

Review Essay

AFTER PUBLIC INTEREST LAW

SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS by Jennifer Gordon, Belknap Press of Harvard University Press (Cambridge, Mass. 2005).

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INTRODUCTION.....	1251
I. THE ORGANIZATIONAL STRUCTURE OF THE WORKPLACE PROJECT	1257
II. THE WORKPLACE PROJECT: A PUBLIC INTEREST LAW PERSPECTIVE	1259
A. <i>Political Context: The New Terrain of Public Interest Lawyering</i>	1260
B. <i>Practice Arenas: Mapping the Field of Public Interest Law</i>	1264
C. <i>Professional Ideology: Lawyering for Social Change</i>	1268
III. BEYOND CRITIQUE: THE FUTURE OF PUBLIC INTEREST LAW	1282
A. <i>Central Challenges</i>	1283
B. <i>Theoretical Frames</i>	1287
C. <i>Methodology</i>	1291
CONCLUSION.....	1293

INTRODUCTION

It has been over three decades since the emergence of “public interest law” as a distinct field of legal practice.¹ It is now commonplace to think of public interest lawyers as crucial—albeit controversial—players in our system of democratic governance, using the legal system to advocate for the

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¹ See JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 24–39 (1978) (describing the emergence of the public interest law field in the 1960s); Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1069–70 (1970) (“A source of intense interest for the present generation of law students is the small number of practitioners outside government or corporate law practice whose prime goal is the promotion of significant social change. The activities of these lawyers, coupled with their sense of commitment and willingness to make personal sacrifices, have led publicists to call them the ‘new public interest lawyers.’”); see also Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law,”* 2005 WIS. L. REV. 455, 457–60 (describing the 1960s and 1970s as the era of “classic” public interest law).

interests of less powerful groups. Unlike the early period of the legal profession, when acting in the public interest was associated with informal pro bono service or stints in government office,² there are now well-established—even if financially less rewarding³—career paths in the public interest field. Indeed, the institutional structure of public interest law has grown significantly since the 1960s, and is now comprised of a diverse network of foundation-supported nonprofit organizations,⁴ bar-sponsored groups,⁵ federally funded legal services organizations,⁶ public defender offices,⁷ law school clinics,⁸ pro bono departments within large corporate firms,⁹ and smaller scale for-profit legal offices engaged in public interest work.¹⁰

While the roots of public interest law date back to the legal aid movement and early “law reform” efforts of the NAACP and ACLU,¹¹ it was not until the mid-twentieth century that public interest law began to gain the resources and recognition that helped define it as a distinct professional category. The NAACP’s famous victory in *Brown v. Board of Education* in 1954 focused national attention on the possibility that public interest law could in fact transform society. A decade later, the federal government established the legal services program, built upon a base of preexisting legal

² See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); see also STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 30–39 (2004).

³ See Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. TIMES, Sept. 12, 2003, at A1.

⁴ See NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 50–61 (1989).

⁵ See Directory of Pro Bono Programs, <http://www.abanet.org/legalservices/probono/directory.html> (last visited Feb. 15, 2006).

⁶ See Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1218–22 (2002).

⁷ See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 36–37 (1995).

⁸ See ALAN W. HOUSEMAN, *RECENT DEVELOPMENTS: CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 12–13 (2001), available at http://www.clasp.org/publications/recent_developments.pdf.

⁹ See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 4 (2004).

¹⁰ For some examples of this type of “private” public interest law firm, see *id.* at 131–34.

¹¹ On legal aid, see Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 540–50 (1985). See also AUERBACH, *supra* note 2, at 53; JACK KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* 34–50 (1982). On the early activities of the NAACP and ACLU, see HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 1, at 22–24. We use the term “law reform” to suggest the use of legal advocacy to effect changes in public policy, either through judicial decree, administrative action, or legislative change. See JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

aid societies,¹² yet heavily influenced by the law reform model.¹³ The advent of federal legal services was followed by the development of an infrastructure of public interest law organizations in the 1960s and 1970s, which included Ralph Nader-inspired consumer groups and foundation-supported nonprofit organizations that brought impact cases in the areas of civil rights, environmental law, consumer rights, women's rights, and poverty law.¹⁴ During this same time, a few major law firms, spurred in part by concerns about losing top law graduates to public interest jobs,¹⁵ set up their own public interest law departments,¹⁶ lent out attorneys on public interest rotations,¹⁷ and even established neighborhood-based branch offices.¹⁸

It is important not to view this early period of public interest law with too much nostalgia: there were vigorous debates about the efficacy of legal tactics and the role of lawyers in social movements, with grassroots activists often clashing with law reform proponents.¹⁹ However, the existence of structural opportunities and organizational resources fed a sense of optimism about the power of law to change society. A receptive federal judiciary, centralized federal agencies, and robust social welfare programs permitted public interest lawyers to extend rights, reform bureaucratic rules, and amplify government benefits.²⁰ A string of impressive court victories by public interest lawyers also marked the era. For instance, federal legal services lawyers won almost two thirds of the eighty cases they argued to

¹² See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 39–70 (1974); see also Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1317 (1964).

¹³ HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 1, at 34. The emphasis on law reform within legal services did not translate into widespread practice, as only a small percentage of cases were reform-oriented. Abel, *supra* note 11, at 573–74.

¹⁴ HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 1, at 41–43; Joel F. Handler, *Public Interest Law: Problems and Prospects*, in LAW AND THE AMERICAN FUTURE 99 (Murray L. Schwartz ed., 1976). “Impact cases” are those with the potential to achieve significant reform beyond the individual case in question, with *Brown v. Board of Education*, 347 U.S. 483 (1954), being the classic example. Often, impact cases are selected by lawyers to test a particular legal theory with the goal of achieving a specific legal reform; for this reason, they are also referred to as “test cases.” See, e.g., HANDLER, *supra* note 11, at 2–3.

¹⁵ HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 1, at 45.

¹⁶ For example, the Washington, D.C., firm of Hogan & Hartson established a public interest law department in 1969. See Cummings, *supra* note 9, at 36 n.202.

¹⁷ *Id.* at 36 n.203 (citing Washington, D.C.-based Covington & Burling’s program of “lending two associates to Neighborhood Legal Services for six-month” rotations).

¹⁸ Baltimore-based Piper & Marbury set the standard, opening its branch office in 1969. See ALLAN ASHMAN, *THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY’S NEIGHBORHOOD LAW OFFICE* (1972).

¹⁹ See Thomas Hilbink, *The Profession, the Grassroots, and the Elite: Lawyering for Civil Rights in the Direct Action Era*, in CAUSE LAWYERING AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., forthcoming 2006) (describing tensions between SNCC and the NAACP).

²⁰ Trubek, *supra* note 1, at 458–59.

the United States Supreme Court through the mid-1970s,²¹ including landmark cases like *Goldberg v. Kelly*,²² which had far-reaching implications for the poor. The new social import of public interest law also was reflected in the academic attention that it received.²³ Although much of this scholarly output raised questions about public interest law's scope and boundaries, it generally agreed on a broad definition of public interest law—one focused on the representation of “underrepresented” groups, such as blacks, women, and the poor²⁴—and expressed a confidence that public interest law could be defined, measured, and analyzed.

Since that time, there has been a profound transformation in public interest law—a product of changes in *political context*, *practice arenas*, and *professional ideology*. Politically, an increasingly conservative judiciary has become less amenable to rights claims from liberal public interest lawyers,²⁵ while creating openings for advocacy by religious conservatives, property rights groups, and business interests.²⁶ Increased decentralization and privatization have shifted regulatory authority to states, municipalities, and private sector actors,²⁷ erecting challenges to lawyering focused on administrative rulemaking at the federal level. Cutbacks to social welfare programs have narrowed advocacy opportunities within poverty law. There also have been significant changes in the organizational context within which public interest lawyers practice, with large law firm pro bono programs taking on increased importance as federally funded legal services of-

²¹ See SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 99–101 (1990).

²² 397 U.S. 254 (1970).

²³ See, e.g., HANDLER, *supra* note 11; HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 1; F. RAYMOND MARKS ET AL., *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* (1972); PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (Burton A. Weisbrod et al. eds., 1978); Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?: The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

²⁴ Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1236 (2005). The classic definition of public interest law is “an activity that (1) is undertaken by an organization in the voluntary sector; (2) provides fuller representation of underrepresented interests (would produce external benefits if successful); and (3) involves the use of law instruments, primarily litigation.” Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS, *supra* note 23, at 1, 22.

²⁵ See Michael McCann & Jeffrey Dudas, *Backlash: Mapping the Changing Context of Movement Lawyering*, in CAUSE LAWYERING AND SOCIAL MOVEMENTS, *supra* note 19.

²⁶ See Southworth, *supra* note 24, at 1247–63.

²⁷ See JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* (1996); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

fices face stricter constraints.²⁸ The ideology of social reform that marked the liberal public interest law project in the 1960s and 1970s has been overtaken by a new orthodoxy that is deeply skeptical of the usefulness of legal strategies to promote social change.²⁹ Confidence in the mission of public interest lawyers has given way to recriminations over the responsibility of lawyers for the decline of social movement activism and the eclipse of political liberalism. And the scholarly enterprise of studying public interest law has splintered, unable even to agree on what to call lawyering in the new era, with different camps staking out distinct labels: cause lawyering,³⁰ critical lawyering,³¹ political lawyering,³² progressive lawyering,³³ rebellious lawyering,³⁴ third dimensional lawyering,³⁵ law and organizing,³⁶ and legal pragmatism,³⁷ to name a few.

Jennifer Gordon is part of the generation of public interest lawyers who came of age during this period of transformation. With a Harvard law degree and a seed grant from the Echoing Green Foundation in hand, she set out in 1992 to start up a legal clinic on Long Island to serve the growing Latino immigrant population laboring away in a warren of modern-day “sweatshops”—restaurants, car washes, construction companies, and domestic work arrangements where wage and hour violations are standard practice and unsafe working conditions the norm. Through her visionary leadership and entrepreneurial ability, she built the Workplace Project, an organization that has become an icon of sorts for an entire generation of

²⁸ See Cummings, *supra* note 9, at 19–41.

²⁹ For the classic expression of this skepticism, see STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

³⁰ CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998).

³¹ Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 30, at 201.

³² See Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996).

³³ *Creating Models for Progressive Lawyering in the 21st Century*, 9 J.L. & POL’Y 297 (2001).

³⁴ GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

³⁵ Lucie E. White, *To Learn and to Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 767–68.

³⁶ Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 445–50 (1995); see also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

³⁷ William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

public interest lawyers, garnering her the prestigious MacArthur “genius” grant in 1999.

Her story is by no means typical. Quite the contrary, she is extraordinary: an elite-educated lawyer who built an entire organization dedicated to fighting for the rights of one of the most vulnerable groups in the country. But it is the very uniqueness of her story, beautifully chronicled in her extraordinary new book, *Suburban Sweatshops: The Fight for Immigrant Rights*, that speaks to the central challenges of the times.³⁸ What it offers is a provocative account of Gordon’s own effort to become a public interest lawyer *after public interest law*.³⁹

It is against this backdrop of dramatic changes in the field that *Suburban Sweatshops* invites us to return to the central questions of the public interest law movement. What is the role of legal advocacy in social change efforts? How should public interest lawyers structure relationships with clients? How should a public interest law office operate? And, more generally, what are the ultimate goals of public interest lawyering?

For the most part, Gordon resists addressing these questions directly, opting for a descriptive narrative rather than a normative tract. However, because the book is a description of her own choices as a public interest lawyer, it unavoidably reflects a set of normative assumptions about lawyering that we attempt to surface and examine in this review Essay. In particular, we suggest that beneath the book’s account of the Workplace Project’s impressive accomplishments lies an ambivalence about public interest law that reflects the impact of structural and ideological changes in the field. We therefore situate the Workplace Project within the context of public interest law’s transformation both as a way of explaining the organization’s appeal and reappraising some of its operating premises. We then draw upon the lessons Gordon offers to look forward to the future of public interest law, highlighting some of the central political challenges, theoretical issues, and methodological questions that lie ahead. In this way, we read *Suburban Sweatshops* as a crucial scholarly turning point, grounded in the liberal critique of public interest law while nevertheless pointing to a richer, more nuanced understanding of the contributions of lawyering to social change.

³⁸ JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

³⁹ Of course, to say that we are now in a period after public interest law is not to suggest that public interest law as a set of institutions and practices has withered away or that lawyers no longer identify themselves with the public interest. To the contrary, the current network of public interest organizations is extensive and new programs designed to encourage public interest advocacy continue to emerge. Therefore, in using the phrase “*after public interest law*” we do not mean to claim a clean break with the past or a completely different present. Rather, we mean to evoke the passage of a particular historical moment in which confidence in law’s transformative potential was matched by significant structural possibilities for liberal legal reform. It is the decline of optimism and opportunity that marks the current era, challenging liberal public interest lawyers to rethink strategies and adapt tactical approaches.

