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EDITOR’S NOTE

BY CONNOR SMITH

Many of history’s great revolutionaries and champions for the cause of justice have been lawyers. From Nelson Mandela to Thurgood Marshall; Fidel Castro to Barbara Jordan, lawyers have often led the charge for peace through fundamental changes to the legal systems in which they work. The skills one learns as a lawyer – a rigorous attention to detail, a deep understanding of law and policy, strong advocacy skills to zealously defend not only one’s client but the all-to-fragile pillars on which systems of justice rest – position lawyers as unique counselors and advocates in the larger movement for justice for all. The best of lawyers use these positions to become People’s Lawyers – lawyers who fight alongside and on behalf of the marginalized, the dispossessed, the abused, and the alienated.

People’s Lawyers have traditionally used their position of privilege and power to lead charges against the battlements of institutions, government overreach, and violence in all forms. As we move into the 21st century, we can look back at the history of those brave (but only partially successful) assaults on the walls of power and learn from those tactics and strategies. Additionally, movements today are arguably better equipped than ever with more discerning education, incredible tools of communication and organization, and a rich history of tactics and solutions to draw from in their fight for justice. So, with history and technology seemingly on our side, where is the justice?

Despite staggered gains in the fields of human rights and legal protections it seems that the milieu in which People’s Lawyers work and operate is just as flawed and broken as it has ever been. Despite the gains of the Civil Rights and Indigenous Movements of the late 20th century, the blood of black and brown children still flows through city streets, and our communities still ache with the absence of missing Indigenous women.

These stark realities should not cause us to cower away, but instead should encourage us to continue challenging the legal and extralegal forces that create violent and oppressive conditions. The People’s Lawyer of the 21st century, walking alongside the movements they represent, must strive to take back the power wrested from the people in courtrooms and in the streets. They must seek justice in the face of discrimination, fearmongering, neo-McCarthyism, and violent crackdowns on dissent and autonomy. The People’s Lawyer of this century must do this first and foremost by listening – listening to their clients, listening to elders, listening to the movements they walk alongside and among. Only from this position of ‘lawyer as listener’ can the People’s Lawyer shout in tune with the courageous cry for justice rising in one voice from the movement itself. Questions of exactly how listening lawyers can join, support, and provide service to the movement lie half-answered on the bleeding edge of legal theory today.

These are questions that the articles in this edition of the The Forum of the Chapman University Fowler School of Law explore and engage with in the fields of copyright law, labor struggles, criminal justice reform, and historical and systemic racism. The authors you will read here present deep insights into the prejudices and flawed structures of the legal system that many if not most might take for granted as the unquestionable status quo. But as People’s Lawyers, we know that the status quo is never inviolable and that a new world is possible and just within our reach.
INTRODUCTION

JAYNE TAYLOR KACER

As I approach retirement, I have spent time thinking about what the Chapman University Fowler School of Law was like when I first arrived as compared to the law school as it is now. Through the efforts of many, we have become a more diverse, and thus stronger and more vibrant, community. In addition, our current students are more engaged than those in past years. They readily share their thoughts, concerns, and passions. This has led to the development of a number of student organizations since 2004, many of which are based on student ethnicity, faith, ideology, and world views, including the American Constitution Society, the Black Law Student Association, the St. Thomas More Society, the Hispanic Law Student Association, the National Lawyers Guild, the J. Reuben Clark Law Society, the Korean American Law Student Association, Outlaw, the Muslim Law Students Association, the Human Rights Law Society, the Students of Law Against Trafficking and Exploitation, and the Diversity and Social Justice Forum. These groups have given their members a voice, as well as an opportunity to share their cultures and beliefs with fellow students, faculty and staff. They have enriched the fabric of our law school and, personally, I am grateful for all they have taught me over the years.

The Diversity and Social Justice Forum ("DSJ") was started by a handful of students with a vision. They wanted to shed light on some of the ills in our community, our nation, and our world. They also wanted to explore how, as lawyers and as human beings, we can address these problems. In only four short years, they have tackled many issues plaguing us today including voter rights and voter ID laws, asylum and immigration, transgender rights, the use of violence against minorities, homelessness, health care, and the school to prison pipeline. Through the use of symposia and publications, the DSJ has expanded the views of those at the law school and the larger legal community on these issues and encouraged us to consider possible solutions.

The DSJ has created a powerful platform on which societal injustice can be examined and ideas to address them can flourish. As I retire, I hope the students who participated in DSJ will continue to advocate against social inequities over the course of their careers. In addition, I challenge the Fowler students who follow in their footsteps to build upon the work begun by their predecessors so that our law school continues to be an environment that embraces diverse identities and ideas.

Jayne Taylor Kacer
Associate Dean of Student Affairs
August, 2019

In September 2019, Jayne Taylor Kacer, Associate Dean of Affairs, retired from 18 years of service to Chapman University Dale E. Fowler School of Law. Throughout her tenure, Dean Kacer facilitated and supported Fowler’s most progressive organizations, and was an integral force that has contributed to the current environment at Fowler that embraces diverse identities and ideas.

After graduating cum laude from Loyola Law School in 1985, Dean Kacer joined the Orange County-based law firm Rutan & Tucker, LLP, and was made partner in 1995. During the course of her career in private practice, she primarily handled large, complex civil litigation matters and civil appeals in both federal and state courts.

Dean Kacer joined the faculty at the Chapman University School of Law as an adjunct in 2001, and accepted a full-time position in 2004. She was selected by the students as Professor of the Year for 2006-2007.

In addition to her teaching and administrative duties, Dean Kacer has served as a faculty member for the National Institute of Trial Advocacy (NITA) on the subject of depositions. She has taught Remedies, Pre-Trial Civil Practice, Practice Preparation, Legal Research and Writing, Legal Writing Skills, and Mediation Clinic.

Dean Kacer’s support and guidance for the Diversity & Social Justice Forum has provided our leadership with inspiration, and has helped to manifest a powerful platform for this community.
The Articles

Featured first in this journal, Chapman University Fowler School of Law’s own Kevin El Khoury presents a feminist critique of copyright law. El Khoury argues how alternative lens and frameworks can show a way towards a reinterpretation of authorship—one in which men, women, and marginalized communities are given equal rights over their creative works and concerns for privacy, authorship, and creative use are taken seriously in a reimagined legal paradigm.

Moving from policy into the courtroom, Chris Zatratz takes a critical look at *Epic Systems v. Lewis* and the victory it signals for employers in the realm of collective action as a legitimate means of labor recourse in American commerce. But, as Zatratz shows, the history of legal impediments to collective action reveals that the pretenses of fairness and equal treatment rest on legal fictions and more realistic frameworks might be bound to develop over time. In the interim, workers continue to fight back, finding innovative ways to both hold employers to their contracts and enforce their rights in court.

Next, bringing attention to decisions surrounding plea deals and the realities of the current criminal justice system Jay Hedges unpacks *Alvarez v. City of Brownsville* and its insidious effects on defendant’s due process rights. Hedges explores the increasing prevalence of plea bargaining as means of conviction, and, the inducement of defendants to plead guilty to offenses they did not commit. Unfortunately, many innocent defendants are induced to plead guilty. A circuit split has developed in response to these realities with some jurisdictions recognizing that the due process rights established in *Brady v. Maryland* extend to the pre-trial phase of plea bargaining, while others have held the opposite.

Finally, taking a historical approach to legal theory, Ezra Graham Lintner brings a critical lens to the ideological foundations of the juvenile justice system. She brings much needed attention to the white supremacist standards by which children and communities of color have been, and continue to be, judged. Lintner lays out racist beliefs about juveniles of color that have existed in this country since its inception. Following these racist beliefs throughout American history, Lintner reveals that they are not bygone cultural attitudes and practices, but rather the foundation for current racist trends in the juvenile justice system. Such analysis seeks to reframe the conversation around the racism that plagues the juvenile justice system.

We hope these articles inform the reader’s practice of law and understanding of the movement towards liberty and justice for all.

Connor Smith
Chair of Publication
September, 2019
ARE WE ON THE SAME PAGE?
Why a Feminist Reinterpretation of Copyright Law Would Afford Media Created by Women and Men a More Fulsome Legal Legitimacy

By Kevin El Khoury

Kevin El Khoury is a third-year law student. He believes that each of us has a moral imperative to interrogate the assumptions that have shaped and continue to shape our institutions. In the spirit of Socrates, he derives great intellectual delight from being a gadfly but, thankfully, is far removed from the jurisdiction of ancient Athens. He makes his academic writing debut in this journal.

INTRODUCTION

In 1989, a group of anonymous feminist artists called The Guerilla Girls published a poster in which they asked, “Do women have to be naked to get into the Met Museum?”[1] At the time, less than 5% of the displayed artwork in New York City’s Metropolitan Museum of Art was created by female artists, but more than 85% of the collection’s nude artwork depicted women.[2] The Guerilla Girls’ critique of one of the world’s most eminent art museums poses a broader inquiry of the laws that govern the creation and protection of artwork at large. A feminist critique of copyright law reveals that the laws make explicit and implicit assumptions about sex that disenfranchise female artists and other artists from traditionally marginalized groups. In this article, I will identify and question those assumptions, tracing their origins before and after the Copyright Act of 1976, then make a case for what I call the “detoxification of copyright law’s toxic masculinity.” I will argue how feminist theory can provide a framework for a reinterpretation of copyright law that, if implemented, would afford media created by women and men a more fulsome legal legitimacy. I will substantiate my argument by providing case studies that illustrate just how oppressive towards women the patriarchal copyright regime is, making the call for the emasculation of copyright law, a movement that is well underway, all the more persuasive.

I
WHO GETS TO PICK UP THE PEN?

Before a meaningful discussion of feminist theory and copyright law can commence, it is imperative that I conduct a review of the origin and evolution of authorship. To foreshadow the obvious (and, in some instances, not so obvious), the contemporary conceptualization of the author is a product of sexist philosophies, legislation, and jurisprudence.

Once Upon a Time, the Author Was a Hero

Before the Enlightenment, the owner of a writing was exclusively recognized to be its publisher.[3] In 1710, the British Parliament enacted the Statute of Anne, which is considered to be a “watershed event in Anglo-American copyright history.”[4] Under the law, copyright vested in authors, not publishers.[5] A figure of major importance in lobbying for the rights of authors was John Locke, who argued in his Two Treatises of Government that authors are entitled to proprietary rights in their works as a consequence of the time and labor expended in producing them.[6] Locke, a champion of empiricism and logical thinking, ironically subscribed to a Romantic notion of the author as hero, which falsely assumes that, like a knight in shining armor seeking to rescue the damsel, the author is “[an] autonomous individual who creates without support from his cultural network” and proceeds to masculinize the author in his claim of dominion over his creations.[7]

The gendered language of authorship is illustrative. In the early 18th century, female writers were maligned, referred to as “prostitutes of the pen” by their male counterparts.[8] The so-called moral rights of authors were also known as the rights of paternity.[9] Today, there is censorship technology that can scan for and skip over scenes with graphic violence or sex, which has been said to have given birth to “bastard[s]” of the original film.[10] As will be further discussed in Section II, subscription to the fallacy of the author as hero is a result of an unquestioned acceptance of authorship as a manifestation of male ego.

For now, if we reject the premise that an author’s creation is wholly his own and, instead, appreciate that it involved the labor of others, the notion of the author as hero is not merely idealistic but rather quixotic.[11]

The Author Cannot Rest in Peace

In sharp contrast with the Romantic notion of the author as hero is the post-structuralist movement that sought to undermine the integrity of the author at his core. In 1968, French post-structuralist Roland Barthes declared the “death of the author.”[12] What Barthes meant was that the Romantic notion of the author as hero was dead. The demystification of authorship insists on
accepting the impossibility of originality. Every artwork is necessarily a reproduction. [13] Barthes also identified capitalism as a guardian of Romanticism. [14] Because capitalism commodifies all labor, artwork, as a product of labor, is reduced to just another form of private property. [15] When the results of authorship are cast “as a stable, almost corporeal entity,” the communicative nature of artwork is obscured. [16] However, disillusionment with the Romantic notion of the author as hero forces one to come to terms with a host of ramifications no less problematic than before the author was 6-feet under. Given how easily corporate interests have appropriated the author to cover the centralization of ownership under copyright law, theories that espouse the “death of the author” might further enable corporations to commodify authorship. [17] Furthermore, it is suspicious that White, male post-structuralists are burying the author at the same time women and people of color are enjoying increasing legitimacy and importance as authors.

**It’s Better to Be a Nephew Than a Niece**

The founding fathers delegated to Congress the duty “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” [18] In the United States, the division between the public and private spheres is sacred; Uncle Sam’s presence in the latter is often regarded with intense suspicion. This division is usually characterized as the separation of the government from interference in one’s individual and group liberties. An objective, at least theoretically, is to protect intellectual property from government regulation. However, all forms of intellectual property are at odds with this objective as they are “commercial products specifically protected and regulated through state action.” [19]

Before 1976, the process for obtaining and maintaining protection was austere and cumbersome. Registration and deposit with the United States Copyright Office and notice were required for protection. [20] If artwork (usually a writing in this context) was published without a proper copyright notice affixed to all copies, it lost protection and fell into the public domain. [21] The Copyright Act of 1976 significantly reduced formalities to the extent that obtaining protection is now a nearly paperless endeavor. [22] When the United States became a signatory to the Berne Convention in 1988, formal requirements were further eroded. [23]

At first blush, protection in a post-Berne world should be more accessible to all artists. [24] However, certain populations, specifically female artists and other artists from traditionally marginalized groups who often “do not enjoy ready access to lawyers and the copyright-licensing machinery,” are arguably disadvantaged the most by the relatively new copyright paradigm because “discerning whether artwork that an [artist] might like to copy, adapt, or borrow from is copyrighted requires a fair amount of research, even before factors such as its availability and desirability are ascertained.” [25]

Artwork that receives robust protection tends to be that which has been broadly commercially exploited or has the potential to be broadly commercially exploited. [26] When an artist institutes an infringement action, which is lengthy and expensive, it can be viewed as a tautological proxy for an artwork’s value. [27] In other words, protecting artwork is appraising artwork. Altogether, changes to copyright law since the 18th century to have resulted in the increasing “commodification of art, its segregation from the community from which it comes and to which it is directed, and its severability in an economic sense from its creator.” [28]

**II**

**FEMINISMS**

Can one can like men and still be a feminist? Yes, a feminist is not prohibited from appreciating men in sexual and non-sexual ways. [29] Neither does a woman-feminist have to disavow her femininity. [30] The image of a feminist as a bra burner is, literally, an incendiary stereotype. As the term, “woman-feminist,” implies, a man can be a feminist. [31] With respect to the many misconceptions of feminist theory, which betray deeply misogynistic and homophobic sentiments, one that is relevant to this discussion is that there is, in fact, more than one school of feminism. Feminisms are as abundant and diverse as the real life experiences of women, which vary because of differences in race, ethnicity, income level, religion, physical ability, and sexual orientation. [32] Therefore, an articulation of one overarching feminist perspective on copyright law that would garner “universal or even substantial acceptance is probably unrealistic.” [33] That said, two prominent schools of feminism, liberal feminism and radical feminism, offer starkly contrasting analyses of copyright law, though both feminisms share the fundamental objective of advancing systemic gender parity. While the feminisms have been accused of engaging in gender essentialism, most feminists, however, appreciate that women and men are extremely diverse within their respective sex. [34] For the purposes of engaging in a productive discourse on gender issues, feminists argue that the gender binary should not determine the behaviors of women and men but, nonetheless, results in prophetic effects as the products of an enstalled “political construct that privileges [men’s] way of thinking and doing over [women’s].” [35] So, while it seems to belie their theses, feminists are forced to employ gender essentialist rhetoric to communicate or else they risk being perceived as unintelligible.

At this point, having conducted a brief historical review of authorship and copyright law and feminist theory primer, I will commence an informed evaluation through a feminist lens of how the patriarchal copyright regime, falsely empowered by Romantic and post-structuralist thinkers, has imbued rightsholders with the “power to control representations of female and non-White bodies and suppress narratives of resistance,” with adverse consequences for egalitarian and dignity interests. [36] Because feminists propose that “gender subordination is the archetype of all subordination,” a feminist perspective on copyright law is apt to identify and rectify the oppression suffered by any traditionally marginalized group. [37] Feminists seek to reform the general hierarchical order, which is the asserted reason for the oppression of any group. [38]

**I Don’t See Gender:**

**The Problem of Gender Blindness**

While copyright law on its face does not discriminate on the basis of sex, it
is being enforced in ways that have a disparate impact on women and men.

