IMPACT LITIGATION RECONSIDERED: NAVIGATING THE CHALLENGES OF MOVEMENT LAWYERING AT THE BORDER AND BEYOND

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While acknowledging the potential tension between impact litigation and movement lawyering, this Article examines their synergies. Through the lens of a class action lawsuit on behalf of migrants unlawfully deprived of access to the U.S. asylum process, the Article explores how impact litigation, if thoughtfully conducted, can help mobilize directly impacted individuals, while catalyzing a broad spectrum of stakeholders to support their struggle. Some scholars argue that such broad-based litigation concentrates power in the hands of lawyers and fails to hold them accountable to affected constituencies, accentuating the underlying inequities of the U.S. legal system. Others point to rigorous procedural rules of litigation that restrict certain types of claims, the limited nature of the relief that can be obtained, and the diversion of scarce resources away from collective action and leadership development within directly impacted communities. In the immigration context, the obstacles to organizing—including language barriers, cultural differences, after-effects of trauma, and physical fragmentation of migrant communities along and across the U.S.-Mexico border—are particularly pronounced. While movement lawyering has emerged as a critical mode of advocacy in the immigrant rights arena, most campaigns have been led by powerful grassroots movements of directly impacted individuals, while lawyers have played a supporting role. This Article posits a model of progressive lawyering that relies on the impact litigation process, in conjunction with other advocacy strategies, to bring together members of fragmented communities in support of a common goal and to create the infrastructure needed for collective action.

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Introduction

The increased visibility of grassroots activism in recent years, exemplified by the Black Lives Matter movement and an increasing number of prison-abolitionist, environmental, Indigenous, and feminist collectives,[1] has reinforced the importance of movement lawyering in dismantling systems of oppression. Rejecting hierarchical models of lawyering where clients defer to their attorneys' perceived expertise, movement lawyers work in close collaboration with politically marginalized groups and other stakeholders to address root causes of inequality and pursue a vision of justice co-generated with their clients.[2] Through a myriad of strategies, both legal and non-legal, movement lawyers typically support campaigns designed to advance diverse objectives, including power-building among directly impacted individuals, whose input and experience are critical to ensure that the movement is responsive to their needs.[3]

Scott Cummings has identified representation of mobilized clients and use of integrated advocacy as the hallmarks of movement lawyering.[4] His premise is that mobilized clients, by virtue of their engagement with and leadership of affected communities, exercise legitimate authority, have the capacity to influence politics, and are well-positioned to hold lawyers accountable for carrying out the movement's objectives.[5] Such objectives can be most effectively achieved through integrated advocacy, in which lawyers collaborate with advocates outside the legal arena on a range of strategies to advance movement goals, promote policy reform,

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[1] *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 Yale L. J. 2497, 2511–12 (June 2023); Black Lives Matter, https://www.blacklivesmatter.com (last visited Aug. 28, 2024); Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, The Guardian (July 19, 2015), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement.

[2] *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. Ill. L. Rev. 1645, 1648 (2017); Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating With Humility, Love and Courage*, 23 Clin. L. Rev. 663, 664 (2017); *see also* Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 Fordham L. Rev. 1383, 1383 (2009) (similarly defining democratic lawyering as "a broad movement that stresses the importance of lawyers' working collaboratively with (not simply on behalf of) low-income and working-class people, people of color, and their groups and communities to push for social change"); Jeena Shah, *Community Lawyering in Resistance to Neoliberalism*, 120 Mich. L. Rev. 1061, 1075 (2022) ("Transformation requires shifting power, particularly by building oppressed people's power to dismantle systems of their oppression and replace them with structures that meet their collective needs.").

[3] *See* Cummings, *supra* note 2, at 1690 (defining movement lawyering as "the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define") (italics omitted).

[4] *Id.* at 1689–1716.

[5] *Id*. at 1691–92.

and transform public opinion.[6] Accordingly, movement lawyering typically happens in contexts where a powerful grassroots movement exists, and lawyers employ various tactics to support ongoing campaigns initiated by directly impacted individuals.[7] While these tactics may include litigation, it is usually de-emphasized or narrowly tailored to obtain specific relief—such as remedies for retaliation against movement leaders, compensation for wrongful deprivation of rights or property, or permits needed for mass actions—rather than systemic change.

Movement lawyering has emerged as a critical mode of advocacy in the immigrant rights arena. Key examples include:

- The central role of immigrant-youth-led networks in advocating for and later fighting to preserve the Deferred Action for Childhood Arrivals program;[8]
- The critical collaboration among the National Day Laborers Organizing Network, litigators, and other advocates on Freedom of Information Act litigation that led to the demise of the Department of Homeland Security's ("DHS") insidious S-Comm enforcement strategy;[9]
- The massive organizing campaign across Arizona to resist SB 1070's sanctioning of racial profiling by law enforcement officials;[10]

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[6] *Id.* at 1695–1716.

[7] *See* Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 Ann. Rev. L. & Soc. Sci. 17, 23 ("lawyers often are not only, or even primarily, litigators; they negotiate, counsel, coordinate, and even sometimes work to educate and mobilize movement constituents and resources"); Cummings, *supra* note 2, at 1716 ("By repositioning the role of lawyers within a broader framework of social movement activism, movement lawyering holds out the promise that deepening connections—among organizations, tactics, and institutions—will ultimately yield more accountable and enduring change.").

[8] *See* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1474–76, 1488–90 (2017); Veronica Terriquez, *Intersectional Mobilization, Social Movement Spillover, and Queer Youth Leadership in the Immigrant Rights Movement*, 62 Soc. Probs. 343 (Aug. 2015) (explaining how DREAMers adopted multiple identity strategies to promote intersectional mobilization of LBGTQ youth).

[9] *See* Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 Geo. Immigr. L.J. 431, 468–90 (2021); Ashar, *supra* note 8, at 1478–82. Secure Communities, which many advocates renamed "S-Comm," was a DHS program that authorized collaboration between federal immigration officials and local law enforcement officers to identify noncitizens in U.S. jails who could be deported based on immigration offenses. Michele Waslin, Executive Summary of The Secure Communities Program: Unanswered Questions and Continuing Concerns (Nov. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/SComm_Exec_Summary_112911.pdf. The program, which was discontinued in November 2014, was widely criticized for incentivizing race-based arrests, targeting low-level offenders, and undermining community policing, among other problems. *Id.*

[10] *See* Kathryn Abrams, Open Hand, Closed Fist: Practices of Undocumented Organizing in a Hostile State (1st ed. 2022); Ashar, *supra* note 8, at 1476–78.

- The organizing and advocacy efforts by the National TPS (Temporary Protected Status) Alliance, a coalition of TPS beneficiaries from across the United States, to save TPS in the short term and to obtain a path to permanent residency in the long term;[11] and
- The labor trafficking campaign by a coalition of former Indian guest workers against Signal International, which prompted a multimillion-dollar settlement agreement, lawful status for the affected workers, and an unprecedented apology from Signal's Chief Executive Officer.[12]

Each of these successful campaigns was led by a powerful grassroots movement of directly impacted individuals, while lawyers provided technical expertise and other support. While litigation played a role in each case, the court battles were among a panoply of strategies used to advance broader movement goals.

Movement lawyers have traditionally viewed legal tactics as a means to an end—namely, empowering marginalized communities to chart their own course and pursue campaigns to achieve their goals—rather than relying solely on favorable court rulings to solve pressing social problems.[13] Indeed, much of the scholarship on movement lawyering tends to be critical of litigation, including class actions and other systemic challenges of unjust laws or policies. Some critics argue that such litigation concentrates power in the hands of lawyers and fails to hold them accountable to affected constituencies, accentuating the underlying inequities of the U.S. legal system.[14] Others emphasize the rigorous procedural rules of litigation that restrict certain types of claims, the limited nature of the relief that can be obtained, and the diversion of scarce resources away from collective action and leadership development within directly impacted communities.[15] Synthesizing

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11 *See* Nat'l TPS All., https://www.nationaltpsalliance.org/ (last visited Aug. 26, 2024).

12 *See* Saket Soni, The Great Escape: A True Story of Forced Labor and Immigrant Dreams in America (2023).

13 *See* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 Stan. L. Rev. 87, 92 (2022); Jennifer Gordon, *Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 Calif. L. Rev. 2133, 2141 (2007).

14 *See, e.g.*, Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470, 482–87, 512 (1976) (suggesting that "some civil rights lawyers … are making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community"); Michael Grinthal, *Power With: Practical Models for Social Justice Lawyering*, 15 U. Penn. J. L. & Social Change 25, 31 (2011).

15 *See, e.g.*, Cimini & Smith, *supra* note 9, at 440, 445; Joseph Phelan, *Purvi & Chuck: Community Lawyering*, Convergence (June 1, 2010), https://convergencemag.com/articles/purvi-amp-chuck-community-lawyering/; Charles Elsesser, *Community Lawyering – The*

many of these caveats, Catherine Albiston has warned that "litigation strategies, whatever their outcome, have the potential to deradicalize a movement, reshape it in ways that marginalize less-privileged communities, and inadvertently reinforce structures of domination and inequality."[16]

While recognizing the limitations of impact litigation, a handful of scholars have posited that it can be instrumental in building power within and among grassroots communities[17] and aid in movement-building.[18] Given the substantial obstacles to organizing confronting certain marginalized communities, this more expansive approach to movement lawyering deserves more attention and analysis.

Through the lens of a class action lawsuit on behalf of migrants unlawfully deprived of access to the U.S. asylum process, this Article explores how impact litigation, if thoughtfully conducted, can help mobilize directly impacted individuals, while catalyzing a broad

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Role of Lawyers in the Social Justice Movement, 14 Loy. J. Pub. Int. L. 375, 376–77 (2013); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy,* 96 Iowa L. Rev. Bull. 61, 62 (2010–11); Jeena Shah, *Rebellious Lawyering in Big Case Clinics*, 23 Clin. L. Rev. 775, 787–89 (Spring 2017).

[16] Albiston, *supra* note 15, at 77. Scholars outside the social justice arena have also criticized the use of impact litigation to effect systemic change. *See, e.g.*, Edward T. Schroeder, Note, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 Tex. L. Rev. 897, 897-98, 922-28 (2005) (summarizing criticisms of "regulation through litigation").

[17] *See, e.g.,* Lobel, *supra* note 13, at 94 ("While litigation is not a plausible vehicle for fulfilling abolitionist goals such as dismantling oppressive, hierarchical institutions, a participatory demand requiring some empowerment of and dialogue with the oppressed group can provide the seeds of a different, more egalitarian model of social relations."); Grinthal, *supra* note 14, at 52–56 (even where litigation is the primary strategy for achieving a group's demands, it may be "conducted in such a way as to maximize opportunities for organizing in the shadows or margins of the case"); McCann, *supra* note 7, at 26 ("[F]ormal legal actions like litigation can work initially to expose systemic vulnerabilities and to render legal claims sensile or salient to aggrieved citizens. As marginalized groups act on these opportunities, they often gain sophistication and confidence in their capacity to mobilize legal conventions to name wrongs, to direct blame, to frame demands, and to advance their cause.").

[18] *See* Cummings, *supra* note 2, at 1694–95 (proposing that impact litigation can, in the absence of existing movement infrastructure, "help spark a movement"); Piomelli, *supra* note 2, at 1397 (referencing democratic lawyers' use of various tactics and strategies, including litigation, "to try to form an engaged public (where none initially exists) that can collectively pursue the shared goal of equal justice"); Baher Azmy, *Crisis Lawyering in a Lawless Space: Reflections on Nearly Two Decades of Representing Guantánamo Detainees*, *in* Crisis Lawyering: Effective Legal Advocacy in Emergency Situations 32, 34, 47 (Ray Brescia and Eric K. Stern, eds., 2021) (discussing the Center for Constitutional Rights' coordination of a mass mobilization of lawyers, activists, and civil society groups, both nationally and globally, to demand an end to Guantánamo following the Supreme Court's authorization of legal representation for Guantánamo detainees); Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 211 (2004) ("The civil rights experience provides the clearest demonstration that legal tactics—even with reluctant legal leaders—can release energies capable of initiating and nurturing a political movement.").

spectrum of stakeholders to support their struggle. The case, *Al Otro Lado, Inc., et al. v. Alejandro Mayorkas, et al.*,[19] concerns asylum seekers who attempted to present themselves at ports of entry along the U.S.-Mexico border in the hope of seeking protection, as permitted by U.S. and international law, only to be turned back to dangerous border towns in Mexico. In this context, the obstacles to organizing—including language barriers, cultural differences, and after-effects of trauma, all of which may inhibit communication and undermine trust—were particularly pronounced. By contrast with the immigrant communities who drove the above-referenced campaigns—all of whom resided in the United States despite varying levels of uncertainty about their ability to remain—these barriers, combined with the physical fragmentation of migrant communities along and across the U.S.-Mexico border, make organizing particularly challenging. Moreover, the sprawling immigration enforcement infrastructure that many recently arrived noncitizens are forced to navigate—including detention in remote locations, unconscionable agency backlogs in adjudicating cases and processing benefits applications, and bars on entry to the United States—pose additional physical and practical barriers to mobilization in the immigration arena.

During the time the *Al Otro Lado* case has been pending—more than seven years at the time of this writing—many class members have succeeded in entering the United States, with the result that those affected by the government's unlawful conduct are geographically separated by an international border. Although the transnational context makes organizing even more difficult, this Article posits a model of progressive lawyering that relies on the litigation process, in conjunction with other advocacy strategies, to bring together directly impacted individuals in support of a common goal and create the infrastructure needed for collective action.

This Article is divided into four parts. In Part I, I trace the evolving tension that some scholars have identified between impact litigation and movement lawyering and suggest that impact litigation can actually facilitate movement-building in contexts where organizing is challenging. In Part II, while heeding the risks cited by movement lawyering scholars, I introduce the *Al Otro Lado* case study to illustrate how impact litigation can be used to mobilize, empower, and foster solidarity among a highly transient population of asylum seekers on both sides of the U.S.-Mexico border. In Part III, I draw on principles of movement lawyering to outline strategies that were—or, in some cases, should have been—used to maximize the potential for engaging directly impacted

[19] No. 3:17-cv-02366-BAS-KSC (S.D. Cal.).

individuals and their allies in the fight to restore access to the U.S. asylum process. In Part IV, I explore the mechanics of movement-building and the important role that Al Otro Lado and other grassroots-focused organizations have played in this endeavor. I conclude that impact litigation, in conjunction with other strategies, can help to build critical movement infrastructure.

