

# COLLABORATIVE LAWYERING IN TRANSNATIONAL HUMAN RIGHTS ADVOCACY

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*The practice of transnational human rights lawyering to date has been largely divorced from many of the contributions of U.S. poverty and environmental justice lawyers who have adopted critical lawyering methodologies seeking to amplify community power and serve their clients' visions of justice. This paper is a first step towards translating those critical lawyering methodologies into practical guidance for transnational human rights advocates. The paper begins by drawing out common themes from the critical lawyering methodologies. It then discusses how the dominant methodology for human rights advocacy fails to incorporate these critical lawyering methodologies, and how the primary critiques of human rights advocacy do not provide practical guidance for practitioners interested in instituting more critical methodologies. The authors draw upon their own experiences as practitioners supporting indigenous communities in the Amazon struggling against multinational oil companies, and the lessons of the critical methodologies, to then present a practical and detailed guide for implementing an effective model of "transnational collaborative lawyering." The paper concludes with a series of questions to guide further refinement of this methodology.*

## INTRODUCTION

For years, cause lawyers, particularly those working on poverty and environmental justice issues, have cast a critical eye upon the

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practice of lawyering and the lawyer—client relationship.<sup>1</sup> They have raised questions regarding the role of the lawyer in the clients' struggle and the possibility that the lawyer might prioritize a legalistic vision of justice at the expense of the clients' visions and needs.<sup>2</sup> To address these concerns, cause lawyers have considered the ways in which adopting a particular methodology based upon critical reflection—be it client-centered-, community-, rebellious-, or collaborative lawyering—might empower communities and serve their clients' visions of justice. To date, however, the practice of transnational human rights lawyering—whether it involves human rights advocacy via public campaigns or impact litigation—has been largely divorced from many of the contributions of theorists and practitioners of these critical models of lawyering. International human rights lawyers have made important efforts to adjust their practice to incorporate this critique,<sup>3</sup> but the critique has yet to be translated into robust practical guidance for human rights advocates, and common challenges to community lawyering in the transnational rights context—whether geographic, linguistic, political, or cultural—have often frustrated the effort for greater incorporation. Lawyers and theorists need to devote more attention to considering and developing more robust models of collaborative and community lawyering in the international human rights context. This paper is a first step in developing that model.

We begin with a discussion of critical lawyering methodologies that cause lawyers working on poverty and environmental issues in the United States have adopted, drawing out common themes. We then discuss how the dominant methodology for transnational human rights advocacy fails to incorporate these critical lawyering methodologies, and the frustrations we have felt as practitioners as a result. We argue that the existing critique of human rights advocacy focuses on the macro level rights-based discourse; does not supply a micro level critique of the mechanics of the lawyer-client relationship; and does not provide practical guidance for practitioners interested in instituting more critical methodologies. Drawing upon our own experiences

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<sup>1</sup> When using the term “lawyer client relationship” we are also referring to the relationship between lawyers and entire communities. We recognize that the terms “lawyer” and “client” are themselves imperfect as they result from framing a problem as a legal problem — in turn discursively producing “lawyers” and “clients” as actors. That said, we use those terms cautiously here for the sake of simplicity.

<sup>2</sup> See *infra* Section II.

<sup>3</sup> See, e.g., Caroline Bettinger-Lopez, David Finger, Meetal Jain, JoNel Newman, Sarah Paoletti & Deborah Weissman, *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 *GEO. J. ON POVERTY L. & POL'Y* 337 (2011); Melissa E. Crow, *From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions*, 26 *MICH. J. INT'L L.* 1097 (2005).

as practitioners and the lessons of the critical methodologies, we present a practical and detailed guide for implementing an effective model of “transnational collaborative lawyering.” We conclude with a series of questions to guide further refinement of this methodology.

While we have written this paper with an eye towards its critical application in diverse contexts, we are well aware that the paper is firmly grounded in our own practice. We are human rights and environmental rights lawyers whose work has primarily involved supporting indigenous communities in the Amazon in their struggles against multinational oil companies. Thus, when we use the term “community” in this paper, we are referring to communities as groups of people situated similarly in time, space, geography and culture who are confronted, collectively, by adverse environmental or human rights impacts. The paradigmatic example in our work is the indigenous community that is already situated in its territory with deep ancestral roots to its environment who is affected by the arrival of an oil company on its land. We use this notion of community as a heuristic device for two reasons. First, more often than not, the resource rich environments where multinational corporations seek to exploit oil or minerals are located in areas indigenous communities call home. Second, this is the type of community and situation with which we have the most experience. We recognize that this paradigm represents just one of a multitude of possible “communities” that may call upon a lawyer for support. Similarly much of our work has involved litigation against companies in courts in the United States, and thus litigation features prominently in the strategies that we analyze.

Our work has shown us that many obstacles present in transnational human rights advocacy are variants of problems that are present in the domestic context. Consequently, much of the work of applying the critical lawyering methodologies in the human rights context is one of translation. Where transnational strategies present qualitatively different obstacles, we aim to bring new and creative thinking to overcome those obstacles. We use this article to start the tasks of translation and developing new thinking to model collaborative lawyering in transnational human rights advocacy.

Our approach is to articulate a practical framework for implementing the critical lawyering methodologies at key moments in the lawyer-client relationship. The ideas that follow represent our effort to identify potential strategies available to transnational human rights lawyers to provide a more collaborative form of representation. We hope that readers will embrace the ethos motivating these ideas, and at the same time discuss and critique them.

I. COLLABORATIVE, CRITICAL, AND COMMUNITY LAWYERING:  
KEY TEXTS AND NEW POSSIBILITIES

A. *Common Themes In Critical Lawyering Methodologies*

Over the past three decades, cause lawyers,<sup>4</sup> theorists and clinicians have developed a rich body of literature devoted to both problematizing and reimagining the lawyer-client relationship and its potential for empowerment as well as for subjugation. Professor Lucie White's seminal piece, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*,<sup>5</sup> highlighted the possibility of collaborative narrative and strategy-building between the lawyer and client as a point of inflection for addressing deeply rooted structural inequalities. Gerald P. Lopez's book, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE*, also drew attention to the problems with traditional models of poverty lawyering as a professional service, and envisioned instead a collaborative, rebellious, form of lawyering that was inclusive and sought social justice.<sup>6</sup> "In this collaborative vision," many clinical scholars found, "an alternative to the hierarchical, objectifying terms of the traditional lawyer/client relationship."<sup>7</sup>

Louise G. Trubek provides some guidelines for what a more collaborative form of lawyering could look like. In *Critical Lawyering: Toward a New Public Interest Practice*,<sup>8</sup> Trubek outlines a proposal for what she terms "critical lawyering." According to Trubek, critical legal practice involves two elements: "seeking to empower oppressed groups and individuals *and* initiating a trajectory of change towards a more just society."<sup>9</sup> Attorneys can empower people in two ways: first,

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<sup>4</sup> We use the terms "cause lawyer" and "collaborative lawyering" as placeholders for what we recognize is a much more complex vocabulary that tracks theories about three dimensional lawyering, rebellious lawyering, community lawyering, client-centered advocacy, and critical lawyering. Some of those distinctions are discussed herein, however, a detailed taxonomy is beyond the scope of this paper, as we are not situating our proposal within any particular one of these theories, but rather, drawing lessons from all of them.