Under the patriarchal copyright regime, women and men “achieve only formal equality, not substantive equality.”[39] The Copyright Act of 1976 enumerates that “[i]n no case does protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”[40] Copyright law on its face seems to be neutral towards sex, but it descends from laws that were “written by men to embody a male vision of the ways in which creativity and commerce should intersect.”[41] The so-called moral rights of authors, which prevent others from altering an author’s artwork, are inalienable and exist in perpetuity in France and other civil law jurisdictions.[42]

Consequently, copyright law can be overprotective of artwork such that prospective artists, who are often women and social minorities, are dismissed as unlawful appropriators of extant artwork.[43] The fact that certain types of creative works within the domestic sphere, which has been generally occupied by women, are not protected impeaches the agnosticism of copyright law with respect to sex. The patriarchy’s feigned justification is essentially that domestic creative works, such as cooking and sewing, are not adequately creative to warrant being subject to monopolistic control.[44] The patriarchy’s gender biases, however, seem to color its proffered definition of creativity. Female artists have “disappeared as recognized creators of art in the European tradition as categories of art have either been masculinized to the position of high art as with the English novel or feminized into the category of craft as with needlework,” with the latter falling below the threshold for protection.[45] It should be noted that up until the Renaissance, embroidery and tapestry-making were considered high art.[46]

Courts, which ostensibly refrain from rendering value judgments of artwork, generally have not recognized copyright in clothing, holding that clothes are primarily utilitarian in design and, to that end, are reconstructions of sewing instructions, which themselves are not copyrightable.[47] The problem, feminists argue, is that courts are indeed judging the artistic merits of clothing by putting a premium on functionality, which is a pretext for what the patriarchy perceives as the creative deficiency of women. It is possible that clothing and the like

Consequently, copyright law can be overprotective of artwork such that prospective artists, who are often women and social minorities, are dismissed as unlawful appropriators of extant artwork.

might be Since womenprotected by patents, which are cumbersome to apply for and enforce, or industrial design law, but factories, for the most part, are run by men, so these alternatives are conveniently aligned with the self-serving interests of the patriarchal copyright regime.[48]

If You Can’t Beat Him, Join Him:

Liberal Feminism

With respect to affecting change in copyright law, the ideas for change espoused by liberal feminists, who were instrumental in gaining women’s suffrage in the United States, are inadequate because they fail to redress the grievances that are intrinsic to the patriarchal copyright regime. Take, for example, the problem of the under-protection of clothing. Liberal feminists advocate for the expansion of copyright law to include clothing.[49] They are disproportionately disadvantaged by the lack of protection for certain types of creative works, it is reasonable and well-intentioned to think that extending protection to include those works would bring about an egalitarian solution.[50] However, after the “playing field is regraded,” women would be expected to compete equally with men in a game “contrived by men that has objectives and governing rules devised by men.”[51] In other words, liberal feminists argue that “women can participate as men on male-defined territory” without redressing the underlying assumptions associated with how we construct knowledge.[52] So, the Romantic notion of the author as hero is translated to reworded as “heroine,” but the underlying narrative is no less paternalistic. Gains for female artists have been incremental and uneven, which begs the question: which women get drafted to play among men? The answer: the ones who can afford to, literally. For the sake of women and men from all socioeconomic backgrounds, it must be possible to “articulate a feminine epistemology [as an] alternative to a masculine epistemology that masquerades as a universal mode of being.”[53]

We’re All in This Together:

Radical Feminism

Radical feminism attempts to redress the problem of gender blindness in copyright law by taking an approach that eschews the incrementalism of liberal feminism for iconoclasm. Radical feminists draw from the post-structuralist thesis that the Romantic notion of the author as hero has been exposed to be problematic.[54] However, their work does not stop once the author has been pronounced dead. On the contrary, at that moment, radical feminists appeal for dialogism, which is a perspective on authorship that is sensitive to the conversations that are being had between female artists and other artists from traditionally marginalized groups, which are being drowned out by the dominant, masculine rhetoric.[55] Dialogism “discredit[s] formalistic, ahistorical analyses of [artwork]” by valuing the relational nature of authorship that transcends time and space.[56] Dialogism proposes that when an artist creates an original expression in any form, she engages in intrapersonal and interpersonal dialogues. She engages in an intrapersonal dialogue when examining herself to develop a personal narrative and interpersonal dialogue when examining others, including their artwork, to communicate meaning to an anticipated audience.[57] An artwork is not original “in the sense of having emerged ex nihilo,” but it is the
as applied to copyright law has been primarily abstract as I have investigated the historical underpinnings of the patriarchal copyright regime and introduced some basic tenets of liberal and radical feminisms. In the third section of this article, I will investigate adjudicated and unadjudicated claims of infringement in various media, including film, sculpture, and literature. I will expose how pervasive and pernicious the male gaze is in copyright law, in part by speculating what might have resulted under a vision informed by feminist values.

A Fixation with Fixation

In 1884, the Supreme Court held that the copyright in a posed shot of Oscar Wilde belonged to its photographer, Napoleon Sarony. The recognition of copyright in photographs was a seminal decision because it normalized a “fetishization of unitary authorship” for what was, at the time, new media. The Supreme Court articulated a reductive definition of authorship, simply reciting the following from the dictionary: “[the author is] he to whom anything owes its origin; originator; maker; one who completes a work of science of literature.” Unwittingly or not, belief in the authorial singularity became zealous. Over a century later, controversy involving an actresses in the movie, The Innocence of Muslims, provided a high-profile opportunity to apply the Supreme Court’s guidance. Initially, the Ninth Circuit subverted precedent and expectations by holding that the actress owned a copyright in her performance and, as such, could enjoin the movie from being shown. Hollywood, unable to surrender its fixation with fixation, urged reconsideration of the decision, which was reversed by an en banc panel. In reversing, the en banc panel held that a performer was not entitled to a copyright in her performance because she “played no role in the fixation of it.” The notion of the fixator as author and rightsholder, which had been a rebuttable presumption, became a bright-line rule.

The consequences of entertaining a steadfast adherence to the fixator-as-author-and-rightsholder jurisprudence become increasingly problematic when privacy and First Amendment interests are involved. The outcomes of the following cases stand for the proposition that the patriarchal copyright regime privileges the interloper, penetrator, and the voyeur with protection.

In 2012, photographer Arne Svenson captured shots of his neighbors as they went about their daily routines from the balcony of his apartment. Notwithstanding Svenson’s measures to limit exposure of his
Copyright law “weaponizes the camera as phallus and allows full realization of photography’s hunting metaphor, where we talk about loading and aiming a camera, about shooting a film, with the object as prey.”[84] Sportscaster Erin Andrews was the victim of both the man who had uploaded an intimate video of her on the Internet and what I call the “peephole loophole” in copyright law. Andrews sued the hotel and the peeping Tom for invasion of privacy and won.[85] However, hers was a Pyrrhic victory because the court ruled that the copyright in the video belonged to the peeping Tom. Accordingly, her remedies were limited to tort. However, if copyright in the video had belonged to her, she could have had the video removed from the Internet under the Digital Millennium Copyright Act.[86] Because a performer seldom owns the copyright in her performance as captured on film, the only way that Andrews, at the time, could have acquired the copyright in the video would have been by written assignment by none other than the peeping Tom.[87] The patriarchal copyright regime empowered Andrews’s tormentor, vesting in him the rights to control the reproduction, distribution, and display of the video. Moreover, Andrews is one of countless victims. In a phenomenon called “revenge porn,” vindictive paramours upload recordings of their sexual encounters to pornographic websites without the permission or in spite of the disapproval of their partners.[88] The Cyber Civil Rights Initiative, the leading advocacy group for victims of revenge porn, estimates that approximately 90% of revenge porn victims are female.[89] So, women-victims are condemned to suffer the perpetuity of the Internet at the hands of men-perpetrators who are afforded copyright in sex tapes because the latter happen to set up the cameras.

Reassembling the Glass Ceiling

In 1989, Arturo Di Modica, hoping to encourage the citizens of New York in the wake of a recession, installed a 3.5-ton bronze statue of a bull at the intersection of Wall and Broad Streets.[90] In 2017, a visitor dared to face Charging Bull. Measuring just over four feet in height, the installation of Fearless Girl directly in front of Charging Bull profoundly changed the latter’s meaning.[91] Di Modica was perturbed that Charging Bull, once a symbol of American tenacity, had been essentially recast as a bully.[92] Consequently, Di Modica threatened to sue the commissioner and creator of Fearless Girl for infringement. Di Modica has not yet followed up on his threat, but he might have two colorable claims, both of which rely on the paramount importance of fixation in copyright law. First, under the Visual Artists Rights Act, which affords the so-called moral rights of authors to artists that create certain media, such as statues, Di Modica could claim that the juxtaposition of Charging Bull and Fearless Girl constitutes an “intentional distortion, mutilation, or other modification of [Charging Bull] that would be prejudicial to [his] honor or reputation.”[93] The second claim would proceed from the argument that the semiotic existence of Fearless Girl is inexorably related to, if not irrevocably dependent on, Charging
Moore’s caretakers, however, were also researchers who, without his consent, harvested his cells to create a cell line for which they eventually obtained a patent.[102] In a decision that “inverts the natural order,” the California Supreme Court held that, in addition to there having been no conversion of his cells, Moore did not have any property interest in the cell line that descended from his cells.[103] Moore was divested of a patent in what were his creations in the truest sense, demonstrating that the male gaze has no sense of propriety but an inflated sense as a proprietary.

A New Chapter in New Media

The patriarchal copyright regime is humorless, meaning that it tends not to condone artists’ attempts to subvert its broad definition of derivative artwork. Copyright law assumes that the process by which one interacts with media, forms of writing in particular, is “read-only.”[104] In other words, reading is passive, and should one be inclined, out of appreciation, to emulate what she has read, she will have to overcome accusations of infringement. Alice Randall, the writer of The Wind Done Gone, a parody of Gone with the Wind, managed to pass muster, but she is the exception.[105] The livelihoods of fan fiction writers, many of which do not have the resources to defend against infringement lawsuits and whose stories would not likely qualify as parody, are in constant jeopardy.[106] For the most part, these “amateur culturists” write for the sake of writing.[107] They create culture in the margins by taking their favorite literature and unironically reinterpretting it by inserting their own experiences.[108] Large publishing houses are usually not inclined to instigate litigation against fan fiction writers because there is little financial gain to be had.[109] However, when they do, it is usually because an unauthorized writing reinterprets the source material in ways that the dominant culture considers to be morally deviant.

For example, “slash fan fiction” involves romantic pairings of same-sex characters in mainstream science fiction television programs and films.[110] Slash fan fiction showcases how “female [and queer] consumers can radically rework and recode existing texts.”[111] Under the patriarchal copyright regime, which subscribes to a read-only assumption of interaction with media, it is the capricious prerogative of heteronormative publishers to send cease-and-desist letters to slash fan fiction writers. Adopting a “read-write culture,” which heralds feminist values, would foster rather than chill the production of fan fiction, which is a ready platform for countermajoritarian ideas.[112] Another ready platform for countermajoritarian ideas is blogging. Blogging is a professional and recreational activity that is immensely popular with women.[113] Group blogging in particular can be seen as a “text-based cyberspace homology to quilting.”[114] Incidentally, online knitting communities, such as Knitty, Another Knitting Blog, and Wendy Knits, exist in abundance.[115] The Creative Commons and the Organization for Transformative Works seek to promote these kinds of communal creation by advocating for the relaxation of licensing schemes.[116] These organizations also advocate that fan fiction is sufficiently transformative and, therefore, should not be considered a violation of the doctrine of fair use.[117]

Hypertext is a tool that is used by authors who write on digital platforms to direct readers to related materials via links and whose transformative nature has been heralded by radical feminists.[118] Readers of hypertext are liberated from total authorial domination. Writings with hypertext
afford non-linear meaning-making experiences to readers. They facilitate “webs of interconnectedness” as opposed to “ladders of hierarchy” in imparting knowledge.[119] Hypertext integrates dialogism in form and substance, resulting in a medium that can amplify the voices of women and social minorities.

Video games comprise a medium that the patriarchal copyright regime has not decisively conquered. Courts have not squarely addressed player contribution to a video game, specifically the possibility that a player is contributing original expression by playing the video game.[120] Most likely, some license or authorization by the manufacturer might be inferred, but it depends on the nature of the game.[121] A coder who is able to access and reorganize the images of an underlying video game might be authoring an unauthorized derivative work because it “essentially tells a new story based on the original game.”[122]

IV

CONCLUSION

As Virginia Woolf once wrote, “I would venture to guess that Anon, who wrote so many poems without signing them, is often a woman.”[123] Many female artists (just how many, we will never know) have been excluded from the canon because of misattribution of artwork to male artists or through anonymity imposed on them due to societal prohibition on women’s participation in autonomous creation.[124] More recently, female artists who manage to tear the veil of anonymity and create artwork in their own names are not afforded a fursome legal legitimacy because the patriarchal copyright regime, which is infatuated with Romantic notions of authorial singularity and solitude, promulgates laws that are simultaneously under-protective and overprotective. A feminist reinterpretation of copyright law would halt and reverse the relentless encroachment of the patriarchal copyright regime. Liberal feminists call for the augmentation of protected categories, but their approach might be viewed as an implicit concession that the patriarchal copyright regime cannot be dismantled or fundamentally changed. On the other hand, radical feminists “question any normative reforms that do not value, preserve, and advance the unique creative endeavors of women.”[125] They repudiate any notion of copyright as being a natural right of the author. Both liberal and radical feminists, however, are cognizant of the widespread injuries sustained by female artists and other artists from traditionally marginalized groups as a result of copyright law’s majoritarian gaze. They resent that courts have disproportionately rewarded men (and male-run entities), who tend to possess greater bargaining power, at the expense of women and social minorities, who are pressed to exhibit their artistry from submissive postures.

Going forward, “from a policy perspective, insisting on the death of the author is a non-starter [and, from] a theoretical perspective, any attempt to assimilate the author’s death into copyright law can only spell the death of copyright itself.”[126] Expanding intellectual property rights is not a panacea but rather a sectarian solution that might exacerbate the problems of women and social minorities, which are rooted in lack of economic and political leverage.[127] The proposals of radical feminists are lofty. Ending the derivative work right, which would empower the expression of resistive narratives, is desirable but unlikely. Perhaps more likely is a revitalization of performer rights, which would restore agency that individuals in front of the camera possess over their bodies and representations of them, and elimination of the mutual intent requirement for joint authorship, which would serve artists who lack economic and political leverage or use discursive and recursive platforms of expression.[128] What is certain, however, is that even though a feminist reinterpretation of copyright law does not lack vision, it will remain largely unrealized until the patriarchal copyright regime stops treating female artists and other artists from traditionally marginalized groups as ingénues, fully allowing them to create their masterpieces.

[2] Id.
[13] Id. at 217.
[14] Id. at 222-3.
[15] Id.
[16] Id.
[20] Patty Gerstenblith, Art, Cultural Heritage, and the Law: Cases and Materials, 89 (2012). A proper notice must have included the copyright symbol, the word, “copyright,” or its abbreviation, as well as the year of the artwork’s first publication and the name of the copyright owner. Id.
[21] Id.
[23] See Gerstenblith at 89. For artwork created after March 1, 1989, notice became permissive rather than mandatory. Id.
[24] Bartow at 566.
[25] Id. at 567.
[26] Id. at 559.
[27] Id.
[28] Wright at 73.
[30] Id.
[31] Id.
[32] Bartow at 570.
[33] Id.
[34] Id. at 558.
[37] Gupta at 77.
[38] Id.
[39] Id. at 70.
[41] Bartow at 557.
[42] Wright at 80. The notion of an inviolable bond between a father and his children has been corrupted in some common law jurisdictions, the United States in particular, where the so-called moral rights of authors can be waived. Id.
[43] Craig at 233.
[44] Id. All that seems to be required is a modicum of creativity. E.g., Desktop Mktg. Sys. Pty. Ltd. v. Telestra Corp., 119 F. C. R. 491 (2002) (holding that copyright attached to telephone directories).
[45] Wright at 89.
[46] Id. In India, textiles, specifically carpet-making, is the preserve of men. Id. at 95.
[50] Id.
[51] Id. at 566.
[52] Halbert at 437.
[53] Id.
[54] Craig at 224.
[55] Id. at 246.
[56] Id. at 243.
[57] Id. at 265.
[58] Id. at 262.
[59] Pollack at 620-1.
[60] Id.
[62] Pollack at 620-1. Radical feminists attribute the decreased fertility of the public domain to the widespread adoption of the Berne Convention. Id.
[63] Bartow at 560.
[64] Gupta at 74.
[66] Id. at 197.
[67] Id. at 202.
[68] Id. Rent tells the story of individuals from a marginalized community. It is bitterly ironic that Thomson’s lawsuit for co-author status left her legally and economically destitute. Id.
[69] Tehranian at 378.
[70] Bartow at 577.
[71] Tehranian at 375.
[73] Tehranian at 371.
[74] Burrow-Giles Lithographic Co. at 57-8 (quoting “Author,” Worcester’s Dictionary (1860)).
[76] Id.
[77] Id. at 744.
[79] Id.
[81] Id.
[82] Id.
[83] Tehranian at 355. One could argue that the actress in The Innocence of Muslims was aware that she was giving a performance, while Svenson’s subjects were simply leading their lives. However, this distinction is belied by Svenson’s own characterization of his subjects as “performing behind a transparent scrim on a stage of their own creation with the curtain raised high.” Foster at 98.
[84] Tehranian at 361.
[87] Tehranian at 359. In fact, there was a written assignment—two years after the video surfaced on the
Internet. Id.

[88] Id. at 362.


[90] Id. at 382. Changing Bull was relocated to Bowling Green two weeks after its installation. Id.

[91] Id. at 383. State Street Global Advisors (SSgA) commissioned Fearless Girl to serve as a commercial tie-in with the firm’s celebration of International Women’s Day, which featured the launch of SSgA’s SHE index fund as part of a campaign to increase female representation on corporate boards. Id.

[92] Id. at 384.


[94] Tehranian at 387.

[95] Id. at 384.

[96] Pollack at 616.

[97] Id.


[99] Id.


[102] Pollack at 611. The patent was assigned to the university, which executed a lucrative contract with a biotechnology company. Id.

[103] Id. (citing Moore at 141–2).


[106] Chaloner at 250.

[107] Id. at 230.

[108] Id. at 246.

[109] Id. at 250.

[110] Id. at 247.

[111] Id.

[112] Id. at 224–5.

[113] Bartow at 574.