I. Tensions Between Impact Litigation and Movement Lawyering

Despite its shortcomings, litigation has been a longstanding component of social change lawyering strategies. The Supreme Court's landmark 1954 decision in *Brown v. Board of Education*[20] initially generated optimism about the prospect of using impact litigation to advance broad social reforms.[21] For the next two decades, dedicated public interest lawyers worked diligently to use class actions and other systemic litigation to challenge unjust laws and policies in other areas.[22] Over time, however, a variety of concerns about this type of "cause lawyering" emerged. These concerns fell into two primary categories—the lack of lawyer accountability to directly impacted communities and the inefficacy of legal remedies in producing social change.[23] As Lani Guinier and Gerald Torres have eloquently noted, "[t]o be sustainable and compelling, a declaration of rights needs to be connected to remedies as well as to the lived experience of those on whose behalf they are named by shifting norms of fairness and justice, not just changing the rules governing their conduct or status."[24]

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[20] 347 U.S. 483 (1954).

[21] Lobel, *supra* note 13, at 98–103; Cummings, *supra* note 2, at 1654.

[22] Joel F. Handler, Ellen Jane Hollingsworth & Howard S. Erlanger, Lawyers and the Pursuit of Legal Rights 22–23 (1978) ("In the era of the Warren Court, it seemed as though every year following the *Brown* decision, reformers could count on not one, but several Supreme Court decisions on behalf of the disenfranchised of American society.").

[23] *See, e.g.*, Cummings, *supra* note 2, at 1655–56; Grinthal, *supra* note 14, at 31–33, 39 (attributing impact litigators' lack of accountability to concerned constituencies and continuing marginalization of those constituencies to concentration of power in hands of lawyers).

[24] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L. J. 2740, 2759 (2014). *See* Bell, *supra* note 14, at 514 (citing Comment, *The New Public Interest Lawyers*, 79 Yale L. J. 1069, 1077 (1970) (interview with Gary Bellow) ("'[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.")); Azmy, *supra* note 18, at 52 ("Without corresponding political legitimacy, any jurisprudentially recognized rights can be taken away soon thereafter.").

Critics focused on accountability argue that cause lawyering permits progressive lawyers to pursue their own vision of the public good without taking into account their clients' views.[25] Admittedly, clients intimidated by the legal complexities of impact litigation may instinctively defer to their lawyers' judgment, complicating the task of meaningful attorney-client consultation.[26] Moreover, as Derrick Bell has noted, the realities of class action litigation, "where the original plaintiffs may have left the system and the members of the class whose interests are at stake are numerous, generally uninformed, and, if aware of the issues, divided in their views," pose additional challenges.[27] Yet consultation with clients is critical because the lawyers' concept of "justice" may differ substantially from the perspectives of those whose interests they purport to serve.[28] Other critics emphasize that impact litigation generates judgments that are difficult to enforce without broad political support,[29] fails to address root causes of injustice,[30]

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[25] *See, e.g.,* Bell, *supra* note 14, at 489, 492–93; William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L. J. 1623, 1624–25 (1997).

[26] *See* Grinthal, *supra* note 14, at 31–33 (characterizing groups represented in impact litigation and class actions as "atomized, dispersed and passive").

[27] Bell, *supra* note 14, at 504. Bell suggests that courts could help to reduce conflicts among class members through more rigorous application of existing class action standards; his recommendations include individual notice to known class members in class actions seeking injunctive relief under Federal Rule of Civil Procedure 23(b)(2) (as well as class actions under Rule 23(b)(3), where such notice is required), preliminary hearings on class certification in instances where certain class members raise objections to the adequacy of class representation or relief sought, limiting the use of class actions to particular issues, dividing a class into subclasses where necessary to increase manageability, and permitting intervention more liberally. *Id.* at 508–09 & n. 124.

[28] *See id.* at 489–90 (arguing, in the context of desegregation litigation, that NAACP lawyers were pursuing integration in response to elite funders and organizational supporters, whereas African American community members preferred quality schools even if they remained segregated); Albiston, *supra* note 15, at 74 (noting that risks of litigation include "subtle dynamics that reshape the goals and message of the movement, often without the explicit choice or awareness of movement participants").

[29] *See, e.g.*, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 562 (3d ed. 2023) ("Relying on litigation to produce progressive social change without political support and a robust social movement makes change unlikely even with headline-making judicial victories."); McCann, *supra* note 7, at 33–34 ("[E]ven when courts act favorably for disadvantaged groups, injustice in most institutional settings will go unchallenged in the absence of well-organized constituencies willing to mobilize legal resources for change."). *See generally* David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law (2016).

[30] *See, e.g.*, Scheingold, *supra* note 18, at 218 ("legal tactics, even in connection with political mobilization, hold little or no promise of 'fundamental' change"); Guinier & Torres, *supra* note 24, at 2749 ("political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems").

threatens to undermine burgeoning social movements,[31] and may even prompt backlash.[32]

The limitations on relief that can be obtained through impact litigation also call into question its value as an instrument of social change. Only certain types of controversies are amenable to judicial resolution, with the result that disputes, including those that are inherently political in nature, must be transformed into "legally cognizable issues" in order to pass muster in court.[33] Judicial remedies also run the risk of entrenching the systems that are being challenged, as well as the assumptions that undergird those systems—as in the context of litigation regarding immigration detention conditions, which almost always results in additional government expenditures on detention facilities rather than the closure of such facilities.[34] Complicating matters further in the immigration context, the Supreme Court's 2022 decision in *Garland v.*

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[31] *See, e.g.*, Scheingold, *supra* note 18, at 214 ("fixation on litigation as a tool of policy implementation … fractionalize[s] political action—dividing rather than uniting those who seek change"); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction, in* Cause Lawyers and Social Movements 12 (Sarat & Scheingold, eds., 2006) ("the mobilizing capacity of litigation may not survive a string of judicial defeats that make the law less and less resonant to movement activists"); Albiston, *supra* note 15, at 77 ("litigation strategies, whatever their outcome, have the potential to deradicalize a movement, reshape it in ways that marginalize less-privileged communities, and inadvertently reinforce structures of domination and inequality"); McCann, *supra* note 7, at 30 ("[E]ventual defeat in official forums can sap movement morale, undercut movement bargaining power, and exhaust movement resources."). *See generally* William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 Ohio N. U. L. Rev. 455 (1994).

[32] *See, e.g.*, McCann, *supra* note 7, at 35 ("[L]egal rights claiming and appeals to official legal institutions have generated far more backlash or countermobilization from reactionary political forces in the United States.") (internal citations omitted); Bell, *supra* note 14, at 515 ("[T]he relief sought and obtained in [school desegregation class action] suits has helped to precipitate a rise in militant white opposition and has seriously eroded carefully cultivated judicial support."); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. of Am. Hist. 81, 91 (1994) ("By propelling southern politics toward racial fanaticism, *Brown* set the stage for the violent suppression of civil rights demonstrations in the early 1960s, which in turn aroused previously indifferent northern whites to demand federal legislative intervention to inter Jim Crow.").

[33] *See* Cimini & Smith, *supra* note 9, at 433–34. *See also* Grinthal, *supra* note 14, at 57 ("Issues are cut, timing is chosen, goals are defined, arguments are formed, and plaintiffs' stories are told at the lawyers' discretion.").

[34] I am grateful to Elizabeth Jordan, Visiting Assistant Professor, Sturm College of Law, Denver, CO, for flagging this point. *See generally* Sharon Dolovich, *How Prisoners' Rights Lawyers Do Vital Work Despite the Courts*, 19 U. St. Thomas L. J. 435, 436 (Spring, 2023) ("[E]ven when lawyers win on behalf of their incarcerated clients, things don't tend to change on the ground as much as they should."). Many immigration advocates have concluded that the immigration detention system is so inherently flawed, oppressive, and racist that it cannot be reformed, but rather must be abolished. *See, e.g.*, Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 Calif. L. Rev. 1597, 1623–36 (2022); Det. Watch Network, Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms, https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022_0.pdf (last visited Aug. 27, 2024).

Aleman Gonzales interpreted a remedy-stripping provision in the Immigration and Nationality Act to bar injunctive relief in certain types of immigration-related cases, leaving declaratory relief as the only available option.[35]

In response to concerns about lawyer accountability in the cause lawyering model, a new body of scholarship promoting "client-centered" lawyering emerged.[36] Client-centered lawyering recognizes that problems have both legal and non-legal dimensions and emphasizes the importance of clients' expertise in resolving them.[37] In this model, clients actively work with their lawyers to identify problems, formulate possible solutions, and make decisions based on their personal goals, interests, and values.[38] Despite the laudable goal of promoting greater client autonomy, client-centered lawyers do not always succeed in this endeavor. Due to unconscious racial biases, class differences, or cultural barriers, lawyers may fail to understand critical aspects of a client's legal claim or unnecessarily limit the legal alternatives presented, thereby undermining the client's ability to engage fully in resolving their problems.[39] Some clients balk at their lawyers' pretense of neutrality, which they perceive as an effort to hide the ball.[40] Even at its best, client-centered lawyering focuses on realizing the goals of a particular individual rather than on building power to address deep-rooted social problems.[41]

These concerns gave rise to an alternative "community lawyering" model, which extends the core principles of client-centeredness to the community level, with the goals of "empowering communities,

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[35] 596 U.S. 543, 550 (2022) (vacating previously granted injunctive relief in two class action habeas suits on the basis that "[8 U.S.C.] § 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions [8 U.S.C. §§ 1221-1232]," other than on an individual basis). For a more detailed explanation of *Garland v. Aleman Gonzales*, *see infra* Part III.

[36] Alan K. Chen & Scott L. Cummings, Public Interest Lawyering: A Contemporary Perspective 290 (2013). Client-centered lawyering is often associated with two casebooks used in many law clinics. *See* Gary Bellow & Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy (1978); David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors: A Client-Centered Approach (1991). *Id.*

[37] Binder, Bergman & Price, *supra* note 36, at 17–18.

[38] *Id. See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501, 507 (1990); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 Clin. L. Rev. 369, 371–72 (2006).

[39] *See* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 346, 391 (1997); Dinerstein, *supra* note 38, at 589 (arguing that client-centered model undermines client autonomy by focusing almost exclusively on lawyer-perceived alternatives).

[40] *See* Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 Buff. L. Rev. 71, 84–88 (1996).

[41] Chen & Cummings, *supra* note 36, at 302–04.

promoting economic and social justice, and fostering systemic change."[42] Like client-centered lawyering, community lawyering rejects the hierarchical lawyer-client relationship that often characterizes cause lawyering, but shifts the focus from problems affecting an individual to issues affecting a client community.[43] While legal tactics, including litigation, may still be relevant, proponents of community lawyering believe that directly impacted individuals should be partners in such endeavors.[44] Yet concerns about lawyer-client domination persisted because community members have diverse perspectives, and lawyers—whether consciously or not—influence their clients' judgments about what is in their best interests.[45] Moreover, while community lawyers may prioritize long-term systemic change over short-term benefits, some of their clients may see things differently.[46]

Movement lawyering, which aspires to be both client-centered and politically transformative, offers a solution to some of these problems.[47] Movement lawyers typically take their lead from mobilized clients, collaborate on a wide range of advocacy strategies to achieve movement goals, and de-emphasize litigation except where necessary to achieve broader campaign objectives.[48] And movement lawyers measure their success based on benchmarks set by their clients, thereby ensuring the lawyers are accountable to those they represent.[49]

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[42] Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 J. L. & Pol'y 359, 364 (2008).

[43] *Id.* at 363. *See generally* Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L. J. 2107 (1991); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 Wis. L. Rev. 699 (1988).

[44] *See generally* Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 Geo. L. J. 1603 (1989); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. Rev. L. & Soc. Change 535 (1987–88); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. Rev. L. & Soc. Change 659 (1987–88); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 Clin. L. Rev. 427 (2000).

[45] *See* William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1102–08 (1994); Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 Fordham Urb. L. J. 481, 528–29 (2004).

[46] *See* Simon, *supra* note 45, at 1102 ("[C]ollective practice involves commitments to multiple clients with potentially differing interests."); Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1122 (1992) (noting that "individual and group interests may diverge").

[47] *See* Cummings, *supra* note 2, at 1689–95; Ashar, *supra* note 8, at 1495–1506; Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & Soc. Inquiry 360, 388–390 (2018).

[48] *See* Cummings, *supra* note 2, at 1689–91; Gordon, *supra* note 13, at 2135–37.

[49] *See* Cummings, *supra* note 2, at 1691–95; Lobel, *supra* note 13, at 101–03; Gordon, *supra* note 13, at 2141.

In the absence of movement infrastructure, however, Cummings and others have suggested that impact litigation can help to lay a foundation for movement-building.[50] The question, of course, is how. Cummings offers the example of the anti-sweatshop movement in the Los Angeles garment industry, which was "sparked" by a civil lawsuit to recover unpaid wages and overtime for seventy-two imprisoned Thai garment workers discovered through a 1995 law enforcement raid of a compound in El Monte, California.[51]

The case, framed as a collective action under the Fair Labor Standards Act, targeted not only the owners of the company, but also several high-profile manufacturers and retailers under a joint employer theory.[52] Following a critical ruling denying the defendants' motion to dismiss the case and affirming that the plaintiffs had sufficiently pleaded their claim of manufacturer control over the employees, the team amended their complaint to include additional claims on behalf of Latina garment workers employed by the same company; this strategy emphasized the widespread nature of the abuses and fostered cross-racial solidarity among Thai and Latina workers.[53]

After the manufacturers settled in 1997 for over two million dollars, the lead lawyers from the Asian Pacific American Legal Center ("APALC") worked to leverage their legal success by suing other significant industry actors, launching a media campaign, and reconstituting a former anti-sweatshop advocacy coalition as Sweatshop Watch, which later succeeded in codifying joint employer status for garment manufacturers under California law.[54] In 2000, with support from APALC, Sweatshop Watch, and other organizations supporting immigrant workers, the Garment Worker Center was created as the organizing arm of the Los Angeles anti-sweatshop movement.[55]

APALC's case demonstrates how impact litigation can be used in conjunction with other types of advocacy strategies to build power among directly impacted individuals. But the engagement of affected workers appears to have occurred primarily outside the courtroom

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[50] Cummings, *supra* note 2, at 1694–95. *See* Albiston, *supra* note 15, at 63 ("Litigation can also create issues around which to organize a movement; attract media attention, financial resources, and participants to a movement; provide leverage in informal negotiations; and publicly embarrass a movement's opponents into capitulation."); Guinier & Torres, *supra* note 24, at 2748 ("Rights can also provide an agenda for group mobilization, translating local complaints to a more generalized cause.").

