

ARGUMENTS

Give the People the Law

Today in most of America, helping someone use the law is illegal unless you're a lawyer. These restrictions damage democracy. The case for legal empowerment.

BY VIVEK MARU FROM SEPTEMBER 4, 2020, 1:49 PM - 23 MIN READ

TAGGED CRIMINAL JUSTICE LAW



Remember Erin Brockovich? Julia Roberts plays a single mom who helps

people in Hinkley, California hold Pacific Gas and Electric accountable for knowingly contaminating their water. In an iconic scene, Ms. Brockovich deadpans to the PG&E lawyers, gathered in a swank conference room, “We had that water brought in special for you folks. Came from a well in Hinkley.” One of the lawyers puts down her glass.

Perhaps we love the scene, and the movie as a whole, because Brockovich embodies a raw American egalitarianism. But few Americans realize that much of what Ms. Brockovich did was illegal.

In nearly every state in America today, if you are not a licensed lawyer, you can educate a neighbor about law and rights in the abstract, but the moment you advise your neighbor about how they might use those laws to solve a problem they face, you are committing a crime called “unauthorized practice of law.”

How did that happen? In health care, we have a whole network of people who help patients: physicians’ assistants, nurses, mid-wives, health outreach workers. COVID-19 has reminded us how essential that vertical network is. In law, there are sometimes paralegals in the back office, but to directly support clients, we only have lawyers.

Brockovich was employed by a lawyer, in both the movie and real life, but she was on the frontline, not in the back office. She worked with community members to gather evidence, advised them on their legal claims, and organized over 600 people to join a class action that ultimately led to a \$330 million settlement.

A [paralegal ethics curriculum](#) from Mohave Community College, in Arizona, asks students to watch the film and write an essay identifying all the instances in which Brockovich commits unauthorized practice of law. This is so the students will know what not to do once they graduate.

I asked Erin Brockovich, who continues to work as a clean water advocate, what she thought of the restrictions. “Those rules are against the First Amendment,” she said. “If Americans knew about them, they’d be appalled.”

Putting the Power of Law in People's Hands

I didn't know the extent of the restrictions myself until recently, though I should have. For 17 years, I have worked with teams of "community paralegals" around the world—people who, like Brockovich, aim to create a bridge between real life and the abstract promises of law.

I started out in Sierra Leone, West Africa, in 2003, after the end of an 11-year civil war. I was invited there by a coalition of domestic human rights groups to help develop a method for delivering basic legal aid. Arbitrariness and injustice were the root causes of the Sierra Leonean civil war—the reasons people had taken up guns in the first place. The coalition was looking for a way to address injustice when it arose in daily life.

There were only 100 lawyers total in the country at the time, more than 90 of whom lived in the capital Freetown, so a lawyer-based model would have been unworkable. Instead, we took inspiration from South Africa, where community paralegals first emerged in the 1950s to help people navigate and survive the codes of apartheid. In South Africa today, community paralegals support people to avail themselves of rights under the country's progressive but under-implemented legislation. My teammate Simeon Koroma and I spent several weeks there, learning from community paralegals and watching them in action.

Back in Sierra Leone, we hired an initial crew and organized trainings for them on basic law and the workings of government. We were somewhat surprised to find that, by learning and invoking the rules, paralegals and communities **could often squeeze some justice out of a broken system**. Government janitors could recover unlawfully withheld wages. A farmer could stop a corrupt chief from taking his harvest. With backing from my partner Simeon, who's a qualified lawyer, as well as other allies, a paralegal and residents of six villages could force a mining company to refill pits it had abandoned, and remove debris it had dumped in a river.

I had nearly dropped out of Yale Law School a few years earlier, because the legal profession had seemed disconnected from ordinary people. Working with community

paralegals made me hopeful about law again. I became obsessed with what you might call legal empowerment: advancing justice by equipping people to understand and use the law themselves. Lawyers are experts; a typical lawyer's message is "I will solve this for you." A community paralegal is an organizer, rooted in her community, who possesses knowledge of law. A community paralegal's message is, "We'll solve this together, and in the process we will both grow."