[114] Id.


[117] Id.

[118] Burk at 522. When media other than text, such as graphics, sound, or animation, are interconnected, the result is referred to as “hypermedia.” Id.

[119] Id. at 524.


[121] Burk at 540. Façade puts the player in the role of a close friend of Trip and Grace, a couple who invites the player to their New York City apartment for cocktails. The evening is soon marred by the palpable marital strife between the hosts. The player types phrases to converse with the couple, either supporting them through their troubles or driving them further apart. The conversations are stored as text files that resemble stageplays, which can be accessed after the player has completed a runthrough. See Playabl Studios, Façade (2005), https://www.playablstudios.com/facade, archived at https://perma.cc/2SML-LWD5.

[122] Id. at 543.

[123] Virginia Woolf, A Room of One’s Own, 51 (1929).


[125] Bartow at 569.

[126] Craig at 266.

[127] Craig at 619.

[128] Tehranian at 393.


**DISASTER OF EPIC PROPORTIONS?**

How Workers Are Fighting Despite Mandatory Arbitration and Class Waivers

**By Chris Zatratz**

Chris Zatratz is a recent graduate of the City University of New York School of Law. In law school he worked with various workers’ centers, labor unions, and at the National Labor Relations Board. Chris has experience working on organizing campaigns, drafting legislation, and participating in employment litigation. He believes in facilitating the organizing of workers and in supporting workers’ organizations. Chris is inspired by the collective action that workers engage in on a daily basis to resist mistreatment on the job and to improve the material conditions of their fellow workers, families, and communities.

**INTRODUCTION**

Employers have long sought to constrain the collective action of workers. The Supreme Court’s decision in *Epic Systems v. Lewis* is just the latest iteration of this effort. But, the history of legal impediments to collective action reveals that the pretense of fairness and equal treatment eventually withers away, with even moderate figures feeling compelled to question the law’s unjust treatment of workers. This article intends to show that the pretension underlying mandatory arbitration and class waivers in employment contracts has similarly been disproven. Yet, despite the blatant unfairness and overwhelming odds facing those covered by these agreements, workers continue to fight back, finding innovative ways to both call employers out on their word and enforce their rights in court.

I  

**BRIEF HISTORY OF LEGAL IMPEDEMENTS TO COLLECTIVE ACTION**

Throughout history, employers have used the law and the legal system in various ways to impede workers from engaging in collective action. The law enacted to curb monopolies was used to declare secondary boycotts illegal.[1] The judiciary was long employed to enjoin strikes and work stoppages.[2] Today, employers achieve this end by including mandatory arbitration agreements[3] and class waivers[4] in employment contracts.

A direct line can be drawn from the legal barriers of yesteryear to current impediments to collective action. In some ways, mandatory arbitration agreements and class waivers are even more egregious. They have the effect of obstructing the power of workers to enforce their rights because workers cannot access the courtroom or join and act together.[5] In the absence of such rights or of adequate enforcement, collective action serves as a substitute for the “inadequacies of law.”[6] Whether exercising collective action through legal proceedings or wholly outside of them, the ability of workers to join together is key because “[f]or workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers.”[7] For this reason, impediments to collective action foreclose any real possibility for workers to resist their exploitation in the workplace because the law is hostile and alternatives to the law (i.e., collective action) are unavailable. Therefore, understanding the history of legal impediments to collective action can inform our understanding of the struggles that workers face in the contemporary workplace.

**The Sherman Antitrust Act**

In 1890, Congress passed the Sherman Antitrust Act for the purpose of protecting trade and commerce against unlawful restraints and monopolies.”[8] Although Senator John Sherman reassured his fellow Congressmen that the antitrust law would not affect labor unions,[9] his amendment explicitly exempting labor unions did not make it into the final version of the law[10] and, upon passage, the courts were not shy to apply it to union activity.[11] Although the courts had previously issued injunctions to restrain union activity, in *Loewe v. Lawlor* the U.S. Supreme Court held, for the first time, that the Sherman Antitrust Act applied to legitimate union activities.[12] The Court determined that the union’s strike for union recognition and its secondary boycott violated the Act.[13]

In the years that followed, the “courts applied the Sherman Act more frequently to union conduct than to business monopolies.”[14] Even Justice William O. Douglas criticized the judiciary’s employment of the Act against unions:

“From the beginning it [the Sherman Antitrust Act] has been applied by judges hostile to its purposes, friendly to the empire builders who wanted it emasculated ... It is ironic that the Sherman Act was truly effective in only one respect, and that was when it was applied to labor unions. Then the courts read it with a literalness that never appeared in their other decisions.”[15]

In response to judicial application of the Sherman Antitrust Act to labor unions, Congress
established the Clayton Act to explicitly exempt labor unions from antitrust law.[16] But, labor’s woes continued as courts narrowly construed the Clayton Act, even going so far to find that the Act only applied to "those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective."[17] In other words, the Act only applied to labor disputes between an employer and its own employees.[18] Thus, collective action by other workers in solidarity with employees engaged in a labor dispute was vulnerable to prosecution.

The Norris-LaGuardia Act

In 1932, Congress enacted the Norris-LaGuardia Act, which divested the federal courts’ jurisdiction over labor disputes, precisely because the courts had enjoined strikes and ruled against workers so frequently.[19] The author of the law, Rep. Fiorello LaGuardia lamented:

“If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now.”[20]

Save for public employees,[21] employers’ use of federal injunctions to prohibit workers from striking has largely ended today due to the enactment of the National Labor Relations Act (“NLRA”), which provides for a right to strike.[22] But, the shift from adjudicating labor disputes in court to an administrative agency, while understandable at the time,[23] has resulted in unique challenges for workers.[24] These challenges run parallel to those posed by mandatory arbitration agreements and class waivers in employment contracts[25] as employment disputes are increasingly subject to adjudication schemes outside of the courtroom.

II
CURRENT LEGAL IMPEDIMENTS TO COLLECTIVE ACTION

Today, employers prevent workers from exercising collective action not by federal injunction or by manipulating statutes, but instead by avoiding the courtroom altogether.

The National Labor Relations Act

For workplace disputes concerning concerted and union activity broadly,[26] these cases are subject to the National Labor Relations Board (“NLRB”). As a result, labor disputes largely remain out of the purview of unfriendly courts, but the NLRA has not resulted in a friendly atmosphere for collective action at the workplace.[27] Many labor advocates argue that the collection of rights and the formal process provisioned in the NLRA further undermines collective action,[28] while purporting to protect it.[29] Due to the Act’s astonishingly weak remedies,[30] time consuming process,[31] and the compromise that the Act itself represents.[32] These inadequacies are exacerbated by the NLRA’s absence of a private right of action[33] because if workers are not satisfied with the NLRB’s handling of a case or with the remedies available in the NLRA, they are foreclosed from enforcing their rights in court. Therefore, the NLRA’s shortcomings undermine collective action because engaging in it is so risky since it is virtually unprotected.

Mandatory Arbitration Agreements and Class Waivers

For workplace disputes over everything else not subject to the NLRA – discrimination, harassment, minimum wage and overtime violations, etc. – workers can seek redress in the courts pursuant to statutes like the Fair Labor Standards Act (“FLSA”)[34] and Title VII of the Civil Rights Act[35] or via other governmental agencies, such as the Equal Employment Opportunity Commission (“EEOC”)[36] and the Department of Labor (“DOL”).[37]

Under the FLSA, workers can even enforce their rights in court collectively through the FLSA’s collective action provision[38] or via a class action.[39] But, here employers have found solace in a workaround that shields them from the risks of civil litigation.[40] Whereas the NLRA requires workers to bring claims to an administrative agency, employers have similarly avoided litigation for employment claims by subjecting the disputes to mandatory individual arbitration.[41]

That is, to circumvent enforcement of employment rights in the courts or by administrative agencies, employers include mandatory arbitration agreements and class waivers in employment contracts; requiring employees to bring disputes individually[42] and in private.[43] This puts the burden on workers to vindicate their rights by bringing claims via individual arbitration or on underfunded governmental agencies to maintain adequate enforcement practices. There is not much optimism for the latter, as demonstrated by the top ten private wage and hour class action settlements in 2015 and 2016. These settlements alone “exceeded the combined total wages recovered by all state and federal agencies.”[44]

A 2017 study found that upwards of 60.1
Workers are deterred from bringing claims to individual arbitration, in part, because lawyers are less likely to retain clients subject to mandatory arbitration as "arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages." [52] Secondly, while bringing disputes subject to arbitration is often cost prohibitive, the class waiver adds another layer of deterrence for the benefit of employers. Because of the costs associated with bringing employment claims individually, "the class action waiver effectively bars these claims from being brought in any forum." [53] Thus, despite the Supreme Court’s recognition of the need for litigants to collectively bring disputes, [54] "class action waivers ultimately allow firms to insulate themselves from all liability and even scrutiny." [55] This is because "many FLSA wage and hour claims involve incremental pay disparities over a few years," [56] thus the inability to combine these small value claims poses no substantial threat to employers engaged in wrongdoing.

The Arbitration Process

The arbitration process itself is stacked against workers. Aside from the economic obstacles facing workers bringing claims, workers are disadvantaged at arbitration because of limited discovery, [57] arbitrator bias, [58] and narrow appeals. [59]

Arbitration proceedings have limited discovery because "by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’ " [60] But, the presumed efficiency of limited discovery harms workers because "the employer is invariably the keeper of all of the records and usually, the possessor of the most critical evidence in employment law cases." [61] Therefore, by failing to require disclosure of all evidence relevant to the case, employees are left without much recourse if they do not possess all of the evidence needed to prove their case.

Arbitrator bias manifests as an advantage to employers because employers are "repeat players" in arbitration proceedings. [62] For instance, one study found that "after 25 cases before the same arbitrator the employee’s chance of winning dropped to only 4.5 percent." [63] While there are many factors that contribute to arbitrator bias, one that stands out is that "arbitrators may feel pressure to rule in favor of the employer to be selected in future cases." [64] As one arbitrator admitted, "[w]hy would an arbitrator cater to a person they will never see again?" [65] As a result, workers subject to arbitration are less likely to win and, when victorious, their award is likely to be less substantial than it would have been in court. [66]

Arbitration decisions are subject to only narrow appeals because "courts are generally required to refrain from reviewing the merits of an arbitrator’s award due to the policy favoring arbitration as a means of resolving labor disputes." [67] Thus, even if an arbitrator misunderstands the law, [68] an arbitrator’s decision cannot be vacated unless it violated one of the extreme grounds outlined in the Federal Arbitration Act ("FAA"). [69] Given that "[e]mployee win rates in mandatory arbitration are much lower than in either federal court or state court," [70] the inability for workers to adequately appeal arbitration decisions means that the frequent losses they face will be final.

III

BRIEF HISTORY OF MANDATORY ARBITRATION AGREEMENTS AND CLASS WAIVERS

I. Mandatory Arbitration Agreements

Congress passed the Federal Arbitration Act ("FAA") in 1925 "in response to a perception that courts were unduly hostile to arbitration." [71] The FAA thereby established "a liberal federal policy favoring arbitration agreements." [72] But, "for a number of years after the FAA’s passage, the Supreme Court was careful to make a distinction between consumer/individual arbitration and business-to-business arbitration." [73] That all changed in the 1980s, when the Supreme Court reversed course and began to slowly find that arbitration clauses applied to a number of federal statutory claims. [74] The Court’s enforcement of arbitration agreements, beyond those made between businesses, culminated with its decision in Gilmer v. Interstate/Johnson Lane Corp, in which it held that employment
discrimination claims under the Age Discrimination in Employment Act ("ADEA") were not precluded from arbitration.[75] Thereafter, federal[76] and state[77] employment discrimination claims, as well as wage and hour claims,[78] were held to be covered by arbitration agreements. As a result, virtually all workplace disputes, and violations of an employee's statutory rights, bypass the courts and are subject to arbitration proceedings if an employee signs an employment contract that contains a mandatory arbitration agreement.[79]

II. Class Waivers

A class waiver is an agreement by a consumer or an employee "not to initiate or participate in any class action against a firm."[80] It is important to understand class waivers in the context of mandatory arbitration agreements because "the waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding."[81] Whereas a mandatory arbitration agreement precludes adjudicating a dispute in court, a class waiver prevents these disputes from including more than one aggrieved party. Class waivers originated in the late 1990s in trade journals "encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations."[82] Plaintiffs in one case even alleged that major credit card companies conspired in the late 1990s in a series of meetings to impose class waivers on customers.[83]

Following the increased use of class waivers by corporations, courts began to invalidate them.[84] Things came to a head, however, when the Supreme Court ruled that "California's judicial rule invalidating class action waivers as unconscionable 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the FAA].'"[85] In other words, the Court held that the FAA preempted the Supreme Court of California's precedent which found that class waivers were unconscionable. Subsequently, "a rubber-stamp effect seemed to ensue in the courts addressing the enforceability of class action waivers in arbitration agreements."[86] This means that after Concepcion, lower courts felt compelled to enforce class waivers in arbitration agreements, "even where state law would invalidate the contractual bans."[87] But, the intersection of mandatory arbitration agreements and class waivers is even more corrosive because "the Discover Bank rule still invalidates class action waivers contained in contracts without arbitration agreements."[88] That is, the class waiver's inclusion in mandatory arbitration agreements is what protects it. As a result, "arbitration agreements have become a safe harbor for otherwise unenforceable class action waivers."[89] What's more, the Supreme Court held in Lamps Plus, Inc. v. Varela that parties subject to mandatory arbitration agreements can only pursue their claims via individual arbitration, unless the agreement explicitly provides that the parties consent to class arbitration.[90] Thus, workers "are assumed to have 'consented' to individualized arbitration even if their employment contract does not clearly waive collective action."[91]

ANALYSIS OF EPIC SYSTEMS V. LEWIS

The Supreme Court's decision in Epic Systems v. Lewis is its latest attempt to build on its recent precedent of favoring the individual arbitration of claims. The decision itself has been described as "a vivid illustration of the declining power of workers in the U.S. political system."[92] The issue in the case, framed by Justice Gorsuch, was reminiscent of the court's Lehner era.[93]

"Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employers always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[94]

More narrowly, as scholars have pointed out, the issue was "whether Section 7 of the NLRA gives workers a substantive right to collective litigation, such that arbitration agreements that waive that right are unenforceable under the FAA."[95]

Three cases were consolidated into Epic and in each the plaintiff employees signed an employment agreement which contained a mandatory arbitration provision and a class waiver.[96] The employees nevertheless sued their employers in federal court in collective proceedings.[97] The respective employers moved to compel arbitration and, at least in one case, the Ninth Circuit held that the FAA's savings clause[98] removed the obligation to enforce arbitration agreements because the agreement violated another federal law – namely, the NLRA, by "barring employees from engaging in the 'concerted activity'"[99] of pursuing claims as a class or collective action."[100]

Justice Gorsuch reasoned that the FAA's savings clause cannot render the arbitration agreement and class waiver unenforceable because "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes."[101] And, the plaintiffs are precluded from doing so because, under the court's precedent, "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration."[102] Thus, because the court has said that a fundamental attribute of arbitration is its individualized nature – despite the existence of class arbitration – the plaintiffs cannot challenge the arbitration agreement on this basis, regardless if such an agreement violates the NLRA.

Justice Gorsuch further argued that mandatory individual arbitration does not violate the NLRA because the NLRA "does not express approval or disapproval of arbitration", "does not mention class or collective action procedures", and "does not even hint at a wish to displace the [FAA]."[103] Further, he reasoned that class action is not protected by the catchall phrase in Section 7 of the NLRA[104] because it serves "to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound 'activities of class and joint litigation.'"[105] Justice Gorsuch so held, despite precedent that "the 'mutual aid or protection' clause protects employees... when they seek to improve working conditions through resort to administrative and judicial forums"[106] because this "dicta" does not prescribe "what procedures an employee might be entitled to in litigation or arbitration."[107] In other words, employees joining together are
protected when they engage in mutual aid through resort to judicial forums, but this protection does not extend to class actions.

Lastly, while acknowledging “that class actions can enhance enforcement by ‘spread[ing] the costs of litigation,’”[108] Justice Gorsuch lamented that class actions can also “unfairly plac[e] pressure on the defendant to settle even unmeritorious claims.”[109] Therefore, the Court held that “a contract defense ‘conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures’ is inconsistent with the Arbitration Act and its saving clause.”[110] The plaintiffs cannot pursue their claims through class actions in court, but instead must resort to individual arbitration proceedings. The consequence of the Court’s decision is that, by including mandatory arbitration agreements and class waivers in employment contracts, “employers may ban workers from participating in any class or collective lawsuit in court” or in class arbitration.[111]

**ANALYSIS OF POST-EPIC CASES**

A number of notable cases have been decided since the court’s decision in Epic. In one, a subsequent interpretation of the Supreme Court’s decision outlines the likely permanency of the enforcement of mandatory individual arbitration. But, two other cases lay somewhat of a roadmap for the vindication of workers’ rights, despite the decision.


Deferring to Epic, the Sixth Circuit reversed the denial of an employer’s motion to compel individual arbitration of claims under the FLSA.[112] The Sixth Circuit framed the rule for displacing the FAA in the following way:

(1) “a federal statute does not displace the Arbitration Act unless it includes a ‘clear and manifest’ congressional intent to make individual arbitration agreements unenforceable”.[113] (2) “to clearly and manifestly make arbitration agreements unenforceable, Congress must do more than merely provide a right to engage in collective action”;[114] (3) “Congress must expressly state that an arbitration agreement poses no obstacle to pursuing a collective action.”[115]

As displayed in Garcia, the mass opt-in of arbitration claims can be an effective way for workers to get around class waivers in order to engage in collective action.