[51] Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 Wis. L. Rev. 441, 452–60. *See generally* Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry,* 1 J. Gender Race & Just. 405 (1998).

[52] Su, *supra* note 51, at 409.

[53] Cummings, *supra* note 51, at 455–56.

[54] *Id.* at 455–57.

[55] *Id.*

rather than during the litigation itself.[56] According to Julie Su, who led the litigation, "The question for me as a lawyer is this: how are the workers made better off, even if we win this suit, if they do not feel like they have been participants in the process?"[57]

Jules Lobel, an accomplished civil rights litigator and scholar, proposes a "participatory" litigation framework, which seeks to empower clients through "collaborative, collective, and consensus-building interactions between the representative and those she represents."[58] Lobel's participatory framework rejects both lawyer-driven and strictly client-centered approaches to class representation in favor of "what William Simon has called 'nonhierarchical communities of interest,' which value 'communication among clients' and 'direct [client] participation' in the litigation."[59] Drawing on his experience representing a class of prisoners challenging solitary confinement at California's Pelican Bay State Prison, Lobel explains that the plaintiffs were actively involved in all aspects of the litigation, including selecting class representatives, deciding on claims, making key tactical and strategic decisions, negotiating and ratifying the settlement agreement, and monitoring compliance with the settlement; their collective engagement ensured that their firsthand experience with California's oppressive prison policies figured prominently in decision making and turned the traditional lawyer-client hierarchy on its head.[60] The lawsuit grew out of a pre-existing prisoners' movement that conducted mass hunger strikes and a written request from one of the strike leaders asking that the Center for Constitutional Rights ("CCR") file a class action lawsuit challenging California's inhumane use of solitary confinement.[61]

The migration context poses particularly daunting challenges to movement lawyering—and organizing more generally. For individuals who succeed in reaching the United States but lack legal status, the potential risks of political engagement, including arrest, detention, and deportation, may simply be too high.[62] Regardless of their location

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[56] *See* Su, *supra* note 51, at 408–09 (noting that U.S. Attorney's Office prohibited workers who testified in related criminal prosecution of operators of El Monte compound from speaking about abuses).

[57] *Id.* at 412.

[58] Lobel, *supra* note 13, at 94, 98.

[59] *Id.* at 153, citing William H. Simon, *Visions of Practice in Legal Thought*, 35 Stan. L. Rev. 469, 486–87 (1984).

[60] *Id.* at 92–93.

[61] *Id.* at 91 ("The CCR took the prisoners' case because the prisoners represented a powerful grassroots movement challenging a torturous policy of prolonged solitary confinement.").

[62] *See, e.g.*, Amended Complaint for Declaratory, Injunctive, and Habeas Relief, Ragbir v. Homan, No. 1:18-cv-01159-PKC (S.D.N.Y. filed July 17, 2018), https://www.law.nyu.edu/sites/default/files/2018%2007%2017%20Amended%20Complaint%20%28Ragbir%29.pdf (alleging that federal authorities had targeted prominent immigrant rights activists, including

in Mexico or the United States, linguistic and cultural differences frequently impede communication among people of different nationalities and among members of Indigenous communities who speak different dialects.[63] Psychological trauma resulting from events that prompted individuals to flee their home countries or harrowing experiences during their journeys to the United States may cause further isolation. And noncitizens may lack familiarity with the systems at the root of their oppression or harbor a deep-seated distrust of such institutions based on past experiences in their home countries that led them to flee.

Other formidable obstacles to mobilizing many migrant communities is their geographic instability and dispersion, both from each other and from potential allies. This is true for both recently arrived noncitizens inside the United States (who may, for example, be detained in remote locations and transferred from one facility to another) and those who remain outside the country (due to discriminatory travel or entry bans or health-related restrictions, among other factors). Moreover, directly impacted noncitizens—such as individuals seeking asylum or workers subject to labor trafficking—may be located both inside and outside the United States, which further complicates mobilization efforts.[64]

This Article provides a blueprint for using impact litigation, in conjunction with other strategies, to facilitate movement-building within and among fragmented communities, including those separated by borders. Even in the event of a favorable court decision, impact litigation alone cannot address deep-rooted social inequities. However, regardless of how the court rules, the litigation process has the potential to highlight the injustice of such inequities, humanize and empower directly impacted individuals, establish structures for collaboration that transcend linguistic and cultural differences, foster leadership, and

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Ravi Ragbir, the executive director of New Sanctuary Coalition, based on their speech and advocacy for immigrant rights and social justice).

[63] *See* Tom Jawetz & Scott Shuchart, Language Access Has Life-or-Death Consequences for Migrants 7 (2019) ("[Guatemalan] indigenous languages—K'iche', Mam, Ixil, Chuj, Q'anjob'al, Q'eqchi', and many others—are spoken in an array of dialects, many of which are not understood by speakers of another."); Amnesty Int'l, U.S. Continues to Violate Indigenous and Human Rights at the Southern Border (Dec. 17, 2021) ("Indigenous peoples are disproportionately impacted by anti-asylum policies … due to the continued erasure of their Indigenous identities, Indigenous language exclusion within immigration services, anti-Indigeneity racism, and ongoing discrimination they face throughout their journeys.").

[64] Regarding the challenges of movement lawyering in a transnational context, *see generally* Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 Clin. L. Rev. 255 (2014) (proposing a "transnational collaborative lawyering" model to support indigenous communities in the Amazon in their struggle against multinational oil companies); Camila Bustos, *Movement Lawyering in the Time of the Climate Crisis*, 39 Pace Envt'l. L. Rev. 1, 24–29 (2022) (discussing challenges of accountability to clients and the broader movement in climate litigation context).

marshal allies in a manner that contributes to these broader objectives. The *Al Otro Lado* case, discussed below, illustrates these dynamics and demonstrates how impact litigation can help to mobilize directly impacted individuals and allies in a manner that has the potential to shift the balance of power.

II. Lawyering at the U.S.-Mexico Border

Every day at ports of entry along the U.S.-Mexico border, U.S. Customs and Border Protection ("CBP") officers inspect thousands of people in vehicles in the order that those vehicles arrive. Until 2016, CBP officers also inspected thousands of migrants who traveled to ports of entry on foot in the order they arrived. Most of those migrants had fled grave harm in their countries of origin and endured arduous and dangerous journeys to seek asylum in the United States.[65]

In May 2016, everything changed. Starting at the San Ysidro port of entry between Tijuana and San Diego, CBP officers began turning back substantial numbers of asylum seekers—and only asylum seekers—telling them that if they wanted to be inspected and processed—as required by the immigration statute[66]—they needed to return to the port "later" because the port was ostensibly "at capacity." Later that year, CBP expanded this "turnback" policy to other ports of entry along the southern border, instead of adapting as needed to fulfill their statutory obligations.

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[65] In crafting the statutory provisions governing asylum, which were codified in the Refugee Act of 1980, Congress adopted the international law definition of a "refugee"— a person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." This definition is set forth in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, which does not bind the United States, and the United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267, which the United States ratified on November 1, 1968.

[66] Congress provided that all noncitizens who are "physically present in the United States" or who "arrive[] in the United States (whether or not at a designated port of arrival)" may apply for asylum, and set forth specific requirements for inspecting and processing those who come to ports of entry. 8 U.S.C. § 1158; § 1225(a)(3) (requiring immigration officers to inspect all noncitizens who are applicants for admission); § 1225(b)(1)(A)(ii) (requiring immigration officers to refer a noncitizen who indicates either an intention to apply for asylum or a fear of persecution for a credible fear interview by an asylum officer).

Although the Illegal Immigration Reform and Immigration Responsibility Act of 1996, which codified the expedited removal process, made obtaining asylum more difficult, Congress has continually preserved the U.S. government's international law obligations to inspect and process asylum seekers arriving at ports of entry. Studies by the U.S. Commission on International Religious Freedom ("USCIRF") indicate that the U.S. government does not have adequate safeguards in place to prevent improper removals of asylum seekers through expedited removal. USCIRF, Report on Asylum Seekers in Expedited Removal (Feb. 8, 2005); USCIRF, Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal (Aug. 2, 2016).

CBP officers used various tactics to turn back asylum seekers who attempted to present themselves at ports of entry.[67] These tactics included lies regarding the capacity of the port, threats, intimidation, misinformation, and the use of physical force to block access to the port. For example, immigration officers informed Dinora Doe[68] and her daughter, who had received death threats and been repeatedly raped by MS-13 gang members in Honduras, "that there was no asylum in the United States" and directed them "to go back to Mexico."[69] When they returned to the port a few hours later, one of the officers told Dinora "that if [she and her daughter] returned to the port again, they would transfer [them] to Mexican officials who would deport [them] back to Honduras."[70] The next morning, one of the officers threatened to separate Dinora from her daughter when they presented at the port. According to Dinora, "The officers told me that I could pass through the port, but that I had to leave my daughter behind…I told them that I could not leave her behind … [and] that what they were doing was illegal."[71]

Beatrice Doe, a Mexican national who fled with her children and nephew to Tijuana to escape death threats from a drug cartel and severe domestic violence, was similarly denied access to the U.S. asylum process.[72] CBP officers at the San Ysidro port of entry misinformed Beatrice that the U.S. government had no obligation to help her or her family, that they did not have a right to come to the United States because they were not born there, and that they should seek help from the Mexican government.[73] The officers later coerced Beatrice into recanting her fear and withdrawing her application for admission to the United States. According to Beatrice:

> They said that for my own good, I should sign the document and that it would not affect my record. When I asked the immigration officer what he meant by "record," he started banging the table and yelled at me that I had to sign the document. I was afraid and felt that I did

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67 The turnbacks were originally driven by longstanding racial animus toward Haitian asylum seekers and perpetuated based on a desire to deter asylum seekers more generally. Amicus Curiae Brief of the Haitian Bridge Alliance, et al. in Support of Plaintiffs-Appellees/Cross-Appellants, Al Otro Lado v. Mayorkas, Nos. 22-55988, 22-56036 (9th Cir. Feb. 28, 2023), https://ccrjustice.org/sites/default/files/attach/2023/03/37%20Haitian%20Bridge%20Alliance%20Amicus%202023.02.28.pdf (last visited Aug. 27, 2024).

68 To protect confidentiality, pseudonyms are used to refer to individuals seeking asylum in the United States.

69 Declaration of Dinora Doe in Support of Plaintiffs' Motion for Class Certification, Al Otro Lado v. Wolf, No. 3:17-cv-02366 (S.D. Cal. Jan. 14, 2020), ECF No. 390-14, ¶ 9.

70 *Id.* ¶¶ 11–12.

71 *Id*. ¶ 16.

72 Declaration of Beatrice Doe in Support of Plaintiffs' Motion for Class Certification, Al Otro Lado v. Wolf, *supra* note 54, ECF No. 390-12, ¶¶ 2–8.

73 *Id.* ¶ 12.

> not have another option but to sign the document. I told the officer that I did not understand what I was signing because the document was in English and I only speak Spanish.[74]

The next day, when Beatrice and her family returned to the San Ysidro port of entry, a CBP officer falsely informed her that she would be jailed for three years if she came back to the port.[75] Although Beatrice told the officer that she and her family feared for their lives in Mexico, the officer responded that "this did not matter."[76] Beatrice sought temporary refuge in Tijuana, where her abusive spouse later located her and coerced her and her children to return home with him.[77] Similar turnbacks have forced tens of thousands of other migrants, including young children, to live for months on end under precarious conditions in Mexico, in the hope of accessing the U.S. asylum process.[78]

Initially, CBP did not put the turnback policy in writing, keeping it in a self-admitted gray area that CBP used to justify turning back asylum seekers by various means. Then, in the spring of 2018, CBP and DHS issued memos memorializing aspects of the turnback policy—which the government referred to as "metering" or "queue management." In drafting these memos, CBP and DHS explicitly contemplated using them to turn back hundreds of asylum seekers at ports of entry each day and disregarded obvious signs that a humanitarian disaster in Mexico would result. They then denied CBP officers at ports of entry permission to inspect and process asylum seekers more quickly.

The efforts of Al Otro Lado, a binational organization that provides legal and humanitarian support to indigent refugees, deportees, and other migrants in Mexico and the United States, were critical in identifying and publicizing CBP's turnback policy, lifting up the voices of Dinora Doe, Beatrice Doe, and other directly impacted individuals, ensuring that they had access to basic necessities, and ultimately enabling them to pursue asylum in the United States. Established in 2014 as a volunteer project to support the deportee community in Tijuana, Mexico, Al Otro Lado has grown exponentially to meet the changing

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74 *Id.* ¶¶ 21–22.

75 *Id.* ¶ 24.

76 *Id.*

77 Second Amended Complaint, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (S.D. Cal. Nov. 13, 2018), ¶¶ 25, 125–32, https://cgrs.uclawsf.edu/legal-document/second-amended-complaint (last visited Aug. 27, 2024).

78 *See, e.g.*, Strauss Ctr. for Int'l Sec. and Law, Asylum Processing and Waitlists at the U.S.-Mexico Border (Dec. 13, 2018), https://www.strausscenter.org/publications/asylum-processing-and-waitlists-at-the-u-s-mexico-border/; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2019 (Nov. 1, 2019), https://www.strausscenter.org/publications/metering-update-2/; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2020 (Nov. 25, 2020), https://www.strausscenter.org/publications/metering-update-november-2020/.

needs of thousands of migrants traveling through Mexico to seek protection in the United States.[79] Al Otro Lado currently has offices in Tijuana, Los Angeles, and San Diego and more than sixty paid employees, including attorneys, accredited representatives, social workers, data and policy analysts, community coordinators, and organizers.[80] These diverse skills give the organization flexibility to adapt as needed to meet new challenges.

Al Otro Lado describes its approach as "multidisciplinary, client-centered, and trauma-informed, combining fierce legal advocacy with holistic support."[81] Al Otro Lado's Border Rights Project, established in 2017, provides legal orientation to refugees regarding the U.S. asylum process, empowering them with information about how U.S. law, policies, and border enforcement practices may affect them.[82] The Border Rights Project further assists asylum seekers in completing their asylum applications, translating evidence into English, identifying experts, finding legal representation, and facilitating access to emergency medical care, housing, food, and other services through their strong relationships with local humanitarian organizations,[83] including Refugee Health Alliance[84] and Espacio Migrante.[85] In addition, the Border Rights Project monitors and documents human rights abuses on both sides of the border to bolster their advocacy for more just migration policies.[86] The Project also regularly accompanies at-risk asylum seekers, including those who are medically vulnerable, experiencing mental health issues, unaccompanied minors, and LGBTQ+ persons, to the San Ysidro port of entry to advocate that CBP allow them to seek asylum

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79 *See* Al Otro Lado, *Beliefs and History*, https://alotrolado.org/beliefs-and-history (last visited Aug. 29, 2024).