I. THE ORGANIZATIONAL STRUCTURE OF THE WORKPLACE PROJECT

From its inception, the Workplace Project was not designed as a conventional legal services office. When Gordon arrived in Long Island in 1992 and started the Workplace Project from an office within the Central American Refugee Center (“CARECEN”), a legal services agency that worked with the Central American community,⁴⁰ she did so with the model of the immigrant workers center in mind.⁴¹ She was inspired by existing nonlegal organizations that sought to organize workers along ethnic lines, rather than around industries or work sites, such as New York’s Chinese Staff and Workers Association and Texas’s La Mujer Obrera.⁴²

The main innovation of the Workplace Project was its fusion of traditional legal advocacy and the workers center model, with the central focus being the promotion of organizing by immigrant workers themselves. Workplace Project staff used several different tactics to advance this goal. There was aggressive outreach to community members, as organizers targeted local churches and other institutions, and used plays, comic books, and songs that would resonate with immigrant workers.⁴³ More importantly, there was a concerted effort to structure legal representation in a way that served the purposes of the organizing mission.

Offering an educational class for community members was one of the principal mechanisms used to encourage workers to participate in the Workplace Project. Workers who came seeking legal assistance to resolve workplace problems were asked to take an intensive Workers Course (offered three times a year), which focused on the history of immigrants, the labor movement, and a critical analysis of labor rights.⁴⁴ In ordinary “know-your-rights” classes, lawyers stand up and lecture to workers about their entitlement to a minimum wage, a safe workplace, and freedom from discrimination. The Workers Course, in contrast, was interactive and confrontational. For example, as Gordon describes it, when the class focused

⁴⁰ CARECEN was founded in the basement of a church in Westbury, New York in 1983, and moved to Hempsted, New York the following year. Telephone Interview with Patrick Young, Director of Legal Services, CARECEN (Feb. 21, 2006). Since its inception, CARECEN in New York has focused on providing legal services and advocacy to the Central American immigrant community. *Id.* The types of legal needs that the organization addresses have changed over time but have generally included immigration, employment, and housing. *Id.*

⁴¹ “Immigrant worker centers are community-based and community-led mediating institutions that provide support to communities of low-wage workers.” Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* 3 (Econ. Policy Inst., Briefing Paper No. 159, 2005), available at <http://www.epinet.org/briefingpapers/159/bp159.pdf>. On workers centers, see also Victor Narro, *The Impact of Next-Wave Organization Campaigns: Creative Strategies for Los Angeles Worker Centers’ Organizing and Legislative Campaigns*, 50 N.Y.L. SCH. L. REV. (forthcoming 2006).

⁴² GORDON, *supra* note 38, at 65, 73–74. There are now over one hundred immigrant workers centers around the country that have emerged as an alternative to traditional unions. See Fine, *supra* note 41, at 4, 14.

⁴³ GORDON, *supra* note 38, at 115.

⁴⁴ *Id.* at 116.

on the issue of earnings, workers talked about the range of wages paid for different jobs and debated the reasons for the disparity—the number of other workers looking for jobs, the presence of unions, a person’s ability to speak English, her race, and whether she had legal documentation.⁴⁵ When the conversation shifted to the minimum wage, participants discussed not only what the law mandated, but also what was just. The class examined the minimum wage as the product of a political compromise between business and labor rather than a reflection of what workers needed to support their families.⁴⁶

The goal of the Workers Course was to sensitize workers to the commonality of their exploitation, to make them understand that theirs were not isolated instances of individualized abuse, but part of a larger structure with deep historical and political roots.⁴⁷ When workers described their workplace problems—recounting stories of low wages, long hours, injuries, and intimidation—they came to realize their connectedness and repetition. Through discussions of past social movements and role plays of current organizing strategies, participants in the course came to “a broader understanding of exploitation as a *systemic* problem that required a collective solution.”⁴⁸ Upon completion of the course, workers were invited to become members of the Workplace Project.⁴⁹ As members, workers were required to pay dues and support the group’s organizing campaigns; they also were allowed to become board members and gained access to benefits such as identification cards and credit union accounts.⁵⁰

Taking the Workers Course was also a way for workers to receive legal services through the Workplace Project’s legal clinic,⁵¹ which was structured to advance the group’s broader organizing agenda. Workers who came to the clinic initially met with an organizer who emphasized that the Workplace Project was in fact not a legal center, but rather an organizing center committed to collective action.⁵² For simple problems, workers were given brief counseling and guidance to facilitate self-help.⁵³ For more complicated problems, workers met with a team that included an organizer, counselor, and lawyer who explained the benefits of a collective action approach.⁵⁴ If a worker wanted to pursue collective action, she was asked to

⁴⁵ *Id.* at 174.

⁴⁶ *Id.* at 174–75.

⁴⁷ *Id.* at 124–25.

⁴⁸ *Id.* at 126–27.

⁴⁹ *Id.* at 128.

⁵⁰ *Id.* at 116, 128.

⁵¹ *Id.* at 199 (“As a condition of receiving legal services, the worker had to agree to take the Workers Course, or if that was not possible to participate in the Project’s committees and campaigns in some other way.”).

⁵² *Id.* at 198.

⁵³ *Id.*

⁵⁴ *Id.* at 198–99.

return with other workers who had the same problem.⁵⁵ A retainer agreement was drawn up under which, in exchange for services, the worker agreed to participate actively in her case—“gathering information, finding and interviewing witnesses, preparing cross-examination questions, playing the role of the employer in mock negotiations or trials, and preparing the first draft of an affidavit or complaint.”⁵⁶ Once the representation was underway, Workplace Project staff and members undertook a tightly orchestrated campaign to resolve the case. The strategy typically included confronting the offending employer, filing a lawsuit, picketing the employer’s place of business, and—in larger cases—coordinating a media campaign, leafleting, and deploying other organizing tactics.⁵⁷ In this way, the Workplace Project turned the notion of a traditional legal clinic upside down: Instead of individualizing claims, the clinic was used to collectivize grievances.⁵⁸

II. THE WORKPLACE PROJECT: A PUBLIC INTEREST LAW PERSPECTIVE

The structure of the Workplace Project raises a fundamental question: How did a group centrally committed to worker *organizing* come to be viewed as an innovation in public interest *lawyering*? Part of the answer, of course, is that Gordon was a lawyer, steeped in the methodology of legal problem-solving and the history of progressive legal movements. Moreover, the Workplace Project staff did bring legal cases in the service of organizing campaigns. However, with lawyering in a subordinate role, the Workplace Project was, in many respects, an unlikely model of public interest law innovation.

In this Part, we provide an account of the Workplace Project as a model organization within the public interest field, suggesting that its emergence as a venue of innovative practice was, in significant part, a product of the transformation of public interest law itself. Specifically, in an environment of political constraint and skepticism about the transformative power of law, the organizing focus of the Workplace Project offered progressive public interest lawyers an alternative approach to social change. By situating the development of the Workplace Project within the context of structural and ideological changes impacting public interest law practice, we highlight the unique contributions of the Workplace Project to the public interest field, while offering a critical perspective on some of its operating principles.

⁵⁵ *Id.* at 199.

⁵⁶ *Id.*

⁵⁷ *Id.* at 200.

⁵⁸ In Gordon’s words, the clinic was “shaped to work in tandem with an organizing effort, to serve collective goals even as it vindicates individual rights.” *Id.* at 185.

A. Political Context: The New Terrain of Public Interest Lawyering

In assessing the Workplace Project from a public interest perspective, our starting point is an examination of the “political opportunity structure”⁵⁹ of lawyering for immigrant workers. The Workplace Project was established and evolved in response to opportunities for immigrant worker advocacy within the broader political and economic environment. Here, we highlight the role of globalization, employer practices, governmental policy, and legal doctrine in shaping the Workplace Project’s organizing approach.⁶⁰

The impact of globalization looms as the central backdrop to the story of the Workplace Project, generating the capital and labor mobility that have contributed to the rise of Long Island’s immigrant-dominated underground economy. Capital mobility has resulted in the outsourcing of jobs by multinational companies to countries with lower labor standards.⁶¹ This has occurred primarily with unionized manufacturing jobs, although white-collar service jobs are increasingly being outsourced as well.⁶² As Gordon describes, Long Island is a microcosm of the shift toward service sector employment. After shedding over 40,000 defense industry jobs in the 1980s and 1990s, the New Economy boom in Long Island brought with it a surge in biotech, finance, and high-tech jobs.⁶³ The emergence of this new class of well-paid, over-worked suburbanites generated its own demand for “workers to clean their homes, clip their lawns, build their pools, care for their children, and cook their restaurant meals.”⁶⁴ The result: an explosion in low-wage service work—including “childcare, housecleaning, janitorial duties, restaurant work, landscaping, and constructions jobs.”⁶⁵

The production of workers to fill these low-end service jobs also has its roots in globalization. The prospect of earning more in a few years in the United States than in a lifetime at home creates incentives for mass immi-

⁵⁹ See Hanspeter Kriesi, *Political Context and Opportunity*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 67, 69 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004); see also DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930–1970*, at 40–43 (1982).

⁶⁰ Our theoretical framework for understanding the political context relies heavily on Sameer Ashar’s excellent analysis of the “macropolitics of undocumented labor.” Sameer M. Ashar, *Undocumented Workers, Mobilization Lawyers, and the State* 3 (Mar. 2, 2005) (unpublished manuscript, on file with authors).

⁶¹ See Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: The Three Challenges to Labor Rights in Our Time* (UCLA Sch. of Law Research Paper No. 05-19, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=781249.

⁶² See Laurie J. Flynn, *Companies Sending Work Abroad Are Learning Cultural Sensitivity—to Their American Customers*, *N.Y. TIMES*, Dec. 8, 2003, at C4.

⁶³ GORDON, *supra* note 38, at 20–21.

⁶⁴ *Id.* at 21.

⁶⁵ *Id.* According to Gordon, service work “now accounts for 86 percent of Long Island’s nonfarm employment.” *Id.*

gration, often through illegal channels.⁶⁶ Gordon describes the spate of immigration into Long Island during the 1980s and 1990s, much of it from Latin America. By 2000, there were almost 300,000 Latinos living in Long Island, somewhere near half of whom were from El Salvador, with the rest coming from México, Honduras, Colombia, and Ecuador.⁶⁷ Gordon's book is centrally preoccupied with the experience of these immigrants, many of whom are undocumented, lured to the United States by the myth of easy prosperity only to be confronted with the implacable reality of low wages and high living costs.⁶⁸ They are the low-wage workers who occupy the lowest rungs of the service sector, toiling in the shadows of the underground economy, where they are subject to systemic labor and safety violations—nonpayment of wages, failure to pay minimum wage and overtime, and exposure to unsafe work conditions—emblematic of the modern-day sweatshop.

That immigration, much of it unauthorized, has swelled the ranks of the low-wage workforce helps to explain the shocking conditions that characterize the service industry. The Long Island that Gordon describes is populated by restaurant dishwashers who work six fourteen-hour days a week for \$250,⁶⁹ domestic workers confined to private homes for seventy hours a week, who are paid less than \$2.00 per hour,⁷⁰ and day laborers who have lost fingers operating lawnmowers.⁷¹ One reason for these abuses is the vulnerable position of the immigrant workers themselves. The incorporation of illegal immigrants into the workforce creates a cohort of workers who do not complain about workplace abuses out of fear of the immigration consequences.⁷² The groundswell of nativism reinforces feelings of vulnerability.⁷³ As Gordon details powerfully, immigrants on Long Island are the subject of intersecting indignities and abuses: English-only campaigns, ef-

⁶⁶ Ashar, *supra* note 60.

⁶⁷ GORDON, *supra* note 38, at 18.

⁶⁸ *Id.* at 33–35 (describing what she terms the “two-year myth” among immigrants: “Go to the United States and in two years you’ll return with enough cash to settle back home for good”). She writes:

A parent with two children working full time *at* (not below) the current federal minimum wage—\$5.15 an hour—earns a gross annual salary of \$10,712 a year. If she puts every penny of that toward rent, paying not a dollar in taxes, eating literally nothing, going nowhere, buying her children not a single item of clothing or a school notebook, never visiting a doctor or taking an aspirin, she will still fall \$4,048 short of the amount she would need to pay fair market rent on a two-bedroom apartment in Long Island for a year.

Id. at 35.

⁶⁹ *Id.* at 11.

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 2.

⁷² Ashar, *supra* note 60.

⁷³ *Id.*

forts to dismantle day laborer sites, and—not infrequently—physical violence.⁷⁴

But the pervasiveness of sweatshop conditions is not simply a function of the failure to report abuses by vulnerable workers. It is more systematic, a product of both employer action and governmental policy. On the employer side, over the past quarter century companies have pursued a program of what Katherine Stone terms “flexibilization”—looking increasingly outside the firm to subcontracted and temporary employees, while changing the nature of the employment relationship with “regular” workers by dismantling internal labor market job structures (in which workers develop skills on the job that allow them to move up the employment ladder) and the implicit promise of long-term employment that accompanied them.⁷⁵ This emphasis on flexibility has placed a premium on short-term employment arrangements, which create openings for immigrant workers but also make it more difficult to monitor compliance with labor standards.

