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### Community Economic Development Is Access to Justice

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## SYMPOSIUM: COMMUNITY ECONOMIC DEVELOPMENT IS ACCESS TO JUSTICE

### Introductory Overview: Community Economic Development Is Access to Justice

*Scott L. Cummings*

I want to start by saying how thankful I am to Ted De Barbieri and CJ Vachon for organizing this January 2018 discussion group. For me, building and sustaining a community of scholars and practitioners who care deeply about these issues, and who put them front and center in their scholarship and their teaching, feels more essential now than ever. Without having these meetings, Community Economic Development (CED) and access to justice issues can wither away and die. I am gratified and inspired to see people from different stages in their careers and from different perspectives coming together and having this conversation.

Building community is what motivated our first discussion in January 2017 at the AALS Annual Meeting in San Francisco, which I helped to organize with two of my heroes: Peter Pitegoff from Maine and Rashmi Dyal-Chand from Northeastern.<sup>1</sup> We decided to bring together people to take stock and collect information about what was happening in the world of CED theory and practice, since there hadn't been that many opportunities in the previous decade to do so. We started from the premise that CED is a broad umbrella concept. What does it mean now? Lots of people had done important work and made foundational contributions both in scholarship and in practice, but we believed that the time was ripe to bring scholars and practitioners together to have a new conversation. When we started to organize in early 2016, we imagined the San Francisco meeting as an exciting chance to assess the state of the field and share innovations. As it turned out, the meeting fell on the eve of Trump's inauguration and thus became an opportunity to reclaim hope in the face of what people felt as

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1. The proceedings of the 2017 AALS Annual Meeting were published by the *Journal of Affordable Housing and Community Development Law*. Peter Pitegoff et al., *Community Development Law and Economic Justice—Why Law Matters*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 31 (2017).

catastrophic despair. And so there was a change in the tenor of the conversation from what we imagined when we organized it to what actually ended up happening on the day that we convened.

Coming out of that conversation were a lot of energy and inspiring stories about resistance to inequality and discrimination at the grassroots level, which made us excited to keep the momentum going. That happened through the leadership of Brandon Weiss, who took the papers that came out of the 2017 meeting and had them published in this Journal.<sup>2</sup> That issue has received a quite positive reaction. And we are fortunate this year to have the leadership of Ted and CJ, who have built on this foundation by bringing us together again.

They asked me to begin by describing what came out of last year's conversation as a segue into the important themes that are raised in the abstracts and comments offered for the discussion group this year.

The central contribution of last year's conversation, to which I already alluded, was a new compendium of stories of resistance and innovation at the grassroots level. For instance, Alicia Alvarez offered an inspiring account of CED lawyers and activists challenging foreclosures in Detroit. Other contributors discussed the movement to promote so-called "tiny homes," creative housing preservation projects, and the relationship between economic development and community opportunity through social enterprise.

A critical theme of those stories was that CED scholars and practitioners need to be attuned to leveraging opportunities where they present themselves in different sites. Along these lines, last year we had folks talking about classic CED strategies in big urban centers. But we also had people breaking out of that framework by exploring cutting-edge CED initiatives in rural areas and smaller post-Rust Belt cities experiencing ongoing economic challenges—but also presenting opportunities for renaissance.

Additionally, last year's contributors talked about rethinking the relationship between federal, state, and local governments in CED—particularly at a moment when the federal government had turned aggressively hostile. Because CED is built upon the idea of leveraging opportunities and incentive programs, contributors asked: What do you do when that opportunity structure changes dramatically? How do we mobilize CED initiatives at the local level to scale up to challenge larger structures of inequality in order to promote systemic reform?

Cutting across these conversations was the question of how lawyers can best help build local power. We discussed different forms of CED lawyering—from transactional legal services to strategic planning and counseling for mobilized organizations—and explored how to translate the different skill sets of CED practice into lessons that we can teach our students.

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2. *Id.*

This background is a transition into our discussion for today. It is crucial that we are moving forward by reframing the relationship of CED to access to justice. In this respect, I had two quick comments before handing the discussion back to the moderators. Reading the abstracts for this meeting reminded me of how important it is to reframe the idea of access to justice away from the traditional notion of access to law and lawyers within the legal system. We need to shift away from the dominant emphasis on helping individuals resolve legal problems through courts (although this remains critically important) to focusing on how to redesign systems to promote better access to economic opportunities and economic fairness in what Anika Singh Lemar aptly refers to as the “age of extreme inequality.”

In this regard, last year’s participants kept coming back to the critical pragmatic question: “What is the pathway for change?” And it is here that I took inspiration from the papers circulated for today’s meeting, which laid out powerful new accounts of lawyers and community organizations struggling to redesign local markets to be more accountable to community members, while also engaging in political mobilization to build a more robust progressive vision of law and society. I took hope from stories of community-led initiatives to rebuild private markets in distressed cities and promote access to capital controlled by community residents. I was energized by descriptions of lawyers representing mobilized groups in designing community-benefits programs and challenging the unfairness of existing economic rules. It is this energy, in the end, that we must sustain and build to continue confronting the enormously difficult—and enormously important—struggle for economic justice ahead. With that, I now look forward to learning from all of you, whose work provides the essential vision that guides us forward.



# Thematic Overview: Race, Place, and Pedagogy in Achieving Access to Justice through Community Economic Development

*Edward W. De Barbieri*

## Introduction

By all accounts, the mainstream economy is booming approaching the end of 2018. A sweeping corporate tax cut in 2017<sup>1</sup> has led to surging corporate earnings. Major stock market indices are at historic highs.<sup>2</sup> Interest rates are near historic lows.<sup>3</sup> Home prices, recently battered by the Great Recession, are stable, and increasing, in most areas.<sup>4</sup>

But that's not the full story. Wages are stagnant, despite near zero unemployment.<sup>5</sup> Schools are now more segregated than they were at the time of *Brown v. Board of Education*.<sup>6</sup> Drug addiction, the opioid epidemic, and other public health emergencies destroy lives and families. Patrick Sharkey characterizes the current moment as an "uneasy peace," contrasted with earlier periods of violence.<sup>7</sup> Grassroots movement organizations are working to address inequality, discrimination, and equity, in both urban and rural areas.

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1. David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. (forthcoming 2018).

2. Sue Chang & Mark Decambre, *S&P 500, Nasdaq Trade at Records on Broad-Based Stock Market Rally*, MARKETWATCH (Aug. 27, 2018, 3:17 PM), <https://www.marketwatch.com/story/stocks-look-to-extend-push-into-record-territory-2018-08-27>.

3. Elena Holodny, *The 5,000 Year History of Interest Rates Show Just How Historically Low US Rate Still Are Right Now*, BUS. INSIDER (Sept. 20, 2017, 2:58 PM), <https://perma.cc/CPR5-LZ5G>.

4. Paul Davidson, *Home Prices Are High. What Could Cool Them Down?*, USA TODAY (July 12, 2018, 12:01 AM), <https://perma.cc/TQT6-7KBF>.

5. Jared Bernstein, *Why Real Wages Still Aren't Rising*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/opinion/wage-stagnation-unemployment-economic-growth.html>.

6. Gary Orfield & Erica Frankenberg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, CIVIL RIGHTS PROJECT, UCLA (May 15, 2014), <http://civilrightsproject.ucla.edu/research/k-12-ducation/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

7. PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018).

It's been seventeen years since Bill Simon's book *The Community Economic Development Movement*<sup>8</sup> and Scott Cummings's article "Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice"<sup>9</sup> were published. Since then, scholars and practitioners have advanced the conversation about CED methods and efficacy. And many have created space for that conversation to continue. Through discussion groups at the AALS Annual Meetings in 2017, 2018, and 2019, the annual Transactional Clinics Conference, and elsewhere, scholars and practitioners have advanced the conversation in a meaningful way. What follows here is a brief thematic overview of the discussion that occurred in January 2018, and a synopsis of the abstracts that follow.

### Racial and Economic Justice, Equality

Specific papers in this collection raise important issues related to racial and economic justice. Steven Hobbs's return to Marcus Garvey addresses key points in any serious look at community economic development and the concept of justice. Hobbs argues that any CED movement must involve a holistic approach to solving economic, social, and political issues that have plagued poor communities. To support his argument, he looks to Garvey's efforts at black enterprise.

Hobbs's discussion addresses issues also described at length in Mehrsa Baradaran's recent book, *The Color of Money: Black Banks and the Racial Wealth Gap*.<sup>10</sup> In *The Color of Money*, Baradaran discusses the history of black banks and how federal policy, deliberately in many cases, failed to support their flourishing. Hobbs's paper, and works like *The Color of Money*, remind readers of vast racial inequities manifest in industries like financial services. Such inequities are massive barriers to achieving just ends.

Hobbs touches on issues like gentrification too. Relatedly, Anika Singh Lemar, in her paper, discusses exclusion from opportunity infrastructure as a barrier to individual wealth accretion. For Lemar, community economic development law fails when it loses sight of how individuals access economic opportunity. Economic opportunity itself leads to the amassing of wealth. Thus, we should treat as suspect CED strategies that fail to increase economic opportunity.

Also in this vein, Sabeel Rahman addresses the concept of sharing of community economic benefits. For Rahman, considering how the community shares in the economic benefits of development connotes an institutional shift in governance and design. Novel approaches to development, such as community benefits agreements, give community economic

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8. WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, & THE NEW SOCIAL POLICY* (2001).

9. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399 (2001).

10. MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017).



development scholars and practitioners a way into designing institutions to be more responsive to community needs.

Rahman's observations about the institutional shift in community equity are astute. They present an opportunity, and a challenge, for CED scholars and practitioners to address. Residents, especially in urban areas, have the drive, and ability, to weigh in on decisions that affect their lives, including on matters of local development.<sup>11</sup> Community benefit agreements (CBAs) can and do benefit communities when negotiated by an inclusive and representative coalition of community organizations.<sup>12</sup>

The specter of gentrification looms large in any conversation about community economic development and inequality. Courts are reluctant to overturn state or local government efforts to regulate development because of gentrification claims. One recent opinion on this topic, issued by a court in New York State, is worth mentioning.

In *Ordonez v. City of New York*,<sup>13</sup> a state court judge combined two separate challenges to zoning approvals brought by longtime residents of rent-regulated housing in East Harlem and Brooklyn. In both instances, residents challenged the city's analysis of socioeconomic impacts of zoning approvals on longtime, low-income renters. In each case, city officials followed environmental assessment guidelines in analyzing how zoning decisions would impact the various areas.

Because the city followed the guidelines, the court would not overturn the city's final approval of each zoning application based on claims that new development would have significant harms on longtime residents. Such a decision reveals the challenges that gentrification places on residents, and the reality that state and local government agency decisions are likely to be upheld by state courts.

A different, but related, area is the issue of state and local government approval of economic development activities. Courts have been reluctant to apply the public purpose doctrine to limit state or local economic development projects. Similarly, state constitutional prohibitions on gifts, loans, or extension of government credit for the benefit of private corporations are unlikely to successfully limit government giveaways to private companies.