<sup>5</sup> See generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990).

<sup>6</sup> See also Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1988); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990).

<sup>7</sup> Lucie E. White, *Collaborative Lawyering in the Field - On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 158 (1994-1995).

<sup>8</sup> See generally Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991).

<sup>9</sup> *Id.* at 50.

“individually, within a supportive attorney-client relationship;” second, “through the process of organizing groups and encouraging them to speak out in the public sphere.”<sup>10</sup>

Similarly, those who employ the framework of “community lawyering” begin with the assumption that inequality of power relations is one of the principal causes of the perpetuation of poverty, exploitation, and the deprivation of fundamental human rights.<sup>11</sup> As a result, proponents of community lawyering argue that legal advocacy should support the efforts of communities to challenge that inequality through their own actions. In other words, the purpose of community lawyering is to “enable a group of people to gain control of the forces which affect their lives.”<sup>12</sup> The lawyer’s support can take a variety of forms depending on the goals of the community, the lawyer’s relationship with the community, and the particular context for the struggle, but the aim is always to amplify the power of the community.<sup>13</sup> Although these campaigns and strategies need not necessarily involve legal challenges,<sup>14</sup> or even lawyers, the recognition that given systems of legal rules drive outcomes for people’s lives often raises questions of a legal nature when social change is a goal. Law is always there, even when organizing.

The literature seeking a more critical, collaborative, and non-hierarchical theory and practice of lawyering converges around at least one clear point: joint empowerment is key. We use the term “joint” because this empowerment should flow in two (or more) directions: with the lawyer and the client collaborating towards a shared vision. The client or client community amplifies the power of the lawyer or

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

<sup>11</sup> See, e.g., Purvi Shah & Chuck Elssessor, “Community Lawyering,” A Conversation with Joseph Phelan of Organizing Upgrade (June 1, 2010), available at <http://www.organizingupgrade.com/2010/06/social-justice-lawyering>.

<sup>12</sup> William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455, 455-56 (1995).

<sup>13</sup> We recognize that the terms “power” and “empowerment” are fraught with critique and with varied meaning. See, for example, the works of Giorgio Agamben, Michel Foucault, and John Gaventa. By using the term “empowering,” we do not wish to imply that the communities or individuals themselves are not already exercising power or capable thereof, but we wish to speak in terms of degrees and types of power — and recognize the very real, material, experienced, dearth of power that many of the communities and individuals whose human, civil and environmental rights are violated, have, vis-à-vis the institutions that affect their lives. Here, we intend the term “empowerment” to serve as a device for discussing the amplification, assertion, and/or shifting of power that people already possess.

<sup>14</sup> For example, some communities with whom we have worked have relied primarily on direct action to leverage their bargaining power with the government and oil companies. See, e.g., Andrew Miller, *The U’wa Nation Will Continue our Peaceful Protest*, (April 26, 2014), available at <http://amazonwatch.org/news/2014/0426-the-uwa-nation-will-continue-our-peaceful-protest>.

advocate as much as the lawyer amplifies the power of the client. Thus, even as the lawyer works with the client to identify, map, and think strategically about the legal and political forces that are driving outcomes in her daily life, the client can help the lawyer to understand how she is also the product of her own legal, political and social context—including her biases and limitations.

Whether framed as “third-dimensional” lawyering<sup>15</sup> or “rebellious lawyering”<sup>16</sup> or community lawyering, community or client empowerment is a critical means, and end, of these practices. Luke W. Cole makes this point explicit in his article *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*.<sup>17</sup> Recognizing that poor people bear the lion’s share of environmental burdens (pollution, contamination, and location of power plants), Cole proposes a model of environmental poverty lawyering that focuses on empowerment and mass mobilization.<sup>18</sup> In doing so, Cole reminds cause lawyers that “pollution will not be stopped by people who are not being polluted.”<sup>19</sup> Only those whose rights are at risk can stop environmental rights abuse. Thus, “the lawyer who wants to serve pollution’s victims must put her skills to the task of helping those people organize themselves and must try to understand their conception of the environmental problem.”<sup>20</sup> This notion is congruent with Trubek’s call for more supportive lawyer-client relationships—where the lawyer works with the client (or client community) to understand (not just legalistically, but also emotionally) the experience of the client (or client community).

Much of the literature regarding community or collaborative lawyering emerges from contexts where lawyers work closely and directly with their clients. These texts envision close client collaboration in the planning and implementation of legal strategies, frequent communication, a mutual understanding of goals, and willingness by the lawyer to be flexible and support the strategies chosen by the client.<sup>21</sup> While certainly not without its challenges,<sup>22</sup> the lawyer is aided in these ef-

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<sup>15</sup> Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 760-66 (1988).

<sup>16</sup> GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 113 (1992).

<sup>17</sup> Luke W. Cole, *Empowerment as the Key to Environmental Protection*, 19 *ECOLOGY L.Q.* 619 (1992).

<sup>18</sup> *Id.* at 633.

<sup>19</sup> *Id.* at 649.

<sup>20</sup> *Id.*

<sup>21</sup> *See id.* at 661-63.

<sup>22</sup> The lawyer must be familiar with a variety of different strategies, understand the effectiveness of those strategies with respect to achieving concrete benefits for the community, and find ways to support the community in implementing those strategies in such a

forts through his or her presence within the community, frequent participation in community meetings, or regular meetings with individual clients living in close proximity to the lawyer.<sup>23</sup> Over time, lawyers devoted to this methodology can develop a wide variety of legal skills ranging from civil litigation in defense of constitutional rights to criminal defense for protest activities, and can thus shape their representation according to the specific community need.<sup>24</sup>

As lawyers and advocates, how can we do this in concrete terms? What changes can we make to the practice of lawyering to make it more collaborative, more critical? Trubek provides six key steps: (1) encourage participation, (2) personalize the issues, (3) be skeptical of bureaucracy, (4) be unbiased in approach to advocacy arenas, (5) organize with other lawyers and (6) apply feminist and anti-racist analyses.<sup>25</sup> Trubek's suggested pathways guide us in our thinking about steps we could take as cause lawyers who work on transnational cases.

### B. *The Short-Comings Of Human Rights Theory*

Human rights, human rights advocacy, and human rights "lawyering" have all faced critique. Both Makau Mutua and David Kennedy launched important critiques of the "imperialism" of the primarily Western human rights discourse and the often misguided efforts of Western advocacy groups who, in their hasty or short-sighted efforts to "save victims," often do more harm than good.<sup>26</sup> Other critiques take issue with the focus on civil and political rights (which mainly deal with liberty and participation in political life) at the expense of "newer" second and third generation rights (such as the right to healthcare, housing, or a healthy environment).<sup>27</sup> Much of this crit-

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way that the community itself, and the lawyer, amplify their power in the process. This is by no means an easy task (as the literature analyzed demonstrates).

<sup>23</sup> See, e.g., Cole, *supra* note 17, at 655-59 (describing community-based lawyering in the context of anti-poverty advocacy).

