

# IT'S ABOUT POWER, NOT POLICY: MOVEMENT LAWYERING FOR LARGE- SCALE SOCIAL CHANGE

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## ABSTRACT

*This article presents a critical reflection on the disconnect between conventional legal training and the skills needed by lawyers to support low-income communities of color, among others, in addressing U.S. systems of oppression. It is intended to assist aspiring “movement lawyers” in developing their capacity to align their strategic and tactical decision-making with the power dynamics faced by the communities they serve. It offers some analytical tools and strategic resources – including the “Social Change Power Meter” – and provides a case study of the national movement to dismantle the “school-to-prison pipeline,” in which lawyers played a critical supporting role in addressing the overuse of out-of-school suspensions, expulsions, referrals to alternative schools, school-based arrests, and other school referrals to the juvenile justice system.*

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The authors are grateful to Allie Moore for her assistance in this article; Allie always brings an attention to detail that is critical and will serve her well in her legal career.

## I. INTRODUCTION

Here is a scenario that has never happened in the history of advocacy:

Public interest lawyers walk into a room full of our country's wealthiest and most politically powerful citizens to convince them that the system of oppression they have created and/or benefitted from should be dismantled. The lawyers masterfully employ the full array of their argumentation skills, deftly summarizing the vast economic, social, cultural, policy, and moral implications of the current system. They skillfully weave in incisive and persuasive data along with an overwhelming body of research supporting their position. They make an irrefutable case for immediate and substantial reform, and the policy proposals they present are expertly crafted—each carefully designed to address longstanding systemic injustices with maximum precision and impact. The clarity and cogency of the presentation grabs the full attention of every person in the room. Their case made, the lawyers make a rousing appeal to our shared humanity and their audience's enlightened self-interest, and conclude with a call to action on behalf of those who are needlessly suffering as a result of the system of oppression. For several seconds after they finish, the crowd is silent, each person seemingly unable to breathe. Tears can even be spotted rolling down the cheeks of some members of their audience. Then all at once, the group of billionaires and political power players rise as one and exclaim, "YES! We have seen the error of our ways. The fog of ignorance has been lifted from our eyes and we now see the need to eliminate the system that has enriched or empowered us beyond measure. Let the people be liberated, and may we all bask in the glory of a just and equitable society!"

We, like many aspiring progressive lawyers, left law school deeply passionate about addressing large systemic injustices – such as mass incarceration, inequitable educational opportunities, and the prevalence of poverty wages – that continually reproduced the oppression, subordination, and disempowerment of low-income communities of color, in particular. We were deeply influenced by Gerald López's brilliant and seminal book, *Rebellious Lawyering*,<sup>1</sup> and its progeny,<sup>2</sup> and were com-

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<sup>1</sup> GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

<sup>2</sup> Among the many articles that have influenced us and guided us over the years, and that we would recommend to others, are the following: Angelo Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363 (1993); Gabriel Arkles, Pooja Gehi, Elana Redfield, *The Role of Lawyers in Trans Liberation: Building A Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579 (2010); Scott L. Cummings & Ingrid V. Early, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Charles Elsesser, *Community Lawyering: The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013); Jennifer Gordon, *We Make the Road by*

mitted to multi-faceted, community-based approaches to lawyering. We firmly believed that once policymakers and the broader public were made aware of the devastating impact of these policies and practices on the many communities we were working with around the country, and heard our eminently reasonable solutions to the problems, they would be compelled to act. We simply assumed that if we made good use of our legal training and if our arguments, litigation strategies, and policy proposals were better than those of the police departments, school districts, and corporations on the other side of the table, then these systems of oppression would become unsustainable. The best ideas would inevitably win out and justice would naturally prevail.

It didn't. Our original enthusiasm for creating large-scale social change was matched only by our ignorance of what it would take for the communities we served to achieve it. We quickly came to the sobering conclusion that it did not matter if we were "right," meaning that our positions were more grounded in basic notions of justice and morality, research, our foundational constitutional principles, common sense, and any reasonable understanding of what would be most pragmatic for society overall. We soon learned that there are thousands of progressive lawyers all around the country that are regularly "right" and yet still consistently find themselves on the losing end of important cases and public policy debates. We also discovered that even while some remarkable "community lawyers" or "rebellious lawyers" were dramatically expanding the advocacy capacity of low-income communities and making significant gains across the country, many of the overall systemic problems were worsening.<sup>3</sup>

What we failed to recognize was just how much some relatively small groups of people benefit from the oppression and exploitation of low-income communities of color and other similarly situated communities, and how invested these oppressors are in maintaining those systems. We learned these lessons the hard way; by coming face-to-face with the beneficiaries of structural racism and structural poverty

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*Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Penda Hair, *Louder than Words: Lawyers, Communities, and the Struggle for Justice*, ROCKEFELLER FOUND. (March 2001), <http://www.racialequitytools.org/resourcefiles/hair.pdf>; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006); William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J.L. & POL'Y 101 (2006); Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

<sup>3</sup> For example, the U.S. incarceration rate has skyrocketed over the past few decades, climate change is becoming increasingly severe, income inequality continues to expand as wages stagnate, and the privatization of public schools has been devastating for low-income communities of color across the country.

and realizing that every advocacy strategy we had learned in law school was virtually worthless in shifting their understanding or behavior. Sure, we are able to win largely inconsequential shifts in policy or symbolic victories. But to meaningfully alter the conditions on the ground, and to address the root causes of community oppression, we soon learned that we would have to reconceptualize our practice and dramatically expand our own strategic capacity.

This reconceptualization started by examining our own theory of social change. As lawyers, we had been trained to think narrowly in terms of policy, and how our legal skills could be used to create the just policies that we believed would inexorably produce a just society. Fortunately, our practice allowed us to work with, and learn from, many remarkable community organizers and grassroots leaders from across the country. Through those experiences we discovered that the organizers had an entirely different understanding of the challenges their communities faced and how to eliminate these challenges.

