

REPRODUCTIVE JUSTICE: DEVELOPING A LAWYERING MODEL

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I. INTRODUCTION

In early 2009, Nadya Suleman, now known as the “octo-mom,” caught international attention for giving birth to live octoplets. Public sentiment quickly turned from awe to scorn when the media disclosed that Suleman had used assisted reproductive technology to become pregnant while unemployed and receiving public assistance.¹ This national media spectacle once again stirred up hostility toward poor women—leading many to call for increased regulation of women’s reproductive choices.² Several state legislatures have considered legislation to prevent women from accessing fertility treatments if their age, health or financial circumstances are deemed “unsuitable.”³

At the heart of the octo-mom debate lies a question that illustrates the line between reproductive rights and justice. When should a woman’s legal *right* to determine the number and spacing of her children give her access to public resources to *support* her choices? The mainstream reproductive rights movement has historically dodged this question—focusing on obtaining and maintaining the legal right to reproductive services, such as abortion. In contrast, an emerging movement for “reproductive justice” refuses to ignore the question of public resources—recognizing that a legal right to reproductive services, without support, leaves many women without meaningful choice.

A movement under the banner of “reproductive justice” has exploded in the past few years—attracting vigorous organizing, funding, and attention from mainstream and progressive advocates. New organizations such as California Latinas for Reproductive Justice have formed to mobilize communities and shape public policy.⁴ Foundations have begun to fund reproductive justice

1. *Octuplets' Birth Spawns Outrage from Public*, L.A. TIMES, Feb. 7, 2009.

2. Carleton Bryant, *Octuplets Likely to Cost Taxpayers Millions*, WASH. TIMES, Feb. 11, 2009.

3. Linda Lowen, *Octomom Bill - Octomom Legislation Limits Number of Embryos Implanted*, ABOUT.COM, Mar 6, 2009.

4. See California Latinas for Reproductive Justice (CLRJ), <http://www.californialatinas.org> (follow “About Us” hyperlink).

projects.⁵ Progressive think tanks have called for a shift to a reproductive justice agenda.⁶ Even mainstream organizations such as the National Organization for Women⁷ have adopted the term.⁸ In the midst of all the excitement over the reproductive justice movement, there is concern that those using the term are not committed to its framework and values.

Reproductive justice is not interchangeable with reproductive rights, but rather reflects a fundamentally different approach to social change. Reproductive justice is rooted in a rich history of organizing among women of color⁹ within movements for social justice and women's health.¹⁰ Additionally, reproductive justice is about shifting resources—in addition to extending rights—to those who lack the information and means to achieve self-determination in reproduction.¹¹ Reproductive justice activists recognize that “reproductive choice” does not occur in a vacuum, but in the context of all other facets of a woman's life, including barriers that stem from poverty, racism, immigration status, sexual orientation and disability.¹² To achieve reproductive justice, according to movement leaders, oppressed communities must build power through organizing, education and political mobilization.¹³

One mainstream national reproductive rights organization, Law Students for Reproductive Justice (LSRJ), has wholeheartedly adopted the reproductive justice framework, but has encountered difficulty in defining its role in the movement. In 2007, Law Students for Choice changed their name to Law Students for Reproductive Justice.¹⁴ Shortly thereafter, LSRJ chapter leaders

5. See Tides Foundation Reproductive Justice Initiative, <http://www.tidesfoundation.org/reproductivejustice> (last visited May 9, 2009).

6. Eveline Shen, *Reproductive Justice: How Pro-Choice Activists can Work to Build a Comprehensive Movement*, MOTHER JONES, Jan., 2006, available at <http://www.motherjones.com/politics/2006/01/reproductive-justice>.

7. Zenaida Mendez, *Reproductive Justice is Every Woman's Right*, NATIONAL NOW TIMES, 2006.

8. It is still unclear whether these mainstream organizations have adopted the reproductive justice framework, or simply adopted the name.

9. I use the term “women of color” to describe the four primary ethnic groups in the United States (African American, Asian Pacific American, Hispanic American, Native American). Since women of color coined the term in 1977 at the National Women's Conference in Houston, Texas, it has become an organizing principle in the United States for women who are most disadvantaged by white supremacy.

10. Jael Silliman et al., UNDIVIDED RIGHTS, WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 35-36 (2004).

11. See LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *What Is Reproductive Justice*, http://lsrj.org/documents/What_is_RJ.pdf (hereinafter “LSRJ”).

12. See SPARK REPRODUCTIVE JUSTICE NOW! (SPARK), <http://sparkrj.org/content/>.

13. See *id.*

14. See LSRJ, *supra* note 11. “In 2007 we changed our name to more accurately reflect the spirit of our intersectional perspectives, inclusive values, and collaborative strategies, as well as the substance of our work. By adopting our new name, our exterior more fully embodies our interior values. At the campus and national levels our new name is heightening involvement of law students, yielding greater diversity in our membership, enhancing our coalition-building capacity, and increasing partnerships with other social justice organizations and advocates. In

convened in Chicago to discuss the name change and learn how to bring the “reproductive justice” model to their campuses. Early in the conference, Aimee Thorne-Thomsen from Expanding the Movement for Empowerment and Reproductive Justice (EMERJ)¹⁵ provided chapter leaders with an overview of the reproductive justice framework, illustrating how it differed from traditional notions of reproductive rights. As a participant in this gathering, I felt energized by this new direction, so I asked a question: “What should law students do?” The speaker paused, shook her head, and quietly responded: “Well... I don’t know. You will have to figure it out.” Throughout the conference students struggled to answer this question, and LSJR continues to grapple with it today.

LSRJ’s difficulty in transitioning from reproductive rights to justice is hardly surprising. There are few legal organizations dedicated to reproductive justice, and even fewer lawyers who explicitly practice it. Legal scholarship has paid little attention to the reproductive justice movement. There are few, if any, courses available in reproductive justice at law schools. Those fellowships that are available in the field tend to be in traditional, mainstream reproductive rights organizations.

Additionally and significantly, it is far from clear what role lawyers can and should play in the reproductive justice movement. Under the reproductive justice framework, those most oppressed should be at the center of the struggle—directing the goals of the movement and building power to achieve them.¹⁶ Given their privilege and elite status, lawyers and law students are not the movement’s core constituency. Further, legal strategies are notoriously disempowering. When lawyers advocate for clients, their clients generally have minimal opportunities to participate in the process or to shape the outcome.

Nevertheless, there is a rising tide of law students who are moved to take part in this new movement. It seems that LSJR has put the cart before the horse. In order to best integrate law students into the movement, it is necessary to take a step back and determine whether lawyers should have a role in the first place, and then determine what that role can and should be. This article seeks to provide that missing analysis—to identify the barriers to establishing roles for lawyers within the reproductive justice movement, to look to other social justice movements for guidance in moving past the barriers, and to put forward two avenues for lawyers to practice reproductive justice law. In so doing, I

short, it is helping us expose more future lawyers, judges, politicians, and scholars to reproductive justice and its intersections with other areas of the law and legal practice.” <http://lsrj.org/orientation>.

15. See Expanding the Movement for Empowerment and Reproductive Justice (EMERJ) (2009), <http://www.emerj.org/>.

16. See ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE (ACRJ), A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE (2005), available at http://www.reproductivejustice.org/download/ACRJ_A_New_Vision.pdf; see also SPARK, *Grassroots Fundraising*, http://sparkrj.org/content/?page_id=10.

hope to inspire those engaged in reproductive justice work to document their stories and build a body of scholarship that can support the reproductive justice movement and those working within it.

The purpose of this article is to develop a lawyering model for reproductive justice. Section II summarizes the reproductive justice movement's origin, history and framework. Section III distinguishes reproductive justice from reproductive rights by first illustrating how the reproductive rights framework falls short in achieving the goals of the reproductive justice movement. Section IV focuses on three aspects of the reproductive rights movement that contextualize the reproductive justice movement—the strategic focus on abortion rights and privacy at the expense of access, the marginalization of women of color within the movement, and the central role of lawyers in shaping the reproductive rights agenda. Section V first explores the barriers to developing a reproductive justice lawyering model, including path dependence, definitional challenges and the isolation of reproductive issues from other social change movements. Section VI looks to the environmental justice movement as a guide for developing a lawyering model for reproductive justice, exploring two approaches that have worked well: community lawyering and integrative lawyering. Sections VII and VIII apply these models to the reproductive justice context, and Section IX provides recommendations for making the transition from rights to justice lawyering.

As a preliminary note on methodology, this article does not purport to provide a comprehensive history or analysis of either the reproductive rights or reproductive justice movements. It is very difficult to describe social movements due to the fact that movements are organic, human-driven forces that rarely follow a linear trajectory. Additionally, there is often much disagreement within the movement about its goals, strategies and tactics. Moreover, documented histories tend to overemphasize the role and importance of those with greater resources. Given these challenges, I have chosen to rely heavily upon other authors who have examined these movements closely.¹⁷ This article seeks to develop models for lawyering within the emerging reproductive justice movement based on the reproductive justice framework and rooted in historical context.