<sup>24</sup> Lawyers working with the Center for Constitutional Rights, for example, in addition to using legal strategies proactively to advance the law and guarantee the human and constitutional rights of affected communities, also regularly provide direct criminal defense to those arrested for engaging in civil disobedience and other protest activities.

<sup>25</sup> Trubek, *supra* note 49.

<sup>26</sup> See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 214-17 (2001); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 102 (2002); Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 217 (1999); Ivan Illich, *To Hell with Good Intentions*, Address to the Conference on Inter-American Student Projects, Cuernavaca, Mexico (April 20, 1968), available at [http://www.swaraj.org/illich\\_hell.htm](http://www.swaraj.org/illich_hell.htm)

<sup>27</sup> See, e.g., Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 152-53 (Louis Henkin & John Lawrence Hargrove eds., 1994).

icism has occurred on the macro level—focusing on problematizing the dominate human rights discourse as Western and imperializing and the efforts of Western activists as paternalistic and misplaced. Very little of the critique has examined the mechanics of the advocate-client relationship<sup>28</sup> when the advocate acts as a lawyer.

Instead, theorists have treated human rights law and human rights practice as different from other forms of cause lawyering. This has generated what Bettinger-Lopez *et al.*, have called a human rights “exceptionalism,” so that human rights clinics and classes are often separate from other legal and practice areas in law schools. But, as Bettinger-Lopez and her colleagues point out, this “justification for an ‘exceptionalism’ for human rights within the clinical field—that human rights clinics are different and therefore require a different pedagogy and set of lawyering tools—is overinflated.” Moreover, “as a newer clinical discipline, human rights clinics have yet to incorporate many of the traditional critical legal theory principles in scholarship and in practice.”<sup>29</sup> Like Bettinger-Lopez and her colleagues, we want transnational human rights lawyers and advocates to consider questions regarding theory and practice that domestic poverty lawyers have already asked.

### C. *Lawyering In The Transnational Context*

Thus far, transnational human right lawyering has followed a significantly different model than the collaborative, critical, and community based lawyer models we outlined above. Lawyers based out of international or regional offices learn of particular rights violations (often in a different country), travel to that region to collect information, and offer the affected communities a limited set of strategies to address their situation based on the particular expertise of that organization—e.g. report-writing, submission of communications to treaty bodies, litigation before international or national courts—and that organization’s mission. This is the same model many law school human rights clinics use. This model is in sharp contrast to clinical practice taught and used in domestic poverty law and community lawyering clinics.<sup>30</sup>

As observers of, and participants in, the model of human rights lawyering described above, we have often been critical of—and at

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<sup>28</sup> The term “advocate-client relationship” is used in this context, rather than “lawyer-client relationship,” mainly because the human rights work being critiqued need not necessarily involve litigation or legal representation, and rather often involves “advocacy” such as report writing or international solidarity campaigns.

<sup>29</sup> Bettinger-Lopez *et al.*, *supra* note 3 at 394.

<sup>30</sup> *See id.* (describing an “exceptionalism” for human rights in the clinical field).



times frustrated by—the legal representation we provide. We often feel limited in the legal strategies that we can offer communities by issues of jurisdiction, statutes of limitations, or other legal doctrines. Other times, we are concerned that the legal strategies we implement fail to capture the full nature or tell the full story of the problems facing client communities. And frequently, we have found that possible remedies do not entirely coincide with community goals or with the harm that communities have suffered. The representation usually involves only minimal client participation and in some cases we have studied, the result of the representation—a settlement ending a lawsuit—has torn the community apart.<sup>31</sup> Experience has taught us that implementing the current models of human rights lawyering, without more, has the potential to make client communities feel even further disempowered.

Part of the problem stems from the transnational nature of the advocacy. Much of our experience has come from supporting communities that have been affected by violations of international human rights<sup>32</sup> perpetrated by large multinational corporations or by state security forces with the complicity of multinational corporations. Under some circumstances, local or national strategies may be appropriate for addressing such situations, but in many cases, effective efforts to achieve justice, accountability, or compensation require transnational strategies.<sup>33</sup> These strategies, however, have often been problematic.

For example, consider litigation in U.S. courts under the Alien Tort Statute, 28 U.S.C. § 1350, a strategy that we have often supported. Litigation under the statute is complex, drawn-out over many years, and results hinge on minute issues of civil procedure. In many cases, the principal legal struggle concerns questions of international law and federal jurisdiction—issues such as the *mens rea* standard for aiding and abetting under international law or the ramifications of the difference between corporate and natural personhood. Briefing and arguing these questions can take years. During this time, the stories of the clients (the merits, or facts) hardly come to light. In such instances, we have had to explain to clients that the question at hand is no longer (or not yet) about whether or not they have suffered the harms they claim to have suffered, but rather about whether or not the court will agree with them that having suffered those harms is le-

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<sup>31</sup> See, e.g., PERU: UNDERMINING JUSTICE (Al Jazeera, People & Power 2012) available at <http://vimeo.com/47488389> (discussing Monterrico Metals case and settlement in Peru).

<sup>32</sup> We give the term “international human rights” its most expansive meaning. We thus include economic, social, cultural rights and the right to a healthy environment in this definition, giving struggles for environmental justice a place in this discussion.

<sup>33</sup> See Keck & Sikkink, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS*, 1998.

gally significant in a U.S. court. This can have the effect of obscuring, rather than highlighting, the wrongs for which they seek recognition and redress.

When you combine these battles over legal minutia with the physical distance between the legal forum and the communities, and the resource constraints that inhibit plaintiffs' lawyers from making frequent visits to the community, the struggle to vindicate clients' rights and remedy harms more closely resembles a battle between highly-educated and elite lawyers than an effort to empower the community.

The existing critique of human rights advocacy simply does not provide a sufficient guide for dealing with these concerns in practice. However, drawing upon the lessons of the critical methodologies that we have examined, and our own experiences as practitioners, we can begin to articulate a guide for collaborative lawyering in transnational human rights advocacy.

## II. CHANGING PRACTICE AND ENGAGEMENT: KEY MOMENTS AND CONSIDERATIONS IN THE TRANSNATIONAL LAWYER-CLIENT RELATIONSHIP

### A. *Toward a Shared Vision of Justice*

At the outset, it should be apparent that in order to achieve "collaboration," it is essential that the lawyer and the client work towards a common goal. In this respect, one of the fundamental challenges for human rights lawyers is that the goals of the lawyer or his organization may not directly align with the goals of the client, often a foreign community. For example, if meanings of "justice" or "the good life" vary across cultures, and do not have a shared meaning, how can one community's vision of justice or the good life be expected to map perfectly onto the visions of an outside advocate?<sup>34</sup> To pretend that notions of "right," or "good," or "just" share singular meanings across cultures would be to make the type of universalist assumption of the sort human rights law and activists are often criticized for making.

Indeed, community goals will likely never align perfectly with the goals of the international non-governmental organization (NGO) or law firm. And there is no reason to expect that they should. Advocates are usually drawn to these communities, not because of a pre-existing connection or social bond, but simply because those communities are affected by human rights violations and the advocate is sympathetic to their struggles. It would be romanticizing the community to believe that the community's goals were exactly the same as the

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<sup>34</sup> See, e.g., GUSTAVO ESTEVA & MADHU SURI PRAKASH, GRASSROOTS POSTMODERNISM: REMAKING THE SOIL OF CULTURES (Zed Books 1998).

