

Access to Power

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Abstract: The traditional approaches to “access to justice” obscure the current distribution of economic, social, and political power, and how that distribution favors those who have power and burdens those who do not. Consequently, the traditional approaches foreclose possibilities for a truly just society. In the law clinic we led together for five years, we developed models of lawyering with our students and community partners focused on how lawyers can contribute to the redistribution of power in society from those who accumulate and deploy it to those who are deprived of it.

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During its first two years in power, the Trump administration waged an open war on immigrants. One week into Donald Trump’s presidency, the executive branch “took the handcuffs off” of federal immigration agents and set the stage for some of the most overtly xenophobic U.S. policy actions in recent history.¹ The number of people in immigrant detention soared and enforcement became dangerously arbitrary.² Racial hostility was embraced at the highest levels of government and immigrants encountered ever more hurdles to making a claim for fair treatment in the workplace or to remain in the United States. The result was devastation, exploitation, and panic, with ripple effects felt across entire communities.

For many watching these events unfold, the response seemed simple. The country needed more lawyers. Lawyers to help immigrants make claims. Lawyers to counsel immigrants on how to make the best of a bad situation. Lawyers to think creatively about how to serve more people: by organizing clinics for those protected by the Deferred Action for Childhood Arrivals program, setting up complaint hotlines, and creating self-help materials. Lawyers to invoke the power of the judiciary to check executive power and clear the path for

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reform.³ Lawyers to hold the line on due process and restore the rule of law.

At the Immigrant Rights Clinic at the University of California, Irvine (UCI) School of Law, which we codirected until 2018, we took a more skeptical approach. In our experience working with some of the most vulnerable immigrants in the United States, traditional access-to-justice approaches had not in fact produced justice. Those initiatives missed a crucial point. Legal process is a means by which the powerful are able to legitimize the system's outcomes, violent as they may be.⁴ The legal system distributes rights and privileges based on a particular configuration of interests, favoring those who have power and burdening those who do not. Access-to-justice approaches that assume the existence of a legal system that dispenses justice obscure the structural and unequal distribution of economic, social, and political power and foreclose opportunities for people to work toward a truly just society.

For every case of a person facing deportation that the UCI Clinic learned of, there were many more immigrants who were summarily arrested, detained, and banished by the state. For every case of a worker subject to abuse by an employer that the Clinic saw, there were thousands of people who toiled in grueling shifts of labor who would never consult a lawyer or seek redress through the courts.

Legal disputes take place in the context of a larger political field. Pure access-to-justice initiatives that ignore this context and the structural conditions that impoverish and immiserate people along lines of race, class, gender, sexual identity, and disability may bring temporary relief on an individual level, but will not fundamentally change such conditions of life.

In contrast, initiatives that seek to center and build up the capacity of relatively

powerless people to discern their individual and group interests and to take collective action to further those interests hold greater promise for altering the current configuration of power. It is also true that relatively powerless people are better able to see the limits of law than legal elites.

For example, immigrants facing deportation have only a few, if any, narrow pathways to relief, in part due to shifts in policy that date back to the 1980s and 1990s.⁵ Even if they are able to secure legal representation in their immigration proceedings, they still face punitive enforcement mechanisms of the state. Many of these same immigrants also live in overpoliced neighborhoods and experience the effects of racially biased criminal law enforcement and an underfunded indigent defense system, making them even more vulnerable to the detention-deportation machine.

Low-wage immigrant workers also constitute an underclass – created in part by the state with the tacit support of employers – increasingly called on to perform jobs with contingent status (as contractor or temporary workers) in industries with historically low or nonexistent government intervention.⁶ Litigation may protect such workers against unjust conditions momentarily, partially, and individually: for example, by recovering back wages for which they were not paid or monetary damages for unlawful termination. But the severely unequal distribution of power between employers and low-wage workers remains entrenched.

Further, courts, administrative tribunals, and legislative processes – the conduits by which law is made – are increasingly tilted toward the powerful: the state that criminalizes and deports, the landlord who evicts, the employer who exploits, or, in other words, the owners of property, the concentrators of wealth,

and the police and bureaucrats that protect them.⁷ They are rewriting rules of dispute resolution to remove legal advocates from the picture, resist collective action, and privatize legal systems, hiding proceedings from view. For example, in *Epic Systems Corp. v. Lewis*, the Supreme Court recently held, in a five-to-four decision, that the National Labor Relations Act does not protect the right of workers to participate in class action wage-and-hour litigation after they have assented to arbitration clauses with a group-action waiver at the start of their employment.⁸ According to labor law scholar Katherine Stone, “over half of nonunion companies impose arbitration agreements on their workers, and nearly all include group-action waivers.”⁹ The scholar Frank Pasquale describes a “web of rules woven by lobbyists and elite attorneys over decades” and corporations funding candidates in state judicial elections “who promote their vision of a stripped-down, nightwatchman state.”¹⁰ These developments are possible because of the distribution of power and the deployment of the state against common people. There can be no real justice without altering this reality.