80 Email correspondence from Erika Pinheiro, Co-Founder and Executive Director, Al Otro Lado, to author (July 18, 2024, 5:43 pm EST) (on file with author). While the full story of Al Otro Lado's evolution as a binational organization with in-house legal and organizing capacity deserves to be told, it is beyond the scope of this Article.

81 Al Otro Lado, *supra* note 79.

82 Al Otro Lado, *Border Rights Project*, https://alotrolado.org/border-rights-project (last visited Aug. 27, 2024).

83 *Id.*

84 Refugee Health Alliance is a nonprofit organization that provides holistic, trauma-informed, ethical care to refugees and other migrants in Tijuana and Reynosa, Mexico. As of this writing, Refugee Health Alliance assists in providing medical care for over thirty shelters, runs four clinics, and operates a hygiene station in Tijuana. Refugee Health Alliance, *Our Programs*, https://www.refugeehealthalliance.org/our-programs; *Our Clinics*, https://www.refugeehealthalliance.org/our-clinics (last visited Sept. 7, 2024).

85 Espacio Migrante is a binational community organization based in Tijuana that works with migrant communities to promote access to human rights such as education and health, provide comprehensive care, and raise awareness about the realities of migrants. Espacio Migrante, *Who We Are*, https://www.espaciomigrante.org/copy-of-quienes-somos (last visited Sept. 7, 2024).

86 Al Otro Lado, *supra* note 82.

in the United States.[87] According to Al Otro Lado's Co-Founder and Executive Director, Erika Pinheiro, "The metaphor of accompaniment goes far beyond escorting asylum-seeking migrants to ports of entry along the U.S.-Mexico border. It involves meeting people where they are without any preconceived ideas of where they should be, responding to their needs, and eventually building trust."[88] This approach has bolstered Al Otro Lado's credibility with the migrants they serve, who value their partnership and solidarity, and has been critical in shaping Al Otro Lado's holistic approach to representation and broad-based advocacy tactics.

In addition to providing support and services to asylum seekers in Tijuana, Al Otro Lado, as a binational organization, is able to continue supporting some of them once they reach the United States through its San Diego and Los Angeles offices. The organization also remains in contact with those it serves, regardless of their location, through the use of an online survey that is administered via WhatsApp. The survey, offered in seven different languages, includes questions about encounters with CBP, Mexican immigration officials, and other Mexican law enforcement officers, as well as questions that enable Al Otro Lado to identify people with particular vulnerabilities.[89] Between August 2022 and August 2023, the survey elicited over 45,000 unique responses from migrants stranded in border towns in northern Mexico.[90] This effort has been critical in identifying human rights violations committed by U.S. and Mexican officials at the southern border, connecting asylum seekers with needed resources, compiling data for advocacy purposes, and providing a reliable mechanism for communicating with asylum seekers more generally.[91]

Trusted service providers in other locations along the southern border, including the Kino Border Initiative (Nogales, AZ and Sonora, Mexico),[92]

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[87] *Id.*

[88] Telephone interview with Erika Pinheiro (June 8, 2021) (notes on file with author) (hereinafter "Pinheiro Interview"). The concept of accompaniment, which stems from liberation theology, "combines the action of walking together with reflection on the spiritual, practical, and political aspects of the joint struggle against oppression and suffering." Lobel, *supra* note 13, at 161 (citing Roberto S. Goizueta, Caminemos Con Jesus: Toward a Hispanic/Latino Theology of Accompaniment 206 (1995); Daniel G. Groody, *Reimagining Accompaniment: An Interview with Paul Farmer and Gustavo Gutiérrez*, *in* In the Company of the Poor: Conversations with Dr. Paul Farmer and Fr. Gustavo Gutierrez 161, 165 (Michael Griffin & Jennie Weiss Block eds., 2013)). *See generally* Staughton Lynd, Accompanying: Pathways To Social Change (2013).

[89] Declaration of Erika Pinheiro in Support of Plaintiffs' Motion for Preliminary Injunction, Al Otro Lado and Haitian Bridge Alliance, et al. v. Mayorkas, et al., No. 3:23-cv-01367 (S.D. Cal. Aug. 10, 2023), ECF No. 39-16, ¶¶ 5, 10.

[90] *Id.* ¶ 62.

[91] *Id.* ¶¶ 5, 10.

[92] The Kino Border Initiative is a binational, inclusive Roman Catholic organization that promotes humane, just, and workable migration through humanitarian assistance and

Annunciation House and Las Americas (El Paso, TX),[93] and Texas Rio Grande Legal Aid (El Paso and Brownsville, TX),[94] also provide humanitarian support, know-your-rights education, legal representation, and other assistance to asylum seekers turned back at local ports of entry. Like Al Otro Lado, most employ a range of strategies that are intended not only to protect rights but also to uphold the dignity of asylum-seeking individuals.

In January 2017, a coalition of immigrant advocacy organizations submitted an administrative complaint[95] to DHS's Office of Civil Rights and Civil Liberties ("CRCL").[96] Although only a few border-based organizations signed the complaint, many more, including Al Otro Lado, contributed case examples and participated in preparing it. The complaint highlighted the experiences of numerous men, women, families, and unaccompanied children who had fled horrendous circumstances in their home countries and endured arduous journeys to seek protection, only to be denied access to the U.S. asylum process at ports of entry.

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holistic accompaniment of migrants, education and encounter between migrants and others, and policy advocacy in Mexico and the United States. Kino's strategies include community education, building leadership skills among migrants to facilitate mobilization, and educational programming that transforms indifferent communities toward empathy or activates key allies. Kino Border Initiative, *Mission and Vision*, https://www.kinoborderinitiative.org/mission-and-values (last visited Aug. 29, 2024).

93 Annunciation House is a non-profit organization that accompanies migrants, refugees, and economically vulnerable people in the border region through hospitality, advocacy, and education. Rooted in Catholic social teaching, the organization is run entirely by volunteers committed to an experience of transformative service and solidarity with the population they serve. Annunciation House, https://www.annunciationhouse.org (last visited Aug. 29, 2024). In May 1987, Ruben Garcia, the director of Annunciation House, and Delia Gomez co-founded Las Americas Immigrant Advocacy Center, to address the legal needs of low-income immigrants, including refugees and asylum seekers, in the El Paso region. Action Network, *Las Americas Immigrant Advocacy Center*, https://www.actionnetwork.org/groups/las-americas-immigrant-advocacy-center (last visited Sept. 7, 2024).

94 Texas Rio Grande Legal Aid ("TRLA"), the largest legal aid provider in Texas, provides low-income individuals with free legal services in a wide range of areas. In the immigration arena, TRLA's work includes securing immigration relief for individuals eligible for lawful status or U.S. citizenship, providing legal education and outreach to vulnerable communities, and collaborating with other teams to provide holistic services to noncitizen clients. Texas Rio Grande Legal Aid, *Practice Areas: Immigration*, https://www.trla.org/immigration-group (last visited Aug. 29, 2024).

95 American Immigration Council, et al., *Compl. RE: U.S. Customs and Border Protection's Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border* (Jan. 13, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf (hereinafter "CRCL Complaint").

96 CRCL reviews and investigates administrative complaints from members of the public alleging civil rights and civil liberties violations resulting from DHS policies, activities, and personnel. DHS, *Make a Civil Rights Complaint*, https://www.dhs.gov/file-civil-rights-complaint (last visited Aug. 27, 2024). CRCL does not grant legal rights or remedies, but rather uses the complaint process to identify and internally address problems resulting from the implementation of DHS policies. *Id.*

The experience of L.R.G., a former community police officer in Mexico who attempted to seek asylum at the San Ysidro port of entry after being brutally attacked by a cartel and hospitalized, illustrates CBP's callous approach. Due to L.R.G.'s injuries and recent surgery, he was in a wheelchair when he and his daughter M.R. approached the port of entry in July 2016. When M.R. explained that her father wanted to seek political asylum in the United States, a CBP officer responded, "We're not accepting any more people." When M.R. insisted that her father could not return to Mexico, the following interaction ensued:

> The officer said, "If you want to go to a Mexican immigration center, there are 3,000 people on the waiting list." I told him that my dad was Mexican, so he did not need to go to any immigration center for non-Mexican citizens. The officer then said, "Go back, if you don't go back we're going to have to escort you out." My father then said, in Spanish, "They're going to kill or torture me, I can't go back." My father took off his cap and showed the officer his head injuries. The officer replied, "I'm sorry sir, we're not accepting any political asylum applicants anymore."[97]

In other cases, CBP officers used physical force to compel migrants to leave ports of entry. G.R.G., who sought protection for herself and her fourteen-year-old daughter in November 2016 after receiving death threats in Guatemala, recalled: "The Latino official [at the El Paso port] angrily yelled at me, asking what I needed and I responded that I needed help….I repeated to him that I needed help and tried to show him our documents but he demanded that I get out of here and go to Juarez." They left the bridge only after another officer pushed G.R.G. with both hands and pointed an automatic weapon at her. Desperate to find safety, G.R.G. and her daughter subsequently entered the United States by crossing the Rio Grande River a few days later.[98]

The administrative complaint urged CRCL to investigate and take immediate action to address CBP's illegal conduct. Despite these

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[97] CRCL Complaint, *supra* note 95, at 4.

[98] *Id.* at 6. Other asylum seekers who tried to navigate the Rio Grande were not as lucky as G.R.G. and her daughter. For example, on June 23, 2019, CBP officers turned back Oscar Alberto Martinez Ramirez, his wife, and their 23-month-old daughter Valeria when they presented themselves at the Brownsville, Texas port of entry. Bill Chappell, *A Father and Daughter Who Drowned at the Border Put Attention on Immigration*, Nat'l. Pub. Radio (June 26, 2019, 12:12 PM), https://www.npr.org/2019/06/26/736177694/a-father-and-daughter-drowned-at-the-border-put-attention-on-immigration. After aid workers in Matamoros, Mexico told Oscar there were hundreds of people in front of him waiting to be processed at the Brownsville port, Oscar waded into the Rio Grande River with his daughter on his back. *Id.* The rapid current swept Oscar off his feet, and he and Valeria drowned. *Id.*

efforts, increasing reports by nongovernmental organizations[99] and news outlets[100] of turnbacks at ports of entry along the southern border, and a related hearing before the Inter-American Commission on Human Rights,[101] CBP continued turning back asylum seekers at ports of entry. Seeing no other avenue to address the life-or-death consequences of CBP's illegal conduct, Al Otro Lado finally turned to the courts. The ensuing challenge was Al Otro Lado's first foray into impact litigation.

III. Impact Litigation Reconsidered

Having decided to proceed with litigation, Al Otro Lado became a critical partner in helping the litigation team—comprised of the Center for Constitutional Rights, the American Immigration Council, the Southern Poverty Law Center, the Center for Gender & Refugee Studies, and two pro bono law firms—navigate the potential pitfalls described in Part I. Impact litigators are frequently criticized for parachuting into marginalized communities, asking questions without providing answers, and abruptly departing after cherry-picking the most sympathetic plaintiffs they can find.[102] While plaintiff outreach can be time-consuming and resource-intensive, this impression—whether justified or not—must be avoided at all costs. Building a solid relationship with clients at the outset of a case is essential to establish productive long-term working relationships. The challenges inherent in this process were magnified when dealing with a highly transient population of recently arrived migrants on both sides of the border. In this context, the litigation team's alliance with Al Otro Lado, a trusted intermediary well-versed in the dynamics within and among migrant communities at the southern border, was critical.

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99 *See, e.g.*, Hum. Rts. First, Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers (2017), https://humanrightsfirst.org/library/crossing-the-line-u-s-border-agents-illegally-reject-asylum-seekers; Amnesty Int'l, Facing Walls: USA and Mexico's Violation of the Rights of Asylum Seekers 19–22 (2017), https://www.amnesty.org/en/documents/amr01/6426/2017/en/.

100 *See, e.g.*, Joshua Partlow, *U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say*, Wash. Post (Jan. 16, 2017), https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html; Caitlin Dickerson & Miriam Jordan, *'No Asylum Here': Some Say U.S. Border Agents Rejected Them*, N.Y. Times (May 3, 2017), https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html; Rafael Carranza, *Are Asylum Seekers Being Turned Away at the Border?*, The Republic (May 4, 2017, 10:55 PM), https://www.azcentral.com/story/news/politics/immigration/2017/05/05/asylum-seekers-being-turned-away-border/309398001/.

101 Inter-Am. Comm'n H.R., 161 Period of Sessions, Public Hearing: Policies that Prevent Access to Asylum in the United States (March 21, 2017), https://www.oas.org/en/iachr/sessions/hearings.asp?Year=2017&Topic=0.

102 *See, e.g.*, White, *supra* note 44, at 545.

A. Cultivating Attorney-Client Partnerships

Having shifted its priorities and thoroughly overhauled the operations of its Border Rights Project in response to CBP's turnback policy, Al Otro Lado had a strong basis for asserting claims on its own behalf in court.[103] Yet the organization's leadership felt strongly that the case should focus on the experiences of directly impacted migrants. The complaint was thus framed as a putative class action. However, in an abundance of caution, Al Otro Lado stepped forward as an organizational plaintiff to ensure that the litigation would continue even if the court did not certify the proposed class.[104]

This "hybrid plaintiff" structure, which incorporated both individual and organizational plaintiffs, proved instrumental in facilitating communication and building trust between the litigation team and the individual plaintiffs.[105] By the time Al Otro Lado embarked on this case, it had a well-earned reputation as a staunch ally of asylum seekers and other migrants in Tijuana and California. Al Otro Lado's client-centered approach and deep commitment to holistic representation—which extends far beyond the legal needs of the population it serves—reassured prospective plaintiffs that the planned litigation was in their best interests. In addition, the far-reaching expertise of Al Otro Lado's staff, many of whom have firsthand experience with the dysfunctional U.S. immigration system, helped the litigation team build cross-cultural

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[103] An organization has standing to bring claims for injuries that "directly affect[] and interfere[] with [their] core business activities" by "'perceptibly impair[ing] [their] ability to provide counseling'" or other services. FDA v. All. for Hippocratic Med., 602 U.S. 367, 395 (2024) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)) (reaffirming *Havens*, but rejecting an expansive reading that would have provided standing to any organization that "diverts its resources in response to a defendant's actions," regardless of the effect on its mission). The Ninth Circuit has applied the *Havens* standard to assess organizational standing, holding that an organization may bring a claim when it suffers "a drain on its resources from both a diversion of its resources and a frustration of its mission." Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002). Immigration service providers have repeatedly established organizational standing on this basis. *See, e.g.*, East Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 663–64 (9th Cir. 2021); East Bay Sanctuary Covenant v. Garland, 994 F.3d 962, 974–75 (9th Cir. 2020).

