RULES FOR RADICAL LAWYERS: ADVANCING THE ABORTION RIGHTS OF INMATES

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> *The real action is in the enemy's reaction. The enemy properly goaded and guided in his reaction will be your major strength.*
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> —Saul Alinsky

I. Introduction

William Lloyd Garrison famously declared that the Constitution was a covenant with the devil – and then proceeded to burn a copy.[1] For a radical abolitionist like Garrison, the statement was an accurate description of the Constitution's origins because, as every civics student knows, the Constitution reflects a process of compromise between slave states and free states that affected multiple aspects of the document, most explicitly the three-fifths compromise.[2] Garrison's statement was more than a description of the process of compromise; he was also promulgating his view, one that distinguished him from

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[1] Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE. L.J. 2003, 2005 (1999).

[2] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

other abolitionists of his era, on how slavery could be defeated.[3] Garrison, like Wendell Phillips, saw the Constitution as part of the slavery problem and not as part of the abolitionist solution.[4] Others, such as Frederick Douglass and Lysander Spooner, believed it possible to use constitutional arguments to eradicate slavery.[5] To these constitutional abolitionists, the document could be read to support an abolitionist argument, and these abolitionists reasoned that it was a mistake to assume that the Founding Fathers had intended to institutionalize slavery

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[3] *See* WILLIAM WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760–1848 (1977); Jules Lobel, *Losers, Fools, & Profits: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1358–64 (1995) (describing "radical constitutional abolitionists," and contrasting them to Garrison's position); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1353–55 (2006) (contrasting Garrison with Frederick Douglass and Lysander Spooner).

[4] *See* WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT (1844); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 108 n.89 (1989) (contrasting Phillips to Constitutional Abolitionists).

[5] Spooner has recently had a resurgence of sorts in legal academia. Interestingly, Spooner has started to be featured not only by scholars of antebellum legal history, but also by conservative and libertarian writers. *See, e.g.*, Randy E. Barnett, Essay, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997); David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1435–40 (describing how Spooner used the Second Amendment to argue that slavery was unconstitutional); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 764 (2009) (claiming Spooner as an "original methods originalist."); John Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 999–1003 (1993) (describing Spooner and other Constitutional Abolitionists as showing "Ninth Amendment-like thinking").

forever. Putting aside the merits of the respective arguments,[6] Garrison's view would ultimately prevail. The legal and governmental structures founded on the Constitution were unable to peacefully abolish slavery and the country ultimately went to war to resolve the issue.

Beyond the rejection of constitutional structures, Garrison's actions were a flamboyant and expressive attack on what the document represented. Garrison knew he was directly challenging the belief, widely held both then and now, that the Constitution is the foundation of all American freedoms.[7] By burning the document, Garrison was doing more than destroying paper or making a statement about strategy—he was trying to inflame passions. Indeed, one can think of few acts more likely

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[6] Spooner's recent popularity is mostly based on his writings on slavery, especially the influential LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845), *reprinted in* 4 THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively ed., 1971). Others have focused attention to his writing on Intellectual Property. *See, e.g.*, John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 67 (1996) (*citing* LYSANDER SPOONER, THE LAW OF INTELLECTUAL PROPERTY 17–21 (Bela Marsh, 1855)). Less attention has been paid to Spooner's early career as a postal entrepreneur. *See* Barnett *supra* note 6, at 979. Indeed, Spooner attempted to directly compete with the United States Postal Service for the delivery of first class mail, declaring the postal monopoly to be unconstitutional. *See* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF THE LAWS OF CONGRESS, PROHIBITING PRIVATE MAILS (1844). *See also* U.S. CONST. art. I, § 8, cl. 7 (establishing the Postal Monopoly). While some modern scholars may agree with Spooner's interpretation of that section of the Constitution, there is a familiar concern that arises when people use the label "unconstitutional" to mean "disfavored." *See* Christina M. Bates, *From 34 Cents to 37 Cents: The Unconstitutionality of the Postal Monopoly*, 68 MO. L. REV. 123 (2003) (examining Spooner's writings on the Postal Monopoly and agreeing with him). It may be worth examining Spooner's views on the constitutionality of slavery in this light.

[7] It is worth noting that Garrison did not explicitly notice the counterpoint: while the Constitution may have been a deal with the Devil, it did not create slavery; it merely ratified pre-existing power relationships. Without the Constitution there would still have been slavery. This is a point for another essay, but it is a point that legal scholars often overlook, focused as we are on the Constitution and what followed. There was an America that predates the Constitution and in terms of power dynamics, it looked a lot like post-constitutional 18th century America. Class, race, sex and other relationships divided American society on both sides of the Constitution. The document hardly created these concerns, it simply institutionalized some of them, destabilized others and partially prepared the conditions for the relationships to solidify and shift.

to cause a severe reaction among both supporters and detractors. In fact, Garrison specifically chose the Fourth of July to stage this burning of the Constitution.[8] Garrison was thus openly and aggressively soliciting backlash.

A Progressive in early-21st Century America may sometimes sympathize with Garrison and share his impulse to burn the Constitution and start over.[9] Many theorists today have begun to turn away from the Constitution and impact litigation and look elsewhere for progressive social change.[10] This essay wonders if perhaps we need not abandon our litigators and pick up our lighters just yet.

In recent decades, there have been important analyses of social movements coming from the legal academy. While William Lloyd Garrison provides the introduction for this piece, the work of radical organizer Saul Alinsky will provide its central focus.[11] Although scholars talk about the relationship between community activists and lawyers and how lawyers can

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[8] THE LIBERATOR, July 7, 1854:

> Then holding up the U.S. Constitution, he branded it as the source and parent of all the other atrocities,—'a covenant with death, and an agreement with hell,'—and consumed it to ashes on the spot, exclaiming, So perish all compromises with tyranny! And let all the people say, Amen! A tremendous shout of Amen! went up to heaven in ratification of the deed, mingled with a few hisses and wrathful exclamations from some who were evidently in a rowdyish state of mind, but who were at once cowed by the popular feeling.

[9] This article does not attempt to hide its political orientation— something which would be unlikely to succeed given the focus on increasing access to abortions and improving the conditions for women in prison, let alone the attention paid to historical leftists like Garrison and Alinsky.

[10] *See infra* notes 21–36 and accompanying discussion.

[11] While Alinsky's more famous work, SAUL ALINKSY, RULES FOR RADICALS (1971), provides this work with its title, there is a significant account of his views in his earlier book, SAUL ALINSKY, REVEILLE FOR RADICALS (1946) [hereinafter ALINSKY, REVEILLE FOR RADICALS], as well as other works. It will be assumed for the purposes of this paper that these texts provide sufficient insight into Alinsky's organizing theories, although one could also look at the social movements within which he operated to distill a more complete understanding of his beliefs.

play a role within social movements, rarely is organizing theory imported into legal practice.[12] Even then, it is extremely rare for these lessons to be applied to impact litigation. While Alinsky's theories about organizing were not written with lawyers in mind, his writing can help develop a new understanding of backlash and how an impact litigation campaign may ultimately be successful in advancing a social movement.

There is much of Alinsky's work that might trouble modern social theorists and a great deal of his work quite simply does not apply to impact litigation campaigns. His writings reflect practices that are over fifty years old and often express ideas that many Progressives may now find distasteful. This Article does not intend to uphold Alinsky as a paragon of organizing perfection, nor does it hope to provide a comprehensive survey of his works. Further, this Article does not intend to serve a role similar to Alinsky's works; this is not a handbook for progressive lawyering in general.

Examining Alinsky's works can broaden our understanding of when impact litigation can succeed while simultaneously examining what success means in the impact litigation context. Mere victory in court would not be the end goal of an Alinsky-inspired litigation campaign; losses may even be more important than in the long run if the arguments are framed correctly.[13] More importantly, considering Alinsky's works can help us broaden our understanding of exactly how backlash operates. What we can learn from Alinsky is that backlash is not a linear entity, exogenous to campaigning tactics or a necessarily regressive force that serves solely to inhibit progressive

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[12] For an important counterexample, see GERALD LÓPEZ, REBELLIOUS LAWYERING (1992). This work is discussed at length *infra* Part VI.A.

[13] Perhaps this is the reason why Alinsky is often a favorite of Poverty Law academics. *See, e.g.*, Peter Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993):

> Lawyers in general tend to think of litigation as the preferred approach to issues, and poverty lawyers are no exception. I do not wish to be heard as disparaging litigation, but it should be evident from everything that is said in this writing that litigation will not produce the policies and programs suggested here.

movements. Rather, backlash can be understood to have a directionality that can be harnessed and used to the campaigner's advantage—an insight that should be internalized by those who seek to use impact litigation.[14]

Part II of this Article discusses problems with current progressive attitudes toward backlash and impact litigation. Part III turns to Alinsky's works in-depth to build a new model of a potentially successful impact litigation campaign. Part IV presents a case study, turning to one of the most contentious areas of constitutional law: reproductive rights. First, the Article will discuss the successful litigation tactics of *Roe v. Wade*, scholarship criticizing that decision and competing strategic visions of women's reproductive rights that coexisted at the time *Roe* was decided. Then, the Article outlines a model litigation campaign, using the reproductive rights of inmates as an example of how the previously constructed Alinsky-influenced strategy could operate.[15] Incorporating Alinsky-style practices into an impact litigation campaign is novel, but the strategy is neither fully comprehensive nor complete. Questions remain about agenda setting, missed opportunities for direct action, legitimation, community participation and commitment reaffirmation. These and other concerns are addressed in the final section.

This Article is a tentative entry into an overlapping set of well-developed doctrinal discussions. There is an ongoing and serious debate about the ability of impact litigation to advance progressive ideals through juridical action as well as serious debate about the role of lawyers within social movements.[16] Arguments on all sides are constantly shifting in reaction to each other. Any chance to operate at the interstices of this discussion

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[14] This is the exact meaning of the quotation that begins this article: "*The enemy properly goaded and guided in his reaction will be your major strength.*" ALINSKY, *supra* note 1, at 136.

[15] The focus on the reproductive rights of inmates draws upon and expands this author's earlier work. *See* Mark Egerman, Roe v. Crawford: *Do Inmates have an Eighth Amendment Right to Elective Abortions*, 31 HARV. J. L. & GENDER 423 (2008).

[16] *See infra* notes 19–38 and discussion.

becomes increasingly hard as mature and complicated analyses begin to acknowledge the complex and indeterminate nature of these struggles. This Article focuses on the rights of pregnant inmates, and it is worth explicitly noting that the realities of litigating on behalf of prisoners may be so substantially different from litigating on behalf of other clients that much of the law-and-social-movement literature breaks down here.[17]

These analyses have added greatly to our understanding of the relationship between law and social movements, as well as the potential harms that can be caused by backlash.[18] Much of this literature arrives at an important conclusion: there is often a strong tension between impact litigation and social movements. This paper does not disagree, but believes that it is possible for vanguard lawyering to serve a unique catalytic role. The challenge is not only to find the right conditions for this to be true, but to strategically make decisions to further these ends—a challenge that faces every activist.

This Article presents an outline of a legal strategy that employs impact lawyering on the margins of constitutional space and informed by social movement theory to advance the interests of subordinated groups. A new approach is taken to the role played by popular backlash to court decisions. A multi-dimensional theoretical understanding of backlash is developed in order to understand why legal approaches must be carefully constructed in order to best utilize these processes. A central focus on harnessing backlash recasts the goals of impact litigation and challenges how we measure its success. This is not a blueprint for universal success, but rather a new approach to an old problem of justice-seeking and perhaps one more tool in the cause lawyer's toolkit.

II. Current Conceptions of Backlash

Garrison's desire to provoke backlash may put him outside

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[17] *See* Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993) (arguing that Rosenberg's views on impact litigation are least correct in the prison context, where judges have greater ability to create self-enforcing rulings).

[18] *See infra* Part II.A, II.B.

of the current progressive mindset, but in many ways we continue to debate the same issues of backlash and the ability of the Constitution to advance the needs of subordinated classes. One of the canonical texts in this field, Gerald Rosenberg's *The Hollow Hope*, argues that progressives are unlikely to advance their agenda through impact litigation.[19] This claim has been reinforced by a number of academics who criticize vanguard lawyering,[20] asserting that a focus on litigation actually reinforces poor clients' feelings of powerlessness,[21] that litigation tends towards less radicalism and ultimately more modest outcomes than would have otherwise been obtained through extralegal or political measures,[22] that radical lawyering is a contradiction unto itself; focusing too much on rights which are not self-enforcing and which are critically integrated with hegemonic power structures,[23] that community needs are best

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[19] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) [hereinafter ROSENBERG, THE HOLLOW HOPE]. As discussed below, the argument presented here is not that Constitutional change is difficult because of issues such as the demanding standards needed for Article V amendment. Rather, the theory focuses on the institutional limitations of the courts and the role that the law plays in reinforcing the status quo and blocking social change. For the purposes of this paper, impact litigation can include not only high-profile constitutional challenges, but also class action suits, especially regarding Title VII challenges.

[20] A good definition of the vanguard category of cause lawyers can be found in Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 664 (2004).

[21] *See* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 542–44 (1988) (describing the courtroom as a place where the poor are unlikely to "feel any command over their own voices.").

[22] *See, e.g.*, Derrick Bell, *The Supreme Court 1984 Term Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 24 (1986) (arguing that "courts cannot and will not meet the needs of our people . . . [and] that real progress can come only through tactics other than litigation."). *But see* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1365 (1988) (arguing that the use of rights rhetoric was a radical, movement-building act for African-Americans).