These organizers and grassroots leaders do not think in terms of policy: They think in terms of power. Power, in this context, means the ability to shape the world. For these organizers and leaders, the primary goal is not to change laws or policies because that represents, at best, a means to an end. Instead, they seek to change the severely disproportionate allocations of power that create and reinforce the systems of oppression that produce unjust laws and policies. They have learned through decades of harsh lessons that even the most progressive policies are little more than words on a page to their communities if the underlying power dynamics are not altered. Thus, these organizers and grassroots leaders resist and disrupt the uses of power that have caused mass suffering for their families, friends, and neighbors, while simultaneously building their community power so that they are better able to exercise self-determination and ensure that all public policies reflect their particular needs and concerns.

These organizers and leaders study the mechanisms of power. Their strategies and tactics are focused on building power. They consciously develop relationships to support power-building. Their proposed reforms are designed to shift the balance of power. This is the approach that guides their work, yet it is an approach that is foreign to most lawyers, including many of those who seek to use their training to join these organizers and leaders in their efforts.

This gap in understanding is of particular importance now, as numerous dynamic social movements and grassroots-led campaigns flourish across the U.S. and produce transformative results. Yet all of these efforts desperately need more resources to realize their enormous potential, and one of the resources they need most is lawyers

with the skills to support meaningful grassroots power-building. This article is intended to assist aspiring “movement lawyers” in being able to meet these on-the-ground needs so that more low-income communities of color and other oppressed communities are able to advance their interests. Thus, it includes some analytical tools and strategic resources – including the “Social Change Power Meter” – that we have designed to equip such lawyers with the skills they need to support the creation of sustainable, large-scale efforts that can more effectively address the root causes of systemic injustice.

Because despite what seem like long odds, oppressed communities can win. As history has shown us time and time again, David can beat Goliath. However, doing so requires that the affected community marshals more power than those who are invested in preserving the status quo. Lawyers can be critical allies in this process, as has been demonstrated recently in the national movement to dismantle the “school-to-prison pipeline” (infra Section IV). Nevertheless, doing so at the scale necessary to effectively support the liberation of oppressed communities will require far more members of our profession to (1) liberate themselves from the constraints imposed by conventional legal training and (2) embrace grassroots power-building as a core function of their practice.

## II. THE REALITY OF SYSTEMIC OPPRESSION

What Professor López demonstrated in *Rebellious Lawyering* 25 years ago is still true today: There is a massive disconnect between the conditions that are causing mass suffering within low-income communities of color and the skillset taught within virtually every law school.<sup>4</sup> There are still distressingly few lawyers who have been prepared to make meaningful contributions to addressing deeply-entrenched systemic injustice within the education, criminal justice, juvenile justice, healthcare, public transportation, voting rights, economic, and political systems, among other areas.<sup>5</sup>

For example, consider the system of mass incarceration in the U.S. and its evolution since the 1980s:

[In 1982] we already had a massive (and expanding) justice system, with perhaps the largest police force and the largest incarcerated population in the world. Indeed, our incarcerated population then – 621,885 – would still rank as third-highest in the world today, behind only China and Russia. If we adjust for inflation, in 1982 the

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<sup>4</sup> LÓPEZ, *supra* note 1, at 1-10.

<sup>5</sup> This is based on a non-scientific analysis, conducted over the past 10+ years, of hundreds of interviews and conversations with progressive lawyers and law students interested in pursuing this type of practice.

U.S. totaled \$90 billion in justice spending (including police, corrections, judicial/legal, and immigration enforcement spending). Nevertheless, we continued to aggressively expand both the size and role of our justice system, particularly as a result of the escalation of the “War on Drugs” and the increased use of the “tough on crime” approach. Thus, by 2012, total justice spending had increased by 229% to nearly \$297 billion. In other words, we spent over \$206 billion more in 2012 than we did in 1982.

Even more staggering is the cumulative impact of those shifts in resources. Over the 30-year period from 1983 to 2012, we spent \$3.4 trillion more on the justice system than we would have if it had merely stayed the same size as it was in 1982.

This “surplus justice spending” . . . turned our already-massive justice system into what we have today. As a result, by 2013, our incarcerated population had more than tripled to 2,227,700, which is by far the largest in the world. If we take into account all of the adults and youth who are behind bars, being otherwise detained, or are within the probation and parole systems, there were nearly eight million individuals within our justice system in 2013.<sup>6</sup>

Even if lawyers were able to provide expert representation for every criminal defendant, create the best litigation strategy for the greatest impact on law and policy, and have the most skilled advocates and lobbyists arguing for reform, our profession would still barely be able to move the needle on the incarceration rate and justice spending in this country. Why? To begin with, every state has hundreds (and perhaps thousands) of laws and policies that have been created over the last 30+ years and actively contribute to this system.<sup>7</sup> Additionally, outside of formal policy, the culture and day-to-day practices that have developed within many law enforcement agencies pose a major barrier to typical reform efforts.<sup>8</sup> Moreover, after decades of being inundated with “law-and-order” messages through the news, popular TV shows and movies, and political rhetoric, much of the public has

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<sup>6</sup> Communities United, Make the Road New York, Padres & Jóvenes Unidos, *The \$3.4 Trillion Mistake: The Cost of Mass Incarceration and Over-Criminalization, and How Justice Reinvestment Can Build a Better Future for All* (Oct. 2016).

<sup>7</sup> See generally Marc Mauer, RACE TO INCARCERATE (Mar. 2006); Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, THE SENTENCING PROJECT (Jul. 2009), [http://sentencingproject.org/doc/publications/publications/inc\\_NoExitSept2009.pdf](http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf); *Too Many Laws, Too Many Prisoners*, THE ECONOMIST, (Jul. 2010), available at <http://www.economist.com/node/16636027>; Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POLICY INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/overtime.html>.