[104] A court will certify a proposed class only if the plaintiffs demonstrate that they meet the requirements of Federal Rule of Civil Procedure 23—numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a). To obtain injunctive or corresponding declaratory relief, the plaintiffs must also show that the defendant has "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2).

[105] Amaha Kassa, Executive Director, African Communities Together, coined the term "hybrid plaintiff" and eloquently highlighted the advantages of including both individual and organizational plaintiffs during a panel presentation on "Movement Lawyering During the Biden Administration," which was part of a virtual conference hosted by the UCLA Center for Immigration Law and Policy on April 30, 2021. UCLA Center for Immigration Law and Policy, *Movement Lawyering During the Biden Administration*, YouTube (Apr. 30, 2021), https://www.youtube.com/watch?v=Bjyy0liJ7Tg.

competence,[106] infuse trauma-informed practices into their work,[107] and better understand and respond to the needs of directly impacted asylum seekers both during the interviews and as the litigation progressed. Over time, Al Otro Lado remained an indispensable partner to the litigation team, routinely attending team meetings, providing updates regarding on-the-ground developments, facilitating communications with prospective class members, and weighing in on virtually every strategic decision.

Before the litigation team arrived in Tijuana, Al Otro Lado had notified asylum-seeking migrants of the visit and the team's interest in speaking to individuals who had been turned back at ports of entry. In the process, Al Otro Lado's staff educated local migrants about how litigation could help secure their long-awaited access to the U.S. asylum process and generated a sense of optimism about this potential strategy. Al Otro Lado also coordinated logistics—including office space, technology, transportation, babysitters, and refreshments—for group information sessions and several days of concurrent interviews, and they made arrangements with local shelters to facilitate additional outreach. Over the next several weeks, Al Otro Lado and members of the litigation team worked tirelessly to screen prospective individual plaintiffs and educate them about the goals of the planned litigation, the potential risks and benefits, the responsibilities entailed in becoming a named plaintiff in a class action lawsuit, and the prolonged duration of most such litigation. Many individuals were concerned about the possibility of reprisals by persecutors in their home countries against family members left behind, which was addressed by using pseudonyms in place of the plaintiffs' actual names in court pleadings. Through in-depth meetings with individuals willing to share their stories, the litigation team ultimately identified a group of willing plaintiffs whose experiences powerfully illustrated the range of tactics that CBP was using to limit the number of asylum seekers inspected and processed at ports of entry.

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106 *See* Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* Race, Culture, Psychology, and Law (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference* and *Talking about Race*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy (Susan Bryant, Elliott S. Milstein & Ann C. Shalleck eds., 2014). For example, one litigation team member recalled the Al Otro Lado staff's emphasis on the importance of speaking with kindness and honesty, recognizing non-verbal cues, avoiding legal jargon, responding to asylum seekers' questions, and taking breaks as needed. Email correspondence from Hilda Bonilla, Legal Fellow, National Immigration Law Center, to author (Jan. 28, 2024, 6:12 pm EST) (on file with author).

107 *See* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clin. L. Rev. 359, 371 (2016); Hannah Fontaine, *Trauma and Activism on Los Dos Lados*, Latina Republic (Sept. 20, 2021), https://latinarepublic.com/2021/09/20/trauma-and-activism-on-los-dos-lados/.

Members of the litigation team subsequently ventured to Nogales, Arizona, as well as Nuevo Laredo, Ciudad Juarez, and the Rio Grande Valley to meet with other service providers, understand how CBP's turnback policy was playing out in those locations, and seek assistance in identifying additional plaintiffs to demonstrate the border-wide scope of CBP's unlawful practices. Despite previous conference calls and Zoom meetings with these advocates, the litigators' time on the ground was essential to better understand their work and build rapport. Whether driven by religious convictions, a commitment to protect human rights, or some combination of both, virtually all the advocates expressed a deep commitment to honoring the human dignity of the people they serve, giving them autonomy over decisions affecting their lives, and maintaining humility. Like Al Otro Lado, they were adept at accompanying migrants, both to ports of entry and more generally,[108] and they encouraged the litigators to take the same approach.

In collaboration with a growing network of advocates, the litigation team finalized its selection of individual named plaintiffs by June 2017. At that point, however, the draft complaint and related documents had to be substantially overhauled to incorporate the individual plaintiffs' voices and experiences. In addition to setting forth the facts required to substantiate the plaintiffs' legal claims,[109] the complaint would be used as a public education tool to generate greater awareness about the tragedy unfolding at the southern border. Fortunately, an emergency fundraising request enabled Al Otro Lado to house and support the individual plaintiffs and their accompanying family members in relative safety for the additional three weeks needed to finalize the complaint. During this period, Al Otro Lado remained the primary point of contact with the named plaintiffs, triaging their immediate needs, providing basic information about the U.S. immigration system, and facilitating conversations with the litigation team when necessary. In retrospect, the litigators realized that they should have anticipated the plaintiffs' need for temporary housing and proactively addressed it.[110] The lack of

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[108] *See, e.g.,* Kino Border Initiative, *Solidarity: Creating Community Across Borders and Defying Division* (July 13, 2020), https://www.kinoborderinitiative.org/solidarity ("As advocates for more just migration, one of the most powerful things that we can do to stand in solidarity with migrant communities is to bring them back into sight–we can make them seen and make them heard. We can listen to their stories and take the time to understand their realities, their needs, and their struggles so that we can be better educated, equipped, and strategic in how we support them. As the needs of migrant communities shift, so should our modes of expressing solidarity.").

[109] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring that a complaint must allege "enough facts to state a claim to relief that is plausible on its face").

[110] The ethical rules of many jurisdictions, including California, prohibit lawyers from paying the personal expenses of a prospective or existing client. *See* Ca. R. Prof. Conduct 1.8.5 (Payment of Personal or Business Expenses Incurred by or for a Client).

a solution could have severely jeopardized their clients' safety, trust, and commitment to the case.

In mid-July 2017, Al Otro Lado and six individual named plaintiffs, acting on behalf of themselves and other similarly situated asylum seekers across the southern border, filed suit against several high-level DHS officials. The plaintiffs' experiences, together with voluminous documentation from other sources, demonstrated that CBP was using a variety of tactics—including misrepresentation, threats, intimidation, verbal abuse, physical force, coercion, and delay—to deprive asylum seekers at the southern border of access to the U.S. asylum process. Alleging violations of U.S. and international law, the plaintiffs sought to ensure that DHS and CBP complied with their legal obligations to inspect and process arriving asylum seekers going forward.

B. Capitalizing On Opportunities To Shift Power To Plaintiffs

Throughout the litigation, Al Otro Lado, the individual plaintiffs, and the litigation team constantly looked for opportunities to shift power from the government to those subjected to the draconian turnback policy.[111] For example, just days after the complaint was filed, the individual plaintiffs, through counsel, apprised the government of their intention to seek an emergency order mandating their inspection and processing at ports of entry—the paramount goal of the litigation. After reviewing a draft of the motion, which meticulously outlined the individual plaintiffs' dire predicament in Mexico and the life-threatening harm they were likely to suffer if forced to remain there, the government promptly agreed to facilitate their entry into the United States.[112]

The filing of the lawsuit also helped prospective class members, at least in the short term. For the next several months, CBP accelerated its processing of asylum seekers at several ports of entry including San Ysidro, the busiest land border crossing in the United States. Had this trend continued, CBP could have dissipated the rising anxiety among the thousands of asylum seekers who had been waiting indefinitely in Mexico.

In the ensuing months, Al Otro Lado's Border Rights Project redoubled its efforts to educate asylum seekers in Tijuana about the U.S.

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111 *Cf.* Su, *supra* note 51, at 411 ("The [El Monte] workers had to learn that even in this country, nothing is won without a fight, no power is shifted without a struggle, and no one is more powerful to stand up for them than they themselves. They—and I—have learned that mere access to the legal system and to lawyers does not ensure that justice will be served.").

112 Unfortunately, a few plaintiffs were unable to take advantage of this opportunity. For example, Plaintiff Roberto Doe tried to cross the border, but Mexican officials arrested him as he was walking onto the international bridge leading to the Hidalgo port of entry and subsequently detained him. Suppl. Decl. of Roberto Doe in Support of Pls.' Mot. for Class Certification, Al Otro Lado v. Wolf, ECF No. 390-97, ¶ 6.

asylum process and advise them on how U.S. policies and border enforcement practices could affect their cases. According to AOL Border Rights Project Director Nicole Elizabeth Ramos, "We believe that refugees are brave and resilient, but in order to fully assess the risks of seeking asylum in the United States, they must have all the information needed to assess that risk."[113] Al Otro Lado's leaders bore witness to the many ways in which the community of waiting asylum seekers mobilized internally, including by creating and disseminating video and audio recordings of CBP's abuses at the border to generate broader awareness of these practices, organizing protests to denounce discriminatory treatment of Black migrants, and educating newly arriving asylum seekers about their rights.[114] Despite the initial wariness of many asylum seekers toward people from different countries, most eventually came to appreciate the advantages of cross-cultural collaboration for purposes of organizing and community-building.[115]

In the spring of 2018, the Trump administration shifted its approach and announced a "metering," or waitlist, process designed to restrict the flow of asylum seekers.[116] Under the metering policy, CBP officers no longer permitted noncitizens without proper travel documents to access the port of entry but instead stopped them before they crossed the international border, falsely claiming that the government "lacked capacity" to inspect and process them.[117] Whether this shift was driven by the pending *Al Otro Lado* litigation, the anticipated arrival of a new "caravan" of Central American asylum seekers, or a more general desire by the government to deter migration was never clear.[118]

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113 Telephone interview with Nicole Elizabeth Ramos (Sept. 9, 2021) (notes on file with author) (hereinafter "Ramos Interview").

114 *Id.*

115 *Id.*

116 Memorandum from Todd Owen, Executive Assistant Commissioner, Office of Field Operations, CBP, *Subject: "Metering Guidance"* (Apr. 27, 2018), https://immpolicytracking.org/media/documents/2018.04.27_CBP_Metering_Guidance.pdf.

117 Damning evidence produced in discovery confirmed that the government's capacity-related justifications for turning back asylum seekers at the southern border were clearly pretextual. While many of the relevant documents remain under seal, DHS's Office of Inspector General released a report in October 2020 that reached the same conclusion. U.S. Dep't of Homeland Sec., Office of the Inspector Gen., OIG-21-02, *Subject: CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry* (Oct. 27, 2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf.

118 Whatever the cause, President Trump justified his administration's aggressive use of turnbacks by characterizing asylum seekers as "criminals" and "animals" seeking to "infest" and "invade" the United States, and by stating, via tweet, that the United States "must bring them back from where they came" and must "escort them back without going through years of legal maneuvering." Donald J. Trump (@realDonaldTrump), X (June 19, 2018, 6:52 AM), https://twitter.com/realDonaldTrump/status/1009071403918864385; Donald J. Trump (@realDonaldTrump), X (June 24, 2018, 8:02 AM), https://perma.cc/35AQ-NSDH; Donald J. Trump (@realDonaldTrump), X (June 30, 2018, 12:44 PM), https://x.com/realDonaldTrump/status/1013146187510243328.

By contrast with the turnback experiences recounted above,[119] Roberto Doe, a Nicaraguan father who had received death threats after participating in anti-government protests in his hometown,[120] was subject to the government's metering policy. When he attempted to seek asylum at the Reynosa-Hidalgo port of entry,[121] CBP officers stationed at the middle of the bridge between Reynosa, Tamaulipas (Mexico) and Hidalgo, Texas, informed him "that the port of entry was 'all full'" and that he "might have to wait for 'hours, days, or weeks' before [he] could apply for asylum."[122] Another CBP officer then contacted Mexican immigration officials, who escorted Roberto back down the bridge towards the Mexican side, where he was subsequently detained.[123]

The government's changing turnback tactics necessitated the filing of an amended complaint adding Roberto Doe and six other new individual plaintiffs who had been subjected to metering. Once again, the government agreed to facilitate the plaintiffs' entry into the United States rather than defending against their intended motion for emergency relief (and, presumably, the damning press reports that would likely have followed if the plaintiffs had been forced to file that motion). Confident that its newly formalized metering tactic—in which CBP stopped most migrants before they stepped onto U.S. territory—would survive judicial scrutiny, the government renewed its efforts to dismiss the case. But after extensive briefing by the parties and numerous *amici curiae*,[124] the court largely denied the government's motion to dismiss and allowed nearly all the plaintiffs' claims to go forward.[125]

Undeterred, the government continued to meter asylum seekers across the U.S.-Mexico border. In numerous Mexican border towns, many asylum seekers were allowed to place their names on waitlists run by other waiting asylum seekers or, in some cases, Mexican immigration officials. When CBP officers at a particular port of entry opted

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119 *See* Part II, *supra.*

120 Decl. of Roberto Doe in Support of Pls.' Mot. for Prelim. Inj., Al Otro Lado v. McAleenan, No. 17-cv-02366 (S.D. Cal. September 26, 2019), ECF No. 294-7, ¶¶ 2–3.

121 *Id.* ¶ 4.

122 *Id.* ¶ 5.

123 *Id.* ¶ 6.

124 Six *amicus* briefs—from Members of Congress, international law scholars, twenty states and the District of Columbia, Amnesty International, Kids In Need of Defense, and various other nongovernmental organizations—were filed in opposition to Defendants' motion to dismiss. Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (S.D. Cal. February 21, 2019), ECF Nos. 219-1, 221-1, 215-1, 216-1, 225-1, 223-2, https://ccrjustice.org/AOL (last visited Sept. 7, 2024).

125 Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, 1198–1205 (S.D. Cal. 2019). The district court endorsed Plaintiffs' legal theory that the Immigration and Nationality Act prohibits CBP from turning back asylum seekers in the process of arriving in the United States and triggers the government's statutory duties to inspect and process them. *Id.* On appeal, the Ninth Circuit found that this analysis was "likely correct" and had "considerable force." Al Otro Lado v. Wolf, 952 F.3d 999, 1011, 1013 (9th Cir. 2020).

to inspect and process asylum seekers, they would direct their Mexican counterparts to bring a designated number of individuals to the port. The Mexican authorities did so, typically using the waitlists. However, list managers frequently denied certain individuals—most notably, Black migrants—permission to add their names to the waitlists,[126] leaving them with no avenue to access the U.S. asylum process.[127] Outraged by such blatant discrimination, a sizeable group of Cameroonian asylum seekers waiting in Tijuana organized protests to demand a role in managing the local list.[128]

Even for migrants enrolled on the waitlists, waiting times ranged considerably depending on the situation at particular ports of entry.[129] Although the composition of the migrant population shifted over time, most individuals were forced to wait anywhere from a few weeks to several months to be inspected and processed. While they waited, migrants in and around Tijuana inevitably learned of Al Otro Lado, whose staff visited local encampments on a daily basis, and often sought out their services. These interactions helped to keep Al Otro Lado—and, in turn, the litigation team—apprised of ongoing changes to CBP policies and their impact on waiting migrants.