[23] Stuart Scheingold, *Radical Lawyers and Socialist Ideas*, 15 J.L. & SOC'Y 122, 122 (1988).

served by the provision of direct legal services,[24] that impact litigation will often come into conflict with client interests—thereby under-serving them[25] and that even when impact litigation campaigns are successful in court that rulings are rarely enforced and can often induce counter-movements that result, on balance, in more harm than good.[26] All of these criticisms arise alongside a larger critique of the role of the judicial system and rights talk developed by the critical legal studies movement. This movement viewed the legal system as maintaining and perpetuating the inequities of the status quo and criticized rights as being more focused on protecting access to private markets and the ability to commodify than on equality.[27]

These criticisms of impact litigation are joined by an active and ongoing debate over the role of lawyers in social movements.[28] On the one hand are legal mobilization theorists who advocate the importance of both constitutional lawyering and legal reasoning in the creation and advancement of social

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[24] *See, e.g.*, Anthony V. Alfieri, *Faith in Community: Representing "Colored Town"*, 95 CALIF. L. REV. 1829, 1850–51 (2007) (summarizing arguments in favor of direct advocacy and community organizing).

[25] *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

[26] *See, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND RACIAL CHANGE, 389–97 (2004).

[27] *See, e.g.*, Scott Cummings & Ingrid Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 451–52 (2001); Robin West, *From Choice to Reproductive Justice*, 118 YALE L.J. 1394, 1412–21 (2009).

[28] While it might be tempting to conflate these two issues, they remain somewhat distinct. One could believe in the possibility of effective impact litigation, but still believe that such an agenda is inherently in tension with social movements, especially when it comes to issues of empowerment, direct action, resource allocation, momentum and agenda setting. Furthermore, one could remain skeptical of the ability for the courts to effectuate radical change, but still believe that impact litigation has inspirational elements that can mobilize a community in important and significant ways. Finally, one could be agnostic on whether or not impact litigation plays a significant role in a social movement, but still have strong feelings about what role lawyers and others elites should play.

movements.[29] These accounts can often become quite dramatic in their view of heroic cause lawyers.[30] On the other hand is an impressive array of authors who have skeptically analyzed the role of lawyers in multiple social movements, including desegregation,[31] abortion,[32] affirmative action[33] and others.

In short, a particular reading of these critics reveals a revitalized version of Garrison's skepticism about the ability of the Constitution to advance radical change.[34] These modern Garrisons do not advocate burning the Constitution *per se*, but

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[29] William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) (arguing that impact litigation is critical for the development of many social movements).

[30] *See* Geoffrey Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1243 (1991) (describing the heroic narrative of the American lawyer as "the fearless advocate who champions a client threatened with loss of life and liberty by government oppression," with reference to Alexander Hamilton, Abraham Lincoln, Abe Fortas and Thurgood Marshall); Lobel, *supra* note 4, at 1339 (describing a "prophetic lawyer" as a "radical social critic, who appeals to tradition and exhorts the population to replace the present unjust reality with a just and equal future").

[31] *See, e.g.*, Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Gerald N. Rosenberg, *Brown is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994). *But see* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994).

[32] *See, e.g.*, ROSENBERG, THE HOLLOW HOPE, *supra* note 20 at, 173–265. *But see* Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

[33] *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

[34] While the two positions are significantly different, they remain closely related. Garrison's focus was not necessarily on the litigation process, but on the historical fact that the Constitution represented a compromise with slave-owning states that gave them enough power to block abolition movements. Rosenberg's focus is on the Court's institutional capabilities, which he traces to the limited nature of constitutional rights as well as the lack of judicial independence and enforcement ability. ROSENBERG, THE HOLLOW HOPE, *supra* note 21, at 35. The same limitation that Garrison saw in the Constitution informs Rosenberg's skepticism of impact lawyering combined with other institutional and structural analyses.

instead prefer a focus on community organizing and the political process. Moreover, many believe that the Constitution should be taken away from the courts and returned to the people, or that we need to reconceptualize a legislative Constitution that results in more deliberate law-making and returns constitutional theory to popular politics.[35] As the literature has grown increasingly sophisticated, authors rarely advocate an either/or tradeoff between community organizing and litigation. Indeed, many of these critics support a well-designed plan that integrates organizing with a limited litigation strategy, but only under certain conditions. Yet, the brunt of this criticism is hard to miss: our traditional heroic understanding of impact litigation, especially famous cases such as *Brown v. Board of Education*[36] and *Roe v. Wade*,[37] needs to be challenged.[38] These critics argue that such cases were not the major successes we thought they were and that there is little hope for successful impact litigation today.[39]

Much of this criticism has been fueled by recent scholarship on the politics of backlash. It is a fear of backlash that motivates some of the condemnation of impact litigation,

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[35] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 281–300 (1994); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[36] 347 U.S. 483 (1954).

[37] 410 U.S. 113 (1973).

[38] For a classic statement of this heroic vision, *see* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

[39] These authors are rarely outright fatalists. One major concern of this literature is identifying the conditions under which impact litigation can succeed. *See* ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 8–36. This paper does not take a position on many, if any, of these larger questions about popular constitutionalism or the role of judicial review. Instead, it focuses on identifying circumstances where impact litigation can be used within a social movement, given the current situation of courts within popular consciousness and the dynamic interchange between that role and public reactions to high-profile cases.

with significant works on post-*Roe*[40] and post-*Brown* backlash,[41] and with nervous eyes turned to recent rulings regarding same-sex marriage.[42] Critics wonder whether these rulings will ultimately undermine the movement for marriage equality, or for gay rights in general, by leading to backlash that elects right-wing politicians or results in constitutional amendments.[43] Reva Siegel and Robert Post have gone so far as to name this fear, using the evocative term "*Roe* Rage."[44] While Garrison courted backlash, his modern-day successors shrink from it.

These concerns have dovetailed with significant changes in the national political landscape as well as decisions made by progressive and liberal politicians. Exemplified by Thomas Franks' best-selling book, *What's the Matter with Kansas*, there has been a serious questioning among Democrats and Progressives about how "we" lost the heartland.[45] These debates try to understand why working-class White Americans

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[40] *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005).

[41] *See, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

[42] *See generally* Symposium, *The Legislative Backlash to Advances in Rights for Same-Sex Couples*, 40 TULSA L. REV. 371 (2005) (analyzing current backlash against gay rights).

[43] *See* Carlos Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1520 (2006) ("Several gay rights supporters have raised concerns about the dangers associated with a backlash to court-mandated equality in the context of marriage that parallels Klarman's critique of Brown."). Angela Harris has even used the "What's-the-Matter-With-Kansas" framework to wonder whether gay marriage is merely a "sideshow" issue that undermines queer activists' goals for a deeper, more meaningful equality. *See* Angela Harris, *From Stonewall To The Suburbs?: Toward A Political Economy Of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1570–71 (2007).

[44] Post & Siegel, *supra* note 33. This paper shares quite a bit in common with this article, although it conceptualizes backlash not as popular engagement with the court, but rather as an inevitable byproduct of progressive social change. *See infra* section II.B.

[45] THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA (2004).

consistently align themselves with political parties that act against their economic interest in state and national elections.[46] Frank's answer is simple: the formerly radical heartland became red states after Republicans successfully manipulated the voting public by focusing on divisive social issues to rally support and shift attention away from more important issues.[47] According to this narrative, the new Republican Party feeds off backlash created by these divisive issues in order to advance a pro-business agenda that only creates more social inequality, thus leading to more social divisiveness.[48] In response, Democrats have made significant strides in the past few decades away from divisive social issues, most specifically abortion.[49]

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[46] *Id.* at 245. *See also* Martha McCluskey, *Kulturkampf: How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars,"* 35 SETON HALL L. REV. 1291, 1292–93 (2005).

[47] *See* FRANK, *supra* note 46 at 1–10. *See also* Zygmunt J. B. Plater, *Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 39–40 (2005) (citing Frank, *supra* note 46).

> By wrapping themselves in the cloak of "traditional family values" the latter day descendants of rapacious home-wrecking nineteenth century robber barons were able to split many disgruntled and desperate denizens of the heartland away from the progressive movements that had been the consistent defenders of their interests.

[48] FRANK, *supra* note 46.

[49] WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 9–31 (2004) (describing decisions made by pro-choice forces in 1986 to counter conservative backlash by moving to the center, focusing on anti-government sentiment, and rejecting a broader view of affirmative abortion rights or sex equality).

Unsurprisingly, this debate has been contentious[50] and many of Frank's underlying premises have been contested.[51]

This Article is not interested in taking sides in the debate, but instead is concerned about the effect this has when taken alongside the legal concerns about impact litigation and backlash. The two trends reinforce each other, as actors within each sphere worry about the potential for backlash to the point where progressives become paralyzed when it comes to these divisive issues.[52] An incredible vacuum has formed, where progressives are afraid of speaking their values or advancing

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[50] At times these discussions strongly resemble the 1950s worries over how "we" lost China. *See* Don Mayer, *Corporate Citizenship and Trustworthy Capitalism: Co-creating a More Peaceful Planet*, 44 AM. BUS. L.J. 237, 261 n.84 (2007) (describing the blame game that occurred after Mao took power in China) (citing Anthony Lewis, *Abroad at Home, Who Lost China?* N.Y. TIMES, May 15, 1983, at 193); *see also* Geoff Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1393 (2005); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 91 n.39 (analogizing discussions among Democrats after losing control of the House of Representatives to the "Who Lost China" debate).

There is an unstated presumption that these individuals ought to have voted for Democrats or progressive candidates—just as it was assumed that China ought to have been aligned with the United States. There is also an often unstated, but usually obvious, classism at work where academics and politicians assume that heartland voters do not know what is best for them; a disdain mirrored fifty years earlier when racist and Orientalist views of China colored all attempts to understand why they had been "lost." The claim that progressives are elitists is usually mere rhetoric that plays into larger narratives about class and community, yet this element of class-based disdain is often quite apparent to the very voters progressives are courting. Moreover, it would certainly be better for the Democratic Party to interrogate the presupposition that it does offer something to working- and middle-class Americans, especially given its large-scale abandonment of many anti-poverty programs coupled with its embrace of privatization and deregulation in the general absence of any discourse of middle-class issues.

[51] *See* Larry M. Bartels, *What's the Matter with What's the Matter with Kansas?*, 2006 Q. J. POL. SCI. 201, 201–26 (challenging Frank through the use of quantitative voting data); Dan Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 126 n.46 (2007) (disputing Frank's claim that culture outweighs economic interests for voters).

[52] Post & Siegel, *supra* note 33, at 374 ("Stunned by the ferocity of the conservative counterattack, progressives have concluded that the best tactic is to take no action that might provoke populist resentments.").

arguments in court, resorting to playing defense and co-opting conservative talking points.[53] While this Author shares Post and Siegel's concern about paralysis, this Article argues that the answer is not to turn solely to Democratic Constitutionalism, as they describe it. Instead, it is time to learn how to embrace and employ backlash and how to use these lessons wisely when crafting impact litigation.[54]

There are many different criticisms of impact litigation and just as many positions on backlash.[55] This Article will focus on two prominent authors, Gerald Rosenberg and Michael Klarman, and use their ideas as partial representatives.[56] Both authors are excellent scholars, although they have had their critics within the legal academy and on the left.[57]

A. Rosenberg and Impact Litigation

Gerald Rosenberg prominently set forth the idea that courts have rarely advanced social change and that impact litigation is almost always unsuccessful in achieving reform. He recently released a second edition of his seminal work, *The Hollow Hope*,

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[53] *See* Francisco Valdes, *We Are Now of the View: Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407, 1410 (2005) (describing this process as dominating law and policy for the past two decades).

[54] Furthermore, it is important to expressly acknowledge that these divisive issues are not sideshows, particularly concerning issues such as abortion rights. This is an article on expanding abortion access to a subordinated class of women who have been denied reproductive autonomy—something the Author certainly believes is as important as any other political issue.

[55] For a summary of three leading perspectives on backlash, see Post & Siegel, *supra* note 33 at, 388–406.

[56] *See, e.g.*, Vincent James Strickler, *Green-Lighting Brown: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 793 (2009) (describing Rosenberg as the most prominent theorist skeptical of judicial power to effectuate social reform).

[57] David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's* The Hollow Hope: Can Courts Bring About Social Change?, 12 J.L. & POL. 63, 66 & nn.28–31 (1996) (summarizing criticism of Rosenberg); Post & Siegel, *supra* note 33, at 391–95 (criticizing Klarman).

updating some information but effectively reasserting the central theme.[58] While skeptical of the view of a "dynamic court," Rosenberg's claims are not monolithic, as he attempts to describe the conditions under which the courts can facilitate social change.[59] He believes that this occurs when four conditions are met: ample legal precedent for change, support for change from substantial numbers in Congress and the executive, support from some citizens or low levels of opposition from all citizens, and incentives created to ensure compliance and enforcement.[60] Rosenberg acknowledges that some major legal cases were won, focusing on civil rights litigation in the 1930s and 1940s as well as the expansion of rights for women under the Fourteenth Amendment.[61] At the same time, Rosenberg rejects the possibility of success from most progressive litigation strategies.[62] The one exception is defensive litigation that can help keep a movement afloat.[63]

In order to challenge this position, it is important to separate out two of Rosenberg's claims. First, the claim that courts are impotent to effectuate change and serve as protectors of the status quo is logically distinct from his belief that organized resistance to court opinions undermines social gains.

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[58] Richard Delgado, *A Comment on Rosenberg's New Edition of* The Hollow Hope, 103 NW. U. L. REV. 147 (2008).