<sup>8</sup> See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 59-96 (2010) (discussing the multiple ways in which the police, parole, and prosecutor function to marginalize people of color and “criminals”).

been conditioned to respond favorably to “tough-on-crime” approaches.<sup>9</sup>

However, these are minor challenges compared to the vast and formidable power structure that supports the system of mass incarceration. There are more than two million police officers, corrections officers, prosecutors, and other justice system employees whose continued employment is at least somewhat contingent upon preserving the current system.<sup>10</sup> Additionally, many elected officials owe much of their political success to the “tough-on-crime” platforms they adopted.<sup>11</sup> In short, there are numerous individuals, many of whom have significant public influence, who will proudly defend mass incarceration. Nevertheless, these individuals are not the primary beneficiaries of this system.

Like all large systems of oppression, mass incarceration primarily serves the long-term interests of the wealthiest and most politically powerful.<sup>12</sup> These largely hidden beneficiaries reap many benefits, including:

- The justice system currently serves to disproportionately protect their property and interests.<sup>13</sup>
- Mass incarceration has severely disrupted and destabilized communities of color, which limits the social, economic, and political advancement of these communities and reinforces their subordination vis-à-vis wealthier and more politically powerful communities.<sup>14</sup>

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<sup>9</sup> See Katherine Beckett & Theodore Sasson, *The Rise of the Modern Tough on Crime Movement*, in *Defending Justice*, (2005), <http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf> (discussing how politicians and news outlets created the tough-on-crime view).

<sup>10</sup> Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2012 – Preliminary*, BUREAU OF JUSTICE STATISTICS (Feb. 26, 2015), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239>.

<sup>11</sup> Beckett & Sasson, *supra* note 9; see also Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough On Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 *Berkeley J. Afr.-Am. L. & Pol’y*, 14-20 (2013).

<sup>12</sup> *Lessons in Racial Justice and Movement Building - Dismantling the School-to-Prison Pipeline in Colorado and Nationally*, PADRES Y JÓVENES UNIDOS & ADVANCEMENT PROJECT, 38-39 (2014), <http://padresunidos.org/reports/lessons-racial-justice-and-movement-building>.

<sup>13</sup> See, e.g., William Quigley, *Racism: The Crime in Criminal Justice*, 13 *LOY. J. PUB. INT. L.* 417, 424 (2012) (citing Dylan Rodriguez, *(Non)Scenes of Captivity: The Common Sense of Punishment and Death*, 96 *RADICAL HIST. REV.* 9, 26-27 (Fall 2006), available at [http://www.ethnicstudies.ucr.edu/publications\\_media/rodriguez/NonScenes\\_of\\_Captivity.pdf](http://www.ethnicstudies.ucr.edu/publications_media/rodriguez/NonScenes_of_Captivity.pdf)); Eve Golberg & Linda Evans, *The Prison Industrial Complex and the Global Economy*, CENTRE FOR RESEARCH ON GLOBALIZATION (Oct. 18, 2001), <http://globalresearch.ca/articles/EVA110A.html>; LOIC WAQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY*, xiv (2009).

<sup>14</sup> ALEXANDER, *supra* note 8, at 92-4 (discussing the impact of mass incarceration on Blacks’ ability to vote, serve on juries, and engage in our political process); see also

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- The over-policing and over-criminalization of communities, and particularly communities of color, promotes social control and, from the perspective of the existing power structure, reduces the threat of political dissent and collective action within subordinated communities.<sup>15</sup>
- The prison industrial complex has produced vast profit-making opportunities for those with capital to invest, most notably – but certainly not exclusively – within private, for-profit prisons.<sup>16</sup>
- The over-criminalization of youth and adults ensures the continued availability of an abundant low-wage labor force, a prerequisite for maximizing profits within our economic system.<sup>17</sup>
- The mass incarceration system has fomented race- and class-based tension within and across communities, which impedes the building of interracial and inter-class unity that could begin to address the structural barriers to racial, economic, and social justice.<sup>18</sup>

In these ways, mass incarceration is strikingly similar to slavery and Jim Crow segregation in the various benefits that accrue to the

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Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015).

<sup>15</sup> ALEXANDER, *supra* note 8, at 59-139; Ian Haney López, *Post Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1032 (2010).

<sup>16</sup> *Banking on Bondage: Private Prisons and Mass Incarceration*, ACLU, 10-17 (Nov. 2011), [https://www.aclu.org/sites/default/files/field\\_document/bankingonbondage\\_20111102.pdf](https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf); Alex Friedmann, *The Societal Impact of the Prison Industrial Complex, or Incarceration for Fun and Profit—Mostly Profit*, PRISON LEGAL NEWS (Jan. 15, 2012), <https://www.prisonlegalnews.org/news/2012/jan/15/the-societal-impact-of-the-prison-industrial-complex-or-incarceration-for-fun-and-profit-mostly-profit/>; *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, JUSTICE POLICY INSTITUTE (Jun. 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf).

<sup>17</sup> Loic Wacquant, *The Wedding of Workfare and Prisonfare Revisited*, 16 J. Urban Poverty, 206-7 (2012) (noting that “[t]he resurging prison has come to serve three missions that have little to do with crime control: to bend the fractions of the postindustrial working class to precarious wage work; to warehouse their most disruptive or superfluous elements; and to patrol the boundaries of the deserving citizenry while reasserting the authority of the state in the restricted domain it now assigns itself.”)

<sup>18</sup> See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1299 (2004). Additionally, as many Americans believe the criminal justice system is fair and race-neutral, higher rates of incarceration among black men solidify perceptions of black criminality, further widening the gap between communities of color and white Americans. Haney López, *supra* note 15, at 1066-1067 (discussing Lawrence D. Bobo and Devon Johnson’s study polling Americans on their views).

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corporate and political “elite.”<sup>19</sup> While these individuals may permit marginal adjustments to this system, they will defend the overall core structure with supreme vigor and often overwhelming resources.<sup>20</sup> Thus, a relatively small number of people are able to exercise vastly outsized influence over a system that has been devastating to millions of U.S. residents, and particularly to low-income communities of color that are substantially more affected by over-policing and over-criminalization.