I have since worked with teams in several different countries to build community paralegal programs, including India, where my family is from, Myanmar, and Kenya. We have focused on tough problems, like environmental destruction, land grabs, and discrimination.

I had long dreamed of trying something similar in the United States, where I grew up and now live. But when we started looking closely at the possibility several years ago, we realized that here, legal empowerment is illegal.

I have certainly encountered opposition from the private bar elsewhere. In Sierra Leone, many lawyers objected to community paralegals out of worry that they'd take business from law firms. In most places, though, the legal empowerment movement has managed to overcome opposition. In Sierra Leone in 2012 (admittedly after years of advocacy), government adopted [a law](#) that recognizes the role of community paralegals and calls for one in every chiefdom of the country.

Today, community paralegals or their equivalents are recognized and even financed by the state [in many places](#), including India, the Philippines, Indonesia, the United Kingdom, and Canada.

Nowhere have I encountered restrictions on the use of law by ordinary people that are as draconian or anti-democratic as the ones we have in the United States. The restrictions are especially callous in light of the pernicious role of law in American society.

Our Legal System Drives Inequality Rather than Reducing It

Law is supposed to be the language we use to translate dreams about justice into living institutions that hold us together. Law is supposed to be the difference between a society ruled by the most powerful and one that honors the dignity of everyone, strong or weak.

But that is not the country we live in. Our legal system is driving inequality rather than reducing it. Thanks to the Black Lives Matter Movement and prophetic advocates like Michelle Alexander and Bryan Stevenson, many Americans are now aware of the racial and economic bias in the way we punish crime. The U.S. imprisons a greater proportion of its people than any other nation.

If you are Black, you are 5.2 times as likely to be imprisoned as whites; if you are Hispanic, 2.5 times as likely. If you're poor, you are 6.9 times as likely to be imprisoned as someone earning more than the median household income. **These disparities** are not explained by Black and brown people, or poor people, committing more crimes. A large proportion of Black, Latino, and poor prisoners are serving time for drug offenses, for example, but the **rates of illicit drug use** are relatively even across the population.

Criminal justice is so broken that you might think it's the main way in which our legal system is failing. But in reality, the harms of our legal system reach much further, into nearly every domain of our lives. Rebecca Sandefur, who won a MacArthur Genius award for her research on access to justice, **estimates** that half the households in America face at least one civil justice problem in any given year. "Civil" is lawyer-speak for everything that won't send you to prison: an eviction, unpaid wages, divorce, bankruptcy, deportation.

Since the Supreme Court decision *Gideon v. Wainwright* in 1963, if you're accused of a crime, you are guaranteed a lawyer to defend you, whether you can afford one or not. If that lawyer **falls asleep** during your trial, or **shows up to trial drunk**, they won't necessarily be deemed ineffective, so the guarantee is thin. But in civil matters, there is no guarantee at all. You can be evicted from your home, or deported from the country, or have your drinking water and air poisoned by the industrial facility next

door, and if you can't afford or otherwise procure a lawyer you are on your own.

Indeed, the Legal Services Corporation **found** that 86 percent of the civil legal problems reported by low-income Americans in 2017 received inadequate or no legal help. The Self-Represented Litigation Network **estimates** that at least one party lacks representation in 75 percent of the civil cases in state courts—that's 30 million people lacking representation in court every year.

Most cases don't make it to the courts at all; in many cases, people don't seek redress in any way. Sandefur **surveyed** people in a typical American community about their civil justice problems. Most didn't think of those problems as having anything to do with law or rights. The most common explanation they gave for what happened to them was bad luck or the will of God.

The pandemic has sunk us leagues below that awful baseline. Thirty million people suddenly out of work means tens of millions newly at risk of a **power shut-off**, or an **eviction**, or **hunger**. The Trump Administration has also **suspended** federal environmental enforcement during the pandemic, leaving people to defend even the air they breathe and the water they drink.

We have laws on the books (and hopefully more coming) that offer at least partial protection against each of those threats to basic rights. But laws on the books are worth little if you can't get them to work for you when you need them.