[59] Rosenberg defines dynamic courts as "powerful, vigorous and potent proponents of change." ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 2. He then tries to identify the conditions under which courts can play this role. *Id.* at 30–35.

[60] *Id.* at 36.

[61] *Id.* at 421.

[62] Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 797 (2006) ("The political left's flirtation with litigation is fundamentally flawed."); ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 423 ("[N]ot only does litigation steer activists to an institution that is constrained from helping them, but it also siphons off crucial resources and talent, and runs the risk of weakening political efforts.").

[63] ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 428 (describing the NAACP Inc. Fund as playing an important role in preventing the repressive legal structures of the South from totally incapacitating the movement).

The second concern effectively represents the backlash thesis and is discussed in the backlash section below.[64] Focusing on the first claim, it is worth asking if the courts are as constrained and conservative as Rosenberg claims. The fact that courts rely on political support to produce reform and that they lack implementation powers may overly generalize and ignore situations where courts have direct control over the parties and can enforce their own rulings. Perhaps the most interesting example is prisoners' rights, an area that Rosenberg focuses on briefly.[65] Susan Sturm directly challenges Rosenberg in this area, noting his failure to acknowledge the important role that district courts play in implementing policies in prisons, as well as the value of using courts for the purposes of test cases.[66] Sturm further notes that Rosenberg's focus on the Supreme Court misses the increasing role that trial courts play in correctional institutions that are far more localized, that trial courts can significantly influence local actors, and that lower court rulings in the correctional context are more self-enforcing than the Supreme Court has ever been.[67]

Another serious concern with Rosenberg's argument is that it takes too narrow a focus on individual cases to the detriment of a longer-term view of how the political landscape can be shaped. Reva Siegel and Robert Post make this claim, arguing that progressives should not take a minimalist approach to constitutional lawyering and that the Court is democratically

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[64] *See infra* Part III.

[65] ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 305–14.

[66] *See* Sturm, *supra* note 18, at 652–57. *See also* Susan Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323 (2007).

[67] ROSENBERG, THE HOLLOW HOPE, *supra* note 20 at, 656.

responsive.[68] Analyzing *Planned Parenthood v. Casey*,[69] they argue that, "the substance of constitutional law emerges from the furnace of political controversy," and if "progressives shun controversy, either in adjudication or politics, they abandon the hope of shaping the content of constitutional law."[70] In this light, as Rosenberg suggests, merely playing defense may cede too much territory to opponents. From this position, it may be better to aggressively pursue a line of cases even if they ultimately fail, as a failure to raise these arguments may allow conservatives to frame the debate and shift the Court (and the country) to the right.

Furthermore, Rosenberg focuses on the legal outcome of court cases and may miss the inspirational and aspirational elements that impact litigation can have, even in defeat. There is evidence of the impact of such inspirational arguments,[71] although there is some skepticism about how significant this effect is in shaping social movements.[72] The ability to communicate these values and work with movement activists to respond to defeats and actualize victories is a hugely important skill for any radical lawyer. Training of activist lawyers needs to emphasize the need to forming a close relationship with the movement because these skills can be as significant as any legal analysis. There is a negative component to the inspirational claim that is rarely made: failing to litigate cases can have a significant impact on subordinated groups as well. When a group feels like it deserves its day in court, or like its rights have been denied, it can be difficult to abandon the litigation. Certainly social movements benefit from a stronger understanding of the conservative nature of courts and the legal system; indeed, activists would be foolish to blindly place their hopes in a

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[68] Post & Siegel, *supra* note 33, at 427–28. In case it is not clear from the rest of the paper, the argument presented in this article is one that is committed to advancing leftist values and does not attempt to be value-neutral; although it is entirely possible that the tactics described here could be adopted by anyone.

[69] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[70] Post & Siegel, *supra* note 33, at 430.

[71] *See* Crenshaw, *supra* note 23, at 1365.

[72] *See* Brown-Nagin, *supra* note 34 at, 1515–17.

miracle ruling from on high.[73] Yet, there is a subjective harm that remains when groups do not even attempt to make transformative arguments in court, a deep internalization of an outsider status combined with a fatalism that can cause individuals to wonder if they will ever succeed. While the courts may not provide social movements with relief, it may still be preferable and more meaningful for activists to try and fail than never to try at all.[74]

Further, Rosenberg does not seem to acknowledge that different legal arguments can result in varied conceptions of rights and impact the status quo in dissimilar ways. In his chapter on abortion, Rosenberg does not discuss the role that the view of abortion-as-privacy-right played in the response to *Roe*. Indeed, he claims that public opinion polling shows that most Americans do not follow the Supreme Court closely and similarly do not understand its abortion rulings.[75] This position misses the way that counter-organization is shaped by the avenues opened by the Court's decision. While many people might not know much about the holdings, the rhetoric used in opposition to the abortion right described in *Roe* might have been shaped by the decision itself. Specifically, in the abortion context, the focus on choice and individual rights led pro-life

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[73] Of course, few activists believe this, and the subordinated generally do not have a rose-colored view of social institutions. Many groups know all too well that the legal system will not side with them.

[74] This can also be a remarkably costly and foolhardy desire, something that Rosenberg is right to counsel against. One may be reminded of the parable of the scorpion who asks a frog to carry him across a river. The frog initially declines, concerned about being stung by the scorpion, but the scorpion reassures the frog, noting that stinging the frog would kill them both. The frog agrees and halfway across the river, the scorpion stings the frog, ensuring that they both will die. The frog asks why the scorpion did so and the scorpion responds, "I'm a scorpion, it is in my nature." Rosenberg may prefer that activists did not think in these terms, especially when courtroom losses have external costs both within and beyond the social movement. However, even knowing that failure is all but guaranteed, it can be hard to sit on one's hands and remain silent. It is in our nature.

[75] ROSENBERG, *supra* note 20, at 235–41. Interestingly enough, he references Nancy Stearns for the contrary position. *Id.* at 236. (quoting her as saying that courts can be used as "a tool for reaching more women and for educating them on the whole question of abortion and women's rights.").

forces to use different framing techniques in order to raise more opposition to the policy than would have been used with other arguments.[76] The benefits gained by framing are true even in losing cases—indeed, as discussed below this might be a crucial element in working with backlash.[77]

The movement to make sexual harassment a legally cognizable wrong provides one example of this effect.[78] In her groundbreaking work, *Sexual Harassment of Working Women*, Catharine MacKinnon described many of the early arguments advanced in courts and the difficulties lawyers had in making these women's experiences of harassment legally cognizable.[79] A number of potential legal theories had been advanced prior to MacKinnon's work, including attempts to recognize sexual harassment as a breach of contract or as a tort.[80] MacKinnon analyzed these alternative theories and provided explanations as to why they were insufficient tools to address the problem.[81] Ultimately, MacKinnon advanced two theories of sexual harassment as sex discrimination and turned to the anti-discrimination law that had developed around Title VII. This argument ultimately prevailed in courts and led to the development of substantive sexual harassment law, almost exactly as MacKinnon predicted, and became one of the most

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[76] MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 46–47 (1987).

[77] *See infra* Part III.

[78] While Rosenberg mentions *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) as an example of a court victory for women's rights, it is the only time that sexual harassment is mentioned in the chapter on "The Courts and Women's Rights." ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 204. While it might be possible for Rosenberg to argue that legal victories regarding sexual harassment have not had the transformative effective they might have had, given the difficulties individuals face in getting their claims recognized, certainly this area of law has radically transformed the American workplace in a short period of time and without any corresponding legislative efforts.

[79] CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, 57–99 (1979).

[80] *Id.* at 81, 88.

[81] *Id.* at 158–74.

remarkable legal campaigns in American history. It also had major ramifications for the women's movement, specifically on how the movement framed the issue of harassment.

Title VII only applies to women employed at workplaces with fifteen or more employees. As such, women who work in the home are not covered by its protections, something MacKinnon herself noted.[82] As these protections exist only in the workplace, they do not cover the kinds of harassment women face in other settings, including catcalls on the street and the recent phenomenon of harassment on Internet bulletin boards.[83] Title VII claims thereby focused on the narrative of women employed in certain settings and did not address other types of harassment. Furthermore, harassment was conceptualized as a problem arising between supervisors and subordinates or between coworkers in a professional environment—as opposed to a defining element of gender roles pervasive throughout society.[84] This framing paved the way for fairly remarkable advances in the law, including the recognition of harassment of men by other men.[85] The lens of Title VII (and later Title IX) makes the ruling in *Oncale v. Sundowner Offshore Services*[86] seem straightforward and uncontroversial, which is surprising given the conservatism underlying other rulings of the same

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[82] *Id.* at 239 n.2.

[83] The book itself is entitled *Sexual Harassment of Working Women*, and not Sexual Harassment of Women. For more on the extension of sexual harassment law to the internet, see Mary Anne Franks, *Unwilling Avatars: Sexual Harassment in Cyberspace*, 20 COLUM. J. GENDER & L. 226 (2011).

[84] There is an interesting tension between the Title VII theories that the law recognized and the final chapter of MacKinnon's work, which goes much further than the law ever would in understanding how harassment constructs gender. MACKINNON, *supra* note 80. Acknowledging the law's shortcomings in no way detracts from the incredible progress made.

[85] Oncale v. Sundowner Offshore Servs, 523 U.S. 75 (1998) (recognizing a Title VII claim by a man who had been sexually harassed by male coworkers).

[86] *Id.*

Court.[87] It is unclear whether other approaches, such as a tort-based theory, would have provided a strong enough foundation for similar advances.

Such strategic choices are always necessary for radical lawyers and it is unlikely that MacKinnon or any other feminist lawyer could have made better framing decisions.[88] What is important to note is that the choice of which legal theories to advance can play a significant role in guiding future actions and shaping a social movement. This is true not only for subsequent legal arguments, but also for how the public may understand and engage with these rulings—what ultimately becomes backlash.[89] Such a theory does not require radical lawyers to win in court; indeed, defeats may eventually energize activists and lead to similar outcomes.[90] Playing defense alone will not accomplish this goal, for by responding to the arguments of the Right, the Left loses some ability to frame the issues and guide backlash.

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[87] Sexual harassment law has been successfully defended at the highest levels in a manner that often seems inconsistent with similarly "conservative" rulings of the same courts. Richard Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1.

[88] Given that the campaign against sexual harassment has been one of the most effective litigation campaigns of the Twentieth Century, the Author cannot think of good arguments against MacKinnon or other activists in this area.

[89] An analysis of how the choice of a Title VII framework shaped backlash is beyond the scope of this paper but remains an interesting idea and one that might help future activists better shape their own campaigns.

[90] One example of this may be Lawrence Lessig's recent efforts to reform copyright law. Lessig's writing on the subject and close engagement with the nascent "Free Culture" movement in many ways reflect the ideas discussed in this Article. *See generally* LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (2004). One of Lessig's many contributions to the movement has been an attempt to reframe the issue away from "piracy" and property rights and towards a First Amendment framework. While Lessig lost in the case *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the First Amendment theories he advanced in that case may ultimately lead to future organizing and the eventual vindication of the movement. While the courts may have acted as Rosenberg would have predicted, by taking this aggressive stance, Lessig and his client were able to challenge the recording industry's traditional tactics, employ new framing rhetoric, and may have shifted both popular opinion and the Court's position in future cases.

A. Klarman and Backlash

It may seem odd to argue that certain forms of backlash are desirable or that they could even move the polity to the Left. The concept of backlash, particularly in the abortion context, has become a monstrosity to the Left.[91] One of the leading theorists of backlash is Michael Klarman, who has focused on the way that *Brown* v. *Board of Education* "radicalized southern politics"[92] and caused "a massive backlash against racial change."[93] Rosenberg[94] and other prominent authors such as Cass Sunstein[95] also embrace backlash theory. Much like Rosenberg's analysis of the constrained role of the courts, this position is often demonstrably true. Unsurprisingly, the major decisions such as *Brown* and *Roe* caused backlash that has undermined their goals. Any time there is an attempt to gain increased rights for a marginalized group there will be

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[91] As discussed above, Post and Siegel coined the descriptive concept "*Roe* rage" to describe the backlash, noting that "Progressives dread *Roe* rage." Post & Siegel, *supra* note 33, at 406.

[92] MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND RACIAL CHANGE 391 (2004).

[93] Klarman, *supra* note 32, at 115 n.494. For a good summary of Klarman's positions on backlash, see Post & Siegel, *supra* note 33, at 391–95.

[94] Rosenberg focuses especially on backlash to same-sex marriage litigation. ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 339–41.

[95] *See, e.g.*, Cass Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 394 (1997):

> I think that [*Roe*] has created unnecessary problems for the Court and the nation. It did so because in its (wholly unnecessary) breadth and in its blindness to matters of fact and institutional role (on which more below), the Court did too much too soon, in a way that has had enduring harmful effects on American life (emphatically including that part of American life that involves equality on the basis of sex).

See also Cass Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) ("Perhaps more fundamentally, [*Roe*] may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents.").

opposition.[96]

Much of this literature fails to show that the backlash caused by these court decisions resulted in a worse outcome than would have occurred via other avenues of social change. If backlash is inevitable, merely showing that it occurs does not prove much. Comparing the actual outcomes to a hypothetical situation where backlash would have taken a different form is an inherently speculative task that relies on counterfactuals and argument by analogy. [97]

Klarman approaches this task with an incredible degree of precision and attention to historical detail. The descriptions he provides of pre-*Brown* efforts at integration provide a stunning contrast to post-*Brown* radicalism.[98] Klarman is unequivocal in the conclusions that he draws, stating "[i]n the short term, *Brown* retarded progressive racial reform in the South."[99] Yet, one has to wonder what baseline level of racial reform serves as the basis of this comparison. While there had been some levels of integration and slow reforms, one can imagine that these early steps would not have continued, or that local actions could have sparked even greater backlash that would have been channeled in other forms.