The analysis outlined above is not unique to mass incarceration. It is largely the same for each of the large systems of oppression that affect low-income communities of color across the country. Yet lawyers are not typically prepared to address challenges of this scale. Within this context, our standard legal strategies represent little more than a flea bite to such elephantine systems of oppression. So, in the face of such formidable opposition, how should progressive lawyers structure their practice?

### III. SHIFTING POWER DYNAMICS

There are a number of ways in which our progressive legal community must improve its collective strategic capacity and understanding of what it takes to prevail against the high-powered beneficiaries of systemic injustice. First, we must accept that, for the reasons discussed above, we cannot do it alone. The work of lawyers in our sector can be dynamic, creative, and inspiring, yet if the goal is to address large systems of oppression, it is largely futile if done in a silo, disconnected from other like-minded individuals and organizations. The only viable path to substantially raising the efficacy of our legal work in this context is to create greater linkages between it and broader, more comprehensive strategies, such as those involving organizing, strategic communications, and grassroots-led policy advocacy at the local, regional, and national levels.

Second, many of us need to develop a more sophisticated understanding of the power landscape around particular issues within each of our communities. There are various forms of power analysis tools that are critical resources for many successful community organizers and grassroots leaders but are rarely used by lawyers.<sup>21</sup> We strongly

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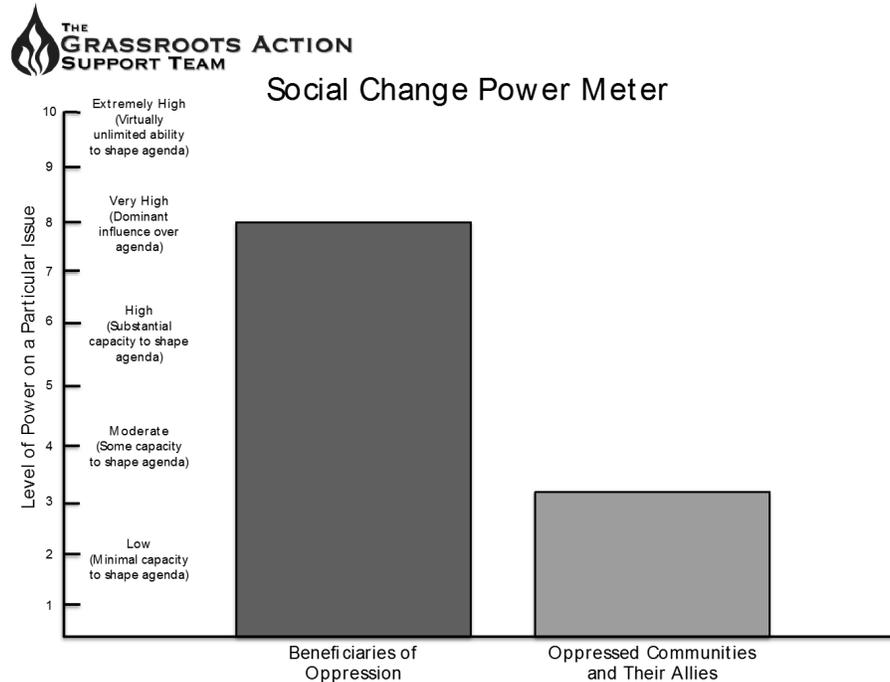
<sup>19</sup> *Lessons in Racial Justice*, *supra* note 12; Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703 (2000); Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839 (2002).

<sup>20</sup> For example, consider the resources that are expended annually to continue expanding the criminal justice system. *See, e.g., How are ALEC Corporations Interfering With Our Criminal Justice System?*, CENTER FOR MEDIA AND DEMOCRACY [http://alecexposed.org/w/images/e/e5/ALEC\\_on\\_Guns%2C\\_Crime%2C\\_and\\_Prisons.pdf](http://alecexposed.org/w/images/e/e5/ALEC_on_Guns%2C_Crime%2C_and_Prisons.pdf).

<sup>21</sup> *See, e.g.,* PowerPoint, STRATEGIC CONCEPTS IN ORGANIZING & POLICY EDUCATION

encourage lawyers to become fluent in using such tools, as they can be invaluable for sharpening strategic and tactical decision-making.

Finally, more lawyers in our sector need to develop a deeper understanding of the sources of our opponents' power, how that compares to the power within the communities we serve, and what can be done by communities (and the lawyers that support them) to destabilize and ultimately reshape those dynamics. One tool we have developed to assist in cultivating this understanding within advocacy efforts is called the "Social Change Power Meter." It starts with the assumption that large-scale, systemic injustice is the result of power imbalances, meaning the beneficiaries of the system have greater power than those that are oppressed by it. Thus, at the beginning of any advocacy effort, the Social Change Power Meter typically resembles the diagram below:



The first step in using the Social Change Power Meter is to deconstruct those power imbalances. Most power in this context derives from four broad areas of influence: political, communications/media, grassroots support, and legal. Thus, we work with communities to answer the following questions with respect to the particular issue they

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(SCOPE), available at <https://network.progressivetech.org/system/files/SCOPEpresentationPA.pdf> (last visited March 28, 2016).

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are seeking to address, first for our opponents and then for the communities themselves:

***Political***

- Do they/we have disproportionate control or influence over the policymaking process?
- How strong is their/our support from policymakers on this issue?
- Do they/we have significant relationships with key stakeholders on this issue?
- Do they/we have disproportionate influence over the process of electing or choosing policymakers?
- Are there broader political conditions that indirectly favor their/our position on this issue?

***Communications/Media***

- How much influence or control do they/we have over the popular narrative on this issue?
- How well are their/our messages related to this issue conveyed by TV, radio, print, and online news media?
- How effectively do they/we use social media to spread their/our messages on this issue?
- Have their/our messages on this issue penetrated other forms of media, such as popular TV shows or movies?
- Do they/we have influential spokespeople on this issue?