Another attempt at power-shifting occurred in July 2019, after the Trump administration promulgated a new "transit" rule that threatened to permanently deprive thousands of metered asylum seekers waiting in Mexico of access to the U.S. asylum process.[130] With very limited exceptions, the rule rendered any individual who had transited through one or more third countries en route to the U.S.-Mexico border ineligible for asylum in the United States unless they had sought and been denied protection in at least one of those third countries.[131] As panic gripped communities of waiting asylum seekers, the plaintiffs moved swiftly for, and ultimately obtained, a preliminary injunction exempting from the transit rule any individual metered before its implementation on July 16, 2019, but not inspected or processed until after that date.[132] In a subsequent order, the court clarified that the government must "make all

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126 *See* Amicus Curiae Brief of the Haitian Bridge Alliance, et al. in Support of Plaintiffs-Appellees/Cross-Appellants, Al Otro Lado v. Mayorkas, *supra* note 67.

127 Decl. of Nicole Ramos in Support of Pls.' Mot. for Prelim. Inj., Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, ECF No. 294-6, ¶ 8 (noting frequent changes to documentation requirements for Black asylum seekers to enroll on the waitlist).

128 Ramos Interview, *supra* note 113.

129 *See, e.g.*, Strauss Ctr. for Int'l Sec. and Law, Asylum Processing and Waitlists at the U.S.-Mexico Border, *supra* note 78, at 7; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2019, *supra* note 78, at 5–14; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2020, *supra* note 78, at 4–9.

130 Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (proposed July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4).

131 *Id.*

132 *See* Al Otro Lado v. McAleenan, 423 F. Supp. 3d 848 (S.D. Cal. 2019).

reasonable efforts to identify," and provide notice of the preliminary injunction to, potential class members in proceedings or in DHS custody and "take immediate affirmative steps to reopen or reconsider" past determinations of ineligibility for asylum based on the transit rule; the plaintiffs and their counsel were tasked with notifying other class members, including those outside the United States.[133] This example of effective coordination among waiting asylum seekers, Al Otro Lado, and the litigation team, followed by the court's favorable ruling, reinforced the potential use of impact litigation to enable plaintiffs and putative class members to respond to policy changes in real time.

Recognizing that the court's order could restore asylum eligibility for countless class members who had been wrongly subjected to the transit rule, the litigation team worked diligently to advise affected individuals outside the United States. Their strategies included the creation of an informational flyer, which was translated into Spanish and six indigenous languages and posted in community centers and churches throughout Central America. Soon afterward, however, the stay-at-home mandates associated with the COVID-19 pandemic reduced the level of traffic in these previously popular gathering places, with the result that many eligible class members remained unaware that they could benefit from the injunction. Meanwhile, the government's slow pace of compliance shifted, at least temporarily, the balance of power back to the pre-injunction status quo. The plaintiffs' subsequent efforts to disseminate information about the injunction and identify and advise affected class members of their rights included outreach through WhatsApp to those whose contact information had been obtained through discovery, a Facebook page,[134] and radio broadcasts in various Central American countries.

To some extent, the power-shifting pendulum swung back in August 2020 when, based on declarations from the individual named plaintiffs, dozens of putative class members, and several experts, the court issued an order certifying the proposed class and designating the individual named plaintiffs as class representatives.[135] Legally speaking,

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133 Al Otro Lado v. Wolf, 497 F. Supp. 3d 914, 933, 935 (S.D. Cal. 2020).

134 Ayuda Lista de Espera – AOL v. Mayorkas, Facebook, https://www.facebook.com/ayudalistadeespera (last visited Aug. 27, 2024).

135 Al Otro Lado v. Wolf, 336 F.R.D. 494, 507 (S.D. Cal. 2020). The certified class consists of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [port of entry] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016." *Id.* The court also certified a subclass of "all noncitizens who were or will be denied access to the U.S. asylum process at a Class A [port of entry] on the U.S.-Mexico border as a result of Defendants' metering policy on or after January 1, 2016." *Id.* For a detailed timeline of the litigation and links to key pleadings, *see* Center for Constitutional Rights, *Al Otro Lado v. Mayorkas*, https://www.ccrjustice.org/AOL (last visited Aug. 27, 2024).

this development was a potential game-changer, ensuring that any favorable ruling in the case would cover asylum seekers turned back at ports of entry along the entire U.S.-Mexico border. Unfortunately, the decision had no immediate impact on the day-to-day lives of class members in Mexico. But for many, the reality of having a pending lawsuit challenging the U.S. government's obstructive conduct bolstered the legitimacy of their struggle and strengthened their resolve to keep fighting for a chance to seek protection in the United States.[136]

C. Developing More Inclusive Representation Structures

The interventions discussed in the preceding section were prompted by developments affecting asylum seekers in Mexico. Given the many thousands of miles that separated the litigators and most of the class representatives from the other class members' day-to-day experiences,[137] Al Otro Lado and other border-based service providers played a critical role in relaying reports from directly impacted individuals and tracking events on the ground in real time.[138] Through weekly calls, email updates, and WhatsApp videos, Al Otro Lado in particular kept the litigation team apprised of ongoing developments at the border, flagged crises that might warrant legal intervention, and offered input on potential strategies based on their experience on the frontlines. While Al Otro Lado's staff were well-positioned to play this role, the time-consuming responsibility of advising and updating the litigation team only added to their crushing workloads.

The circumstances of this case demonstrate certain potentially problematic class action dynamics. While individual named plaintiffs are selected in part because their claims are "typical" of those of a larger group of similarly situated individuals and raise "common questions of law and fact" that are capable of class-wide resolution, they may also be the beneficiaries of emergency relief that, as in this case,[139] disconnects them from the ongoing struggles of other class members. This disconnect can complicate a litigation team's efforts to stay abreast of

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136 Zoom interview with Joanna Williams, Executive Director, Kino Border Initiative, Oct. 6, 2023 (notes on file with author) (hereinafter "Williams Interview").

137 As discussed in Part III.B, *supra*, the government facilitated the entry of most of the individual named plaintiffs into the United States following the filing of both the initial and amended complaints.

138 Sameer Ashar has proposed that such "dialogic" relationships between lawyers and client organizations have the potential to facilitate a redistribution of power and "project new horizons for the work." Sameer M. Ashar, *Pedagogy of Prefiguration*, 132 Yale L. J. F. 869, 898 (2022–2023).

139 Although the government paroled most of the individual named plaintiffs into the United States shortly after they filed their complaint, *see* Part III.B, *supra*, this emergency relief did not render their claims moot or prevent them from serving as class representatives. Al Otro Lado v. Nielsen, 327 F. Supp. 3d 1284, 1295, 1302–04 (S.D. Cal. 2018).

developments on the ground and may require unconventional arrangements to facilitate the flow of accurate, updated information from directly impacted individuals.

The litigation team's relationship with the class representatives in the United States recalls the traditional attorney-client dyad, in which lawyers and clients communicate directly. Through the concerted efforts of several Spanish-speaking paralegals, the litigation team has stayed in regular touch with these eleven class representatives through monthly check-ins by phone or WhatsApp and, when necessary, additional conversations to troubleshoot housing, medical, legal, and other emergencies, in keeping with principles of holistic representation. The litigation team sends the class representatives regular updates about key developments in the case and solicits their input at critical junctures.[140] While most class representatives remain interested in case-related developments, the demands of their individual immigration cases—in which they are represented by separate counsel—and their need for stable employment understandably take precedence over their focus on impact litigation.

Moving beyond the attorney-client dyad, the litigation team collaborated closely with Al Otro Lado and other border-based service providers to facilitate communication with class members in Mexico, including through the use of innovative technology that has the potential to transform class action litigation. As the litigation team worked to develop proposed settlement terms following President Biden's election in late 2020, Al Otro Lado's staff began facilitating Zoom meetings with simultaneous live interpretation in English, Spanish, French, and Haitian Creole, which enabled the team to solicit input directly from class members in Mexico. By circulating simple flyers in Spanish and Haitian Creole (including via WhatsApp, most migrants' preferred mode of communication) to the many individuals who had sought their services, Al Otro Lado managed to get the word out quickly. Less than a week later, the litigation team met via Zoom with a diverse group of Tijuana-based asylum seekers to discuss litigation-related developments and gain a better understanding of these class members' priorities for settlement. Using the same technology, the litigators conducted similar

[140] Communication with Beatrice Doe and Roberto Doe, the two individual named plaintiffs who remained outside the United States after the others had been inspected and processed, proved more challenging, both technologically and logistically. In this regard, the assistance of Justice in Motion proved invaluable. Founded in 2005 to secure access to justice for migrant workers, Justice in Motion has established a Defender Network of human rights lawyers and nonprofit organizations throughout Mexico, Guatemala, El Salvador, Honduras, and Nicaragua, who partner with U.S. lawyers on legal cases, advocacy, and community education projects across the region. *See* Justice in Motion, *Our Story*, https://www.justiceinmotion.org/our-story (last visited August 27, 2024).

meetings with asylum seekers in other parts of Mexico, whose priorities were surprisingly consistent with those expressed at the Tijuana meeting.

The litigation team later repurposed the Zoom interpretation technology to enable class members to listen to court hearings. Given the ongoing pandemic, the court provided a phone line that members of the public could call to hear the arguments. The litigation team hired Spanish and Haitian Creole-speaking interpreters, who called into the hearing and provided simultaneous interpretation of the arguments that dozens of directly impacted individuals in Mexico (in addition to several class representatives in the United States) accessed through Zoom. Following the hearing, a member of the litigation team recapped the arguments and responded to attendees' questions. According to Al Otro Lado's Border Rights Project Director Nicole Elizabeth Ramos, concerted outreach by Al Otro Lado and others to Spanish and Haitian Creole-speaking asylum seekers in Mexico was essential to ensure turnout and send a strong message that this litigation was intended to provide "justice for all"—including "an absolute right to information regarding the legal process in which they are trying to engage to save their lives."[141]

These recent breakthroughs in communicating with class members in Mexico prompted numerous conversations among litigation team members and Al Otro Lado leadership about other ways to facilitate greater engagement of directly impacted individuals in the case. Suggestions included establishing a litigation steering committee of directly impacted individuals, possibly on a rotating basis, to provide regular input and guidance on the litigation; holding regular meetings with the litigation steering committee and periodic update meetings with broader groups of affected individuals; and collaborating with local service providers to disseminate periodic written litigation updates in Spanish, Haitian Creole, and other prevalent languages to a broad swath of class members (in addition to the class representatives, who regularly received them).[142]

While intriguing, the establishment of an on-the-ground litigation steering committee is not contemplated by the existing class certification requirements, which focus on the individual named plaintiffs' ability to represent the class.[143] Assuming the class representatives had been

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[141] Ramos Interview, *supra* note 113; email correspondence from Nicole Elizabeth Ramos to author (Apr. 8, 2024, 1:45 pm EST) (on file with author).

[142] Pinheiro Interview, *supra* note 88.

[143] *Cf.* Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U. S. F. L. Rev. 911, 948–49 (1995) (recommending amendment of rules of professional responsibility to encourage more robust communication among class counsel, class representatives, and class members and clearer delineation

interested in seeking the input of class members still waiting in Mexico, the litigation team and Al Otro Lado could conceivably have facilitated such communication and provided interpretation as needed. However, given the precarious conditions under which most asylum seekers in Mexico live and the exigencies of their day-to-day struggles to survive,[144] the scope of their capacity to provide reliable, consistent assistance to the class representatives was uncertain at best.[145]

D. Facilitating Parallel Momentums

Impact litigators can use the strategies outlined above—including partnerships with local intermediaries to build credibility and cultural competence, the hybrid plaintiff structure, strategic interventions to facilitate power-shifting in plaintiffs' favor, and recourse to innovative technology and other creative communication mechanisms—to foster greater engagement by directly impacted individuals in the litigation and, ideally, greater solidarity among class members. But the limits of litigation are undeniable. In the words of ACLU Deputy Legal Director Cecillia Wang, "Litigators act as firefighters to extinguish the [immediate] harm."[146] To maximize the potential for systemic change, a broad-based advocacy strategy—including, as appropriate, grassroots organizing, public protest, media campaigns, community education, and policy work—is essential.[147]

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of decision-making authority, along with amendment of Fed R. Civ. P. 23 to include court approval of plan for notifying and communicating with class members).

144 *See, e.g.*, Tom K. Wong, Seeking Asylum: Part 2, U.S. Immigr. Pol'y. Ctr. 4 (Oct. 29, 2019), https://bit.ly/31NbfCu; Sumiko Keil, *Migrant Shelter in Mexicali Desperate for Help Amid the Pandemic*, KYMA (Aug. 6, 2020, 2:43 pm), https://bit.ly/3mtKMC1; John Holman, *Mexico Fails to Provide Promised Jobs to Migrants*, Al Jazeera (Aug. 28, 2019), https://bit.ly/2HEovlQ; Julia Ainsley, *As COVID-19 Looms, Conditions for Migrants Stalled at U.S. Border are a 'Disaster in the Making'*, NBC News (May 12, 2020, 2:01 am), https://nbcnews.to/34ylKvy (reporting that although Mexican law purports to guarantee access to health care, many low-income people are turned away from hospitals and public health workers were blocked from visiting migrant shelters under COVID-19 stay-at-home orders).

145 For similar reasons, the involvement of directly impacted migrants in U.S.-based advocacy coalitions has been relatively minimal. Critical steps that U.S.-based advocates could take to facilitate such involvement include holding meetings online rather than in-person, scheduling meetings outside the workday, and consistently providing interpretation. Email correspondence from Nicole Elizabeth Ramos to author (Apr. 8, 2024, 1:45 pm EST) (on file with author). *But see* Refugee Council USA, *Constituent Leadership*, https://rcusa.org/impact-area/constituent-leadership/ (last visited Aug. 27, 2024) (outlining Refugee Council USA's efforts to expand opportunities for people with lived experience to directly shape humanitarian protection policy).