One possible benefit of *Brown* is that backlash over integrated schools actually defused a more deadly scenario: the

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[96] William Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J.L. & POL'Y 101, 154 n.225 (2006) (quoting Frederick Douglass, Speech Delivered at Canandaigua, NY: West India Emancipation (Aug. 4, 1857), *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 437 (Phillip S. Foner ed., 1950)). Even if it were conceivably possible to extend rights to a disadvantaged group without any cost to other social groups, the relative position of the privileged within society would be weakened and we would still see backlash.

[97] Quite simply, we do not know how racist whites would have reacted to further desegregation in the absence of *Brown*. While we can demonstrate what happened in other jurisdictions or at other points in time, ultimately, we cannot hold all significant factors constant.

[98] *See* KLARMAN, *supra* note 92, at 344–442.

[99] Michael Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 454 (2005).

potential implosion of Southern society and the resulting violence that would have accompanied the decriminalization of interracial marriage. As Klarman himself notes, polls showed that Whites were more strongly opposed to interracial marriage than to school integration.[100] Moreover, the *Brown* Court went out of its way not to challenge bans on interracial marriage because many southern Whites believed that the ultimate goal of school desegregation was to give Black men access to White women.[101] Had the South continued a slow process of civil rights reform, it certainly would have hit a wall with interracial marriage and thus encountered potentially uglier resistance than the actual *Brown* backlash. Liberal Northerners, appalled by the reaction to *Brown*, might not have been as willing to support a civil rights movement had the focus been backlash to interracial marriage, given that Northerners were also less comfortable with the practice.[102] Furthermore, it would have been easier to deploy long-standing stereotypes about race and sex in order to maintain the status quo and subordinate Blacks.[103]

Counterfactuals aside, it is important to turn to the theoretical basis underlying Klarman's arguments and the potential responses. Klarman details three reasons why major court rulings can cause such backlash: "Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over 'outside interference' or 'judicial activism,' and they alter the order in which social change would otherwise have

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[100] *Id.* at 477 n.332 (citing GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 60–61, 587–88 (1944).

[101] *Id.* at 446–47.

[102] The same argument could be made with regards to abortion. Had there been substantial backlash to the line of cases pioneered by Ruth Bader Ginsberg at the ACLU women's rights project, perhaps there would not have been such a reaction to *Roe*, a few years later. Or perhaps the backlash to *Roe* distracted the right from opposing sexual harassment laws, just as civil rights backlash over *Brown* prepared the country for *Loving v. Virginia*, 388 U.S. 1 (1967).

[103] Of course this practice was also employed with substantial success during the civil rights era, although with less direct impact than it would have in the interracial marriage context. For more on this, see SUSAN BROWNMILLER, AGAINST OUR WILL ch. 7 (1975); RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003).

occurred."[104]

The first concern, salience, addresses the intensity of the response. The second point focuses on the directionality of the backlash, casting attention on additional actors (and ones who usually cannot respond). The third concern is the counterfactual component, which can be frustrating. Klarman almost posits a "normal" course of social change that excludes impact litigation. Once again, this baseline level of societal development that excludes backlash is troubling, especially insofar as it treats public opinion as disjoint from court rulings.[105]

We should wonder whether salience is really such a problem. Post and Siegel take a similar position and acknowledge that some degree of conflict may be the inevitable consequence of upholding the rights of certain groups, whether this is achieved through adjudication or legislation.[106] They see this controversy as having "positive benefits for the American constitutional order."[107] After all, opposition is a form of political activity and popular debate about the Constitution leads to an engaged populace and an improved polity. It is not particularly problematic to make citizens feel like these issues are increasingly important. Indeed, one may even wonder whether there was significant backlash after rulings like *Harris v. McRae*[108] or *Parents Involved in Community Schools v. Seattle School District No. 1* and how increased salience affected the issues impacted by those rulings.[109]

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[104] Klarman, *supra* note 100, at 473.

[105] Klarman makes this mistake a few times. *See* Klarman, *supra* note 100, at 452 (discussing the court's relationship to public opinion of anti-miscegenation laws without acknowledging the role that the backlash-response cycle regarding *Brown* played in changing this opinion).

[106] Post & Siegel, *supra* note 33, at 390.

[107] *Id.*

[108] 448 U.S. 297 (1980) (upholding Hyde Amendments).

[109] 551 U.S. 701 (2007) (prohibiting certain affirmative efforts in desegregating public schools).

The directionality of backlash is something that deserves more consideration. While Klarman posits backlash as inherently problematic, it is entirely possible that harnessing backlash can serve an important goal for Progressives. Ruth Bader Ginsburg, has adopted something very similar to this view when it comes to *Roe v. Wade*. Ginsburg does not believe that "if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious."[110] Yet, she later indicates that a sex equality holding would have changed the outcome of later court rulings on abortion funding.[111] Ginsburg at least acknowledges that, while some degree of backlash may be exogenous to the legal theories advanced by the Court, those theories might partially determine future avenues for challenging the ruling or advancing the argument.

The specific legal arguments chosen by radical lawyers may or may not affect the intensity of the backlash, but they can impact how the backlash is expressed. Had the Court couched its abortion reasoning in *Roe* in sex equality terms, this would have affected later litigation and also would have changed the ways that the opposition mobilized. The privacy right, as conceived by *Roe*, requires a balancing of the state's interest in protecting fetuses against a woman's right to make medical decisions with her doctor. Much of the anti-abortion rhetoric became focused on fetal rights, which led pro-life groups back to legislatures and into courts, attempting to redefine fetuses as human beings in order to change this balance.[112] Had the Court found an equal protection violation, this rhetoric would likely have been different. Absent a balancing test, perhaps the Right would have argued that men and women are fundamentally different and that sex-based classifications were not unconstitutional. Or, perhaps, the protests would have taken a different tone and become even

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[110] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).

[111] *Id.* at 383–86.

[112] *See* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1656–64 (2008) (discussing historic rise of fetal-focused arguments on pro-life side which have recently yielded to woman-protective arguments).

more violent, just as radical whites became more violent after *Brown*. While there has been significant violence targeted against clinics and practitioners, perhaps some of the efforts that went into legal reform would have instead been channeled towards even more violent activity.[113]

III. Lessons From Saul Alinsky

Saul Alinsky might not be the first radical theorist that one would turn to when incorporating principles of community organizing into an impact litigation campaign. Not a huge fan of attorneys, Alinsky opens *Rules for Radicals* with a criticism of lawyers during the Chicago Seven trial.[114] His vision of organizing is fairly far removed from impact litigation, focusing mostly on a People's Organization led by local leaders who are tightly integrated with the community.[115] Yet, Alinsky's teachings, when removed from this context, can be extremely important to impact litigators. Alinsky understands organizing to be inherently centered on conflict, an adversarial worldview important for litigators (and a position that irks other schools of organizing thought that focus less on conflict and more on

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[113] Reva B. Siegel seems to make the opposite argument—that the fetal-protection language led to increased clinic violence. *See id.* at 1660–61 (discussing the relationship between fetal-protective language and increased clinic violence).

[114] ALINSKY, *supra* note 1, at 5–6.

[115] ALINSKY, REVEILLE FOR RADICALS, *supra* note 12, at 46:

> If we strip away all the chromium trimmings of high-sounding metaphor and idealism which conceal the motor and gears of a democratic society, one basic element is revealed—the people are the motor, the organizations of the people are the gears. The power of the people is transmitted through the gears of their own organizations, and democracy moves forward.

See also id., chs. 5, 6 (describing native leadership and community organization). Much of what Alinsky writes is not applicable outside of the context of a People's Organization, but a significant part of his work remains relevant to all social movements.

cooperation).[116] Many of Alinsky's tactics seem remarkably aggressive and questionable even today.[117] Nonetheless, his writings provide an incredible insight into backlash, how it operates, why it must be accepted and how to structure a successful litigation campaign around these issues.

A. The Enemy's Reaction

Saul Alinsky's view on backlash is characteristically blunt: "*The real action is in the enemy's reaction. The enemy properly goaded and guided in his reaction will be your major strength.*"[118] Not only does Alinsky disagree with Rosenberg and Klarman, but he also does not share Post and Siegel's view of backlash as a process-enhancing benefit whereby citizens can deepen their commitment to constitutional meaning. Alinsky sees backlash as an ends-focused opportunity to isolate the opposition and move the general polity towards his position. Furthermore, Alinsky believes that backlash can be guided and that it is not just a static response to an unpopular action. Good organizers and a well-orchestrated social movement can engage with backlash and use it as one of the most effective tools in an entire movement. As stated above, the intensity of the backlash may or may not be endogenous to the legal theories advanced through impact litigation, but it may be possible to shape the forms that the backlash takes. Careful planning can effectuate the kind of goading that Alinsky describes. Two of the tools that Alinsky highlights are holding opponents accountable to their

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[116] *Id.* at 132, 134 ("A people's organization is a conflict group . . . . In our war against the social menaces of mankind there can be no compromise. It is life or death.").

[117] Perhaps the most troubling is his chapter "Of Means and Ends" in ALINSKY, *supra* note 1, at 24–47. To many modern viewers, this chapter is a wholesale embrace of a win-at-any-costs mentality that can be destructive for long-term social reform, especially with its casual comfort with violence. At one point, Alinsky seems to imply that Gandhi only chose non-violent resistance out of necessity. *See id.* at 39 ("If Gandhi had the weapons for violent resistance and the people to use them this means would not have been so unreservedly rejected as the world would like to think."). *But see* MAHATMA GANDHI, NON-VIOLENT RESISTANCE (SATYAGRAHA) (1961) (outlining Gandhi's vision of non-violence).

[118] ALINKSY, *supra* note 1, at 136 (emphasis in original).

own beliefs[119] and the use of ridicule.[120] Of all the various tactics that Alinsky advances, this Article argues that these are the two most useful ways to shape backlash through impact litigation in order to advance social change.

1. Forcing the Opposition into Contradiction

The first tactic, accountability, demonstrates that it is important to provoke backlash that fundamentally contradicts the values of the opposition. When choosing different legal theories, it is essential to predict how different responses to each theory can be used against the opposition in order to undermine their arguments or to mobilize a counter-reaction.[121] Alinsky writes that you can "kill [the opposition] with this," as it is impossible for reactionaries to live up to their own stated principles.[122]

2. Employing Ridicule

The second tactic, ridicule, is best employed when there is a disproportionate response to a change. Groups that scream that the sky is falling over small legal changes can quickly be isolated and ridiculed for overreacting. It is important to note that the reaction must be disproportionate to the *perceived* change, not to the actual change. Some question whether *Roe* actually changed the number of abortions performed in

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[119] *Id.* at 128 ("The fourth rule is: *Make the enemy live up to their own book of rules.*" (emphasis in original)).

[120] *Id.* ("The fourth rule carries within it the fifth rule: *Ridicule is man's most potent weapon.* It is almost impossible to counterattack ridicule. Also it infuriates the opposition who then react to your advantage." (emphasis in original)).

[121] This idea of counter-reaction or counter-backlash is essential to Alinsky's line of thought. Klarman himself seems to acknowledge the importance of this, at one point noting that televised scenes of Southern brutality mobilized the North. Klarman, *supra* note 100, at 456, 458 (noting that public opinion throughout the country changed quickly in reaction to reactionary backlash from Southern racists). Alinsky himself uses the language of revolution and the inevitable "counter-revolution." ALINSKY, *supra* note 1, at 17–18.

[122] *Id.* at 128.

America.[123] Yet there is little question that people angered by the ruling felt that it fundamentally changed the rules.[124] Ridicule can also be used to fight against the mainstreaming of radical claims, something that often happens as social movements become increasingly popular.[125]

The goal then should be to choose litigation campaigns that focus on controversial "small" rights,[126] issues that do not affect everyone but that are limited both in scope and application. Although limited, these "small" rights must be chosen such that they still provoke intense backlash. An example of this strategy was employed by The Right for the "partial-birth" abortion ban.[127] They were able to portray this ban as extremely important but also as a relatively minor and insignificant change in the law.[128] When pro-choice opponents rallied against the change, these opponents were brought to ridicule for fighting for something that was seen to be simultaneously so insignificant

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[123] ROSENBERG, THE HOLLOW HOPE, *supra* note 20, at 178–80.

[124] The same is true for *Brown*, which was simultaneously felt to be momentous while having had questionable direct impact. *See, e.g.*, KLARMAN, *supra* note 93; Strickler, *supra* note 57 at, 791–98.

[125] *See* Nancy Polinkoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1541–42 (1993) (describing how many social movements begin with the articulation of radical beliefs but subsequently discard that rhetoric; using abortion as an example).

[126] This Article uses the term "small" in quotations to make it clear that the Author does not believe that the rights in question are of limited value, especially to those to whom they have been denied, but rather would be perceived as such by others.

[127] Even the phrasing itself was carefully chosen to advance this agenda.