***Grassroots Support***

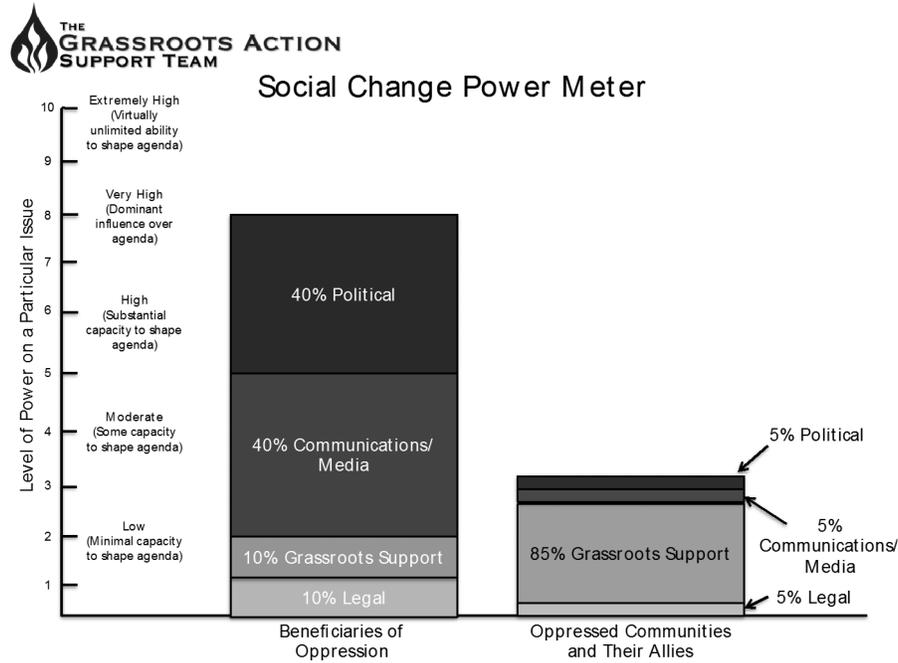
- How much support do they/we have from members of the community (individuals and organizations) on this issue?
- How active are their/our supporters in the political process surrounding this issue?
- How active are their/our supporters in shaping the popular narrative on this issue?
- How influential are their/our supporters with other key stakeholders?

***Legal***

- How much influence or control do they/we have over the courts and the justice system?
- How much would existing law favor their/our position on any legal actions related to this issue?
- Are there any other factors that would make them/us more likely to win, and benefit from, any legal actions on this issue?

In answering these questions, we want to determine how much

power our opponents have in each category relative to the communities we serve. We also estimate how much of both our opponents' and the communities' power on this issue emanates from each of the four categories. For example, a completed Social Change Power Meter might look like this:



In this example, the opponents' power derives primarily from its advantages in political and communications/media influence, while the only area where the communities have an advantage is in grassroots support, which is the source of most of their power.

Once there is a solid collective understanding of community power compared to that of their opponents, the analysis then moves to deciding how we can collectively deploy our resources to shift these relationships to build the power of the communities we serve and reduce oppositional power (thus getting closer to a proportionate allocation of power for this particular issue).

The goal for lawyers working in solidarity with oppressed communities should be for each of the strategies and tactics we employ to result in those communities acquiring more political, communications/media, grassroots, or legal influence relative to their opponents. At the same time, our sector should strive to build the capacity of those communities so that they are able to assume increasingly more re-

sponsibility for these power-building activities.<sup>22</sup> Note that while there are benefits to having multiple organizations working on parallel tracks in pursuit of the same goal, such methods will be most effective if they emanate from a collaboratively developed strategy.

Of course, the massive advantages in resources enjoyed by the beneficiaries of oppressive systems will not be eliminated in the short term. Their superior wealth and access to policymakers, media, and the courts ensures that marginalized communities will not be able to enjoy proportionate influence in those spaces within the near future. Well-designed strategies and tactics can close that gap, but the elimination of it will first require the development of a far more inclusive and equitable society. Thus, in order for the communities we serve to amass enough power to prevail, they cannot simply play the same game as their opponents. They must maximize their one clear comparative advantage: developing grassroots support. In other words, for progressive lawyers seeking to maximize their impact, focusing on building grassroots support is not just desirable; it is *essential*.

Ultimately, and at the risk of minimizing the immense courage, dedication, and sacrifice at the core of large advocacy campaigns and social movements, the strategic process described above can be reduced to a simple math problem. If  $A$  (Community Power)  $<$   $B$  (Their Opponents' Power), the communities we serve will continue to lose. If  $A > B$ , then those communities will win. It is that simple.

Fortunately, what is obvious to grassroots organizers and leaders – but typically not to lawyers – is that there are massive, largely untapped sources of grassroots power all across the country in the form of politically marginalized communities (typically as a result of decades or even generations of structural disempowerment, structural racism, and structural poverty).<sup>23</sup> Thus, effectively engaging these communities is the key to large-scale social change. This mobilization can be done locally, regionally, or nationally, but to address large systems of oppression, it represents the only way to get from this:

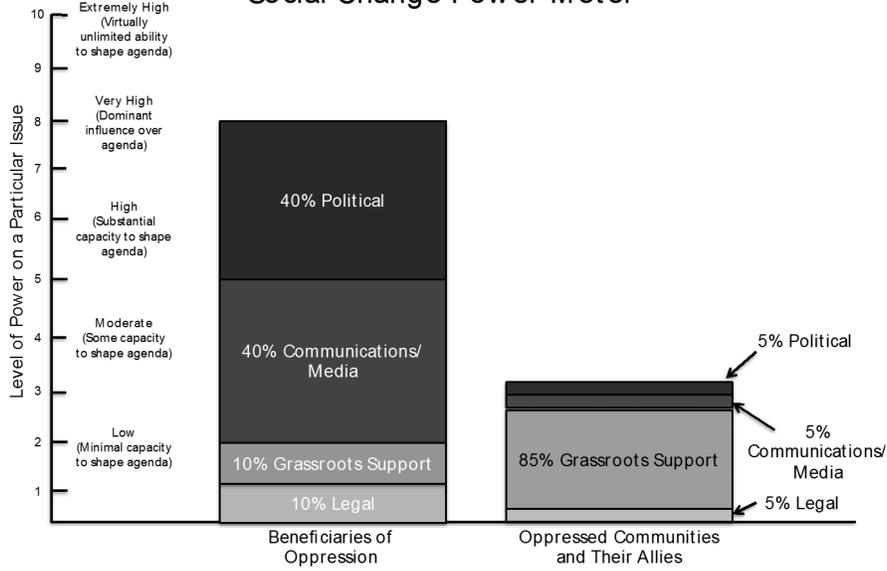
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<sup>22</sup> For a previous discussion of grassroots capacity-building, *see, e.g.*, Jim Freeman, *Supporting Social Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191, 195-97 (Summer 2015).