NGO's, and romanticizing the NGO to assume that it is *only* interested in community empowerment. We propose, then, that—even if it is not likely that communities and outside advocates share identical goals—it is possible to converge around a joint, or shared, vision of justice that communities and NGOs can pursue together. Articulating this joint vision and preparing the roadmap for getting there, then, invites collaboration.

An example from our own practice is illustrative. While supporting an indigenous community's efforts to respond to a series of oil spills in its territory, the community—through several large community meetings attended by both leaders (mostly male) and adult women—asked for our support in negotiating with the company to receive both higher wages to perform forest-clearing services for the oil company and higher remuneration in a servitude agreement. While our representation initially involved environmental remediation and compensation for harms suffered as a consequence of the spills, the more immediate goal of securing better wages became the most important and salient issue for the community. These goals quickly supplanted the goal that had originally drawn our support. To a certain extent, responding to the community's request would serve the goal of empowerment: the indigenous community felt vulnerable by virtue of the arrival of the foreign oil company and the impact it had had on their lives, and our legal support and advice would be an important means of assisting the communities to take control of their relationship with the company. On the other hand, institutionally and personally, it was difficult to support two strategies that we believed would ultimately facilitate oil extraction, distract from the harms already caused by the company to the environmental health of the community, and do nothing to prevent future abuses.

Thinking as lawyers, we identified the ways in which the oil company was likely “stringing” along the community by running out the clock on the statute of limitations for potential claims. On the other hand, we recognized that the act of negotiating with the company gave the community a sense that it was an equal partner with the company—exercising its agency and autonomy. Given this seeming conflict between values and strategies, the goal of our engagement became seeking out and acting upon goals and strategies where our skill set and principles matched up with those of the community. In this sense, we identified, and operationalized, a shared vision. We spent time with the community mapping out their history with the company and with government actors. We emphasized the importance of statute of limitations—placing a legal marker on the timeline. We spoke with them about their interest in increasing their bargaining

power by understanding labor and contract law, and we put them in touch with local lawyers who could assist with that effort. Negotiating the disparity and the interconnectivities between our culture and vision and theirs became a productive asset rather than a hindrance.

We begin with the premise then that differing goals between the community and the human rights advocate are an inherent part of the lawyer-community relationship in the transnational human rights context. It follows that a human rights lawyer is not always going to be able to be “on tap,” waiting to serve whatever goal the community chooses in a given moment—and to a degree here, we depart from some of the literature regarding community- or empowerment-lawyering. The lawyer instead looks to work with the community and support a shared vision of justice. We believe that identifying and seeking this shared vision of justice, beyond any abstract notion of empowerment, is the principal goal of the collaborative human rights lawyer through the representation—and the end to which the lawyer owes ultimate allegiance. The lawyer looks for collaboration with the community in pursuing a shared goal that is, necessarily, jointly informed by the lawyer’s own vision of social change.

But the fact that communities and their lawyers must focus on their convergence around a shared vision rather than come together with an identical goal, does not render the lessons of community or collaborative lawyering any less useful in this context. On the contrary, it is precisely under these circumstances that the lessons are most important. Without an honest and frank understanding of the interests, goals, and backgrounds of both parties, affected communities and lawyers alike could easily be treated as mere pawns in the other’s struggle for social change.

### *B. Introducing Yourself And Offering Support*

#### *1. Risks Of Undermining Community Power*

One of the most salient takeaways from the collaborative lawyering literature is the importance of identifying and managing power dynamics embedded in the lawyer-client relationship. In our view, we must attend to the power relationship inherent in the mere arrival of the lawyer in the community even before discussing power in direct interaction between the lawyer and the clients. Some communities receive support from a variety of allies, including NGOs and indigenous federations, and may already have developed a plan of action or community vision that provides the basis for either accepting or rejecting the lawyer’s offer of support. In many situations, however, communities may be relying on their own strategies to respond to human rights violations, or may see the arrival of the lawyers as one of

their few chances of winning external support for their struggle. In this latter context, and on occasion in the former as well, the arrival of a foreign NGO or lawyer proposing a particular strategy as a means of addressing the human rights violation has the potential to be a disempowering and even coercive experience if the lawyer is not aware of these dynamics. The risks are even greater in situations where the lawyer first engages with affected individuals outside the context of a community meeting.

Even the most conscientious attorney runs the risk of coercing the client into accepting a particular strategy if the strategy is presented as a “take-it-or-leave-it” offer of the lawyer’s assistance. Often, this “take-it-or-leave-it” offer is not because the lawyer believes that one strategy is the only way to move forward. Rather, the lawyer is often limited by his/her organization’s mission, source of funds, or even own academic and professional formation. For example, we have bar licenses in the United States, and thus the menu of legal strategies that we can offer to communities, on our own, is limited to litigation in the United States or before international human rights bodies. At times then, in merely expressing our own organizational or professional limitations, we run the risk of exerting some pressure on communities to adopt strategies that may not align precisely with their own vision for how best to affect change.

An example from our own experience here may be helpful. We were working with an indigenous community in the central Peruvian Amazon that was facing persistent oil extraction and contamination on their lands. We had come to talk with them about supporting their struggle against a powerful U.S. oil company, and about the possibility of using litigation in the United States to do so. But the community had a different idea for how best to achieve reparation for the contamination they were confronting. Drawing upon the history of their relations with the oil companies in their territory, and wary of adopting any strategy that could take years to resolve, the leaders proposed instead a plan of peacefully taking over the oil wells, forcing the company to turn off its machinery, and using their own voices and bodies to make their grievances known, with the end of reaching a negotiated solution with the company. They turned to us, and they said: “and you, *doctores*, you will be a part of our legal commission when we take over the wells, right?”

In this particular circumstance, our vision of justice closely aligned with theirs. Of course we wanted to support them; of course we wanted to accompany them in their strategies for vindicating their rights against companies that had been repeatedly spilling crude oil into their water supply. And we wanted this support to have no limi-

tations. But we also knew that we could not do what they had asked of us. While we expressed to the community that we would like to accompany them in whatever strategies they chose, we had key limitations as lawyers from the United States. We would eagerly support the community in its legal strategies on the international level, but we were afraid that we were unable to represent them in any criminal defense cases in Peru should they be arrested when they take the direct action. Our representation simply could not extend that far.

It was difficult to anticipate what affect those words would have on the community. Would the leaders discard the option of taking the wells based on their concern for the government prosecution of protest activity and our inability to provide them with criminal defense? Would they revisit the strategy that we were proposing, even though they weren't convinced it would be the best strategy, just to keep us involved? As soon as we had expressed our limitations, we realized how limited we were in our goal of helping the community shift the balance of power. At the precise moment when the community was considering a strategy of exercising its power, we started stepping away. How could we really expect to accompany the community in vindicating its human and environmental rights if our representation was limited to the contours of our bar licenses?

