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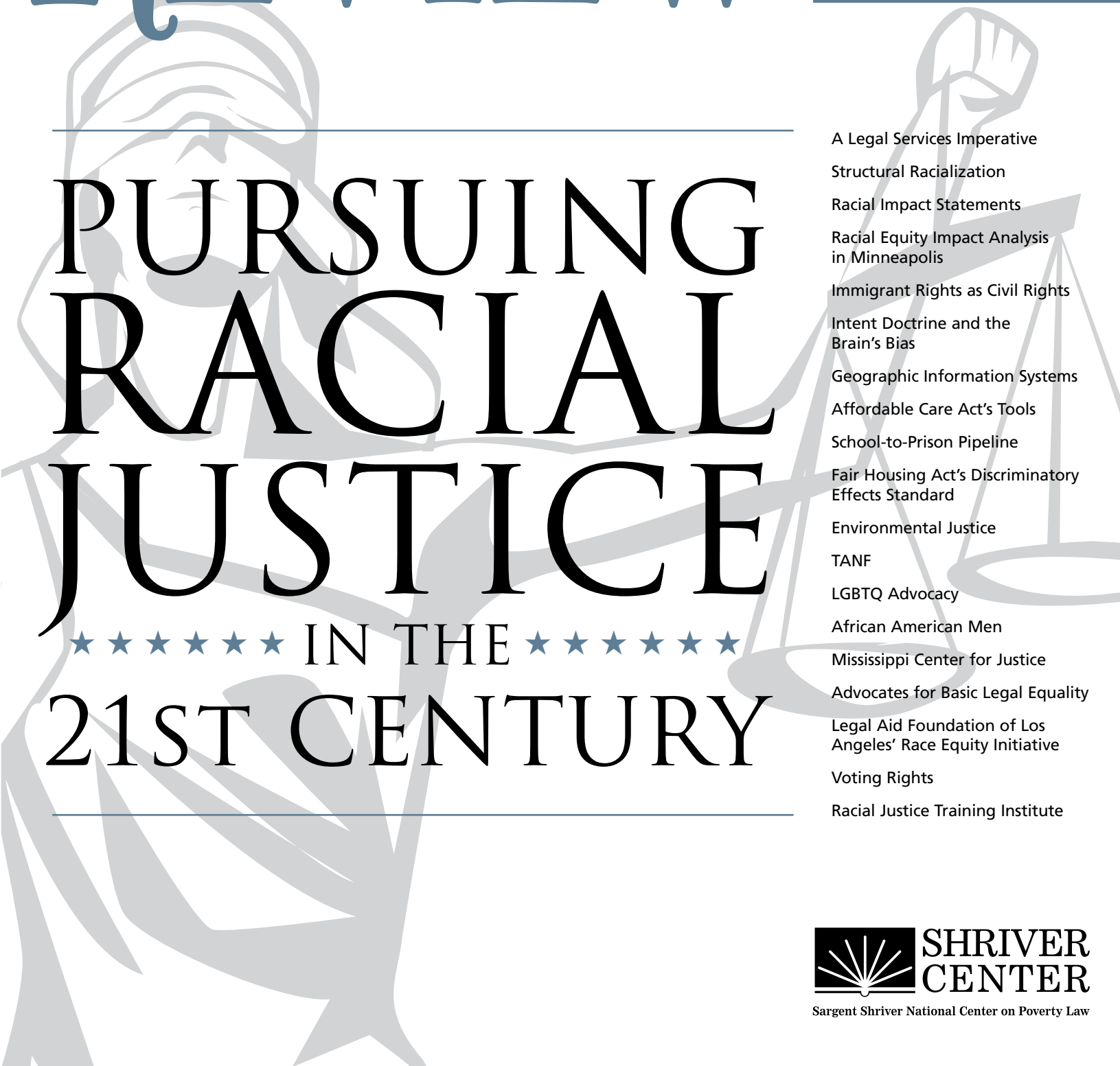
PURSUING RACIAL JUSTICE IN THE 21ST CENTURY