<sup>23</sup> *See, e.g.*, White, *supra* note 2 (discussing Steven Lukes' three dimensions of power).



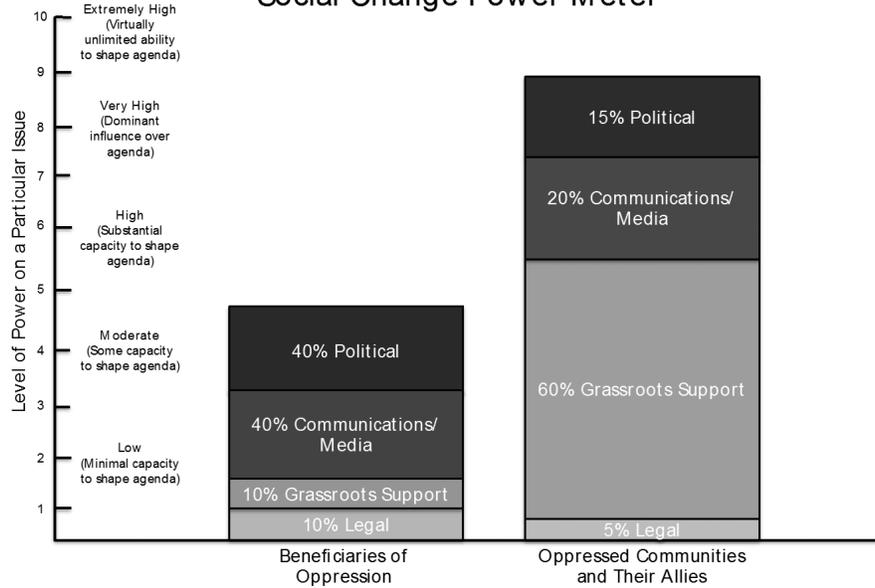
Social Change Power Meter



To this:



Social Change Power Meter



#### IV. PUTTING GRASSROOTS POWER-BUILDING INTO PRACTICE: THE DISMANTLING OF THE SCHOOL-TO-PRISON PIPELINE

An example of how these techniques can break down large systems of oppression is found within the issue of school discipline and the school-to-prison pipeline. There is now widespread recognition that the overuse of out-of-school suspensions, expulsions, referrals to alternative schools, school-based arrests, and other school referrals to the juvenile justice system have had a devastating impact on youth, their families, schools, and entire communities.<sup>24</sup> Yet consider the state of this field just ten years ago.

By 2006, school disciplinary practices were still becoming increasingly harsh, and the trend showed no signs of abating.<sup>25</sup> The same “tough-on-crime” rhetoric and policy that were driving mass incarceration had fully infiltrated schools across the country, particularly within communities of color.<sup>26</sup> What little news coverage there was on the issue strongly favored the “zero-tolerance” approach.<sup>27</sup> Within the public dialogue, there was virtually unanimous support for disciplinary practices that pushed students as young as five years old out of school at an alarming rate.<sup>28</sup> The lone dissenters – mostly from within the

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<sup>24</sup> See, e.g., U.S. DEP’T. OF EDUC., *RETHINKING DISCIPLINE* (April 21, 2016), <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html>; U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, *GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE* (Jan. 2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS AND U.S. DEP’T. OF JUSTICE: CIVIL RIGHTS DIV. JOINT DEAR COLLEAGUE LETTER (Jan. 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>; U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, ATTORNEY GENERAL HOLDER, SECRETARY DUNCAN ANNOUNCE EFFORT TO RESPOND TO SCHOOL-TO-PRISON PIPELINE BY SUPPORTING GOOD DISCIPLINE PRACTICES (Jul. 2011), <http://www.justice.gov/opa/pr/2011/July/11-ag-951.html>; *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, COUNCIL OF STATE GOV’T JUSTICE CENTER (2014), <https://csgjusticecenter.org/youth/school-discipline-consensus-report/>.

<sup>25</sup> See, e.g., *Test, Punish and Pushout: How Zero Tolerance and High-Stakes Testing Funnel Youth into the School-to-Prison Pipeline*, ADVANCEMENT PROJECT 13-24 (Mar. 2010), <http://www.advancementproject.org/resources/entry/test-punish-and-push-out-how-zero-tolerance-and-high-stakes-testing-funnel> (describing the trends continuing to worsen even after 2006); *Education on Lockdown: The Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT (Mar. 2005), <http://www.advancementproject.org/resources/entry/education-on-lockdown-the-schoolhouse-to-jailhouse-track>; *Arresting Development: Addressing the School Discipline Crisis in Florida*, FLORIDA STATE CONFERENCE NAACP, ADVANCEMENT PROJECT, AND NAACP LEGAL DEFENSE AND EDUC. FUND, INC. (Spring 2006), <http://www.advancementproject.org/resources/entry/arresting-development-addressing-the-school-discipline-crisis-in-florida>.