II. THE REPRODUCTIVE JUSTICE FRAMEWORK

A. *Origin and History of the Term "Reproductive Justice"*

The term "reproductive justice" was coined in 1994, during a national pro-choice conference.¹⁸ At the conference, a Black Women's Caucus formed to bring the lessons of the International Conference on Population and

17. SILLIMAN, *supra* note 10; JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* (2003).

18. Loretta Ross, *Understanding Reproductive Justice*, May 2006, available at http://www.sistersong.net/publications_and_articles/Understanding_RJ.pdf.

Development in Cairo to the United States reproductive rights movement.¹⁹ According to Loretta Ross, one of the members of the Black Women’s Caucus and co-founder of SisterSong Women of Color Reproductive Health Collective:²⁰

“[W]e were dissatisfied with the pro-choice language, feeling that it did not adequately encompass our twinned goals: to protect the right to have—and not to have—children. Nor did the language of choice accurately portray the many barriers African American women faced when trying to make reproductive decisions. We sought a way to partner reproductive rights to social justice and came up with the term ‘reproductive justice’.”²¹

Reproductive justice leaders sought to connect domestic activists with the global struggle for women’s human rights.²² As such, the concept of reproductive justice is based on a human rights framework, which recognizes the link between social and political rights and economic rights, acknowledges that oppression occurs in both public and private spheres, and affirms collective and group rights.²³

B. *Definition of Reproductive Justice*²⁴

In 2004, Asian Communities for Reproductive Justice (ACRJ) developed a framework for reproductive justice in an effort to define the term and set forth goals and strategies for the emerging movement.²⁵ Reproductive justice, as defined by ACRJ, is: “the complete physical, mental, spiritual, political, social and economic well-being of women and girls, based on the full achievement and protection of women’s human rights.”²⁶ Barriers to achieving reproductive justice include, “the systematic denial of women’s and girls’ self-determination, control over their bodies, and limiting of their reproductive choices.”²⁷

19. *Id.*

20. SisterSong formed in 1997 as a coalition of 16 organizations representing four communities of women of color: African-American, Asian-American and Pacific Islander, Latina, and Indigenous. SisterSong’s original mission was advocacy for the reproductive health needs of women of color through grassroots mobilization and policy advocacy. See SILLIMAN, *supra* note 10, at 42.

21. ACRJ, *supra* note 16, at 5.

22. Ross, *supra* note 18.

23. *Id.*

24. For this article, I adopt the prevailing definition of reproductive justice, as put forward by ACRJ in 2004. There are other likely definitions of reproductive justice and there will undoubtedly be more to come. Admittedly, ACRJ’s definition is both narrow and broad. It does not include men as part of the movement. At the same time, its reach is expansive—to issues far beyond those directly connected to reproduction—with no explicit boundaries. ACRJ’s focus on women is likely attributable, at least in part, to the importance of identity-based organizing among women of color in the reproductive rights movement. See SILLIMAN, *supra* note 10, at 13. Likewise, its broad scope reveals the various sources of oppression that intersect to prevent women from achieving full empowerment.

25. See ACRJ, *supra* note 16.

26. Ross, *supra* note 18.

27. See ACRJ, *supra* note 16, at 6.

Intersectional analysis provides a key theoretical underpinning of the reproductive justice framework in two ways. First, the movement seeks to address power inequities at various levels—the individual, interpersonal, family, community, and institutional levels.²⁸ Second, the movement views other forms of oppression, including race, class, gender, sexuality, ability, age and immigration status, as inextricably linked to reproductive oppression.²⁹

C. *Achieving Reproductive Justice*

At its core, reproductive justice is about changing power relations and redistributing resources. Accordingly, the movement's strategy entails "base-building that focuses on organizing women, girls and their communities to challenge structural power inequalities in a comprehensive and transformative process of empowerment."³⁰ The key players in the reproductive justice movement are organizers, and their core strategy is to organize poor women and girls of color to take direct action to win real changes for themselves and their communities.³¹

III: DISTINGUISHING REPRODUCTIVE JUSTICE FROM REPRODUCTIVE RIGHTS

A. *The Reproductive Rights Framework*³²

The reproductive rights framework serves to protect an individual woman's legal right to reproductive health services.³³ Under this model, reproductive rights are essential to achieving a world where "every woman participates with full dignity as an equal member of society."³⁴ This individual rights-based model is based on four, highly inter-related, principles:

- 1) **Choice** (i.e., women must have a choice about whether and when to bear a child);
- 2) **Privacy** (i.e., personal decisions about sexual intimacy and childbearing are private);
- 3) **Freedom from governmental interference** (i.e., the government should not interfere with a medical decision that is made by an individual in consultation with her physician); and
- 4) **Personal autonomy** (i.e., the freedom to make decisions about one's body is an essential component of autonomy).³⁵

28. *Id.*

29. *Id.*

30. Ross, *supra* note 18.

31. See ACRJ, *supra* note 16, at 6.

32. The term "reproductive rights" has evolved over the past half-century. It has been used interchangeably with "abortion rights" at some times, and at other times interchangeably with "reproductive justice." I adopt ACRJ's definition as a distinct framework that is both larger than abortion rights, yet analytically different in means and ends than reproductive justice.

33. ACRJ, *supra* note 16.

34. CENTER FOR REPRODUCTIVE RIGHTS (CRR), <http://reproductiverights.org/>.

35. See Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U.J. GENDER SOC. POL'Y & L. 59, 61-65 (2005).

The notion of what is and what is not a “reproductive right” has expanded and contracted over time—often in response to political, social and legal forces. Reproductive rights have traditionally included “negative” rights (i.e. the right *not* to be subjected to an action of another person or group) such as the right to safe, accessible and legal abortions; the right to private and confidential doctor-patient relationships; and the right to comprehensive reproductive health care services provided free of discrimination, coercion and violence.³⁶ The Center for Reproductive Rights now includes some “positive” rights in their purview (i.e. the right to be subjected to an action of another person or group) such as the right to a full range of safe and affordable contraception; the right to safe and healthy pregnancies; and the right to equal access to reproductive health care for women facing social and economic barriers.³⁷

To achieve these rights, organizations primarily use legal, legislative and administrative advocacy.³⁸ Key players in a reproductive rights framework are advocates—lawyers, policymakers and elected officials.³⁹ This is not to say that reproductive rights groups have not engaged in grassroots organizing. Many reproductive rights coalitions operate at the state and local level, usually engaging in organizing to build political power to influence elected officials.

B: The Limitations of the Reproductive Rights Framework to Achieve the Goals of Reproductive Justice

Reproductive rights are necessary, but insufficient to achieve reproductive justice. First, articulating a reproductive right does not alone eliminate barriers to enjoying those rights, such as racism, sexism, economic injustice, and immigration policies. Second, the articulation, or even the constitutional protection of rights does not necessarily alter power relations or shift resources. Reproductive justice claims, then, are more appropriately viewed as political than legal.

1. A Right Does Not Necessarily Mean Access

The right to an abortion has not translated into access to abortion or other reproductive health services such as contraception, sex education, or basic gynecological care for low-income women.⁴⁰ Similarly, the right to parent has not been recognized to mean a right to financial assistance for a child.⁴¹

The right to choice does not mean equal access to abortion. Courts have

36. CRR, *supra* note 34.

37. *Id.*

38. ACRJ, *supra* note 16.

39. *Id.*; CRR, *supra* note 34.

40. Melissa L. Gilliam, Amy Neustadt & Rivka Gordon, *A Call to Incorporate a Reproductive Justice Agenda into Reproductive Health Clinical Practice and Policy*, 79 *CONTRACEPTION* 243–246 (2009).

41. *Sojourner A. v. N.J. Dep’t of Human Servs.*, 177 N.J. 318, 377 (2003).

generally upheld funding restrictions for abortions, refusing to make the leap from reproductive rights to access to the *means* to ensure reproductive control. In other words, a woman's constitutional right to abortion does not mean that she is entitled to public funds to pay for it. Consider *Renee B. v. Florida Agency for Health Care Administration*,⁴² in which the Florida Supreme Court distinguished between the right to a legal abortion and state funding for abortions for women in poverty:

The right of privacy in the Florida Constitution protects a woman's right to choose an abortion.... [It] does not create an entitlement to the financial resources to avail herself of this choice. Poverty may make it difficult for some women to obtain abortions. Nevertheless, the State has imposed no restriction on access to abortions that was not already present.⁴³

The courts' attitudes are reflected on the ground. Today, abortion remains out of reach for thousands of women each year who find that the expense, location and shortage of services create daunting barriers.⁴⁴ While abortion has become prohibitively expensive for many women, research shows that most women facing an unintended pregnancy find a way to pay for it, often at great sacrifice to themselves and their families.⁴⁵ Studies indicate that many such women are forced to divert money meant for rent, utility bills, and food or clothing for themselves and their children.⁴⁶

Likewise, a right to choose to have a child does not mean access to financial support for the pregnancy and the child once born. This gap in access is most apparent in "family cap" welfare policies, where states cap the amount of cash assistance to needy families at a certain family size. In effect, a family receives no additional financial support for a new child.⁴⁷ In 2003, the New Jersey Supreme Court upheld the state's family cap policy, holding that the

42. 790 So. 2d 1036, 1039-41 (Fla. 2001); *compare* Comm. to Defend Reproductive Rights v. Meyers, 625 P.2d 779, 781 (Cal. 1981) (invalidating a statute prohibiting state funding of abortion on the ground that the state constitutional right of privacy precludes the state from funding births while withholding funds for abortions).