The prioritizing of private interests over communities and community wealth-building assets is a problem to sustained community economic development. The impacts are far-reaching. If not addressed, neighborhood segregation, and the wealth gap that follows racial segregation, will only increase.

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11. I discuss elsewhere this ability and offer a framework for when urban anticipatory governance might best be used. Edward W. De Barbieri, *Urban Anticipatory Governance*, 46 FLA. ST. UNIV. L. REV. (forthcoming 2019).

12. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773 (2016).

13. *Ordonez v. City of New York*, July 11, 2018 (unpublished decision of the New York Supreme Court, New York County, on file with the author).

### **Community Economic Development Outside the Urban Core**

The notion of place is closely linked with racial and economic justice themes. Robert Miller's paper discusses economic development, and its absence, on Indian reservations. He explores reasons for the lack of locally owned businesses on reservations. He points to a lack of access to savings, banks, and home equity as a barrier to new business development. He also discusses legislative efforts to require a greater percentage of goods and services bought and sold on reservations be purchased from reservation-based businesses.

Alex Sickler's paper, though focused mainly on teaching law students to serve clients in areas of rural economic activity, also has an element of place—namely, the rural—in addressing issues of economic opportunity. Both Sickler and Miller look at economic opportunity outside of the urban core and find unique features to community economic development practices based in non-city areas. Miller locates prospects to increase economic development opportunities on reservations, while Sickler reminds us of the importance to the legal profession of proper training of attorneys to practice law in areas of rapid economic expansion, like in the instance of Bakken oil development in western North Dakota.

### **Teaching Transactional Lawyering**

Several contributors explore issues of course design, and client selection, as relevant to the ideas of community economic development in addressing access to justice. Tony Luppino and Brandon Weiss discuss one such course offered at the University of Missouri—Kansas City School of Law. Paul Tremblay looks at client selection as an access to justice issue in transactional clinics. And Brian Krumm examines Tremblay's claims in detail.

How we teach community economic development to the next generation of students and lawyers will significantly impact economic opportunity. Luppino and Weiss explore an interdisciplinary approach to curricular design. Tremblay shows how transactional community economic development clinics can address public interest ends—and how they cannot. All told, critically assessing the efficacy of community economic development programs is a key component of this pedagogical endeavor. By all accounts, it's a great time to be a community economic development scholar and practitioner.

# Mind the Gap: The Story of People with Ideas and an Economy

Christyne J. Vachon

## I. Introduction

When Ted and I talked about this discussion group, both of us were directors of community economic development clinics at our respective schools, and both of us already had the relevant issues on our minds. We knew several colleagues were having similar discussions, and we wanted to bring them all to the table. Often, the concepts that come to mind when a conversation involves justice are the commonly known concepts of civil rights, incarceration, and unequal treatment based on gender, orientation, race, religion, color, disability, etc. My space—transactional law—often gets overlooked. In my mind, this oversight is a huge error by our community at-large. As an operational concept, the principle of “justice” implies universal principles that guide people to determine the difference between right and wrong. The reaction to a statement that justice includes “being able to start and run a business” triggers raised eyebrows and “what are you talking about” type of statements. Of the four types of justice,<sup>1</sup> distributive justice (“the ethical analysis of the distribution of benefits and burdens in society”<sup>2</sup>) is most relevant to the discussion and will not be achieved if, for instance, each person is “not given equal opportunity to acquire and enjoy the fruits of income-producing property.”<sup>3</sup> Social justice, part of distributive justice, includes economic justice. Economic justice involves maneuvering through the law and institutions that affect how society’s members contract, earn income and otherwise sustain themselves, sell/buy goods and services, and bring funds and interest to their communities.<sup>4</sup> As part of

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1. The four types of justice are distributive justice, procedural justice, restorative justice, and retributive justice. See [http://changingminds.org/explanations/trust/four\\_justice.htm](http://changingminds.org/explanations/trust/four_justice.htm)

2. Jeffrey M. Gaba, *Taking “Justice and Fairness” Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 570 (2007).

3. CENTER FOR ECON. & SOC. JUSTICE, *DEFINING ECONOMIC JUSTICE AND SOCIAL JUSTICE* (2018), <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice>.

4. KIMBERLY A. LOWE, *BUSINESS LAW PRO BONO: HOW BUSINESS LAW LAWYERS CONTRIBUTE TO ECONOMIC JUSTICE* (n.d.), [http://apps.americanbar.org/buslaw/committees/CL580000pub/newsletter/201509/fa\\_1.pdf](http://apps.americanbar.org/buslaw/committees/CL580000pub/newsletter/201509/fa_1.pdf).

distributive justice, social justice guides communities in establishing institutions and necessitates community collaboration for personal and societal betterment.<sup>5</sup> Economic justice encompasses social enterprise and community economic development. Where someone who may have been wrongly incarcerated can benefit from access to counsel, like a low *bono* or *pro bono* attorney who knows the legal steps, looks out for the strange concepts, and can advocate, so too can a person who tries to start and maintain a business with few means benefit economically from an attorney who knows the concepts, can write the necessary documents, explain, and advocate. Here is the gap that we must mind and to which we must respond. What are we doing for those who have the ideas and drive but not the access? This gap is for *pro bono*, clinics, and others to fill.

Looking at community development through the lens of transactional law, economic justice seems to get short shrift from a publicity standpoint.<sup>6</sup> Studies exist about the impacts that access to legal advice has for someone trying to figure out the legal system and law jargon of courts.<sup>7</sup> But the concept has not been equally adopted for those people, businesses, and communities that need transactional assistance—the part of legal work that represents the greater percent of practicing lawyers<sup>8</sup> non-litigation work.

5. CENTER FOR ECON. & SOC. JUSTICE, *supra* note 3.

6. Lowe, *supra* note 4.

7. For relevant examples, see National Center for Access to Justice, The Justice Index 2016 : Measuring Access to Justice (2018), <https://justiceindex.org>; California Commission on Access to Justice, Language Barriers to Justice in California: Report of Commission on Access to Justice 1–2 (2005), [http://www.calbar.ca.gov/Portals/0/documents/accessJustice/2005\\_Language-Barriers\\_Executive-Summary.7.2.12.pdf](http://www.calbar.ca.gov/Portals/0/documents/accessJustice/2005_Language-Barriers_Executive-Summary.7.2.12.pdf); Johnathan Silver, *Lawmakers Look for Ways to Help People Who Can't Afford Lawyers*, TEXAS TRIB. (Sept. 15, 2016), <https://www.texastribune.org/2016/09/15/lawmakers-mull-legal-advice-people-who-cant-afford>; Matthias Kilian, Address to International Bar Ass'n in Astana, Kazakhstan: Representation in Court Proceedings—Comparative Aspects and Empirical Findings (2016), [http://europeanlawyersfoundation.eu/wp-content/uploads/2016/10/Kilian\\_Representation-In-Courts.pdf](http://europeanlawyersfoundation.eu/wp-content/uploads/2016/10/Kilian_Representation-In-Courts.pdf) (referencing two German studies, including a study from the 1980s that showed that “[r]epresentation by a lawyer leads to significantly more activities of the judge hearing the case[;]. . . [r]epresentation by a legal professional bridges the problem of asymmetrical knowledge of the parties on one side and the court on the other side and allows, to some extent, control of the court[;] . . . [and a] successful outcome of litigation depends extremely on representation by a member of the bar as far as defendants are concerned”; and noting British studies that showed that “[r]esearchers also found that lawyers obtain significantly better results in tried cases than unrepresented litigants, [with one] research project f[inding] that cases involving fully unrepresented litigants were much more likely to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than agreement between the parties or by judgment following a trial or appeal hearing”).

8. For instance, between 30–35% of lawyers in large firms are involved in litigation. See ED WESEMANN & MELISSA HOGAN, THE NEW LITIGATION PRACTICE IN

The Department of Justice's Office of Access to Justice sets forth these standards of justice: accessible to all, fair to all, and efficient.<sup>9</sup> This mantra is equally applicable to understanding legal concepts in the transactional setting. With this in mind, during the fall semester of 2017, students<sup>10</sup> in the Community Development Clinic of the University of Massachusetts School of Law (Clinic) witnessed the challenges brought to them by their clients and, in light of those challenges, saw the gap. Minding that gap, they conducted a robust analysis of the websites of all fifty states to determine accessibility for all people who may want to form and maintain a business. The students started to reach some conclusions about the community around them, including that one of the larger obstacles blocking people from starting a business is that they have no idea where to start. As Isabel V. Sawhill, an economist at the Brookings Institution, stated, "The U.S. does not have as much mobility as most other advanced countries."<sup>11</sup> Recognizing that each business client had been formed under a state's law and realizing that nonlawyers without access to a lawyer really only have the state's website to fully rely on as accurate (as compared to some consolidator websites like LegalZoom), the students began to ask themselves in case rounds whether some of their clients' problems were attributable to the presentation of content on each state's website.

These students created a query list that they applied to every state's website<sup>12</sup> that included approximately 1,217 questions. These questions covered general accessibility issues, such as ease of locating based on a common Google search, translators, legalese, and use of images, along with comparison charts of corporations, limited liability companies, partnerships, and nonprofits. After carefully crafting the questions, conducting test-runs to catch problematic areas and ensure that they were similarly interpreting the questions and website content, and creating overarching questions, the students collaboratively analyzed the websites of 50 states and created an information source with over 60,000 data points.<sup>13</sup> While

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AMERICA (Oct. 7, 2009), <http://edwesemann.com/articles/general/2009/10/07/the-new-litigation-practice-in-america>.

9. U.S. DEPT. OF JUSTICE, ACCESS TO JUSTICE, <https://www.justice.gov/atj>.

10. These industrious students, now graduates, were Paolo Corso, Anthony Doss, Amanda Quigley, Michael Ryan, and Anthony Senerchia. Additional assistance came from Zachary Devlin and Kristina Prete, also now graduates of UMass School of Law. Katelyn Golsby conducted follow-up analysis of the results.

11. Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES (Jan 4, 2012), <https://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html>.

12. The state websites the students accessed were the website of each state's secretary of state. There were, at times, other options that either had the potential to increase or decrease confusion for the users. For instance, some states opted to outsource the information packaging to third-party resources.

13. The students conducting the study looked at each state's website, with attention to detail, but may have missed some information that was not easily accessible.

mostly qualitative in nature, the study still provides valuable and interesting insight into the access to information and, therefore, access to economic justice. With interest from the Progressive Policy Institute in Washington, D.C., the UMass students packaged some of the results from their study and presented that snapshot to the Progressive Policy Institute in Washington, D.C. A snapshot of that information has been provided in Section III below.

## II. The Stories

While the types and situations of clients vary in a community development clinic or other *pro bono* transactional service provider, the stories below set the tone for the types of stories that inspired the UMass students.