Many people have given up on law altogether. I know a woman from Gainesville, Florida, named Jhody Polk, who described a deep sense of resignation in her community. Jhody served seven years, the bulk of her twenties, in prison. One of her brothers is serving a 30-year sentence for robbing a convenience store. Her other brother, Julius Irving, has been to prison once for a drug offense and is now facing charges for what he believes was an act of self-defense, that could result in life imprisonment.

A week after George Floyd was murdered by police in Minneapolis, Jhody said

people in her African American neighborhood weren't talking about the incident, and she knew no one who joined a protest. She said people are traumatized and desensitized. "The law," she said, "does a good job of incarcerating our minds."

Criminalization in Practice

Lam Ho, who founded a legal empowerment organization in Chicago called **Beyond Legal Aid**, offered an example of how unauthorized practice of law restrictions are used to suppress ordinary people. An organizer at a workers' rights center in Chicago helped a low-wage worker to demand approximately \$500 from his employer, for work he had done but was never paid for.

The employer hired a lawyer who settled with the employee. That same lawyer went on to file a complaint with the Illinois Attorney Registration and Discipline Commission, arguing that the workers' center was committing unauthorized practice of law by advising people on how to bring unpaid wage claims. Ho's group represented the workers' center. In the settlement they reached with the Commission, the workers' center agreed to curtail its activities.

"It's nearly impossible to find a lawyer who will represent you on a \$500 unpaid wage case," said Ho. Five hundred dollars is a significant amount for a low-wage worker, but it's less than a lawyer's legal fees would be to provide help in the case. And yet advice from a workers' center is unauthorized practice of law. "So what are workers supposed to do?" asked Ho.

Bar associations defend unauthorized practice of law rules as a way of protecting people from untrained quacks. In reality, the rules seem to be more about protecting the interests of lawyers. State courts, which are of course made up of lawyers, hold the power to set and enforce these rules, rather than state legislatures. Legal historian Laurel Rigertas **shows** this was the product of active lobbying by bar associations in the 1930s.

Deborah Rhode and Lucy Ricca **surveyed** unauthorized practice of law authorities in 42 states and the District of Columbia. Three-quarters of jurisdictions reported that

fewer than half of their complaints came from consumers or clients. Forty-two per cent of jurisdictions reported that more than half their complaints came from attorneys. Other sources of complaints were judges, bar associations, attorney general offices, and immigration officials. Two thirds of respondents could not recall a specific case of harm to a client or customer in the last year.

No one should falsely make themselves out to be a lawyer. That would be fraud, and we have laws that prohibit it. The unauthorized practice of law restrictions seem to serve a different, unworthy purpose: placing a professional monopoly on the use of rules that are supposed to belong to all of us.

Jailhouse Lawyering

We do tolerate some exceptions. In *Johnson v. Avery* in 1969, the Supreme Court struck down a regulation in Tennessee banning what are colloquially called jailhouse lawyers—prison inmates who are not trained lawyers but who offer legal help to other inmates. Because Tennessee—and most states—do not provide prisoners with lawyers after their convictions, the court concluded that banning jailhouse lawyering would be leaving most prisoners with no way to access justice.

Today, many prisons authorize certain prisoners to provide legal help to other prisoners; the official term is “inmate law clerks.” When Jhody Polk, the woman I mentioned from Gainesville, Florida, visited the prison law library a few months into her sentence, the librarian, Ms. Johnson, spoke to her and said she thought Jhody could make a good law clerk. Jhody spent eight months in training; she had to take exams on each of eleven modules. During that time, she worked as the library receptionist and watched the other three inmate law clerks in action.

When Jhody passed her last test, she started working from her own desk in the law library. Prisoners could fill out a form to see her. At any given time she supported 60-75 people; over seven years, she worked with about 420 prisoners altogether. She told them, “The laws they used to convict us are the same laws that will free us.”

Many of the issues Jhody helped with were civil: women trying to avoid losing

custody of their children; women defending against deportation (Jhody noted deportations of prisoners increased once Barack Obama came into office); women challenging the cancellation of their license to nurse or practice some other profession.