43. *Id.* at 1041; *see also e.g.*, Harris v. McRae, 448 U.S. 297 (upholding the constitutionality of the Hyde Amendment, "a woman's freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.")

44. MARLENE GERBER FRIED, *Abortion in the United States: Barriers to Access*, POLICING THE NATIONAL BODY; SEX, RACE, AND CRIMINALIZATION 106 (2002). A number of studies have examined how many women are forced to forgo their right to abortion and bear children they did not intend. Studies published over the course of two decades looking at a number of states concluded that 18-35% of women who would have had an abortion continued their pregnancies after Medicaid funding was cut off. *See also* Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL. REV. 1, Winter 2007, available at <http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.html>.

45. Boonstra, *supra* note 44.

46. *Id.*

47. Twenty states currently have a family cap policy and an additional two states have a flat cash assistance grant regardless of family size. National Council of State Legislatures, *Family Cap Policies*, <http://www.ncsl.org/statefed/welfare/familycap05.htm>.

right to bear a child does not mean that a woman receiving welfare assistance is entitled to financial support for an additional child.⁴⁸ The court drew a direct parallel to the abortion rights/funding distinction, reasoning that a woman's right to bear a child remains unblemished, even if her choice is made more difficult based on financial constraints.⁴⁹

Notably, the abortion rates for women of color are increasingly higher than those of white women.⁵⁰ The higher rate may reflect the skyrocketing costs of raising a child.⁵¹ As Marlene Fried said, "having an abortion because one cannot afford a child in a society that privatizes childrearing is not an expression of reproductive freedom."⁵² Whether one chooses to pay the high price to abort or to have a child, economic inequality constrains reproductive choices, even with the "right" to choose.

Despite the constitutional right to obtain and use contraceptives,⁵³ vast disparities in reproductive healthcare remain. Women of color have disproportionately lower access to affordable contraception, as well as comprehensive sex education, affordable quality pre-and post-natal care and to basic gynecological care.⁵⁴ The disparity in reproductive healthcare today

48. *Sojourner A. v. N.J. Dep't of Human Servs.*, 177 N.J. 318, 377 (2003).

49. *Id.* at 334-37.

50. Abortion rates for all racial and ethnic groups have declined recently. The rates now range from 11 per 1,000 for non-Hispanic white women to 28 per 1,000 for Hispanic women and 50 per 1,000 for black women. Black women account for 37% of abortions, non-Hispanic white women for 34%, Hispanic women for 22% and women of other races for 8%. STANLEY HENSHAW AND KATHRYN KOST, *TRENDS IN THE CHARACTERISTICS OF WOMEN OBTAINING ABORTIONS, 1974 TO 2004* (Aug. 2008). The disparate rates reflect different pregnancy and childbearing patterns across groups. For example, Hispanic women have higher abortion rates than non-Hispanic white women, but they also have higher pregnancy rates—and therefore higher birthrates, both intended and unintended. A higher proportion of their pregnancies are unintended, but unintended pregnancies among Hispanic women are no more likely to end in abortion than unintended pregnancies among non-Hispanic white women. Lawrence B. Finer & Stanley K. Henshaw, *Disparities in rates of unintended pregnancy in the United States, 1994 and 2001*, 38 *PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH* 90–6, 2006. Like Hispanic women, black women have much higher pregnancy rates than non-Hispanic white women, but unlike Hispanic women and non-Hispanic white women, they have an extremely high rate of unintended pregnancy (almost 70%). Lower levels of contraceptive use, higher failure rates and greater use of less-effective methods are likely to be partially responsible for these differentials. Kathryn Kost et al., *Estimates of Contraceptive Failure from the 2002 National Survey of Family Growth*, 77 *CONTRACEPTION* 10 (2008); William D. Mosher, *Use of Contraception and Use of Family Planning Services in the United States: 1982–2002*, *ADVANCE DATA*, No. 350, 2004.

51. The higher rate among women of color is also due to higher rates of unintended pregnancies among women of color—itsself an indicator of disparities in health access. Boonstra, *supra* note 44.

52. FRIED, *supra* note 44, at 117.

53. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

54. *See* Kaiser Family Foundation, *Percent of Mothers Beginning Prenatal Care in the First Trimester by Race/Ethnicity, 2005*, available at <http://www.statehealthfacts.org/comparemaptable.jsp?ind=45&cat=2>. *See also* CRR, "Contraceptive Access in the United States," March 5, 2009, available at: <http://reproductiverights.org/en/project/contraceptive-access-in-the-united-states>.

indicates that legal rights alone are insufficient to end reproductive oppression for a great many women. The systematic inequity among women along race, class and geographic lines in reproductive healthcare access and outcomes has not been effectively addressed through the recognition of reproductive rights.

3. *Rights Do Not Alter the Balance of Power*

Reproductive rights are susceptible to the same inherent limitations as other rights-based claims.⁵⁵ As Rosalind Petchesky writes:

The concept of “rights,” is in general, a concept that is inherently static and abstracted from social conditions. Rights are by definition claims staked within a given order of things. They are demands for access for oneself, or for “no admittance” to others; but they do not challenge the social structure, the social relations of production and reproduction.⁵⁶

The reproductive rights framework is inadequate to alter the balance of power—to shift resources from the haves to the have-nots.⁵⁷ Yet, that is precisely what reproductive justice seeks to achieve.

In fashioning a “lawyering” model for the reproductive justice movement, it is critical to understand the limits of the reproductive rights framework in achieving the goals of the reproductive justice movement. An entirely new way of legal problem-solving is required to meet the needs of the reproductive justice movement—one that achieves distributive justice rather than simply the recognition of and enforcement of rights.

IV. CONTEXTUALIZING THE REPRODUCTIVE JUSTICE MOVEMENT: HISTORICAL CONSIDERATIONS

The reproductive justice movement builds upon a long history of identity-based organizing among women of color around reproductive health and social justice issues.⁵⁸ While it has roots in the reproductive rights movement,⁵⁹ it is

55. See e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2d ed. 2004); Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 477-509 (1999).

56. ROSALIND PETCHESKY, *ABORTION AND WOMAN’S CHOICE* 7 (1984).

57. This is not to say that rights rhetoric has no place in justice movements. Rights claims can serve as critical consciousness-raising and organizing tools. See e.g., Joel Handler, *Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 968 (1990).

58. For more information on the history of women of color organizing for reproductive justice, see generally SILLIMAN, *supra* note 10.

59. For purposes of this Article, I use the term “mainstream reproductive rights movement” as a large umbrella term describing the broad constituency in support of legal access to women’s reproductive healthcare, which includes abortion rights, contraceptive rights, and other “rights” related to sexual health. Today, the movement primarily operates through large organizations, including Planned Parenthood Federation of America and its affiliates, NARAL, and the Center for Reproductive Rights. The terms “pro-choice” and “reproductive freedom” are a subset of reproductive rights that focus narrowly on abortion rights. The nuanced differences between these

best conceptualized as separate from and as transcending the reproductive rights movement: it is a movement based on reproductive issues but situated within the history of national movements for social justice.⁶⁰

Yet, the reproductive justice framework also responds to and reflects dissatisfaction with the mainstream reproductive rights movement.⁶¹ Leaders in the reproductive justice movement have operated, at times, within the mainstream reproductive rights movement, and their experiences seem to have influenced the direction of the reproductive justice movement.⁶² While there is much to say about the history and contours of the reproductive rights movement, this article focuses on three interrelated issues that are relevant to understanding the motivation behind the emerging reproductive justice movement and to framing the challenges in developing a lawyering model to serve it: 1) The movement's limited focus on abortion rights and privacy at the expense of access; 2) the marginalization of women of color within the movement; and 3) the central role of lawyers in the movement.

A. Strategic Focus on Abortion Rights and Privacy at the Expense of Access and a Broader Reproductive Health Agenda Alienated Women of Color

Roe v. Wade, the landmark 1973 Supreme Court decision legalizing abortion, has largely defined the reproductive rights movement in the United States⁶³ for the last 35 years.⁶⁴ *Roe* mobilized fierce opposition to abortion, drawing reproductive rights advocates into a decades-long battle to defend the legal right to abortion.⁶⁵ In the face of zealous opposition and the rise of the New Right, mainstream reproductive rights activists have clung to the rhetoric of *Roe*, focusing on privacy, individual rights, "choice," and autonomy at the expense of access to reproductive health.⁶⁶

The choice to hold fast to *Roe*, particularly its emphasis on individual rights and privacy, has alienated many women of color and poor women.

movements is beyond the subject of this article—it is sufficient for this purpose to generalize the reproductive rights movement, since it the *perception* of its values, operation, choices and composition that have influenced the reproductive justice movement.

60. *Id.* at 35-45; LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP 31 (2001).

61. *See, e.g.*, SILLIMAN, *supra* note 10, at 1-5, 296.

62. *See id.*

63. The reproductive rights movement in the United States is somewhat unique from the rest of the world, in part because the United States has not adopted a human rights framework in our legal system. This article focuses on the domestic reproductive rights movement.

64. *Roe* held that an individual has a right to make personal decisions about procreation as a function of the right to privacy, which is in turn embedded in the substantive due process right to liberty. Under *Roe*, the right to privacy is expressly negative—the right to be free from state interference.