### *A Tale of Two Clients*

#### A Nonprofit

In the 1970s, Leslie founded a tax-exempt nonprofit—Building Rescue Nonprofit—to rescue a building and the related institution in that building that represented a historic part of the community in which Leslie grew up, lived and would, eventually, retire. She filed the necessary paperwork with the state and the Internal Revenue Service. For many years, Leslie ran the ship. But, of course, as time goes by and an established nonprofit survives, additional people help and may often take over. As is the story for many organizations without expertise in governance and compliance, when someone new takes over or a change in requirements occurs, things fall through the cracks. This was the case for Building Rescue Nonprofit. The organization had limited resources, did not have a lawyer or accountant in its volunteer retinue, and did not have the network to reach out and find one. Leslie developed health issues and other volunteers took over the heavy work of the organization. Unknown to them, twelve years before receiving assistance from the Clinic, federal and state regulatory agencies terminated the organization's status as a tax-exempt nonprofit due in part to its failure to file annual reports. During the twelve-year time period, donors had made donations to the organization believing that it was tax-exempt and, therefore, that donations were tax-deductible. The reason that the organization found out there was a problem was through the town government grapevine. Not the state.

When the students met with the board and other leaders of Building Rescue Nonprofit, they learned that the leaders had tried to comply with the requirements to maintain the organization's status. Starting more than twelve years before, the leaders had sought information on how to comply and maintain the status from the state with phone calls, going into the state regulatory office, and searching on the state's website. And, clearly, the leaders had not received the necessary information, including that the status had lapsed. They found the website to be confusing and unhelpful. At a minimum, they had not known that they had to proactively file annual reports. And the state did not send them a notice.

### A For-Profit

One year before coming to the Clinic, Betsy thought that she founded a start-up corporation to protect herself from liability for the small health business she runs. She came to the Clinic for assistance setting up a board of directors and, as it turns out, figuring out how to maintain minutes and the corporate records book. Once again, this information was not available through the state's office or website. She was not aware at the time she signed up with the Clinic that she needed to have at least an annual board meeting and maintain minutes. However, Betsy had a bigger problem. She had looked on her state website to find out what she needed to do to form her corporation. The information was thin and not in plain English. Based on what she read and understood, Betsy took action and thought that she had created a corporation. After meeting with the client, the Clinic student dug in and tried to find the information for the company on the state's website and found nothing. The student asked for the necessary records from the client. The client was unfamiliar with the terms for the documents, articles of incorporation and bylaws, for instance. Instead, the client sent the student proof of the employee identification number. The client had understood that she had to file to receive an employee identification number for the business. Once she did that, she thought she had formed her corporation and was done. As the student discovered, the only step that the client had taken to form the entity had, indeed, been filing to receive an EIN and had, consequently, been operating her business without an actual entity to shield her.

Lest anyone lose sleep over the concerns of these clients, the Clinic set them on a path to survival.

### III. Results

The study focused on issues of accessibility, exploring such issues as whether:

- the state's website used legalese or plain English;
- the state's website user had to click-through multiple times to get to the necessary information, gathering as she goes, or hunt in one place with few click-throughs;<sup>14</sup>

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14. Based on the team's research, the students analyzed how many clicks from the landing page were required to access the key information, for instance, on how to form a corporation. Various research had shown that website users lose momentum/interest after a certain number of clicks. See Shari Thurow, *User Experience Myth or Truth: The Three Click (or Tap) Rule*, MKTG. LAND (Oct. 24, 2014), at <https://marketingland.com/user-experience-myth-truth-three-click-tap-rule-104760>; Bitsy Knox, *How Many Seconds Does Your Website Have to Capture User Attention*, EYEQUANT, <http://www.eyequant.com/blog/2013/04/08/how-many-seconds-does-your-website-have-to-capture-user-attention>.

- the state's website had a translator;<sup>15</sup>
- the state's website had no information versus very clear and helpful information;
- the state's website was found top-ranked in the results of a Google search;<sup>16</sup>
- the state's website was smartphone friendly;<sup>17</sup>

15. The students determined the number of states with translators on the website. Data from 2013 showed that one in five Americans do not speak English at home. Forty-four percent of those people were born in the United States. About half of those people self-identified as not speaking English "very well" or worse. As one student in the Clinic pointed out, if there is no translator that is a problem. If it is in legalese, that's a whole other issue.

16. In the United States, using a search engine is the second most common activity among Internet users. RALPH SCHROEDER, *SOCIAL THEORY AFTER THE INTERNET: MEDIA, TECHNOLOGY, AND GLOBALIZATION* 101, 104, <http://discovery.ucl.ac.uk/10040801/1/Social-Theory-after-the-Internet.pdf> (citing to 2012 Pew study, <http://www.pewinternet.org/2012/03/09/search-engine-use-2012>). Search engines inadvertently serve as gatekeepers to information, and, as a result, the public's reliance on them causes websites like Google to shape what information users have available to them. *Id.* at 109. The states where people most frequently use a Google search related to starting a business are Mississippi, Georgia, Alabama, Louisiana, and South Carolina. <https://trends.google.com/trends/explore?geo=US&q=how%20to%20start%20a%20business> (based on Google search queries for the twelve months preceding March 24, 2018). Note that this search can be updated to reevaluate at any time. *Id.*

17. The team relied on a few studies, such as the Pew Study of Smartphones, Pew Research Center, *Mobile Fact Sheet* (2018), <http://www.pewinternet.org/fact-sheet/mobile>; see also Pew Research Center, *Internet/Broadband Fact Sheet* (2018), <http://www.pewinternet.org/fact-sheet/internet-broadband>. If all people should have access to forming a business, then those who rely mostly or exclusively on smartphones for Internet access may be at a disadvantage if the majority of states' websites are not smartphone friendly. As the Pew study showed, one in ten Americans only use smartphones to access the Internet. Twenty-one percent of those people make \$30,000 or less. Twenty-seven percent of those people have a high school education or less. Twenty-three percent of those people are Hispanics, and fifteen percent are African American. Consequently, if states' websites are not useful to these individuals to assist in forming and maintaining a business, there is a problem in economic justice. A website that can be accessed by a mobile phone is accessible to more people who do not have or cannot afford other methods of accessing web pages. A website's ability to be read and understood when accessed by a smartphone is not measurable by an exact formula, but one feature that helps significantly is a website's ability to respond to a mobile user by automatically resizing the website's content and allowing the site to be read in portrait and landscape view. Marcus Banks, *Get Responsive: Making Sure Your Library's Website Is Mobile Friendly*, *AM. LIBRARIES*, Nov.-Dec. 2017, at 24, [https://link.galegroup.com/apps/doc/A514513476/AONE?u=mlln\\_s\\_umass&sid=AONE&xid=9bf7d69e](https://link.galegroup.com/apps/doc/A514513476/AONE?u=mlln_s_umass&sid=AONE&xid=9bf7d69e) (last visited Mar. 14, 2018). Without the ability of a website to change depending on what device is accessing it, a website may be extremely difficult to read due to the need for excessive scrolling, disappearing



- the state's website provided a variety of means of payment;<sup>18</sup> and
- Other concerns.

Since individuals without resources would rely largely on what is available to them in common circulation, the students sought out the secretary of state's website for each state. The study sought to answer, among others, questions related to why the gap continues to exist:

- Does the website include enough information for laypeople to understand how to start and maintain a business?
- Does the website include enough information for laypeople to understand what it means to form a business and the responsibilities that they are taking on?
- Is the information presented in a way that laypeople could understand and make decisions, for example among entity types?
- Is the information readily accessible?<sup>19</sup>

The following information from the study represents a snapshot of the data collected, presented in the sequence that an entrepreneur might need it as she makes decisions to form an entity. Initially, an entrepreneur may want to know what, if any, entity fits her situation. That entrepreneur may or may not be aware that she should be thinking about, among other things, structure, cost to form and maintain, method of taxation, for-profit versus nonprofit, liability exposure, and future possibilities. The UMass study in 2017 found that slightly over sixty percent of the states provided descriptions of limited partnership, corporations, and limited liability companies.<sup>20</sup> Of those definitions, over fifty percent of the states only provided

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text, and extremely small font sizes or pictures. *Id.* These issues can make the website difficult, frustrating, or near impossible to understand if a user's only means of access is a mobile phone.

18. States that provide noncredit alternatives to online payment systems provide more people from economically disadvantaged groups access to pay the fees necessary to open and operate a business. In 2015, approximately nine million households did not have a bank savings or checking account. FEDERAL DEPOSIT INSURANCE CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS (2015), <https://www.fdic.gov/householdsurvey/2015/2015report.pdf>. In the same study, in three-quarters of these households, no member had a credit card. *Id.* at 32–33. Reasons that many low-income people are not able to obtain a bank account include the instability of their income and the requirements and fees that many banks impose. Fumiko Hayashi, *Access to Electronic Payments Systems by Unbanked Consumers*, ECON. REV. (KANSAS CITY), Summer 2016, at 51, [https://link.galegroup.com/apps/doc/A470870499/AONE?u=mlln\\_s\\_umass&sid=AONE&xid=d3bc5657](https://link.galegroup.com/apps/doc/A470870499/AONE?u=mlln_s_umass&sid=AONE&xid=d3bc5657) (last visited Mar. 14, 2018).

19. "Accessible" was understood to be a broad term. Consequently, the students explored issues of language, click-throughs, Google searches, etc.

20. General partnership and limited liability partnership were just above fifty percent.

the definition from the statute. As law students the world-over would probably attest, having a chart that compares entities is incredibly helpful—arguably best practices. In the Clinic, students would create charts for their clients, if relevant, and receive great appreciation for their work. The study found that only five states overall provide an entity comparison chart or table.<sup>21</sup>

If the entrepreneur opted to form a corporation, she would find that forty percent of the states do not have a description of how to form a corporation. Sixty-four percent of the states do not describe the requirements to qualify as a corporation. Eighty percent of the states do not identify that certain titled-positions must be filled (e.g., president, secretary, treasurer and director). Eighty percent of the states either do not mention, or define, a shareholder. Another aid that entrepreneurs (and students alike) find helpful is a step-by-step guide on formation or completion of a form. Just over ten percent of states had any kind of step-by-step guide related to formation.

More in depth, the entrepreneur may want to know about liability protection. The study found that only thirty percent of the states identify for her who is liable for the entity's debts. But sixty-three percent of the states reference corporate liability in some capacity. Another concern for our intrepid entrepreneur may be raising capital. Nine percent of the states reference raising capital. None of the states mentions insolvency and what the entrepreneur should do for filings. As many lawyers know, another important aspect of forming a business becomes the tax treatment. Just under sixty percent of the states do not mention corporate taxation. Only seven percent of the states referenced double-taxation (or the equivalent), and only thirty-four percent describe an S-Corporation.<sup>22</sup>

An entrepreneur without resources to hire an attorney will have to wade through the decision-making and complete the formation documents. Twenty-three percent of the states had a clear link to where the formation documents could be found on the state website. Only fifty-five percent of the states described the articles of incorporation (or equivalent document), twenty-five percent had an annotated version,<sup>23</sup> and only one state had a completed sample of articles of incorporation.<sup>24</sup> Further, ninety-three percent of the states mention filing fees for the formation document, but only thirty-four percent clearly indicate how to make those payments.

21. Those states are Delaware, Georgia, Hawaii, New York, and Rhode Island.

22. The states that mention the S-corporation are Alaska, Arkansas, Delaware, Georgia, Hawaii, Indiana, Maine, Montana, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, and Virginia.