Sometimes, as with the case of a woman I'll call Kayla James, Jhody helped people leave prison. (I have changed the names of prisoners with whom Jhody worked.) Jhody and Kayla had gone to elementary school together. During Kayla's first year in prison, Kayla gave birth to a baby boy. Kayla hadn't heard about the form to seek out legal help; Jhody proactively approached her in the prison yard.

Kayla had been sentenced to ten years for aggravated battery; she'd cut someone during a fight at a nightclub. Jhody helped Kayla track down her court transcripts, her judgment, and her sentence. They figured out that the judge had made an error applying sentencing guidelines, overstating her past record, and so Jhody helped Kayla petition for a reduction. Kayla's sentence was reduced from ten years to four, allowing Kayla to leave prison before Jhody.

Out of the roughly 420 people she supported, Jhody estimates prisoners were able to achieve meaningful positive results in about 100 cases. Only one out of the 420, whom I'll call Ashley Lewis, had a lawyer. Ashley was on death row, so she was not allowed to visit Jhody in the law library. Every Tuesday, Jhody would go to Ashley's door in the death row ward and talk with her about law, so that Ashley could better understand, and ask questions of, her attorney.

Without an inmate law clerk like Jhody, everyone but Ashley would have had no legal support at all.

Jhody herself was not representing anyone; she was supporting people to represent themselves. All motions were filed "pro se"—by the prisoner directly, in her own name. Jhody always made the inmates write the first drafts. "I'd say to my ladies, you got to make a believer out of me. I don't care if you use curse words but you write your argument. I'll help you translate it into a language the judge can hear."

Jhody was paid nothing for her work, yet it gave her life meaning. “I grew up having to steal to eat. Crime was a means to have your needs met.” Jailhouse lawyering became her vocation. She would sometimes sneak law books from the library back to her dorm so she could read at night. “I found identity in Florida statutes,” she said. “I got free in prison.”

Other Exceptions, Court Navigators, and Attempts at Reform

We permit some exceptions to the unauthorized practice of law restrictions outside prison as well. Non-lawyers are allowed to represent others in select forums: unemployment compensation appeals, appeals for denials of social security disability income, labor grievance arbitration, some state tax courts, and immigration courts.

There’s also a relatively new crop of “court navigator” programs—lay people in the courthouse who assist self-represented litigants to fill out forms, find their way around the building, and understand court process. Rebecca Sandefur (the MacArthur winner I mentioned earlier) and Thomas Clarke **evaluated** one of these programs, in which navigators assisted tenants in housing court in New York City. Normally in New York at the time of the study, one in nine tenants who appeared in housing court would be evicted. Sandefur and Clarke reviewed 150 cases in which people had help from navigators, and they found no evictions at all. Not one. A little bit of legal empowerment can go a long way.

Veteran civil justice advocate Mary McClymont **documented** 23 court navigator programs across the country. These programs have not sought formal exceptions to the unauthorized practice of law restrictions, and McClymont did not encounter complaints against them on those grounds. In theory, the navigators are offering legal information, which is allowed, rather than legal advice, which is not allowed.

In my experience, that’s not a meaningful distinction. Talk to a friend about a problem they have, and pretty quickly you will move from information in the abstract toward how that information applies to your friend’s situation in particular. At that point, a court navigator or anyone else who doesn’t fall under the few official

exceptions is committing a crime.

Some states are undertaking reforms. Washington state approved a category of para-lawyer professionals called “Limited License Legal Technicians.” Utah endorsed something similar, called “Licensed Paralegal Practitioners.” Both of those require multiple years of formal schooling and an admission test analogous to the bar exam. Neither profession has attracted many candidates to date, and Washington’s was recently **terminated**.

In August, the Utah Supreme Court **authorized** a “regulatory sandbox,” through which the state will allow experimentation with additional models of non-lawyer involvement in legal services. Arizona has approved a promising **pilot**, spearheaded by Stacy Butler of the University of Arizona Law School, which would allow social workers supporting domestic violence survivors to provide basic legal advice. Both Arizona and California have set up task forces to revisit unauthorized practice of law regulation.