## 2. *Power-Respecting Strategies At Initial Meetings*

The risk of community disempowerment counsels in favor of lawyers building capacity, either within their own organization or through partnerships with allies, in order to offer a community more than one particular strategy to respond to the human rights violation it faces. For example, after this experience, we suggested to our organization that they hire a Peruvian lawyer, and they did. The lawyer and his or her organization should develop a funding model that allows for flexibility, and does not depend entirely on contingency fee arrangements that necessarily contemplate civil litigation, or funding grants that explicitly limit the type of strategies that the organization can pursue. The lawyer may have expertise in a particular strategy, such as litigation, and may be committed to that strategy as the most effective means of addressing a particular rights violation, but the lawyer must also be highly aware of the limitations of that strategy and explore the myriad reasons why such a strategy might not be appropriate in a given community. When an alternative strategy may be called for, the lawyer might help the community to identify local actors who possess the skill set necessary to provide the needed support. Here, exploring the possibility of collaborative litigation models—in which lawyers from one country assist lawyers in another country—either with

human or economic resources, is also an option for lawyers to explore.<sup>35</sup> Regardless of what option the lawyer and the client collectively choose to pursue, the lawyer should be a student of social change and the diverse options and strategies available for advocacy. Lawyers should share these strategies with communities in workshops upon the lawyer's arrival in the community and throughout the lawyer's continued engagement.

One possibility that we have explored is the use of the initial and introductory workshops as a space to share histories (both the community's and the lawyers') through dynamic exercises. This can serve to both situate the problem that the community has identified and to give the lawyers a chance to take Cole's invitation to "try to understand" their collective "conception" of the problem. One technique that we used was to work with the community to draw a timeline of events that the members view as critical to the emergence of the problem. The community can then articulate and develop its own narrative of harm and identify key moments in space and time that the community wants the lawyer to come to comprehend and understand on a personal level. In turn, during these initial workshops, the lawyers might take the opportunity to share with the community their own motivation for being there and to bring some of their history with them.

Another key exercise that we have used in the initial strategic discussions with the communities is mapping relevant actors and strategies. The mapping exercise seeks to identify all the actors that influence the situation facing the communities and then to discuss the motivations of each of these actors and the different points of pressure available to affect those actors. Once completed, this map can serve as the basis for identifying particular legal or advocacy strategies that might be adopted, and for understanding how these strategies interact with one another, impacting multiple actors.<sup>36</sup>

In our own experience, we have coupled this mapping exercise with a workshop that we run on "how corporations think," as we tease out the motivations of the company actor. We have found that these workshops provide us with an opportunity to explain how we are well positioned to understand how corporations think and behave, because

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<sup>35</sup> See, e.g., EarthRights International, *Tanzanian Maasai Villagers Win Fight For Information about Land-Grabs and Forced Eviction against Luxury Boston Safari Company*, (April 22, 2014), available at <http://www.earthrights.org/media/tanzanian-maasai-villagers-win-fight-information-about-land-grabs-and-forced-eviction-against> (discussing Foreign Legal Assistance Actions as a potential tool for collaborative litigation).

<sup>36</sup> For additional resources on tactical mapping methodology, see Douglas A. Johnson & Nancy L. Pearson, *Tactical Mapping: How Nonprofits Can Identify the Levers of Change*, *THE NONPROFIT QUARTERLY* 92 (2009).

we, as lawyers, were trained with the same rules and professional formation as were the lawyers for those corporations, and because corporations are often “creatures” of the legal system we call home. Through these exercises, we exchange conceptualizations and narratives with the community, and in the process, we begin constructing a shared narrative, combining elements from each of our experiences. This narrative directly influences the discussion of appropriate strategies and the ends they might serve.

The aim of both these initial and of subsequent collaborative sessions is: determining if there is a shared vision of justice; that can be developed into a plan of action; that resonates with the goals and situation of the community; and that can be calibrated to community needs. Much of the information covered in the workshops will likely be familiar to the community based on the community’s existing knowledge of strategies of resistance. Other ideas and arguments may be new. Hopefully, the community will be adding new strategies to the list of options with which the lawyer is familiar, creating a mutual learning environment for lawyer and community. The lawyers and the community can discuss these options in detail, with the lawyer clearly identifying the particular strategies where his or her organization would be able to provide support, the areas where the support of other allies or partners should be sought, and the lawyer’s frank recommendation on a course of action based on the information conveyed by the community. Where the community elects to pursue a strategy outside the realm of the lawyer’s expertise or vision for social change, the lawyer may offer to help facilitate connections with other organizations that can be of greater assistance. In this sense, it is important for us to consider not only what type of lawyers and lawyering we engage in, but also about how we can best build our networks and organizational resources to enable us to diversify and expand the menu of tools and possibilities that we can offer to communities.

### *C. Developing And Signing The Retainer*

We believe that signing a retainer agreement is a pivotal moment in the lawyer-client relationship, and the process by which parties negotiate and agree on a retainer should be fundamentally changed in the transnational lawyering framework. The retainer agreement is a contract that articulates the precise nature of the relationship between the lawyer and the client. As such, the retainer agreement presents a perfect opportunity for a frank discussion about the goals and expectations of both parties, and an opportunity to put in writing the commitments that each side is making in formalizing the relationship. For lawyers committed to collaborative lawyering, it is problematic that



lawyers write retainer agreements, for the most part, without community input. The lawyer's autonomy in determining the contours of the agreement is often a requirement for receiving lawyers' services. We take the position that the retainer can and should be a collaborative undertaking for the lawyer and clients: an opportunity to exchange and negotiate hopes, expectations, and shared commitments. It should be viewed as a dialogue rather than as words on a page; as a basis for establishing a relationship to which each is committed and bound.

Change is thus needed both at the level of process and content. As a matter of process, the lawyers and the client community should negotiate the retainer in a collaborative exchange. If the lawyer feels that certain terms are necessary, she should present those terms individually and justify them to the community. The community should have an opportunity to put forward its own terms for discussion. The exchange at this level should be designed to bring the expectations of both parties to the forefront, and for the document that emerges to be a reflection of this process, rather than a mere procedural necessity.

As a matter of content, in addition to the traditional terms regarding costs and the power of the attorney to act on behalf of his or her clients, at minimum, the retainer agreement should also address the legal strategy that is contemplated by the relationship, and most importantly, the goals of the community in pursuing that legal strategy. The vast majority of retainer agreements that lawyers prepare in anticipation of litigation presume that the ultimate goal of the representation is monetary compensation. This assumption informs a number of the attorney's steps in the development of the legal strategies, and effects such essential decisions as whether the lawyer recommends that the client accept a settlement offer. In many circumstances, however, monetary compensation may not be the community's primary goal in pursuing a legal strategy. Indeed, legal strategies could serve a number of goals in pursuit of the community's own understanding of justice for example, environmental remediation, an end to a company's operations in a given area, a public apology, a chance to demand justice in a courtroom—and the lawyer can design specific strategies to serve those different goals. It is essential in at least three different ways for lawyers and communities to identify these goals at the outset of the representation. First, it allows the lawyer to calibrate the legal strategies to specifically serve the end identified. Second, it ensures that the lawyer is genuinely interested in providing the support contemplated. This step, for example, may cause a number of lawyers working for for-profit law firms to walk away if it becomes apparent that the community is not principally con-

cerned with monetary compensation. This reinforces the importance of seeking diversified funding sources so that non-profit or pro bono lawyers can continue to offer such support. And third, it avoids stressful conflicts down the line, including fracturing community unity, that emerge when the litigation becomes a struggle only for monetary compensation, the consequences of which the community did not adequately consider at the time they signed the retainer.