65. MARCY J. WILDER, *Law Violence and Morality*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, at 79 (1998).

66. Hooton, *supra* note 35; *see also* WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR (2003).

Perhaps the sorest spot for reproductive justice activists is the failure of the mainstream reproductive rights movement to rally against the Hyde Amendment, which prohibits federal funds for abortions.⁶⁷ This issue was of primary importance to women of color, who are disproportionately low income.⁶⁸ Today, the Hyde Amendment is one of the largest contributors to the racial disparity in access to reproductive health.

This failure to launch serious opposition to the Hyde Amendment is likely due, in large part, to the fact that the ability to find and finance abortion services was not a problem for middle-class white feminists, who largely controlled the movement, and to whom it appeared that the abortion battle had ended with *Roe*. Yet, even as it became clear that the abortion battle was not “won,” and the reproductive rights movement became reenergized in the 1980s, the movement’s leadership made strategic decisions to defend the legal right to abortion at the expense of ensuring access to reproductive health services.⁶⁹ To woo conservative voters, NARAL, Planned Parenthood and others narrowed the reproductive rights agenda to defending against abortion restrictions, putting a libertarian spin on it and framing such restrictions as “big government.”⁷⁰

The Movement’s strategic decision to defend the legal abortion right with *Roe* privacy and individual rights rhetoric undercut claims for public access to abortion and reproductive healthcare.⁷¹ Additionally, the narrow focus on abortion also failed to address a central concern among women of color—the right to have children.⁷² These decisions, while arguably successful in the short term at defending the legal right to abortion, have wreaked considerable damage to the long term organizing prospects for a united movement for a larger reproductive justice agenda that seeks to address inequities in healthcare access.

67. SILLIMAN, *supra* note 10, at 30. For more information on the Hyde Amendment, see generally PETCHESKY, *supra* note 56, at 293-94, 297-99.

68. SILLIMAN, *supra* note 10, at 30.

69. *Id.* at 30-31; SALETAN, *supra* note 66, at 15.

70. SALETAN, *supra* note 66, at 15.

71. There were dissenting voices within the mainstream movement, such as NOW and ACLU. There were also feminist organizations, such as CARASA and R2N2 that explicitly rejected the mainstream movement’s conservative shift. Nevertheless, the perception of the movement as a whole has contributed to the reproductive justice movement.

72. Women of color have long sought to end government imposed fertility control in communities of color. Efforts to suppress fertility include: promotion of long-acting contraception and sterilization in communities of color, prosecutions of women who use illegal drugs while pregnant, policies curtailing public assistance to low-income women and families, federal “illegitimacy” bonuses to states with the largest decrease in out-of-wedlock birth rates, and judicial interference with prisoners’ and probationers’ rights to procreate.

B. Racism and the Marginalization of Women of Color in the Reproductive Rights Movement

Many women of color continue to distrust the mainstream reproductive rights movement because of allegations of racism and marginalization of women of color within the movement.⁷³ First, some have characterized the mainstream movement's failure to mobilize against the Hyde Amendment (described above) and other abortion funding restrictions as racist, or at least as failure to confront racism.⁷⁴ Second, many women of color continue to believe that reproductive rights are connected with racist eugenics policies and the forced sterilization of African-American, Native American and Hispanic women.⁷⁵

Additionally, the leadership and constituency of the mainstream reproductive rights movement has been predominantly white, middle-class and affluent women.⁷⁶ Women of color have expressed experiencing fatigue and frustration working within the mainstream reproductive rights movement because they were often called upon to be "representatives" of their community, and constantly struggled—often to no avail—to avoid marginalizing issues that disproportionately affect low income women and women of color.⁷⁷

In developing a lawyering model for the reproductive justice movement, it is critical to understand these experiences of racism and marginalization.⁷⁸ These perceptions have greatly influenced the reproductive justice movement's emphasis on ensuring that those most affected by reproductive injustice lead and sustain the movement to end it.

C. The Central Role of Lawyers has had Disempowering Effects

With its zealous focus on achieving and keeping legal abortion, it is unsurprising that lawyers have played a central role in the reproductive rights movement.⁷⁹ Lawyers have played a significant role in shaping the movement's agenda, in developing its strategy and in constructing its rhetoric.

73. SILLIMAN, *supra* note 10, at 11, 53, 284.

74. *E.g.*, ANGELA DAVIS, *WOMEN, RACE, AND CLASS*, 204-06 (1981).

75. For more information on the history of the early birth control movement and its ties to eugenics, see generally Beverly Horsburgh, *Schrodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 *CARDOZO L. REV.* 531 (1996); LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 271-72 (rev. ed. 1990); LORETTA J. ROSS, *African-American Women and Abortion: 1800-1970*, in *THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN* 141, 148 (1993).

76. *See, e.g.*, SILLIMAN, *supra* note 10.

77. *Id.* at 296.

78. For more examples of racism and marginalization, see *id.*

79. *See* Hooton, *supra* note 35.

Without question, lawyers have made important contributions to achieving and protecting reproductive rights. Yet, the movement has faced criticism for relying so heavily on lawyers, particularly because such reliance has had disempowering effects that disproportionately impact activists of color. This section provides a brief summary of the historic role that lawyers have played within the reproductive rights movement and then explores how the centrality of lawyers has been disempowering.

1. *The History of the Lawyer's Role in the Reproductive Rights Movement*

Lawyers played a central role both in initiating the reproductive rights movement and developing its strategy for legal abortion. The early abortion rights movement developed in the hands of a relatively small number of professionals, concentrated in New York and California, who fought their battles in the state court systems.⁸⁰ From the mid-1950s through the 1960s, a handful of medical professionals and civil liberties lawyers formed organizations to advocate for abortion law reform in state legislatures.⁸¹ As part of an orchestrated strategy, these organizations set up secret networks to refer women to safe abortions and tapped the networks to find test cases to challenge state abortion laws.⁸²

The movement did not expand beyond professionals until the late 1960s when feminists incorporated reproductive rights into their larger struggle for women's rights. Throughout the late 1960s and 1970s, feminist activists expanded the secret, underground networks for obtaining safe abortions and lobbied state legislatures to expand the availability of birth control and safe, legal abortions. As part of the strategy, feminist lawyers quickly tapped these underground networks and brought lawsuits on behalf of patients seeking abortions, culminating with *Roe v. Wade* in 1973.

Since *Roe*, the reproductive rights movement has largely unfolded as a cyclical story of legislation followed by litigation,⁸³ dedicating most of its energy and resources to keeping abortion legal.⁸⁴ Almost immediately after the decision, anti-abortion activists launched a state-by-state effort to pass legislation to ultimately chip away at *Roe*. Their efforts were rewarded in *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509 (1989), where the court allowed states to restrict abortion in myriad ways that had previously been

80. LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION 170-73* (1973).

81. NELSON, *supra* note 17, at 12.

82. *Id.*

83. This is not to say that the reproductive rights movement has not been engaged in organizing or other forms of advocacy post-*Roe*. There have been several large-scale mobilizations, including several national marches in Washington, called the "March for Women's Lives" in 1986, 1989 and again in 2004. Nevertheless, the movement has been perceived as one dominated by lawyers with a large emphasis on litigation. This perception has helped fuel the grassroots-based reproductive justice movement.

84. Hooton, *supra* note 35.

deemed inconsistent with *Roe*. Several years later, anti-choice forces again successfully scaled back abortion rights in the 1992 *Planned Parenthood v. Casey* decision,⁸⁵ where the Court held that states may regulate abortion at any point prior to viability provided that the state did not “unduly burden” a woman’s right to choose. Post-*Casey*, many states accepted the Court’s invitation, and have passed numerous restrictions on abortion, including mandatory waiting periods and requirements for parental notification.⁸⁶ In the post-*Casey* world, the reproductive rights movement has had to decentralize its efforts and spend resources fighting these restrictions at the state level through litigation,⁸⁷ lobbying, and defending ballot initiatives.

2. *Disempowering Effects*

The reproductive rights movement, like other rights-based movements, has relied heavily on the expertise, advice, and political clout of lawyers to achieve their goals. The central role of lawyers has had disempowering effects among women of color and poor women in the reproductive rights movement.⁸⁸ These effects include: the crowding-out of non-legal tactics, the marginalization of those claims within the movement that are not easily cognizable in legal terms, and elitism that tends to downplay class issues within the movement.⁸⁹

a. *Crowding-Out of Non-Legal Tactics*

The reproductive rights movement has been consistently engaged in litigation for the last fifty years. The decision to prioritize litigation may reflect, in part, the general trend among social movements in this same period to pursue their agendas in court through test cases, class actions and other impact litigation.⁹⁰ The litigation-centered strategy may also be due to the movement’s

85. 505 U.S. 833 (1992).

86. Since 1995, state legislatures across the country have passed more than 400 measures restricting access to abortion. These include bans on specific procedures, mandatory-delay and informed-consent requirements, funding roadblocks, and targeted regulations against abortion providers (TRAP laws) that aim to put facilities out of business. See CRR, *supra* note 34, *Roe in the States*.

87. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2039 (2008) (reporting that reproductive rights lawyers have spent an increasing amount of time fighting legislation and ballot initiatives).

88. This section is primarily concerned with the *perception* of the reproductive rights movement, as viewed by those involved in the reproductive justice movement. In order to build a lawyering model to serve the reproductive justice movement, it is critical to understand the frustrations and concerns that are driving it—even if such motives are based on mere perception.