<sup>26</sup> *Test, Punish and Pushout*, *id.* at 9-10; *Lessons in Racial Justice*, *supra* note 12, at 9-10.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> See, e.g., *Arresting Development*, *supra* note 25 (discussing the arrest of five-year-old Ja’eisha Scott in Florida, which prompted a series of public hearings on school discipline in

Black and Latino communities most affected by these policies and practices – were isolated and largely ignored. In short, there seemed to be little hope of addressing the harm and suffering caused by the school-to-prison pipeline.<sup>29</sup>

Now, a decade later, the tide has turned, and virtually all of the momentum in this field is directed at eliminating the unnecessary exclusion, pushout, and criminalization of K-12 students. School discipline reform has become a popular bipartisan issue with support across the ideological spectrum, including from civil rights groups, teachers' unions, law enforcement groups, and right-wing think tanks and political leaders.<sup>30</sup> The school-to-prison pipeline has become a frequent topic in the media, with the vast majority of coverage favoring progressive school discipline reform.<sup>31</sup> There are now hundreds of organizations actively addressing these issues across the U.S.<sup>32</sup> Additionally, major reform efforts are underway all across the country – at the local, state, and federal levels – to replace the harsh disciplinary practices of the zero-tolerance era with developmentally appropriate and racially equitable techniques that better promote the creation of safe, healthy, and productive schools.<sup>33</sup> Moreover, the U.S. Department of Justice, U.S. Department of Education, and Council of State Governments have all devoted substantial resources to addressing

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the state documenting districts' support for harsh discipline policies).

<sup>29</sup> To put it another way, the Social Change Power Meter for the beneficiaries of the school-to-prison pipeline was probably at a 9, while for the communities being affected by it, it was probably no higher than a 1 or 2.

<sup>30</sup> See, e.g., *Restorative Practices: Fostering Healthy Relationships & Promoting Positive Discipline in Schools: A Guide for Educators*, OPPORTUNITY TO LEARN CAMPAIGN, ADVANCEMENT PROJECT, AMERICAN FEDERATION OF TEACHERS, & NAT'L EDUC. ASSOC. (Mar. 2014), <http://schottfoundation.org/sites/default/files/restorative-practices-guide.pdf>; Press Release from Fight Crime Invest in Kids California, "California Law Enforcement Leaders Support Effective School Discipline Approach to Cut Suspensions and Reduce Future Crime," (Sept. 11, 2012), <http://www.fightcrime.org/wp-content/uploads/FCIK-SD-Report-Release-091112.pdf>; Editorial, *Principal's Office or Courtroom? Texas School Discipline Reform Makes Sense*, DALLAS MORNING NEWS, (Apr. 14, 2013) (quoting Grover Norquist); Stephen Laudone, *One Nation: Students Turned Into Criminals*, THE DAILY SIGNAL (Apr. 29, 2010).

<sup>31</sup> *Lessons in Racial Justice*, *supra* note 12, at 42.

<sup>32</sup> For example, within just one coalition, the Dignity in Schools Campaign, there are over 100 member organizations. See *List of Members*, DIGNITY IN SCHOOLS CAMPAIGN, (last visited March 30, 2016), <http://www.dignityinschools.org/about-us/members>.

<sup>33</sup> Some examples of organizations that have played a leading role in advancing school-to-prison pipeline reforms at the local and state level are Padres & Jóvenes Unidos (Denver, CO), Voices of Youth in Chicago Education (VOYCE) (Chicago, IL), and the Labor/Community Strategy Center (Los Angeles, CA). At the federal level, both the U.S. Department of Education and the U.S. Department of Justice have been actively engaged in addressing these issues through the dissemination of guidance and resources, and through their enforcement authority. See *supra* note 24.

these issues.<sup>34</sup> After almost entirely ignoring these issues in the past, Congress included numerous relevant and meaningful provisions in the Every Student Succeeds Act (ESSA).<sup>35</sup> School discipline has even become a presidential campaign issue—Hillary Clinton announced in February 2016 a \$2 billion proposal to address the school-to-prison pipeline.<sup>36</sup>

The most important change, however, has been the dramatic improvement in how youth, and especially youth of color, are treated in schools across the country. Indeed, it is no exaggeration to say that hundreds of thousands, and probably millions, of people have benefited directly from this shift, not only students and their families, but also educators and police officers as well.<sup>37</sup> Indeed, by keeping more students in school, off of the streets, and out of the justice system, all U.S. residents have benefitted indirectly from this massive shift in disciplinary practices.<sup>38</sup>

We are proud to have been able to contribute, along with many other lawyers, to this dynamic and transformative effort to dismantle the school-to-prison pipeline. Yet this striking change did not occur as

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<sup>34</sup> *Id.*

<sup>35</sup> *School Discipline Reform, School Climate, and Equity Provisions in the Every Student Succeeds Act*, DIGNITY IN SCHOOLS CAMPAIGN AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (Mar. 9, 2016), <http://www.dignityinschools.org/sites/default/files/3-9%20School%20Climate%20and%20Equity%20Provisions%20in%20ESSA.pdf>.

<sup>36</sup> Sam Frizell, *Clinton Announces Plan to Address 'School-to-Prison Pipeline,'* TIME (Feb. 16, 2016), <http://time.com/4226205/clinton-school-to-prison-pipeline/>

<sup>37</sup> For a discussion on how educators and law enforcement benefit from school discipline reform, see *Handcuffs on Success: The Extreme School Discipline Crisis in Mississippi Public Schools*, ADVANCEMENT PROJECT, ACLU OF MISSISSIPPI, MISSISSIPPI STATE CONFERENCE OF THE NAACP, AND MISSISSIPPI COALITION FOR THE PREVENTION OF SCHOOLHOUSE TO JAILHOUSE (Jan. 2013), <http://www.advancementproject.org/resources/entry/handcuffs-on-success>.