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Practical Lessons from One Program's Experience with RACIAL JUSTICE ADVOCACY

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For poverty law programs struggling to maintain core services with fewer resources, the prospect of embarking on new racial justice initiatives or shifting focus to broader-based advocacy can create stress, anxiety, and even opposition from staff. Yet, as the articles in this Clearinghouse Review issue demonstrate, race equity advocacy is a critical component of our shared goal of reducing poverty and inequity. A failure to account for how race continues to be inextricably intertwined with poverty law issues will leave us ill-equipped in our efforts to have a meaningful impact on poverty in our communities. From this perspective, our diminished resources make even more critical our having to prioritize work with the potential for the greatest impact. Examining poverty law issues through a racial justice lens can make our impact on our communities deeper and wider.

At Advocates for Basic Legal Equality (ABLE) we find that there is no set formula or one particular way to engage in racial justice advocacy.[1] Varying in form with the issue, our work stems from recognizing race equity as a core component of poverty law advocacy and from committing to such advocacy. We have been fortunate to have a strong history of systemic advocacy from which to draw. ABLE was founded in 1969 with a systemic law reform mission. We took that mission seriously. -- In the 1970s we filed numerous class actions against race discrimination and segregation on many different fronts. We understood even then that racial justice advocacy was at the forefront of the war on poverty, and the strategy of choice was a frontal attack on the clearest reflections of racial inequities—facially discriminatory policies and practices. Forty years later, our challenge in poverty law programs is to bring that same commitment to race equity advocacy while developing creative strategies that reflect changes in the law, scientific research, and a keener understanding of the subtleties of race discrimination.

Here I share three examples of ongoing race equity advocacy by ABLE over the past several years. Although each reflects a different strategy, together they present some practical lessons that may help in advancing racial justice work.

Race Equity Advocacy in Transportation Services

In August 2011 ABLE filed a Title VI complaint with the Offices of Civil Rights for the Federal Highway Administration and the U.S. Department of Transportation.[2] The

[1]Advocates for Basic Legal Equality (ABLE) is a non–Legal Services Corporation (LSC) program that works together with LSC-funded Legal Aid of Western Ohio to provide a full range of legal services to low-income individuals in thirty-two counties of northwest and west central Ohio. ABLE's main office is located in Toledo, Ohio.

[2]*Administrative Complaint on Behalf of Leaders for Equality and Action Inc. (LEAD) Against City of Beavercreek, Ohio* (U.S. Dep't Transp. Fed. Highway Admin. Off. Civ. Rts. filed Aug. 10, 2011).

complaint alleged that the City of Beavercreek, a small, predominantly white suburban community outside Dayton, had illegally discriminated on the basis of race in denying an application for bus stops at a Beavercreek shopping mall. Earlier the Dayton Regional Transit Authority (RTA) had submitted an application to construct, at the mall, bus stops which would be served by an extension of a bus route from West Dayton, a predominantly African American section of the city. Despite meeting all necessary design and construction criteria, the application was denied by the Beavercreek City Council. The denial followed heated public city council meetings and comments voicing objection to the bus stops for fear of safety risks and the influx of crime from West Dayton. Both the manner in which the case developed at ABLE and the decision to proceed with a federal agency administrative complaint reveal helpful lessons in race equity advocacy.

ABLE's involvement began after we were approached by a Dayton-area community group, Leaders for Equality and Action (LEAD). A coalition of religious groups with a history of social justice activism, LEAD had become enmeshed in the struggle over the application and believed that it had reached the point where legal counsel was needed. Our role as counsel was strongly shaped by the potential power and resources brought to the table by this group. From the start, we knew that our best contribution would be to give information and options to support the group in its goals and agenda. This may seem obvious, but too often in legal services we turn our lawyering role into a leadership role—getting assent from a client on a plan we have developed instead of supporting our clients in the planning and development of their own goals. In racial justice advocacy the clients we work with—groups or individuals—must become empowered as part of the advocacy process.

LEAD also brought to the table a bold and savvy communication strategy; from its perspective, the more media attention the better. In many circumstances the sensitivities in facing issues of race discrimination require delicacy with respect to media attention. Here, with LEAD comfortable being the face of the struggle, the attorneys could devote attention elsewhere.