It will be interesting to see how other circuits interpret Epic and whether they will apply a similar rule. The Sixth Circuit’s interpretation seems to leave very little room for plaintiffs to get around individual arbitration, at least via federal employment statutes, because none expressly make individual arbitration agreements unenforceable. Therefore, the court’s synthesis outlines why the enforcement of individual arbitration agreements is likely to be permanent – namely, because making them unenforceable will take not just an act of Congress, but a very specific one.

**II. Correia v. NB Baker Elec., Inc.**

While federal employment law can no longer be used to challenge the enforcement of individual arbitration agreements, a California appellate court has demonstrated that it is state law which paves a way for plaintiffs to get around Epic. In Correia v. NB Baker Elec., Inc., two plaintiffs sued their employer for violations of California wage and hour law and for civil penalties under the state’s Private Attorney General Act of 2004 (“PAGA”).[116] Although the plaintiffs were subject to mandatory arbitration agreements and class waivers, the court ruled that the waiver of the PAGA claim was unenforceable because Epic did not address “a claim for civil penalties brought on behalf of the government and the enforceability of an agreement barring a PAGA representative action in any forum.”[117]

Therefore, Epic did not disturb precedent in the state that waiver of PAGA actions is unenforceable[118] because under PAGA an employee is deputized to bring a claim “on behalf of the state, not on behalf of other employees.”[119] So, not only are class waivers unenforceable for PAGA representative actions, but arbitration agreements are as well because “the state never agreed to arbitrate the claim.”[120] Thus, a possible workaround of Epic is for states to pass PAGA statutes, which undermine the FAA because it is the government technically bringing a PAGA claim and not the employee who signed the mandatory arbitration agreement and class waiver.

**III. Garcia v. Chipotle Mexican Grill, Inc.**

Lastly, in another case following Epic, an employer made an astonishing admission about the true reason why they seek to subject claims to mandatory individual arbitration – namely, to suppress claims and not to make arbitration “a viable alternative to class-action litigation.”[121] In Garcia v. Chipotle Mexican Grill, Inc., Chipotle was being sued by workers for unpaid wages and it sought to prohibit the plaintiffs’ attorney from representing a class of plaintiffs, who were dismissed from the case because they were subject to arbitration agreements, in their individual arbitration proceedings.[122] When the large number of plaintiffs were dismissed, they opted-in to take their claims to arbitration and Chipotle protested that “it is suffering a ‘manifest injustice’ wrought by the ‘multitude of arbitration filings.’”[123] However, the court rejected Chipotle’s pleas:

“The irony is not lost on the Court. Chipotle could have permitted its employees to raise disputes through collective actions such as those under the FLSA and realize the efficiencies inherent in collective or class procedures...Chipotle cannot credibly complain that too many employees, having learned of their rights from a lawful Court-authorized notice, are now asserting those rights through arbitration. Chipotle is not suffering one scintilla of injustice—it is getting exactly what it bargained for in the arbitration agreement.”[124]

This case demonstrates that employers are not actually content with individually arbitrating claims if a large number of aggrieved parties all do so at once. Chipotle’s objection to the
multitude of arbitration filings reveals that it did not actually intend arbitration to replace class action litigation, otherwise diverting all of those claims to arbitration would be exactly what Chipotle wanted. Instead, Chipotle’s protest of the amount of arbitration claims displays that the true intention of mandatory individual arbitration agreements is to suppress claims. So, while the law might prevent collective action in the courtroom, it cannot prevent plaintiffs from opting-in to arbitration, en masse.

**POST-EPIC STRATEGIES**

I. Mass Opt-In of Arbitration Claims

As displayed in García, the mass opt-in of arbitration claims can be an effective way for workers to get around class waivers in order to engage in collective action. Apart from the award that each plaintiff might receive, companies would be subject to large attorney’s fees for handling each claim. Also, if they use the American Arbitration Association’s rules which require employers to pay all fees, “employers can be hit with hundreds of thousands of dollars in fees for multiple arbitration proceedings.”[125] Additionally, “employers facing multiple individual claims also have to consider whether it is worth the cost of paying arbitrators’ and experts’ fees in 10, 20, 100 or 1,000 cases when the fees can typically range from $1,000 to $5,000 per day.”[126] Finally, the harmful effect of collateral estoppel on employers can be twofold. On one hand, a claimant’s loss would not affect the ability of other claimants to win because “collateral estoppel binds only the parties to a particular proceeding, one individual case result cannot bind another claimant who was not a party in the earlier proceeding.”[127] However, since the employer will be a party in every proceeding, the employer would be bound by a claimant’s win “if the same issues were litigated in subsequent cases.”[128]

Thus, there are financial and procedural factors that can work against an employer in individual arbitration, once aggregated. The one caveat to this approach is that employers like Uber and Chipotle have prevented the mass opt-in of arbitration claims from proceeding by refusing to pay their share of the filing fee.[129] If the employer fails to pay then the employee must front the cost, file suit to compel payment, or seek a default award from the arbitrator and pursue the claims in court.[130]

II. Public Pressure

When actually litigating or arbitrating a claim is unavailable, workers and their allies can resort to collective action as it was originally intended.

For example, a group at Harvard Law School named the Pipeline Parity Project has been organizing against law firms that require employees to sign mandatory arbitration agreements, and they’ve been successful.[131] By using social media, protesting at offices, and developing an open letter to the National Association for Law Placement, the group has convinced a number of law firms to drop forced arbitration for associates and all employees.[132]

Using public pressure has been successful elsewhere as well. “In November 2018, 20,000 Google employees across the globe walked out in protest over [the] company’s policies around equity and transparency in the workplace.”[133] In response, “Microsoft and Facebook have done away with forced arbitration of sexual harassment claims, and Google has gone even further, recently nixing its arbitration mandate altogether due to pressure from workers.”[134] Yet still, Google has not demanded its suppliers to end their use of mandatory arbitration.[135] Public pressure, nonetheless, seems like a viable tactic for workers who have less access to resources for engaging in mass arbitration opt-ins or for lobbying legislation.

**III. Legislation**

Incremental legislation cannot completely solve the problems posed by Epic.[136] For that, legislation would have to explicitly undermine the FAA. But, as California has demonstrated, “states can . . . take action to address the untenable burden forced arbitration imposes on their enforcement agencies.”[137]

**Whistleblower Enforcement Model**

The whistleblower enforcement model “expands public enforcement capacity by reimagining the way workers, community organizations, and public agencies can work together to hold corporate wrongdoers accountable, while generating revenue to fund enforcement.”[138] California’s whistleblower enforcement law workers in the following way:

“PAGA authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency on behalf of the employee and other current or former employees for the violation of certain provisions of the California Labor Code affecting employees.”[139]

The purpose of PAGA is to “augment the enforcement abilities of the Labor Commissioner by creating an alternative ‘private attorney general’ system for labor law enforcement.”[140] Essentially, employees are deputized by the state to bring civil actions against their employers.[141] Since the action is technically on behalf of the state, “a successful PAGA claim is entitled to collect 25 percent of the civil penalties for the employee, with the remainder going to the government.”[142] Further, as discussed regarding Coreia, “[a] PAGA claim is a class action in disguise that avoids some of the pitfalls of class actions normally encountered by plaintiffs.”[143]

The success of PAGA should not be understated. According to some practitioners, “PAGA has had a dramatic impact on compliance with workplace protections, despite the fact
that approximately 67 percent of the state’s employees labor under forced arbitration clauses, a higher share than the national average.”[144] Thus, states that enact their own PAGA statutes[145] could circumvent federal policy favoring arbitration, and benefit workers, by enabling them to pursue their claims in court and recover some award despite signing mandatory arbitration agreements and class waivers.

Preemption of the FAA

Two proposed pieces of federal legislation would do well to prevent workers from being compelled to pursue claims against their employers via individual arbitration by preempting the FAA’s application to employment, consumer, antitrust, and civil rights claims.

The Restoring Justice for Workers Act[146] would make an arbitration agreement invalid and unenforceable “if it requires arbitration of an employment dispute.”[147] Additionally, the Act would amend Section 8(a) of the NLRA to include, under protected concerted activity, the ability of employees to bring class and collective legal action.[148] The Act, thereby, “would overturn Epic Systems and ban forced arbitration and class- and collective-action waivers in labor and employment disputes.”[149]

The Forced Arbitration Injustice Repeal Act[150] would make an arbitration agreement or joint-action waiver invalid and unenforceable “with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”[151] The Act, thus, would prevent employees and consumers from waiving their right to bring class or collective actions and would “eliminate forced arbitration clauses” in other than business-to-business disputes.[152]

IV CONCLUSION

Even when viewing the Supreme Court’s decision in Epic in the greater historical context of legal impediments to worker collective action, the decision stands out as somewhat of a death blow. Some 25 million workers are now precluded from adjudicating claims against their employers in court on account of their signing mandatory arbitration agreements and class waivers. That number will surely rise, providing employers with virtual impunity to violate the rights of workers. But, workers nonetheless have tools at their disposal. Through mass opt-ins, workers can take their claims to arbitration en masse and overwhelm employers. Public pressure can be applied to embarrass or force employers into dropping their mandatory arbitration and class waiver policies. Lastly, legislation in the mold of California’s PAGA can be implemented in state’s all over the country to circumvent precisely what Epic presumes to stand for. Regardless of the path that workers take, if previous obstacles to collective action are a guide, it is collective action itself which will be the impetus for change. The law always follows.

[1] See 6 A.L.R. 909 (Decision in Loewe v. Lawlor prohibited secondary boycotts and held union members liable for damages due to the boycott, under the Sherman Antitrust Act).


[9] Joseph L. Greenslade, Labor Unions and the Sherman Act: Rethinking Labor’s Nonstatutory Exemption, 22 Loy. L.A. L. Rev. 151, 216, n. 40 (1988) (quoting 21 CONG. REC. 2562 (1890)) (statement of Senator John Sherman) (“combinations of workingmen to promote their interests promote their welfare, and increase their pay . . . are not affected in the slightest degree, nor can they be included in the words or intent of the bill”).

[10] Id. at 157 (“However, the Sherman Act, in its final version, did not contain an express labor exemption”).

[11] Although, the court was hesitant in applying the Sherman Antitrust Act to business monopolies. See United States v. E.C. Knight, Co., 156 U.S. 1 (1895) (holding “it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt . . . to monopolize commerce”).

[12] See 208 U.S. 274, 294 (1908) (holding that the labor union was a “combination” that “falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes”); see also 22 Loy. L.A. L. Rev. at 164.
See 22 Loy. L.A. L. Rev. at 163.

Id. at 216, n. 76.


See 15 U.S.C.A. § 17 (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof”).


See 43 Ariz. L. Rev. at 64; See also 29 U.S.C. §§ 101-115 (1994).

Id. at 64, n. 5 (quoting 75 Cong. Rec. 5478 (1932)).

See 37 A.L.R.3d 1147 (“As a general rule, public employees, even in the absence of express statutory prohibition, are denied the right to strike or to engage in a work stoppage against a public employer”).

29 U.S.C. § 163 (1994) (“Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right”).

See Cynthia L. Estlund, The Ossification of American Labor Law, 102 Colum. L. Rev. 1527, 1552 (2002) (“The original choice of administrative enforcement is understandable. In 1935, the courts were the last places to which New Dealers and union activists would have turned for the enforcement of labor rights”).

See infra notes 28-35.

See infra notes 48-69.


See Benjamin J. Sachs, Labor Law Renewal, 1 Harv. L. & Pol'y Rev. 375, 400, n. 3 & 11 (2007) (“one in five employees who takes an active role in organizing campaigns is discharged for doing so”), (“many employers insist on NLRB elections because they are a tool for killing an organizing drive”).

See id. at 377 (“the NLRAs failings have left the traditional legal channel for collective action blocked”).

See id. at 389-90 (“Although the [NLRAs] promises that workers, should they choose to do so, may organize and interact collectively with their employers, the statute’s deeply inadequate reme dial regime has rendered protections for associational and collective activity ineffectual and produced a culture of near impunity . . . . in much of U.S. labor law and practice”).

See 102 Colum. L. Rev. at 1554 (“The weakness of the Act’s remedies in the face of employer resistance has proven to be the Achille’s heel of employee rights”).

See 1 Harv. L. & Pol’y Rev. at 390 (“because the statute centralizes all enforcement power in the NLRB and denies workers a private right of action, the Board’s weak remedies and time consuming procedures are the only game in town”).


See supra note 32.

For the private right of action in the Fair Labor Standards Act (“FLSA”), see 29 U.S.C.A. § 216(b) (“An action to recover . . . . may be maintained against any employer . . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated”).

For the private right of action in Title VII, see 42 U.S.C.A. § 2000e-5(f)(1) (“[EEOC] shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge”).

Surell v. California Water Serv. Co., 518 F.3d 1097, 1104 (9th Cir. 2008) (citing 42 U.S.C. § 2000e-5(e)(1)) (“A person seeking relief under Title VII must first file a charge with the EEOC within 180 days of the alleged unlawful employment practice”).

See 29 U.S.C.A. § 216(c) (“The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages”).

See Epic Sys. Corp., 138 S. Ct. at 1636 n.4 (Ginsburg, J., dissenting) (“The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U.S.C. § 216(b). In particular, it authorizes ‘one or more employees’ to maintain an action ‘in behalf of himself or themselves and other employees similarly situated.’ Ibid. ‘Similarly situated’ employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. Ibid”).

See id. at n.3 (Ginsburg, J., dissenting). (“Rule 23 establishes an opt-out class-action procedure, pursuant to which ‘[o]ne or more members of a class’ may bring an action on behalf of the entire class if specified prerequisites are met”).

See Alexander J.S. Colvin, The Metastasization of Mandatory Arbitration, 94 Chi.-Kent L. Rev. 3, 20 (2019) (“the Supreme Court’s shifting doctrines around arbitration presented employers with the opportunity to reduce their exposure to litigation in the courts through the adoption of mandatory arbitration for their workforces”).

See id. at 3 (“Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court”).

See 15 Stan. J. Civ. Rts. & Civ. Liberties at 47 (“Slightly more than 30 percent of [mandatory arbitration] agreements
require employees to arbitrate individually rather than as a group and thereby to waive any rights to a class action lawsuit or class arbitration 


[44] Economic Policy Institute and the Center for Popular Democracy, Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back, 14 (May 2019).


[46] Supra note 46 at 1.


[49] See supra note 47.

[50] 96 N.C. L. Rev. at 682.

[51] Supra note 46 at 3.

[52] See supra note 47.


[54] *Deposit Guar. Nat. Bank, Jackson, Miss. v. Reper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device").


[56] 96 N.C. L. Rev. at 695.


[58] See id. at 814-15.

[59] See id. at 810-12.


[62] *Amendanz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 115 (2000) ("[v]arious studies show that arbitration is advantageous to employers . . . because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system").


[64] See supra note 65.


[66] See supra note 65 ("Differences in damages awarded are even greater, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts").


[68] See *San Martine Compania De Navegacion, S. A. v. Seguency Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961) (The FAA does not “authorize [an award’s] setting aside on the grounds of erroneous finding of fact or of misinterpretation of law").

[69] See 9 U.S.C.A. § 10(a) ((1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperiously executed them that a mutual, final, and definite award upon the subject matter submitted was not made").

[70] See supra note 65.


[74] See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 214 (1985) (holding that when a complaint raises both federal securities claims and pendant state claims, a court may not deny a motion to compel arbitration of the state-law claims if
the parties agreed to arbitrate their disputes); see also Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (holding that arbitration clauses could cover civil RICO claims because “[t]he Arbitration Act . . . mandates enforcement of agreements to arbitrate statutory claims”).


[76] Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 886 (4th Cir. 1996) (holding that summary judgment of Title VII and Americans with Disabilities Act (ADA) claims was correct because the plaintiff failed to submit her claims to mandatory arbitration as required in a collective bargaining agreement).


[78] Adkins v. Labor Ready, Inc., 303 F.3d 496, 507 (4th Cir. 2002) (holding that claims under the FLSA, and state wage and hour laws, were covered by arbitration agreements).

[79] See 94 Chi.-Kent L. Rev. at 4 (“If an employment right protected by a federal or state statute has been violated and the affected worker has signed a mandatory arbitration agreement, that worker does not have access to the courts and instead must handle the claim through the arbitration procedure designated in the agreement”).

[80] 94 Tex. L. Rev. at 276.


[82] Id. at 396.


[84] See Discover Bank v. Superior Court, 36 Cal. 4th 148, 161 (2005) (holding that class waivers “in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable”), abrogated by AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); see also In re Am. Express Merchants' Litig., 634 F.3d 187, 197–98 (2d Cir. 2011) (holding class waiver unenforceable because “the cost of plaintiffs individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws”), adhered to on reh'g sub nom. In re Am. Exp. Merchants' Litig., 667 F.3d 204 (2d Cir. 2012), rev'd sub nom. Am. Exp. Co. v. Italian Colors Res., 570 U.S. 228 (2013).


[86] Id. at 782.

[87] Id.

[88] 94 Tex. L. Rev. at 280.

[89] Id. (citing Myriam Gilles, Anthony Sebok, Crowd-Clas Singhing Individual Arbitrations in A Post-Class Action Era, 63 DePaul L. Rev. 447, 459 (2014) (“class action waivers embedded in arbitration clauses are enforceable even where proving the violation of a federal statute in an individual arbitration would prove too costly to pursue”). See Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

[90] 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis").