23. The states that provided the annotated version of the articles of incorporation are Alabama, Alaska, Arkansas, California, Colorado, Maryland, Minnesota, Missouri, New Mexico, North Carolina, and North Dakota.

24. Utah provided the completed sample of articles of incorporation.

More generally, if an entrepreneur did a search on Google such as “form a business in [state]” (inserting the state’s name), only four percent of the states were listed in the first place on the Google results page. The majority of states were the third listed on the results page. Further, the study found that under fifty percent of the states had some form of translator, and under five percent were truly smartphone friendly.

#### IV. Why the Gap Matters

Before a business enterprise starts, the issue of unequal access begins. The poor quality of, or complete lack of information on, choices, necessary steps to start and maintain an entity, the reasons to have an entity, and other issues stymie individuals who may otherwise add to our community by, for example, creating jobs. The massive hurdle to understanding the law and implementing the steps mostly gets conquered by money, a network, or both.<sup>25</sup> Without either, a gap arises. A state that provides access to resources and information for its residents to understand the requirements to form and maintain a business supports the local and national economy. More and more, people are relying on the Internet to which states need to respond. For example, in 2017, thirty-nine percent of farms in the United States relied on a smartphone or tablet to conduct business.<sup>26</sup>

Those *pro bono* service providers who help fill the gap would serve as excellent advisors about website content to create accessibility. Features of a website that make it “user friendly” provide universal access to it for people who are looking for important information. A website that is user-friendly should be built with the consideration that it must be able to help any user regardless of his or her education level or experience to find the necessary information within a reasonable time.<sup>27</sup> The most important indicators of a user-friendly website are that the website is easy to use, easy to understand, and easy to find information on.<sup>28</sup> A website’s address should be appropriate to reflect its content and easy to remember.<sup>29</sup> The importance of the UMass study shows how few states appreciate this issue and how they could respond to the gap.

25. PowerHomeBiz.com, 12 Common Reasons Why People Don’t Start Their Own Businesses (Aug. 29, 2013), <https://www.powerhomebiz.com/starting-a-business/entrepreneurship/12-common-reasons-people-dont-start-businesses.htm>.

26. U.S. DEP’T OF AGRIC., FARM COMPUTER USAGE AND OWNERSHIP (Aug. 2017), [http://usda.mannlib.cornell.edu/usda/current/FarmComp/FarmComp-08-18-2017\\_correction.pdf](http://usda.mannlib.cornell.edu/usda/current/FarmComp/FarmComp-08-18-2017_correction.pdf).

27. Layla Hasa & Emad Abuelrub, *Assessing the Quality of Web Sites*, 9 APPLIED COMPUTING & INFORMATICS 11, 23 (2011), [https://ac.els-cdn.com/S2210832710000037/1-s2.0-S2210832710000037-main.pdf?\\_tid=fb2a76c2-6aeb-4f6c-bd98-34131cbe7fb6&acdnat=1520018681\\_71c6ddd52a0adf845141f96ba91337](https://ac.els-cdn.com/S2210832710000037/1-s2.0-S2210832710000037-main.pdf?_tid=fb2a76c2-6aeb-4f6c-bd98-34131cbe7fb6&acdnat=1520018681_71c6ddd52a0adf845141f96ba91337).

28. *Id.*

29. *Id.* at 24.

In the United States, small businesses account for ninety-nine percent of all businesses.<sup>30</sup> In 2014, small businesses employed almost half of the private workforce in the United States.<sup>31</sup> Further, small businesses also accounted for ninety-seven percent of exports to other countries.<sup>32</sup> Consequently, with a backbone of small businesses in the United States, states should provide entrepreneur accessibility in their websites that actually represents the population, not just the population that currently has access.

What is the population to which the states should respond, and, as the UMass study indicates do not do adequately? In 2017, the Small Business Association identified twenty-six million small businesses in the United States. Of those small businesses, minorities owned eight million.<sup>33</sup> The median income for individuals who were self-employed at their own incorporated small business in 2015 was \$49,804.<sup>34</sup> For individuals who were self-employed in their own unincorporated firms, the mean income was \$22,424,<sup>35</sup> an income which would place a family of three or four near the 2017 federal poverty guidelines.<sup>36</sup> With the cost of a small business lawyer ranging from \$150 to \$1000 per hour,<sup>37</sup> many small business owners have little choice but to rely on themselves to bridge the gap.

Addressing this gap in access, each state could address poverty in lower-income areas. The cost of transportation affects lower-income people as they struggle to get to jobs outside of their communities since fewer small businesses operate in low-income areas than in other areas of the United States.<sup>38</sup> And low-income entrepreneurs are less likely to incorporate their business, compared to their non-low-income counterparts.<sup>39</sup>

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30. U.S. Small Business Admin., Office of Advocacy, Small Business Profile (2017), [https://www.sba.gov/sites/default/files/advocacy/All\\_States\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/All_States_0.pdf).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. HEALTHCARE.GOV, FEDERAL POVERTY LEVEL (2018), <https://www.healthcare.gov/glossary/federal-poverty-level-FPL>.

37. UPCOUNSEL, SMALL BUSINESS LAWYER COST: EVERYTHING YOU NEED TO KNOW (2018), <https://www.upcounsel.com/small-business-lawyer-cost>.

38. <https://www.sba.gov/sites/default/files/437-Entrepreneurship-in-Low-income-Areas.pdf>. Significantly fewer people in low-income areas report being self-employed compared to other areas. *Id.*

39. Maurice Kugler, Marios Michaelides Neha Nanda & Cassandra Agbayani, Office of Advocacy, U.S. Small Business Admin., Entrepreneurship in Low-Income Areas (Sept. 2017), <https://www.sba.gov/sites/default/files/437-Entrepreneurship-in-Low-income-Areas.pdf>.

## Community Economic Development and the Concept of Justice

*Steven H. Hobbs*

The theme for this discussion group gave me a chance to reflect on the concept of Justice. I think that the ideal of justice should proceed and underpin any efforts at community economic development. Justice should shape and inform the choices that we make as we pursue community economic development. My hope is that this discussion group offers us an opportunity to consider notions of justice that can guide our work. Is it just about the chance for an entrepreneur to make money? Does the work actually improve a community? If so, how does one define community and measure improvement? What happens if community economic development ends up benefiting those who have money to invest in the development? Here I think of the issue of gentrification.

My idea is to go back and take a look at some historical examples of efforts at community development. The work of Marcus Garvey in the first part of the twentieth century provides an example of early economic community development. Garvey, who came from Jamaica to the United States in 1916, sought to uplift the race through his organization, the Universal Negro Improvement Association and African Communities League (UNIA).<sup>1</sup> Inspired by Booker T. Washington and his work at Tuskegee Institute, Garvey initially sought to construct a similar school in the West Indies. However, as he traveled about the country raising funds, Garvey's vision of the task ahead grew and became sophisticated and internationalized. In a concise statement reflecting self-determination he said:

And then I read *Up From Slavery*, by Booker T. Washington. And then my doom, if I may so call it—of being a race leader dawned upon me. I asked. . . . Where is the Black Man's government? Where is his kingdom? Where

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1. To establish a Universal Confraternity among the race; to promote the spirit of race pride and love; to reclaim the fallen of the race; to administer to and assist the needy; to assist in civilizing the backward tribes of Africa; to strengthen the imperialism of independent African States; to establish Commissionaires or Agencies in the principle countries of the world for the protection of all Negroes, irrespective of nationality' to promote conscientious Christian worship among the naïve tribes of Africa; to establish Universities, Colleges and Secondary Schools for the further education and culture of boys and girls of the race; to conduct a world-wide commercial and industrial intercourse. PHILOSOPHY AND OPINIONS OF MARCUS GARVEY 38 (Amy Jacques Garvey ed., 2d ed. (1967)).

is his President, his country and his ambassadors, his army, his navy, his men of big affairs? I could not find them, and then I declared, "I will help to make them!"<sup>2</sup>

Garvey sought, among other objectives, to "promote the spirit of race pride and love; to reclaim the fallen of the race; . . . to strengthen the imperialism of independent African States; . . . to conduct a world-wide commercial and industrial intercourse."<sup>3</sup> Garvey's movement for African redemption came as the world was emerging from the throes of a horrible war fought to preserve democracy. Garvey saw in the war and times a struggle by oppressed people to gain independence and self-determination. In early November 1918, Garvey announced a UNIA-sponsored conference to develop the "peace conference demands and belated war aims of the Negroes."<sup>4</sup> Nearly two thousand persons met in New York on November 10, 1918, and passed a resolution to be presented at the Paris Peace Conference. The resolution read in part:

- (1) That the principle of self-determination be applied to Africa and all European controlled colonies in which people of African descent predominate.
- (2) That all economic barriers that hamper the industrial development of Africa be removed. . . .
- (9) That the captured German colonies in Africa be turned over to the natives with educated Western and Eastern Negroes as their leaders.<sup>5</sup>

Garvey sought to promote the idea of equality for peoples of African descent. Garvey sought to instill dignity and pride in the race. He also sought to demand justice and freedom for his people. For Garvey, such a demand could only be asserted if blacks had a nation that could offer powerful protection of the full panoply of human rights. Among those rights as described in the Declaration of the Rights of the Negro Peoples of the World:

23. We declare it inhuman and unfair to boycott Negroes from industries and labor in any part of the world.
27. We believe in the self-determination of all peoples.

2. E. DAVID CRONIN, *BLACK MOSES* 15–16 (1949).

3. Marcus Garvey, A Talk with Afro-West Indians at the Library of Congress, Washington, D.C., Booker T. Washington Papers, DLC (n.d.) (originally printed and published by the African Communities League; manuscript corrections in Garvey's hand); 1 MARCUS GARVEY, *MARCUS GARVEY AND UNIA PAPERS*, 1826–AUGUST 2019, at 55–64 (Robert Abraham Hill ed., 1983) [hereinafter 1 MARCUS GARVEY AND UNIA PAPERS].

4. 1 MARCUS GARVEY AND UNIA PAPERS, *supra* note 3, at 284.

5. *Id.* at 299.

50. We demand a free and unfettered commercial intercourse with all the Negro people of the world.<sup>6</sup>

Garvey's ideal of Justice encompassed freedom, equality, human dignity, and self-determination. The ability to freely engage in commercial enterprises was part of his vision of justice. To this end, Garvey and the UNIA established the Black Star Line, a steamship company that endeavored to trade between the United States, the Caribbean, and Africa. They also created the Negro Factories Corporation designed to create factories that were run by black people. The corporation included "a chain of cooperative grocery stores, a restaurant, a steam laundry, a tailoring and dress-making shop, a millinery store and publishing house."<sup>7</sup>

What I learn from Garvey is that we should approach community economic development as a fundamental human right that can be actualized by creating business opportunities that uplift the community. In other words, we need a holistic approach to solving the economic, social, and political inequities that plague too many communities. I am still working on the particulars, but my sense is that we have to start with the children's fundamental needs, including the basics of education, healthcare, housing, and nutrition. Then we have to focus on entrepreneurial education in whatever venues are available. And, finally, we need institutions that will build enterprises that will generate the possibility of financial independence.