We explored legal options; we looked specifically for ones that may work best in conjunction with a media campaign organized by a strong community group. We developed the factual narrative first and allowed that to inform our legal strategy and not vice versa. Through our investigation, we learned of evidence that supported an argument that Beavercreek's actions reflected intentional discrimination against African Americans. Several examples surfaced of what appeared to be pretense to mask discriminatory intent through the use of symbols and code words for exaggerated racial fears. These included warnings such as "we cannot allow West Dayton to strong arm its way into Beavercreek"; these appeared to serve as the basis for the city council vote.

Through a broader examination, the narrative that developed focused less on intentional discrimination and more on disparate impact and a compelling story that could garner support across many demographic lines and in the media. For example, African Americans constitute 40 percent of the population in Dayton, but they heavily rely on public transportation and represent 64 percent of the ridership. In Dayton nearly 12 percent of African Americans, compared to 3.7 percent of whites, ride public transportation to work.[3] Job counselors in Dayton attest that lack of transportation to the Beavercreek area has been a major barrier to employment, while the Beaver Creek mall is located in an area of significant job growth, near a newly constructed hospital and a branch campus of a local community college.[4]

[3]RLS and Associates & Wright State University Center for Urban and Public Affairs, Greater Dayton Regional Transit Authority, 2009 Title VI Baseline and Trip Characteristics Study (Feb. 22, 2010); U.S. Census Bureau, American Fact Finder, http://1.usa.gov/Yb85x7.

[4]Three affidavits by Dayton job counselors were submitted with the Administrative Complaint.

Working with the Kirwan Institute for the Study of Race and Ethnicity at Ohio State University, we obtained a map displaying the disparate impact in a powerful visual form. The map, overlaying the mode of transportation among residents in Dayton compared with Beavercreek on census tracts showing the percentage of African Americans, communicated a clear and concrete message. A compelling theme emerged: the decision by the Beavercreek City Council to deny the RTA bus stop application has a disparate impact on African Americans in the Dayton area who disproportionately rely on public transportation to get to work and access services.

The next step was working with LEAD on the most effective legal strategy. After evaluating our resources, we discussed recourse via a civil rights–friendly federal administration that might bring great investigatory and enforcement resources to bear. Even though an administrative complaint through the federal agencies would entail a loss of some control over the course of proceedings, the potential advantages and the likelihood of success in establishing a Title VI violation prompted LEAD to proceed with the civil rights administrative complaint.[5]

Following an intense on-site investigation and review, the Federal Highway Administration issued a decision in June 2013. It concluded that "African Americans have faced discriminatory impact as a result of the City's decision to deny the RTA's application" and there is no substantial legitimate justification for denying the application.[6] Beavercreek must now implement a nondiscriminatory application process and reconsider the RTA application within ninety days or risk losing close to $11 million in federal funding. As we have seen from this case, working with a strong, organized community group to develop a race equity strategy can be powerful. Developing a case narrative that drives the legal strategy and informs the decision on both the form of the advocacy and the forum can be critical to advancing the cause.

Reframing Housing Desegregation Litigation into Opportunity Advocacy

Working in a program with a history of racial justice advocacy presents many advantages, particularly in institutional experience and expertise. At times, however, such work can also present some difficulties in creatively reframing race equity issues and developing new strategies for old problems. Such a scenario was presented by one of ABLE's long-standing civil rights cases from the 1970s, *Jaimes v. Toledo Metropolitan Housing Authority and U.S. Department of Housing and Urban Development.*[7] After the landmark *Gautreaux v. Chicago Housing Authority* litigation to desegregate public housing in Chicago, similar cases followed around the country.[8] In Toledo this took the form of the *Jaimes* case filed in 1974 to challenge both the discriminatory siting of public housing in low-income, high-minority concentrated areas and the segregation of residents within public housing developments. Following more than a decade of litigation, the housing authority and the U.S. Department of Housing and Urban Development were found liable for intentional discrimination and an affirmative action plan was ordered by the federal district court in

[5]See also Randal S. Jeffrey et al., *Drafting an Administrative Complaint to Be filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 35 Clearinghouse Review 276 (Sept.–Oct. 2001).