Once this exchange takes place, the lawyer and the client should draft the retainer such that, in addition to laying out the shared goals of the parties, the retainer also lays out their mutual commitments. In this sense, we are inspired by the common practice in Peru of drafting up *convenios*. *Convenios* are a record of a collaboration and conversation between two or more actors who agree to undertake a project together. In the *convenio*, the parties outline what they expect to be their shared commitments and individual tasks and contributions.

Lawyers and client communities can also use the retainer agreement as an opportunity to discuss procedures to be relied upon in the future, anticipating potential issues that are likely to emerge. Understanding that community priorities can change over time, a retainer agreement could contemplate a procedure by which community goals are reassessed at determined intervals to ensure that current strategies serve the ultimate goals of the community. To give another example, if the lawyer feels strongly that certain voices from the community, such as those of women, be included in the community decision-making process, that lawyer can negotiate with the community of procedures to be included in the retainer as part of the community's commitment in the relationship. The lawyer and the client might contemplate and discuss any number of such procedures at the outset to facilitate a strong lawyer-client relationship down the line.<sup>37</sup>

#### *D. Special Considerations Involved in Working with a Client Community*

##### *1. Recognizing both Individual and Collective Interests*

A special consideration that lawyers must confront when working with communities, rather than individuals, affected by human or environmental rights violations, is how to address the special nature of

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<sup>37</sup> One potential roadblock that U.S. lawyers might face in adopting this new model of collaboratively drafting the retainer is that lawyers often arrive in the communities with the finalized retainer pdf-ed and printed out, ready to be signed. Given the remoteness of some communities and the limited electrical or technological capacity, it might seem impractical to do anything but finalize and print out the retainer beforehand. It is for this reason that we always bring a battery powered portable printer with us when we travel to the communities.

collective harms. The lawyer-client model dictated by Professional Ethics does not ask, or tell us, about what it means to be a community lawyer or instruct us how to advocate for a remedy to rights violations experienced by collectivities. In the field of human rights, this model is particularly limiting. Indeed, the model of lawyering that presupposes that lawyers will advocate zealously for the client as an individual alone, with an individualized injury, does not easily accommodate the many ways in which individuals are situated within communities with communal injuries and visions of justice. This is especially true when it comes to the impacts of mining and oil companies, which generate collective as well as individual harms.

We propose that the individual-centric lawyer-client model is itself an outgrowth of the American legal imagination that problematically focuses on personal/individual rights—or rights that attach to the individual client—while ignoring common or collective rights that attach to a community.<sup>38</sup> That model asks us to consider our clients as individuals without ever taking into account their placement within a larger community. It forgets to ask what the consequences of individual decisions to seek justice, or to choose a certain strategy, might have upon the greater community. That model ignores, the contributions of political theorists and anthropologists who have taken pains to question and deconstruct the sanctity of the “rational rights bearing individual” and to look instead at the ways in which individuals should not be understood to be particularized singular entities, but rather exist both within, and as, relationships to others. Indeed, individuals are always individuals situated within communities that bear upon their subjectivity. Communities are complex hammocks of relationships, and pulling on one thread will affect everyone.<sup>39</sup>

The myopia of the American legal system and the limitations of the individualized lawyer-client model become obvious when one considers a common situation in our work: the existence of multiple separate communities affected by oil or mineral extraction in a particular zone. Although a great number of communities in that region might likely be affected to some extent by the extraction, the U.S. legal dictates of statutes of limitations, causation, or injury-in-fact, all of which analyze an individual’s potential cause of action, may act to limit the

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<sup>38</sup> As a means of comparison, many Latin American countries provide for collective rights, such as the right to a healthy environment or to self-determination and provide for judicial procedures to vindicate those rights in the collective. *See, e.g.*, Benjamin Hoffman and Marissa Vahlsing, *Institutionalizing Transformative Legal Service Provision: Histories and Possibilities from the United States and Latin America*; Course Paper: Legal Profession—Delivery of Legal Services (Fall 2010) Professor Jeanne Charn; February 25, 2011. On file with authors.

<sup>39</sup> *See, e.g.*, ESTEVA & PRAKASH, *supra* note 34.

lawyer's ability to work with the communities as collectivities, or even to work with several communities at all. In such circumstances, justice, rather than being shared or collective, becomes partial, severed, or disjointed.

Even when it might be possible to bring a class action in the above scenario—or to bring a claim on behalf of a community as a juridical entity whose interests the lawyer can serve without passing through individuals as representatives<sup>40</sup>—a whole host of questions arise that throw the individual-centric lawyer-client model into disarray. For example, as lawyers working with “class” communities, we must ask whose “interests” are we supposed to be zealously representing. The answer, of course, is the class's interest. But, whose voice is being heard and channeled into the “interests” of the class? Who speaks for the community? When we discuss “community” in this context, are we often really referring to the “male community” or the “leaders of the community”? Both are wholly inadequate if we purport to represent collective interests.

In many of the communities with which we have worked, it is most often the men, and the men only, who speak “on behalf of” the community or dialogue with the lawyers. This should cause us to question whose narrative is being captured when we tell a “community's” story in a legal document, and whose narrative goes untold. Yael Tamir speaks to this in her essay, “Siding with the Underdogs”<sup>41</sup>

the notion of group rights as it is often used. . . presupposes that “the group” is a unified agent. . . Consequently, internal schisms and disagreements are perceived as a threat to the ability of the group to protect its rights. . . group rights strengthen dominant subgroups within each culture and privilege conservative interpretations of culture over reformative and innovative ones.<sup>42</sup>

When one works with indigenous communities in Latin America, it is critical to partner with the corresponding “indigenous federation” for that region. These federations are often gatekeepers to the communities and also speak on the communities' behalf. The leaders of these federations, however, bring their own personal or political interests to bear upon the situation and strategy in a way that is not always supported by the community itself.

To fully and honestly confront this dilemma, transnational law-

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<sup>40</sup> In Peru, for example, indigenous communities are considered juridical persons and can publically register as such. Art. 89, POLITICAL CONSTITUTION OF PERU (1993); Decreto ley 22.175 (*Ley de Comunidades Nativas y de Desarrollo Agrario de las Regiones de Selva y Ceja de Selva*), Art. 7 (Peru).

<sup>41</sup> Yael Tamir, *Siding with the Underdogs*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 47 (Susan Moller Okin ed. 1999).

<sup>42</sup> *Id.*

yers will have to divest themselves of any romanticized notion that communities, especially indigenous communities, are not complex, internally diverse, and contradictory. Anthropologist, Linda Tuhiwai Smith makes the point that as westerners we tend to believe that authenticity is static and unchanging, hence the difficulty in determining what are communities' interests.

