

CRITICAL LEGAL CONSCIOUSNESS IN ACTION

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Replying to Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

Professor Orly Lobel has produced a stunning piece of work, one that promises to move legal scholarship beyond the deeply pessimistic view of the role of law in social change that has defined the post-civil rights era. I want to build upon the foundation that Professor Lobel has painstakingly erected to illuminate a scholarly perspective that understands legal reform strategies as presenting a set of basic trade-offs analogous to those presented by other techniques of social transformation. I do this by grounding Professor Lobel's theoretical account in the practical reality of contemporary public interest advocacy. In particular, I contend that if we look to *what lawyers are doing in practice*, we see a more optimistic picture of legal activism than is generally presented in the literature, one in which lawyers and their allies are quite thoughtful in their power analysis of legal strategies and skillful in their navigation of the shoals of cooptation.

This practical vantage point allows us to reframe Professor Lobel's analysis in two important ways. First, it challenges some of the assumptions underlying the critique of legal cooptation. Specifically, what we know about practice suggests that while some lawyers surely push legal activism at the expense of movement energy, there are many who defy that categorization. Moreover, while cooptation continues to be a salient concern, it appears less relevant to the current generation of public interest lawyers (at least those on the political left), whose experience is defined not by their strong position to influence policy at the cost of deradicalizing movements, but rather by their weak position to resist the policy agenda of a conservative central state.

Second, attention to practice complicates Professor Lobel's story about the turn to "extralegal" activism — activism "outside" the law. As a descriptive matter, it is not clear that the activities Professor Lobel presents can accurately be viewed as operating in an extralegal sphere. In addition, a broader survey of contemporary practice reveals a response to the critique of legal cooptation that is not trapped "outside" the law, as Professor Lobel argues, but rather is sophisticated in operating across "legal" and "non-legal" fields. It is in this sense that

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current practice has outstripped Professor Lobel's critique of extralegalism, embracing a version of what I call *constrained legalism*, which strategically deploys law in a way that is neither utopian in its hopes for legal reform nor rejectionist in its dismissal of legal avenues of transformation.

I. CRITICAL LEGAL CONSCIOUSNESS AT THE INTERSECTION OF THEORY AND PRACTICE

Professor Lobel distills an enormous literature into a "contemporary critical legal consciousness — a conventional wisdom about the relative inefficacy of law."¹ This conventional wisdom, she suggests, holds "that the law often brings more harm than good to social movements that rely on legal strategies to advance their goals."² According to Professor Lobel, contemporary scholars embrace extralegal activism, which operates "outside" the formal legal sphere, as an antidote to the cooptive effects of traditional legalism.

While this formulation offers a useful heuristic for understanding the trajectory of legal scholarship, it does not capture the full complexity of legal thinking about social change from the world of practice. Professor Lobel thus overstates the degree to which concerns about legal cooptation accurately define the conventional wisdom, exposing a disjuncture between consciousness in theory and consciousness in action.

A. *Whose Critical Legal Consciousness?*

Professor Lobel uses the term "legal consciousness" to trace "the genealogies of paradigm construction made by legal scholars."³ Yet in doing so, she does not probe other reservoirs of critical consciousness that may be relevant to her project. In particular, given the relationship between theory and practice that Professor Lobel draws, it is useful to ask: do lawyers identified with the public interest law sector share the critical legal consciousness that Professor Lobel articulates?

Though there is no definitive evidence to directly answer this question, there are reasons to think that the academy's concerns about cooptation do not neatly map onto the ideology of activists. One clue is found in the structure of contemporary practice, which still tilts heavily in the direction of conventional legal advocacy strategies. A recent study by Professors Laura Beth Nielsen and Catherine Albiston found that public interest law organizations in their survey spent on average

¹ Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 938–39 (2007).

² *Id.* at 939.

³ *Id.* at 939 n.1.

nearly two-thirds of their time on “legal work,” as opposed to activities like legislative advocacy, research, education, and outreach.⁴ Though Nielsen and Albiston note that there is some evidence that extralegalism is on the rise,⁵ the overall picture still suggests that lawyering in public interest organizations is generally situated at the more conventional end of the advocacy spectrum.