[6]*Leaders for Equality and Action Inc. (LEAD) Against City of Beavercreek, Ohio*, DOT No. 2012-0020 (U.S. Dep't Transp. Fed. Highway Admin. Off. Civ. Rts. June 26, 2013).

[7]The case is now officially captioned *Grayson v. Lucas Metropolitan Housing Authority* and pending as case No. 74-cv-00068 in the Northern District of Ohio, Western Division. See *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1985), and *Jaimes v. Toledo Metropolitan Housing Authority*, 715 Supp. 835 (N.D. Ohio 1989), for permanent injunction that can be lifted only upon the court's ruling that the affirmative action plan has achieved its purpose.

[8]*Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969). See also William P. Wilen & Wendy L. Stasell, Gautreaux *and Chicago's Public Housing Crisis: The Conflict Between Achieving Integration and Providing Decent Housing for Very Low-Income African Americans*, 34 Clearinghouse Review 117 (July–Aug. 2000).

1989.[9] Unfortunately the experience with the plan over the past two decades has been less than promising. Little progress has been achieved in creating meaningful change in either desegregating current housing or de-concentrating public housing outside Toledo's center. In 2011 ABLE began reassessing options on the affirmative action plan. The plan allowed for any of the parties to seek modification upon a showing that no progress was being made. With a motion to modify as a likely strategy, we were still uncomfortable with what seemed to be a general remedial scheme for resident placement and reassignment that, under current circumstances, seemed unlikely to have any real impact.

We were without a clear focus on what we were trying to achieve with the affirmative action plan at this point, twenty years after its inception. When dealing with racial inequity as part of society's complex infrastructure, articulating clear goals and objectives can be difficult, but such articulation is critical to advancing advocacy. For us, although the underlying problem had been clear, it was the remedy that needed direction.

To assist us in our effort, we reached out to Prof. john a. powell.[10] Professor powell, then director of the Kirwan Institute, agreed to work with us on assessing the state of progress and providing expertise on developing a plan. Without question, staying current on academic advancements in the study of race, poverty, and inequity, let alone developing enough insight and understanding to integrate them into a piece of complex litigation, is difficult in our day-to-day poverty law practice. We must reach out within our progressive race equity community and bring that expertise into our programs. Professor powell's scholarship in the area of critical race theory, including cutting-edge work in advancing theories on implicit bias and structural racialization, assisted us in pushing our case to a much more complex level.[11]

Professor powell helped us focus on our remedy by pointing us back to the original wrong. The ill caused by discriminatory public housing policies was not simply in segregating African American and Hispanic residents by race but in segregating them from opportunity. Our problem was that we were dealing with an affirmative action plan that did not reflect current realities; the plan failed to account for the critical challenge of reconnecting residents to opportunity.

According to Professor powell, an effective affirmative action plan uses an opportunity framework to guide housing policies toward providing access to opportunity wherever it may exist. Therefore our remedial affirmative action plan must target the primary source of mobility and relocation for public housing residents—housing choice vouchers—and must do so by incorporating an extensive mobility program using the opportunity framework indicators as measures of progress.[12]

Professor powell's insight gave us a new frame for our case. Instead of focusing on intentional discrimination, which characterized the language of the early history of the case and more recently tended to keep all parties mired in talk of limits on liability and a constrictive remedial plan,

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[9]*Jaimes*, 758 F.2d 1086; *Jaimes*, 715 F. Supp. 835 (N.D. Ohio 1989). The entry of permanent injunctions, which formed the basis for the affirmative action plan, included desegregation mandates governing housing assignments for new applicants to public housing and a prohibition on expending funds to construct low-income housing in racially affected areas. The plan is ongoing and requires annual reports filed by the housing authority with the federal court. The plan includes monitoring by ABLE as class counsel and provides for motions filed periodically with the court to modify the plan or seek waivers as necessary.