Flexibility also has created challenges for labor organizing in the new “boundaryless” workplace.⁷⁶ As Gordon documents, in the new work environment of hyper-mobility, contracting out, and contingent work, traditional conceptions of union organizing have become anachronistic.⁷⁷ It is more difficult to find identifiable worksites or even stable industries to organize.⁷⁸ Instead, day laborers stand on the corner hoping for intermittent gigs with one-shot employers; domestic workers cobble together babysitting and cleaning jobs in an unstable patchwork. Workers labor in small units, physically disconnected from similarly situated employees on a shop floor.⁷⁹ There is intense wage competition in the low-wage sector and rapid job turnover that attenuates worker attachment to specific employers and occupational categories.⁸⁰ And workers often have only indirect relationships with companies—retained as independent contractors or employed by subcontractors that have little power to increase wages.⁸¹

Governmental policy has further weakened labor protections and encouraged domestic employers to recruit illegal workers. The right to organize has been curtailed by limitations on secondary boycotts (in which subcontracted workers picket the company that contracts for their labor) and the exclusion of independent contractors from the protection of the National Labor Relations Act.⁸² Gordon notes that these restrictions have made it

⁷⁴ GORDON, *supra* note 38, at 19.

⁷⁵ KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 68–72 (2004).

⁷⁶ *Id.* at 196–216.

⁷⁷ GORDON, *supra* note 38, at 48–49.

⁷⁸ *Id.* at 53–54.

⁷⁹ *Id.* at 54.

⁸⁰ *Id.* at 55.

⁸¹ *Id.* at 56–57.

⁸² *Id.* at 56–58; *see also* STONE, *supra* note 75, at 209–15.

particularly difficult to organize in the service sector, only six percent of which is unionized.⁸³ To be sure, there have been high-profile success stories in this environment—the Service Employees International Union’s Justice for Janitors campaign stands out⁸⁴—but for the most part mainstream unions have been singularly unsuccessful in organizing the “unorganizable” workers in the modern sweatshop sector.⁸⁵ Basic employment protections do exist for low-wage immigrant workers.⁸⁶ The problem is that existing regulations are systematically underenforced—the result of underfunded and unresponsive government agencies, as well as meager penalties for labor violations that serve as ineffective deterrents to noncompliance. Again, New York stands as an example with severely understaffed federal and state departments of labor that Gordon describes as ill equipped to tackle the problems of sweatshop abuses and often hostile to immigrant worker concerns.⁸⁷

Nor have the federal courts been an ally in the fight for immigrant rights.⁸⁸ To the contrary, the Rehnquist court was generally inhospitable to civil rights, limiting the right of workers to bring claims of discrimination and wage violations on federalism grounds.⁸⁹ Its decision in *Hoffman Plastics Compound, Inc. v. NLRB* dealt a heavy blow to immigrant worker protections, when it held that immigration laws precluded a court from ordering an employer to award back pay to undocumented workers fired in retaliation for union organizing.⁹⁰ The *Hoffman Plastics* decision not only has chilled immigrant organizing, but it also has led employers to threaten deportation as a means of disciplining immigrant workers who attempt to

⁸³ GORDON, *supra* note 38, at 53.

⁸⁴ The campaign “has organized over 200,000 building maintenance workers, many of whom are immigrants, since its inception in 1985.” *Id.* at 61–62. It “seeks to win change in the building maintenance industry through active community-labor alliances, large-scale mobilizations of workers and allies, and a strategy that targets all major contractors in a market at once in order to take wages out of competition.” *Id.* at 62.

⁸⁵ See Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000).

⁸⁶ For instance, they are protected by minimum wage and overtime laws. See, e.g., *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (holding that undocumented aliens are entitled to maintain an action for unpaid wages and damages under the Fair Labor Standards Act for work already performed); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1058–59 (N.D. Cal. 2002) (finding that even after the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), undocumented workers still may bring a claim for wages earned under the Fair Labor Standards Acts).

⁸⁷ GORDON, *supra* note 38, at 24–26; see also Gordon, *supra* note 36, at 418–22.

⁸⁸ Ashar refers to the Supreme Court’s jurisprudence of workplace rights as the new “Lochnerism.” Ashar, *supra* note 60, at 13–15.

⁸⁹ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that state workers could not sue their employers for monetary damages for violations of Title I of the Americans with Disabilities Act); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that state employees could not bring suit in state court to enforce the provisions of the federal Fair Labor Standards Act).

⁹⁰ 535 U.S. 137 (2002).

assert a range of other workplace rights.⁹¹ Moreover, for immigrant rights advocates, it has sent the message that federal court litigation to enforce and extend immigrant protections is a risky strategy.

B. Practice Arenas: Mapping the Field of Public Interest Law

The Workplace Project was a “law and organizing” center: an organization that attacked the problem of sweatshop work by both representing aggrieved workers in court and spearheading labor campaigns. As a lawyer, Gordon was quite aware of the tension that this combination created. The organizers she worked with were frequently skeptical of lawyers, who they saw as domineering, removed from the community’s struggle, and prone to see every issue through a legal lens, often at the expense of building grassroots movements.⁹² Moreover, for Gordon, there was an inherent conflict between the logics of legal action and collective action:

In law, people with a problem come to trained professionals who tell them what they are likely to be entitled to under the state’s vision of justice, and then speak for them as the legal process proceeds. Little wonder, then, that when law is asked to function in the service of organizing, sparks often fly.⁹³

The Workplace Project was Gordon’s grand experiment in bringing together the combustible mix of law and organizing to advance the rights of sweatshop workers.

Why did Gordon take this risk? An outstanding student at Harvard Law School, she could have pursued any number of public interest career paths, such as a job in legal aid or at a national advocacy group like the ACLU. We have already suggested that part of the decision to form the Workplace Project as a law and organizing group was based on the advocacy opportunities provided by the political context. Here, we examine the practice environment that framed Gordon’s decision to create a start-up organization outside of the infrastructure of existing public interest sites. In particular, we identify a set of “push” and “pull” factors that provided the context for Gordon’s individual decision about where to *locate* herself as a public interest lawyer.

The push factors, which Gordon touches upon, relate to the constraints upon immigrant worker advocacy within more conventional practice arenas. The Federal Legal Services Corporation (“LSC”), which funds the bulk of legal services organizations across the country, has suffered funding cut-backs and advocacy restrictions since its high-water mark in the 1970s. Funding declined through the Ronald Reagan and George H.W. Bush ad-

⁹¹ See Nancy Cleeland, *Employers Test Ruling on Immigrants; Labor: Some Firms Are Trying to Use Supreme Court Decision as Basis for Avoiding Claims over Workplace Violations*, L.A. TIMES, Apr. 22, 2002, at C1.

⁹² GORDON, *supra* note 38, at 191–97.

⁹³ *Id.* at 148–49.

ministrations,⁹⁴ and in 1992, the year the Workplace Project was formed, the federal appropriation for LSC was down almost one-third from its peak level in 1980.⁹⁵ In 1996, funding was reduced to just under one-half the 1980 level.⁹⁶ More significantly for immigrant advocates, legal services groups were prohibited from using LSC funds to represent undocumented immigrants in 1980, and in 1983 LSC regulations further proscribed services to certain legal immigrants.⁹⁷ Despite these restrictions, LSC groups could still represent immigrants with non-LSC funds, but this changed in 1996, when Congress prohibited lawyers in LSC-funded organizations from using non-LSC funds to support banned activities.⁹⁸ As a result of the 1996 legislation, which also imposed a range of other advocacy restrictions,⁹⁹ many lawyers left LSC-funded groups, and the number of LSC grantees fell from 325 in 1995 to 160 in 2003.¹⁰⁰ The rise of big firm pro bono has filled in some of the gaps left by legal services decline,¹⁰¹ but labor and employment cases on behalf of undocumented workers hold little appeal for firms

⁹⁴ See Houseman, *supra* note 6, at 1222 tbl.1.

⁹⁵ ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 36 (2003), available at http://www.clasp.org/publications/Legal_Aid_History.pdf.

⁹⁶ See Houseman, *supra* note 6, at 1222 tbl.1.

⁹⁷ See Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 496–97 (2003).

⁹⁸ See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321 (codified in scattered sections of 18, 20, 28, and 42 U.S.C.). Implementing this new law, LSC promulgated a regulation mandating that a recipient of LSC funds maintain physical and financial separation from programs operating without LSC restrictions. 45 C.F.R. § 1610.8(a)(3) (2005). This “program integrity” regulation has been challenged by advocates. The Ninth Circuit upheld the regulation against a facial constitutional challenge, rejecting the argument that the regulation imposed an unconstitutional condition on the First Amendment rights of recipients of LSC funds. *Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998). In a more recent preliminary injunction action, the Brennan Center for Justice brought a facial Tenth Amendment challenge and an as-applied First Amendment challenge to the program integrity regulation. The district court rejected the Tenth Amendment claim, but granted plaintiffs’ preliminary injunction request on First Amendment grounds. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004), modified by 356 F. Supp. 2d 267 (E.D.N.Y. 2005) (declining to impose permanent injunction and modifying preliminary injunction). This suit is currently on appeal to the Second Circuit. See Brennan Center for Justice, *Dobbins v. Legal Services Corporation*, <http://www.brennancenter.org/programs/pov/dobbins/index.html> (last visited Apr. 15, 2006).

⁹⁹ For instance, under the 1996 law, LSC attorneys were prohibited from engaging in lobbying, challenging welfare reform legislation, claiming or collecting attorneys’ fees, and participating in class action litigation. For an analysis of the restrictions, see BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER (2000). The prohibition against engaging in activities to amend or challenge the validity of welfare laws was subsequently held unconstitutional. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

¹⁰⁰ HOUSEMAN & PERLE, *supra* note 95, at 38.

¹⁰¹ In one notable example, Latham & Watkins initiated a firm-wide program to provide pro bono services to undocumented minors held in detention by the Department of Homeland Security. See LATHAM & WATKINS, PRO BONO ANNUAL REPORT 16 (2003), available at <http://www.lw.com/upload/docs/doc121.pdf>.

due to ideological and business concerns.¹⁰² The risk of impact litigation in the face of unsympathetic courts has made traditional law reform groups less attractive as practice sites, while limitations on fee awards in civil rights cases have created challenges for small firm public interest practice.¹⁰³

While these practice constraints operate to push public interest lawyers to look for alternative settings, there are opportunities that pull lawyers toward innovation. The availability of competitive law fellowships that allow recent law school graduates to enter public interest practice by designing their own public interest project has been a key enabler. The two major fellowship programs within public interest law are the Skadden and Equal Justice Works (formerly NAPIL) fellowship programs,¹⁰⁴ both of which leverage private sector support to fully fund a select group of fellows for two years at sponsoring nonprofit organizations.¹⁰⁵ Particularly in light of the difficulty in gaining access to entry-level positions, these fellowships offer a pathway into public interest law, while affording the additional inducement of prestige associated with the receipt of highly competitive grants. The fellowships, which require applicants to design their own innovative projects, also promote creativity.¹⁰⁶ This is particularly true of the Echoing Green fellowship that Gordon received out of law school, which describes its mission as providing seed money and technical support to “emerging social innovators,” those “individuals with innovative ideas for creating new models for tackling seemingly unsolvable social challenges.”¹⁰⁷ It thus values entrepreneurialism and creative problem-solving. Moreover, because the fellowship is open to leaders in different fields, it

¹⁰² See Cummings, *supra* note 9, at 116–29.

¹⁰³ See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Servs.*, 532 U.S. 598 (2001) (limiting fee-shifting in “prevailing party” fee-shifting statutes to cases in which the plaintiff either wins a judgment or receives the court’s approval for a settlement); *Farrar v. Hobby*, 506 U.S. 103 (1992) (holding that a prevailing party that wins only nominal damages may not be entitled to attorneys’ fees); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding that there is no barrier to so-called sacrifice settlement offers in which defendants offer full monetary relief to plaintiffs on the condition that statutory attorneys’ fees are waived).

¹⁰⁴ For information on the Skadden Fellowship program, see Skadden Fellowship Foundation, <http://www.skaddenfellowships.org> (last visited May 16, 2006). For information on Equal Justice Works, see General Information, <http://www.equaljusticeworks.org/fellowsinfo.php> (last visited Jan. 19, 2006).

¹⁰⁵ At the time Gordon graduated from law school, the fellowship programs were all relatively new. The Skadden program was launched in 1988, see Skadden Fellowship Foundation, *supra* note 104, NAPIL/Equal Justice Works began in 1992, see Equal Justice Works Fellowships, *supra* note 104, and the Echoing Green fellowship started in the late 1980s, see Echoing Green, *How We Started*, <http://www.echoinggreen.org/index.cfm?fuseaction=Page.viewPage&pageId=89> (last visited Jan. 19, 2006).

¹⁰⁶ See Louise G. Trubek, *Poverty Lawyering in a New Millennium*, 17 YALE L. & POL’Y REV. 461, 464–67 (1998).