Furthermore, there is evidence that some public interest lawyers view their legal work as complementary to political mobilization. Professors Michael McCann and Helena Silverstein, for example, have conducted in-depth qualitative studies of activist lawyers in both the pay-equity and animal rights movements. Reflecting on the ideologies of these lawyers, they conclude that the lawyers “did not view litigation as an exclusive end in itself” and were “very committed to encouraging, enhancing, and supplementing” movement activity.⁶ Similarly, Professor Ann Southworth’s study of civil rights and poverty lawyers in Chicago found that lawyers used litigation as part of multidimensional political strategies to secure positive outcomes for clients.⁷ Notably, Southworth described lawyers who deeply appreciated the political constraints on conventional legal work but nevertheless viewed their efforts as “political assets” that could be used to provoke legislative reform, discourage future wrongdoing, or mobilize community participation.⁸ Professors Austin Sarat and Stuart Scheingold, who have led a ground-breaking investigation into cause lawyering over the past decade, have also presented evidence that lawyers can make “seminal[] contributions to the building, maintenance, and success of social movements.”⁹ What this literature suggests is that there is rea-

⁴ Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1612 (2006). The definition of “public interest law organizations” used by Professors Nielsen and Albiston covers groups that have activities that include at least one “adjudicatory strategy.” *Id.* at 1601. Though this means that their sample includes only groups that do some traditional law, it is still broad enough to provide a useful picture of the range of public interest practice.

⁵ See *id.* at 1612 (“In 2004, 10% of [public interest law organizations] reported that they devoted less than one-fifth of their organizational effort to legal activities; this is a dramatic increase from 1975, when all of the organizations included in the study devoted at least one-fifth of their effort to legal activity.”).

⁶ Michael McCann & Helena Silverstein, *Rethinking Law’s “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261, 269 (Austin Sarat & Stuart Scheingold eds., 1998) (emphases omitted).

⁷ See Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 477 (1999).

⁸ *Id.* at 488.

⁹ Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 10 (Austin Sarat & Stuart Scheingold eds., 2006); see also JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

son to believe that at least some lawyers have developed a legal consciousness that is not driven by fears of cooptation to avoid conventional legal conflict.

Taking account of these empirical studies does raise the question of whether it is accurate to assert that a coherent critical legal consciousness exists among scholars, some of whom have been careful to distinguish themselves from the pessimistic view of legal cooptation.¹⁰ In addition, even some of the most pointed critics of legal activism have been quick to point out that lawyers can form alliances with movements and deploy legal strategies in a way that reinforces their political goals.¹¹

It is also important to underscore that the critical legal consciousness that Professor Lobel describes is specific to legal academics on the political left. Despite the fact that the last 30 years have seen a build-up of conservative public interest law organizations that have focused on traditional litigation,¹² there has not been the same sort of backlash against law reform by conservative legal commentators. Indeed, as Professor Lobel points out,¹³ conservative advocacy groups that now see opportunities in the federal judiciary for favorable decisions have charted sophisticated impact strategies to transform society — strategies that rival anything done by their liberal counterparts.

B. What Is “Legal” About Cooptation?

Professor Lobel does an extraordinary service by disentangling strains of the cooptation critique, building a typology that she uses to support her central argument that cooptation concerns are not specific to legal activism. Professor Lobel concludes that by embracing the logic of legal cooptation, “contemporary critical legal consciousness has eclipsed the origins of critical theory.”¹⁴ This is a powerful insight, which by itself is a major contribution to the field. My purpose in this section is to refine the point by highlighting how concerns about legal cooptation mask the operation of larger structural constraints on progressive legal activism.

To do this, it is important to draw a distinction between two broad concerns that animate the literature on cooptation — and which cut in slightly different directions. First, there is a concern about *law as a*

¹⁰ See, e.g., Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506 (Austin Sarat ed., 2004).

¹¹ See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996).

¹² See Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1267–68 (2005).

¹³ See Lobel, *supra* note 1, at 984–85.

