaign of community and labor groups that sought to negotiate a community benefits agreement from a publicly subsidized developer of a large sports and entertainment complex in downtown Los Angeles.[14] There, the coalition relied on the threat of litigation as leverage, but the primary lawyer involved conducted many other tasks. He advised the group about other points of leverage in the land use planning and approval process; he negotiated with the developer's attorney; and he drafted the contract that memorialized the community benefits agreement. I suggested there that the lawyer functioned more as a campaign strategist than a litigator, guiding the group through the existing legal framework in order to maximize its power to achieve its ultimate goal: extracting monetary concessions from the developer directed toward affordable housing, public space, and living wage jobs. The potential for lawyers to take too much control in this type of setting may be less than in the litigation context, where the lawyer's technical knowledge of the arcane rules of the forum may be more likely to exclude clients. Some commentators, however, have suggested that transactional lawyering poses its own risks of disempowering groups.[15]

C. Type of Lawyers

- Who are the lawyers?
- Where do they work?
- What is their approach to representing community groups?
- Do they charge a fee or provide free services?

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13. *See* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2002).

14. Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERING AND SOCIAL MOVEMENTS 302 (Austin Sarat & Stuart Scheingold eds., 2006).

15. Daniel Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999).

- Do they share the clients' goals or are they neutral?

Whether or not organizing groups have reasons to mistrust lawyers depends a great deal on the lawyers in question. The conception of lawyers as intentionally or inadvertently dominating has taken on outsized proportions in the scholarly debate about law and social change. Derrick Bell's famous critique of NAACP LDF lawyers—as clinging to the integrationist goals of its desegregation campaign after it became apparent that integration had lost its appeal with a significant part of the black community—underscored the dangers of cause lawyering.[16] Lucie White's depiction of a legal aid lawyer representing a welfare client, Mrs. G, showed that client domination could occur inadvertently when a well-meaning poverty lawyer trying to do her best across the divide of class and race misunderstood the client's cultural context.[17] These stories no doubt capture important dynamics within public interest and poverty law. However, there are also stories of productive legal collaborations by lawyers sensitive to advancing community interests, suggesting that the approach of progressive lawyers to client empowerment is nuanced and complex. There are many lawyers who would prefer to view themselves as "on tap, not on top."[18] Although the lawyer's self-conception does not eradicate accountability concerns, we would expect greater lawyer sensitivity to power dynamics within the lawyer-client relationship to reduce the risk of domination.

D. Type of Client Group

- What type of community group is it?
- How powerful is it within the local, state, or national political environment?
- Who are its leaders?
- How much money does it have and what is its source of funding?
- How familiar are its members with legal processes?

16. Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests*, 85 YALE L.J. 470 (1976).

17. White, *supra* note 7.

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

- How connected is the group to a larger network of movement organizations?
- Is the group coherent or is it loosely structured?
- Does the group operate as part of a coalition?

There are categories of client groups, particularly those comprised of lower-income and less educated community members, in which power dynamics make them particularly susceptible to being taken advantage of by lawyers. But there are, by contrast, many community groups that are not particularly vulnerable. More powerful groups with sophisticated leaders—unions, for example—are less likely to be taken advantage of by lawyers and more likely to accurately assess the costs and benefits of legal action. The South Ardmore example is a case in point. There, LMVUE was a relatively sophisticated group, including professionals and well-educated academics, including Shdaimah herself—who, though not a practicing lawyer, is someone deeply knowledgeable about lawyers and their relationship to social change. For LMVUE, the issue was less one of disempowerment than whether filing a lawsuit would accomplish their ends.

II. Context Factors Influencing the Effectiveness of Legal Action

This leads to the next set of concerns about the efficacy of law in achieving social change. Here, I suggest that how effective legal action may be in advancing specific social change objectives depends on factors such as the type of problem at issue (and how amenable it is to easily enforced legal solutions), the type of outcome sought, and the viability of alternative courses of action.

A. Type of Problem

- Does the problem require rule change or monetary redress?
- Are the rights in question relatively self-executing or do they require substantial enforcement efforts?
- If enforcement is required, who would be required to carry it out? How much discretion would they have? How resistant would they be?
- How many resources are available to carry out enforcement efforts? Where would they come from?

In the South Ardmore case, a successful lawsuit would enjoin the school district from its redistricting plan. That victory would be relatively easy to enforce because it would simply stop redistricting from being carried out, thereby allowing parents to make choices for their children within the pre-existing school assignment framework. A successful injunction would therefore

not require a significant additional investment of enforcement resources.