[10]john a. powell is director, Haas Institute for a Fair and Inclusive Society, and Robert D. Haas Chancellor's Chair in Equity and Inclusion, University of California, Berkeley.

[11]See john a. powell, *Understanding Structural Racialization*, in this issue.

[12]Motion to Modify the Affirmative Action Plan, Exhibit F, *Grayson v. Lucas Metropolitan Housing Authority*, No. 74-00068 (N. D. Ohio filed Aug. 4, 2011) (Professor powell's expert report prepared in support of our motion and filed with court).

we have begun to change the language to focus on the underlying goal—reconnecting families to opportunity. Although our first attempt—a motion to modify—met with resistance, it has opened the door. While denying our motion, the federal district court subtly adopted Professor powell's assessment of the current ill-fitting remedial plan when it stated that the plaintiffs had shown that the plan was "not well suited to contemporary realities" and that the public housing agency "could act in a completely fair, nondiscriminatory, and nonsegregationist manner and still never reach [the desegregation targets of the plan]."[13] Most important, the court continued, progress under the plan may be "plateaued," which "leaves the situation ripe" for the parties to collaborate on a revised plan.[14] Promising conversations have begun with the housing authority; there is greater comfort with the language of the opportunity framework, and the idea of progressive mobility planning is being explored.

Although an ongoing effort, our work in the *Jaimes* case has demonstrated the need for flexibility and creativity in properly framing racial justice advocacy. No doubt an aggressive full-frontal challenge to clearly racist policies and discriminatory practices was necessary—and succeeded in many respects in the 1970s—to put an end to intentional discrimination in public housing. Yet the challenge in this particular case is one shared in many race equity cases today: how to reframe these issues decades after most of those intentionally discriminatory policies and practices have been eliminated. Through the use of experts and scholars in our national community of advocates, we can incorporate into our work creative and progressive theories on race and equity to assist us in framing and advancing these issues.

Fighting Profiling of Hispanic Farmworkers at the Northern Border

While some issues require a deep analysis of nuanced structural racism, others present themselves as clear pictures of racial injustice from the start. Each year ABLE staff members travel around Ohio to migrant farmworker labor camps to conduct educational outreach and intake. The advocates and outreach workers cover a wide range of topics such as employment and wage rights, health and sanitation, housing conditions, educational issues for children, public benefits, and taxes. During harvest season, as many as twenty thousand migrant workers—almost all of whom are Hispanic—travel to Ohio to work the fields. Northern Ohio is bordered by Lake Erie, which shares an international border with Canada, and in early 2009 the U.S. Border Patrol opened a substation in Sandusky, Ohio, along the lake. Shortly thereafter advocates on outreach found themselves spending more of their time listening to stories of Hispanic farmworkers detained and questioned about their immigration status. The detentions and questioning occurred not only at traffic stops but also at gas stations, grocery stores, bus stations, and soccer games. The farmworkers reported that these detentions were initiated by border patrol agents and by local law enforcement, but none of the stops involved actual entries across the border and most were nowhere close to Lake Erie. The facts all pointed to illegal profiling of Hispanics by law enforcement along the northern border.

When ABLE first learned about farmworkers' concerns about the increased border activity, the challenge was not how to frame this problem as a racial justice issue. Instead the questions were how to undertake a legal challenge to this activity while balancing other program priorities for farmworkers and pulling together the resources for possible complex and lengthy federal litigation.

One of the first steps that ABLE took was to connect with two powerful community-based Ohio labor rights organizing groups serving the same population: the Farm Labor Organizing Committee and the Immigrant Worker Project. Contact with these groups confirmed that the reports

[13] *Grayson v. Lucas Metropolitan Housing Authority*, No. 74 -00068, slip op. at 10, 2012 WL 3878149, at *6 (N.D. Ohio Sept. 6, 2012).

[14] *Id.*

from ABLE advocates were not isolated. Like ABLE, both the committee and the project understood that they had to take on this illegal profiling as fear and concern were growing within the Hispanic community. Working with the committee and the project—both eventually becoming organizational plaintiffs in the federal lawsuit—allowed us to collect information, receive client referrals, and garner support on this issue beyond what our resources would have otherwise permitted.