<sup>38</sup> For example, a study of more than one million students found that students who were suspended or expelled were six times more likely to repeat a grade, five times more likely to drop out, and nearly three times more likely to be in contact with the juvenile justice system the next year. *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, COUNCIL OF STATE GOV'T JUSTICE CENTER & THE PUB. POLICY RESEARCH INST, TEX. A&M UNIV. (July 2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf). Another study found that being arrested in school doubles the chances of dropping out, and a first-time court appearance quadruples the chances of dropping out. Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUSTICE QUARTERLY No. 4, (Dec. 2006). Reducing student exclusion creates healthier, safer communities with lower crime rates. See, e.g., *Fight Crime Invest in Kids California*, *supra* note 30; *Health Impact Assessment of School Discipline Policies*, HUMAN IMPACT PARTNERS (May 2012), <http://www.cadre-la.org/core/wp-content/uploads/2013/07/HIA-Summary.English.pdf>. By making students less likely to succeed academically and more likely to become incarcerated, these practices carry steep economic costs for all taxpayers. See, e.g., THE CENTER FOR BENEFIT-COST STUDIES OF EDUCATION, (last visited June 12, 2016), <http://cbcse.org>.

a result of conventional legal strategies. Indeed, the arguments made for reform and the policy proposals advanced have hardly evolved since the earliest days of the movement. Additionally, most of the influential lawsuits or administrative complaints are best understood as effects or byproducts of this social movement, rather than causes or significant contributors to its creation or development.<sup>39</sup> So how did this movement happen, and what role did lawyers play?

In short, the movement was built from the ground up and led by the low-income communities of color that were most affected by zero tolerance and the school-to-prison pipeline. That movement generated enough power to force policymakers to respect its arguments in support of reform, implement its policy proposals, and begin to use conventional legal processes to support its priorities. That power was built primarily by Black and Latino youth and adults who, with remarkable passion, creativity, and perseverance, successfully developed the popular support and political will for change through sophisticated, multi-faceted organizing and advocacy strategies. Along with the critical contributions of innumerable researchers, sympathetic educators and justice system personnel, funders, and other advocates, movement lawyers also played a substantial (and often behind-the-scenes) role in supporting the on-the-ground work.

For example, here is a sampling of contributions – from the four primary areas of influence described above – that lawyers have made to support this movement:

### *Political*

- Assisted in developing advocacy strategy;
- Performed research to inform grassroots leaders of the relevant policy and legal context for their campaigns;
- Assisted in identifying advocacy targets and conducting power analyses;
- Supported the drafting of grassroots leaders' policy proposals, often through a participatory process;
- Helped facilitate lobbying visits and other direct advocacy efforts for grassroots leaders;
- Assisted in preparing grassroots leaders to advocate for their policies and bills; and
- Provided grassroots leaders with assistance in negotiations

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<sup>39</sup> For example, while the U.S. Department of Education Office for Civil Rights has been very active in enforcing Title VI of the Civil Rights Act of 1964 around school disciplinary issues in recent years, that was not the case until the school-to-prison pipeline movement successfully raised the visibility of the impact of harsh and disproportionate school discipline.

with policymakers and lobbyists.

### ***Communications/Media***

- Helped develop and implement strategic communications plans, including both traditional media and social media components;
- Collected and analyzed research for grassroots leaders' use in developing their public messages;
- Assisted grassroots leaders with message development;
- Created a wide variety of broadly-accessible materials that grassroots leaders used in public education efforts;
- Conducted communications trainings for grassroots leaders;
- Helped design and implement media events;
- Performed outreach to local and national media outlets;
- Developed materials for sharing successes and lessons learned with other similarly-situated organizations and communities;
- Created platforms for grassroots leaders to share their stories and messages; and
- Helped recruit influential spokespeople.

### ***Grassroots Support***

- Assisted in designing organizing strategies and tactics;
- Developed participatory research projects with grassroots leaders;
- Helped create and implement grassroots trainings and workshops;
- Assisted in the planning and hosting of community meetings, public hearings, and other convenings;
- Facilitated relationship-building among grassroots leaders across regions;
- Helped create a national learning community around school-to-prison pipeline issues; and
- Assisted in developing and implementing outreach strategies for potential allies and other coalition-building efforts.

### ***Legal***

- Assisted grassroots leaders in filing Title VI complaints with the U.S. Department of Education, Office of Civil Rights.

Perhaps the most important contribution that movement lawyers have made is that through all of the work described above, they helped create a more powerful network of grassroots organizations across the country. As a result, the low-income communities of color that have led this work are now better positioned to: (1) preserve the victories they have already achieved when their opponents inevitably regroup; (2) replicate those victories in other communities across the country; and (3) expand upon those victories in the coming years, both

in continuing to dismantle the school-to-prison pipeline and to address other community priorities as they arise.

## V. CONCLUSION

There is no denying that the challenges currently faced by low-income communities of color and other oppressed communities are daunting. For many lawyers, encountering those challenges can be profoundly discouraging, and even paralyzing, because our training does not provide us with the analytical tools or practical skillsets needed to even envision a viable path forward.<sup>40</sup> Unlike conventional legal practice, which is entirely based upon being able to operate within a narrow set of rules and constraints, there are no limits to what can be accomplished when movement lawyers embrace multifaceted grassroots power-building. There are no problems too large or intractable once we begin to play with all of the pieces on the chess board. There are no unwinnable campaigns. For every system of oppression in existence, there is far more than enough latent grassroots power to dismantle it. We simply have to get to work – both on the ground, working in solidarity with oppressed communities, and in dramatically expanding our efforts to train new waves of movement lawyers – and the possibilities for building a more inclusive and equitable society become endless.

In short, that is how lawyers can help David to beat Goliath, or more accurately, can help the thousands of Davids there are for every Goliath to realize and actualize their strength so that they can win. That is how the public interest lawyers that we started with can walk into that room with the wealthiest and most politically powerful citizens and have their arguments and policy proposals prevail. Not because of the strength of their argument or their ideas; but because they represent a mighty, grassroots-led movement that the existing power structures can no longer ignore.

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<sup>40</sup> This lack of training is itself a manifestation of structural oppression, as Duncan Kennedy described years ago in *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 598 (1982).