How can lawyers contribute to the redistribution of power in society from those who accumulate and deploy it to those who are deprived of it?

Individual casework is a prominent form of representation recognized and favored within public interest law by funders and law schools with clinics.¹¹ Their approach is to provide legal representation or pro se assistance to relatively powerless people increasingly operating in hostile forums with limited procedural protections. Most law school clinics, legal services offices, and pro bono attorneys confine their practice to seeking redress for harm within these traditional

channels; a few lawyers or programs (and their funders) work to identify sources of systematic exclusion through impact litigation and “grasstops” policy advocacy.¹² The ACLU and NAACP Legal Defense and Education Fund provides examples of this latter type of advocacy.

At the UCI Clinic, we offered students visions of practice that include these traditional dimensions of lawyering, as well as a third vision of change-oriented lawyering: working with organizers and community groups to develop the capacity of marginalized people to obtain and exercise power. In this type of legal work, lawyers support organizers and community groups so that they may themselves identify the causes of systematic disadvantage and alter the structures and public discourse that constrain their communities.¹³

As legal educators, we sought to help law students realize that it is the responsibility of lawyers, advocates, and organizers to support the mobilization of subordinated people and to remain accountable to them so that they may exercise greater power.¹⁴ This creates openings for broader social change and motivates elites to defend the vulnerable and participate in the progressive redistribution of resources.

With students and community partners, we undertook two broader initiatives in the Clinic that built power from below.

In the first initiative, we partnered with organizers to create the Orange County Rapid Response Network (OCR RN). The network is an interconnected system of nonprofit and grassroots organizations, civil rights attorneys, law school clinics, and individuals working together to respond to dehumanizing immigration enforcement locally. Like other such networks, the OCR RN came together in the wake of the 2016 presidential election to respond to anticipated raids and other enforcement actions under the Trump

administration. One way the OCRRN responded to such enforcement actions was through the provision of legal assistance. However, rather than attempting the impossible task of finding a lawyer for every community member arrested by federal immigration authorities, the network adopted a “participatory defense” model of representation, pairing one organizer or community volunteer with each lawyer to work closely with a family on cases selected by a committee.¹⁵ The goal was to empower supporters to take part in the case of the person arrested, connecting it to systemic issues and (when appropriate) systemic advocacy.

Our work with the OCRRN built on the Clinic’s collaboration with organizers in Santa Ana, California, on a previous community defense initiative: the successful passage of a sanctuary ordinance that served as a model for other jurisdictions.¹⁶ Just after the election of Donald Trump, organizers sought to mobilize the Latino-majority city council to take a forthright stand against the coming immigration enforcement onslaught. The Clinic crafted language for a proposal that included creation of a “task force” of community members to advise the city on implementation and it has supported community groups as they have monitored the city’s compliance with the ordinance.

Immigrants who are most stigmatized, such as LGBT immigrants or those who have had contact with the criminal justice system, have been prioritized for intake in the Clinic, as are activists and individuals whose cases could be connected to broader policy campaigns. By collaborating with and defending immigrants who are themselves doing work to organize others to reclaim their political power, the Clinic taught students to recognize and nurture such work.

In the second broad initiative, the Clinic focused on the defense of immigrant

workers in low-wage sectors of the regional economy. The Clinic represented warehouse workers, day laborers, and hotel workers referred to it by immigrant worker centers and progressive union locals. The organizers, lawyers, and, eventually, clients understood that an individual wage theft case, or one hundred wage theft cases, or even a class action against a single large employer would not fundamentally alter the distribution of power between powerful employers and vulnerable workers. Instead, worker-center and union organizers develop workers’ voices and leadership and bring those worker-leaders into policy fights to alter the terrain of employment law across sectors.

In this effort, the Clinic sought to use individual cases in traditional channels of legal advocacy to build toward larger challenges to systematic subordination. For example, representing individual workers in their wage and hour cases in coordination with community organizations built their trust in those groups and motivated individuals to participate in political campaigns.¹⁷ By exercising a high degree of intentionality in intake and forming strong, foundational relationships with organizers, the Clinic demonstrated a distinct model of lawyering that sought to change the distribution of social, economic, and political power. These initiatives embodied an aspiration to imbue lawyering in traditional channels with a deeper understanding of how the structural distribution of power creates conditions of severe injustice – conditions that are often immune to frontal legal attack.