¹⁴ *Id.* at 940.

social change tactic. Scholars worry that the *process* of lawyers using law in the context of social struggle undermines other forms of social activism. Professor Lobel captures this concern with her discussion of litigation diverting resources and reframing disputes, as well as with her analysis of the risks of lawyers blunting client initiative and silencing client voice.¹⁵ Professor Lobel notes that some scholars have proposed informalizing lawyer-client relationships and emphasizing non-litigation efforts in order to avoid this problem.¹⁶ Her response to this move is to warn proponents of informalization of the risk of ceding the formal legal field to adversaries.¹⁷

I agree with this position, but it is again helpful to place it in political context. The aims of the liberal public interest law movement have been left unrealized not just because of political missteps and lawyer overreaching, though this has certainly occurred. What has been equally — if not more — important in curtailing the movement has been the significant change in the political environment since the early public interest period, which has included an “assault” on the foundations of liberal rights advocacy.¹⁸ This assault has included: a reversal in the composition of the federal courts that has limited liberal rights claims; a weakening of the regulatory power of administrative agencies; the decline of the welfare state; major restrictions on the federal legal services program; and, most recently, the constriction of civil rights and civil liberties, particularly for noncitizens, in the name of counterterrorism.¹⁹ In light of these changes, it is worth asking whether focusing critical energies on the cooptive effects of legal tactics reinforces systemic efforts to narrow the scope of progressive legal activism.

There is a second set of cooptation concerns that relate to *law as a social change outcome*. Here, the worry is that the *substance* of a legal reform may have pernicious effects on movements, either by legitimating injustice or by making promises of change that are never fulfilled.²⁰ From this perspective, *how* the law is changed is less impor-

¹⁵ See *id.* at 949–54.

¹⁶ See *id.* at 953.

¹⁷ See *id.* at 970.

¹⁸ See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

¹⁹ See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. (forthcoming 2007) (UCLA Sch. of Law Public Law and Legal Theory Research Paper Series, Research Paper No. 06-41, 2006), available at <http://ssrn.com/abstract=944552>; Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 9, at 37; Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law,”* 2005 WIS. L. REV. 455.

²⁰ See Lobel, *supra* note 1, at 954–58; see also Handler, *supra* note 9, at 18–22 (discussing the difficulty of enforcing legal orders through bureaucratic channels).

tant than its ultimate form. Thus, cooptation concerns arise whether legal reform comes as a *legislative response* to social movement demands, as in the case of the National Labor Relations Act or Civil Rights Act,²¹ or as *judicial action* in response to impact litigation, as in *Brown v. Board of Education*.²² The problem in each case is that after law reform is achieved, it constrains action, dissipates enthusiasm, and defines the limits of a movement's transformative agenda. One solution proposed by scholars is to emphasize "soft law" responses — what Professor Lobel calls "legal pluralism"²³ — that move away from hard regulation toward open-ended accountability regimes that create space for ongoing community participation.²⁴ Here, Professor Lobel is precisely right to point out that the turn to soft law is also susceptible of cooptation, in that it may reinforce conservative agendas and discount the importance of legal enforcement. However, there is a bigger point to be made: whether reforms are hard or soft, the product of lawyer-led litigation campaigns or broad-based social movements, they are always as vulnerable to strategic reinterpretation, deliberate nonenforcement, and political backlash.²⁵ This is a product of power inequality, not legal cooptation. Thus, what we should take away from Professor Lobel's analysis is that social change strategies by definition are ongoing and complex, constrained not just by their legal form, but by the very limits of our democratic system of governance.

II. FROM EXTRALEGALISM TO CONSTRAINED LEGALISM

Though I was persuaded by Professor Lobel's "problematizing" of extralegal activism,²⁶ I want to again turn a closer eye to practice to highlight ways in which her account of activism "outside" the law is a partial one. In particular, I suggest that her analysis of law and organizing, civil society revivalism, and legal pluralism discounts the ways in which activists in those categories operate across legal boundaries in a manner that suggests deep appreciation for the interplay between traditional legal activism and transformative political goals. In this

²¹ See Lobel, *supra* note 1, at 942, 946.

²² 347 U.S. 483 (1984). See Lobel, *supra* note 1, at 946.

²³ See Lobel, *supra* note 1, at 966.

²⁴ See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 187–90 (2004).