The purpose of commenting on such a concept as what counts as 'authentic' is used by the West as one of the criteria to determine who really is indigenous, who is worth saving, who is still innocent and free from Western contamination. There is a very powerful tendency in research to take this argument back to a biological 'essentialism' related to race, because the idea of culture is much more difficult to control. At the heart of such a view of authenticity is a belief that indigenous cultures cannot change, cannot recreate themselves and still claim to be indigenous. Nor can they be complicated, internally diverse or contradictory. Only the West has that privilege.<sup>43</sup>

Smith's question is one of the reasons why we have often wondered if anthropologists might be better situated to organize communities into collective action. The nature of the legal profession—and the practical requirement that a lawyer be connected to their email and their ECF account to meet necessary court filing deadlines—makes it difficult for us to be in-house counsel for a community. Unlike anthropologists, lawyers rarely have the time to live among communities long enough to know their interests and their positions and to account for conflicting interests and positions within that same community. While difficult, this task is not impossible.

## 2. *Assessing Community Positions And Priorities*

The transnational collaborative lawyer must seek to represent the interest of the community as a whole, while recognizing that that interest might be complex and internally contradictory. At various times in the representation, the lawyer will have to gauge the position of the community as an entity distinct from its individual members. As a philosophical matter, this proposition is particularly difficult. As a practical matter, while not uncomplicated, the task is usually manageable, as the lawyers defer to the community's existing decision-making structures. The community has often developed and adopted these structures over time in order to ensure both that the community can come to decisions on issues that require a single community position, and that such decisions are viewed as legitimate within the com-

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<sup>43</sup> LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES* 74 (London: Zed Books 1999).

munity. We should treat these structures with significant deference, but that does not mean we should not raise questions about participation or take steps to ensure that all voices are heard.

As suggested above, the traditional decision-making structures of the community might suffer from a particular gender, racial, socioeconomic, or age-related bias that may cause the lawyer to question whether or not the arrived upon decision in a given instance is an accurate reflection of the position of the entire community. In the indigenous communities where we have worked, for example, consensus-based community decisions were reached in community-wide assemblies at which no women were present. These observations should cause the lawyer to question whether or not the decisions adequately consider, and include the opinions of the marginalized voices.

Where the lawyer believes that purported community decisions may suffer from a particular bias, the lawyer may use creative strategies to assess the opinions of the marginalized voices. For example, while one member of the legal team participates in the all-male assembly, another member of the team may assist the women of the community in the preparation of food for the assembly, and in the process, conduct an informal meeting of those women present to cover the same issues being discussed in the assembly. To the extent that this process reveals opinions and ideas that would otherwise be excluded from the community dialogue, the lawyer can attempt to create spaces in the existing procedures for those voices to be heard. These types of strategies allow the concerns for bias to be tested, and potentially even addressed, without openly disrupting the existing decision-making structures. Should these strategies, however, reveal a degree of bias that causes the lawyer to question whether he or she could honestly rely on the existing decision-making structures to faithfully represent the interest of the community, then the lawyer and the community may need to modify the operative structures as part of an honest negotiation, taking care to avoid heightening any existing vulnerability that this type of modification may have on the particular group involved.

### 3. *Working With Community Leaders To Facilitate Interactions With The Community*

Strong community leadership and local organizing are essential elements for community empowerment and for the implementation of nearly any effective legal strategy.<sup>44</sup> Given the limits of the lawyer's expertise and legitimacy in the area of community organizing—espe-

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<sup>44</sup> See Quigley, *supra* note 12 at 456.

cially in the transnational context—lawyers need the assistance of community leaders to accomplish legal strategies. Indeed, Earth Rights International values this element enough to devote over a third of its focus and resources to the specific task of training community leaders in human rights and environmental justice advocacy strategies.<sup>45</sup>

When engaging with the community then, it is important for the lawyer to seek out and build collaborative relationships with key leaders within the community. These leaders will become vital allies in the tasks of translating the lawyer's communications with the community, working to organize the community around key steps, and collecting necessary information from the community to guide the work of the lawyer.

While as a practical necessity the lawyer will rely heavily on these leaders for the implementation of legal strategies, the lawyer must simultaneously be cautious to avoid facilitating the concentration of power in certain leaders to the exclusion of the empowerment of the entire community. The leader will often be tasked with speaking for the community, and the lawyer should always understand and consider the steps that the leader has taken to gauge the community opinion. Here, we use the term leaders not just to mean those who are already in the position of being leaders, elected or otherwise, but also those who play leadership roles behind the scenes or who are still developing their leadership potential. For this reason, we have found it particularly valuable to develop relationships with women who are respected in the community, such as *madres indigenas*,<sup>46</sup> or to work with younger adult members of the communities who take an interest in their community's struggle and seek to develop their personal and academic capacity in order to be able to advocate for the community down the road.

#### 4. *Community Participation In The Implementation Of Legal Strategies*

While apparent from the theoretical discussion above,<sup>47</sup> it is important to emphasize here as well that the community must be involved in as much of what the lawyer does as possible. Active community involvement not only serves the goal of building the capacity of the community to actively defend itself, but also has the po-

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<sup>45</sup> See EARTHRIGHTS SCHOOLS, <http://www.earthrights.org/training>.

<sup>46</sup> In our experience, a number of indigenous communities in the Peruvian Amazon provide for the position or *cargo* of the *madre indigena* (translated as the "indigenous mother"). The *madre indigena* is usually considered a very knowledgeable female elder.

<sup>47</sup> Section II.A., *supra*.

tential to radically improve the quality of the legal strategy being implemented. Indeed, it will rarely be the case that the lawyer's voice will be the more effective call for justice. The lawyer should approach community engagement with humility and openness to learn from the community. Empowerment, in this respect, can be multi-directional. Unfortunately, given the transnational nature of the legal strategies implemented in this area of advocacy, community participation is often one of the first things that lawyers sacrifice for its practical difficulties. It is precisely because of the alien nature of the transnational strategies implemented that lawyers must give even greater attention to the task of involving the community in the legal strategy, otherwise the strategy will quickly become something that a lawyer implements on behalf of a community, rather than with the community.

It is thus incumbent on the lawyer to conduct workshops and trainings, and convene working groups within the community, to ensure that the community is informed, involved, and committed to the strategy being implemented. This process begins with the lawyer's first visits to the community and continues through the decision to implement a particular legal strategy, through the drafting of the complaint, and through each step of the developing legal struggle. Given sufficient time and will, the complaint could be developed in concert with the community; thus making the most compelling arguments and representing communities' priorities. Ensuring community participation may require significantly more work and creative thinking, but this is precisely the work that ensures that the lawyer-client relationship follows a more collaborative model.

##### 5. *Working with Social Movements and Activists*

Throughout this paper, we have focused much of our attention on addressing issues that relate to working with communities like those we work with in the Amazon—groups of people similarly situated in space, geography and time, and experiencing collective harms to their environmental and human rights. We recognize, however, that this is only one sort of community contemplated by the term.

Another example is the community formed by social movements and activists that come together in solidarity around a particular cause. These communities differ from the paradigmatic communities described above in that they often cohere around a cause rather than a collective experience of rights violations. Here, we are talking about social movements as communities. The social movement can comprise activists from various countries and backgrounds, journalists, academics, campaigners, organizers, and yes, even lawyers. Some of the members of these activist communities, of course, also themselves



might be members of communities affected by human rights violations but they are also part of a larger community of solidarity.