146 UCLA Center for Immigration Law and Policy, *Immigrant Rights Litigation in the Biden Administration: A Conversation with Cecillia Wang*, Youtube (Apr. 23, 2021), https://www.youtube.com/watch?v=i6-FhBPs7AI.

147 *See* White, *supra* note 43, at 765 ("[P]rofessional identification as a lawyer can narrow one's strategic imagination. Perhaps the best arrangement is for lawyer-outsiders to work side by side with outsiders trained in other fields.").

The *Al Otro Lado* case illustrates how integrated advocacy can generate parallel momentums that complement ongoing litigation.[148] When the original complaint was filed, only a few human rights organizations and a handful of journalists had reported on turnbacks of asylum seekers at ports of entry along the southern border. As the case progressed, both the litigation team and Al Otro Lado solidified channels of communication with advocates across the border, confirmed the pervasive nature of CBP's illegal conduct, and worked with local groups to identify class members and monitor trends. Meanwhile, an increasing number of immigration advocacy organizations issued reports confirming and denouncing CBP's unlawful policy and practice of turning back asylum seekers at ports of entry.[149]

The robust *amicus* curiae, or "friend of the court," briefing that occurred at various stages of the case amplified the chorus of stakeholders publicly denouncing CBP's turnbacks of asylum seekers. In addition to many of the national and border-based advocates with whom the plaintiffs' counsel had worked closely,[150] *amici* included 77 Members of

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148 *See* Cummings, *supra* note 2, at 1695 (noting that "[t]he essential thrust of integrated advocacy is to break down divisions associated with legal liberalism—between lawyers and nonlawyers, litigation and other forms of advocacy, and courts and other spaces of law making and norm generation—toward the end of producing more democratic and sustainable social change").

149 *See, e.g.,* Amnesty Int'l, *supra* note 99; Hum. Rts. First, *supra* note 99; Amnesty Int'l, USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States (Oct. 11, 2018), https://www.amnesty.org/en/documents/amr51/9101/2018/en/; Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, Ctr. for Migration Stud. (June 25, 2018), http://cmsny.org/publications/heyman-slack-asylum-poe/#_ednref11.pdf; Adam Isacson, Maureen Meyer, & Adeline Hite, "Come Back Later": Challenges for Asylum Seekers Waiting at Ports of Entry (Aug. 2018), https://www.wola.org/wp-content/uploads/2018/08/Ports-of-Entry-Report_PDFvers-3.pdf.

150 *See* Amicus Curiae Brief of Nineteen Organizations Representing Asylum Seekers, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/organizations_representing_asylum_seekers.pdf (arguing that the administration's "lack of capacity" justification for denying individuals access to the U.S. asylum process was factually false, that migration was at historically low levels, that under the Obama administration CBP demonstrated a significantly greater capacity to process asylum seekers at ports of entry, and that CBP's turnback policy was driven by hostility to the asylum process and animosity toward asylum seekers); Amicus Curiae Brief of Amnesty International in Opp'n to Def's Mot. To Dismiss, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/amnesty_intl.pdf (arguing that U.S. legal obligations under domestic and international law require the prompt processing of asylum seekers, and that CBP's policy was a direct violation of these obligations); Brief of Amici Curiae Kids in Need of Defense, et al. in Supp. of Pls.' Opp'n to Mot. To Dismiss, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/kind.pdf (explaining severity of harms faced by juveniles denied access to the U.S. asylum process).

Congress,[151] 19 State Attorneys General,[152] and various immigration and refugee law scholars.[153] In some cases, an amicus strategy can provide an opportunity to engage and educate individuals and groups not involved in the litigation about the issues at stake and encourage them to offer their perspectives for consideration by the court.[154] Here, most of the *amici* were familiar with the issues and grateful for the chance to denounce CBP's unlawful conduct. Their diverse perspectives reinforced the importance of the fight, signaled to the court that its decision would impact a wide range of stakeholders, and generated greater awareness—and outrage—among immigration advocates across the country. In addition, the significant involvement of legislators and other government actors helped to build political support for the plaintiffs' positions. After the amicus briefs were filed, many of the nongovernmental organizations representing the plaintiffs posted them on their websites in an effort to reach an even broader audience.

As the case unfolded, more formal coordination among advocates took shape. The Border Working Group, which was established by the Women's Refugee Commission in early 2017 to facilitate information-sharing among national and on-the-ground advocates concerning border-wide trends (including metering),[155] continues to meet virtually on a biweekly basis to share regional updates and strategize about advocacy. Meanwhile, the Trump administration's insistence on metering,

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151 *See* Amicus Brief of Members of Congress, in Supp. of Pls.' Opp'n to Defs.' Mot. To Dismiss the Second Amended Complaint, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/members_of_congress.pdf (arguing that Congress's intent was to facilitate processing of asylum seekers at the border and that DHS's practice of deterring asylum seekers by limiting access to ports of entry and the U.S. asylum process was thus unlawful).

152 *See* Amicus Curiae Brief of the States of California, et al., Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/al_otro_lado_amicus_brief_filed.pdf (arguing that the administration's policy of turning back asylum seekers was subjecting them to severe trauma and would increase the needs of those who reached the United States for state-funded mental and physical health services).

153 *See* Brief of Immigration Law Professors as *Amici Curiae* in Supp. of Pls.' Opp'n to Defs' Mot. To Partially Dismiss the Second Amended Complaint, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/international_law_professors.pdf (arguing that migrants who have reached the U.S. border have clear rights under federal statutes, the Constitution, and international law to access the U.S. asylum process, whether they have stepped across the border or not).

154 Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 Stan. J. Civ. Rts. & Civ. Liberties 197, 200–01, 205 (October 2011). *See* Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 Asian Pac. Am. L. J. 22, 23, 25 (2008) (explaining how amicus brief filed by Asian American activists in marriage equality cases was "an effective tool to engage and educate community-based organizations and their constituencies" and helped to build a strong coalition that included both LGBT and allied members of the Asian American community).

155 Telephone interview with Leah Chavla, Former Senior Policy Advisor, Women's Refugee Commission (January 25, 2024) (notes on file with author).

among other draconian efforts to prevent migrants from accessing the U.S. asylum process, only reinforced the need for concerted pushback. In response, a broad-based coalition of more than ninety organizations, activists, asylum seekers, advocates (including litigators), and community members collectively established the Welcome With Dignity Campaign, which uses policy work, education, and media campaigns to "transform[] the way the United States receives and protects people forced to flee their homes to ensure they are treated humanely and fairly."[156]

The parallel efforts of such a broad spectrum of actors—including news media, federal legislators, state government officials, scholars, human rights investigators, advocates, and activists—heightened public awareness of the injustice of turning back asylum seekers and generated increased momentum to stop this practice. Initially, the litigation galvanized different stakeholders to participate in challenging turnbacks. Over time, many of these stakeholders came to view turnbacks as part of a more pervasive pattern of CBP misconduct, which has become the focal point of a broader campaign on behalf of individuals seeking asylum.

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As of this writing, the legal outcome of the *Al Otro Lado* case remains uncertain. In its September 2021 ruling on summary judgment, the court found that CBP's systematic turnbacks of asylum seekers arriving at ports of entry violated its mandatory inspection and processing duties, as well as class members' due process rights.[157] In the wake of this decision, the government rescinded its metering guidance.[158] By then, however, the COVID-19 pandemic was in full swing, and the government was relying on a different statute, 42 U.S.C. § 265 (known as "Title 42"), a related regulation, and a series of orders from the Centers for Disease Control and Prevention to justify its continuing rejection of asylum seekers at ports of entry along the southern border.

In its subsequent order on remedies, issued in August 2022, the *Al Otro Lado* court acknowledged the glaring need for broad injunctive relief prohibiting the government from continuing to turn back asylum seekers at ports of entry (absent independent statutory authority, such

156 Welcome With Dignity, *Our Vision & Mission*, https://welcomewithdignity.org/vision-mission (last visited Aug. 30, 2024).

157 Al Otro Lado v. Mayorkas, 2021 WL 3931890, at *18–20 (S.D. Cal. Sept. 2, 2021).

158 Memorandum from Troy A. Miller, Acting Commissioner, CBP, to William A. Ferrara, Executive Assistant Commissioner, Office of Field Operations, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.

as Title 42), but ultimately found that the Supreme Court's intervening decision in *Garland v. Aleman Gonzalez* precluded such relief.[159] In *Aleman Gonzalez*, the Court interpreted 8 U.S.C. § 1252(f)(1) to bar injunctive relief in certain types of cases challenging the "operation" of particular provisions of the immigration statute,[160] including 8 U.S.C. § 1225—one of the statutes on which the *Al Otro Lado* court relied. Clearly irked by these new constraints on its authority, the *Al Otro Lado* court issued a class-wide declaratory judgment affirming the illegality of the government's refusal to inspect and process asylum seekers arriving at ports of entry, which it noted would have the effect of perpetuating "preventable human suffering."[161]

The strong language of the *Al Otro Lado* remedies order, which criticizes the Supreme Court for giving immigration agencies "*carte blanche* to implement immigration enforcement policies that clearly are unauthorized by the statutes under which they operate,"[162] makes the court's frustration palpable. In a particularly sharp rebuke, the decision notes:

> It would be quite absurd if, in *Brown, Swann,* or *Milliken,* the lower courts were restrained to issue injunctive relief, schoolchild-by-schoolchild…. One can hardly think of a remedial methodology that is less economical, particularly where the members of a class raise indistinguishable claims and seek identical relief, and less effective. Yet that is precisely the approach the Supreme Court deems proper for remediating statutory and constitutional violations committed by immigration enforcement agencies.[163]

On a more encouraging note, the *Al Otro Lado* court issued a concurrent order converting its previously issued preliminary injunction to a permanent injunction, which allows certain individuals subjected to the government's metering policy and transit rule to renew their claims for asylum.[164] Outreach by the litigation team to *Al Otro Lado* class members

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159 Al Otro Lado v. Mayorkas, 619 F. Supp. 3d 1029, 1032–34, 1043–45 (S.D. Cal. 2022).

160 596 U.S. at 550. 8 U.S.C. § 1252(f)(1) states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

161 Al Otro Lado, 619 F. Supp. at 1040, 1049–50.

162 *Id.* at 1033.

163 *Id.* at 1044.

164 Al Otro Lado v. Mayorkas, 2022 WL 3142610, at *22–*24 (S.D. Cal. Aug. 5, 2022). *See* Am. Immigr. Council, Ctr. Const. Rts., Ctr. Gender and Refugee Stud. & S. Poverty Law Ctr., Frequently Asked Questions: Federal Court Issues Permanent Injunction

who could potentially benefit from the injunction—which the court found that *Aleman Gonzales* did not bar[165]—remains ongoing in various Central American countries at the time of this writing. Meanwhile, virtually all aspects of the district court's decision remain pending before the Ninth Circuit Court of Appeals.[166]

IV. Movement-Building Revisited

This Article expands the existing scholarship on movement lawyering by demonstrating how impact litigation can be used to engage and build power within and among previously fragmented communities, including those separated by borders. In this endeavor, Al Otro Lado's vision and guidance were critical. While litigation may not be the most strategic option to facilitate movement-building in every case, Al Otro Lado had the foresight to understand that it could provide a rallying point for both migrants and other key stakeholders outraged by CBP's unlawful conduct.

At the outset of the *Al Otro Lado* case, the putative class members were in no position to formulate collective goals or drive litigation strategy. However, Al Otro Lado repeatedly stepped in to share their ideas, ensure that directly impacted individuals' needs and priorities remained front and center, and provide opportunities for them to speak directly with members of the litigation team when necessary and feasible.[167] By this time, Al Otro Lado's longstanding engagement with the Tijuana migrant community had made them a trusted ally of waiting asylum seekers, who were willing to follow their lead by supporting and, in many cases, actively participating in the litigation.

As the *Al Otro Lado* case unfolded, it advanced the enterprise of movement-building in a number of ways. First, it helped to empower

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Restoring Asylum Eligibility for Certain Asylum Seekers Turned Back at Ports of Entry (POEs) Before July 16, 2019 (Dec. 4, 2019, updated Apr. 28, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/faq_update_final_4.28.2023.pdf.

165 Al Otro Lado, 2022 WL 3142610 at *23 (finding that the preliminary injunction "directly implicates" 8 U.S.C. § 1158(b)(2)(C), which is not covered by § 1252(f)(1)) (internal quotation marks omitted).

166 Docketing Notice, Al Otro Lado v. Mayorkas, No. 22-55988 (9th Cir. filed Oct. 25, 2022). Meanwhile, the Biden administration has effectively mandated a new form of "digital" metering, under which asylum seekers waiting in Mexico must obtain an appointment using a flawed mobile phone application in order to present themselves for inspection and processing at a port of entry. That policy is the subject of a separate challenge by Al Otro Lado, Haitian Bridge Alliance, and ten individual asylum seekers on behalf of a putative class. *See* Al Otro Lado and Haitian Bridge Alliance, et al. v. Mayorkas, No. 3:23-cv-01367-AGS-BLM (S.D. Cal.) (complaint filed July 27, 2023), https://cgrs.uclawsf.edu/legal-document/complaint-2.

167 Although the class members' needs—including housing, medical treatment, and legal assistance—sometimes extended beyond the scope of the litigation, both Al Otro Lado and the litigation team were committed to finding ways to address them.

asylum-seeking individuals—by affirming their dignity,[168] creating a shared narrative, amplifying their voices and concerns, educating them about their legal rights, engaging them in strategic decision-making, and building solidarity among them. Second, the use of innovative technology helped to build movement infrastructure by facilitating communication among directly impacted individuals in different locations and fostering connections between such individuals and the broader advocacy community—in addition to enabling ongoing attorney-client consultations. Third, recourse to integrated advocacy increased public awareness of the issues at stake, rallied a diverse constituency of allies, and transformed the case into a broader campaign on both sides of the border to restore and safeguard meaningful access to the U.S. asylum process. Regardless of the ultimate outcome of the *Al Otro Lado* litigation, the fight to protect migrants' access to asylum will continue. Yet its long-term success—and indeed legitimacy—will depend on the ongoing involvement and leadership of directly impacted asylum seekers and other stakeholders on both sides of the border.[169] While Al Otro Lado used impact litigation constructively to facilitate movement-building, the more daunting challenges of building and sustaining this effort require a variety of other skills, including leadership training and organizing expertise, which are not included in most litigation budgets—although perhaps they should be.[170]

On-the-ground service providers such as Al Otro Lado, Kino Border Initiative, and Espacio Migrante often step in to fill these gaps, and some have come to view power-building among directly impacted individuals as a critical part of their missions. Given the deep trust these organizations have cultivated with migrants by facilitating their access to basic needs, assisting in trouble-shooting problems, and providing other support, they are in a unique position to help those interested

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168 *See* Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. Rev. L. & Soc. Change 45, 70–73 (2018); Su, *supra* note 37, at 413 ("Human dignity must be the measure of what we recognize as legal rights.").