89. This section relies on Orly Lobel’s framework in analyzing the reproductive rights movement. The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics, 120 HARV. L. REV. 937, 949-54 (2007).

90. See generally WILLIAM A. GAMSON & DAVID S. MEYER, FRAMING POLITICAL OPPORTUNITY, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 275, 275-85 (1996) (discussing interactions between political opportunities, mobilizing structures, and framing

reliance on lawyers, who tend to overemphasize legal strategies.⁹¹ Further, like other movements where lawyers have played a central role, the reproductive rights movement has likely been seduced by the “myth of rights”⁹²—placing great hope in the promise of civil rights and abandoning other strategies.⁹³ Whatever the reason, the litigation-centered strategy has consumed the majority of the reproductive rights movement’s resources.⁹⁴ As a result, the movement has historically put fewer resources into alternative tactics that also require resources, such as grassroots organizing, public education, and coalition building.

The prioritization of litigation over other non-legal tactics has had disempowering effects both inside and outside the movement. Litigation has proved insufficient to ensure access to reproductive rights.⁹⁵ Yet, the movement has historically put few resources into non-legal means that may prove more successful in addressing barriers to access. Many women of color within the movement expressed frustration that they were powerless to direct the movement to put resources into strategies that would better address their communities’ concerns.⁹⁶ These frustrations are common in social change movements where lawyers play a central role.⁹⁷ Subgroups within a movement that have greater resources, including access to lawyers, tend to hold more sway in making tactical decisions than do grassroots subgroups with fewer resources, causing legal strategies to dominate the movement at large.⁹⁸

Second, litigation has not built sustainable power for the movement or its members. Reproductive justice activists have expressed frustration that litigation has not galvanized grassroots activism, nor altered the balance of power to empower women and their communities.⁹⁹ Their frustrations find ample support in critical legal theory. Litigation is rarely useful in bringing

processes as factors influencing social movements).

91. See GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

92. See ROSENBERG, *supra* note 55; SCHEINGOLD, *supra* note 55; Southworth, *supra* note 55.

93. Of course, the anti-abortion movement’s state-by-state legislative strategy has also played a role in shaping the reproductive rights movements’ tactics toward court battles. See SILLIMAN, *supra* note 10.

94. See Hooton, *supra* note 35.

95. See *id.*

96. See SILLIMAN, *supra* note 10.

97. For example, in the context of the civil rights movement, the Civil Rights Act’s focus on nondiscrimination at work may have reflected the interests of the movement’s elites rather than the immediate interests of poorer constituents who needed more direct investment of resources in their communities. Lobel, *supra* note 89, at 950.

98. See SANDRA R. LEVITSKY, *TO LEAD WITH LAW: REASSESSING THE INFLUENCE OF LEGAL ADVOCACY ORGANIZATIONS IN SOCIAL MOVEMENTS*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 145, 146, 157-58 (2006).

99. See SILLIMAN, *supra* note 10.

about structural social change.¹⁰⁰ Other social change movements have found that legal strategies rarely sustain long-term organizing.¹⁰¹ Instead, litigation has likely created a psychological reliance on the legal system to deliver freedom from reproductive oppression.¹⁰² This reliance has arguably stunted grassroots political activity that could build power and create sustainable change for women and their communities.¹⁰³

b. Marginalization of Issues Not Easily Framed in Legal Terms

The reproductive rights movement has historically relied on an individual rights-based framework, which has proved inadequate to address barriers to access and to shift resources and power to communities of color. The emergence and lasting power of this framework, despite its limited usefulness to achieve many of the movement's goals, is likely attributable to the central role that lawyers have played within the reproductive rights movement.

First, litigation requires a movement to frame problems in distinct legal claims for limited judicially available remedies.¹⁰⁴ Accordingly, in social movements where lawyers have a central role, goals that cannot be easily translated into legal claims will often go unaddressed.¹⁰⁵ Individual reproductive rights claims are easily cognizable in legal terms and lend themselves to legal remedies. For example, a court need only determine whether a state may place restriction X on an individual woman's ability to terminate her pregnancy. On the other hand, group-based claims for access to health care are more difficult to frame in legally recognized terms.¹⁰⁶ Indeed, the law has historically been inadequate in recognizing the intersection of sex, poverty, race, and immigration status in rights claims.¹⁰⁷ The mainstream movement's continued reliance on an individual-rights-based framework, while neglecting broader justice claims that are not as legally cognizable, is likely attributable to the key role that lawyers have played in setting the reproductive rights movement's agenda...

Second, a legal strategy often requires a movement to provide a united

100. See ROSENBERG, *supra* note 55, at 338.

101. See generally Handler, *supra* note 57.

102. See Lobel, *supra* note 89; ROSENBERG, *supra* note 55; Ross, *supra* note 18.

103. See Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 384 n.182 (1978); Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366-69 (1988) (discussing this phenomenon in the context of the Critical Legal Studies movement).

104. See, e.g., William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 138 (2004).

105. Lobel, *supra* note 89, at 951.

106. See, e.g., Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 595 (1986).

107. See e.g., Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63 (2004).

front.¹⁰⁸ As a result, lawyers tend to frame the movement's goals in a limited and generalized way—prioritizing those goals that are most broadly shared and minimizing the complexity of interests within the movement.¹⁰⁹ The individual rights framework likely endures because the right to make private reproductive health decisions is the goal most broadly shared among those in the movement. However, the movement's focus on its lowest common denominator goal has drawn criticism from those within the movement whose goals and priorities have been marginalized—largely women of color.

c. Elitism has Downplayed Class Issues in the Movement

Lawyers tend to dominate social movements, at least in part because of their elite status.¹¹⁰ Additionally, lawyers in strategic decision-making positions tend to downplay class issues in social movements. For example, Professor Risa Goluboff describes how the equal protection-based strategy of antidiscrimination litigation was deliberately divorced from economic and class-based claims: “The NAACP lawyers marginalized, cabined, and outright repudiated class issues through the complaints they pursued and those they ignored. By the 1950s, when the anti-segregation strategy that eventually led to *Brown* coalesced, they had succeeded in writing class out of their story.”¹¹¹

The same critiques may be launched at reproductive rights lawyers. Throughout the movement's history, lawyers have played a central role in strategic decision-making. It is likely no coincidence that the mainstream reproductive rights movement has not devoted significant resources to addressing the systematic socioeconomic conditions that prevent women from exercising their full range of reproductive options.

V. THE REPRODUCTIVE JUSTICE MOVEMENT: KEY CHARACTERISTICS

The disempowering and marginalizing experiences described in Section IV have likely influenced the reproductive justice movement's motives and orientation. The reproductive justice movement is comprised mainly, though not entirely, of poor and working class people—most are women of color. This membership contrasts with the mainstream reproductive rights movement, which has been overwhelmingly white and middle class in its staff, membership, and perspective.¹¹² Since poor women and women of color have been marginalized within the reproductive rights movement, and have historically had less confidence with the role of law in improving their lives,

108. See Lobel, *supra* note 89.

109. *Id.*

110. *Id.*

111. Risa L. Goluboff, “*We Live’s in a Free House Such as It Is*”: *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 1979 (2003).

112. See, e.g., SILLIMAN, *supra* note 10.

the reproductive justice movement proceeds primarily through grassroots activism and other non-legal strategies.

Further, while the movement recognizes and supports reproductive rights,¹¹³ reproductive justice activists see reproductive oppression as just another way that their communities are under attack. Moreover, reproductive justice activists take a holistic view, seeing structural societal change as a way to alleviate many of their communal problems - poverty, crime, joblessness, and environmental degradation. Thus, reproductive justice activists seek remedies that are more fundamental than an injunction against an abortion restriction, such as affordable healthcare for all.

Finally, and significantly, reproductive justice activists seek to address barriers directly facing their communities.¹¹⁴ They have an immediate and personal stake in their movement—it is their bodies that have been sterilized or controlled, their children with disproportionately higher rates of teen pregnancy, their own inability to access affordable healthcare or to adequately support children while living in poverty.

VI. DEVELOPING AN APPROPRIATE ROLE FOR LAWYERS IN THE REPRODUCTIVE JUSTICE MOVEMENT

This section first explores some of the barriers to finding an appropriate role for lawyers within the movement, including path dependence, the political nature of reproductive justice claims, definitional problems, and the isolation of reproductive justice issues from other social justice movements. Next, I explore the similarities between the reproductive justice movement and the environmental justice movement and discuss how environmental justice scholarship and practice can be useful to finding an appropriate role for lawyers within the reproductive justice movement. Finally, I put forward two models for reproductive justice lawyering to guide lawyers and law students to participate appropriately and effectively in the movement.

A. Barriers to Developing a Model for Reproductive Justice Lawyering

1. Path Dependence

History matters.¹¹⁵ Douglass North claims that the path of system development, once set, is reinforced by increasing returns that are characteristic

113. ACRJ, *supra* note 16.

114. This is not to say that reproductive rights don't directly affect all women, but there has long been a recognition that middle class women will be able to find an abortion if necessary—even if it means flying abroad.