[128] *See* Nadine Strossen & Caitlin E. Borgmann, *The Carefully Orchestrated Campaign*, 3 NEXUS 3 (1998). Opponents would point to the language used in the ban, as well as the lack of an exception where a woman's life is at stake, as a substantial and problematic impact on the reproductive rights of women. Furthermore, the legislation and subsequent state actions created an environment that burdened abortion providers and undermined abortion access for many.

and so repellant.[129]

B. Building a Successful Campaign

Putting these two tactics together, we can sketch the beginning of a unified approach. Impact litigators should develop legal strategies that advance around "small" rights that result in disproportionate backlash that is inherently contradictory to the opposition's values. This can create the material conditions for organizers and activists to marginalize and ridicule the opposition, thereby moving the polity to the left.[130] Alinsky has more to offer in addition to this outline. There are negative inferences to be taken from Alinsky's work as well, specifically that impact litigation should try to represent communities not traditionally organized through other means, and that non-traditional legal strategies should be used.

1. Focusing on Underserved Communities

Alinsky's focus on a People's Organization and on community organizing ought to remind attorneys of the extreme importance of grassroots organizing as a vehicle for social change. Litigation is not always the answer, but when you have a legal hammer, all the problems in the world look like legal nails.[131] This motivates a substantial amount of the criticism

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[129] Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15, 47–53 (2008).

[130] It is worth emphasizing that this does not just happen magically but must represent a sustained effort by talented organizers with sufficient resources to effectuate change. These movements can and do fail, with the result of regressive social forces winning in the court of public opinion. While this Article focuses on the role of a unique form of impact litigation in a larger social movement, it must be emphasized that if the organizational strength to fight backlash is not present, then there is no value in obtaining any court victories. Lawyers may not be the best judges of when a movement can handle backlash and developing metrics to decide these questions is an important element of any activist campaign.

[131] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 104–08 (1974).

mentioned above.[132] When impact litigators try to represent a community that is already served by local organizations or by attorneys working in poverty law or in economic community development, these tensions are most obvious and the impact litigators are viewed as unnecessary.[133]

Yet not every subordinated group can be represented through a People's Organization in the way that Alinsky envisions.[134] Grassroots organizing is well-suited to address the needs of poor urban communities, centrally-located immigrant populations, members of certain disability groups, and workers within a single industry. It is substantially harder, if not impossible, to organize asylum seekers, inmates, victims of trafficking, and other subordinated groups that are disparately located and able to participate in a grassroots movement.[135] The latter groups often have strong familial and community ties to organizations that fall more cleanly into the first list.[136] Yet traditional organizing cannot always serve these groups and it is in the spirit of serving the underrepresented and in the interest of avoiding conflicts that these groups should be the focus of an Alinsky-inspired campaign.[137]

Taking the principles outlined above together, an Alinsky-inspired impact litigation strategy should look for approaches to deal with entrenched problems facing underserved communities, find "small" rights that will engender disproportionate backlash,

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[132] *See supra* notes 12–25.

[133] *See* Louise Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 415–17 (1996).

[134] This is a particularly tricky statement, as Alinsky really may believe, ultimately, in a singular People's Organization that would represent all radical programs. *See* ALINSKY, REVEILLE FOR RADICALS, *supra* note 12, at ch. 4.

[135] ALINSKY, *supra* note 1, at 120 ("To organize a community you must understand that in a highly mobile, urbanized society the word 'community' means community of interests, *not* physical community.").

[136] For more on this, see *infra* Part VI.A.

[137] Alinsky himself seems to note some tension here, although never quite gets to the point of acknowledging that not all "communities" can be organized in the same way.

go on the offensive in courts in order to provoke the opposition into a contradictory position, and work with activists and organizers to isolate and ridicule the opposition, moving the public towards a desired political position.[138]

There are significant concerns raised by this constellation of tactics that are addressed below. First this Article will analyze *Roe v. Wade* through this lens and show how a similar strategy was almost employed. Second, this Article will propose a new litigation campaign that embraces this model for a present problem: the reproductive rights of inmates.

IV. *Roe v. Wade*, the Nineteenth Amendment and Missed Opportunities

Roe v. Wade[139] remains one of the most controversial decisions in Supreme Court history,[140] and yet it has been met with a relatively peculiar silence in scholarly and popular literature. While many have talked about what *Roe* should have said,[141] and others document the history of practitioners and women's activists who have sought to provide abortion care,[142]

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[138] It is worth noting that this is different than the common tactic of choosing "sympathetic" clients. Attorneys select their clients in order to raise their chances at winning in front of a court. What this Article is arguing is different: attorneys should be selecting their legal theories in order to shape backlash to potential outcomes. A focus on clients is also important and can play a major role in the shaping of backlash, as can the media campaigns and grassroots activism that publicizes the cases before they become famous. A more in-depth study that focused on these issues could expand upon these ideas.

[139] 410 U.S. 113 (1973).

[140] *See* William Eskridge, *Some Effects Of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2382 ("*Roe v. Wade* remains one of the Court's most controversial decisions."); Abner J. Mikva, *The Burger Court Evaluated: Some Good Marks From Unexpected Quarters*, 82 NW. U. L. REV. 808, 814 (1988) ("*Roe v. Wade*, is doubtless the Burger Court's most controversial legacy.").

[141] *See, e.g.*, WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack Balkin ed., 2005).

[142] CAROL JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* (1995).

not enough has been written about the simultaneous pro-abortion litigation that occurred while *Roe* was decided—the missed opportunities that could have become the basis for what *Roe* almost said.[143] There was little or no attention paid to the potential for backlash and no attempts were made to direct or control these reactions. An analysis of these efforts through the theoretical framework described above can help illustrate how things may have been different.

A. Sarah Weddington and the Development of *Roe*'s Reasoning

Sarah Weddington, the lead counsel for the plaintiff in *Roe v. Wade*, has become something of a mythic figure within cause lawyering. Most of the attention, however, has been due to her astonishing success at the Supreme Court at such a young age and on such a major and controversial issue.[144] Only twenty-six years old at the time, Weddington successfully represented "Jane Roe" in a lawsuit challenging Texas state criminal abortion laws.[145] The Supreme Court found that there is a right to privacy within the Fourteenth Amendment's Due Process protections and

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[143] While Rosenberg and others discuss simultaneous political activity in liberalizing abortion laws, almost nobody, save for Sylvia Law, even mentions that there were alternative legal theories advanced in courts at the time. Outside of the legal academy there has been a great deal of writing on related subjects that touch upon this issue. The most comprehensive of these works has been DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE (1998). Garrow dedicates over 100 pages to pre-*Roe* legal challenges. Another major work in the field is JOFFE, *supra* note 143. Joffe writes on the doctors who worked in the field prior to *Roe*. Her work brings a much needed perspective to the literature, and decentralizes the role of attorneys in this process.

[144] Some believe that Weddington is the youngest person ever to have successfully argued a case before the Court—an empirical claim that the Author has not yet substantiated (although the Author has no reason to doubt it). This claim is repeated without citation in an introduction to a speech by Dr. Weddington. Jessica Kitson, Co-Editor-in-Chief, Women's Rts. L. Rep., Welcome and Opening Remarks (Mar. 6, 2002), *reprinted in* 23 WOMEN'S RTS. L. REP. 203, 204–05 (2002). The same claim is stated again in a keynote address by Sarah Weddington, Reflections on the Twenty-Fifth Anniversary of *Roe v. Wade* (Nov. 5, 1998), *reprinted in* 62 ALB. L. REV. 811, 811 (1999).

[145] *Roe*, 410 U.S. at 117–18.

the Ninth Amendment's reservation of rights to the people.[146] Moreover, the Court found that the criminal abortion laws interfered with a woman's right to privacy,[147] and that the state's compelling interest in protecting fetal life did not satisfy strict scrutiny.[148]

The decision was immediately criticized by both conservatives and liberals, with John Hart Ely famously claiming that "[*Roe*] is a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[149] This criticism, among many others, focused on the fact that the right to privacy (as well as to abortion) is not mentioned in the Constitution. Further attacks came from those who believed that the state's interest in protecting fetal life outweighed a woman's right to privacy.[150] Interestingly enough, it appears that few have criticized the second element of the holding, that prohibitions on abortion violate a woman's privacy.[151]

Yet the ruling in *Roe* is nowhere near as radical or unprecedented as Ely or others made it out to be. The Court had previously upheld privacy rights in the reproductive context,

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[146] *Id.* at 153.

[147] *Id.* at 154.

[148] *Id.* at 162.

[149] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (emphasis in original).

[150] *See, e.g.*, John Noonan Jr., *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668, 673 (1984).

[151] Erwin Chemerinsky, *In Defense of* Roe *and Professor Tribe*, 42 TULSA L. REV. 833, 835 (2007).

notably in *Griswold v. Connecticut*[152] and *Eisenstadt v. Baird*.[153] As Erwin Chemerinsky notes, the Court has also expressly held that certain aspects of family autonomy constitute fundamental rights, even if they are not mentioned in the text of the Constitution.[154] These rights included the right to marry,[155] the right to custody of one's children[156] and the right to educate one's children.[157]

Not only was the finding of a right to privacy fairly mundane, but the Supreme Court had also predicted the actual legal argument eight years earlier during oral arguments for *Griswold*. One hour into the second day of oral arguments, after a lengthy discussion about whether the First Amendment protects a doctor's right to advise people to use contraception and whether there exists a tension with aiding and abetting statutes, Justice Hugo Black's Southern drawl changed the direction of the discussion.[158] Justice Black directly asked the attorney for the plaintiffs, Yale Law professor Thomas Emerson, "With reference to all these things we've been talking about—privacy and so forth, would we invalidate all laws that punish

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[152] 381 U.S. 479 (1965) (striking down a state law banning the sale or use of contraceptives by married people as unconstitutionally violating the right to privacy).

[153] 405 U.S. 438, 452 (1972) (striking down a statute similar to the one in *Griswold* that made it a crime to distribute contraceptives to unmarried individuals).

[154] Chemerinsky, *supra* note 152 at 834–35.

[155] Loving v. Virginia, 388 U.S. 1 (1967).

[156] Santosky v. Kramer, 455 U.S. 745 (1982).

[157] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[158] For what it is worth, Emerson was before his time on this issue. In 2002, the Ninth Circuit upheld this line of argumentation in *Conant v. Walters*, 309 F.3d 629 (2002) (finding that the First Amendment protects the rights of doctors to recommend medical marijuana without actually distributing the drug itself, prohibiting an aiding and abetting claim by the Government).

people for bringing about an abortion?"[159] Emerson denied the link between the two issues, attempting to distinguish the privacy interests by arguing that contraceptive use occurs in the privacy of the household while abortions occur in clinics. Justice Black rejected the argument, noting that abortion restrictions also involve a serious restriction on a woman's privacy.[160] Justice Byron White then offered the idea that abortion involves the "killing a life of a being" and that the state's interest in protecting a fetus might be different than its interest in restricting contraceptive use.[161] Emerson continued to try to distinguish the cases, but the Justices had already laid out the holding of *Roe*. This exchange has been conveniently left out of almost every analysis of *Roe*. Also left out is a 1968 law review article written by a law student that outlined the argument Weddington would make.[162] Yet, there was a heroic cause lawyer in the abortion rights movement who is far less known.[163]

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[159] Second Day of Oral Argument at 1:01:20, Griswold v. Connecticut, 381 U.S. 479 (1965).

[160] *Id.*

[161] GARROW, *supra* note 144, at 240.

[162] Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968).

[163] One of the few scholars who has attempted to give Nancy Stearns her due is Reva B. Siegel, who describes Stearns' brief at the end of WHAT ROE V. WADE SHOULD HAVE SAID. SEE REVA B. SIEGEL, WHAT ROE V. WADE SHOULD HAVE SAID 246 (Jack Balkin ed., 2005) (referencing Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Coalition at 24, 32, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18)). Siegel also quotes Stearns in *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823 n.21 (2007).

B. Nancy Stearns and the Radical Logic of the Nineteenth Amendment

Nancy Stearns[164] was a staff attorney at the Center for Constitutional Rights in 1969.[165] In *Hall v. Lefkowitz*,[166] she and four other female attorneys represented 350 women who sought to challenge New York's abortion laws. The case was assigned to a three-judge panel, which included Henry Friendly, sitting by designation from the Second Circuit.[167] The idea behind the lawsuit came from the Women's Health Collective, a group of women who saw the courts as a location to stage a political and legal battle.[168] This collective held meetings throughout New York City, providing information about abortion and taking case histories of women who had dealt with unwanted pregnancies.[169] The group then turned to the courtroom and employed a form of political theater, as women crowded the courtroom, carrying

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[164] I hesitate to single out Stearns when describing the activities in the Northeast, as there are certainly countless individuals who struggled with her to advance these issues. Yet her role both in these cases, later cases in New Jersey, and her amicus brief in *Roe* single her out as a true visionary. Furthermore, additional space could be dedicated to Roy Lucas, who played an important role as well, from writing the initial law review article, which would predict the victorious strategy to helping Weddington prepare for *Roe*. An early friendship with Alan Guttmacher led Lucas to play an important role in many of these early state actions, some of which he helped litigate. Lucas' article predicts and lays out much of the argument that would lead to *Roe*, basing it in the substantive due process right established in *Griswold*. Among the more interesting claims is the idea that abortion statutes discriminate against the poor (which were not yet seen as not a suspect class). Lucas' article does not develop either an Eighth or Nineteenth Amendment argument. For background on Lucas' role, *see* GARROW, *supra* note 144, at 389–472.

[165] Nancy Stearns, *Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 1 (1989).

[166] 305 F. Supp. 1030 (S.D.N.Y 1969).

[167] A. Raymond Randolph, *Before* Roe v. Wade: *Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1036 (2006).

[168] Stearns, *supra* note 166, at 2.