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6. 2 MARCUS GARVEY, MARCUS GARVEY AND UNIA PAPERS, AUGUST 1919–AUGUST 1920, at 571–77 (Robert Abraham Hill ed., 1983).

7. RUPERT LEWIS, MARCUS GARVEY: ANTI-COLONIAL CHAMPION 70–71 (1987).





# Community Economic Development Is Access to Justice

*Brian Krumm*

My views on the questions raised in the original call for participation have been framed in large part by Professor Paul Tremblay's article "Transactional Legal Services, Triage, and Access to Justice."<sup>1</sup> While he acknowledges that the traditional access-to-justice movement treats litigation legal services (LLS) as more critically important than transactional legal services (TLS),<sup>2</sup> he suggests that this view might be shortsighted. The provision of TLS is a way to address longer-term issues confronting underserved communities by helping to create businesses that, in turn, create economic opportunity.

Tremblay's article addresses not only the provision of TLS services to underserved communities, but also those entrepreneurs who may come from more privileged backgrounds but still do not have the financial resources to obtain the necessary legal assistance to form a business entity or protect their intellectual property. He acknowledges the views of various commentators who question the lack of quantitative evidence related to the provision of TLS having a positive effect on the creation of economic opportunity and subsequently on "access-to-justice." However, he concludes by recognizing that offering free transactional legal services to social entrepreneurs and to those in underserved communities is a justifiable use of scarce legal resources. He also recognizes that allocating resources to purely entrepreneurial efforts is harder to justify, but may be wise in individual circumstances.

I would suggest that history demonstrates that people from disadvantaged communities have risen out of those circumstances, not only from pursuit of education, but also from forming their own businesses and establishing organizations that would enhance the welfare of their community. As innovation makes the world increasingly more complex, entrepreneurs from all walks of life are in need of TLS. While some would argue that

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1. Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J. L. & POL'Y 011 (2015).

2. "TLS . . . refer[s] to free or very low-cost legal assistance to entrepreneurs and businesses (both for-profit and nonprofit, and individualized or community-based) intended not to resolve disputes in the way that litigators do, but to establish, organize, govern, and maintain the organization's work." See ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 1-10 (2013) (describing the scope of transactional work).

there is an abundance of online resources available to those entrepreneurs that need legal assistance, my experience suggests that such resources often introduce more legal problems for the entrepreneur than they solve. Without the provision of free or low-cost TLS, only the wealthy and corporations will be able to effectively innovate and compete in the marketplace, thus further widening the gap between the haves and have-nots.

I will be prepared to discuss some examples of entrepreneurs with whom my clinic has worked that both directly served disadvantaged communities, as well as those entrepreneurs whose products or services have benefited those communities.

## Access to Justice Requires Access to Opportunity Infrastructure

*Anika Singh Lemar*

In a few sparse sentences, a vignette in Isabel Wilkerson's book about the Great Migration<sup>1</sup> describes for me the relationship between community economic development (CED) and access to justice. Wilkerson tells the story of Robert Joseph Pershing Foster, a successful surgeon in Los Angeles, who grew up in a segregated Monroe, Louisiana, in the 1930s. As an adult, Foster regretted that he never learned to roller skate. His parents, both schoolteachers, could have afforded to buy him roller skates. But, as Foster told Wilkerson, they "couldn't buy sidewalks." The dirt roads in their segregated neighborhood did not provide the infrastructure that he needed to skate. And no individual could build that infrastructure. Building sidewalks would have required government investment. There was no such investment in Foster's African-American neighborhood. Segregation was designed and operated to ensure that African-Americans did not benefit from "public goods" that were available to white families. As we all know, separate never was equal.

The vignette is powerful because it neatly presents the problem of segregation and differential access to public resources. In many ways, Foster lived a middle-class childhood. But differential access to communal resources—the opportunity infrastructure necessary for a child to access economic mobility—nevertheless put him at a disadvantage. The United States, by design, provides lower-quality public goods in low-income neighborhoods and neighborhoods disproportionately occupied by people of color. Sidewalks, public parks, clean air, and schools with adequate supplies and staffing are all underfunded in the places where they are most needed to advance mobility.

Compare Foster's story to Richard Rothstein's account of the development of Levittown, New York.<sup>2</sup> In the late 1940s, white families could purchase homes in Levittown, Long Island, for \$8,000.<sup>3</sup> They could do so because the Federal Housing Administration (FHA) subsidized the

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1. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

2. RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017).

3. *Id.* at 70–71. Per Rothstein, that purchase price is equal to \$75,000 in 2017 dollars. *Id.* at 202.

construction of Levittown. The FHA also expressly mandated that homes in Levittown be sold and occupied only by whites.<sup>4</sup> Today those homes sell for about \$400,000, and Levittown remains disproportionately white. In fact, Levittown's population is less than one percent African-American. It is no surprise that an astronomical racial wealth gap persists and that a component of that wealth gap is a massive discrepancy in the amount of home equity held by whites versus that held by African-Americans.<sup>5</sup>

Mid-twentieth century home-ownership subsidies enabled the development of the American middle class, but only for white families, and they operated in a way that is fundamentally different from today's subsidized home-ownership programs: there were no limitations on how much equity one could accrue. Interestingly, contemporary CED policies and practices shy away from the type of wealth transfers that built Levittown and the exclusively white middle-class families that came to occupy it. Chasing available resources, largely governmental subsidies and foundation support, CED practice often imposes restrictions on individual wealth accretion. CED practitioners will lock themselves into tax-exempt structures because, whatever the limitations on these entities are, tax-exempt status unlocks grant and governmental funding not available to for-profit entities. While other subsidy programs have dwindled, federal tax expenditures for housing development survive. As a result, CED practitioners often pursue subsidized housing strategies simply because there are available subsidies. Subsidized affordable housing, including subsidized home ownership models, imposes caps on equity accretion.<sup>6</sup> These limitations on individual wealth accretion reappear in much of CED practice, which some would argue is a feature, not a bug.<sup>7</sup> Consider, for example, worker cooperatives where members cannot amass a profit by selling their stake in the entity. I worry, however, that we are providing lesser property rights to low-income people and limiting their ability to access economic opportunity and mobility.

These CED practices undoubtedly result in community resources in the form of locally owned businesses, rehabilitated housing, and efficacious social services organizations. But do they result in justice? What would justice for young Robert Joseph Pershing Foster have looked like? It would have required not just sidewalks, but roller skating. Does justice

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4. *Id.* at 70–71.

5. WILLIAM DARITY JR., DARRICK HAMILTON, MARK PAUL, ALAN AJA, ANNE PRICE, ANTONIO MOORE, & CATERINA CHIOPRIS, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Insight Ctr. for Cmty. Econ. Dev., Apr. 2018), [https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/FINAL%20COMPLETE%20REPORT\\_.pdf](https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/FINAL%20COMPLETE%20REPORT_.pdf).

6. Notably, the home ownership subsidies available to middle-class and wealthy people—for example, the mortgage interest deduction, the exclusion of imputed rent from taxable income, capital gains exclusions, and property tax deductions—are effectively cash transfers with no strings attached.

7. WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS & THE NEW SOCIAL POLICY 143 (2001).

for a low-income homeowner hoping to join the middle class manifest as a house or as home equity, available to be tapped for college tuition or to start a small business? Constrained property rights, where individual wealth accretion is limited, result in communal goods. I posit instead that the “community” in CED should refer to inputs—the communal efforts required to build opportunity infrastructure—rather than the outputs—constraints on individual economic mobility. CED’s contribution to the pursuit of justice ought to be creating new opportunity infrastructure that results in individual mobility.

In the Community and Economic Development Clinic at Yale Law School, we are building and expanding upon a practice oriented around opportunity infrastructure.<sup>8</sup> On behalf of various clients, we seek to make it easier to develop both rental housing and starter homes, subsidized and unsubsidized, in towns with lots of opportunity infrastructure. These towns use zoning and other regulations to exclude low- and moderate-income families. Our mission is to break down those barriers. We have worked with the New Haven Promise to deploy community resources to provide pure grants for college for a wide swath of students in New Haven’s public schools. We have long represented a neighborhood community development corporation that owns and manages a supermarket-anchored shopping center, then uses its cash flow to subsidize early childhood education in a high-quality Montessori preschool in a low-income neighborhood. We seek to decrease barriers to entry for low-income entrepreneurs. Our clients train would-be entrepreneurs and farmers from diverse backgrounds, develop kitchen incubators, and train family daycare providers. We work with community-based clients in an effort to ensure that landlords, homeowners associations, and housing authorities do not put home-based businesses out of business. The Clinic has advocated on behalf of low-income entrepreneurs facing zoning, licensure, and other regulatory barriers. We have worked on various projects to develop equitable access to financial products, from small business loans to DACA loans to checking accounts that meet the needs of individuals with mental illness. Across all of our work, in partnership with community-based clients, we seek to advance economic opportunity and mobility.

The need for a justice-oriented CED is greater than ever. Our urban and suburban landscape continues to be hyper-segregated. The wealthy, as a general matter, reside in segregated neighborhoods in which they are able to direct their taxes and other resources to their own segregated schools, parks, and other public resources. Separate is still not equal. This situation is a deep injustice. Our contribution, as CED scholars and practitioners, ought to be the development of an opportunity infrastructure that enables economic mobility.

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8. I was privileged to inherit a practice and docket built, over the years, by many lawyers, most notably Bob Solomon and Jay Pottenger. The docket has evolved in recent years but remains informed and inspired by everything that came before.



## Interdisciplinary Projects-Based Community Entrepreneurship Courses

*Anthony J. Luppino and Brandon Weiss*

Over the last approximately fifteen years, the University of Missouri—Kansas City (UMKC) School of Law has developed a multifaceted set of courses, including interdisciplinary courses, *pro bono* clinics, and other programs and events relating to for-profit entrepreneurship and economic development, and social and civic entrepreneurship. This presentation will describe two recent interdisciplinary additions to these offerings—the Law, Technology and Public Policy (LT&PP) course and the Entrepreneurial Urban Development (EUD) course. Both have strong elements of increased access to law and justice, with particular focus on presently disadvantaged and underrepresented individuals, groups, and communities. They significantly enhance the training of individuals to become effective community economic development and social justice advocates and facilitators. They deliver productive projects-based learning through multidisciplinary teamwork among faculty, students, and government officials and/or community activists, grounded in design thinking, and embracing the emphasis on empathy and constructing solutions responsive to the needs of various stakeholders that design thinking entails.

The LT&PP course grew out of the July 2014 Law Schools, Technology & Access to Justice Conference organized by UMKC School of Law with support from the Ewing Marion Kauffman Foundation. That event brought together champions of both law technology and access to justice from across the United States. The course concept was to build on the “legal hackathons” movement, often involving weekend events that challenge participants to create technology-assisted solutions to societal challenges, by instituting a semester-long course in which interdisciplinary teams seek to design and build problem-solving prototypes. UMKC has now offered the course eight times.