115. STEPHEN E. MARGOLIS & S.J. LIEBOWITZ, *Path Dependence*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 17 (1998) (summarizing claims regarding path dependence as amounting to “some version of ‘history matters’”).

of the initial structure: “Once a development path is set on a particular course, the network externalities, the learning process of organizations, and the historically derived subjective modeling of the issues reinforces the course.”¹¹⁶

History poses substantial barriers toward developing a reproductive justice lawyering model. First, reproductive justice activists have historically distrusted the reproductive rights movement and those perceived to be part of it. The reproductive justice movement has been evolving and developing for decades in the shadow of the reproductive rights movement, and in the past 15 years, it has emerged with great momentum—largely without lawyers.¹¹⁷ The movement may be resistant to bringing lawyers on board, out of fear and skepticism that they may cause more problems than they solve.¹¹⁸

Second, the mainstream reproductive rights movement has developed institutions that may be difficult to change.¹¹⁹ These institutions will likely have difficulty reorienting from a large-scale “impact model” to a “community-based model.” It is unlikely to expect, therefore, mainstream reproductive rights organizations to restructure in order to embrace the strategies of the reproductive justice movement, even if they align with their goals. Accordingly, it is improbable that mainstream reproductive rights organizations will shift the role of lawyers from rights-based advocacy into justice campaigns, at least in the short term.

For those reproductive rights lawyers who seek to change course and take part in the reproductive justice movement, they may not easily shift from a rights-based, lawyer-driven model to a justice framework that places lawyers in the passenger seat. First, reproductive justice lawyering, in contrast with impact litigation, will likely entail hands-on work with low-income communities of color—a different skill set and mind frame from rights-based lawyering. Second, as discussed in section IV, lawyers have tendencies toward dominance and cooptation, which may lead to frustration when they are asked to assume a non-leadership role within the movement.¹²⁰ Path dependence may make it difficult for reproductive justice lawyers—even those most committed to supporting important community grassroots campaigns—to apply their skills to community campaigns rather than to fighting abortion restrictions or making

116. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 99 (1990); DOUGLASS NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (2005).

117. See CLRJ, *supra* note 4; ACRJ, *supra* note 16; See generally, SILLIMAN, *supra* note 10.

118. Phone Interview with Rocio Cordoba, (CLRJ Executive Director), CLRJ, Spring, 2009.

119. Planned Parenthood, NARAL, and Center for Reproductive Rights are the dominant reproductive rights organizations.

120. See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1935 (1999).

large-scale rights-based claims.¹²¹

2. *Defining the Boundaries of Reproductive Justice*

There are two ambiguities related to the definition of reproductive justice that pose challenges to developing a role for lawyers within the movement. First, the line is somewhat unclear between what *is* and what *is not* a reproductive justice issue. ACRJ has developed one definition of reproductive justice that focuses primarily on women and girls. Yet, couldn't reproductive justice also include men? For example, if an environmental hazard in a factory posed a high risk of sterility among its predominantly low-income male employees, would that be perceived as a reproductive justice issue? On the other hand, is there a limit to how far the doctrine stretches? Does reproductive justice require the defense of Nadya Suleman, the California woman who recently gave birth to octuplets via *in vitro* fertilization, while receiving public assistance? And who decides what is and what is not a reproductive justice issue? Reproductive justice, like environmental justice, will likely be an evolving concept with many definitions across many communities. For now, though, it would seem inappropriate for lawyers to define the outer boundaries of the movement, particularly given the movement's insistence that those who are most oppressed set the vision and define the movement's goals and strategies. These definitional ambiguities make it somewhat difficult for lawyers to proceed while ensuring they are supporting and not co-opting the movement, especially in places where a reproductive justice community is not yet organized.

Second, defining what constitutes a "community" for reproductive justice poses a challenge. Several reproductive justice organizations and grassroots coalitions have emerged, such as California Latinas for Reproductive Justice and ACRJ. In places where such organizations have already developed, the community has already been defined, and lawyers need only step in and collaborate.¹²²

However, in many states, regions, and cities, the reproductive justice "community" may not already be organized. If a lawyer wants to practice reproductive justice, how might she seek out a community? And is it critical to the movement that the community be organized prior to the lawyer getting involved? If so, are the lawyer's hands tied until a community forms? Further, since reproductive justice is purportedly about shifting resources and power to marginalized women and their communities, how should the community be

121. See Nancy Cook, *Symposium, Poverty, Justice, and Community Lawyering: Interdisciplinary and Clinical Perspectives: Looking for Justice on a Two-Way Street*, 20 WASH. U. J.L. & POL'Y 169, 181-83 (2006).

122. See *infra* section VIII for a discussion about the roles a lawyer could play in working with an existing reproductive justice organization.

drawn to evaluate such distribution of power?¹²³ Is it based on the effect of a particular action, such as a state law or a school district policy? Should it be defined by racial or ethnic identity? What are the geographic boundaries? The difficulty in defining a community—outside of a context where a grassroots movement has formed—poses a challenge to determining how lawyers may play a useful role in advancing reproductive justice.

3. *Social Justice Lawyering Scholarship has Ignored the Reproductive Rights and Justice Movements*

Reproductive justice activists have faced resistance—and sometimes even outright hostility—when they seek to integrate their issues into broader social justice movements.¹²⁴ While sexism may be at work, the abortion “issue” has also been a lightning rod within social justice circles. Some even characterize it as a distraction from anti-racism work.¹²⁵ Others choose to avoid dealing with reproductive issues in order to maintain coalitions with religious groups.¹²⁶ Whatever the reason, this isolation of women’s reproductive health from other social justice issues occurs in legal circles as well.

Neither the reproductive rights movement, nor the reproductive justice movement has participated in the development of scholarship on social justice lawyering.¹²⁷ While lawyers and practitioners working in other social justice movements—such as anti-poverty, environmental justice, economic justice, workers’ rights, and immigrants’ rights—have contributed to the discourse surrounding “cause lawyering,” voices from the reproductive rights and justice movements have largely been absent.¹²⁸ Without their contributions, this body of literature does not include the experience of those working with grassroots communities on issues particularly affecting poor women, and therefore does not provide clear guidance to those seeking to shift from rights-based to justice-

123. These questions have arisen in the environmental justice context as well. See generally Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 *FORDHAM URB. L.J.* 633 (1994) (discussing difficulties in defining population types and communities’ geographic boundaries); John J. Fahs Bender, *Note, An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 5 *N.Y.U. ENVTL. L.J.* 120 (1996) (discussing the importance of boundary-drawing to assessing claims of distributional injustice and suggesting factors to be considered in the process).

124. SILLIMAN, *supra* note 10 at 40, 286.

125. *Id.*

126. REVEREND CARLTON W. VEAZEY, in *DISPATCHES FROM THE RELIGIOUS LEFT: THE FUTURE OF FAITH AND POLITICS IN AMERICA* (Frederick Clarkson ed., 2008).

127. There are signs that this may be changing. See <http://www.law.stanford.edu/calendar/details/2693/>.

128. See main contributions to this literature, including e.g., LOPEZ, *supra* note 91; Lucie E. White, *The Power Beyond Borders*, 70 *MSS. L.J.* 865, 874-76 (2001); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); *Panel III, Creating Models for Progressive Lawyering in the 21st Century*, 9 *J.L. & POL’Y* 297, 303-20 (2001); Luke Cole & Sheila Foster, *supra* note 60; JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

based lawyering within the reproductive context.¹²⁹

Additionally, while lawyers in other movements have enjoyed the benefit of collaborative thinking through the exchanging of ideas and sharing of best practices, lawyers in the reproductive rights movement have proceeded largely in isolation, without such opportunities to develop and evolve. Thus, social justice-oriented lawyers may not be aware of reproductive justice issues that arise in their work, while reproductive rights lawyers are generally not exposed to the intersections between their work and other movements.¹³⁰ These gaps in practice and scholarship may make it difficult for reproductive justice lawyering to take hold.

B. How Lawyers can Add Value to the Movement

Some have suggested that lawyers should not play a role in grassroots movements, such as the reproductive justice movement.¹³¹ Given lawyers' tendencies toward cooptation and dominance, these writers are justifiably skeptical.¹³² Nevertheless, there are compelling normative and strategic reasons for lawyers to engage in power-altering justice work. This raises the question—what value can lawyers add to the reproductive justice movement? In the absence of scholarship on reproductive justice, I look to the environmental justice movement as a useful guide for determining how lawyers may be useful in the reproductive justice context.

1. Environmental Justice Movement as a Model

The environmental justice movement serves as a useful guide for the reproductive justice movement. There are many similarities between the movements' origins, goals, and strategies. Additionally, both movements arise out of the context of mainstream rights-based organizations that have tended to litigate more than they do anything else. Unlike the reproductive justice movement, however, environmental justice academics, activists, and practitioners have engaged in considerable debate around the appropriate role for lawyers within the movement. This section briefly identifies the similarities

129. Compare Cole & Foster, *supra* note 60, at 24-26 (2001) (describing how academics played an instrumental role development of the environmental justice movement).

130. For example, Luan Huynh, a poverty lawyer at the East Bay Community Law Center, describes her work on eliminating the California maximum family grant (MFG) as "about self-determination, breaking down the many layers facing mothers who are just trying to help their families survive." She told me she really did not know what a reproductive rights frame could offer her work—that when she thinks about reproductive rights, she "thinks about eugenics." Yet, her work at the intersection of poverty and reproduction is emblematic of a reproductive justice issue under the prevailing definition.