The necessity, extent, and type of enforcement effort required in connection with legal action is therefore a key consideration for organizing groups considering its use. The absence of substantial post-decision enforcement efforts by the state or individuals makes legal action more appealing. Same-sex marriage litigation offers another interesting example in this regard. When successful (and not subject to political reversal), litigation establishing the right to same-sex marriage in court empowers individuals to make choices rather than rely on state officials with significant discretion to implement. Rather than requiring bureaucratic implementation (as in the case, for example, of school desegregation), same-sex marriage rights are relatively self-executing, with individual couples making the decision to marry and then carrying out the ministerial tasks of obtaining a marriage license. It is the case that couples could be blocked by intransigent local officials unwilling to issue licenses to gay couples, but the experience in states with same-sex marriage laws suggests that this is not a significant problem (and one, when it occurs, which can be easily dealt with through legal channels). It is also possible that states with judicial decrees establishing same sex-marriage could erect procedural barriers to make it more difficult for gay couples to wed—analogous to what states opposed to abortion have done to make abortion more difficult to obtain as a practical matter (through parental notification, mandatory waiting periods, and counseling requirements), while technically complying with the letter of the law. However, because marriage is available to heterosexual couples as well, it would be much more difficult to impose selective impediments to same-sex marriage without running afoul of a legal mandate requiring it as a matter of equal rights.

Contrast this with the movement to enforce employment rights in the Los Angeles garment industry.[19] In that context, enforcement required individual action by thousands of garment workers denied minimum wage and overtime. Enforcement was sought by workers against their individual employers—small contractors that resisted payment and often went out of business. California state law allowed workers to recover against larger garment manufacturers that outsourced production to the contractors, but they were difficult to identify (contractors, by design, often did not keep careful records) and frequently refused to pay. Courts could order the enforcement of unpaid judgments, but the mechanisms for recovery were weak and the prospect of delay led many workers to accept deeply discounted settlement

19. Cummings, *supra* note 11.

offers. As this example suggests, when systemic enforcement depends upon large numbers of individual actions against violators, defendants are relatively powerful and bent on resistance, and government enforcement mechanisms are weak, legal action may be less likely to produce the desired results.

B. Type of Outcome

- If enforcing existing law or creating new law is not the goal of legal action, what is?
- If legal action is used for public relations purposes, what are the mechanisms by which the case is designed to generate publicity?
- What are the audiences the organizing group is trying to influence? How likely is it that they will be persuaded by the publicity generated by a lawsuit?
- If legal action is used for community education or as a spur to community organizing, what are the mechanisms by which the legal action will be channeled into the education or organizing efforts?

The enforcement of legal mandates—or the creation of new law—may not be the goal of legal action. Lawsuits may be brought to raise the consciousness of aggrieved actors, generate positive publicity to put pressure on adversaries in ongoing negotiations, or allow a community group to gracefully exit a losing campaign. In addition, as the "political trials" of the 1970s demonstrated, lawyers may manipulate legal processes to highlight official hypocrisy or underscore fundamental unfairness. When legal action is not taken to achieve an enforceable legal mandate, then concerns about its conventional effectiveness (did the lawsuit result in a "victory") becomes less important—and groups may often "win by losing" if they are able to use the case for mobilization purposes. When suits are brought for strategic reasons other than law creation or enforcement, community groups choose to target different audiences than judges and state officials charged with implementing the law. Instead, the message of the lawsuit is communicated to people in the client community, other community members who could become political allies (who Shdaimah calls "bystander publics"), or political decision makers.

This process of translating legal action into a force for broader mobilization is complex and how one measures "success" is not always clear. It is often too easy to tell a story of legal action that results in some type of positive outcome, no matter how attenuated. When assessing the impact of law on organizing efforts, it is therefore important to use objective criteria rigorously applied. Nonetheless, in gauging the effectiveness of law as a social change tool, the evaluative criteria should permit

measurement of the actual outcomes that activists are seeking to achieve.

C. Alternatives to Legal Action

- What are the strategic alternatives to law?
- What is the likelihood that they will produce different (and better) outcomes?
- How immune are they to strategic nonenforcement or political backlash?

Finally, when a group is considering legal action, there is always the question: As opposed to what? In South Ardmore, legal action was put on the agenda after unsuccessful efforts to mobilize concerned parents to attend school board meetings and engage in lobbying efforts. It was thus considered after non-legal alternatives failed.

The classic justification for public interest law, particularly the lawsuits attacking Jim Crow during the Civil Rights Movement, was the entrenched and immobile political opposition to the cause of racial equality. Law may be a second-best option, but sometimes it is the most powerful weapon available. When organizing groups are contemplating different courses of action, the use of law must be compared to alternative non-legal strategies and their likely outcomes. It may be that in a particular organizing context, law poses significant risks. But what are the risks of other strategies? How might the risks be weighted and usefully compared? Realizing Shdaimah's call for a "fluid" approach to law and organizing requires a genuine analysis of the trade-offs of legal action and non-legal alternatives and a strategic plan of action that combines the best of both.