[91] Supra note 46 at 4.


[95] 132 Harv. L. Rev. at 428.


[97] See id. at 1620.


[99] 29 U.S.C.A. § 157


[101] Id. at 1622.

[102] Id. (quoting Concepcion, 563 U.S. at 344).

[103] Id. at 1624.

[104] See 29 U.S.C.A. § 157 (other concerted activities for the purpose of collective bargaining or other mutual aid or protection)


[108] Id. at 1632 (quoting Epic Sys. Corp., 138 S. Ct. at 1637 (Ginsburg, J., dissenting)).


[110] Id. at 1631 (quoting Concepcion, 563 U.S. at 336).

[111] Supra note 46 at 11.


[113] Id. at 295 (quoting Epic Sys. Corp., 138 S. Ct. at 1624).

[114] Id. at 295 (quoting Epic Sys. Corp., 138 S. Ct. at 1627).


[117] Id. at 609 (emphasis in original).

[118] Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 360 (2014) (“an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy”).


[120] Id. at 622.

[121] Supra note 46 at 3.


[124] Id. at 4.


[126] Id. at 119.

[127] Id.

[128] Id.


[132] Id.

[133] Supra note 46 at 13.


[136] See supra note 46 at 14 (“The preemptive power of the [FAA] is so strong that courts have even overturned state laws requiring that arbitration clauses be emphasized so that people realize what they’re signing”); see also Doctor’s Associates, Inc. v. Casanite, 517 U.S. 681, 687 (1996) (“Montana’s § 27-5-114(4) directly conflicts with § 2 of the FAA because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally”).

[137] Supra note 46 at 14.

[138] Supra note 46 at 14.


[140] Id. at 266 (quoting Senate Floor, Floor Analysis of SB 796, at 2 (Sept. 11, 2003)).


[142] Id.


[144] Supra note 46 at 16.

[145] See supra note 46 at 14 (“Bills introduced in six states in 2019 would authorize workers to initiate enforcement actions on behalf of a public agency for violations of labor law”).


[147] Since the text of Act in the 116th Congress is unavailable, the text of the Act in the 115th Congress is a guide. See H.R. 7109, 115th Congress (2017-2018).


[149] Supra note 46 at 13.


[151] Id.

[152] Supra note 46 at 13.
REFUSING TO RECOGNIZE REALITY

How a Stubborn Court Perpetuated Injustice in Alvarez

By JAY HEDGES

Jay Hedges is a second year law student at St. John’s University School of Law in Queens, New York, where he is a member of the Democratic Socialists of America. Prior to law school, Jay worked as a grant writer for Clayborn Temple, the organizing headquarters of the 1968 Sanitation Workers’ Strike in Memphis, Tennessee. The organizing efforts of the striking sanitation workers brought Dr. Martin Luther King Jr. to Memphis to highlight the strike as part of his Poor People’s Campaign. As a grant writer for Clayborn Temple during the 50th anniversary of the strike and Dr. King’s assassination, Jay learned about the power of working class solidarity in the fight for racial and economic justice. After law school, Jay hopes to continue participating in that fight as a tenant lawyer in Queens.

INTRODUCTION

Wise criminal justice jurisprudence requires an understanding of the modern realities of the criminal justice system. This justice system has seen an increasing prevalence of plea bargaining as means of conviction,[1] and, unfortunately, many innocent defendants are induced to plead guilty.[2] Some courts have responded with sensitivity to these realities, in particular, by recognizing that a defendant’s due process right to exculpatory evidence, established by Brady v. Maryland,[3] extends to the pre-trial phase of plea bargaining.[4] Other courts have ignored the realities of the criminal justice system, perpetuating injustice in the process, by failing to recognize pre-trial Brady rights.[5] Recently, in Alvarez, the Fifth Circuit stuck with its precedent and decided against recognizing “a defendant’s constitutional right to Brady material prior to entering a guilty plea.”[6]

In 2005, seventeen year old, George Alvarez, a ninth-grade special education student, was arrested and taken to the detention center of Brownsville, Texas, where an altercation with Officer Jesus Arias took place.[7] Officer Arias was moving Alvarez to his cell when the officer grabbed Alvarez by the arm, took him to the ground, then proceeded to place Alvarez in a chokehold.[8] All the while, Alvarez “squirmed and flailed his arms.”[9] The incident was captured on video by multiple cameras in the detention center.[10] but Officer Arias falsely claimed that Alvarez assaulted him, grabbing his throat and upper thigh.[11] The police alerted the district attorney's office to charge Alvarez with assault of a public servant.[12] Alvarez’s attorney reviewed the evidence on the case, which failed to mention the video recordings proving the officer lied.[13] When Alvarez was offered a plea deal, he accepted and pled guilty to the assault.[14]

Four years later, the videos of the altercation surfaced by happenstance in an unrelated case.[15] Alvarez filed a writ of habeas corpus in state court claiming that the withheld videos violated Brady.[16] After reviewing the new evidence, the state court found Alvarez “actually innocent” and dismissed all charges against him.[17] Months later, Alvarez sued the City of Brownsville under a federal statute in the district court, which found that the prosecution in Alvarez’s case violated his Brady right to exculpatory evidence, granting Alvarez $2.3 million in damages.[18] The City of Brownsville appealed to the Fifth Circuit, which reversed the district court’s ruling and dismissed Alvarez’s suit with prejudice.[19]

The Fifth Circuit, on grounds of strict adherence to its precedent, held that by pleading guilty Alvarez was precluded from asserting any Brady right to exculpatory evidence.[20] In defense of its ruling, the court summarized the case law concerning pre-trial Brady rights beginning with United States v. Ruiz,[21] which the court read as foreclosing, though indirectly, the extension of Brady rights to the plea-bargaining process.[22] Next, the court surveyed the sister circuits which also doubted the defendant’s right to exculpatory evidence pre-trial.[23] Looking to the First Circuit, the court agreed with the reasoning in United States v. Mathur[24] that Brady is a trial right, so unless there is a trial, there can be no Brady violation.[25] Another line of reasoning the court cited follows that when a defendant pleads guilty, the defendant is choosing to confess to the crime committed, so there is no need for the protection of Brady material.[26] The Fifth Circuit concluded by repeating that it would “not disturb this circuit’s settled precedent and abstains from expanding the Brady right to pretrial plea bargaining context for Alvarez.”[27]

While the court in Alvarez hid behind its precedent without interrogating its reasoning,[28] two concurring judges authored opinions which elaborated on why they, too, refused to extend the
plea-bargaining phase a defendant’s right to exculpatory evidence.[29]

The first concurrence, authored by Judge Higginson, expressed reluctance to shape the discovery practice of criminal proceedings through a judicial decision, explaining that the Who, What, and When, details of an extended Brady right would be difficult to outline.[30] Judge Higginson also stated that the constitutional protections already in place for defendants were sufficient, so the added protection of a pre-trial Brady right was unnecessary.[31]

In contrast to Judge Higginson’s reluctant pragmatist approach, Judge Ho authored a fierce formalist defense of the circuit’s precedent and chastised the district court for ignoring it.[32] In three sections, Judge Ho fleshed out two of the reasons against extending Brady rights cited by the court—the trial right[33] and the nature of pleas[34]—and then made a diminished exchange value argument.[35]

Dissenting, Judge Costa pointed out that the 5th Circuit was an outlier among all other jurisdictions (federal and state) in holding that defendants who plead guilty are “not entitled to evidence that might exonerate [them].”[36] Tackling the court’s and concurrences’ reasoning, Judge Costa argued that the Brady right should follow in the footsteps of the right to effective counsel, which had recently been extended to the plea-bargaining phase by the Supreme Court.[37] Judge Costa also argued against the idea that a guilty plea is necessarily an admission of guilt, citing research and cases showing that it is not rare for an innocent person to plead guilty.[38] Thus, Judge Costa argued, Alvarez’s due process rights were violated.[39]

The Fifth Circuit’s relatively brief opinion, in the face of an obvious injustice, is telling.[40] The precedent supremacy exercised by the court reeks of stale formalism, out of touch with the realities of the modern criminal justice system. The Fifth Circuit incorrectly reasoned and wrongly decided Alvarez. Applying constitutional principles to the reality of our modern criminal justice system demonstrates that courts ought to recognize a defendant’s right to exculpatory evidence prior to entering a plea agreement.

I
THE COURT’S REASONING IS FOUND ON FAULTY PREMISES

The Fifth Circuit has committed itself to its precedent, however, as the modern criminal justice system increasingly becomes “a system of pleas,”[41] misunderstanding the nature of pleas and precluding Brady rights from the plea-bargaining process allows for an unfair erosion of those rights.

The Trial Right Limitation Misreads and Misapplies Brady

The court’s assertion that Brady is a “trial right”[42] plucks phrases from Brady out of context. The Fifth Circuit cites Mathur’s reasoning which stated, “The animating principle of Brady is the ‘avoidance of an unfair trial.’”[43] This line of reasoning emphasizes the original wording of Brady but takes that wording out of context and deprives it of the Supreme Court’s intent.

In Brady v. Maryland, the petitioner, Brady, was sentenced to death for a murder which he admittedly participated in but did not commit himself.[44] The prosecution provided Brady with some extrajudicial statements from his co-defendant, Boblit, but withheld statements in which Boblit confessed to being the one who actually killed the victim.[45] Brady claimed prejudice regarding the prosecution’s non-disclosure, but for which he would not have received the death penalty.[46] The Court’s decision was an extension of its prior rulings in Mooney v. Holohan and Pyle v. Kansas.[47] Mooney established that non-disclosure by the prosecution may violate due process when used to “contrive a conviction through the pretense of a trial.”[48] Pyle held that a person is deprived of constitutional rights when that person’s “imprisonment resulted from . . . the deliberate suppression . . . of evidence favorable to him.”[49] Notice that the cases from which Brady was derived did not emphasize the application of the disclosure right to a trial, but recognized the right whenever the state sought “conviction” or “imprisonment” of an individual. Of course, prosecutors seek to convict and imprison defendants through plea deals as well as trials, so limitation of Brady to a trial right ignores the reasons for which disclosure rights developed.

Also, over-emphasizing the Brady Court’s usage of the word “trial” as a limiting qualification, ignores the key motivation of the Court—system-wide fairness: “[O]ur system of the administration of justice suffers when any accused is treated unfairly.”[50] The Fifth Circuit appears to value such fairness by citing Mathur which says, “courts enforce Brady in order to minimize the chance that an innocent person [will] be found guilty.”[51] But if the Fifth Circuit truly desired to protect the innocent, then it would not have read Brady as limiting the due process right to full-blown trials.[52]

Understanding that limiting Brady to trials fails to minimize the chance that an innocent person would “be found guilty,” however, requires recognizing that many innocent defendants wind up pleading guilty, a fact that seems entirely lost on the Fifth and First Circuits.[53]

Viewing Pleas as Admission of Guilt Ignores the Often Coercive Nature of Plea Bargaining

Characterizing pleas as an admission of guilt ignores the coercive nature of plea-bargaining in which the innocent as well as the guilty take pleas.[54] The Fifth Circuit subscribes to this misunderstanding, quoting Mathur’s argument that a plea means the defendant is “choosing to admit guilt.”[55] An amici brief in support of Alvarez, authored by the Innocence Project, discusses multiple examples of cases it had been involved with where an innocent defendant pleaded guilty and was later exonerated by DNA or other exculpatory evidence withheld by the prosecution.[56]

One example described in the brief illustrates the coercive effects of white supremacy in plea bargaining. Michael Phillips, a black man, was told by his counsel that “no jury would believe a black man over a white woman.”[57] Rather than go to trial and risk receiving a conviction and life sentence from a majority white jury and a white judge, Phillips pleaded guilty to a rape he did not commit and received a lesser sentence.[58]

The brief goes on to discuss the direct link between poverty and guilty pleas.[59] Working class pressures such as affording rent, maintaining employment, or the fear of losing one’s children, force many low-income clients to “accept whatever deal a
prosecutor offers, even if they are innocent, just to get out of jail.”[60] Waiting for a full trial, in which innocent defendants may otherwise be acquitted or have their charges dropped, can simply be too costly for low-income folks.[61] Working class pressures as well as judge and jury racism are just two examples which illustrate that guilty pleas are not necessarily admissions of guilt, but are sometimes deals innocent defendants are coerced into taking after assessing the risks of going to trial.[62]

The Fifth Circuit would have reached the better-reasoned outcome of extending Brady disclosure rights to plea bargaining had it (A) acknowledged that fairness in the criminal justice system requires fairness pre-trial and (B) recognized that pleas sometimes function as coercive deals rather than admissions of guilt.

II

THE BETTER APPROACH APPLIES CONSTITUTIONAL PRINCIPLES TO MODERN REALITIES

The Fifth Circuit could have used the following two applications of constitutional principles to extend Brady rights to plea-bargaining. First, the balancing test in Ruiz supports the due process right to exculpatory evidence pre-trial.[63] Second, the prosecutorial duty recognized by the Supreme Court requires disclosure of exculpatory evidence before the defendant enters a plea agreement.[64]

The Due Process Argument for Recognizing Pre-Trial Brady Rights

In reaching its conclusion that the Constitution does not require disclosure of “impeachment information” pre-trial, the Court in Ruiz used a Due Process balancing test.[65] The Court weighed (1) the nature of the defendant’s private interest, (2) the value of the additional safeguard, and (3) the adverse impact of the requirement on the government.[66] While weighing these factors led the Court to refuse extending a right to impeachment information before the defendant enters a plea agreement,[67] applying this same test to exculpatory evidence yields a different result.

The nature of the private interest in avoiding unfair punishment is of grave constitutional significance.[68] The Fifth Amendment states that “No person shall . . . be deprived of life, liberty, or property without due process of law.”[69] Since the deprivation of the defendant’s liberty is at stake, the private interest in pre-trial disclosure is high.

Also, the value, as an added safeguard, of disclosing exculpatory evidence to defendants pre-trial is high.[70] A primary goal of the criminal justice system is to avoid punishing the innocent.[71] The bevy of individual cases listed by the Innocence Project, in which innocent defendants pled guilty in spite of withheld exculpatory evidence available to the prosecution, reveals the devastating consequences of not recognizing a right to pre-trial Brady material.[72] The years which these people spent behind bars because of the non-disclosure and suppression of exculpatory evidence is an incalculable damage.[73] And many of these non-disclosures caused a “double injustice . . . convicting the innocent and freeing the guilty.”[74] Sometimes, the individual actually guilty of the crime, which the state failed to convict, went on to commit more crimes.[75] Thus, in many cases, disclosing exculpatory evidence would have been an invaluable safeguard against both punishing the innocent and letting the guilty go free.

The adverse impact of requiring the government to disclose exculpatory evidence is negligible.[76] Regarding the disclosure of impeachment information before trials, the Court in Ruiz mentioned witness intimidation and harm to ongoing investigations as
particularly adverse to the government.[77] Exculpatory evidence, on the other hand, "is entirely different," [78] the disclosure of which pre-trial, rarely, if ever, carries the same risks as impeachment information. Still, the Department of Justice’s brief in Alvarez cautioned against the extension of Brady rights because of the "serious costs" it would impose on the criminal justice system.[79] Yet the Innocence Project pointed out that the numerous jurisdictions which already recognize a pre-trial right to exculpatory evidence are not overly-burdened by the requirement.[80] These functioning jurisdictions cited by the Innocence Project indicate that the adverse impact of such a requirement is likely exaggerated by those who oppose extending the right.

Taken altogether, (1) the high value of disclosing exculpatory evidence for the accused and (2) the significant value as a safeguard added by the practice, weighed against (3) the negligible cost of the requirement as a burden on the government, means that disclosure of exculpatory evidence pre-trial surely passes the Supreme Court’s due process balancing test. Thus, the Constitution ought to recognize such a right.

The Prosecutorial Duty Argument for Recognizing Pre-Trial Brady Right

Failing to recognize the prosecution’s obligation to disclose exculpatory evidence before reaching a plea agreement perverts the revered role of the prosecutor in the criminal justice system.[81] Though Judge Higginson, in his concurrence, brings up legitimate concerns regarding the Who, What, and When of disclosure, prosecutors, rather than opposing the practice altogether, ought to be actively solving these pragmatic considerations.[82] Any increased burden on prosecutors is far outweighed by their duty as agents of the state. The Supreme Court described this duty in Berger v. United States:

[A prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[83]

The notion that exculpatory evidence, proving the accused’s innocence, may be withheld or even suppressed prior to that person pleading guilty runs contrary to the very nature and duty of the prosecutor.[84] Rather than being seen as an onerous burden, the practice of making sure the accused is not actually innocent ought to be seen as perfectly reasonable considering the prosecutor’s “special role . . . in the search for truth.”[85]

III

CONCLUSION

Interrogating the Fifth Circuit’s reasoning reveals that its precedent is founded on faulty premises, inapplicable to the modern realities of the criminal justice system. Any well-reasoned argument regarding the defendant’s right to exculpatory evidence pre-trial must be made with the reality of plea bargaining’s prevalence and often coercive nature in mind. Therefore, considering these realities, the duty of prosecutors and the constitutional principle of due process make clear that defendants have a right to exculpatory evidence during plea-bargaining.


[2] See discussion infra Section I.B. Also, among these realities is that the criminal justice system is racist and classist. See also Matt Ford, The Senseless Legal Precedent That Enables Wrongful Convictions, New Republic (Sept. 12, 2018), (discussing how plea bargaining “disfavors poorer defendants” and, [8][like virtually every other aspect of the criminal-justice system, it punishes non-white defendants more harshly than their white counterparts”). Though it is beyond the scope of this note to discuss the extent and impact of the system’s racism and classism, it is imperative that lawmakers, jurists, practitioners, students, and scholars keep these issues in mind when discussing criminal justice.