¹⁰⁷ Echoing Green’s Fellowship Program, <http://www.echoinggreen.org/index.cfm?fuseaction=Page.viewPage&pageId=41> (last visited Jan. 19, 2006).

places a premium on multidisciplinary. Therefore, to the extent that the Workplace Project's goals were shaped by the availability of start-up funding, the Echoing Green program aligned with the nontraditional objectives Gordon staked out.¹⁰⁸

Gordon's decision to leave CARECEN and establish a freestanding organization highlights a final pull factor toward nontraditional lawyering sites: the availability of the workers center model itself. Workers centers, which initially were developed in the late 1970s and early 1980s in places like New York's Chinatown and along the México-U.S. border, constituted a vehicle for organizing immigrant workers who were largely abandoned by the organized labor movement.¹⁰⁹ The Workplace Project was part of the second wave of workers center formation, sparked by the new immigration from México and Central America in the 1980s and 1990s.¹¹⁰ When Gordon struck out on her own, she thus adapted the workers center form, adding the component of legal services for members. In doing so, she also tapped into an emerging network of community-labor coalitions that supported direct organizing around workplace issues, housing, and environmental justice.¹¹¹ Reflective of this trend was the Workplace Project's collaboration with unions and other community-based groups—including the Latino Workers Center and the Chinese Staff and Workers Association¹¹²—to win passage of the Unpaid Wages Prohibition Act (“UWPA”) of 1997, a New York state law that increased civil penalties for employers who fail to pay wages while imposing stricter criminal sanctions for repeat offenders.¹¹³

¹⁰⁸ We note that Gordon's multidisciplinary approach to serving immigrants corresponded to a broader trend in the field to combine multiple services for the poor in “one-stop” organizational structures or closely connected collaborative networks. See Louise Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000).

¹⁰⁹ See Janice Fine, *Non-Union, Low-Wage Workers Are Finding a Voice as Immigrant Workers Centers Grow*, LABOR NOTES, Aug. 2003, at 5, available at <http://www.labornotes.org/archives/2003/08/c.html>.

¹¹⁰ See *id.*

¹¹¹ See BUILDING BRIDGES: THE EMERGING GRASSROOTS COALITION OF LABOR AND COMMUNITY (Jeremy Brecher & Tim Costello eds., 1990); see also Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERING AND SOCIAL MOVEMENTS, *supra* note 19.

¹¹² See Jennifer Gordon, *The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law 1* (Carnegie Endowment for Int'l Peace, Working Paper No. 4, 1999), available at http://www.carnegieendowment.org/files/imp_wp4gordon.pdf [hereinafter Gordon, *Campaign for the Unpaid Wages Prohibition Act*].

¹¹³ Under the new law, a failure to pay wages is a misdemeanor for the first offense and a felony for the second offense, if committed within six years of a prior conviction. See Act of Sept. 17, 1997, ch. 605, § 5, 1997 N.Y. Laws 3392, 3393 (codified at N.Y. LAB. LAW § 198-a (McKinney 2005)). Additionally, the UWPA strengthened the state law regarding civil penalties for labor abuses. The former law allowed for the state commissioner, upon receipt of a complaint from a worker for unpaid wages, to issue a civil penalty “not exceeding fifty percent of the total amount found to be due.” N.Y. LAB. LAW § 218 (McKinney 1996). However, the decision to issue the penalty was discretionary. *Id.* The new

C. *Professional Ideology: Lawyering for Social Change*

We have suggested so far that the definition of the Workplace Project as an organization that used law as an instrument to promote immigrant organizing was shaped in part by structural considerations. We turn here to examine how the organization's approach to lawyering also was informed by Gordon's own ideological commitments and how these, in turn, map onto broader debates in the field.

At the heart of *Suburban Sweatshops* is the question of what to do about the problem of immigrant labor abuse. Gordon's answer is quite clear: *organize*. That she chose to do so within the context of an organization that also provided legal services raises a central question of the book: What is the appropriate relationship between legal action and collective action?

At the outset, we note the obvious contrast between the Workplace Project and conventional legal organizations. In the classic legal aid model, law is used to achieve individual client goals through case-by-case representation. In the public interest law reform model, law is used to advance a lawyer-defined reform agenda using impact lawsuits to build legal precedent. At the Workplace Project, in contrast, law was used to advance membership-defined reform goals through different techniques of collective action. That is, law was viewed *instrumentally*—not as a means to achieve specific legal victories, but as a spur to collective action.

The book offers three principal justifications for the priority of collective action over legal action—one grounded in a claim about law, another in a claim about lawyers, and a third in a claim about clients. This section will explore each of these claims in turn.

1. *The Role of Law: Legal Action v. Collective Action.*—Gordon's claim about law is at bottom a critique of law's *efficacy*.¹¹⁴ Her skepticism about the effectiveness of law began to develop during her formative years in law school: "What I was learning about individual legal services and impact litigation . . . seemed inadequate as a response to the complex and entrenched reality of low-wage immigrant work."¹¹⁵ As a new lawyer, Gordon witnessed the ways in which law on the books did not always help her immigrant worker clients. In the first two years of the Workplace Project, Gordon describes her evolving sense of frustration with the process of individual client representation: "[O]ver time—and not very much time—

law makes the civil penalty mandatory in those cases where the employer has previously been found in violation of the law, or where the violation is "willful or egregious." N.Y. LAB. LAW § 218-1 (McKinney 2005). It also increases the civil penalty, which is payable to the commissioner, to "double the total amount found to be due." *Id.* See generally GORDON, *supra* note 38, at 104–07.

¹¹⁴ Gordon's efficacy critique resonates with a line of empirical scholarship critiquing legal advocacy as a social change strategy. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

¹¹⁵ GORDON, *supra* note 38, at 73.

the question of what counted as a ‘victory’ became harder to answer. A win in court, for example, did not necessarily translate to wages in hand.”¹¹⁶ It was on the basis of Gordon’s assessment of law’s inadequacy in redressing worker grievances that she and her colleagues at the Workplace Project began to build an organizing component into the legal clinic. The emphasis on organizing that prevailed in the clinic beginning in 1995 reflected Gordon’s attempt to respond to what she viewed as the *short-term* and *long-term* limitations of traditional forms of lawyering for immigrant workers.¹¹⁷

From a short-term perspective, Gordon argues that the Workplace Project emphasized organizing over law because organizing was often more effective as a *tactical* matter in helping workers to recover money owed to them for employment violations. In making the case for this point, Gordon details the inadequacy of litigation to procure full compensation for aggrieved workers because of the ability of employers to evade liability and shield assets.¹¹⁸ As Gordon describes, in the sweatshop context, legal rules operated in a way that permitted employers to drag cases out and often to circumvent payment altogether. In one case she recounts, a court victory on behalf of four construction workers was “studiously ignored” by the employer.¹¹⁹ The workers were able to recover only after going through

the laborious process of finding and freezing [the employer’s] bank accounts, tracking down some money but less than what the workers were owed. And those workers were lucky. If an employer was determined to avoid paying, all of the legal tools available were often not enough to find his money and compel him to pay.¹²⁰

The Workplace Project used collective action to respond to problems inherent in private enforcement by making employer misconduct a matter of public concern. For example, the Workplace Project used picketing and protest to pressure employers to resolve matters. In one case, the Workplace Project represented two workers owed several thousand dollars in

¹¹⁶ *Id.* at 78.

¹¹⁷ Gordon states that the first version of the legal clinic, in which organizing was not used, operated from the organization’s inception in 1992 to November 1994. Gordon, *supra* note 36, at 437.

¹¹⁸ GORDON, *supra* note 38, at 78–79. Obtaining a judgment is often no easy task, as employers contest even straightforward wage-and-hour claims by contending that workers are independent contractors or employed by subcontractors outside of the employers’ control. See generally Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988–90, 1103–34, 1144–46 (1999); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 571 (1996). Even in cases in which employees are able to successfully obtain a judgment against their employers, employees must often bring a separate collection action to force employers to pay. And, even then, employers can shield assets, declare bankruptcy, or use other tactics to make it difficult for employees to collect the unpaid wages. See, e.g., Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996).

¹¹⁹ GORDON, *supra* note 38, at 78.

¹²⁰ *Id.* at 78–79.

back wages by their employer, Be-Bop Bagels in Hempsted. When Be-Bop refused to pay the workers because they were undocumented, the group filed a lawsuit and carried out a series of protests in front of the shop, handing out fliers that said “Q: Are Be-Bop Bagels part of a balanced diet? A: You’ll have to ask a nutritionist. But common sense tells us that working 66 and ½ hours a week for less than minimum wage is not healthy for anybody.”¹²¹ To stop the picketing, the employer quickly settled.¹²²

The book tells us that this organizing-based clinic model frequently “did a better job” than straight legal services in “resolving workers’ problems. As the Be-Bop case illustrates, the combination of legal pressure and protest was often more effective than a lawsuit alone in settling cases.”¹²³ However, giving the clinic positive marks based on the fact that *in some cases* organizing worked better than law leaves open important questions about the clinic’s larger programmatic structure. Surely it is true that organizing is, at times, more effective than law in resolving disputes: Gordon gives us ample documentation to this effect. But it is also the case, as Gordon acknowledges, that at other times law works better than organizing. Indeed, during the first two years of the legal clinic—before the organizing model was instituted—it was able to recover over \$120,000 for more than one hundred workers through straight legal representation.¹²⁴

As those numbers illustrate, in certain cases legal services were the swiftest and least costly way to vindicate a worker’s rights. Where few workers were involved in the dispute, or where the employer was not responsive to low-cost public pressure, such as pickets or a media campaign; where workers were denied unemployment benefits; where a worker was injured on the job but did not receive workers’ compensation, individual representation was almost always the fastest, if not the only, way to solve the problem.¹²⁵

In the end, we are left with a contingent assessment of the relative short-term merits of law versus organizing. The most we can say after reading the stories about the legal clinic is that in certain cases, under certain conditions, organizing is more effective than law in helping workers resolve disputes, while in other cases, under other conditions, law is the better tool.

The question this raises is: Why should lawyers invest in organizing at all? Gordon’s answer, it seems, is that some combination of law and organizing maximizes worker recovery. Yet it is not clear from the book that it is necessarily the case. We are not told, for instance, how much more money the Workplace Project was able to recover for workers under the organizing approach. That is, if the organizing methodology were superior in resolving worker disputes, we would expect to see greater monetary returns

¹²¹ *Id.* at 201.

¹²² *Id.*

¹²³ *Id.* at 202.

¹²⁴ *Id.* at 190.

¹²⁵ *Id.* at 190–91.

to workers. Yet the book does not provide any systematic evidence on that score. It does tell us that by the end of 1995, the first year that the organizing model was employed, the Workplace Project had won a total of \$215,000 for 166 workers,¹²⁶ reflecting a per-worker increase over the pre-organizing clinic figures (\$120,000 for 100 workers) that Gordon cites.¹²⁷ It is difficult, however, to compare this figure with the earlier numbers since it is not possible to know how much of any increase reflected in the 1995 figure was a function of more effective organizing, or simply the result of greater legal experience, better cases (for example, the workers might have had larger claims to begin with), or other factors. Finally, we are not provided any additional information about worker recovery over time. We are told that organizing was “incorporated into [the clinic’s] problem-solving when organizing could increase the chances of victory.”¹²⁸ But during Gordon’s tenure, how often was organizing used relative to individual case representation? When it was used, what proportion of cases was successfully resolved? How much did workers recover?

Because we are not offered answers to these questions, we are left to speculate how the Workplace Project’s organizing approach actually fared. In light of the success the Workplace Project had in winning individual claims during its first two years, we wonder what might have happened had Gordon decided to invest more heavily in a strategy of traditional legal enforcement. Some employers do, in fact, respond to legal action. And with a cadre of employment attorneys trained in enforcing judgments, employers would find it more difficult to escape liability. Cases could be coordinated against large employers or repeat offenders for maximum impact.¹²⁹ Particularly given the resource-intensiveness of an organizing-based strategy that relies on placing people on picket lines, there is an argument in favor of investing organizational resources in identifying clients with the strongest legal claims and systematically pursuing their cases in court. In a sweatshop sector plagued by egregious violations of basic workplace protections (minimum wage, overtime, and workplace safety), a successful legal enforcement campaign would have significant benefits.¹³⁰

But while an argument could be made that collective action might plausibly take a back seat to legal action for the *short-term* purpose of win-

¹²⁶ *Id.* at 243.

¹²⁷ There is a problem of apples and oranges here, since the \$215,000 figure reflects recovery in wage-and-hour cases only, while the \$120,000 figure appears to be the total recovery in all cases (including workers’ compensation and other types).

¹²⁸ GORDON, *supra* note 38, at 199.

¹²⁹ See Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA BRIEFCASE, Aug. 1977, at 106, 121–22, available at <http://www.garybellow.org/garywords/solutions.html> (discussing this type of “focused case strategy”).

¹³⁰ Gordon makes this point: “In the setting in which the Workplace Project’s members labored, successful rights enforcement strategies would have been no small achievement.” GORDON, *supra* note 38, at 176–77.

ning cases, this idea would have been fundamentally at odds with Gordon's commitment to collective action as a *long-term* strategy for improving wages and working conditions more broadly in the sweatshop economy. As Gordon puts it, the clinic seemed "weaker when measured against the organization's long term goal of improving wages and working conditions in Long Island's suburban sweatshops."¹³¹ Litigation suffered from the problem of remedying only past harms and not adequately deterring future wrongdoing; employers who were found liable in one case were not deterred from violating the rights of other workers,¹³² while confidential settlements allowed employers to avoid correcting underlying problems by preventing information of wrongdoing from being shared with other workers.¹³³ The fundamental problem "was the inadequacy of existing rights. To attempt only to enforce laws on the books would thus have been to concede far too much."¹³⁴ From Gordon's perspective, "[t]he only significant improvement will come when immigrant workers mobilize themselves to shift the balance of power so that they can demand real change."¹³⁵ Consistent with this view, Gordon's first hire, during the project's second year of existence, was an organizer, not a lawyer.¹³⁶ Whatever the merits of legal enforcement were, Gordon decided very early on that organizing presented the more attractive route.