As the strategy developed for challenging this profiling activity on constitutional equal protection and Fourth Amendment grounds, it became increasingly clear that we were headed for federal court. Our farmworker advocacy staff consisting of only three attorneys, all with full caseloads, we lacked the internal capacity to undertake this litigation on our own. Fortunately we had established a close relationship with a private law firm, Murray & Murray, that specializes in complex federal litigation and happens to be located in Sandusky, Ohio. We took the time to meet with the firm in person and talk through the expectations and goals for the litigation in detail. The firm committed to the litigation the time of three attorneys, including a senior partner—a commitment that has continued to date. Leveraging resources where we can find them—advocacy partners and private law firms—can help us build the capacity to undertake race equity work.

As a result of these partnerships, a federal class action lawsuit challenging the illegal profiling was filed in late 2009 against the U.S. Border Patrol and three local law enforcement agencies.[15] Extensive discovery confirming disparate enforcement upon the Hispanic population has been conducted. Close to 90 percent of the individuals being apprehended by federal agents were Hispanic. Of those apprehensions, only about 10 percent were within the "border zone," and none was actually attempting to enter the United States without inspection by coming across Lake Erie.

The litigation, which is ongoing, has resulted in settlements with the local law enforcement agencies and in continued battles with the federal defendants, including a pending appeal in the Sixth Circuit on sovereign immunity issues.[16] However the litigation turns out, this has been a success on many levels. The partnerships with the labor advocacy groups and private cocounsel have allowed us to challenge a racial justice concern raised by our clients. Due to our combined advocacy, the "patrol zone" by the border patrol has been constricted closer to the actual border, and both the number of apprehensions and the disparities in apprehension rates in the border zone have dropped each year since the lawsuit was filed.[17] As important, our willingness to undertake this daunting effort with the Farm Labor Organizing Committee and the Immigrant Worker Project has empowered farmworkers.

Lessons Learned

Racial justice advocacy can be a challenge to poverty law programs but should be encouraged and supported if we hope to succeed in having a meaningful impact on poverty in our communities. From our experience at ABLE, we offer no set formula for racial justice work. Rather, we have learned practical lessons that increase our comfort level, expertise, and chances for success in racial justice work. In sum:

- Tap into the powerful resources of community-based groups.

[15]Complaint, *Muniz v. Gallegos*, No. 09-cv-02865 (N.D. Ohio filed Dec. 10, 2009).

[16]*Muniz-Muniz v. U.S. Border Patrol*, No. 12-4419 (6th Cir. appeal filed Nov. 16, 2012).

[17]The apprehension rate statistics come from an analysis by an expert retained for the litigation. The constriction of the patrol zone is the result of a change of policy by the border patrol after the case was filed; we learned about this through discovery.

- Incorporate community lawyering skills into racial justice work to empower clients and advance the cause of race equity.
- Develop a solid narrative of the race equity issue and use that narrative to help guide the legal strategy.
- Explore creative and progressive ways to frame racial justice advocacy, keeping objectives and goals focused.
- Take advantage of the new theories and research that can support our race equity advocacy from our own community's experts and research institutions.
- Leverage resources whenever possible, such as partnering with client advocacy groups and looking to the private bar for cocounseling support and litigation expertise.

Whether by creating a separate racial justice initiative or by incorporating race equity priorities into general poverty law advocacy, programs need to make a genuine commitment of time and resources in order to support this crucial work.

Author's Note

We are happy to share more detailed information on the cases mentioned above, and you may directly contact the ABLE attorneys involved. The Beavercreek transportation equity case is led by Ellis Jacobs (ejacobs@ablelaw.org); our new advocacy efforts arising from the Jaimes *litigation has Matt Currie (mcurrie@ablelaw.org) as lead counsel; and the fight against profiling of Hispanics at the northern border has been led by Mark Heller (mheller@ablelaw.org) and Eugenio Mollo (emollo@ablelaw.org).*

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