[7] Id. at 385–86.

[8] Id.

[9] Id.

[10] Id.


[12] Id. F.3d 382, 407–08 (5th Cir. The police reviewed the altercation internally in a separate department to determine whether Officer Arias’s use of force was proper. Id. at 386–87. While an internal department evaluating the use of force viewed video footage of the altercation, the separate department which gathered evidence for the assault charge never viewed the footage. Id.

[13] Id. at 388.

[14] Id. The deal gave Alvarez a suspended sentence of eight-years and ten years of community supervision conditioned on completion of a substance abuse program. When Alvarez failed to complete the program, the state revoked the suspended sentence and remanded Alvarez to serve the remainder of his eight-year sentence. Id.

[15] Id.


[18] Id. at 388–89.

[19] Id. at 389. A panel of the Fifth Circuit initially heard the appeal and reversed, but the Fifth Circuit granted a rehearing en banc, again, reversing the district court. Id.


[21] 536 U.S. 622, 633 (2002) (holding that the constitution does not require the disclosure of impeachment information relating to any informants or other witnesses).

[22] Alvarez, 904 F.3d at 392. The court also discussed Conroy which held that the scope of Brady material was not different for impeachment information or exculpatory evidence, thus, according to Ruiz, the defendant was entitled to neither prior
to trial. Conney, 567 F.3d at 178–79.

[23] Alvarez, 904 F.3d at 392.

[24] 624 F.3d 498 (1st Cir. 2010).

[25] Alvarez, 904 F.3d at 392–93. The Fifth Circuit also cited the Fourth Circuit’s decision in United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010), which supported the “trial right” limitation. See Alvarez, 904 F.3d at 393.

[26] Id. at 392; see Mathur, 624 F.3d at 507.

[27] Alvarez, 904 F.3d at 394.

[28] This is apparent from the court’s refrain, choosing to not “disturb” or “uproot” “settled precedent” while exerting little effort to explain this precedent’s validity. Id. at 389, 392, 394.

[29] Id. at 395 (Higginson, J., concurring); id. at 397 (Ho, J., concurring).

[30] Id. at 395–96 (Higginson, J., concurring).

[31] Id. at 396. While Judge Higginson listed these “protections,” he neglected to explain how these protections failed to keep an innocent defendant like Alvarez out of prison. Id.

[32] Id. at 397 (Ho, J., concurring). In Part I of his concurrence, Judge Ho expressed his disdain for the district court’s dismissal of the circuit’s precedent, yielding Hamilton’s Federalist 78 to remind the district court that it ought to be bound by “strict rules and precedents,” lest they exercise arbitrary discretion. Id. at 397–98.

[33] Judge Ho explained that since the original meaning of Brady was limited to a “trial right,” and since pleas are meant to avoid trials, a Brady extension to the pre-trial phase would contradict the purpose of pleas. Id. at 399.

[34] Here, Judge Ho explained that the constitution is a series of rights which, if they are to be of value to citizens and the nation, must be waivable. Id. at 399–400.

[35] Judge Ho argues that the ability to waive one’s right to exculpatory evidence is a powerful bargaining chip, thus, “[c]onverting the Brady right into a prosecutorial requirement would . . . give[e] defendants less to offer the prosecution during negotiations.” Id. at 401.

[36] Id. at 406 (Costa, J., dissenting).

[37] Id. at 409. The Supreme Court in Lafler v. Cooper, 566 U.S. 156 (2012), and Missouri v. Frye, 566 U.S. 134 (2012), decided the same day, held that the right to effective counsel ought to be extended to the plea-bargaining stage, since the criminal justice system is becoming a system of “pleas, not . . . trials.” Alvarez, 904 F.3d at 406 (quoting Lafler, 566 U.S. at 170).

[38] Id. at 415–16 (citing Buffey v. Ballard, 782 S.E.2d 204, 210 (W. Va. 2015); John H. Blume & Rebecca K. Helm, The Unexonerated: Factually Innocent Defendants Who Plead Guilty, 100 Cornell L. Rev. 157, 173 (2014)).

[39] Id. at 416 (“It is difficult to think of greater deprivations of that liberty than the government’s allowing someone to be held in prison without telling him that there is evidence that might exonerate him.”).

[40] See supra text accompanying note 28.

[41] Lafler v. Cooper, 566 U.S. 156, 170 (2012); see id. (97% of convictions in federal cases resulted from pleas).

[42] Alvarez, 904 F.3d at 392–93 (quoting United States v. Mathur, 624 F.3d, 498, 507 (1st Cir. 2010)).


[44] Brady, 373 U.S. at 84.

[45] Id.

[46] Id. at 88.


[50] Brady, 373 U.S. at 87.


[54] See Brief of Innocence Project, et al. as Amici Curiae Supporting Appellee at 23, Alvarez v. City of Brownsville, 904 F.3d 382 (5th Cir. 2018) (No. 16-40772) (“The effect of not extending Brady to pleas would be to continue to knowingly convict and incarcerate individuals who, like Amici’s clients, are innocent of crimes to which they were coerced to plead guilty.”).

[55] Alvarez, 904 F.3d at 392 (citing Mathur, 624 F.3d at 507). Judge Ho’s concurrence went even further, arguing that by pleading guilty defendants, apparently so convinced of their guilt, indicate that they do not even want to see exonerating evidence. Id. at 397 (Ho, J., Concurring). Judge Ho must realize how inescinere it sounds to argue that the accused does not want to know that there is evidence proving her or his innocence, but this rhetoric aligns with Judge Ho’s understanding that pleas are waivers. Id. at 398; see supra note 34. This ignorance to the fact that innocent people plead guilty seemed to be shared by Justice Scalia, who suggested, “[O]ur system never permits or encourages innocent defendants to plead guilty.” Petegorsky, supra note 53, at 3624 n.251 (citing Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caves to Everest to Consumer Protection, 99 Calif. L. Rev. 1117, 1134 (2011)).

[56] Brief of Innocence Project, supra note 54, at 8–10, 20; see also id. at 12 (15% of exonerees nationwide pled guilty).

[57] Id. at 14.

[58] Id. DNA evidence exonerated Phillips twenty-five years later. Id. at 9. A reinvestigation revealed that the prosecution in Phillips’ case “had withheld evidence that victims identified the man eventually determined to be the rapist in pre-trial and pre-plea lineups . . . .” Id.

[59] Id. at 14. This link is especially strong when coupled with a cash bail system which holds defendants who cannot afford bail in jail before even being convicted of a crime. Id.

[60] Id.

[61] Id. at 15.


[64] See Brady v. Maryland, 373 U.S. 83, 87 n.2 (1963) ("[T]he prosecutor is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. . . . [T]he Government wins its point when justice is done in its courts.") (quoting Judge Simon E. Sobeloff); see also Buffey v. Ballard, 782 S.E.2d 204, 217 (W. Va. 2015) ("Both the United States Supreme Court and inferior courts throughout the country have consistently recognized that our criminal justice system has inbued prosecutors with a 'special role ... in the search for truth.'" (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999))).

[65] Ruiz, 536 U.S. at 631.

[66] Id.

[67] Id.

[68] U.S. Const. amend. VIII; see also Alvarez v. City of Brownsville, 904 F.3d 382, 408 (5th Cir. 2018).

[69] U.S. Const. amend. V; see also id. amend, XIV, § 1 (guaranteeing due process under state law as well as federal law).

[70] See Alvarez, 904 F.3d at 413 (discussing the value of exculpatory evidence as a safeguard against innocent defendants pleading guilty); Buffey v. Ballard, 782 S.E.2d 204, 213–14 (W. Va. 2015) ("[T]he due-process calculus also weighs in favor of the added safeguard of requiring the State to disclose material exculpatory information before the defendant enters a guilty plea. . . .") (quoting State v. Huebler, 275 P.3d 91 (Nev. 2012)).

[71] Petegorsky, supra note 53, at 3614.

[72] Brief of Innocence Project, supra note 54, at 7–10. Joseph Buffey spent thirteen years in prison before DNA evidence, available to the prosecution’s office six weeks before he pleaded guilty, exonerated him. Id. at 7–8; see also Buffey, 782 S.E.2d at 206. Dale Duke spent nineteen years incarcerated after pleading no contest to aggravated assault before being exonerated by statements known to the prosecution at the time of his case. Brief of Innocence Project, supra note 54, at 8. Stephan Brodie was exonerated after seventeen years in prison. Id. at 8. Antone Johnson was exonerated after thirteen years. Id. at 8–9. Twenty-five years after pleading guilty, in hopes of avoiding a life sentence, Steven Phillips was cleared of his conviction through DNA evidence. Id. at 9. Robert Jones was exonerated after twenty-one years by evidence originally withheld by the prosecution. Id. at 9–10. Michael Morton spent twenty-five years in prison before being exonerated by DNA evidence which the prosecution had withheld and suppressed before Morton pleaded guilty. Id. at 21.

[73] Not to mention the fiscal burden on the state and tax payers of imprisoning unnecessary incarcerates for years, a metric perhaps more compelling to the likes of the pragmatists and formalists unmoved by the plight of Alvarez and others. See Alvarez, 904 F.3d at 395 (Higginson, J., concurring); id. at 397 (Ho, J., concurring).

[74] Id. at 415 (Costa, J., dissenting) (internal quotations omitted).

[75] See Brief of Innocence Project, supra note 54, at 21.

[76] See Brief of Innocence Project, supra note 54, at 18–23.


[78] McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003), ken up by many prosecutors. See Brief for United States, supra note 79, at 2 ("[T]he United States has a substantial interest in the resolution of this case.").

[79] Brief for United States as Amicus Curiae Supporting Appellant at 15, Alvarez v. City of Brownsville, 904 F.3d 382 (5th Cir. 2018) (No. 16-40772). Judge Costa, in his dissent, points out that the Department of Justice’s claim of burdensome costs is “puzzling” since it admits that the practice of disclosing exculpatory evidence pre-trial is already mandated by its own policy. See Alvarez, 904 F.3d at 410. So, if the Department of Justice is following its own policy, there would be no increase in costs should pre-trial Brady rights be recognized.

[80] See Brief of Innocence Project, supra note 54, at 18–19.


[82] See Alvarez, 904 F.3d at 395–96 (Higginson, J., Concurring). The Department of Justice’s amicus brief reveals the opposition to recognizing pre-trial Brady rights to.


[84] Instead of viewing disclosure of exculpatory evidence in this light, the Department of Justice cavils about how such a requirement would oblige prosecutors to do their job. See Brief for United States, supra note 79, at 16 ("[Should a Brady disclosure obligation be recognized,] the government would have to search the files of all members of the prosecution team for potentially exculpatory material and assess whether the material it uncovers, either individually or collectively, would be reasonably likely to lead the defendant to reject a plea and go to trial.").


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THE TIES THAT BIND
Historical Trends of Racism in the Juvenile Justice System

By Ezra Graham Lintner

Ezra Graham Lintner is a third year J.D. candidate at DePaul University College of Law. So far, Ezra has focused in areas of the law wherein historically marginalized people are at further risk of oppression by the legal system. This has primarily led them to poverty law and criminal defense. Ezra is currently interning with Chicago Coalition for the Homeless. At school, they serve as a Co-President for their school’s Public Interest Law Association, the Selection Editor for DePaul Law’s Journal for Social Justice, and a board member for the National Lawyers Guild. Ezra looks forward to a postgraduate career partnering with communities to use the law as a tool to pursue social justice.

INTRODUCTION

The United States criminal justice system has a long and excruciating history of perpetuating white supremacy. The juvenile justice system, while distinct from the adult criminal justice system in some ways, parallels this history of racism. Numerous violently racist beliefs about juveniles of color have existed in this country since its inception. Following these racist beliefs throughout American history reveals that they are not bygone cultural attitudes and practices, but rather the foundation for current racist trends in the juvenile justice system. In this piece, I argue that by following the threads of specific racist ideologies, one can observe the ways in which racism has consistently mutated, ultimately taking the form of modern racist practices and prejudices in the current American juvenile justice system. Such analysis seeks to reframe the conversation around the racism that plagues the juvenile justice system. This reframing helps the juvenile justice system’s racist practices of today come into focus for what they are: modern iterations of tools used by white colonizers and slave owners. In essence, it calls on practitioners within the juvenile justice system to recognize that the current trends in the juvenile justice system are part of a larger history of white supremacy.

In particular, this paper follows two racist ideological threads, and a third underlying racist belief, that have been perpetuated tangibly throughout American history. First, there is an underlying belief that communities of color and children of color are “irredeemable.” This belief has a unique interplay with the other ideologies discussed in this paper, in that it has often served as their underlying justification. As such, this belief should not be viewed as a discrete historical ideological trend, but rather as an inseparable, interwoven belief. Next, there is the belief that white parents are better suited to properly raise children of color than black and brown families or communities. This horrifically destructive concept draws its roots from colonization, where the Puritans determined that Indigenous families could not be redeemed when they refused to convert to Christianity.[1] As such, the colonizers felt they had to “save” the Indigenous children by kidnapping and raising them.[2] This forced removal of children was devastating to tribal communities as well as the children themselves.

The trend of removing Indigenous children continued in the era of Manifest Destiny, where Indigenous children were forcibly removed from their tribes and sent to assimilation-focused boarding schools with the goal of raising children in conformity with white ideals and social structures.[3] This trend appears again in the Juvenile Justice Era, where courts often held not only that misbehaving black and brown children were delinquent, but that the child’s entire community was also delinquent and therefore incapable of raising the offending youth.[4] In so holding, a judge could determine that the child was not to return home, thereby forcibly removing the child from their family and
community.[5] In these instances, black and brown children were often sent to reformatories or housed in adult prisons.[6]

Currently, this trend surfaces as a selectively punitive child and family services system, wherein children of color are forcibly removed from their homes until their parents comply with what the American government has determined is the correct or safe way to parent.[7] This practice has been consistently criticized as having a disproportionately negative effect on families of color.[8]

The second ideological thread highlighted in this paper is that black and brown children do not deserve the experience or protection of adolescence. Society often recognizes adolescence as a distinct developmental time in a person’s life, warranting special protections and understanding. Black and brown children do not always receive this protection and understanding, despite their age. That deprivation results in black and brown children being barred from the lenient and rehabilitative goals of the juvenile justice system. This ideology finds its roots in the colonial belief that people of color are “irredeemable,” and therefore undeserving of the juvenile justice system. During colonization and slavery, black children were thought of as less than human. Their youth was considered only in terms of its monetary worth and potential for manipulation.[9]

Next, during the Jim Crow Era, this ideological thread surfaced through whites barring children of color from the early juvenile houses of refuge, which focused on rehabilitation rather than punishment.[10] Consequently, children of color involved with the juvenile justice system were often forced into slave-like apprenticeships, punished through deadly convict leasing programs, and sent to adult prisons.[11]

This trend was continued in the Juvenile Court Era by white court administrators who allowed children of color unequal access to the services offered by the juvenile justice system. A child of color’s access to services was directly linked to whether or not they came from a “redeemable” community.[12] If a judge decided the child was from a redeemable community, they were considered to be deserving of the rehabilitative model of the juvenile justice system. If not, they were often taken from their homes.

The trend of children of color being labeled as undeserving of the rehabilitative aspects of the juvenile justice system resurfaced during the “Superpredator” Era. Being labeled as a “superpredator” insinuated that the child of color was inherently beyond saving.[13] As such, it was believed that the juvenile justice system could do no good for them, and their status of being “irredeemable” meant that any resources spent on them were wasted.[14] The superpredator label was a justification to send children of color to adult court, and later to adult prison, en masse.[15] This pattern of children of color being treated as “irredeemable” endures today in the overrepresentation of children of color being transferred to adult court.[16]

I

THE ERA OF AMERICAN COLONIALISM

The history of children of color experiencing brutality at the hands of white people and white justice systems began with the arrival of European colonizers to the Americas. Indigenous tribes were seen by American colonizers as an “irredeemable race” of people.[17] Tribal family structures, religious systems, and expressions of sexuality horrified the Puritan colonizers.[18] The Puritans, new to an unfamiliar land, felt that God would not allow their survival if they were not surrounded by piety.[19] This religious philosophy was used, among other reprehensible justifications, to colonize the Indigenous inhabitants.[20] This effort sometimes included Puritan families kidnapping Indigenous children in an attempt to raise them in conformity with white ideals.[21] According to attorney James Bell, founder and president of the W. Haywood Burns Institute:

The most notable of these [kidnappings] occurred in 1675 in the “Great Swamp Fight” or “Great Massacre” between settlers and the Narragansets. In this historic encounter, settlers attacked a Narragansett village, setting fire to 500 lodges and claiming the lives of almost 1,000 men.[22]

Mr. Bell goes on to note the parallels to the current era’s child and family welfare system: “Today, the Puritan narrative regarding “good families” survives, with tribes fighting to keep their children in adoption and other proceedings.”[23]

Black children and adolescents also faced excruciating violence during this era due to legalized slavery.[24] An enslaved child’s worth was determined entirely by their monetary value.[25] Enslaved children were an especially valuable commodity.[26] According to Professor Goell Ward, although “...slave owners and their

Professor Ward writes, “Slaveholders commonly viewed enslaved children as young commodities that, if properly controlled and nurtured, would yield more docile and productive pools of adult labor.”
This era of American history is significant because it set the groundwork for the beliefs and ideological trends that this paper follows.