If one accepts Gordon's view that the long-term improvement in working conditions is the product of sustained collective action, the question is whether such collective action can effectively move forward in tandem with legal advocacy focused on rights enforcement. That is, can law and organizing coexist or even be mutually reinforcing? For Gordon, the answer to this question is a qualified yes: Law and organizing can be effectively married to achieve long-term systemic change, but only when law plays a carefully circumscribed role.

It is for this reason that Gordon's analysis of the compatibility of law and organizing emphasizes the *dangers* to organizing posed by the reliance on law. Gordon reflects that "by providing legal services for individual workers, we were undermining our goal of organizing the community."¹³⁷ In describing the evolution of the legal clinic, she recounts the ways in which individual case representation provided through the clinic "seemed to be working *against* the possibility of collective action."¹³⁸ A key concern

¹³¹ *Id.* at 191; *see also id.* at 88 ("But as evidence accumulated that individual cases had little impact on how employers behaved in the aggregate or in the long term, attention within the organization shifted to the question of how to support workers who wanted to organize while they remained on the job.").

¹³² *Id.* at 79.

¹³³ Gordon, *supra* note 36, at 440.

¹³⁴ GORDON, *supra* note 38, at 178.

¹³⁵ Gordon, *supra* note 36, at 441.

¹³⁶ *Id.* at 430.

¹³⁷ *Id.* at 438.

¹³⁸ GORDON, *supra* note 38, at 191.

was that victorious litigation often defeated the purpose of collective action. Success co-opted potential leaders by paying them off with a settlement, after which they left the organization.¹³⁹ As Gordon describes,

the wages that the Workplace Project recovered through the first two incarnations of its legal clinic consistently represented more money than its systemic organizing was likely to put in any worker's hands in the near future. As a result, the Project found itself in the perverse position of trying to persuade workers who had been successfully represented by the clinic that what they had just observed about the efficacy of lawyers was untrue, or at least not as true as the efficacy of collective action—with all evidence being to the contrary.¹⁴⁰

In Gordon's view, litigation was also disempowering to workers: "a successful experience with legal services taught the worker nothing more than reliance on legal services."¹⁴¹ In addition, litigation was seen as a barrier to organizing because it was often viewed as less risky and therefore more attractive to community members.¹⁴² The legal clinic sought to overcome these problems by requiring participation as a condition of legal services—what Gordon calls law "as a draw"¹⁴³—but the conflicts between legal services and organizing in the clinic remained.

Gordon presents a more optimistic view of using the *language* of legal rights for the purpose of advancing worker organizing. In her analysis of the Workers Course, Gordon offers a fairly positive assessment of the power of "rights talk" to spur collective action. In contrast to scholars who caution against the individualizing and politically demobilizing nature of rights,¹⁴⁴ Gordon saw in rights the potential for group solidarity and increased worker consciousness of systemic injustice:

At its best, the organization approached rights not as "facts to be learned" but as "data to be analyzed"—understood as products of specific political times and constellations of power, discussed in relation to workers' own experiences,

¹³⁹ *Id.* at 193–94.

¹⁴⁰ *Id.* at 195–96.

¹⁴¹ *Id.* at 196; *see also* Gordon, *supra* note 36, at 438.

¹⁴² GORDON, *supra* note 38, at 194. Gordon also mentions that, by providing legal services, the Workplace Project presented an image of itself as a service organization rather than an organizing group. *Id.*

¹⁴³ *Id.* at 202.

¹⁴⁴ *See id.* at 149–50 ("Some scholars have further argued that . . . talking about rights actively undermines the possibility of meaningful collective action for social change, because of the ways that a quest to win individual rights can atomize movement participants, because a battle for rights channels a movement's energy from the streets to the courts, and because of the way a focus on winning new rights leads to a passive reliance on the state to grant those rights rather than a broad struggle for justice."); *see also* STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5 (2d ed. 2004) (describing the myth of rights as the assumption that "litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change").

and considered as potential targets for change. The Workplace Project's approach to talk about rights thus started with the individual but soon led to discussion of group strategies to tackle systemic problems. . . . Talk about rights also transcended discussion of substantive rights on the books to become a springboard to developing the group's vision of justice—and then to act on strategies to achieve that vision.

Through this process, Workplace Project members developed a new consciousness of several specific things—of how immigrant workers fit into the much larger economic system, of how widespread the abuse they faced was, of the need to build power in order to make change, of how others had done and were doing so. The result, for many participants, was the shaping of a new element of their identity, a sense that the term “immigrant workers” not only described the fact of their exile and their labor but represented a fuller story about themselves, a story that linked them to other immigrants and to other workers, a story that involved membership in the Workplace Project and implied a commitment to action.¹⁴⁵

Yet Gordon is still cautious about rights, even in the limited role that they are given in the Workers Course. She claims that legal rights can act as an upper bound on what workers can demand from their employers: Because legal rights are considered by many all that workers deserve, if workers sought “to win higher wages and better working conditions in the political arena by talking about rights, they had to overcome the barrier they had strengthened.”¹⁴⁶ What Gordon suggests, in the end, is that while rights can be useful as a *starting point* for pursuing collective action, they should not be mistaken as ends in themselves.

This *instrumental* view of rights reflects the Workplace Project's broader vision of the relationship between law and organizing.¹⁴⁷ In both the legal clinic and the Workers Course, law was viewed as a means to the end of organizing. In the clinic, legal services were the hook to draw workers into the group's broader organizing activities. And the main use of “rights talk” in the Workers Course was to forge a collective identity among immigrant workers and underscore the need for organizing to transform the ideal of rights into reality.¹⁴⁸ The structure thus institutionalized concerns about the drawbacks of law as a social change instrument by making sure that it played a subordinate role to the organizing mission.

¹⁴⁵ GORDON, *supra* note 38, at 183–84.

¹⁴⁶ *Id.* at 177–78.

¹⁴⁷ This instrumental view resonates with Scheingold's “politics of rights,” which suggests how “[l]itigation can be useful for political mobilization and can in this way affect the balance of forces.” SCHEINGOLD, *supra* note 144, at 8.

¹⁴⁸ GORDON, *supra* note 38, at 184. At times, Gordon does suggest a noninstrumental view of rights, stating that “knowledge about rights was a critical component of the effort to improve working conditions.” *Id.* at 150. But her overall emphasis is on rights as a way to promote organizing.

While the Workplace Project's instrumental approach to law usefully reminds us of the importance of collective action, it risks perpetuating its own *myth of organizing*, in which the benefits of organizing and the limits of law harden into fixed presumptions that guide strategic action.¹⁴⁹ This myth is seductive for progressives: The image of mass mobilization echoes victories of the labor and civil rights movements that now are a distant memory. It also provides an explanation for the decline of progressive movements, assigning some responsibility to an emphasis on legalism. But the myth also can operate to obscure a balanced evaluation of the pros and cons of organizing versus law in specific political contexts.

It is thus important to retain a sense of proportion about the Workplace Project's achievements. While we in no way want to diminish its accomplishments—to the contrary, we believe that given the political and economic terrain, the Workplace Project used the resources it had to achieve astonishing victories—we do think it necessary to place its success in perspective. In terms of sheer numbers, the Workplace Project remained a relatively small group. In 1998, the year Gordon left the organization to write and teach, there were 500 immigrants signed up as members of the organization, though the Workplace Project had only about twenty-five to thirty workers playing leadership roles and another fifty to seventy workers who participated less intensively.¹⁵⁰ This is no small feat, to be sure, but by no means did these workers represent a major force.

The book recounts organizing victories: raising wages for day laborers thirty percent by organizing street corners; getting two domestic worker referral agencies to sign on to a Domestic Worker Bill of Rights; and establishing a landscaping and domestic worker cooperative.¹⁵¹ But these victories were limited. The day laborer wage increase was sporadic and difficult to enforce; the Bill of Rights, although requiring a signed contract between the employer and worker enumerating the conditions of work did not raise the salaries of domestic workers beyond that already imposed by law; and the success of the cooperatives was difficult to evaluate.¹⁵² The legal clinic's campaigns to force employer payments were reactive, resource intensive, and ultimately achieved only individual recoveries.¹⁵³ Indeed, one of the paradoxes of the legal clinic's approach was that it used *collective* organizing to seek *individual* redress, with the workers' financial recovery tied to the enforcement of legal minimums.

¹⁴⁹ See, e.g., Wexler, *supra* note 23, at 1053 (“[T]he object of practicing poverty law must be to organize poor people, rather than to solve their legal problems.”).

¹⁵⁰ *Id.* at 112.

¹⁵¹ *Id.* at 93–104.

¹⁵² *Id.* Gordon, of course, acknowledges these drawbacks, mentioning the failure of the group to systematically raise wages, enforce its victories, or achieve significant scale. *Id.* at 69–70, 108–10. On worker cooperatives, see also Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181 (1999).

¹⁵³ GORDON, *supra* note 38, at 226.

The Workplace Project's role in the passage of the UWPA was a major victory, but one that was coordinated with other groups and ultimately bolstered the very type of legal rights enforcement that the Workplace Project sought to move beyond. The passage of the UWPA also highlighted additional constraints on collective action. While in its most robust form, collective action is designed to achieve ongoing influence over political decisionmaking, the most familiar result is simply some form of legislative change that codifies organizing demands.¹⁵⁴ Although legislative reform is often a powerful mechanism of redress, such reforms are also vulnerable to noncompliance and political backlash, and may also impose costs on social movement activity. For example, Gordon notes how the UWPA has been grossly underenforced: "In 1998, the first full year that the law was in effect, the [New York State Department of Labor] collected less money and helped far fewer workers than in 1995 or 1996."¹⁵⁵ The reason she identifies is the failure to continue organizing after achieving the legislative "win": "[B]ecause the Workplace Project did not continue to focus its organizing and advocacy work for the implementation of the law as it had for its passage, the Department of Labor was let off the hook."¹⁵⁶ The important lesson is that to the extent that organizing campaigns result in legal reforms, they are—like their litigation counterparts—susceptible to implementation problems.¹⁵⁷ Moreover, the codification of organizing in legislation also can have a demobilizing effect on activism¹⁵⁸—again, similar to what occurs in litigation.

Our point is not that legal action and collective action are the same, but rather that collective action is more contingent than is sometimes suggested, frequently resulting in reforms that are vulnerable to strategic nonenforcement, countermobilization, and political reversal. Legal action, in turn, also can be more robust than its critics allow, operating to open up possibilities for reform within concrete institutional settings.¹⁵⁹ In contrast to the instru-

¹⁵⁴ See *id.* at 463–64.

¹⁵⁵ Gordon, *Campaign for the Unpaid Wages Prohibition Act*, *supra* note 112, at 32.

¹⁵⁶ *Id.*

¹⁵⁷ Cf. HANDLER, *supra* note 11, at 18; ROSENBERG, *supra* note 114, at 21.

¹⁵⁸ Indeed, Gordon's recent work on the United Farm Workers ("UFW") suggests that legislative victories—such as the victory that the UFW achieved with the passage of the California Agricultural Labor Relations Act in 1975—are "at least as vulnerable to subversion as their judge-made cousins, given their highly public and—in comparison with litigation victories—often potentially more far-reaching character." Jennifer Gordon, *The Impact of a New Law on a Movement: The Case of the UFW and the California Agricultural Labor Relations Act*, in CAUSE LAWYERING AND SOCIAL MOVEMENTS, *supra* note 19.

¹⁵⁹ A relevant example from the garment industry is the work of the Asian Pacific American Legal Center ("APALC") in Los Angeles, which has used strategic impact litigation in an effort to extend liability for employment violations to the manufacturers and retailers of garments, rather than just the sweatshops where the clothes are made. APALC's strategy has achieved important, albeit still limited, successes. See, e.g., *Bureerong v. Uvawas*, 959 F. Supp. 1231 (C.D. Cal. 1997); *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996). For an account of APALC's work in the garment industry, see

mental vision of law that Gordon stakes out, we therefore believe that collective action and legal action might be better viewed as similar types of political tools, each with the potential to operate for good (or bad) depending on the particular conditions in which they are deployed.

2. *The Role of the Lawyer: Expertise and Accountability.*—The second principal organizational justification for privileging collective action over legal action is framed in terms of the risks posed by *lawyers* to social change, with the central focus on the issues of legal expertise and lawyer accountability. With respect to legal expertise, there is a current of distrust that runs through the Workplace Project. The concern is that lawyers, by virtue of their professional training and prestige, are apt to use their expertise in ways that disempower poor clients. As Gordon notes, “[o]nce a problem has been defined as part of the legal sphere, people are reluctant to take it back into their own hands.”¹⁶⁰ In her description of the Workplace Project, Gordon takes pains to emphasize the steps taken to foster inclusion, dialogue, and action by the immigrant workers who became members. The focus is on creating “paths to participation” through which workers learn to make their own decisions and solve their own problems.¹⁶¹ It is, in part, a story about her efforts to minimize her status as legal professional, to use it strategically as necessary, but to be vigilant lest her lawyer identity thwart participatory action.¹⁶²

This concern about professional expertise raises a number of important questions. For one, is it peculiar to lawyers? Do other professionals—doctors, for example—question the social relevance of their skills and training? Perhaps it is that lawyers stand in a different position vis-à-vis social change and marginalized communities than do other professionals and thus have a special obligation to use their power with sensitivity—even to the extent of trying to submerge the visible traces of its operation. Yet the notion that the social power that is conferred upon lawyers must be somehow restricted (or even eliminated) in order to effectuate real change is by no means self-evident.