131. Interview with Katie Buckland, California Women's Law Center. After describing her organization's work with a reproductive justice coalition, she concluded, "lawyers should just be lawyers—they aren't grassroots organizers. They should stick to practicing law."

132. See, e.g., LOPEZ, *supra* note 91.

between the two movements, providing a basis for using the environmental justice movement as a model, and then describes types of lawyering that could be useful in the reproductive justice context.

The environmental justice movement,¹³³ like the reproductive justice movement, has origins in the civil rights movement and broader social justice organizations.¹³⁴ Both movements are grassroots—dedicated to building power through organizing.¹³⁵ Both movements' members are activists, largely from poor or working class backgrounds, and many are people of color who come from disenfranchised communities.¹³⁶ Like the reproductive justice movement, the environmental justice movement takes an intersectional approach to their primary issue—locating environmental injustice as one of many sources of oppression facing their communities.¹³⁷ Additionally, both movements challenge inequitable distribution of resources and harms, seeking to build power to gain control over their environment and their bodies.¹³⁸

In addition to substantive similarities, both movements emerged against the backdrop of powerful mainstream rights-based organizations that largely ignored, or strategically chose not to focus on issues affecting the poor and communities of color.¹³⁹ Environmental justice activists have experienced racism and marginalization within the environmental rights movement, just as in the reproductive rights movement.¹⁴⁰ Additionally, like the reproductive rights movement, the traditional environmental community has spent the past twenty-five years using litigation as their primary strategy.¹⁴¹ In contrast, both the reproductive justice and environmental justice movements have employed a wider range of strategies—in part because litigation has not effectively addressed their goals, and also in part because litigation has disempowered and stunted movement building.¹⁴² Like the reproductive rights movement, legal strategies have “fallen woefully short” of aiding communities in achieving more than basic access—both movements have primarily political and economic claims that are more likely met through non-legal means.¹⁴³

133. This section does not attempt to provide a comprehensive history of the environmental justice movement. I simply intend to show how the movement, in general terms, can serve as a guide for the reproductive justice movement.

134. Cole & Foster, *supra* note 60, at 19-33.

135. *Id.* at 33

136. *Id.*

137. *Id.*

138. Alice Kaswan, *Defining the Movement: Parallels Between Feminism and Environmentalism*, 9 CARDOZO WOMEN'S L.J. 455, 458 (2003).

139. *Id.* at 28.

140. *Id.* at 30.

141. *Id.*

142. *See id.* at 122; *see also* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”*, 47 AM. U.L. REV. 221 (1997) (describing the gap between the environmental justice movement and environmental movement).

143. Cole & Foster, *supra* note 60, at 119-25.

Based on these similarities, the reproductive justice movement can learn from the decades of writing, thinking and practice in the environmental justice movement. Two models of environmental justice lawyering—"community lawyering" and "integrative lawyering"—reveal how lawyers can add value to the reproductive justice movement.¹⁴⁴

2. *How Lawyers Add Value to the Environmental Justice Movement*

There are two primary ways that lawyers have contributed to the environmental justice movement. First, lawyers have served as catalysts in poverty law centers, spurring collective action.¹⁴⁴ Second, lawyers have served as counsel to established environmental justice campaigns and organizations. This section provides examples of these two lawyering models and lays the groundwork for applying these to the reproductive justice movement.

a. *Community Lawyering*

"Community lawyering" aligns in many ways with the goals and values of the environmental justice movement, and also serves important practical considerations.¹⁴⁵ First, poverty law centers and lawyers are actors within their communities. They have long-term relationships with local residents and community groups, and are often trusted sources for information and assistance.¹⁴⁶ Accordingly, poverty lawyers interface with poor people. They are often the first line of triage for people suffering from symptoms of poverty—joblessness, eviction, denials of welfare and health benefits, and immigration issues. Impoverished communities also tend to be disproportionately affected by environmental hazards. This leaves lawyers in poverty law centers well positioned to identify environmental injustice.

Second, community lawyering can be empowering. Over the past several decades, there has been a movement for poverty lawyers to identify common problems through a community-centered approach. The approach has stressed development of community-based strategies that get to the root of the problem, while using individual representation and litigation only when necessary, and ideally as a vehicle to build power for the community.¹⁴⁷ These factors were very important to leaders in the environmental justice movement who have been concerned that lawyers' traditional roles and practices would not build the movement or meet its goals.¹⁴⁸

144. See Jennifer Gordon, *After Public Interest Law Suburban Sweatshops: the Fight for Immigrant Rights*, 100 NW. U.L. REV. 1251; Cole, *supra* note 128.

145. Luke Cole pioneered the concept of environmental poverty law, calling for community-based lawyering in the struggle for environmental justice. Cole, *supra* note 128.

146. Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 572 (1999).

147. *Id.*

148. See Cole, *supra* note 128.

Here is an example of poverty lawyering for environmental justice, adapted from Luke Cole's story about Kettleman City: A man walks into a community based lawyering center to seek help because the city is about to decide whether to approve a permit to build a hazardous waste incinerator in his neighborhood. The lawyer performs intake by calling other community groups to find out if other groups are hearing about this problem. Once the lawyer finds out that there are many residents who would suffer from this incinerator, the lawyer holds a series of community meetings, working with community leaders to develop a letter-writing campaign to the city. The community gets involved, writing hundreds of letters to the city, after which the city approves the permit anyway. The community, now organized, participates in a lawsuit, while continuing to build momentum for the city planning commission elections. The lawsuit is successful in overturning the permit, in part because of the extensive administrative record. The community remains organized and puts a member of their group on the city council planning department—keeping the incinerator out and also building power to prevent another one from coming in the future.

Community lawyering is just one of the ways that lawyers have contributed to the environmental justice movement. Another is integrative lawyering, discussed in the next section.

b. Integrative Lawyering

Lawyers have also supported the environmental justice movement through representing established grassroots environmental justice campaigns and organizations. This type of lawyering, also known as “integrative lawyering,”¹⁴⁹ proceeds on the notion that grassroots organizations are “clients” who set the movement's goals and direct the lawyer toward achieving those goals.

Integrative lawyering prioritizes movement building over legal battles—contextualizing each legal step within the campaign or movement's goals. Accordingly, lawyering is practiced with restraint and caution to build and support power for the organization. Integrative lawyers must have a careful understanding of organizing strategy, and mindfulness about their role in the movement or the overall campaign. As Luke Cole said, lawyers have a role to play in grassroots movements, “we just have to understand what that role is: we don't drive the wagon, but we can ride shotgun.”¹⁵⁰

For example, lawyers worked with West Harlem Environmental Action (WE ACT), an environmental justice organization, on a campaign against

149. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007).

150. Luke Cole, *Environmental Justice and the Three Great Myths of White Americana*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 573, 585 (2008).

Columbia University's expansion.¹⁵¹ Throughout the campaign, lawyers provided strategic advice and counsel to the group, engaged in negotiations with community stakeholders, lobbied decision-makers and assisted the group in community education.¹⁵² The group chose not to pursue litigation or other traditional legal channels rejected because such strategies would not necessarily achieve WE ACT's broader political organizing or community empowerment goals.¹⁵³ In other environmental justice campaigns, lawyers have provided technical assistance, translated organizational goals into legal claims, and served as an important political resource by helping the group gain access and leverage in difficult campaigns.¹⁵⁴

Environmental justice activists and scholars continue to analyze and discuss the appropriate role for the law and lawyers within the movement. There are still concerns that lawyers tend to dominate and co-opt groups, and further that the law continues to disempower groups, who maintain the myth that they need a lawyer.¹⁵⁵ Yet community and integrative lawyering are good working models for achieving two of the environmental justice movement's goals: significantly redistributing political power and reducing problems inherent in lawyer-centered movements.¹⁵⁶

The next section applies these models to the reproductive justice context.

VII. REPRODUCTIVE JUSTICE LAWYERING THROUGH COMMUNITY LAW CENTERS

Community lawyers are well positioned to assist the reproductive justice movement for many of the same reasons that they add value to the environmental justice movement. First, they are likely the first line of defense for women suffering from symptoms of reproductive oppression. Women go to their local community law center for myriad reasons associated with poverty. Some may explicitly seek assistance with reproduction-related problems, such as finding affordable pre- or post-natal care, family planning or abortion services. More commonly, though, women walk in the door because they are about to be evicted, or because they have been denied benefits.¹⁵⁷ Through

151. See, e.g., Foster & Glick, *supra* note 149.

152. *Id.*

153. *Id.*

154. See Gordon, *supra* note 144.

155. See Kaswan, *supra* note 138.

156. As partners in a long-term problem-solving process, community lawyers seek to guard against the hierarchy of roles that can undermine the community's power, and interfere with conflict resolution. Community lawyers aspire, instead, to create connections through shared experiences and goals that will strengthen and empower the community, ultimately producing systemic change and greater social and economic equality. Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008).

157. Interview with Luan Huynh.

intake, lawyers can identify policies and practices that are keeping women from controlling their bodies and getting out of poverty. For example, lawyers may discover that a client is having trouble making ends meet because she has had to pay the high cost for an abortion—particularly if she lives in a state with mandatory delays, few providers, or other barriers to access—or because of a sudden increase in birth control costs.¹⁵⁸

Second, lawyers can act as a catalyst for communities to organize around oppressive reproductive policies. Lawyers can assist in collectivizing claims with others to organize a community response, which would likely start through partnering with grassroots organizations, or developing one, and building a reproductive justice campaign.