169 *See* Cole, *supra* note 29, at 224 ("The courts are more often the culmination than the catalyst for constitutional change.").

170 Although, as Sameer Ashar has noted, "it is organizers who often help workers envision possible futures, above and beyond the ones in which they are mired," the prevailing ethical rules explicitly prohibit third-party involvement in client decision-making. Ashar, *supra* note 8, at 891 and n. 100 (citing Model Rules of Prof'l. Conduct 1.8, 5.4(c) (Am. Bar Ass'n 2021)). *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 513 (2001) ("The simplest strategy for averting conflicts is for the lawyer to avoid simultaneously serving as an organizer and a legal representative."). The improbability of recovering organizing costs under the Equal Access to Justice Act complicates matters further. *See* 28 U.S.C. § 2412(d)(2)(A) (defining recoverable "fees and other expenses" to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees").

in developing their voices as leaders and advocates. This may happen in different ways, including by connecting such individuals with sympathetic reporters interested in understanding their lived experiences or by creating opportunities for them to meet with U.S. officials who travel to the border to learn about the human impact of current border policies.[171] Asylum seekers must be thoroughly prepared for such encounters; many advocates encourage them to remain anonymous and avoid photographs, both for their own safety and to avoid any potential conflict with future court testimony, which could jeopardize their credibility.[172]

Border advocates report that the COVID-19 pandemic created conditions conducive to solidarity-building. With the implementation of the Title 42 policy in March 2020, the U.S. government blocked migrants from crossing the southern border, bringing asylum processing to a grinding halt for almost three years.[173] As a result, formerly transient migrant communities found themselves stranded in Mexico indefinitely, with an unanticipated opportunity for solidarity-building. The results include a clinic in a migrant encampment in Matamoros run by a group of residents with medical backgrounds; classrooms for child migrants in various Mexican border cities, including the Sidewalk School in Matamoros; and a migrant-run shelter for women and children waiting in Tijuana to seek asylum, with a vegetable garden, playground, and chicken and piñata-building cooperatives.[174] Some of these projects may be sufficiently entrenched to enable newly arriving migrants to carry them forward while waiting to present themselves at a port of entry.[175]

To encourage asylum seekers to remain politically engaged once they cross the border, some organizations, including the Kino Border Initiative, have hired staff to follow up with those who settle in certain parts of the United States and, where possible, engage them in ongoing advocacy on behalf of asylum seekers in Mexico. In other cases,

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171 I am grateful to Joanna Williams, Executive Director, Kino Border Initiative, for explaining how her organization actively works to create such "spaces of encounter." Williams Interview, *supra* note 136.

172 *See* Center for Gender & Refugee Studies, Florence Immigrant & Refugee Rights Project, & Welcome With Dignity, *Your Rights with the Media: A Guide for People Seeking Asylum* (May 10, 2023), https://cgrs.uclawsf.edu/our-work/publications/your-rights-media-guide-people-seeking-asylum.

173 Pursuant to the Title 42 policy, CBP officers turned away nearly three million migrants who came to the U.S. border, ostensibly to prevent the spread of COVID-19. Adam Isacson, *10 Things to Know About the End of Title 42*, Washington Off. on Latin Am. (May 9, 2023), https://www.wola.org/analysis/end-title-42/. The Title 42 policy remained in effect until May 11, 2023. *Id.*

174 Kino Border Initiative, *supra* note 108.

175 Email correspondence from Joanna Williams, Executive Director, Kino Border Initiative, to author (Mar. 18, 2024, 6:47 pm EST) (on file with author).

those who reach the United States end up connecting with similarly situated individuals and engaging in advocacy on issues that affect them more directly. They do so through innovative organizations like Migrantes Unidos, originally based in St. Louis, Missouri, which provides opportunities for asylum seekers to partner with policy experts on research projects regarding issues of concern.[176] Adriano Udani and Maria Torres Wedding co-designed Migrantes Unidos as a mutual support group based on the idea of political accompaniment, which intentionally centers asylum seekers in decision-making and cultivates a collective process that treats them as critical thinkers and problem solvers in pursuit of systemic change.[177] Migrantes Unidos members are compensated for their work, and the project received funding in 2021 to establish similar "social justice leadership hubs" in two other U.S. cities.[178] According to Udani, "Rarely have the people who are impacted by the system become part of th[e] conversations about changing it. I think the next level for asylum seekers is to be considered as experts, as leaders of work that centers on justice and equity."[179]

The Asylum Seeker Advocacy Project ("ASAP"), a nonprofit organization that provides legal and community support, similarly views its more than 600,000 members as experts on needed improvements to the U.S. asylum process and surveys them to determine the organization's priorities, identify possible solutions to problems facing asylum seekers, and solicit their views on advocacy proposals.[180] ASAP creates resources, answers members' legal questions, educates them about the systems that can be used to promote change, and employs litigation, policy work, and storytelling to advocate for a fair and just asylum

176 Steve Waletnick, *Migrantes Unidos Gives Voice to Asylum-Seekers Advocating for Policy Changes*, USML Daily (May 24, 2022), https://blogs.umsl.edu/news/2022/05/24/migrantes-unidos-gives-voice-to-asylum-seekers-advocating-for-policy-changes/.

177 Email correspondence from Adriano Udani, Associate Professor, Department of Political Science, University of Missouri, St Louis, MO, to author (Sept. 7, 2024, 5:47 pm EST) (on file with author) (hereinafter "Udani Email"). The earliest members of Migrantes Unidos began meeting via Zoom in November 2020 to discuss the trauma associated with ankle monitors, which most of them had been forced to wear since their arrival in the United States. These meetings led to the creation of a guide on how to effectively advocate for the removal of an ankle monitor. Waletnick, *supra* note 176. *See generally* Migrantes Unidos, Adriano Udani, Maria Torres Wedding, Ángel Flores Fontanez, Sara John, & Allie Seleyman, *Envisioning a World Without Prisons: Group Concept Mapping as a Collective Strategy for Justice and Dignity*, Pol., Groups, and Identities (2023) (discussing participatory research methods used to define Migrantes Unidos' priority areas).

178 Udani Email, *supra* note 177.

179 Waletnick, *supra* note 176.

180 Asylum Seeker Advocacy Project, *5 Ways to Change the Asylum Process*, https://help.asylumadvocacy.org/5-ways-to-change-the-asylum-process/ (last updated June 27, 2024).

process.[181] According to ASAP's Co-Executive Director Conchita Cruz, "Only an organized collective of asylum seekers has the power to fundamentally re-envision the asylum system and create a more welcoming United States. Their voices and vision must be centered in order to bring about transformative systemic change."[182]

Such efforts to uplift the voices and lived experience of people seeking asylum are critical to the enterprise of movement-building. Regardless of the strategy employed, advocates are well-served by partnering with directly impacted individuals, drawing on their expertise, and checking in regularly to ensure that their goals are aligned.

Conclusion

This Article demonstrates that impact litigation, undertaken in partnership with grassroots-focused organizations, can provide a forum for marginalized communities to contest problematic policy changes as they happen. In the process, such collaborations can help to build critical movement infrastructure. Depending on the context, movement-building may require organizing, media campaigns, education, storytelling, policy work, or other less conventional strategies—either in addition to or instead of litigation.[183] These strategies are not mutually exclusive, but rather part of a continuum on which progressive lawyers can draw as needed. Like Al Otro Lado, many grassroots-focused organizations favor a multidisciplinary approach that allows them to adapt to the changing needs of the communities they serve.

Where litigation is among the strategies employed to "spark a movement," the tactics proposed here—cultivating attorney-client partnerships, capitalizing on opportunities for power-shifting, developing more inclusive representation structures, and facilitating parallel momentums—may be helpful in achieving that goal, but they are not exhaustive. More conversations among advocates, organizers, members of directly impacted communities, funders, and other stakeholders are needed to fully explore the range of possibilities.

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[181] Email correspondence from Conchita Cruz, Co-Executive Director, Asylum Seeker Advocacy Project, to author (Apr. 15, 2024, 1:40 pm EST) (on file with author).

[182] Almost There, *Episode 7 with Guest Conchita Cruz, What if We Let Asylum Seekers Fix Our Immigration System?*, Emerson Collective (July 31, 2023), https://www.emersoncollective.com/articles/almost-there-podcast-episode-7-what-if-we-let-asylum-seekers-fix-our-immigration-system.

[183] *See* Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. Rev. 1235, 1242 (2010) (characterizing "[e]fforts to isolate court-centered strategies from the broader advocacy context" as "artificial and antiquated").

To the extent that those involved in impact litigation are committed to using it to achieve movement-building goals, new ethical rules will be necessary to ensure that the lawyers involved remain accountable to those they seek to serve and empower, both in the class action context and more generally.[184] The Model Rules of Professional Conduct presume that lawyers are tasked with resolving discrete legal problems between individuals or organizations with a well-defined decision-making process, which may not be the case with client groups that are not yet mobilized.[185] Moreover, Lobel suggests that the traditional allocation of authority between the client, who is charged under the ethical rules with determining the objectives of representation, and the lawyer, who has primary responsibility for determining how to achieve those objectives, does not give proper credence to the client's lived experience and should be either modified or rejected.[186] Some scholars have suggested that ethical rules should be tailored to particular practice contexts, which may lend themselves to different types of relationships between lawyers and their clients.[187]

In the class action arena, individual named plaintiffs can be certified as class representatives only after demonstrating that their claims are sufficiently similar to those of putative class members that they can

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184 *See* Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 Fordham L. Rev. 2449, 2465 (1999) ("In the area of representation most plagued by conflicts and accountability problems—injunctive class actions—the Model Code and the Model Rules have virtually nothing to say."); Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 Hofstra L. Rev. 11, 16 (2018) (highlighting need for new code of ethics on the social responsibility of lawyers "designed to facilitate conversations, to encourage interrogation of the status quo, and to revive the heart and soul of our profession," and drafted in collaboration with representatives of marginalized client communities).

185 Southworth, *supra* note 184, at 2465 ("Ethics doctrine … offers little guidance about representing groups that are just beginning to take shape and groups whose decision making processes fail to protect those whom the organization is designed to serve."); Grinthal, *supra* note 14, at 44 ("[C]anonical models of lawyer-group relationships often provide little guidance where client groups are still in the process of forming, and cannot yet easily engage in the unambiguous mechanisms of representation and accountability on which those models rely. Lawyers attempting to do this work fall into a gap in the lawyering paradigm."); Diamond & O'Toole, *supra* note 45, at 509–10.

186 Lobel, *supra* note 13, at 159. *See* William B. Rubenstein, *supra* note 25, at 1633–34 (noting ambiguity of "goals/means distinction"); Model Rules of Prof'l. Conduct 1.2 (Scope of Representation & Allocation of Authority between Client & Lawyer) (2023).

187 *See, e.g.,* Southworth, *supra* note 184, at 2449, 2468 ("Requiring lawyers to be accountable to clients and to respond to conflicts within groups may require different approaches for different types of collective representation, because the opportunities, pressures, and constraints of these various types of practice vary significantly."); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. Cal. L. Rev. 1145 (1993).

"fairly and adequately" represent their interests.[188] However, the applicable screening criteria do not always ensure that the perspectives of class representatives reflect the full range of views held by class members.[189] In fact, certified class representatives need not even consult with other class members before making critical case-related decisions on their behalf.[190] If litigation is intended in part to engage directly impacted individuals in a political struggle, the existing class certification framework may undermine this goal.

Moreover, as in the *Al Otro Lado* case, class representatives may be granted relief at a relatively early stage of the case—either as a result of an emergency motion or due to the defendants' efforts to moot out their claims. While class representatives' claims often remain legally viable under these circumstances,[191] their priorities and concerns may diverge from those of other class members—especially if they are living on opposite sides of an international border. In that scenario, effective communication between class representatives and class members becomes even more important to ensure that the class representatives remain attuned to the needs of those whose interests they represent. Innovative uses of technology, collaboration with local service providers or other intermediaries, and other information-sharing mechanisms can help to achieve this goal but come with their own logistical and practical obstacles.

While litigation can help to lay a foundation for movement-building, the challenges of sustaining long-term political engagement and fostering systemic change remain formidable. In this regard, Al Otro Lado's ongoing work and the innovative initiatives by the Kino

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188 Fed. R. Civ. P. 23(a) (requiring, *inter alia*, that claims of class representatives and putative class members present common questions of law and fact, and that class representatives are sufficiently invested in the matter to pursue it zealously and have a close enough connection to other class members to fairly and adequately represent their interests).

189 *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 847 (2017) ("Concern over representational legitimacy permeates the development of modern class action law."); Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 Mich. St. L. Rev. 671, 682 (2004) (noting that courts have "approved class representatives despite significant evidence that the representatives lacked even basic knowledge about the case"); Bell, *supra* note 14, at 505–07.

190 Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syracuse L. Rev. 709, 734 (1989); Ellman, *supra* note 46, at 1118–19, Southworth, *supra* note 184, at 2468; Marshall, *supra* note 143, at 948-49.

191 Where an individual plaintiff seeks to represent a class, the class claims remain live as long as there is a "controversy … between a named defendant and a member of the class represented by the named plaintiff." Sosna v. Iowa, 419 U.S. 393, 402 (1975). In such cases, as long as the individual plaintiffs' claims were not moot when the lawsuit was filed, the class certification decision relates back to the time of filing. County of Riverside v. McLaughlin, 500 U.S. 44, 51–52 (1991).

Border Initiative, Migrantes Unidos, and the Asylum Seeker Advocacy Project[192] provide fertile ground for exploration. Even an unsuccessful lawsuit may provide critical leverage to achieve other types of progress that could ultimately shift public consciousness.[193] Perhaps more importantly, it can empower and embolden clients to chart their own course to obtain justice.

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192 *See* Part IV, *supra.*

193 *See* Lobel, *supra* note 13, at 147–48 ("We had lost in court, but the political mobilization surrounding our courtroom effort [in the Pelican Bay litigation], the recognition our effort received, and the achievement of forcing the defendants to meet with the plaintiff representatives in open court to discuss remedying the abysmal conditions in maximum-security California prisons made the effort successful from a long-term, political perspective."). *See also* Jules Lobel, Success Without Victory: Lost Legal Battles and the Long Road to Justice in America (2003); Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941 (2011).