This leads to another set of questions: Within the legal arena, is the distrust of expertise confined to progressive lawyers? Are conservative activist lawyers similarly wary of their power? It may be, in fact, that legal expertise is also viewed skeptically by conservative constituencies. Our impression, however, is that the concern about legal expertise is one felt more acutely on the left. Perhaps it is the case that there is something inherent in the left’s conception of social change—focused as it is on participation and empowerment—that produces a unique distrust of legal

Julie Su, *El Monte Thai Garment Workers: Slave Sweatshops*, in *NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS* 143 (Andrew Ross ed., 1997).

¹⁶⁰ Gordon, *supra* note 36, at 438–39.

¹⁶¹ GORDON, *supra* note 38, at 112.

¹⁶² *See id.* at 271.

expertise.¹⁶³ It is an issue worth further examination since it has real consequences for lawyering on the ground. For one, while skepticism about expertise may lead to a healthy dose of self-awareness among progressive lawyers as they interact with marginalized groups, it also may breed a devaluation of legal skills in a way that risks ceding the field of legal struggle to adversaries.¹⁶⁴ A focus on cabining lawyer expertise also may obscure the way that other “expertises” are deployed at the community level. For instance, there are organizers, social workers, and local business leaders who come to low-income communities with elite academic training and professional backgrounds. They, like lawyers, can use their skills in ways that impede community participation and empowerment.

The other risk to social change posed by lawyers relates to the issue of accountability. The idea is that we should be wary of lawyers, as outsiders to the community, making decisions that do not comport with the community’s interests. Gordon echoes this sentiment, which forms one of the foundational elements of the Workplace Project. Indeed, she recounts how, in the organization’s infancy, she worked to affirm the centrality of democratic participation by the workers, fearful that her status as “the consummate outsider: a white, middle-class lawyer with an elite education” would ultimately “concentrate power in my hands, both within the organization and in the eyes of the outside world.”¹⁶⁵

Gordon’s concern with lawyer accountability echoes other critiques of public interest lawyering.¹⁶⁶ In a well-known article, Derrick Bell criticized the NAACP’s accountability to its constituency, arguing that middle-class black and white lawyers were pushing an integrationist agenda that did not always square with the needs of the black community for quality schools.¹⁶⁷ In the early 1990s, during the period when Gordon was a law student, poverty law scholars warned that lawyers—particularly white lawyers operating across dimensions of race and class—reinforced the marginalization of low-income clients, to whom there was little accountability for outcomes. Gerald López, in particular, critiqued poverty lawyers as insensitive to their clients’ own problem-solving skills.¹⁶⁸ His response to this problem was to

¹⁶³ We thank Tanina Rostain, Professor of Law at New York Law School, for this insight.

¹⁶⁴ See Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993); see also Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics* (June 2003) (unpublished manuscript, on file with authors).

¹⁶⁵ GORDON, *supra* note 38, at 74–75.

¹⁶⁶ We thank Sameer Ashar, Assistant Professor of Law at CUNY School of Law, for pointing this out to us.

¹⁶⁷ Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests*, 85 YALE L.J. 470 (1976).

¹⁶⁸ LÓPEZ, *supra* note 34; see also 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 BUFF. L. REV. 1 (1990).

encourage greater client participation in the process of representation—an idea he called “lay lawyering.”¹⁶⁹

The structure of the Workplace Project, built around the centrality of worker participation with lawyers in an ancillary role, is an effort to navigate the accountability issue. Yet in the organizing context, accountability questions do not disappear, they only change. Who speaks for the community is a problematic issue in a membership-based organization where particular individuals rise as leaders of the group.¹⁷⁰ There are also individual-group conflicts, made particularly acute by the structure of the Workplace Project’s legal clinic, which required participation in group activities in exchange for individual legal services. This raises difficult conflicts issues, for example, when a client wants to cut a confidential settlement deal and run, while the organization wants to fight out a wage dispute publicly in order to bring more workers into the organizing fold. The Workplace Project had devices in place for dealing with this, such as up-front client waivers of confidential settlement agreements.¹⁷¹ But even with such waivers, it is not clear as a matter of principle how one should resolve this tension between individual client interests and group solidarity.¹⁷²

In the end, the conflicts Gordon identifies between lawyering and organizing were resolved by eliminating the lawyer from the Workplace Project structure. A year and a half after Gordon’s departure, the leaders of the group instituted a new program, called the Alianza para la Justicia (Spanish for the Alliance for Justice), which “eliminated the legal clinic and its problematic lawyer-client relationship altogether.”¹⁷³ In its place, the Workplace Project adopted a “structure of industry-based workers committees,”¹⁷⁴ in which workers and committee members would confront employers, write letters, and picket businesses.¹⁷⁵ While there are no longer practicing lawyers on staff, the Workplace Project does assign some cases to outside pro bono counsel. In its current form, the Workplace Project therefore operates like a straight organizing group, albeit one that employs law school gradu-

¹⁶⁹ Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984). More recently, William Simon has suggested that the lack of lawyer-monitoring mechanisms and the idea that rights are analytically derived by legal professionals have weakened lawyer accountability in the public interest law context. Simon, *supra* note 37, at 164.

¹⁷⁰ See Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103 (1992).

¹⁷¹ GORDON, *supra* note 38, at 208.

¹⁷² As a guide, Gordon references the United Farm Workers practice of sacrificing individual claims to win a collective bargaining agreement. *Id.* at 211.

¹⁷³ *Id.* at 215 (quoting Saru Jayaraman, a recent law school graduate hired in 2000 as the legal clinic coordinator for the Workplace Project).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 215–16.

ates and generates its organizing campaigns out of individual worker grievances.¹⁷⁶

3. *The Role of the Client: Empowerment Through Participation.*—

The third principal organizational justification for privileging collective action over legal action is that it empowers immigrant workers. As Gordon explains, through the process of organizing, community members who initially thought of themselves as “afraid,” “invisible,” or “nobody” were able to become “effective political actors.”¹⁷⁷ The Workplace Project was created as a place where “immigrant workers should run their own center and fight their own battles.”¹⁷⁸ Collective action, then, was a vehicle not simply for achieving economic benefits, but for promoting worker participation and leadership.

Gordon offers two different versions of why member participation was valued, both rooted in a conception of member empowerment. On the one hand, it is suggested that the principle of democratic participation was important precisely because it deepened the sense of what workers believed they could achieve. In particular, it shifted their perception about the importance of collective action and produced a sense of internal efficacy that could be carried into other political arenas.¹⁷⁹

Yet Gordon does not assert the significance of participation as an end in itself. Rather, she emphasizes the importance of translating internal power into external change: “If internal power is understood merely as an emphasis on cooperation and personal growth, and cultivated in isolation from the question of how the group can challenge the existing balance of power, it is unlikely to result in structural change, because structural change requires engagement with structural power.”¹⁸⁰ However, the language that she uses to describe the results of the Workplace Project’s experiment in mobilizing internal power to produce structural reform is often couched in possibility and potential rather than in concrete examples and evidence. She notes that participation has “the potential to have far more of a collective impact that we can measure by looking at one slice of time” and suggests that “in the long term” there is the possibility of building participation into a larger social movement.¹⁸¹ In the meantime, the structural impact of

¹⁷⁶ Gordon is critical of the elimination of lawyers, calling it “naïve.” *Id.* at 195. She is also critical of the new clinic structure, suggesting that planning organizing in reaction to worker problems that come in the door focuses too much on enforcing legal minimums rather than generating higher workplace standards. *Id.* at 220–22. One solution that Gordon proposes is to plan organizing campaigns on the basis of independent research and analysis, setting long-term strategy focused on industries where “wins” are most likely to be achieved. *Id.* at 227.

¹⁷⁷ *Id.* at 9.

¹⁷⁸ *Id.* at 70.

¹⁷⁹ *Id.* at 143–44.

¹⁸⁰ *Id.* at 147.

¹⁸¹ *Id.* at 145.

empowerment may be visible in terms of the way immigrant workers relate to community institutions—becoming more active in their children’s schools, remaining involved in home country politics, and starting up mutual help community organizations.¹⁸²

There is nothing wrong with planting the seeds of reform and placing one’s hope for change in the harvest to come. And, certainly, there are important reasons to want to promote legal consciousness among the poor. But there are risks in this strategy, not the least of which is exaggerating the autonomy of the poor in a way that obscures the structural nature of their condition and the need for some sort of society-wide response.¹⁸³ The question is: How does changed consciousness become imprinted on the world outside in the form of different laws, restructured economic relationships, or concrete political power? The book does provide one powerful example of the move to political participation in the example of member leadership in the passage of the UWPA. Others stories like this would be useful.

There is also the important question of how to evaluate worker empowerment in the context of a legal clinic that requested organizational participation as a condition of free legal help.¹⁸⁴ Group participation was a radical idea that responded to the left’s critique of public interest law by linking individual representation to organizing, but it subjected Gordon to criticism from lawyers and academics who worried that she was using the promise of legal help to coerce vulnerable clients into organizing.¹⁸⁵ Gordon responds that rationing legal services is a necessity in a world of scarce resources. Asking clients to make contributions to the organization—even if it simply means attending a Workers Course—in order to receive free services is just as legitimate as other methods of client triage.¹⁸⁶ But the fact that some workers may have joined in organizing activities as the only way to get free legal help complicates any effort to evaluate how

¹⁸² *Id.*

¹⁸³ See Frank Munger, *Rights in the Shadow of Class: Poverty, Welfare, and the Law*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 336 (Austin Sarat ed., 2004); see also Joel F. Handler, *Quiescence: The Scylla and Charybdis of Empowerment*, in LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY 271, 272 (Frank Munger ed., 2002).

¹⁸⁴ In Gordon’s words, legal services were “the Project’s half of a bargain in which a worker ‘pays back’ in time what she receives in legal representation.” GORDON, *supra* note 38, at 197. Clients were told that “although the Workplace Project would readily provide free legal counseling, for actual services the ‘client’ must commit to giving back to the organization. The organizer then provided an overview of the Project’s programs and gave examples of ways in which the worker could participate, culminating with the Workers Course.” *Id.* at 198. Although participation in Workplace Project activities was not mandatory, Gordon notes that “in the end, few workers balked at this commitment. Only about one in ten workers chose the ‘counseling’ alternative, rather than choosing to participate in the organization, possibly because the requirements were not particularly onerous.” *Id.* at 198.

¹⁸⁵ *Id.* at 204; see also Cummings & Eagly, *supra* note 36, at 495–97.

¹⁸⁶ GORDON, *supra* note 38, at 205.

successful the Workplace Project was in staying true to its mission of worker empowerment.

III. BEYOND CRITIQUE: THE FUTURE OF PUBLIC INTEREST LAW

In the end, *Suburban Sweatshops* is poised between two distinct conceptions of public interest lawyering. At times, it tilts toward a critical view rooted in concerns about the effectiveness of litigation and lawyer domination that have become so familiar in the academic literature over the past twenty-five years. Legal skills, as such, are downplayed, even ignored. Organizing is given political priority. The goal of the Workplace Project is framed in terms of democratizing lawyering, incorporating clients into the process of representation as a means of empowerment.

Yet the Workplace Project does not simply institutionalize the dominant liberal critique of public interest lawyering. Gordon is not narrowly focused on raising client consciousness; she cares about building power and challenging structural inequities and there is no question she views lawyers as important to this project. Thus, the book also signals a different conception of lawyering, one that moves beyond critique toward an understanding of lawyering as an important political resource—one that is, to be sure, subject to constraints, but that nevertheless can be combined with other political strategies in a sophisticated approach to mobilize power and alter structural relationships.¹⁸⁷ As Gordon notes, a “vision of law as a part of a larger strategy to move power is the best vision we have.”¹⁸⁸ Within this vision, law is coordinated in multidimensional strategic campaigns to advance group interests. These campaigns combine litigation with community education and legislative advocacy,¹⁸⁹ all of which are viewed as providing opportunities to press demands while also remaining subject to their own unique limitations. Indeed, Gordon’s work at the Workplace Project is emblematic of a style of lawyering that is highly integrated with political activity outside of court.¹⁹⁰

This vision grows out of a critique of lawyering that recognizes the limitations of the conventional model of practice. Yet it also advances beyond the critical discourse by moving into an examination of active lawyer-

¹⁸⁷ This view resonates with Michael McCann and Helena Silverstein’s research on cause lawyers in the pay equity and animal rights contexts. See 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, *supra* note 30, at 261, 266 (finding that “nearly all of the cause lawyers in our movement studies viewed law, litigation, and legal tactics in a skeptical, politically sophisticated manner”); see also RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994* (1995); Ann Southworth, *Lawyers and the Myth of Rights in Civil Rights and Poverty Law Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

¹⁸⁸ GORDON, *supra* note 38, at 302.