Indigenous and black children who were formally adjudicated experienced harsh treatment from the criminal justice system during the colonial era.[31] At this time, there was no juvenile justice system, and children brought to court entered the adult criminal justice system.[32] Children of color had to face a court system that was not only ignorant of their age, but also specifically designed to perpetuate white supremacy.

This era of American history is significant because it set the groundwork for the beliefs and ideological trends that this paper follows. We can begin tracking the concept of “redeemability” with the arrival of the Puritan colonizers. In determining that entire races of people were inherently irredeemable because of their refusal to convert to Christianity, the Puritans created a binary. In creating this binary, white colonizers essentially demanded that indigenous people be active participants in their own colonization. Indigeneous tribes had two options: conform to Puritan ideals and religion, or be viewed as unsavable in the eyes of their colonizers. Choosing the latter option was akin to a strict liability crime in the minds of the Puritans. This unwillingness for white society to take in other points of view, styles of parenting, or familial structures set the stage for much of the ongoing mentality around redeemability.

The arrival of Puritan colonizers also marks the beginning of white people acting on the ideology that white society’s methods of raising children were superior to all others, and that therefore, children of color should be raised in line with with these methods. The above-mentioned beliefs about redeemability laid the groundwork for this ideology. When Indigenous communities were determined to be irredeemable, the European colonizers sometimes kidnapped children from their tribes and placed them with white Puritan families, as discussed. This perhaps points to the idea that Puritans felt the children themselves might still be redeemable, but only if they were removed from their communities.

Slave owners introduced the ideology of black children being undeserving of the protections and leniency of adolescence through the very practice of slavery. This ideology led to a systematic deprivation of adolescence.[33] Through slavery, whites summarily deprived enslaved people of all stages of life, adolescence included. As Professor Ward discussed, while enslaved children were sometimes viewed with special attention to their age, this attention was not given to ensure the child grew and developed in a healthy manner. Instead, slave owners recognized that adolescence provided an opportunity to brainwash and control the people they had enslaved. This recognition helped create the foundation for the ideology that children of color are undeserving of the protections that should come with adolescence. The slave owner’s view of childhood was an utter subversion of the respect for development given to white children.

Black children experienced harsh conditions in the absence of humane intervention. Convict leasing was a horrific alternative for black children involved in the legal system.[39] The system allowed for convicts to be “leased” for manual labor.[40] While slave owners had an incentive to keep enslaved people alive, no such incentive existed for those simply leasing black laborers.[41] Indeed, it has been reported that no enslaved person under Mississippi’s convict leasing system lived for more than seven years.[42] The 1890 census, which showed that about twenty percent of all black prisoners were children, proves that children were not spared this terrible fate.[43] It is important to note that the convict leasing program was made legal through the Thirteenth Amendment, which allows for people to be enslaved “as punishment for a crime” to this day.[44]

During the Manifest Destiny Era, Indigenous children also faced awful treatment at the hands of the state. Many Indigenous children were subject to forced assimilation, wherein they were forcibly removed from their homes and sent to American boarding schools focused on “integrating” them into the American way of life.[45] The government's goal in developing these boarding schools was “to separate native children from their tribal communities, strip them of their tribal customs, mores, and languages, and “prepare [them] for never again returning to [their] people.”[46] Prior to colonization, Indigenous tribes frequently practiced restorative justice and followed unwritten codes of values.[47] This stood in stark contrast to life at a boarding school, which used strict corporal punishment in an effort to “civilize” and “Americanize” Indigenous youth.[48] The consequences were devastating for Indigenous life and culture as a whole.[49]

One such consequence of forced assimilation was the destruction of Indigenous justice systems.[50] This has had major ramifications for contemporary tribal life. In 2015, the Department of Justice found that Indigenous youth were three times more likely to be incarcerated than white youth.[51] It is particularly ironic that the American juvenile justice system is integrating concepts of restorative justice—a practice attributed...
to Indigenous tribes—while at the same time, Indigenous children in this country are over-incarcerated—a concept that did not exist prior to colonization. This appropriation of legal ideology is a poignant example of how colonization and white supremacy have devastated tribal justice systems.

This era in American history, for all its innovation and perceived altruism, did not provide an equitable foundation on which a fledgling juvenile justice system could develop. From its earliest days, children of color did not have the same access to the rehabilitative efforts the system was designed to provide. Moreover, some of the early system’s efforts at “rehabilitation” translated into the practice of removing children of color from their homes to be raised by whites. Boarding schools provide a stark example of a white paternalistic state attempting to raise children of color in accordance with its ideals. It is important to note that the dominant actor involved in forcibly removing Indigenous children from their homes was the United States government itself. The process of kidnapping children from their homes and entering them into assimilation-based institutions became legalized during this era. Children were raised how the United States government saw fit. This legalized kidnapping and forced assimilation set the stage for all formal removals of children of color from their homes and communities.

This era of juvenile justice also saw white-dominated institutional reformatories refusing to integrate black children into their rehabilitative programming. This refusal was rooted in the idea that “black youth were ‘undeserving subjects of the white-dominated parental state.’”[52] Whites felt that it was a waste to spend valuable resources on black children.[53] Moreover, there was a shared sense that the recent reforms in the fledging juvenile justice system were singularly intended to benefit white children.[54] Even when black and brown children were allowed into the early houses of refuge, their experiences there were significantly more brutal and violent. This implies that the children of color held in these houses of refuge were not receiving the same levels of rehabilitation that white children were enjoying. This can again be attributed to the overall belief that black and brown children were irredeemable, and therefore undeserving of the benefits available at rehabilitation-focused institutions.

Black and brown children faced horrific violence as a result of not being able to access the early houses of refuge available to white children. With little opportunity to access humane alternatives designated to white children, black and brown children were forced to accept adult punishments for childhood crimes. While this was also true during the era of colonization, the Manifest Destiny Era reveals that this trend was not just a colonial practice, but a legalized American practice as well. The convict leasing system, discussed above, provides a nightmarish example of this violence.

III
THE JUVENILE COURT AND JIM CROW ERA

The Juvenile Court Era saw radical reform to the American court system.[55] Juvenile courts were pioneered by groups of female activists who desired to change the punitive nature of the system to a more understanding, rehabilitative model for children.[56] Despite its altruistic intent, the juvenile justice system was fraught with racism and classism from its inception.[57] By the early 1900s, two truths about racism in the juvenile court system were widely acknowledged.[58]

First, it was established that there was a clear overrepresentation of children of color being hauled into court and placed in jail.[59] One report conducted in Cook County in 1913 noted, “although the colored people of Chicago approximate one-fourth of the entire population, one-eighth of the boys and young men and nearly one-third of the girls and young women who had been confined to the jail during the year were Negroes.”[60]

Second, it was acknowledged that black and brown children were not offered the same rehabilitative opportunities that affluent white children were offered.[61] Services offered were largely based on the court’s belief about whether the child was “redeemable.” In this context, the idea of redeemability was based on the child’s family and community rather than the children themselves.[62] When determining redeemability, the court would weigh variables such as crime levels, ethnic makeup, and socioeconomics of the child’s community.[63] Courts judging the child’s family would consider whether the child’s mother worked, how many children were in the house, and whether the child’s parents were married.[64] Ultimately, the court would determine not just whether the child was delinquent, but whether their community and families were also “delinquent.”[65]

This era provides an example of the close interaction between beliefs surrounding irredeemability and the ideologies of white society being better-suited to raise children of color than their own communities. The ideology of the system was leveraged against entire communities, with children bearing the brunt of that determination. Indeed, the determination had chilling effects on a child’s prospects for success in the system.

The court’s solution to perceived community irredeemability was to withhold release of the child back into their community and home.[66] While white children would have an opportunity to go to rehabilitative institutions if separated from their families, black and brown children rarely had the same option. Legalized segregation made it incredibly difficult to place children in rehabilitative institutions or with individual white families. As a result, children of color were sent to harsh and discriminatory boarding houses, institutions, or adult prisons.[67]

This practice of removing children from “delinquent” communities was
the Juvenile Court Era’s manifestation of whites believing that families of color were not able to properly parent their children. During this era, the juvenile court system became active in making the removal of children of color from their homes a legal punishment for juvenile delinquency. It used simple childhood transgressions as a justification to remove children from their communities. Similarly to the Manifest Destiny Era, children stolen from their communities were not often placed with white families, as they were during colonization, but rather were raised by state institutions.[68]

IV

THE TOUGH ON CRIME AND “SUPERPREDATOR” ERA

Juvenile Justice in the 1970s, 1980s and 1990s can be defined by the following concepts: the “War on Drugs,” politicians vowing to restore “law and order” by getting “tough on crime”, and fear of the “superpredator”. [69] Each concept has been criticized as thinly-veiled racism.[70] Additionally, this era marked the rise of the current social work and family services model, which has been critiqued as punishing black and brown families, especially mothers, for not conforming to white notions of how to properly raise children.[71]

The 1960s and 1970s saw an explosion of crime and unrest in the United States.[72] The crack epidemic of the 1980s only added to the chaos.[73] The media focused endlessly on the rise of violence and drug addiction.[74] While America certainly needed to reckon with the rise in crime, conservatives used the crime rate as a tool to further divide the populace.[75] It is well-documented that national Republican politicians promised to restore “law and order” as an appeal to racist southern whites, many of whom still felt deep-seated anger about integration and civil rights.[76] In essence, the Republican party, joined by the media, placed the blame for America’s rising crime on people of color.[77] Children were not spared.[78]

This concept, introduced in the early 1990s, was “[i]nfluenced by a national shift towards the political right and the declaration of the War on Drugs during the Reagan administration, a combination of political leaders, social policy ‘experts,’ and media organizations.”[79] While the inception of the “superpredator” myth was the effort of many parties, the concept is often attributed to Professor John Dilulio of Princeton University, who stated that superpredators were a “new breed” of ‘fatherless, Godless ... radically impulsive, brutally remorseless youngsters’ that would soon terrorize all of society.”[80] The idea of the superpredator allowed conservative politicians to give the public a targeted enemy: children of color.[81]

The concept of the superpredator mapped onto a larger shift in the juvenile justice system during the 1970s through the 1990s. During this time, the pendulum of the juvenile justice system swung from a rehabilitative attitude toward encouraging punitive measures for youth.[82] The “get tough” mentality found a home in the juvenile justice system in a variety of forms, each of which continued the practice of treating black and brown children as adults.[83] This practice was most apparent in the revamping of transfer and sentencing laws.[84] Phrases like “adult crime, adult time” and “old enough to do the crime, old enough to do the time” stripped the concept of rehabilitation from the juvenile justice system.[85] Indeed, these ideas run contrary to the very foundation of the juvenile justice system.

This era of juvenile justice is significant for two reasons. First, it helps explain the current state of affairs of the juvenile justice system, wherein black and brown children are significantly more likely to be imprisoned than their white counterparts for similar crimes.[86] Second, it exposes the current iteration of multiple ideological threads this paper has followed: children of color being viewed as “irredeemable,” children of color being forcibly removed from their homes by white people in power, and children of color being deprived of the protections and experience of adolescence.

The label of “superpredator” provided the newest iteration of black and brown children being viewed as irredeemable.[87] Black and brown children labeled as “superpredators” were incapable of being saved by the juvenile justice system, according to those who perpetuated this myth. The answer was clear: there was to be no attempt at rehabilitation for children of color committing crime. Instead, they were to be sent to adult criminal court, followed by adult prison if found guilty.[88]

The Superpredator Era’s manifestation of the ideology that black and brown families and communities are not adept to raise their own children takes the form of an unforgiving and punitive child and family services system. America’s child and family services have been critiqued as being hyper-controlling of black and brown parents, especially mothers.[89] When involved with such a system, black and brown parents are often confronted with a choice: comply with the mandates of the system, or risk losing their child.[90] Parents of color face formidable barriers in trying to get their children back, according to those who study the system.

In addition to being more likely to become ensnared in the child protection system, families of color tend to fare much worse than white families once a case has been opened. Studies have shown that minority children are more likely than white children to be placed in foster care, even when they have the same characteristics as white children. An initial placement in foster care greatly increases the risk that parents will have their custodial rights permanently terminated. Once in foster care, black children suffer worse consequences—they remain in foster care longer, are moved from home to
home more often, and receive less desirable placements than white children. Black children who are removed from their homes stay in care for an average of nine months longer than white children do. Increased lengths of stay in foster care are particularly significant because the chances a child will reunify with his or her parent begin to decrease rapidly after the first five months of placement. Although the intention of the child protection system may not be to dissolve poor families and, in particular, poor families of color, the families most surveilled and most often destroyed by the system are almost always poor and disproportionately African American. [91]

Considering that the child and family services system, like all systems in the United States, is primarily staffed by white social workers[92], parents of color must struggle with a system run by notions of "proper parenting" constructed by white people. The child and family services model is the current iteration of the ideology that whites are best suited to raise black and brown children. It shows no sign of changing [93]

Lastly, the overarching mentality of the juvenile justice system during the Superpredator Era provides the newest iteration of children of color being deemed undeserving of the protections and leniency the juvenile justice system is intended to provide. The very idea of the superpredator is one not far removed from eugenics. Black and brown children regarded as super predators were thought to be inherently less likely to be redeemed through rehabilitation, and therefore undeserving of any attempt to intervene on their behaviors. Moreover, phrases like "adult crime, adult time," and "old enough to do the crime, old enough to do the time," removed the very essence of rehabilitation and leniency from the juvenile justice system. This era rocked the very foundation of the juvenile justice system. The current system has not yet settled; black and brown children are still transferred to adult courts at disproportionately high rates.[94]

V

CONCLUSION

Anyone familiar with the American juvenile justice system, whether in theory or in practice, knows that it is plagued by racist beliefs. These are not new views, but rather current manifestations of long-ranging ideologies that are as old as America itself. The positions that children of color are irredeemable, that white people are better-suited to raise children of color than their own families, and that children of color are undeserving of the protections and experience of adolescence have taken various forms throughout United States history. In any form, they have proved to be deeply destructive beliefs that have wreaked havoc on children and communities of color in this country.

Practitioners and academics attempting to analyze current trends in juvenile justice must reckon with this harrowing history if there is to be any genuine attempt at change. Indeed, historical context is a powerful lens through which we can understand the present issues that adversely affect youth of color in the juvenile justice system. Only when we fully acknowledge the entrenched history of racism within the juvenile justice system will we be able to remedy it.

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[2] Id.


[5] Id. at 1360.

[6] Id. at 1366.


[10] Bell, supra note 1, at 5.


[14] Id.


[17] Bell, supra note 1, at 5.


[19] Id.

[20] Id.

[21] Bell, supra note 1, at 3.


[23] Id.

[24] Bell, supra note 1, at 4, 6.


[26] Bell, supra note 1, at 4.

[28] Id. at 36.
[29] Id.
[31] Bell, supra note 1.
[32] Id.
[33] Nunn, supra note 9, at 680–681.
[34] Bell, supra note 1, at 5.
[36] Bell, supra note 1, at 5.
[37] Id.
[38] Id.
[40] Id.
[41] Id.
[42] Bell, supra note 1, at 6–7.
[43] Id.
[45] Rolnick, supra note 3, at 63.
[47] Bell, supra note 1, at 8.
[49] Rolnick, supra note 3, at 80–82.
[50] Id.
[52] Bell, supra note 1, at 4.
[53] Id. at 7.
[54] Butler, supra note 4, at 1359.
[56] Butler, supra note 4.
[58] Butler, supra note 4, at 1369.
[59] Id. at 1369–1370.
[60] Id. at 1370, quoting Louise De Koven Bowen, The Colored People of Chicago: An Investigation Made for the Juvenile Protective Association, 3 (1913).
[61] Butler, supra note 4, at 1365–68.
[63] Id.
[64] Id.
[65] Butler, supra note 4, at 1361.
[66] Butler, supra note 4, at 1360.
[67] Butler, supra note 4, at 1365.
[68] The Juvenile Justice revolution is often credited to the campaigning of white women. This re-writing of history undermines the tremendous achievements of black women during the Juvenile Justice Era. From its beginning, black women began making noteworthy improvements in the way black children were treated by the juvenile system. In particular, they focused their energy on two things: ensuring that black children were included in the rehabilitative model of the juvenile justice system, and doing community-based work to decrease the number of black children entering into the juvenile justice system. Disregarding resistance is a tool of oppression. As such, it is important to note the contributions of these women. See Butler, supra note 4, at 1346, 1365, 1350, 1375.
[69] Soung, supra note 16.
[70] Id.
[71] Roberts, supra note 7.
[74] Id. at 375.
[75] Feld, supra note 13, at 1451.
[76] Id. For a deplorable example of the narrative surrounding this strategy, see Alexander P. Lamis, Southern Politics in the 1990’s, 7–8 (1999).
[77] Id.
[78] Id.
[80] Bell, supra note 1, at 15.
[81] Feld, supra note 13, at 1451.
[82] Feld, supra note 13, at 1506.
[83] Id.
[84] Id. For more information about the disproportionate effect the War on Drugs had on youth of color, see Christina


[86] Bell, *supra* note 1, at 17.