Theorists and practitioners who were active during the civil rights and welfare rights movements have much insight into how to work with these already mobilized communities to develop legal strategies and goals in a collective fashion,<sup>48</sup> and it is beyond the scope of this paper to discuss the ways in which supporting social movements might require a different type of engagement. We flag this point here, however, to highlight that the structure, composition, experiences, and participation of communities can vary substantially depending on the context, and there is not any one approach to community engagement that will work in every context. Additionally, the geographic communities that are usually considered as those “directly affected” by a human rights violation may be part of a larger social movement community which the lawyer may be called on to support. The lawyer should be conscious of the composition of the community, and the multiple communities present in a given situation, when designing a strategy for community engagement.

### *E. Resolving The Legal Strategy*

How a legal strategy gets resolved is often the most salient take-away from the lawyer’s representation. As highlighted above in the section regarding retainer agreements,<sup>49</sup> there are a number of reasons why a community might decide to bring a particular legal strategy; while filing a legal complaint might serve some of these reasons, such as raising public awareness regarding a particular rights violation, in many other cases the goal is necessarily linked to an anticipated final result, such as a negotiated settlement or a court judgment. Accordingly, the lawyer must do significant work from the very beginning of her engagement to discuss the precise goals of the community, the potential final outcomes of any legal strategy, and how that final outcome will impact the community in the future.

The lawyer cannot merely assume that economic compensation paid directly to affected individuals is the only, or even principal, goal. The communities that we have worked with that have decided to litigate have often been interested in receiving some combination of injunctive and monetary relief to help the community as a whole respond to the violation. An important part of the injunctive relief that oil-affected communities in the Amazon often seek is a meaningful remediation of their land and water sources and access to clean

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<sup>48</sup> See, e.g., ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* (1983).

<sup>49</sup> See *supra* Section III.C.

water. Indigenous communities that we have supported have also intended for the litigation to help advance their *plan de vida* (life plan), which includes goals in areas such as health, education, the environment, and economic development. Communities of survivors of Apartheid in South Africa have expressed a desire for litigation to bring new economic and career opportunities to a population deprived of such opportunities for years. It might surprise lawyers trained in the United States to learn that for some communities, direct compensation to individual survivors is often considered as a secondary goal at best.

With transnational litigation, the most probable positive outcome for the case is a negotiated settlement. The flexibility involved in the crafting of a negotiated settlement allows a particularly promising opportunity for the litigation to directly serve the goals of the community. Settlement negotiations, however, carry their own set of obstacles.

First, settlement negotiations and agreements are often so highly confidential that practitioners and communities alike are unable to engage in open debate about them. As a result, the lessons to be learned are inaccessible for those who might seek to learn from them. For example, a community might be under an obligation not to discuss or share their own experiences with litigation, negotiation, or settlement, with neighboring communities, making collective action, learning, and mass mobilization even more difficult.

Second, once a monetary offer is on the table, it is easy for the lawyer's approach in crafting a settlement to shift from one of responding to the previously articulated community goals, to one of getting the best deal for one's clients or one's community. Delegated negotiators from the community feel a similar pressure, reluctant to return to their communities empty handed. Given the difficulties in successfully litigating transnational human rights cases, lawyers may conclude that a settlement offer, even one that is inconsistent with communities' articulated goals, is the best outcome the community can achieve through litigation. In these circumstances, the lawyer may wish to recommend settlement to his or her clients.

This hypothetical situation is typical of many settlement negotiations, and carries with it a number of significant problems. First, engaging with the company on the company's own terms often immediately closes off the possibility of achieving a settlement that directly meets the goals of the community. For example, companies are often more interested in funding development projects than they are in undertaking the remediation sought by oil-affected communities because they view remediation thus as an acknowledgement of

the problem of contamination in the first place. Second, while even a small, confidential, monetary settlement in the abstract may seem like a better deal for the community than running the risk of receiving nothing through continued litigation, a lawyer's genuine commitment to the community's articulated goals in pursuing litigation might lead her to the opposite conclusion. Indeed, in certain circumstances, a confidential monetary settlement that falls outside of the community's original goals has the potential to cause significant internal turmoil and even fracture the community.

These considerations counsel caution in pursuing settlement negotiations, and highlight the need for close community participation in the process. Great vigilance and unity is necessary to maintain control of the settlement negotiations, and the lawyer has a significant role to play in keeping the control of the process in the hands of the community. The community has its own substantial responsibilities in staying committed to its goals in bringing the litigation, a task that is difficult enough without the added pressure of their lawyers pushing an un-planned-for resolution.

#### CONCLUSION

This paper was motivated by three broad questions which also guided our examination: How can the lawyer-client engagement be more empowering, more collaborative? How can collaboration get us to a shared vision of justice and a joint strategy for getting there? And how can that vision and strategy get us back to collaboration? We have highlighted some of the most critical texts in understanding the collaborative lawyering methodology, and have presented a series of ideas that we have developed over a few short years of practice. As we mentioned from the outset, the ideas we have presented are intended as an initial effort to identify potential strategies available to the transnational human rights lawyer to provide a more collaborative form of representation. They are intended to be met with critical reflection and to fuel a conversation and heightened focus on collaborative transnational human rights advocacy. As a result, rather than end this paper with a series of traditional conclusions, we end with a non-comprehensive series of questions that we continue to grapple with, and which we hope will guide further investigations.

- What methodology can be used by the lawyer to safeguard against coercing a community into the adoption of any particular strategy?
- How should the lawyer address requests for support for strategies with which the lawyer does not agree?
- What options and opportunities are available for financing

this type of collaborative lawyering to expand the possibilities for the type of representation provided and to limit the monetary considerations influencing the lawyer's engagement?

- What "tech-fixes" and practical fixes can be incorporated into improving communication and collaboration with client communities?
- How can the norms of professional ethics be criticized and improved to contemplate the possibility of collaborative lawyer-client relationships in a transnational setting (so that one might appreciate and represent collective interests rather than individual interests)?
- How should the lawyer address the common task of determining the position of "the community," and the possibility of differing views within that community, and the possibility that the community position can shift over time?
- What strategies are available to the lawyer for engaging with community ideas that are wholly anti-democratic and/or anti-egalitarian? When is it appropriate to challenge those ideas? How can those ideas be challenged?
- What steps can be taken to develop strong collaborative relationships with key points of contact within the community? How should the lawyer approach working with those contacts so as to avoid facilitating the concentration of power in a few leaders at the expense of the empowerment of the entire community?
- How can empowerment be multi-directional in a transnational setting, and what practices can be implemented to facilitate this level of exchange?
- In the context of settlement negotiations, what strategies can be implemented to ensure that the community maintains control of the terms and process of the negotiation? How can the lawyer work with the community to ensure that the community stays committed to its goals in bringing the litigation? How should the lawyer deal with the potentially changing articulation of the community goals?
- How should the lawyer address a situation in which the best interests of the community with which the lawyer is working are in direct conflict with other neighboring communities that are similarly situated?
- What happens to the lawyer-community relationship after a case is finished or settled? Can or should the lawyer remain involved in community affairs, and in what role?