The Clinic’s impact is hard to measure: it is limited to a low-volume practice, and our aspirations sometimes gave way to pragmatic concerns. But our vision resisted the notion that lawyers rather than the people they serve are the ones to achieve justice or that the current legal system is

Access to Power a system of justice. In doing so, we aimed to undertake representation that would open and facilitate – rather than foreclose – access to power.

ENDNOTES

- ¹ Executive Order 13767, “Border Security and Immigration Enforcement Improvements,” *Federal Register* 82 (18) (January 30, 2017): 8793–8797; Executive Order 13768, “Enhancing Public Safety in the Interior of the United States,” *Federal Register* 82 (18) (January 30, 2017): 8799–8802; and Executive Order 13769, “Protecting the Nation From Foreign Terrorist Entry into the United States,” *Federal Register* 82 (20) (February 1, 2017): 8977–8982.
- ² National Immigrant Justice Center, “ICE Released Its Most Comprehensive Immigration Detention Data Yet. It’s Alarming,” March 13, 2018, <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet>.
- ³ “How America’s Courts Can Keep the Government in Check,” *The Economist*, February 15, 2017, <https://www.economist.com/the-economist-explains/2017/02/15/how-americas-courts-can-keep-the-government-in-check>.
- ⁴ Robert M. Cover, “Violence and the Word,” *The Yale Law Journal* 95 (8) (1986): 1601–1629; and Mijente, *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era* (Mijente, 2018), bit.ly/mijenteimmigrationplatform.
- ⁵ Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (Oxford: Oxford University Press, 2012).
- ⁶ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, Mass.: Harvard University Press, 2014).
- ⁷ Samuel Bowles and Arjun Jayadev, “One Nation Under Guard,” *The New York Times*, February 15, 2014, <https://opinionator.blogs.nytimes.com/2014/02/15/one-nation-under-guard/>; and John Whitlow, “Beyond Access to Justice: Challenging the Neoliberal Roots of Hyper-Gentrification,” *Law and Political Economy*, April 9, 2018, <https://lpeblog.org/2018/04/09/beyond-access-to-justice-challenging-the-neoliberal-roots-of-hyper-gentrification/>.
- ⁸ *Epic Systems Corp. v. Lewis*, 584 U.S. ____ (2018).
- ⁹ Katherine Stone, “Symposium: Majority Gives Short Shrift to Worker Rights,” SCOTUSblog, May 23, 2018, <http://www.scotusblog.com/2018/05/symposium-majority-gives-short-shrift-to-worker-rights/>.
- ¹⁰ Frank Pasquale, “The Real Barriers to Access to Justice: A Labor Market Perspective,” *Law and Political Economy*, April 2, 2018, <https://lpeblog.org/2018/04/02/the-real-barriers-to-access-to-justice-a-labor-market-perspective/>; and Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- ¹¹ Scott L. Cummings and Deborah Rhode, “Managing Pro Bono: Doing Well by Doing Better,” *Fordham Law Review* 78 (5) (2010): 2357–2442; and Robert R. Kuehn, David A. Santacrose, Margaret Reuter, and Sue Schechter, *The 2016–17 Survey of Applied Legal Education* (Ann Arbor: Center for the Study of Applied Legal Education, 2017).
- ¹² McKinsey and Company, *Learning to Navigate the Advocacy Maze* (New York: McKinsey and Company, 2009), <https://www.mckinsey.com/industries/social-sector/our-insights/learning-to-navigate-the-advocacy-maze>.
- ¹³ Lucie E. White, “To Learn and Teach: Lessons from Driefontein on Lawyering and Power,” *Wisconsin Law Review* (1988): 699–769; John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (Urbana: University of Illinois Press, 1980); and Thomas B. Stoddard, “Bleeding Heart: Reflections on Using the Law to Make Social Change,” *New York University Law Review* 72 (5) (1997): 967–991.

- ¹⁴ Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder, Colo.: Westview Press, 1992). Sameer Ashar & Annie Lai
- ¹⁵ Raj Jayadev and Albert Cobarrubias, "The Story of Participatory Defense," Silicon Valley De-Bug, May 22, 2015, <http://archives.siliconvalleydebug.org/articles/2015/05/22/story-participatory-defense>.
- ¹⁶ Lawrence Downes, "A 'Sanctuary City' Seizes the Moment, and the Name," *The New York Times*, March 2, 2017.
- ¹⁷ Sameer M. Ashar, Fernando Flores, and Sara Feldman, "Advancing Low-Wage Worker Organizing Through Legal Representation," *Clearinghouse Review Journal of Poverty Law and Policy* 47 (2013): 313–317.