[169] *Id.* at 3.

babies, and holding coat hangers.[170] After the hearing ended, the women left the building, leaving the coat hangers behind.[171] The court never issued a ruling, as the state legislature, in response to significant political pressure, liberalized the state's abortion laws, rendering the case moot.[172]

Similar suits were filed in Connecticut, Pennsylvania, and New Jersey, with 600 women plaintiffs in New Jersey and 1000 women plaintiffs in the other states.[173] Action was not limited to the Northeast alone, as similar cases were filed in the West and Midwest, although without corresponding social movements.[174] The Connecticut case was resolved in favor of the plaintiffs, finding that the abortion prohibitions violated the privacy rights established in *Griswold*.[175] This ruling is almost identical to the holding in *Roe*.

However, the New Jersey case, *YWCA v. Kugler*,[176] provides an interesting twist in which a federal district court discussed whether New Jersey's abortion laws violated women's First, Fourth, Fifth, Sixth, Eighth, Ninth, Fourteenth, and

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[170] *Id.*

[171] *Id.*

[172] Randolph, *supra* note 168, at 1037. Randolph notes that Judge Friendly's draft opinion would have rejected the claims put forward by Stearns and Lucas.

[173] Stearns, *supra* note 166, at 4.

[174] Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970) (denying standing to non-pregnant women and physicians); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972) (class action plaintiffs denied preliminary injunction against Kansas abortion law). Litigation out of Kentucky resulted in one of the few pre-*Roe* circuit cases to discuss the issue, as the Sixth Circuit reversed a district court's denial of standing and remanded the case for further proceedings. Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971). All of these cases were rendered moot by *Roe*. Crossen v. Att'y Gen., 410 U.S. 950 (judgment vacated by Roe v. Wade). None of the litigators from the Northeast appear to have participated in these actions. The complaints all raised Eighth Amendment concerns as they related to privacy, but not Nineteenth Amendment concerns.

[175] Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972).

[176] 342 F. Supp. 1048 (D.N.J. 1972).

Nineteenth Amendment rights.[177] The court engaged in some independent discussion of the First Amendment as applied to doctors being prohibited from dispensing advice, and the Fourth and Fifth Amendments were seen to protect the doctor-patient privilege.[178] There was no independent discussion of the Eighth Amendment; it was merely lumped into the "privacy issues" protected by the Ninth Amendment in *Griswold*.[179]

What stands out is the Nineteenth Amendment argument. The plaintiffs argued that the abortion restrictions forced them to bear unwanted children, thereby perpetuating the very inferior status that the Nineteenth Amendment intended to eradicate.[180] The court dismissed the women's' claims on standing grounds, but found that the doctors had standing and declared the abortion statutes unconstitutional on their behalf.[181] This same Nineteenth Amendment argument was raised again in a Rhode Island court.[182] Nancy Stearns filed an impressive *amicus* brief in *Roe*, where she made equal protection arguments and an aggressive Eighth Amendment claim.[183] She did not raise the Nineteenth Amendment claim and once *Roe* was decided, these cases were

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[177] *Id.* at 1052.

[178] *Id.* at 1055.

[179] *Id.* at 1069.

[180] *Id.* at 1056.

[181] *Id.* at 1076.

[182] Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 972 (1984) (citing Women of R.I. v. Israel, Civ. Nos. 4605 & 4586 (D. R.I. 1973) (challenging restrictive abortion laws as perpetuating an inferior status prohibited by the Nineteenth Amendment) *consolidated with* R.I. Abortion Counseling Serv. v. Israel, Civ. No. 4586 (D.R.I. 1971)).

[183] Brief for New Women Lawyers et al. as Amici Curiae Supporting Appellants, at 24, 34–43, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134283. The Eighth Amendment claim here, like in many of these early cases, does not limit itself to prisons and in fact, does not appear to mention them at all. It appears that Stearns saw the Eighth Amendment as prohibiting the criminalization of abortion as cruel and unusual and did not consider the role the Eighth Amendment plays in regulating the medical needs of inmates.

vacated.[184] The Nineteenth Amendment argument in the context of abortion was never raised again in court.

Analyzing this argument through the theoretical framework of an Alinsky-style campaign demonstrates how it may have been a much stronger claim than proponents realized at the time. Such an analysis could have potentially led to a different form of backlash that would have more strongly secured abortion rights and led to a far preferable outcome.

C. The Nineteenth Amendment Argument as Prototype

The Nineteenth Amendment may be one of the least cited Amendments, making the argument put forward by Stearns all the more fascinating. The Amendment contains nothing more than a short statement prohibiting disenfranchisement on the basis of sex.[185] Nowhere is there a discussion about eradicating the inferior status of women, yet this line of argumentation predicts the sex-equality based arguments of Ruth Bader Ginsburg, Catharine MacKinnon and Reva B. Siegel, all of whom would ground their claims in the Equal Protection Clause of the Fourteenth Amendment.[186] In light of later litigation strategies, it is worth considering how solidly we might view these Fourteenth Amendment arguments; yet the Fourteenth Amendment is equally silent on women's rights. At least the Nineteenth Amendment was ratified after a long campaign for women's equality.[187]

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[184] *See, e.g.*, Markle v. Abele, 410 U.S. 951 (1973) (vacating a challenge to Connecticut abortion laws in light of *Roe*).

[185] U.S. Const. amend. XIX, § 1.

[186] Ginsburg, *supra* note 111; Catharine MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281 (1991); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815 (2007).

[187] At the time some scholars supported this idea. *See, e.g.*, W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26 (1970) (arguing that the Nineteenth Amendment ought to be read as extending the Thirteenth, Fourteenth, and Fifteenth Amendments to women).

Despite the lack of textual support, the argument is stronger than it might seem.[188] Connecticut's abortion statute, like every state's abortion statute at the time, had been passed before women had the right to vote. Setting aside the part of the law that criminalizes the action of doctors,[189] the law only affects women, and yet, it was passed before women had a chance to have their voices heard or their votes counted.[190] Arguing that this violates the principles of political equality represented by the suffrage movement is an innovative and clever move. Not only does it show that women's political voices matter, but it also claims that women were made less equal by their historic lack of political representation. Additionally, it aggressively reframes the suffrage movement in a new light, arguing that the goal was not just women's political equality, but a substantive equality in all measures, as obtained through political participation.

Furthermore, the argument nicely dovetails with the political activism at the time. *Roe*'s holding, that abortion is protected by a substantive due process privacy right, transforms the discussion into one of individual rights and freedom from government interference.[191] The Nineteenth Amendment, however, invokes memories of the suffrage movement and would make abortion specifically about women's rights, not individual rights. While the decision to terminate an unwanted pregnancy is very personal, it was together as women that they were challenging the laws.

It might be hard to believe that this argument could have been successful, but the state of women's rights in the courts in the early 70s was very much in flux. *Reed v. Reed*, subjecting

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[188] Reva B. Siegel has supported something very similar in a remarkable article. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 947–1046 (2002).

[189] Even this is suspect as it only affects doctors who perform a procedure that only women need. *See* MacKinnon, *supra* note 187, at 1319.

[190] *Id.*

[191] Of course, this rhetoric not only lead to the label pro-choice, but also the holding in *Harris v. McRae*, 448 U.S. 297 (1980), where the Hyde Amendments were upheld. *See infra* Part V.C.

sex-based classifications to a rational basis test, was not decided until 1971.[192] Five years later, *Craig v. Boren* required intermediate scrutiny for sex-based classifications.[193] These cases represented victories for the advancement of women's rights under the Equal Protection Clause of the Fourteenth Amendment, but it is hardly fair to say that the line of reasoning emerging from these cases was dominant. Perhaps clever lawyering could have revitalized the Nineteenth Amendment and created a new jurisprudence that accomplished the same goals.[194]

One reason why this might seem implausible today is that states such as South Dakota and Oklahoma continue to pass anti-abortion statutes with women's political participation.[195] Had the Nineteenth Amendment argument been aggressively pursued, however, then perhaps women would see abortion as a collective women's right, understand the issue differently and therefore vote differently on the subject.

The Nineteenth Amendment argument for abortion never saw the light of day, as standing issues relegated it to the back burner. Yet, it represents a potentially prototypical example of a form of creative lawyering that could have engaged with a grassroots movement. Though the backlash to this argument would have been different, it could have been addressed in such a way that would allow society to better understand the important role reproductive justice plays in social equality. There would have been backlash to such a ruling and, indeed, skeptical law professors like Ely would certainly declare it to be "not

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[192] 404 U.S. 71 (1971).

[193] 429 U.S. 190 (1976).

[194] Furthermore, one advantage of the Nineteenth Amendment reasoning is that it would not have separated the abortion right (decided on due process grounds) from women's equality (decided on equal protection grounds). This might have lead to a better understanding of reproductive justice as fundamental to women's political and social equality.

[195] Indeed many states have so-called "trigger clauses" that would outlaw abortion within the state if *Roe* was ever overturned. *See* Heidi Alexander, Note, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381 (2009).

constitutional law".[196] Certainly such an expansive reading of a limited amendment would have been jarring. Yet, a Nineteenth Amendment ruling would have bolstered the women's movement, focused attention away from the individuals seeking an abortion, and limited the forms of activism that pro-life forces could have taken. Of course, it is entirely possible that such an argument would have lost at the Court, leading to more years where women were denied safe and legal abortions and extracting an extremely high cost on these individuals.

V. A New Movement: The Reproductive Rights of Inmates

Times have changed. The political and legal conditions that existed when Nancy Stearns argued that the Nineteenth Amendment protects a woman's right to choose no longer exist. Since then, an entire line of cases have developed analyzing the abortion right under the Due Process Clause of the Fourteenth Amendment.[197] Furthermore, there has been no development of a Nineteenth Amendment right and such a campaign now would seem bizarre, out-of-touch and highly unlikely to succeed. As discussed above, clever lawyering must be very context-aware and timing is almost everything. A different campaign is necessary and this Article asserts that an argument focusing on the Eighth Amendment rights of pregnant inmates can play this role.[198]

A. The Need for Action

In the past few years, a small group of litigators has placed a new focus on policies that restrict or deny inmates'

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[196] *See* Ely, *supra* note 150.

[197] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 113 (1973); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Harris v. McRae, 448 U.S. 297 (1980); Webster v. Reprod. Health Servs, 492 U.S. 490 (1989); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[198] A substantially longer and more complete analysis of the legal basis for this section is described in Egerman, *supra* note 16. Since then, a number of other articles have been written on the abortion rights of incarcerated women, although none promote the Eighth Amendment view.

reproductive rights.[199] The need for this litigation is patently obvious to anyone who cares about social justice as the treatment of pregnant women in state and federal prisons is beyond abhorrent. It is estimated that at least six percent of women inmates enter prison pregnant and even more become impregnated by guards, often by rape.[200] Even when not formally prohibited by regulations, female inmates often struggle to assert their reproductive rights in the face of bureaucratic indifference, sadistic treatment by guards and a limited time in which they can legally obtain an abortion. Overcrowded and underfunded prisons are one of the worst places possible for a woman to have an unwanted pregnancy and to be forced to carry it to term. Guards and fellow inmates are not known to be accommodating, prisons are hardly designed with comfort in mind, prenatal care can be non-existent and nutrition is insufficient. It is no surprise that pregnant inmates have incredibly high rates of pre-partum depression, increased likelihood of premature birth and low birth weights and a miscarriage rate fifty times the non-prison average.[201]

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[199] One of the problems these litigators face is that there are often unwritten policies or prison-by-prison regulations. For an overview on these restrictions, see the ACLU's guide: *State Standards for Pregnancy-Related Health Care and Reproduction for Women in Prison*, ACLU, http://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map (last visited Aug. 6, 2011). These problems are not unique to reproductive rights in prisons, but affect many issues regarding inmate rights. Furthermore, some have argued that prison litigation is a case where Rosenberg's views of impact litigation have been incorrect and where substantial victories have been won. *See* Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993).

[200] *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991: WOMEN IN PRISON (1999) (estimating six percent of women entered prison pregnant in 1991); Diana J. Mertens, *Pregnancy Outcomes of Inmates in a Large County Jail Setting*, 18 PUB. HEALTH NURSING 45, 45 (2001) (estimating ten percent of female prisoners entered prison pregnant); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of* Slavery, 33 FORDHAM URB. L.J. 571 (2006) (describing the sexual abuse of female prisoners in historical context).

[201] RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 154 (2000) (describing high rates of miscarriage in prison relative to rates among non-prisoners); Rachel Roth, *Justice Denied: Violations of Women's Reproductive Rights in the United States Prison System* (2004), *available at* http://www.prochoiceforum.org.uk/psy_ocr10.asp.

Furthermore, women who enter prisons have a higher rate of serious health concerns than the general public, which leads to even more high-risk pregnancies.[202]

There is no place in a humane society for morning sickness in lockdown. Forcing these women to give birth against their will represent a serious violation of human rights, but the tragedy does not end there, as these women are then denied a chance to be with their child, who almost always becomes a ward of the state.[203] These women are amongst those with the fewest rights in society, with few advocates outside of prison fighting for them, with few resources to help themselves and with few regulations to protect them.

B. An Outline for an Eighth Amendment Argument

Three recent cases have attempted to challenge these restrictions. In *Roe v. Crawford* and *Doe v. Arpaio*, litigators from the ACLU Reproductive Freedom Project successfully overturned state policies in Missouri and Arizona.[204] These cases overturned bans on elective abortions by arguing that state policies unconstitutionally restricted women's Fourteenth Amendment right to an abortion. That argument focuses on *Turner v. Safley*, the Supreme Court case that established a four-part test for judging prison restrictions on fundamental rights.[205] This test is inherently deferential to prison administrators and likely to under-enforce inmate rights.[206]

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[202] Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40, 42 (2003).