That reform is happening is surely positive—it suggests a recognition that the status quo is untenable. But the reforms under consideration strike me as extremely limited. At best, they seem to point toward highly regulated para-lawyer professions and other narrow exceptions, granted one at a time.

But perhaps the logic of *Johnson v. Avery*, the decision that barred Tennessee from banning jailhouse lawyering, should apply outside of prisons as well. When there are so many Americans with justice needs who cannot access legal support—even more now because of the pandemic—is it conscionable to criminalize people who help each other?

Know Law, Use Law, Shape Law

I am not suggesting that our systems are fair if only people could have a decent shot at navigating them. To the contrary, inequality and unfairness run deep in the systems themselves. Police officers are shielded from accountability for acts of brutality by “qualified immunity,” which requires the specific act to have been explicitly

forbidden by a prior court decision. Corporations can qualify for bankruptcy protection relatively easily, but we make it extremely difficult for ordinary people to do so. The Clean Air and Clean Water Acts do not require consideration of cumulative impacts when permitting industrial facilities, allowing poor and minority communities to be overburdened with pollution.

Advancing justice requires not just expanding access to the rules we have now but changing those rules to make them more fair. That's easier said than done. After being released from prison, Jhody worked on the campaign to restore voting rights to felons in Florida. She was struck by how many people she met who were already eligible to vote but disinterested in voting.

Since the voting rights initiative was adopted in 2018, Jhody has met many people who are newly eligible to vote but uninterested in doing so. One freed felon, Deontre Washington, **told** Jhody's brother Julius, "I don't care about this government and this government doesn't care about me."

I have met people similarly frustrated and disaffected everywhere we work, from Sierra Leone to Myanmar. Jhody feels that way herself sometimes; it's part of why she was numb to the news of George Floyd's murder. I have known that feeling too. The injustice is so deep, so normal, it's debilitating.

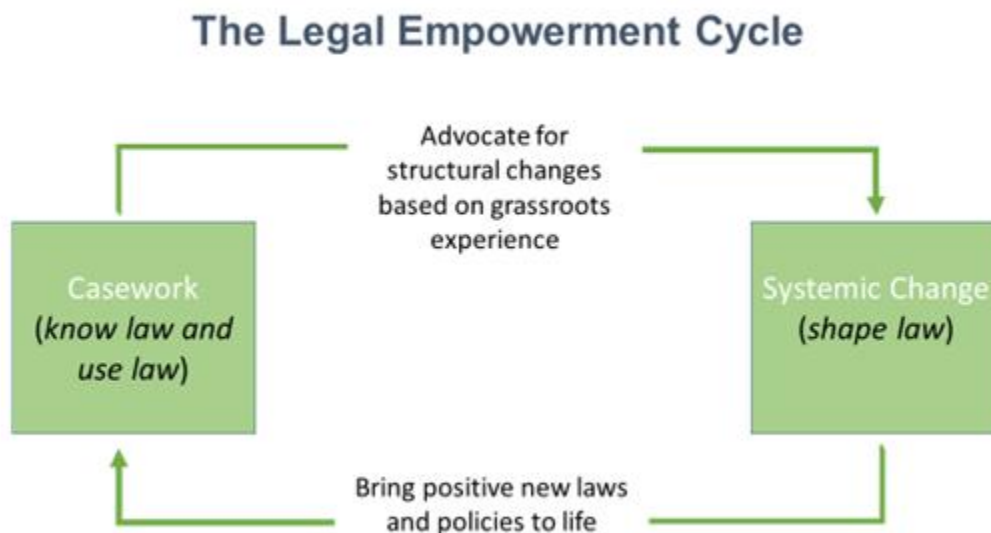
Yet I have found that the practice of knowing and using law—imperfect as our laws are—can chip away at disaffection. The practice of knowing and using law to tackle a concrete problem can make the prospect of shaping law feel less abstract.

Furthermore, when you put them together, the stories of cases like Kayla's reveal something otherwise unknown: how systems are working in practice. Patterns that emerge across many cases show where laws are functioning effectively, and where they're breaking down; where they're oppressive or unfair, and precisely how.