For a more concrete example, consider the East Bay Community Law Center (EBCLC) in Berkeley, CA. Around 2000, a woman walked into the center seeking help with her benefits. Through the intake, a lawyer discovered that the woman had been subjected to California's maximum family grant (MFG) policy,¹⁵⁹ and she was not receiving any additional assistance for her new baby. Soon, the clinic saw a stream of women who also had MFG children, and today, EBCLC lawyers estimate that nearly half of their clients have children who are not receiving adequate financial support because of the MFG policy. In addition to representing clients in administrative proceedings to challenge their determination, the Center sought to collectivize these claims, reaching out to the Women of Color Resource Center and a grassroots welfare organization. Together with grassroots organizations and clients, the Center has launched a legislative effort to repeal the MFG.

MFG policy may not seem like a traditional reproductive rights issue, however, it is unquestionably a reproductive justice issue, since family caps are designed to keep poor women from having children.¹⁶⁰ These policies are racialized—"states in which African-Americans make up a higher proportion of welfare recipients are statistically more likely to adopt family cap policies."¹⁶¹ In effect, these measures keep poor families poorer, while disproportionately affecting women of color.¹⁶²

Lawyers and law students can work with local community law centers to identify issues like MFG, to collectivize claims and work with grassroots groups to build reproductive justice campaigns. This type of work honors the

158. Due to a glitch in a federal law, birth control prices skyrocketed for several years. This has been recently overturned.

159. See CAL. WELF. & INST. CODE § 11450.04. For more detailed history and analysis of the maximum family grant, see, e.g., Rebekah Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151 (2006).

160. Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 313 (1997).

161. H.R. 107-3113, § 3(10) (2001).

162. Smith, *supra* note 159.

substantive goals of the reproductive justice movement. When lawyers are working to empower clients through collectivizing claims and working with grassroots organizations and community groups, the lawyer does not drive the movement, nor litigate more than doing anything else. This gives the community the power to set the agenda. Community lawyers look to their clients and local community groups to determine the sources of reproductive oppression and how to best eradicate them—placing the community in the center of the movement, rather than focusing on high-impact rights-based work disconnected from the community.

The model presented here assumes a great deal about the operation of community law centers, the communities they serve, and the availability of existing grassroots organizations. This article hopes to encourage those who embark on this type of partnership with community centers to document and write about their experiences to begin to build a body of scholarship and collective knowledge about reproductive justice lawyering.

VII. PRACTICING REPRODUCTIVE JUSTICE THROUGH INTEGRATIVE LAWYERING

In the reproductive justice context, integrative lawyering would involve a lawyer or law firm reaching out to an organized reproductive justice group, such as California Latinas for Reproductive Justice, to determine whether and how lawyers can play a role in helping them achieve their goals. They may want help with drafting legislation, or filing a lawsuit alleging discrimination in the provision of reproductive health care, or research into the legality of a school's abstinence-only policy. The key to this practice is that the community drives the lawyering, ensuring that lawyers focus on the issues organizations find most pressing. In some cases, such lawyering may focus narrowly and locally—such as directing legal tactics at a particular school district. In others, the lawyering may reach international forums—in taking the organization's claims before human rights commissions abroad. All the while, the lawyers remain mindful that their roles are supportive and collaborative, not superior to the organizations'.

While integrative lawyering may not look much different than the traditional work that reproductive rights lawyers do, it is contextualized and owned by the movement, ensuring that the movement builds power, rather than relies on lawyers for direction and methodology.

Unfortunately, I do not have any concrete examples of integrative lawyering in the reproductive justice context. It is helpful to look at the California Women's Law Center (CWLC), which has a reproductive justice practice area. While not functioning optimally, this example provides a starting point for looking at how lawyers could connect to grassroots reproductive justice groups. CWLC seeks to bridge the gap between reproductive rights and access. To this end, they have partnered with five community-based

organizations in Los Angeles County to develop Sisters in Control, a public education campaign designed to provide birth control information through a reproductive justice lens for women of color, immigrant women and adolescent girls. The collaboration recently trained over seven hundred low-income women including Mayan women, immigrant Latinas, African-American women, Muslim women and Nepalese women at sixty direct service organizations.¹⁶³ Additionally, they convened the Reproductive Justice Coalition of Los Angeles, a diverse group of over twenty grassroots, statewide, and national organizations. The coalition conducted focus groups to identify the most pressing barriers to reproductive justice in Los Angeles and to set priority goals for the region.

It appears that CWLC has adopted the reproductive justice framework by looking to community groups to set the agenda, and engaging in non-legal means to expand access to reproductive health and avoiding rights-based litigation. Yet there is something missing—lawyering, in the traditional or integrative sense. CWLC lawyers have engaged in public education, coalition-building, facilitating and have provided resources. While these skills are undoubtedly useful in a movement, they are not necessarily “lawyering” skills. The environmental justice movement’s experience suggests that lawyers can do more for grassroots movements by serving as a political resource, providing strategic advice, and carrying out any legal work the movement needs. CWLC, for example, could work with the communities to determine whether any of their priority areas could be advanced through litigation or through drafting new legislation, and then meet the needs of the community. There is still much that needs to be documented in this area. This article intends to encourage lawyers who work with grassroots reproductive justice groups to write about their experiences and participate in developing the field of reproductive justice.

IX. MAKING THE TRANSITION

Reproductive justice lawyering looks a lot different than reproductive rights lawyering. The reproductive justice movement demands lawyers with different skills, motivation and orientation from those who advocate for reproductive rights. This raises several questions: who will be the first generation of reproductive justice lawyers? How will and should those lawyers be trained?

When using the environmental movement as a guide, it seems unlikely that mainstream reproductive rights organizations will shift toward pursuing reproductive justice.¹⁶⁴ Many reproductive rights lawyers, like traditional environmental lawyers, came of age in a different era and received training in rights-based, impact-litigation lawyering. As such, their skills and orientation

163. See www.cwlc.org; interview with Executive director, Katie Buckland.

164. Cole & Foster, *supra* note 60, 28-31.

are not well suited to the reproductive justice movements' goals and strategies. While reproductive rights lawyering continues to play an important role in the overall struggle against reproductive oppression, protecting and maintaining rights is necessary, but not sufficient to achieving reproductive justice. Thus, reproductive rights organizations will likely not supply the first generation of reproductive justice lawyers.¹⁶⁵

Because the first generation of reproductive justice lawyers will not be coming from reproductive rights organizations, they will likely be cultivated and trained law school. Law schools should offer courses in reproductive justice, using environmental justice curriculum as a model. At minimum, law schools should integrate reproductive justice into community and social justice lawyering courses. Additionally, law students who seek to practice reproductive justice should take courses or get clinical training in poverty lawyering, coalition-building and cultural sensitivity, as well as other social justice courses.¹⁶⁶

In these difficult economic times, traditional reproductive rights jobs are extremely limited. Fellowships have been cut, and few jobs are available for those early in their career. This, however, has not stopped the reproductive justice movement from growing, as there are tremendous opportunities for lawyers to plug into the movement through representing organizations or through community law centers.¹⁶⁷ Yet, there are likely law students and lawyers who are drawn to poverty law and social justice, but have not considered working on reproductive issues because the job opportunities have historically been limited to traditional rights-based work in a few organizations. Now is the time for law schools and students to develop reproductive justice curriculum, partner with community law centers and organizations to begin to train the first generation of reproductive justice lawyers.

X. CONCLUSION

The reproductive justice movement has emerged in part because the

165. This is not to say that there will not be some lawyers who will want to transition out of reproductive rights work and into justice work. LSRJ could provide CLE materials and training, as well as refer them to reproductive justice lawyers, organizations and community law offices.

166. See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 353-61 (1997) (suggesting that clinical educators need to educate the court so that it also becomes more aware of cultural differences, and focus more on self-awareness training in the classroom so law students learn how to adapt to clients coming from different backgrounds).

167. Not every lawyer or law student who is interested in reproductive rights is cut out for reproductive justice work, particularly those drawn to high-profile litigation. There is certainly space within the reproductive rights movement for those who want to pursue rights-based litigation. In fact, reproductive justice activists explicitly support rights-based work as a complement to their work and as necessary to the broader struggle for reproductive justice. ACRJ, *supra* note 16, at 6.

reproductive rights movement has largely ignored issues facing poor women and women of color, either because such issues were deemed politically inexpedient or too difficult to frame in legal terms. Additionally, those marginalized within the mainstream reproductive rights movement are at the center of the reproductive justice movement—not as leaders and members, but as targets for mobilization to build power in their communities. This movement has emerged and operated in a largely extra-legal manner—proceeding through grassroots activism, education and outreach, leadership development and public policy advocacy. If lawyers are to play a role in the reproductive justice movement, they must understand this context and develop a model that reflects it.

In spite of the barriers, there is no time like the present to begin thinking, writing and developing a role for lawyers within the reproductive justice movement. The environmental justice movement provides two lawyering models that may be translated into the reproductive justice context: community lawyering and integrative lawyering. Those who pursue these models should reflect and write about their experiences to develop this area of law and practice.