[203] Egerman, *supra* note 16 at 443

[204] Roe v. Crawford, 514 F.3d 789, 792 (8th Cir. 2008), *cert. denied*, Crawford v. Roe, 2008 U.S. LEXIS 6829 (U.S. Oct. 6, 2008); Doe v. Arpaio, 150 P.3d 1258 (Ariz. Ct. App. 2007), *review denied*, Doe v. Arpaio, CV-07-0104-PR (Ariz. 2007), *cert. denied*, Arpaio v. Doe, 2008 U.S. LEXIS 2716 (U.S. Mar. 24, 2008).

[205] 482 U.S. 78 (1987).

[206] *See* Egerman, *supra* note 16, at 426–29.

A poignant example of this problem is present in *Victoria W. v. Larpenter*, a Fifth Circuit case that upheld Louisiana's requirement that inmates receive a court order before obtaining an abortion.[207] The facts in *Victoria W.* are heartbreaking:[208] Victoria learned she was pregnant while in jail and sought an abortion, but was forced to wait two weeks to meet with a prison official who informed her that the prison policy required her to get a court order to receive an elective operation. Victoria did not have representation at the time and the attorney she attempted to contact originally refused to represent her, apparently because of moral reasons. A month after Victoria had requested an abortion, an attorney agreed to file a motion on her behalf. Victoria was transported to the courthouse for the hearing but remained in a holding cell and only later discovered that her attorney had not asked for the required court order to receive an abortion. By the time Victoria left prison, she was in the twenty-fifth week of her pregnancy and was therefore unable to legally obtain an abortion in Louisiana. Her pregnancy was classified as "high risk," and following an emergency cesarean section, she gave her newborn up for adoption.

Unlike the decisions in *Roe v. Crawford* and *Doe v. Arpaio*, the Fifth Circuit found that the policies that resulted in the above circumstance were constitutional under *Turner*.[209] This ought to give any litigator pause, especially given the willingness of the Supreme Court to "balance away" reproductive rights.[210]

The following legal theory could be useful for attacking these policies: abortion restrictions violate inmates' Eighth

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[207] 369 F.3d 475 (5th Cir. 2004).

[208] The following summary comes directly from Egerman, *supra* note 16, at 428–29.

[209] *Victoria W., 369 F.3d at 485*

[210] *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

Amendment rights.[211] In *Estelle v. Gamble*, the Supreme Court found that "deliberate indifference to serious medical needs of prisoners" violated the Eighth Amendment.[212] Therefore, it can be argued that an unwanted prison pregnancy represents a serious medical need and prohibiting an inmate from seeking the only possible medical care (an abortion) violates the Eighth Amendment.[213] This argument was upheld in a Third Circuit case argued by famed abortion rights litigator Janet Benshoof in 1987[214] and by the district court in *Roe v. Crawford*,[215] but rejected by the Eighth Circuit.[216]

The mechanics of the Eighth Amendment argument are remarkably straightforward. The Supreme Court has never defined what constitutes a serious medical need under *Estelle*, and there are many divergent lower-court rulings. A dispassionate focus on the inhumane conditions that pregnant women face and the concomitant health risks will certainly meet nearly any possible bar, especially given that courts have ruled

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[211] Others have proposed different legal theories. *See* Elizabeth Budnitz, Note, *Not a Part of Her Sentence: Applying The Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOK. L. REV. 1291 (2006) (arguing that the Court should use the *Casey* undue-burden standard instead of the *Turner* balancing test); Claire Deason, Note, *Unexpected Consequences: The Constitutional Implications of Federal Prison Policy for Offenders Considering Abortion*, 93 MINN. L. REV. 1377 (2009) (arguing that federal prison policies are unconstitutional as applied because they place an undue burden on women seeking abortion).

[212] 429 U.S. 97, 104 (1976).

[213] A detailed analysis of this argument, with medical evidence and a review of the caselaw on the subject can be found in Egerman, *supra* note 16, at 432–38.

[214] Monmouth County Corr. Inst'n Inmates v. Lanzaro, 834 F.2d 326, 345 (3d Cir. 1987).

[215] Roe v. Crawford, 439 F. Supp. 2d 942, 953 (W.D. Mo. 2006).

[216] Roe v. Crawford, 514 F.3d 789, 798–99 (8th Cir. 2008). For an analysis of why this ruling was not based in a legible legal theory, *see* Egerman, *supra* note 16, at 439–42.

procedures such as a tonsillectomy are covered.[217] An Eighth Amendment analysis would focus on the real harms caused by unwanted pregnancies and the life experiences of pregnant inmates—exactly the rhetoric that ought to be used in order to sway public opinion. Further, there is no distinction to be made based how a prisoner became pregnant because the harms are exactly the same regardless of the means of conception. This allows advocates to avoid distinguishing between "worthy" and "unworthy" clients—a classic divide and conquer strategy employed by anti-choice activists to disparage certain women seeking abortions.[218]

Perhaps most importantly, a focus on an Eighth Amendment argument can allow activists to transcend the notion of an "elective" abortion. The Eighth Amendment argument claims that all unwanted pregnancies present a serious medical risk and therefore that all abortions in the prison context are necessary, not elective.[219] Indeed, a simple balancing of the risks and harms presented by an unwanted prison pregnancy against an objective standard of a serious medical need directly speaks to this concern. Moving beyond this notion of "electiveness" allows for a more nuanced and substantive understanding of the procedure itself, why women choose to get an abortion, and what the conditions of pregnant inmates are like.

An Eighth Amendment argument therefore allows activists to side-step many of the difficulties associated with the

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[217] Derrickson v. Keve, 390 F. Supp. 905, 906–07 (D. Del. 1975). This is not to say that courts always uphold *Estelle* challenges or that inmates' needs are fully served by the precedent. *See* Kendra Weatherhead, Note, *Cruel but not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429 (2003).

[218] Of course, with all clients being inmates, they will certainly be seen as "unworthy" by a significant percentage of the population. This will be a substantial barrier for abortion-rights activists to overcome, but the legal focus on a singular class of women will prevent the traditional distinction between women who were impregnated by rape or incest and all others.

[219] The rhetoric surrounding the term "elective" is deeply problematic. It is usually used by pro-life speakers to mean "cosmetic" or "unnecessary." Certainly all medical procedures are elective, as opposed to forced or involuntary. Yet nobody would describe an emergency bypass as elective, even if the patient chose to receive the procedure.

substantive due process right established in *Roe*, modified in *Casey* and *Carhart* and applied through *Turner*. Instead of focusing on a woman's privacy right (something which is unlikely to remain unmodified in prison), distinguishing between how a woman became pregnant and labeling her decision as "elective" or not, the Eighth Amendment focuses on the medical data and the prison conditions facing all female inmates. The Eighth Amendment test in *Estelle* does not require any balancing between the rights of the fetus and the rights of the woman, an important distinction given the recent trend by the Supreme Court to adjudicate this balance in favor of the fetus.

Certainly, there are significant concerns about the strength of this argument. The Court has not always understood pregnancy to be a medical condition or understood pregnancy in reasonable terms.[220] The Court may look past the data on miscarriage, morbidity, and mortality and refuse to recognize pregnancy as a medical condition, or at least as one covered by the Eighth Amendment. Further, the Court may limit the scope of *Estelle* to not cover this or even other medical needs.

C. The Practical Case for an Eighth Amendment Argument

In addition to the strengths of the case itself, an Eighth Amendment argument offers significant practical advantages over one based on the Fourteenth Amendment. First, the Eighth Amendment provides an affirmative right to healthcare and not a negative right prohibiting government intervention. As such, the Eighth Amendment would require that prisons pay for inmate abortions, and for the first time the government would have an affirmative duty to provide women with reproductive care. This would also require that at least part of the package of restrictions on federal funding of abortions be found unconstitutional, as Congress would lack the power to abridge the Eighth Amendment rights of inmates by denying them federally-funded abortions. The same would be true of some state laws. This could be the start of a sustained political effort to undermine and

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220 *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that discrimination on the basis of pregnancy does not violate the equal protection clause).

eventually overturn the Hyde Amendments. Once prisoners have the right to state- funded abortions, it could be argued that our fighting servicewomen deserve the same rights.[221] Eventually, it could be argued that Medicare should also include this funding to remove the perverse incentive that might send poor women to jail in order to get a state-funded abortion.

The second major strategic advantage is that an Eighth Amendment argument may be more likely to be upheld at the Supreme Court than the Fourteenth Amendment argument. Justice Kennedy, as the sole swing vote on the issue, has shown a willingness to restrict abortion rights when presented with a compelling state interest, something that would likely lead him to side with the prison were a case to be argued under the deferential *Turner* test. The Eighth Amendment forces us to address changing standards of decency and larger notions of cruelty and kindness. These metaphysical concerns animated Kennedy's opinions in *Planned Parenthood v. Casey*[222] and *Lawrence v. Texas*.[223]

D. Inmate Abortion Rights as an Alinsky-Inspired Campaign

Not only does a focus on inmate abortion rights represent a necessary campaign on behalf of a subordinated group, but it

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[221] Other legislation prohibits servicewomen from having equal access to reproductive care. *See* Egerman, *supra* note 16. *See also* Leah Ginsberg, *Do Prisoners Get a Better Deal? Comparing the Abortion Rights and Access of Military Women Stationed Abroad to Those of Women in Prison,* 11 CARDOZO WOMEN'S L.J. 385, 411 (2005). Strong arguments can be made by activists to link these two groups. While counterintuitive to some, comparing the struggles of these two groups of women can advance a common understanding of the problems facing all women, servicewomen and prisoners alike. Indeed, just as being forced to give birth against one's will is not a part of a prisoner's sentence, neither is being denied her rights a part of a servicewoman's commission. Coalition building like this is fundamental for successful activists.

[222] 505 U.S. 883, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[223] 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

also exemplifies the values described in Section III.[224] First, this argument has both transformative potential and the capacity, in conjunction with social movements, to advance a broad conception of reproductive rights. As discussed above, the Fourteenth Amendment privacy right focused on the individual at the cost of an understanding of communal rights or equality. The Eighth Amendment focuses on the role of the state in forcing women to give birth against their will, and on conditions under which women become and remain pregnant. It asks us how we define cruelty and how cruel a people we will be. Unplanned pregnancies are more than mere accidents; they reflect the fact that many women are often coerced into sexual acts, lack resources to provide for their own birth control, and are undervalued for everything but their reproductive capacities.[225] These conditions are also responsible for the problems that led many of these women to become incarcerated and, once in jail, being abused and forced to trade sexual favors with male guards.[226] Side-stepping the rhetoric of choice, the role of the state in creating these conditions, both inside prison and out, becomes part of the conversation. Furthermore, the specter of the back-alley abortionist with a coat hanger would not play its traditional role in this campaign. That image represents the harms to women forced to obtain unsafe illegal abortions, a reality that used to kill upwards of 10,000 women each year in America.[227] Instead, the haunting image to represent this campaign would be a pregnant woman in an orange jumpsuit, emphasizing the role of the state and the confinement and imprisonment felt by women who are denied their reproductive rights. Furthermore, the fact that some women are chained to prison or hospital beds while giving birth can serve as another poignant symbol of a shocking violation of human

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[224] *See supra* Part III.

[225] *See* Catharine MacKinnon, *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion*, RADICAL AM., July–Aug., 1983, at 23.

[226] *See* Egerman, *supra* note 16, at 424.

[227] *See* Lucas, *supra* note 163, at 730.

dignity.[228]

Pregnant inmates are not a well-defined community that one could organize through traditional means. These women may have family members and friends on the outside who care deeply about them and it might be possible to organize in these communities, which are likely to be predominantly African-American and Hispanic, as well as poor.[229] Importantly, it may be possible to form a new coalition of women's rights advocates and prison reform/abolition advocates. Political theater remains viable, as it would be possible to get dozens of pregnant women to wear orange jumpsuits while in court and there exists incredible testimony of women forced to give birth while incarcerated.[230] This could also lead to larger discussions about the treatment of prisoners and an understanding that prison

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[228] Amnesty International, *Pregnant and Imprisoned in the United States*, 27 BIRTH 266, 267–68 (2000) (documenting the use of restraints on pregnant inmates as they give birth).

[229] Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in Their Treatment*, 19 J.L. & HEALTH 259, 262 (2004).

[230] Here is just one example:

> Giving birth while incarcerated was one of the most horrifying experiences of my life. While enduring intense labor pains, I was handcuffed while being taken to the hospital, even though I was in a secured vehicle with a metal grating between the driver's and passenger's compartments and with no interior door handles on the passenger doors. With the handcuffs on, I could not even hold my stomach to get some comfort from the pain . . . . At the hospital I was shackled to a metal bed post [sic] by my right ankle throughout 7 hours of labor, although a correctional officer was in the room with me at all times . . . . Imagine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turning having hard, cold metal restraining my movements . . . . Even animals would not be shackled during labor . . . . The birth of a child is supposed to be a joyous experience, and I was robbed of the joy of my daughter's birth.

Amnesty Int'l, *supra* note 229, at 267–68.

issues are women's issues.