¹⁸⁹ See McCann & Silverstein, *supra* note 187, at 269 (calling this “flexible” lawyering).

¹⁹⁰ See Cummings, *supra* note 111 (referring to this as “mobilization lawyering”).

community collaborations that are not focused solely on what the lawyer does *wrong*, but rather thoughtfully examine what she does *right*.¹⁹¹ From a public interest perspective, Gordon's major scholarly contribution is that she opens the door in this regard. However, the book's discussions of the actual lawyering within the Workplace Project are limited, primarily focused on descriptions of lawyers conducting community education classes or filing simple lawsuits. A more robust examination of *lawyering* is therefore in order—one that focuses on a politically sophisticated, multi-dimensional approach that deploys technical legal skills to engage questions of political economy, while remaining sensitive to issues of community empowerment. As scholars undertake this project, we suggest that they be mindful of the central political challenges, theoretical options, and methodological issues that we sketch out here.

A. Central Challenges

Within the terrain of public interest law, practitioners face a new configuration of political resources and obstacles. For lawyers to navigate this terrain effectively, they need a deep understanding of the new political map, which is where scholarly inquiry can assist by clarifying changes, identifying opportunities, and describing innovative practices. To facilitate this inquiry, we draw attention to three challenges that—although surely not the only ones that lawyers face—raise some of the most critical issues for public interest lawyers in the new environment and thus require closer scholarly examination.

I. Race.—The question of racial justice has dominated public interest law since its inception. The realization of formal legal equality coupled with the persistence of substantive inequality has forced a reexamination of legal rights strategies in light of structural racism.¹⁹² Within the academic arena, critical race scholars have focused primarily on how law has contributed to the maintenance of racial subordination and have sought to challenge racial oppression by asserting alternative constructions of social reality as it relates to race.¹⁹³ There generally has been less attention paid to lawyering strategies designed to promote racial justice, although there is a growing body of important work in this regard.¹⁹⁴ Here, we highlight three trends in racial justice lawyering that warrant further inquiry.

¹⁹¹ We acknowledge Louise Trubek for this insight and are indebted to her for pushing us to look “beyond critique.” See Louise G. Trubek, *The New Movement Lawyers: Law, Power, and Politics*, Law and Society Annual Meeting (May 27, 2004).

¹⁹² See *Introduction* to *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995).

¹⁹³ See *id.*

¹⁹⁴ See, e.g., Muneer Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); Ashar, *supra* note 60; Shelia Foster, *Justice from the Ground up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86

One is the development of alternative lawyering practices around racial justice issues. These practices are generally focused on community-based strategies, and have been discussed most prominently in the arenas of community economic development and environmental justice. Penda Hair's 2001 report to the Rockefeller Foundation on the state of civil rights advocacy highlighted lawyering stories with strong grassroots components: the Los Angeles Asian Pacific American Legal Center's campaign against garment sweatshops; the Los Angeles Bus Riders Union's efforts to prevent cuts to bus service upon which working-class residents of color relied; UNITE's successful campaign in Greensboro, North Carolina to win union representation for primarily African American Kmart workers; and the struggle to block the building of a garage in Boston's Chinatown.¹⁹⁵ The critical question is how these strategies relate to altering the structures of racial subordination. They do not focus primarily on changing the political system as it relates to racial inequality in the short term, but rather seek to build community power with an eye toward longer term community development and political engagement. One of the interesting issues raised involves the degree to which these types of strategies promote multiracial and multiethnic alliances over single-race strategies. In addition, all of these projects overlay dimensions of class onto racial justice advocacy in a way that invites further scrutiny.

Another important development is the incorporation of new understandings of discrimination, grounded in scientific knowledge about the psychological and cognitive dimensions of racial bias,¹⁹⁶ within legal advocacy strategies. Part of this effort has built upon scholarly research challenging the common understanding of discrimination as intentional conduct by showing that people are often unconscious of their own bias.¹⁹⁷ However, the goal of translating such research findings into changes in legal doctrine has so far met with little success, although efforts are underway by groups like the Equal Justice Society to promote doctrinal reform.¹⁹⁸ Gary

CAL. L. REV. 775 (1998); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201 (1999); Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 815 (1990); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997); see also Symposium, *Critical Race Lawyering*, 73 FORDHAM L. REV. 2027 (2005).

¹⁹⁵ PENDA D. HAIR, *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE* (2001), available at http://www.rockfound.org/Library/Louder_Than_Words_-_Lawyers,_Communities_and_the_Struggle_for_Justice.pdf.

¹⁹⁶ See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

¹⁹⁷ See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁹⁸ See Susan Kiyomi Serrano, *Dismantling the Intent Doctrine and Healing Racial Wounds*, AM. CONSTITUTIONAL SOC'Y BLOG, Mar. 7, 2005, <http://www.acsblog.org/equal-protection-and-due-process-962-guest-blogger-dismantling-the-intent-doctrine-and-healing-racial-wounds.html>.

Blasi has recently used current scientific research to suggest new ways that lawyers can advocate “against stereotype”—for example, by introducing counter-stereotypical examples of clients to counteract jurors’ implicit biases.¹⁹⁹

Finally, there has been a greater focus on the lawyer-client relationship as a site in which the struggle for racial equality is enacted.²⁰⁰ This stems from Bell’s and López’s critiques of public interest lawyering, which were, in part, critiques of white lawyer insensitivity to the concerns, needs, and contributions of clients of color. As a result, innovative examples of lawyering in the racial justice arena have concentrated on promoting greater attorney-client collaboration and challenging status hierarchy.²⁰¹ Yet more research is needed to understand the dynamics of client participation and how such collaborative relationships translate into concrete advances in promoting racial justice.

2. *The Role of the State.*—Scholars have long drawn attention to the importance of the state to the reformist aspirations of public interest lawyers.²⁰² The state sets the terms of legal intervention²⁰³—supplying substantive rights, procedural rules, and legal resources—while also providing a primary target for legal reform.²⁰⁴ Louise Trubek has suggested that the changing nature of the federal government has created opportunities for distinct types of advocacy, while also erecting new challenges.²⁰⁵ In particular, the decentralization of administrative authority from the federal government to states and localities, combined with the privatization of important governmental functions have placed a premium on a more collaborative style of lawyering focused on the development of public-private partnerships.²⁰⁶ Perhaps the best example of this collaborative style is community economic development lawyering, which focuses on designing public-private partner-

¹⁹⁹ Gary Blasi, *Advocacy Against Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002).

²⁰⁰ See HAIR, *supra* note 195, at 141, 143.

²⁰¹ See *id.* at 143.

²⁰² See Stuart A. Scheingold, *Cause Lawyering and Democracy in Transnational Perspective: A Postscript*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 382, 389–91 (Austin Sarat & Stuart Scheingold eds., 2001).

²⁰³ See Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY, *supra* note 183, at 506; Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 30, at 3, 8–10.

²⁰⁴ See Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering During the Enactment of the Americans with Disabilities Act*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 202, at 211, 212 (“The role of the lawyers is to mediate between the citizenry and the state.”).

²⁰⁵ Trubek, *supra* note 1, at 458–61.

²⁰⁶ *Id.*

ships to build affordable housing, create jobs, and increase services in low-income communities.²⁰⁷

While such partnerships create new ways of leveraging resources and promoting community participation, they also disclaim any vision of legal reform in the sense of articulating public rights with universal application. Thus, while the federal government creates incentives for private sector activity, it is not viewed as a source of rights articulation or broad regulatory transformation, at least with respect to issues of concern to the left. As a result, liberal public interest lawyers have looked away from the federal government as a resource and toward state and local governments as a potential site of reform—a development seen in the gay rights movement.²⁰⁸ At the same time, liberal public interest lawyers have fought battles against the centralization of federal power in other arenas, such as protecting civil liberties in the context of the federally coordinated “War on Terror.”²⁰⁹ In the current political context, public interest lawyers on the left thus have to negotiate their relationship with multiple sources of state power, exploiting openings at the local level for creative advocacy, while fighting defensive battles against centralized federal power.

3. *The Right.*—On the right, the picture is inverted. The consolidation of federal governmental power by Republicans has generated opportunities for conservative lawyers to press their causes. As Ann Southworth documents, the rise of a conservative legal movement in response to the perceived domination of federal courts and administrative agencies by liberal advocacy groups has generated an extensive and well-funded network of conservative public interest organizations sponsored by business interests, religious conservatives, law and order groups, and libertarian organizations.²¹⁰ The largest of these groups—including the Pacific Legal Foundation, the Institute for Justice, and the Alliance Defense Fund—have annual budgets of over \$5 million dollars.²¹¹ The emergence of these groups poses a fundamental challenge to liberal public interest lawyers. For one, they advocate a political agenda that seeks to roll back many liberal public interest victories, such as “the right to abortions under *Roe v. Wade*, constitutional protections for criminal defendants, and Establishment Clause restrictions on school voucher programs.”²¹² They also work to in-

²⁰⁷ See Cummings, *supra* note 111.

²⁰⁸ See Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 77 (2005) (“Because the heterosexist doctrine in *Bowers* heavily influenced federal court jurisprudence concerning gay and lesbian issues, pro-gay social movements adopted a new strategy. They pursued litigation in state courts and the exertion of influence in those state and municipal legislatures that were receptive to antiheterosexist politics.”).

²⁰⁹ See Linda Greenhouse, *The Supreme Court: Detainees, Access to Courts*, N.Y. TIMES, June 29, 2004, at A1.

²¹⁰ Southworth, *supra* note 24, at 1225.

²¹¹ *Id.* at 1268.

²¹² *Id.*

validate affirmative action, scale back economic regulation, promote property rights, challenge political activity by unions, and promote government benefits for religious groups.²¹³ They aggressively use legal advocacy to pursue their goals and see the Supreme Court as a potentially favorable target: Southworth reports that from 2000 to 2004, forty-two conservative and libertarian public interest groups filed briefs in 144 Supreme Court cases.²¹⁴ In addition to setting a political agenda to which liberal groups must respond, conservative public interest organizations also compete for resources—for example, increasingly calling upon firms for pro bono representation.²¹⁵ More fundamentally, the rise of a conservative counterpart to liberal public interest groups asserts an ideological challenge to the very meaning of the “public interest” by importing a range of conservative values into its definition.²¹⁶

B. Theoretical Frames

For scholars analyzing the interplay between public interest lawyering and social change, there are a range of theoretical frames from which to draw, each of which focuses on different dimensions of lawyering and has distinct implications for the way the legal practice is evaluated. *Suburban Sweatshops* does not explicitly adopt any particular theory, but draws upon aspects of the following theoretical frameworks in analyzing the strategies, tactics, and successes of the Workplace Project.

The first framework for understanding public interest lawyering comes from *social movement theory*.²¹⁷ In social movement theory, scholars examine the formation, activities, and outcomes of social movements by focusing primary attention on the *political context* within which they operate and the *resources* they are able to mobilize and deploy.²¹⁸ Thus, scholars emphasize

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1258.

²¹⁶ *Id.* at 1224.

²¹⁷ See generally DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970* (1982); ALDON MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* (1984); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1979); SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* (1988); RALPH H. TURNER & LEWIS M. KILLIAN, *COLLECTIVE BEHAVIOR* (1987); Doug McAdam, John D. McCarthy & Mayer N. Zald, *Social Movements*, in *HANDBOOK OF SOCIOLOGY* 695 (Neil Smelser ed., 1988); Charles Tilly, *Social Movements and National Politics*, in *STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY* 297 (Charles Bright & Susan Harding eds., 1984).

²¹⁸ See Michael McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 80 (Bryant G. Garth & Austin Sarat eds., 1998) (“The political process approach categorizes [movement] dynamics in terms of changing (1) systemic opportunities for, and vulnerabilities to, challenge from traditionally marginalized citizens; and (2) movement resources, including financial resources, cultural discourses, indigenous associations, and third-party support from government, elite patrons, allied groups, and so on.”).

the importance of the political opportunity structure in generating movement activities, defining the range of tactics, and identifying political targets and goals.²¹⁹ The legal regime forms a central part of the political context both in the sense that it offers an institutional forum for attacking injustice as well as providing symbolic resources (for example, rights) for movement activists.²²⁰ Movement actors—allies, adversaries, and bystanders—are critical players within the political opportunity structure; their fluid relationships and shifting allegiances generate coalitions, sympathizers, and countermovements.²²¹ In order to take advantage of political opportunities, collective action depends heavily on the capacity to gain access to resources (financial, organizational, personal) and convert them into tools for advancing collective goals.²²² Resources are necessary to overcome the free rider problem faced by groups seeking to provide collective goods,²²³ but also to sustain organizational activity and mount campaigns to achieve strategic goals.²²⁴ Importantly, while resources are necessary to enable collective action, they also impose constraints, steering movement activity into channels favored by important resource suppliers.²²⁵

A social movement frame tends to locate power within large institutional structures: governmental entities, private corporations, and mass-based organizations. In social movement theory, lawyering is examined as it relates to the building of power by nonelites at different phases in the development of collective action strategies. Thus, Michael McCann describes how lawyering contributes to movements by helping to “name” existing injustices, providing “leverage” for the resolution of disputes, and promoting the design and implementation of policy.²²⁶ This framework is useful for understanding the Workplace Project, which is self-consciously part of both

²¹⁹ Kriesi, *supra* note 59, at 67, 69. On political process versus resource mobilization, see also Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552 (1984).