UMKC participants in the LT&PP course have come predominantly from the School of Law, the School of Management, and the School of Computing & Engineering at UMKC. Individuals from several other academic institutions (including Brooklyn Law School, Missouri Western State University, MIT Media Lab, Queen Mary University of London, and Vermont Law School) have also been involved with course design or mentoring on particular projects. Course teams have interacted with government

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officials in Kansas City, Missouri, and Kansas City, Kansas, representatives of the KC Chapter of Code for America, and leaders of several community organizations/initiatives. Examples of the course projects include creating streamlined and consumer-friendly online tools to apply for permits and licenses (more established/better resourced individuals/businesses can and do pay professionals to help them navigate through the complex web of current processes, but entrepreneurs of modest financial means struggle to do so); suggesting model policies for Smart City data collection (e.g., through sensors) and dissemination that can stimulate economic development and public safety, but must be tempered by attention to community perspectives and privacy concerns; and electronically mapping abandoned properties and developing means to predict when properties may be headed toward abandonment and to make redevelopment of such properties more accessible to developers and local tradespersons.

The new EUD course, offered for the first time in the 2017 spring semester, is one of the key components of an Urban Entrepreneurship Initiative co-organized by the UMKC Law School and the Lewis White Real Estate Center at the Bloch School of Management. The course consists of interdisciplinary teams of students, faculty, and community mentors providing analysis to local governments and nonprofits on real estate-based community development projects in the greater Kansas City area. Students receive instruction in real estate feasibility analysis, community economic development, tax incentives (federal, state, and local), principles of urban planning, public-private partnerships, zoning, and racial and environmental justice. Faculty are drawn from UMKC's Law School, School of Management, Department of Architecture, Urban Planning and Design, Latin and Latin American Studies Program, and Department of Geosciences.

In the course's first year, student teams applied their classroom learning to provide advice to a wide variety of project providers, including a city government hoping to turn an investment in a downtown healthy campus into a catalyst for broader revitalization; a community development corporation considering establishing a community land trust and worker-owned housing rehab cooperative; a nonprofit founded by a historically Black sorority converting a historic athenaeum into a community space; and a city looking to connect racially and economically segregated neighborhoods via an innovative transit corridor.

The goals of both of the above-described courses include breaking down traditional interdepartmental barriers, exposing students to how professionals across fields collaborate on real-world projects, and, ultimately, leveraging the resources of the university to effect positive change in the surrounding communities. Challenges for future iterations of these courses include further shifting institutional incentives to reward interdisciplinary collaboration, refining project-provider and student-selection procedures to better leverage resources, and maintaining engagement with projects over multiple semesters for more sustained community impact. In our presentation, we will share reflections on lessons learned and suggestions on developing these types of courses.



# Creating Sustainable Economic Development on Indian Reservations Is an “Access to Justice” Issue

*Robert J. Miller*

Very few of the 300 Indian reservations in the United States have functioning economies in which reservation residents can be employed, spend money, and find adequate housing. In contrast, almost all reservation residents have to travel to distant cities to find banks, businesses, higher education, livable wage jobs, and adequate housing.<sup>1</sup> This situation creates economic and justice-related disasters on Indian reservations. American citizens, including Indians of course, deserve some minimum level of economic prosperity. Instead, dire conditions of poverty degrade and nearly destroy the possibility of creating reservation economies and community stability. Forcing Indian communities to live in dire poverty is an issue of justice and equality. American society at large, and specifically Indian governments and communities, need to find solutions to these problems.

## I. Keeping Dollars on Reservations

Reservations rapidly lose the money that residents receive because of the absence of a variety of tribally and privately owned businesses where people can spend their money. This leads to an enormous loss of economic activity and employment that should occur in Indian country. Ideally, money should circulate five to seven times within a community, county, or state before it “leaks” away. The only solution to this problem on reservations is for tribal governments and communities to establish a significant number of privately owned businesses.

Keeping money circulating within a reservation implicates an economic principle called the “multiplier effect.” This concept defines a situation where every dollar that is spent by one person ends up as profit and salary in the hands of another person. This new person will then also spend that dollar and pass it on to another person who will also spend it, etc. In this fashion, one dollar “multiplies” throughout an economy and becomes pay, profit, and spending money for a greater number of people as long as that dollar stays within the local economy.

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1. ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 2–3, 135–37 (2012).

## II. Developing Entrepreneurial Businesses on Reservations

Governments play a crucial role in developing the private, free-market economic system. They protect the public interest, ensure fair competition, maintain law and order, and create laws and courts that help enforce contract and property rights. Governments create and enforce the rules that ensure a fair system that attracts investors to a community. The stability provided by government encourages people to work to acquire economic and property rights and to risk their investments. Tribal governments play this crucial role for reservation economies. It is important to note, however, that many tribal governments have not yet enacted the kinds of business and commercial codes that businesses and banks need before they can operate on reservations.

Tribal policymakers should also consider lobbying Congress for a stronger federal "Buy Indian" act. The 1910 Buy Indian Act, 25 U.S.C. § 47, grants the Secretary of Interior total discretion whether to spend federal funds on Indian labor and Indian-made products. In contrast, if the Secretaries of Interior and of Health and Human Services were legally required to spend a certain amount of the Bureau of Indian Affairs and Indian Health Service budgets on Indian labor and products, it would create an enormous incentive for Indian-owned businesses to provide these goods and services, and it would create more Indian-owned and reservation based businesses. Tribal governments should also enact their own "Buy Indian" acts and should purchase as many goods and services as possible from tribal, reservation-based, and Indian-owned businesses. Tribal governments can also create more Indian-owned businesses by creating an environment that assists reservation residents to start businesses. Tribal nations can work to remedy some of the reasons for the abysmal rate of private-business ownership among Indians. For example, the vast majority of privately owned businesses in the United States are started by using family savings, acquiring bank loans, or borrowing money against home equity. But most American Indians lack access to these avenues due to historic poverty and unemployment rates and rarely have home equity due to a nearly non-existent private housing market on most reservations. Consequently, seed money provided by tribal, private, state, and federal loan funds is crucial to alleviate this funding problem.

Reservations also rarely have role models of successful business owners from which others can learn, or on-reservation businesses where young people can get their first jobs and learn about work and business management. Tribal economic development departments can help address this situation by operating mentoring and training programs to develop entrepreneurs and to help them start businesses. Also, a few organizations already provide this training for individual Indians. Organizations such as the Oregon Native American Business and Entrepreneurial Network, the Four Bands Community Fund, and the Lakota Fund, train individual

Indians to learn about entrepreneurship and financial literacy, to draft business plans, to acquire financing, and to operate their business.<sup>2</sup>

In conclusion, if American Indians are going to participate fully, and equally, in the “American dream,” the United States, Indian nations, and reservation communities must do everything that they can to develop more privately owned businesses in Indian country and to create functioning economies to make Indian reservations more sustainable, healthy, and viable.

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2. *Id.* at 128–29, 151–54.



# Balancing Political Power: Community Economic Development and Institutional Design

*K. Sabeel Rahman*

Community Economic Development (CED) has been a central area of focus for practitioners, clinicians, and legal scholars, emphasizing questions of community benefits, affordable housing, access to justice, and much more. As the urban inequality crisis has continued to worsen, advocacy groups and practitioners have begun to experiment with more creative approaches to social change that lie at the intersection of traditional public-interest lawyering, social-movement organizing, and institutional design. These innovative approaches represent a potentially valuable area for practice and innovation in urban economic justice.

As scholars of law and social movements (including several on this panel) have rightly noted, an increasingly important overlap exists between strategies of legal change and grassroots organizing (e.g., Scott Cummings, *Law and Organizing*<sup>1</sup>). In the community-development space, this turn to organizing has been further nuanced by a parallel turn to governance. In cities like Detroit, Oakland, and elsewhere, grassroots advocacy groups have begun to propose novel governance arrangements as a way to increase not only the substantive economic outcomes of city development deals but also the community participation in formulating and monitoring these deals. Thus, the Partnership for Working Families, for example, has developed a community oversight board with the City of Oakland, which empowers local constituencies to help oversee, implement, and hold accountable developers and the city itself to meeting local benefits benchmarks. Similarly, Detroit recently considered and narrowly rejected a grassroots-proposed, municipal-wide community-benefits ordinance.<sup>2</sup> While community-benefits agreements have a rightly fraught history of legitimizing inequitable urban development, these experiments suggest a valuable next wave of innovation that aims to create more systematic community empowerment.

This turn to institutional design and governance represents a return in some ways to some of the more radical origins of the welfare rights

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1. SCOTT CUMMINGS & INGRID EAGLY, A CRITICAL REFLECTION ON LAW AND ORGANIZING (2001), <https://escholarship.org/uc/item/473524bg>.

2. Detroit residents approved a narrower, compromised community-benefits ordinance.

movement, the grassroots war on poverty, and the early era of community economic development. For practitioners today, this institutionalist turn could be crucial to redressing the problems of urban inequality. At a systemic level, inequitable urban development is rooted in disparities of political power—particularly between communities and developers, and between communities and city officials. These disparities in economic and political power interact and are especially stark in the context of urban planning and development decisions. Efforts like the novel approaches to community benefit agreements (CBAs) offer some valuable insights into how social movements and practitioners can develop more systemic and institutionalized forms of power that can influence central processes of urban development. These insights can be adapted to a range of community development decisions, including the problem of privatization and governance of infrastructure, and city and regional zoning and planning decisions.

# A Rural State Perspective on Transactional Skills in Legal Curricula and Access to Economic Opportunity

*Alexandra P. Everhart Sickler*

Teaching transactional skills to law students is an important component of furthering economic development and diversification in a sparsely populated, predominantly rural state like North Dakota in which energy and agriculture dominate the local economy. Rural states like North Dakota are geographically distant from larger commercial markets where financial, social, and human capital are relatively abundant. Entrepreneurs that want to reach markets beyond the state's borders face the challenge of accessing these capital sources, either because they are scarce locally or because obtaining them from larger markets is too cumbersome and expensive. These start-ups need to be able to access the knowledge and skills that they do not have in-house, including legal expertise, without wasting their limited resources. Beyond the needs of larger business entities, North Dakota's local communities also have small business owners that need legal services.

Thus, two dimensions to the need for transactional legal services exist in North Dakota. First, there is the entrepreneurship dimension, where innovation-focused businesses are entering and operating in markets for wind energy, biotechnology, unmanned aircraft systems, and precision agriculture and need legal advice. Second, there is the community economic development dimension, which speaks to the provision of legal services to small-business owners that intend to provide goods or services within a local community.<sup>1</sup>

But a lawyer shortage in North Dakota, particularly in its rural areas, is in tension with the demand for transactional legal services in the state.<sup>2</sup> While the number of attorneys has been increasing, most of them live in the

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1. See Lynnsie E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175, 179–80 (2017) for a discussion of the CED clinic versus the transactional law clinic, as opposed to the CED clinic, that practices in the fields of business law and entrepreneurship law. She posits that “students can learn corporate skills in preparation for practice while accomplishing the social justice goals aligned with the missions of clinical education.” *Id.* at 179.