²⁵ This is one of the lessons of the social movement literature. See Edwin Amenta & Neal Caren, *The Legislative, Organizational, and Beneficiary Consequences of State-Oriented Challengers*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 461 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004) (discussing the vulnerability to political reversal of legal reforms achieved through social movements); see also Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 9, at 277, 278.

²⁶ See Lobel, *supra* note 1, at 970–71.

sense, lawyers on the ground are moving ahead of her critique, adopting a version of “constrained legalism” as an alternative to legal exit.

A. *Contesting Extralegal Activism as “Outside” the Law*

Professor Lobel suggests that the scholarly response to legal cooptation has emphasized “opting out” of the legal arena to focus on extralegal action. She thus examines the move toward “law and organizing” as an illustration of this trend.²⁷ Here, Professor Lobel emphasizes that scholars propose to use law not to achieve specific legal victories, but to win “nontraditional gains” like “empower[ing] individuals and groups in their everyday lives.”²⁸

I agree with Professor Lobel that this focus on empowerment is a dominant strain in the literature. However, in practice, lawyers deploy “law and organizing” strategies not just to promote “grassroots mobilization and self-help,”²⁹ but also to *change law on the books*. Indeed, the Workplace Project, which Professor Lobel cites,³⁰ is notable not just because of its embrace of nontraditional techniques, such as picketing recalcitrant employers’ homes to recover back wages for immigrant workers, but also for its use of such techniques to promote systemic labor enforcement and to reform state labor laws.³¹ There are other well-known examples, including efforts by immigrant rights organizations to impose joint liability on garment retailers and manufacturers for the labor violations of sweatshop contractors,³² as well as the success of law school clinical programs in combining law and organizing to challenge abusive restaurant industry practices.³³ As these examples suggest, lawyers who embrace organizing and client empowerment often do so with the joint purposes of grassroots mobilization and systemic reform. One distinction between this method and old-style law reform is that the target of current efforts is often not the federal government, but instead lower level decisionmakers. Thus, one tradeoff is that local reform activism sacrifices the quest for univer-

²⁷ See *id.* at 959.

²⁸ *Id.* at 960–61.

²⁹ *Id.* at 961.

³⁰ See *id.* at 950 n.50.

³¹ See JENNIFER GORDON, SUBURBAN SWEATSHOPS 243–60 (2005) (recounting the campaign to pass New York’s Unpaid Wages Prohibition Act).

³² See Julie A. Su, *El Monte Thai Garment Workers: Slave Sweatshops*, in NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 143, 148 (Andrew Ross ed., 1997).

³³ See Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. (forthcoming 2007) (describing the work of the City University of New York Immigrant and Refugee Rights Clinic in representing workers associated with the Restaurant Opportunities Center of New York to gain a major labor victory against a large chain restaurant in New York).

sally applicable rules in order to achieve more attainable victories on a smaller scale.

This tradeoff, however, again underscores the importance of political context: locally oriented efforts reflect the reality that progressive city and state legislative bodies are more amenable to liberal reform efforts than are their federal counterparts. Thus, to the extent that extralegalism does, in fact, entail “opting out” of the federal arena, one must be careful to separate out exit that is *chosen* and exit that is *forced*. Lawyers may be engaged in extralegalism not because of its normative attractiveness, but out of pragmatic necessity in light of the imposition of restrictions in the federal legal sphere.

A similar observation about the complexity of practice can be made about activism in the civil society arena. On a global level, while it is no doubt true that extralegalism is pervasive, this is owing in part to the absence of formal legal arenas within which to pursue redress. To the degree that legal opportunities present themselves, activists pursue them, as is evident in recent efforts by public interest lawyers to bring cases before the Inter-American Commission on Human Rights, file grievances in the United Nations, and press labor and environmental demands within the World Trade Organization and the North American Free Trade Act system.³⁴ In addition, labor and environmental lawyers in the United States have gained attention for linking up with activists abroad to file lawsuits under the Alien Tort Statute³⁵ against transnational corporations like Unocal and Exxon Mobil for human rights abuses against local populations.³⁶ Similarly, when one looks at activism around soft law initiatives, such as corporate codes of conduct, one sees not just extralegalism at play, but nuanced attempts to combine hard and soft law to constrain corporate conduct. One example of this is the recent case filed by the International Labor Rights Fund on behalf of a class of workers from supplier factories in developing countries that accuses Wal-Mart of labor violations on the basis of a code of conduct contained in its supplier contracts and alleged to be enforceable by the workers as third-party beneficiaries.³⁷

Likewise at the local level, while the community economic development movement provides a leading example of decentralized activism in the nongovernmental sphere, it too encompasses efforts not just to promote citizen participation, but to translate participation into city-

³⁴ See Cummings, *supra* note 19, at 82–89.