Most importantly, these cases present a good opportunity to engage with inevitable backlash. Opponents of abortion rights will be infuriated at a successful Eighth Amendment argument, which would require their tax dollars to pay for an abortion . . . for a prisoner. In many ways, this is a double slap-in-the-face to pro-life communities: not only does the state subsidize abortion, but also the subsidy goes to disfavored groups that pro-life individuals may already scorn. Short of coerced abortions, a position equally repulsive to pro-choice groups, it is hard to imagine a more offensive outcome and the intensity of the backlash will likely be incredible. At the same time, this is a perfect opportunity to utilize the theory outlined above, playing off the mismatch between the reaction and the "smallness" of the right. The right being sought is not particularly broad—it applies only to pregnant inmates, not to society at large. Thus, the right is limited in both the number of people it affects and the number of places where it exists. It should be possible to portray the response as an overreaction and to use this as a wedge by which to advance reproductive justice.

Furthermore, careful campaigning can utilize the tension between a "culture of life" advanced by anti-abortion individuals and the conditions under which these women are forced to give birth. What kind of a culture of life allows for women to be shackled during birth? The fact that the newborns are then separated from their mothers and sent to foster care deepens this criticism. In addition, it may be possible to portray opponents as vengeful individuals who seek to punish prisoners. This can lead to co-option of the "culture of life" argument, with pro-choice groups arguing that no child should be a punishment and that childbirth should be a wonderful time in a woman's life, a time when she is surrounded by people who love and care for her.

Ultimately, the conditions in modern prisons are so terrible that moderates may understand prison pregnancies to be a limited situation, like rape or incest, where it is not right to deny a woman an abortion. If the pro-choice community can portray pro-life groups as overreacting, vengeful and contradictory, it may be possible to marginalize these groups in the eyes of moderates and advance pro-choice arguments to larger groups of

people. By advancing a small right that can be used by a social movement to reframe our understanding of reproductive rights while producing manageable backlash that could advance the cause as a whole, the Eighth Amendment argument for inmate abortions represents the strategies embodied by this essay.

VI. Problems Raised

Having established the rough contours of this model and discussed one potential application, in the next Section this Article will discuss many of the potential problems that the proposed strategy faces. It is not possible to craft a cause lawyering campaign that is immune to criticism and many of the answers to the questions posed by other theorists may seem non-responsive. When these disagreements arise out of axiomatic differences, there is little conversation to be had.

A. López and Organizing Challenges Facing Non-Geographic Groups

One of the most significant criticisms of impact lawyering has come from Gerald López. In his book *Rebellious Lawyering*, López describes regnant lawyers as those who serve the subordinated by formally representing others through litigation services without a strong connection to the community and without a strong understanding of how the law impacts their clients.[231] This idea is contrasted with a vision of "rebellious lawyering" where lawyers ground their work in the communities of the subordinated themselves, living with and working alongside their clients with a deep commitment to the

[231] LÓPEZ, *supra* note 13, at 23–24.

community.[232]

To a certain extent, López has the Author nailed. His model of rebellious lawyering certainly provides a superior model of representation where an attorney can better understand the problems facing a community, represent that community's needs, allocate the community's own resources, and conceive of real solutions. On a purely epistemological level, rebellious lawyering of that sort is significantly more likely to lead to representation that understands the clients. As far as respecting one's clients, López has the upper-hand as well, breaking down the barriers of prestige and exclusivity to better understand how to organize for change. Yet, one of the fundamental problems of this position is that it only applies to geographically-organized groups.

Not all subordinated groups are organized into the kind of communities into which an attorney can integrate. When dealing with the incarcerated, it becomes rather difficult to live amongst the community unless one is a prison lawyer. Furthermore, when the group is subordinated on the basis of their reproductive status, it becomes even harder to solve these problems together. López would believe that the second point is not insurmountable and he does discuss working in a battered-women shelter within the community. When the scope of reproductive issues is broadened to include child-care and the treatment of female workers of childbearing age, then these issues are not shared by pregnant women alone.

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[232] *Id.* at 38. *See also* Gerald P. López, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2043 (2005).

> The rebellious vision depends upon networks of co-eminent institutions and individuals. These co-eminent collaborators routinely engage and learn from one another and all other pragmatic practitioners (bottom-up, top-down, and in every which direction at once). They demonstrate a profound commitment, time and again, to revising provisional goals and methods for achieving them; to searching for how better to realize institutional and individual aspirations; to monitoring and evaluating from diverse perspectives what's working and what's not; and to picturing future possibilities that extend beyond (even as they take cues from) past events and current arrangements.

Given López's writing, one potential way to harmonize these approaches is to maintain strong relationships with the communities connected to women in prison. Inmates are not a randomly selected sample of the population; they overwhelmingly come from the subordinated communities that López writes about. One possibility is to situate a clinic there and to work with people concerned about incarcerated women as well as their own needs. One real concern about this, however, is that it often reduces women to their familial status, primarily in relation to men. There is something potentially regressive about seeing women only within the family context as it too easily reduces them to mothers, daughters and wives.[233] Working with women's groups and broadly understanding the role these relationships play in these inmates' lives would be necessary to avoid this problem.

Another solution, one that is adopted by Legal Services For Prisoners With Children, is to work with former inmates and women on work release to deal with these issues. Forming relationships with women who were formerly incarcerated, including those who were pregnant during their incarceration, will help inform the organization of the needs of those it represents and can help provide an important feedback cycle where inmate concerns are better understood. One major problem with representing inmates is a lack of understanding of what life is like on the inside and a general inability to observe and interact with inmates during the majority of their daily lives. Working with prisoners' groups and former inmates can address some of these concerns as well as the others raised by López while acknowledging that his vision may be inapplicable in this circumstance.

B. Conflicting Client Interests

A final concern is the ability to adequately represent clients

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[233] This is even more complicated than it may first seem, as differing cultural contexts and ideological differences between feminist attorneys and the communities served may heighten this tension. Quite simply, any discomfort felt by an attorney in approaching pregnant inmates may not be shared by their family members on the outside. It is a mistake to let those voices represent "the community," implicitly reducing the community to certain privileged (and mostly male) voices.

when employing non-traditional impact litigation. This is what concerned Derrick Bell in the school desegregation context and it is important to raise here.[234] Pregnant inmates who want an abortion will likely be grateful for any attorney who is successfully able to get them a preliminary injunction for the care that they need, but what follows is more problematic. After an injunction, successful or not, the next step in litigation would be to ask the client if she is willing to proceed with the case as the representative plaintiff in a class action suit.[235] The client would likely prefer a situation where her lawyer spent that energy helping fight her sentence or pushing for a new trial. As soon as the case becomes a class action, the clients largely drop out of the picture and are unlikely to have any say in directing the campaign. Given the fact that the clients are inmates, already subjected to numerous indignities and reduced to second-class citizenship, this will certainly reinforce feelings of powerlessness.[236]

Such concerns may result in a number of problems, including denying women the chance for the consciousness-raising that Stearns and others provided through political theater. Further, the divide between reproductive rights activists and the inmates in this case may fracture coalitions. Reproductive rights campaigners have long been able to draw upon the understanding of millions of women who view their own autonomy as closely aligned with the goals of the movement, as well as with men who understand that reproductive justice is necessary for sexual equality. These groups may not understand prison issues in the same personal terms. Furthermore, prisoner rights groups may look skeptically at the reproductive rights issue, feeling it to be secondary compared with overcrowding, violence against inmates, health concerns and other injustices

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[234] *See* Bell, *supra* note 26.

[235] Class action suits are necessary in this context in order to defeat standing concerns. This is how the cases proceeded in both Missouri and Arizona. *See* Doe v. Arpaio, 150 P.3d 1258 (Ariz. Ct. App. 2007); Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008).

[236] For more on this line of criticism, see Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1988).

within prisons.

When dealing with inmates, there are few things that can be done about many of these problems, but it is something that activist lawyers must remain sensitive about. Maintaining close relations with clients and outside groups will always be necessary to avoid magnifying these concerns. Nonetheless, innovative and creative approaches to these problems will have to be developed on a case-by-case basis.

C. West and the Cost of Constitutionalized Abortion Rights

In addition to the concerns listed above, Robin West has raised yet another problem: the focus on court-created rights has come at a significant cost to the reproductive justice movement.[237] West outlines a significant number of concerns about the right created in *Roe*, most of which are shared by this Article.[238] Further, West notes the legitimating function of a privacy right focused on the individual and the role that this right plays in legitimating coercive or unwanted sex prior to pregnancy, as well as inadequate state funding of indigent families.[239]

If West's critique stopped there, there would be no conflict with the ideas set forth in this Article.[240] However, West also notes the costs that constitutionalization poses to the reproductive justice movement itself and ultimately to those underserved by our current regime of reproductive rights. In addition to previous critiques that court-created rights enhance a

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[237] West, *supra* note 28, at 1426–32.

[238] *See id.* at 1405–25. *See also supra* Part I & notes 20–27. As discussed in Egerman, *supra* note 16, the Fourteenth Amendment framework as developed in *Roe* is inadequate to protect the reproductive rights of inmates, in addition to other significant shortcomings.

[239] West, *supra* note 28, at 1406–12.

[240] This Article does not advance a privacy right nor does it seek to focus on freedom from state action, rather it looks to positive duties owed by the state to vulnerable groups in order to guarantee their reproductive health. On this point, this Article and West are likely in some agreement.

public/private divide that may continue to subordinate women, West notes that progressive victories in courts must be inherently conservative and somewhat consistent with past precedent.[241] This has created a dynamic process where legislatures become enfeebled in the face of aggressive court rulings and do not aggressively pursue their own vision of equality.[242] This causes activists to focus their efforts back on the courts and away from grassroots political activism.

This argument can go even further. Once a right is established by a court, it becomes imperative for the movement to protect that right and efforts which may have otherwise gone into expanding the communities served by the right may be converted into defensive litigation that focuses solely on the first groups afforded those privileges.[243] This defensive turn will often come at the exact moment when backlash will energize the opposition, who may instead turn to the legislative process, and in so doing, be able to accomplish many significant goals.[244]

West's concerns about the reproductive justice movement represent one of the strongest formulations of the backlash thesis and one that adequately accounts for the dynamic relationship between political activity, court decisions and popular opinion.[245] The focus on court rulings results in inadequate

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[241] West, *supra* note 28, at 1414.

[242] *See* Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020 (Jack Balkin & Reva B. Siegel eds., 2009).

[243] This is the case today with abortion rights. The amount of effort spent defending *Roe* resulted in a tradeoff of resources that may have gone to underserved communities that lack access to an abortion provider, or to those communities that are often prohibited by law from obtaining an abortion—namely inmates and servicewomen. Historically, this was the case with the right to obtain and use birth control. While married women were first afforded this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), it was not until *Eisenstadt v. Baird*, 405 U.S. 438 (1972) that this was extended to unmarried couples.

[244] This underscores the fear of Frank's book, WHAT'S THE MATTER WITH KANSAS?, *supra* note 46.

[245] This addresses one of the larger concerns expressed about Klarman. *See supra* Part II.B & note 106.

rights that fail to truly address the needs of the movement, stunts the way legislators think about equality, and distracts resources away from growing a movement at a crucial time.

West's analysis is correct, yet, we do not create social movements or relationships between branches of government from scratch.[246] As activists, we inherit a series of social relationships, government institutions, historic campaigns and resource allocations. The decision whether to undertake an impact litigation campaign does not singularly cause a legislature to abandon its role as equality-bearers, nor does it singularly focus public attention on the Court as rights-giver. Moreover, at the margins, each individual case has a small impact.[247] While the earlier concerns about the inadequacy of rights-talk remain valid, the modern activist should not weigh the entire costs of this constitutionalization against any potential gains created by this strategy. Yet, one cannot help but feel like part of the problem when turning to the courts like this, even if the ultimate goal is to spur backlash and mobilize a grassroots movement.

The insight gained from Gerald López can reinforce these concerns. If activists limit their backlash-generating campaigns to those communities underserved by traditional organizing, then many of the problems described by West can also be addressed. If the courts become not the default starting point for all organizations, and instead are used in a limited fashion by those activists trying to raise the salience of a hidden problem and even then are limited to cases likely to cause the right kind of backlash, then we will certainly see less of the kind of problem West describes.

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[246] One is reminded of Carl Sagan's famous quote: "If you wish to make an apple pie from scratch, you must first invent the universe." CARL SAGAN, COSMOS 218 (1985).

[247] Making this an interesting example of the tragedy of the commons, where no individual campaign is directly responsible for the problems West describes. Yet, as a whole, each decision to turn to the Court makes it more costly for other campaigns to ignore the courts, thereby encouraging others to move in that direction and deepening the problem.

CONCLUSION

This Article attempts to present a new approach to serious questions about cause lawyering. It tries to create a loose theoretical framework for a strategy that internalizes lessons from community organizing, specifically the writings of Saul Alinsky. This was developed in response to significant criticisms of impact litigation and analyses of backlash that these litigation campaigns created. Perhaps controlling backlash and directing public opinion may be more important than the actual outcome of any given case and impact litigators would be wise to carefully select their strategies. This Article presented an historic analysis that contrasted the traditional approach taken in the fight for abortion rights, and gave an example of how things might have been different had these strategies been followed. Utilizing the Eighth Amendment to fight for inmate abortions was proposed as a model campaign that could utilize these tactics today.

These are not questions with definitive answers or strategies that clearly dominate others. Impact lawyering and social movements are always highly context-specific and require endless talent, tact and more often than not, luck. The threat of serious backlash is very real and, without extreme care, even the best-intentioned litigation campaign can do more damage than good. Standing on a stage and burning a copy of the Constitution will not improve the lives of pregnant women in prison. Understanding how backlash operates, how it can be used to advance a cause, how to structure a litigation campaign and how to anticipate potential pitfalls will yield the best opportunity to resolve a persistent problem.