2. Robin Runge & Christyne Vachon, *Planting the Seeds and Getting into the Field: The Role of Law Schools in Ensuring Access to Justice in Rural Communities*, 59 S.D. L. REV. 616, 618 (2014).

state's metropolitan areas,<sup>3</sup> and conversations with practitioners reveal that not many transactional lawyers practice in the state. A shortage of qualified local transactional lawyers can delay development as the few existing attorneys are overwhelmed with high workloads. Meanwhile, state residents and businesses using local counsel less experienced in transactional practice run the risk of entering into less advantageous transactions.

The Bakken oil development in western North Dakota highlights the need for qualified transactional lawyers. It is a tremendous strain on the rural region's ability to support business development and provide community facilities, affordable housing, and utility infrastructure. But it is also an unprecedented opportunity for the state and its residents to generate massive economic benefits. During the oil boom,<sup>4</sup> new businesses entered the North Dakota market, many existing businesses grew exponentially, and a myriad of new corporate enterprises were formed while workers connected to the oil-industry-inundated communities in western North Dakota.<sup>5</sup> Existing businesses, schools, and hospitals struggled to expand to meet demand. Industrial, commercial, and residential infrastructure, including airports, roads, refineries, pipelines, and healthcare systems needed to be built or greatly expanded. Landowners were inundated with oil and gas exploration and production leases and easements for industrial infrastructure on their agricultural land. The transactional challenge faced by such landowners, beyond the obvious economic terms, was to balance reasonable oil and gas development while protecting ongoing surface land use and the environment. At the core of all of these challenges were transactions that needed lawyers familiar with North Dakota law and culture. As a result, there is ample opportunity and great need to incorporate transactional legal skills in the law school's curriculum.

More broadly, the need for economic diversification in North Dakota has been clear since before statehood. North Dakota's economy is mostly focused on producing raw commodities that are shipped and processed outside the state. In the wake of the agricultural downturn of the 1980s, efforts to promote innovation and entrepreneurship within the state became more intentional. The University of North Dakota (UND) launched its Center for Innovation in 1984, coaches regional entrepreneurs, and promotes innovative business ventures with the state while providing experiential learning opportunities for UND's students. In 2007, North Dakota State University opened its Research & Technology Park, a business incubator, with the stated goal of creating an entrepreneurial culture that fosters innovation

3. *Id.* ("Of the 357 towns in North Dakota, the North Dakota Supreme Court reports that only eighty-five have an attorney.")

4. The North Dakota oil boom peaked in 2012 but experienced a slowdown beginning in early 2015 due to a global decline in oil prices. See Jack Nicas, *Oil Fuels Population Boom in North Dakota City*, WALL ST. J., Apr. 6, 2012.

5. *New Boom Reshapes Oil World, Rocks North Dakota* (NPR radio broadcast Sept. 25, 2011); *Oil Boom Puts Strain on North Dakota Towns* (NPR radio broadcast Dec. 2, 2011).



and encourages ingenuity. Changes to state tax law were made to encourage angel funds to invest in regional projects, most recently, precision agriculture and biotech. Current Governor Doug Burgum is a former Microsoft senior executive with extensive experience leading and advising technology start-up entities, with a stated goal of improving the entrepreneurial environment of North Dakota. Such efforts are in tandem with a larger national trend, as evidenced by recent actions of Steve Case and other large investors, to increase the availability of venture capital in rural parts of the United States, like North Dakota.<sup>6</sup>

With significant efforts currently underway by political and business leaders, along with additional in-state capital generated by the Bakken oil boom, North Dakota has a unique chance to lead this national trend while broadening its economy. Well-trained lawyers are critical to that economic diversification. Entity formation, capital financing, intellectual property rights, purchase and sale of goods and services, and risk management, specifically for start-ups, are just a handful of topics for which skilled lawyers are needed in the state.

Thus, building law students' practice awareness in commercial and transactional law is critical to promoting economic development and entrepreneurship in North Dakota as well as keeping those legal services within the state. But the challenge is figuring out how to accomplish this broadly stated goal, which involves teaching concrete skills to help companies form, operate, and protect and value their innovations, along with teaching soft skills that transactional attorneys need to effectively represent their clients. In the entrepreneurial context, the challenge of teaching law students soft skills that may not predominate in traditional legal education is magnified. These skills include, for example, making sound decisions with imperfect information, shifting from a risk management mindset to an opportunity capture mindset, and the ability to pivot in the face of changed circumstances.

Many scholars recognize that these skills are best taught through experiential learning, most often in a clinical setting. UND does not have a community economic development clinic or transactional law clinic. Instead, it tries to provide students a concrete first experience either in a skills or doctrinal course. Clearly, the skills and exercises connect to any doctrinal focus of a course, but it is equally important to contextualize those skills and exercises in the North Dakota economic landscape, so that law students understand and appreciate the value that transactional lawyers add to economic development.<sup>7</sup> The idea here is to emphasize that lawyers contribute to commercial growth and wealth building within their communities and

6. *From Bezos to Walton, Big Investors Back Fund for 'Flyover' Start-Ups*, N.Y. TIMES, Dec. 4, 2017, <https://www.nytimes.com/2017/12/04/business/dealbook/midwest-start-ups.html>.

7. See Phillips Pantin, *supra* note 1, at 193 (discussing the importance of grounding students' development of practical lawyering skills in the economic landscape).

state by having students practice skills in simulated exercises that are connected to industries currently fueling economic growth within the state.

One such industry is wind energy. North Dakota is the sixth windiest state in the country and ranks eleventh for installed wind capacity.<sup>8</sup> North Dakota's potential for economic growth is not limited to the construction of wind farms or the generation of wind power. It extends to businesses that make equipment for the industry.<sup>9</sup> Infrastructure leases with landowners, regulatory oversight issues, raising project capital, and entity formation are all legal topics relevant to successful development of the wind industry in North Dakota.

Another industry is unmanned aircraft systems (UAS). The Federal Aviation Administration has designated North Dakota as one of six federal UAS test sites tasked with determining how to safely integrate UAS into national airspace.<sup>10</sup> This selection makes North Dakota a prime location for UAS-oriented businesses to develop and test technology in any number of areas, such as precision agriculture. What is touted as America's first commercial UAS business and aviation park, Grand Sky, is located on the Grand Forks U.S. Air Force Base in eastern North Dakota. Its purpose is to allow tenants, like Northrup Grumman, to test new UAS technologies under extreme weather conditions in uncongested airspace. As the uses for UAS proliferates beyond military and agricultural applications into areas like the construction and design industries and utilities, transactional lawyers will be needed to establish the legal framework in which this infant industry operates, in areas like venture capital.

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8. North Dakota has more than 3000 megawatts of wind energy capacity installed throughout the state, consisting of more than 1500 wind turbines on wind farms across the state. It currently obtains more than twenty percent of its power from wind resources. Am. Wind Energy Ass'n, North Dakota Wind Energy, <https://www.awea.org> (last visited Jan. 1, 2018).

9. LM Wind Power in Grand Forks manufactures wind turbine blades and ships them across the country by rail.

10. See NORTH DAKOTA DEP'T OF COMMERCE, NORTHERN PLAINS UAS TEST SITE (2018), <https://www.business.nd.gov/aviation/NorthernPlainsUASTestSite>.

## Social Justice Implications for “Retail” CED

*Paul R. Tremblay*

### Introduction

Several years ago, I attended a faculty meeting where an item on our agenda called for some special treatment or consideration (I forget what it might have been) for a public interest initiative at the school. A veteran tenured colleague, a prominent scholar who published important work, questioned us about what warranted the “public interest” designation for this activist measure. He wrote law review articles that influenced public policy, he argued, so wasn’t his work just as entitled to be considered “public interest” as the initiative in question?

I knew that he simply had to be wrong (although I did not say anything at the time), but his argument has stayed with me over all of the intervening years.<sup>1</sup> His curiosity about what “counts” as public interest is not frivolous, and it resembles the question presented in this discussion about what counts as “justice” in community-based transactional work. As I seek to explain in this brief overview, *sometimes* community economic development (CED), and the related transactional practice, will serve the needs of justice, and at other times it probably does not. For those critics who worry

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1. While my colleague’s question may not represent a serious internal debate on law school campuses touting their public interest commitments, variations of that question have led to intriguing definitional uncertainties among scholars. As Susan Carle has written,

Today, people use the term “public interest” law as a gloss for a wide range of sometimes contradictory lawyering categories. Some people define “public interest” law as lawyering for the poor. Some define it as “cause” lawyering. Others think of it as lawyering specifically with a left wing or politically progressive agenda. Still others define the term as encompassing jobs in the public and nonprofit sectors.

Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *FORDHAM L. REV.* 719, 729–30 (2001); see also Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 *UCLA L. REV.* 506, 517 (2012) (“[F]orty years after the invention of public interest law, we no longer have a working definition of what exactly it is.”); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027, 2029 (2008) (“[There are no] rigorous, widely accepted criteria for determining what constitutes a ‘public interest’ legal organization . . .”).

that, for instance, transactional clinics in law schools will diminish the traditional commitments of law schools to justice-driven education,<sup>2</sup> there are encouraging responses.

I want to focus here on what I might call “retail”<sup>3</sup> CED—transactional work performed for businesses or social enterprises that need it to survive or succeed. It seems to me that two related dimensions exist on which to assess the relationship between the transactional lawyering found in CED work and notions of social justice. First is the nature of the work itself: Does representing this client achieve a recognizable social-justice aim beyond what any lawyering at all, for any client, might achieve? Second is the triage implication of the chosen work, aside from its individual quality. Given the needs of distressed and historically disadvantaged or overlooked communities, is transactional CED work the best use of the lawyer’s services? In both instances, the answer will be “It depends,” and the interesting consideration is what accounts for the difference. And, as we shall see, the two questions connect in important ways.

### I. Transactional Lawyering and Access-to-Justice Goals

Imagine that a local nonprofit law firm has an opening for a new client, and the following three prospective clients<sup>4</sup> have requested help:

Karen is a low-income, disabled victim of domestic violence whose controlling partner, Bill, through his lawyer, has filed a petition in family court for full custody of the couple’s six-year-old child. A motion for temporary custody has been scheduled for next week. Karen is 35 years old and white.

Gillian is a 25-year-old, white MBA student at a university, located in a nearby leafy suburb, which has built its reputation on fostering entrepreneurship. She has considerable educational debt. Her MBA curriculum includes encouragement for startup business development. Gillian has developed a web-based program that would facilitate sharing, Airbnb-style, of canoes, kayaks, sailboats, and motor craft. She needs help with corporate filings, trademark protection, liability concerns, and employment issues.

Soyoung lives with her family in a largely-Korean neighborhood of the local metropolitan area. Her parents are immigrants from Korea. She has started a business out of her home, catering functions with Korean cuisine.

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2. See, e.g., Amber Baylor & Daria Fisher Page, *Developing a Pedagogy of Beneficiary Accountability in the Representation of Social Justice Non-Profit Organizations*, 45 Sw. L. Rev. 825, 827 (2016) (“Notably, not all clinics representing organizational clients are engaged in social justice lawyering, particularly considering the rise of transactional clinics in recent years, many of which have eschewed a social justice mission . . .”).