²²⁰ McCann, *supra* note 218, at 82.

²²¹ See Dieter Rucht, *Movement Allies, Adversaries, and Third Parties*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 59, at 197.

²²² See Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 59, at 116; see also McCann, *supra* note 218, at 80 (identifying movement resources as “including financial resources, cultural discourses, indigenous associations, and third-party support from government, elite patrons, allied groups, and so on”).

²²³ See J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 537–38 (1983). For additional background, the classic work on collective action is MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

²²⁴ See Edwards & McCarthy, *supra* note 222, at 116.

Mobilization is the process by which a group secures collective control over the resources needed for collective action. The major issues, therefore, are the resources controlled by the group prior to mobilization efforts, the processes by which the group pools resources and directs these toward social change, and the extent to which outsiders increase the pool of resources.

Jenkins, *supra* note 223, at 533.

²²⁵ See Edwards & McCarthy, *supra* note 222, at 135.

²²⁶ McCann, *supra* note 203, at 511, 513–15.

the labor movement and community organizing traditions. The Workplace Project's use of rights to "name" the problem of sweatshop abuse, its deployment of wage-and-hour lawsuits to pressure employer concessions, and its use of legal knowledge about labor violations to promote the enactment of the legislation all fit within a social movement lens.

Another framework is that of *postmodernism*,²²⁷ which scholars used commonly during the 1980s and 1990s to examine the lawyer-client relationship in the poverty law context. We note two key postmodern ideas that have been associated most closely with public interest scholarship. The first is the notion that stories matter: The stories we tell about poor clients shape their individual identities.²²⁸ The second idea is that power is diffuse and malleable. It does not reside in stable hegemonic structures, but rather permeates all aspects of social interaction in deeply contested ways.²²⁹ The instability of power means that it is constantly open to disruption by small-scale acts of resistance.²³⁰ Within this framework, lawyering is seen as either oppressing clients by reinforcing stories of client powerlessness, or empowering clients by helping to construct stories of client agency and activate client resistance.²³¹ Again, lawyering within the Workplace Project could be read through this lens, particularly the efforts to build "internal power" through participation in labor organizing,²³² to use "rights talk" to help immigrant workers construct their own vision of social justice and mobilization,²³³ and to help workers "*talk themselves into* their own agency" in the UWPA campaign.²³⁴

A third framework is what some have labeled *experimentalism*. Conceived as a framework for understanding new forms of regulation in which power is decentralized to promote solutions adapted to local situations,²³⁵

²²⁷ See generally LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION (Maureen Cain & Christine B. Harrington eds., 1994).

²²⁸ See Alfieri, *supra* note 168, at 2123–30.

²²⁹ Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 700 (1992). This notion of power is drawn from Michel Foucault. See MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 98 (Colin Gordon ed., 1980).

²³⁰ Handler, *supra* note 229, at 701.

²³¹ See Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 862 (1990).

²³² GORDON, *supra* note 38, at 143.

²³³ *Id.* at 184 (stating that rights talk built "a new consciousness" among workers, resulting in "the shaping of a new element of their identity, a sense that the term 'immigrant workers' not only described the fact of their exile . . . , but a fuller story about themselves . . . [that] implied a commitment to action").

²³⁴ *Id.* at 272; see also *id.* ("Through talk—a particular kind of talk, focused on analyzing a situation critically and creating a solution, in a context of institutional support for action—they developed a vision of themselves as legitimate and capable actors in the political system.").

²³⁵ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998).

experimentalism has come to be associated, more broadly, with “collaborative” forms of problem-solving that involve multiple “stakeholders” to resolve entrenched disputes through the design of flexible and participatory processes.²³⁶ William Simon has imported experimentalism into the domain of public interest lawyering, describing a new “pragmatist” version of lawyering that corresponds to experimentalist themes.²³⁷ Through the experimentalist lens, lawyering is viewed as connected to new problem-solving techniques that promote public-private partnerships, enhance community input into the design and implementation of policy, emphasize information-sharing, and value long-term, open-ended regulatory structures.²³⁸ In this sense, experimentalism shares themes in common with social movement theory and postmodernism. Like social movement theory, it focuses on institutions and relationships between social-change actors; yet, in contrast to social movement theory, it values collaboration over adversarial confrontation. Like postmodernism, it is focused on participation, but participation is grounded in concrete institutional settings.

Drawing on experimentalism, one could situate the Workplace Project within a broader map of institutional relationships that includes labor unions, foundations, other legal services providers, immigrant rights groups, and other organizations. There is certainly collaboration evident in the Workplace Project—again seen in the formation of the coalition that gained passage of the UWPA. Yet there is a disjuncture between experimentalism and the Workplace Project’s confrontational approach to politics and its self-conception as part of a movement with clear adversaries. There are other examples of experimentalist approaches in the labor context, such as the collaboration between unions, community groups, the New York Attorney General, and industry representatives that resulted in the settlement of suits against New York City greengrocers and the adoption of a Greengrocer Code of Conduct that specifies standards for labor compliance.²³⁹ In ad-

²³⁶ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 498, 500 (2001).

²³⁷ Simon, *supra* note 37.

²³⁸ *Id.* at 173–98; see also Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

²³⁹ See Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183 (2003). The Code of Conduct arose out of a series of investigations launched in 1999 by the New York Attorney General’s Labor Bureau after receiving referrals from community and labor organizations of greengrocery workers who had suffered severe wage and hour violations. *Id.* at 192. As evidence of the pervasiveness of such violations in the greengrocer industry grew and the Labor Bureau vowed to step up enforcement, a greengrocer industry group entered negotiations with the Labor Bureau, worker representatives, and the AFL-CIO to craft a proactive solution. *Id.* at 194. The outcome was a Code of Conduct that, while restating the greengrocers’ obligation to follow labor law minimums, also requires signatories to provide some additional employment benefits, submit to random monitoring by an independent monitor, refrain from retaliating against workers who complain about Code violations, and aver that it is good business practice to exceed the minimum legal requirements with respect to wages and other employment practices (though there is no

dition, other modes of lawyering, such as in the fields of community economic development or health care,²⁴⁰ share much in common with experimentalist themes.

C. Methodology

Suburban Sweatshops also suggests that a shift is underway in the methodology of public interest law scholarship, which has been the focus of some debate. We roughly divide public interest scholarship into three different methodological categories. The first, which prevailed during the 1970s and 1980s, took an empirical, often quantitative approach, seeking to catalogue the development of the new public interest organizational structure.²⁴¹ This scholarship emanated largely from the field of law and society and focused on the social organization of public interest practice.²⁴² As such, the process of lawyering was not a primary concern.

The second approach, which prevailed in the late 1980s and 1990s, focused on grassroots studies of lawyering and emphasized the way that law and lawyers reinforced client subordination. The studies examined how “everyday forms of resistance” by clients could disrupt hegemonic structures and hierarchical relationships.²⁴³ The focus was on individual agency, and the studies were more explicitly normative in the sense that they advocated particular models of lawyering that claimed to best facilitate client empowerment and—more tentatively—political transformation. Much of this scholarship came out of the world of clinical education, where the focus on the lawyering process mapped onto the scholarly emphasis on the power dynamics that circulated within the lawyer-client relationship. The main critique of this methodology was that, by focusing on lawyer domination, it ignored the more serious structural causes of client subordination.²⁴⁴

obligation to do so). *Id.* at 194–98. As part of the final deal, the Labor Bureau agreed not to investigate signatories for prior wage and hour violations. *Id.* at 199.

²⁴⁰ On community economic development, see generally WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001). *But see* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399 (2001) (describing more confrontational approaches to community economic development). On health care, see Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 *WIS. L. REV.* 575.

²⁴¹ *See, e.g.*, ARON, *supra* note 4; COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (1976); HANDLER, *supra* note 11; HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 1; MARKS ET AL., *supra* note 23; KAREN O’CONNOR & LEE EPSTEIN, *PUBLIC INTEREST LAW GROUPS: INSTITUTIONAL PROFILES* (1989). *See generally* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS, *supra* note 23.

²⁴² *See, e.g.*, KATZ, *supra* note 11; Abel, *supra* note 11.

²⁴³ *See* Munger, *supra* note 183, at 336. The most well-known examples are LÓPEZ, *supra* note 168; Alfieri, *supra* note 168; White, *supra* note 168.

²⁴⁴ *See* Gary L. Blasi, *What’s a Theory for?: Notes on Reconstructing Poverty Law Scholarship*, 48 *U. MIAMI L. REV.* 1063, 1089 (1994); Handler, *supra* note 229, at 726; William H. Simon, *The Dark*

The new wave of public interest scholarship,²⁴⁵ of which *Suburban Sweatshops* is a part, is careful not to deemphasize political context, which was the criticism of the second approach. Yet, unlike the scholarship of the first wave, it is also keenly attuned to lawyering practice. The approach of the third wave can be characterized as mapping *institutionally embedded legal practice*. This methodology views public interest lawyering as both constituted by and transformative of institutional settings. It thus draws upon reflexive sociological theories and an interpretive approach to legal professionalism to suggest a picture of legal practice that is neither structurally unconstrained nor completely determined.²⁴⁶ Lawyering is situated within concrete institutional structures that operate to both facilitate and constrain behavior, providing “normative frameworks that both structure and give meaning to human interaction.”²⁴⁷ Yet the fact that institutions impose taken-for-granted scripts on actors within them does not mean that action is predetermined; rather, the ambiguity of institutional norms leaves open the possibility for innovation and transformation.²⁴⁸ Gordon’s book is an example of this, describing a legal practice powerfully constrained by the global political economy of sweatshop work, while nevertheless finding openings to mobilize rights, winning significant victories for individual workers, and creating unexpected coalitions in lobbying for more protective labor laws. Other important examples of this approach are Austin Sarat and Stuart Scheingold’s cause lawyering project,²⁴⁹ and Michael McCann’s work on lawyers in the pay equity movement,²⁵⁰ both of which have offered textured, institutionally focused examinations of lawyering. This scholarship has come from both the traditional law and society and clinical fields. Going forward, the scholarly agenda should include both an updated empirical assessment of the public interest law field—where its lawyers prac-

Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era, 48 U. MIAMI L. REV. 1099, 1100 (1994).

²⁴⁵ See Mark Suchman, *The Many Faces of Public Interest Law*, Address at the Law and Society Annual Meeting (June 3, 2005).

²⁴⁶ See Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 22 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992). This approach draws upon the social theory of Pierre Bourdieu. See PIERRE BOURDIEU & LOÏC J.D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* (1992); see also Austin Sarat & Stuart Scheingold, *The Dynamics of Cause Lawyering: Constraints and Opportunities*, in *THE WORLD CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 1, 8 (Austin Sarat & Stuart A. Scheingold eds., 2005) [hereinafter *THE WORLD CAUSE LAWYERS MAKE*].

²⁴⁷ Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 *LAW & SOC’Y REV.* 11, 15 (2005).

²⁴⁸ HANDLER, *supra* note 27, at 22–23.

²⁴⁹ CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 202; CAUSE LAWYERING AND SOCIAL MOVEMENTS, *supra* note 19; SCHEINGOLD & SARAT, *supra* note 2; THE WORLDS CAUSE LAWYERS MAKE, *supra* note 246.

²⁵⁰ MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

tice, what they do, and what they think about their work—as well as case studies and interpretive accounts that map public interest lawyering within distinct institutional settings.

CONCLUSION

Suburban Sweatshops stands as an enormously important contribution to the field of public interest law scholarship, a book that is at once theoretically powerful, historically grounded, and rich in ethnographic detail. It tells a compelling story about lawyering and organizing against all odds, a story that does not shy away from the implacable hardships that immigrant workers face, but still offers hope about the potential of courage and tenacity to transform individual lives and reshape society. As such, it deserves a place among the seminal works in the field.

It is also a book that sits at a crucial crossroads, referencing where public interest lawyering has been and pointing to where it is going. It resists easy dichotomies—neither a nostalgic story about the heroic lawyer who uses her intellect and professional skill to create new law, nor one about the bad lawyer whose disregard for the interests of marginalized communities ends up undermining meaningful social change. It is instead a story about the complexity of lawyering in a politically sensitive way, one that listens to client voices, collaborates with other social change actors, and uses legal expertise as a complementary political strategy.

Our review Essay has sought to link Gordon's work to broader changes in the field of public interest law practice, both as a way to underscore the importance of her contributions and build a bridge to future advocacy and scholarship in the field. Our critical analysis of the Workplace Project is meant to challenge the orthodox view that lawyering as such is a politically marginal strategy, which we believe is both inaccurate and counterproductive. Indeed, we see the power of Gordon's account in its portrayal of her own experience as a lawyer struggling to create space for reform in the recalcitrant world of underground work. She leaves us with the legacy of the Workplace Project—an institutional space within which the struggle for immigrant worker rights will proceed. But she also leaves us with her story of possibility, which will leave a lasting imprint on the shape of public interest lawyering to come.