Everywhere we work, we have seen paralegals and communities use the evidence from their casework to envision, organize around, and win improvements in rules

and systems, including a better mechanism for enforcing sand-mining regulations in India, stronger social and environmental standards for businesses investing in Sierra Leone, and Myanmar's first legal commitment to respect the customary land rights of ethnic minorities. Those changes were not conceived of by elites, as many laws are. They grew directly from the lived experience of ordinary people.

When positive reforms are adopted, paralegals educate their communities about the new legal provisions and use them to solve concrete problems. This cycle represents the core vision of legal empowerment: that all people should be able to know law, use law, and shape law.



Today, Jhody is **working to support** jailhouse lawyers in Florida, New York, and across the country. She conducted a survey of jailhouse lawyers and found that many do receive some form of training, but that the training is sorely inadequate. The curriculum for inmate law clerks in Florida, for example, includes nothing on civil issues—immigration, housing, family law—though the majority of the problems people brought to Jhody when she was a jailhouse lawyer were civil. Jhody has **collaborated** with students at NYU Law School's Bernstein Institute to design a new curriculum, which two prisons in New York have agreed to use so far.

Jhody's vision is bigger than jailhouse lawyers helping one prisoner at a time. She

wants to pursue the legal empowerment cycle: to support jailhouse lawyers to track data on their cases, and, collectively, use that information to demand fundamental improvements in the criminal justice system. She also wants to see jailhouse lawyers working to build just institutions on the outside, once they're released. And to continue her own journey from knowing and using to shaping, she has set a goal of winning a seat in the state legislature.

Invest in Legal Empowerment

Observing America in the 1830s, Alexis de Tocqueville admired its legal culture. Lawyers, with their love of order and rules, offered a healthy counterbalance to democracy; they helped guard against “the tyranny of the majority.” Tocqueville wrote, “without this mixture of the legal spirit with the democratic spirit, I doubt that democracy could govern the society for long.”

I wonder how Tocqueville would assess our current moment. The legal rigidity and elitism he perceived as benign have calcified, creating a tyranny of their own. When law is out of reach or cruelly unequal for so many of us, it can't be a meaningful check on democracy's potential for ugliness. Rather, people grow cynical, and ugliness—Trumpian or otherwise—thrives.

To deepen democracy, we should invest in legal empowerment rather than criminalizing it. Currently, we spend a pittance on the problem of making law work for people. The Legal Services Corporation received only \$490 million from Congress for 2020, enough to assist less than 10 per cent of those who needed the services and qualified for them before the pandemic. That fraction is even lower now. There are also tens of millions of people who earn above 125 percent of the poverty line, and so are ineligible for LSC support, but are unable to afford legal help.

Furthermore, LSC-funded agencies are barred from pursuing systemic solutions to systemic problems. Since Congress imposed restrictions in 1996, organizations receiving LSC funding cannot bring class actions, lobby legislatures, represent incarcerated people, or challenge welfare reforms. Legal aid agencies are drowning in individual cases but forbidden from taking on the rules and systems that are causing

the deluge.

If we can ask today what it would take to offer health care to all, we should similarly grapple with what it would take to build a legal system that serves everyone. Perhaps we'll be able to think more boldly about how much we invest if we re-imagine the set of solutions in which we're investing. Not lawyers alone, but a vertical network that includes jailhouse lawyers, community paralegals, organizers using law openly, and other kinds of intermediaries. Not strictly retail services helping one client at a time, but legal empowerment efforts that explicitly support communities to build from casework toward systemic change.

A week after we spoke, Jhody sent me a [TikTok](#) video to show that protests had caught on in her neighborhood after all. It's evening, and the young men are dancing and chanting, not resigned, much the opposite. Shortly after Floyd was murdered, President Obama [wrote](#), “[T]he choice isn't between protest and politics. We have to do both.” But moving from defeat to protest to politics is not easy; it involves great leaps. “Legal empowerment,” Jhody says, “can be the bridge.”

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