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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.¹ 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,² there are encouraging responses.

I want to focus here on what I might call “retail”³ 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 clients⁴ 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.

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."⁵

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,⁶ 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.⁷

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.⁸

Of course, the answer is considerably more complicated. While no one would argue for Gillian, some will argue for Soyoung.⁹ 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.¹⁰ Aiding a client like Soyoung, 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).¹¹ Respecting the limits of lawyer capacity to effect longer-term social change at the retail level,¹² 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 Soyoung. Thoughtful critics have argued, with impressive support, that for low-wealth and historically disadvantaged community members, entrepreneurship is most often a false hope.¹³ Success is rare, and the absence of social, political, and (of course) financial capital makes the challenge all the greater.¹⁴ 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

(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 CED¹⁵ and Sameer Ashar’s advocacy for community and movement lawyering¹⁶ to Michael Haber’s recent assessments of transactional lawyering,¹⁷ the message is clear: this kind of work “cannot seriously challenge the hegemony of liberal capitalism.”¹⁸ The emergence of demosprudence—“the study of the dynamic equilibrium of power between lawmaking and social movements”¹⁹—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.”²⁰

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,²¹ 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 regnant²² (although I have argued that the lawyering for Soyoung is less regnant than that for Karen²³). 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,²⁴ 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.²⁵ 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.²⁶

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,²⁷ 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" factors²⁸ 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."²⁹ It does little, and certainly nothing "serious," to "challenge the hegemony of liberal capitalism."³⁰ 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."³¹ And that's not a bad thing.

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.