³⁵ 28 U.S.C. § 1350 (2000).

³⁶ See *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).

³⁷ See Press Release, International Labor Rights Fund, Sweatshop Workers on Four Continents Sue Wal-Mart in California Court (Sept. 13, 2005), available at http://www.laborrights.org/press/Wal-Mart/lawsuit_pressrelease_091305.htm.

wide legal reforms to hold local developers accountable for improving labor standards and expanding affordable housing.³⁸ Instead of completely opting out of legally regulated spheres, there is activism within the “extralegal” domains Professor Lobel describes that is keenly attuned to deploying nontraditional tactics to force legal change.

*B. Revisiting the Role of Law
Within the Paradigmatic Social Movements*

Focusing on the world of practice allows us to discern multiple “critical legal consciousnesses,” including one that I would associate with the notion of “constrained legalism,” by which I mean an approach to legal activism informed by a critical appreciation of *law’s limits* that seeks to exploit *law’s opportunities* to advance transformative goals. To illuminate this approach, it is instructive to return briefly to current activity within the two fields that have symbolized the perils of legal cooptation: labor and civil rights. Interestingly, both movements have embraced law reform as an important goal, though the current wave of reform efforts looks quite different from its New Deal and Civil Rights era precursors.

Within the labor movement, local legal reform to promote labor standards has been pursued by a coalition of community-labor groups, supported by public interest lawyers. In Los Angeles, for example, community-labor coalitions have pressed a reform agenda that includes card check neutrality, living wage laws, the imposition of community benefits requirements on publicly subsidized private developers, and limits on the negative economic impact of big-box retail stores like Wal-Mart.³⁹ These efforts have enlisted lawyers to conduct research on living wage impacts, draft legislation, negotiate community benefits agreements with developers, and resist big-box developments through land use and environmental challenges.

Classical civil rights activism has been channeled into a diverse range of new movements, including prominent efforts to promote the rights of immigrants and other noncitizens. The movement for undocumented immigrant rights has deployed a traditional social movement strategy, with the 2006 “Spring Marches” demonstrating power in numbers in order to influence the content of a proposed guest worker statute. The movement has also relied on strategic litigation, as mentioned above in the context of restaurant and garment advocacy, as well as organizing-based labor enforcement efforts in the low-wage immigrant work sector, as the example of the Workplace Project illus-

³⁸ See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 9, at 302, 313.

³⁹ See Scott L. Cummings, *Law and the Challenge to Wal-Mart’s Labor Standards: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. (forthcoming 2007).

trates. In the wake of the Bush administration's counterterrorism policies after 9/11, we have also been reminded of the continued importance of public interest law in protecting the rights of noncitizens against executive power, with the Center for Constitutional Rights bringing two successful lawsuits that resulted in courts upholding the right of detainees to challenge their detention through habeas corpus in *Rasul v. Bush*⁴⁰ and invalidating military commissions in *Hamdan v. Rumsfeld*.⁴¹ Though these cases have by no means ended the battle over detainee rights, they have succeeded in mobilizing intense political pressure on administration officials to change their practices. It is the self-conscious effort to combine the legal and political — to deploy them in mutually reinforcing ways that recognize the power and limits of both — that points beyond the boundaries of extralegalism.

Professor Lobel ends with a call for restoring “critical optimism” to the field of legal inquiry.⁴² Her article, which stands as a milestone of legal scholarship, does the heavy lifting of dislodging the freighted ideology of the past. For directions on future paths forward, one need look no further than the contemporary thrust of legal activism on the ground.

⁴⁰ 542 U.S. 466 (2004).

⁴¹ 126 S. Ct. 2749 (2006).

⁴² Lobel, *supra* note 1, at 987.