3. See DAVID WAGNER, *THE QUEST FOR A RADICAL PROFESSION: SOCIAL SCIENCE CAREERS AND POLITICAL IDEOLOGY* 195–210 (1990) (reporting discouragement among radical social workers in their efforts to adopt empowerment theories at the “retail level” with individual clients).

4. For the sake of this admittedly implausible thought experiment, I assume that the nonprofit firm has adequate expertise to address any one of the three client projects.

The business could expand to a food truck, she hopes. Soyoung needs legal help with corporate organization, local permitting, liability protection, and trademark registration.

Each of these prospective clients has a significant need for legal help and cannot afford to obtain that help except through a program like this nonprofit firm. In choosing which client to accept, the firm no doubt will be concerned about the social justice implications of its selection. If it chose to offer its scarce and finite time to Karen, no observer would be surprised or criticize the agency. Indeed, one of the more prominent social policy endeavors in recent years has been the organized effort to craft systems to increase the availability of legal help to persons just like Karen. The accepted shorthand for the collective efforts is “access to justice.”<sup>5</sup>

By contrast, no one would plausibly argue that, of the three prospective clients, the agency should accept Gillian’s matter. Like Karen, Gillian has an array of legal needs, having access to a lawyer will *matter*, and she will not find a lawyer on the private market. And, if her web program succeeds, she will have contributed to the general economy, likely have added jobs and tax revenue, and satisfied a societal need. But there is no implication of *justice* in Gillian’s enterprise. Like with the public-interest definition debate referenced earlier,<sup>6</sup> and my tenured colleague’s faculty meeting comment, while it is right and fair for Gillian to have support for her entrepreneurship, the stakes for her not having a lawyer, by comparison to Karen, are simply not that significant.<sup>7</sup>

So, where does that leave Soyoung? Her legal needs resemble Gillian’s far more than they do Karen’s, and like Gillian the stakes are not nearly as dire. This simple thought experiment shows why observers question whether transactional legal services deserve to be included in the access-to-justice conversation. Should available free lawyers turn down a client like Karen in order to offer services to small businesses like Gillian’s or Soyoung’s? It may be hard to imagine why.<sup>8</sup>

Of course, the answer is considerably more complicated. While no one would argue for Gillian, some will argue for Soyoung.<sup>9</sup> For lawyers work-

5. The civil *Gideon* movement, the recent “hackathon” innovations, and similar efforts to alleviate the shortage of affordable lawyers all aim to address the question in the text. I review those trends in a recent access-to-justice article. See Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, sans Lawyers*, 31 GEO. J. LEGAL ETHICS 377 (2018).

6. See note 1 *supra*.

7. This analysis is true even if we assume, to make the story a tad more compelling, that Gillian cannot afford to use a resource like LegalZoom to achieve most of her results.

8. For an elaborate examination of how progressive lawyers have historically chosen to allocate resources for social justice purposes, see Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374 (2017).

9. See, e.g., Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL’Y 249, 259 (2004); Lynnise E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175

ing at this retail level, there are good reasons to support entrepreneurs, and especially entrepreneurs of color, working in underserved communities seeking to make businesses succeed. Aiding a client like Karen helps in a short-term (if invaluable) way, but leaves her as short of power as before, and just as vulnerable.<sup>10</sup> Aiding a client like Soyung, by contrast, collaborates with a client in ways that support her power and autonomy growth. When the relationship ends she has less need for professional help than when it began (and she might be able to afford what she needs).<sup>11</sup> Respecting the limits of lawyer capacity to effect longer-term social change at the retail level,<sup>12</sup> there are justifiable, persuasive reasons to offer those services to entrepreneurs whose missions might make a difference both to the founders themselves, and, more speculatively but if so valuably, to the neighborhoods in which they work. In this way, one can conclude that in this setting, transactional lawyering, as part of modest CED, represents a commitment to social justice. The choice to offer that service is a justified, justice-driven allocation of resources.

Before I move to the larger perspective on the lawyer's role, I need to highlight one more important consideration for the retail triage choices made by the nonprofit agency among Karen, Gillian, and Soyung. Thoughtful critics have argued, with impressive support, that for low-wealth and historically disadvantaged community members, entrepreneurship is most often a false hope.<sup>13</sup> Success is rare, and the absence of social, political, and (of course) financial capital makes the challenge all the greater.<sup>14</sup> Better, the critics argue, for poverty lawyers and progressive activists to support employment opportunities rather than startup businesses.

I know of no commentators who disagree with that discouraging empirical analysis. Let us assume it is valid. The puzzle for street-level actors

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(2017); Joseph R. Pileri, *Expanding Our Reach: Direct Client Representation vs. Policy and Advocacy Impact in a Transactional Clinic*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 325 (2017).

10. See Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J.L. & SOC. POL'Y 11 (2015).

11. See Paul R. Tremblay, *Rebellious Strains in Transactional Lawyering for Underserved Entrepreneurs and Community Groups*, 23 CLINICAL L. REV. 311 (2016).

12. See Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441.

13. Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory for Community Economic Development*, 42 HOFSTRA L. REV. 839 (2014); Louise A. Howells, *Dimension of Microenterprise: A Critical Look at Microenterprise as a Tool to Alleviate Poverty*, 9 J. AFFORDABLE HOUS. & CMTY. DEV. L. 161 (2000).

14. See Lynnis E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419 (2018).

like the lawyers here, making triage choices among the three prospective clients, is whether that empirical data ought to deprive Soyoung of the opportunity to try to succeed in this business at this time. It is hard to criticize the agency for its support of Soyoung notwithstanding the odds.

## II. Transactional Lawyering and Community-Building Goals

Let us accept for the moment the proposition that a local neighborhood nonprofit offering retail legal services to residents with pressing legal needs can justifiably offer such services to entrepreneurs of color who have a reasonable shot at establishing a successful small for-profit business. Let us accept that, using the access-to-justice metric, such a choice is plausibly defensible. We then encounter the powerful argument that asserts that we’re asking the wrong question from the beginning. Should the agency in question be operating at a retail level at all? Perhaps the agency should not only turn away Soyoung and Gillian, but Karen as well. Its mission ought to be different from individualized, bespoke legal services. It ought to be community-based and system-changing, and the triage choice from Part I is none of that.

Much of the most prominent CED literature operates at that level. From Scott Cummings’s early critiques of market-based CED<sup>15</sup> and Sameer Ashar’s advocacy for community and movement lawyering<sup>16</sup> to Michael Haber’s recent assessments of transactional lawyering,<sup>17</sup> the message is clear: this kind of work “cannot seriously challenge the hegemony of liberal capitalism.”<sup>18</sup> The emergence of demosprudence—“the study of the dynamic equilibrium of power between lawmaking and social movements”<sup>19</sup>—anchors serious rethinking of the role that lawyers play, and especially CED lawyers, in effecting social change, and advancing social justice. As Haber writes, consistent with many critical observers, “leading CED programs too often to fail to aggressively challenge the structural drivers of inequality.”<sup>20</sup>

15. See, e.g., Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399 (2001).

16. Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 *UCLA L. REV.* 1464 (2017); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *CALIF. L. REV.* 1879 (2007) [hereinafter Ashar, *Resistance Movements*].

17. Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 *FORDHAM URB. L.J.* 295 (2017).

18. Joel F. Handler, *The Presidential Address, 1992: Postmodernism, Protest, and the New Social Movements*, 26 *L. & SOC’Y REV.* 697, 719 (1992).

19. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740, 2749 (2014).

20. Haber, *supra* note 17, at 361.

The debates among the CED critics and movement lawyers are rich and provocative,<sup>21</sup> and we'd all agree—the critics are essentially right, aren't they? The work that our fictional nonprofit agency might perform for Soyoung, or for Karen, will be what Gerald López describes as essentially regnant<sup>22</sup> (although I have argued that the lawyering for Soyoung is less regnant than that for Karen<sup>23</sup>). It affects the larger community barely at all, and has questionable transformative benefit to the clients the agency chooses to serve. The puzzle, though, is what that reality means for lawyers like those offering retail representation to clients like Karen and Soyoung.

As long as lawyers continue to offer retail representation to individual clients in need, choices like that between Karen and Soyoung will persist. And while some critical scholarship implies that the street-level, single client lawyering model ought not to be an available model,<sup>24</sup> most would likely agree that at a minimum a division of labor makes sense from a policy perspective, with both retail and movement/organizing work performed by those who hope to advance social justice.<sup>25</sup> As Alizabeth Newman notes, the clients who are not yet aligned with mobilization campaigns have important legal needs that warrant attention from the legal services community.<sup>26</sup>

Once (or if) we accept the division of labor conception, and the reality of retail legal practice, then we return to the access-to-justice question, with choices like those presented in the thought experiment that introduced this essay. If we imagine a triage assessment—of the choice between Karen, who needs family law and domestic violence-related representation in court, and Soyoung, who has transactional legal needs that will help her emerging neighborhood-based business have a greater chance to succeed—applying the most helpful triage standards for allocation of scarce

21. See, e.g., Barbara Bezdek, *Digging into Democracy: Reflections on CED and Social Change Lawyering After #OWS*, 77 MD. L. REV. ENDNOTES 16 (2018) (responding to Haber, *supra* note 17).

22. GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 25 (1992).

23. See Tremblay, *supra* note 11.

24. See, e.g., Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008); Ashar, *Resistance Movements*, *supra* note 16; Ascanio Piomelli, *Sensibilities for Social Justice Lawyers*, 10 HASTINGS RACE & POVERTY L.J. 177, 190 (2013). The statement in the text overstates and oversimplifies the arguments of scholars like Ashar and Piomelli, but it captures some truth.

25. See Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) (developing a division-of-labor proposal for poverty law institutions).

26. Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 635–36 (2011); see also April Land, *"Lawyering Beyond" Without Leaving Individual Clients Behind*, 18 CLINICAL L. REV. 47, 59 (2011).



legal services,<sup>27</sup> we see that offering services to Soyoung would satisfy many of the principles involved. Applying Glenn Cohen's "rationing principles" scheme, the "best outcomes," "aggregation," and "instrumental" factors<sup>28</sup> all would support assistance to a prospective client whose long-term success would decrease needs in the future and offer some likely improvement in the lives of others beyond the client served. By contrast, aiding Gillian fares far less well in that kind of scheme.

To be sure, this work is, to use Barbara Bezdek's phrase, "small-ball."<sup>29</sup> It does little, and certainly nothing "serious," to "challenge the hegemony of liberal capitalism."<sup>30</sup> But it makes some modest progress to "reconstruct legal-political lessons of inner-city advocacy and organizing in alliance with the communities [the lawyers] serve."<sup>31</sup> And that's not a bad thing.

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27. See I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221 (2013); Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859 (2012).

28. Cohen, *supra* note 27, at 245.

29. Bezdek, *supra* note 21, at 16.

30. See note 18 *supra*.

31. Alfieri, *supra* note 8, at 1462.