[90] *Id.*


[94] Jeree Michele Thomas & Mel Wilson, *The Color of Youth Transferred to the Adult Criminal Justice System: Policy & Practice Recommendations*, (2018) http://cfyj.org/images/pdf/Social_Justice_Brief_Youth_Transfers_Revised_copy_09-18-2018.pdf, archived at https://perma.cc/CGN9-SBEL (“Black youth are approximately 14% of the total youth population, but 47.3% of the youth who are transferred to adult court by juvenile court judges who believe the youth cannot benefit from the services of their court. Black youth are 53.1% of youth transferred for person offenses despite the fact that black and white youth make up an equal percentage of youth charged with person offenses, 40.1% and 40.5% respectively, in 2015.”) (citation omitted) (emphasis added)).
AMERICA'S HOMELESS TRAGEDY
Current Approaches Have Not Worked

PROFESSOR DENIS BINDER

Professor Binder’s career teaching Antitrust, Environmental Law, Torts, and Toxic Torts at law schools nationwide spans 4.5 decades. He has served as a consultant to a variety of organizations, ranging from the Army Corps of Engineers to Cesar Chavez and the United Farm Workers. In September 1996, Professor Binder received the National Award of Merit from the Association of State Dam Safety Officials for his contributions to promoting dam safety over the preceding two decades. He graduated first in his class at the University of San Francisco School of Law and received his LL.M. and S.J.D. degrees from the University of Michigan Law School. Professor Binder served as the President of the Chapman University Faculty Senate during the 2006-2007 academic year and as chair of the Environmental Law Section of The Association of American Law Schools for 2011-2012.

INTRODUCTION

The homeless are an exploding population in America, especially on the West Coast.[1] Homelessness is both a humanitarian crisis and a public health and safety crisis. “Justice, justice, you shall pursue,” admonishes the Torah.[2] Homelessness is a justice issue, but balancing justice for the homeless with the public health and safety risks to the homeless and the general public is a troublesome issue for society today.

Gunnar Myrdal published in 1944 An American Dilemma, The Negro Problem and Modern Democracy. His famous book chronicles the history of the horrific treatment of African Americans in the United States. Clearly, not all issues have been resolved, but at least slavery and Jim Crow are gone. An African American was elected President of the United States, while others have served as Governors, Senators, Representatives, and business executives. They are now well represented in higher education and Hollywood.

A modern problem is the surge in homelessness[3], especially on the West Coast in Seattle, Portland, Sacramento, San Francisco,[4] Los Angeles, Orange County, and San Diego. However, with all the attention on the West Coast homeless, New York City has the most homeless in the United States. The number of homeless in America is uncertain although estimates and surveys exist.[5] The number for California is 2018 is 129,972.[6] Homelessness is a national problem.

The Los Angeles Homeless Point-in-Time count showed a growing homeless problem in both the county and city of Los Angeles.[7] The County’s homeless numbers rose 12% to 58,936 in 2019 from 52,765 in 2018. The City of Los Angeles number rose 16% to 36,300 from 31,285.

The homeless problem is not new to America. People talked decades ago in the “Dark Ages” about the “bums” and “alikes” hanging out on Skid Row, the Tenderloin, and the Bowery. The police would periodically roll up the homeless, put them in the police van,[8] and then let them dry out overnight in the “drunk” tank. An alternative approach was for local officers to transport, i.e. drop the transients off in a neighboring community. Law enforcement would often confiscate the possessions of the homeless as well as arresting them. Policies may have prohibited sleeping in cars or trailers on public streets. The police objective was to keep the homeless contained and harmless to society.

Some of these historical approaches ignored the constitutional and property rights of the individuals, and would often resort in substantial liability today.[9]

Society tolerated the homeless as long as they stayed in Skid Row,[10] Tenderloin and the Bowery with occasional panhandling. The public attitude was one of benign neglect. Today’s exploding homeless population has moved into residential areas, commercial areas, vacant lots and parking lots, along riverbeds and railroad tracks, suburbs and the hills, and increasingly in transit stations, and riding buses and trains,[11] sometimes to stay warm. The growing homeless encampments/tent cities spreading through urban areas tell us the problem is growing. The homeless are not all living on the street. Many are in shelters while others live in cars, motor homes and RV’s parked on streets or lots, lacking sanitation hookups.

The dilemma for society is balancing compassion and treatment with public health and safety. H.L. Mencken, the American satirist, once wrote: “For every complex problem there is an answer that is clear, simple, and wrong,” which is a way of saying no easy solution exists to America’s growing homeless problem.

The homeless are not numbers. They are humans. Each is an individual. They are American citizens who should be treated with compassion, decency, dignity, empathy, sympathy, and respect. They equally need meaningful assistance and help. Many have bravely served the country.

Homelessness does not discriminate by race, gender, ethnicity, religion, age, disability, or education, young and old, men, women and children, healthy and disabled, and college students. All are
homeless on the streets, inside shelters, camps or tent cities, or living in vehicles. Some in California’s Central Valley live on the levees.[12]

The homeless can be very creative and ingenious. Denver tested containers for the homeless to store their possessions. The homeless quickly converted them to shelters to live in, and spread the word.

The Homeless problems has to be looked at from the different perspectives of cause, effect, and solutions. Any systemic approach to solving the homeless problem needs to start with the causes. If society does not understand and address the causes, then the homeless population will continue to grow. The problem cannot be solved without addressing the root causes; it will otherwise continue to grow. Society has been slow to address the root causes, resulting in ever expanding homelessness.

I

THE CAUSES OF HOMELESSNESS

Today’s homelessness is not a unitary phenomenon. Several, often unrelated, causes, the exact percent of each is uncertain, are responsible.

One cause beginning in the 1950’s was initiating the deinstitutionalization policy whereby those with mental problems would only be institutionalized under exigent circumstances. The assumption was that their psychological problems could be controlled through medication. The goal was to release them under controlled circumstances, such as halfway houses, to accommodate them among the population. The deinstitutionalization occurred,[13] but not the proper accommodations, often due to local opposition. The “inmates” were effectively thrown on the streets or never institutionalized. Many of the homeless today suffer from severe mental disabilities.

A change in criminal approaches to low level “quality of life” crimes plays a role. Drug crimes, such as possession or use, would no longer be treated as a misdemeanor calling for arrests, but as a call for treatment. Seattle, for example, stopped arresting for assaults, thefts, and drug possession. Police stopped arresting in other cities because prosecutors will not prosecute for these crimes. “Treatment Rather than Arrest” became the mantra.

Unfortunately, large scale treatment programs were not established. Neither were large numbers of group homes. To the contrary, a large number of homeless have drug and alcohol addiction problems.

Handing out free needles to the homeless seems compassionate, but it is not a solution to homelessness or drug addiction. On the contrary, it fuels the addicts and encourages the homeless, as well as leading to used, contaminated needles scattered around the community on streets and sidewalks, in playgrounds, along beaches, and in foyers, endangering public health.

Veterans suffering from PTSD are also found on the streets. The military has only recently addressed the PTSD problem, with the number of suffering veterans from the Afghanistan and Iraqi wars adding to the toils.

California’s Props 47[14] and 57[15] resulted in an early release of prisoners and reducing the degree of criminality for many offenses, resulting in many of them on the street rather than in jail. Police in cities, such as Los Angeles and San Francisco, have stopped arresting for “quality of life” offenses, which were commonly used to get the homeless off the street. Prosecutors often had the ability to force treatment on arrestees by giving them a choice: treatment or jail. They no longer have that option because the threat of imprisonment is gone.

Economics is a major factor. We have the economic victims who have lost their jobs or cannot afford housing. The middle class is shrinking; inequality is rising. Cities, such as San Francisco and Seattle, are experiencing an economic boom, driving up housing prices. San Francisco has 75 billionaires, the highest per capita number in the United States (1/11,600). Housing prices are escalating with a corresponding decline in affordable housing.

Gentrification is expanding to the lower income neighborhoods. Low income tenants are evicted or ejected with nowhere to go except the streets. Gentrified and redeveloped cities have witnessed the demise of the very low rent traditional flop houses and SRO’s where otherwise homeless could abide.[16]

Two other factors play a role. Natural disasters can destroy housing, throwing victims into the streets. A unique factor for the growing West Coast homeless population is the favorable weather compared to the Frost Belt. Thus, many of the West coast homeless have moved there.

An additional problem is that homelessness is usually accompanied by transportation and health problems.

II

THE PUBLIC HEALTH AND SAFETY CRISIS

One of the primary obligations of government is safeguarding the public health and safety, especially public sanitation. Los Angeles, San Francisco, and Seattle currently fail that basic test, both to the homeless and the general public.

The public health and sanitation risks the homeless were relatively small as long as their numbers were small and relatively self-contained. The exploding populations have given rise to widespread public health and sanitation crises. The population boom leads to rodent infestations and then diseases, many of which, typhoid, typhus and hepatitis A, should be rare in a modern urban city. Trash accumulates or scattered where ever. Sanitation and sanitary facilities are often lacking. Many homeless use water resources as a toilet, reminiscent of third world countries.

Action is necessary because of public health and safety problems. The LA City hall is teeming with garbage fed rats carrying fleas and typhus. Homeless have caused fires in the hills in their encampments by igniting cooking fires. For example, the December 2017 Skiberral Fire was sparked by a cooking fire at a homeless encampment. The fire destroyed six homes and destroyed a dozen more in Bel Air, California.[17]

Steve Lopez, a columnist for the Los Angeles Times, wrote about downtown Los Angeles: “A mountain of rotting, oozing, stinking trash – stretching a good 20 yards along a skid road alley. Rats popped their heads out of the debris like they were in a game of Whack-a-Mole, then scampered for cover as a tractor with a scoop lurched towards them . . .”

Many homeless use the city’s streets and sidewalks as toilets while others
avail themselves bodies of water which may be part of a community’s water supply. San Francisco has a daily poop patrol cleaning off the streets of San Francisco. An interactive poop map shows San Francisco almost totally covered with brown pins representing feces droppings throughout the city.

The cleanup from January 22-March 3, 2018 of the Santa Ana Riverbed encampment adjoining Angels Stadium relocated 718 homeless, temporarily with vouchers to motel. The cleanup collected over 400 tons of trash, 13,950 needles, and 5,279 pounds of fecal matter.[18]

San Diego needed two years to end a hepatitis A epidemic among the city’s homeless with 20 deaths and almost 600 sickened during the disease.[19] San Diego City and County officials promoted vaccinations, street cleaning, portable toilets, hand washing machines and temporary shelters housing up to 700 at a time at a cost of $12 million.[20]

III

ECONOMIC COSTS OF HOMELESSNESS

The direct costs state and local governments are spending on homeless are easy to ascertain. Much more difficult are business losses on streets where homeless are lying on the sidewalks, crowding entrances, and using the streets as toilets. Property values can also drop. The aesthetics of homeless squalor can deter shopping and hence negatively affect commerce.

Criminal Problems

Many criminal problems arise with the current homeless population in addition to the “quality of life” issues. The extent of the problem is unknown, but we have documented instances of homeless on homeless, homeless on non-homeless, and non-homeless on homeless. Crimes include assaults, batteries, sexual assaults, arson, thefts, homicides, and drug possession and trafficking. The theoretical approach to quality of life crimes is treatment rather than arrests. Treatment trails the need.

Public Expenditures

Public funding for the homeless comes from the federal, state and local governments. Congress enacted the McKinney-Vento Homeless Assistance Act of 1987[21] whereby Congress annually appropriates homeless assistance funds to communities. The funding for FY19 is $2.64 billion. One of the funding conditions is that HUD conducts an annual homeless count, the Point in Time (PIT) count, which the states and communities are required to conduct. The PIT is one day during the last ten days of January. It counts both sheltered and unsheltered homeless. It’s best to view the PIT count as a rough estimate of communities.

States and cities are beginning to spend large sums on money on the homeless problem. So far their efforts are directly at the effects, i.e. the homeless on the street, rather than also addressing the causes. Much of the money has little to show for its expenditure.

Money alone cannot solve the problem. For example, San Francisco is spending over $300 million annually on the homeless problem, which is growing. Seattle is reportedly spending $100,000 for each homeless person in King County.

Los Angeles’ approach has failed on many fronts. First, they’ve blown hundreds of millions of dollars annually between an increased bureaucracy with little additions to the shelter base. City of Los Angeles voters passed in 2016 Proposition HHH, a $1.2 billion bond, for homeless shelters, with a goal of 10,000 new units in a decade. By April 2019 2/3 of the funds had been committed for ½ of the units not yet under construction.

The Los Angeles Controller issued a devastating report on August 29, 2019.[22] The 2019 PIT count showed an increase of 13,500 homeless to 56,000 from 2017 with 42,500 unhoused.[23] The city of Los Angeles and Los Angeles County have joined together to form the Los Angeles Homeless Services Authority (LAHSA), which manages about $300 million in grants to provide shelter, permanent housing, and services for the homeless.[24]

The report recommends LAHSA’s first priority should be short term solutions until permanent housing is available.[25] According to the Report San Francisco, San Jose, San Diego, Seattle and Los Angeles all have more unhoused homeless than sheltered. For example, the figures for Los Angeles are 42,500 versus 13,800 sheltered.[26] Conversely, New York City has made a concerted effort to provide shelter to its homeless. NYC has 75,000 sheltered homeless versus only 3,700 unsheltered.[27] Los Angeles has been concentrating on permanent housing instead of seeking to convert existing, often abandoned, buildings to shelters, fitting them with sanitary facilities and providing support.

LAHSA’s 2019 figures show 918 homeless died in 2018, up 76% from 2014. In addition, 8,785 of the homeless over 18 self-reported a serious mental illness while 4,888 identified a substance abuse disorder.[28]

The Comptroller’s report shows none of the HHH funds had not resulted in any permanent housing facilities for the homeless, although projects are under construction or in the conceptualization and planning phases.[29]

Los Angeles County voters approved on March 7, 2017 a 1/4 cent increase in the sales tax for the homeless. The tax is expected to generate $355 million annually for 10 years. 2 1/2 years after the vote, no shelter had been completed.

Los Angeles voters expressed their compassion and empathy in approving these bonds and tax increases. The expectation in exchange for passage is that the government would address the homeless problem. Political leaders have failed as the homeless have exponentially increased.

The current estimate is that LA will build 6,000 units pursuant to the HHH funds. Simple math says that comes out to $200,000/unit. That is expensive shelter for the homeless, and but a drop in the bucket for a city with roughly 60,000 homeless.

LA’s leaders have been caught between the perils of Scylla and Charybdis. Those opposed to proposed sites litigate, often under California’s Environmental Quality Act (CEQA). Environmental impact statements, especially under California’s CEQA statute, are used as a weapon to block homeless housing, a critical problem in California.[30]

On the other hand the advocates for the homeless want more than the standard shelter accommodations for the homeless. Thus the cost rises. The result is a paralysis of governance with a lack of leadership by the Mayor of Los
Angeles and the Governor of California. California politicians are now pushing for changes in CEQA to facilitate siting shelters.

They are also seeking other forms of financing to resolve the homeless problem, figuring out which additional accounts they can tap. The Los Angeles Mayor is leading a campaign of mayors in impacted communities for federal funding.

IV
THE JUDICIAL SOLUTIONS

Reflecting our litigious society, lawsuits have been filed to help the homeless and also to block their placement in areas that don't want them.

The Ninth Circuit upheld a preliminary injunction in Lavan v. City of Los Angeles[31] against the city's confiscation and destruction of the personal property of the homeless as a violation of the 4th and 14th Amendments.[32]

The court in the 2018 case of Martin v. City of Boise[33] held under the 8th Amendment that a community cannot impose criminal penalties on homeless for sleeping, sitting, or lying outside public property when no alternative sleeping space is available. The Ninth Circuit opinion is contra to decisions of the 4th[34] and 11th Circuits.[35] The eleventh Circuit upheld an Orlando ordinance banning the sleeping on public property.

Orange County Federal District Court David Carter held the local communities could not remove the homeless encampments until they provided alternative shelters. Communities then provided vouchers for three months of motels. Several, Anaheim, Costa Mesa, Orange, Tustin, and Orange County have settled the litigation by providing shelters. Others are working on complying with Judge Carter’s order.[36]

Conversely the California Supreme Court in Tobe v. City of Santa Ana[37] rejected a challenge to a city ban on public camping. It recognized though the problem:

Many of these issues are the result of legislative policy decisions. The arguments of many amici curie regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g. teenagers, families with children, and the mentally ill should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.[38]

A different problem is that communities sometimes address their homeless problems by attempting to ban providing food to them, presumably to starve the homeless out of the community. For example, Philadelphia enacted an ordinance in 2012 that forbad serving food outdoors to homeless. A federal judge enjoined it on August 9, 2012.[39]

The Fort Lauderdale Food Not Bombs (FLFNB) has weekly events in which they share vegetarian and vegan food for free with passersby, including homeless, in Stranahan Park. The 'feast' involves the host entertaining and the guests interacting. Fort Lauderdale enacted an ordinance in 2014 restricting such activities. The organization conveys a message of diverting military funding to food. Its set up includes a banner “Food Not Bombs.” The 11th Circuit in 2018 held the ordinance violated the First Amendment Freedom of Speech and Expression rights of FLFNB.

An outbreak of hepatitis A among the homeless of the San Diego area a few years ago resulted in the city of El Cajon banning the feeding of the homeless. 12 people were arrested in January 2018 on misdemeanor charges of feeding the homeless. They had offered apples and bags of chips in El Cajon Park. Neighboring San Diego focused on sanitation and vaccination.[40]

The New Transportation: One Way Bus Tickets

Several communities are trying to export their homeless by buying then one-way bus tickets presumably to families and friends elsewhere that can take care of them. Portland, for example, has sent homeless to Las Vegas, Phoenix, and Seattle, which hardly needs more homeless.[41]

Shelters and Lots

Shelters are a proven means of providing both short term and long term homeless housing, as long as sanitation, sustenance, showers, health services, and security are provided while drugs are excluded. Los Angeles unfortunately focused the HHH funds on permanent structures rather than shelters.

Shelters can be temporary or permanent; they can include tents and prefab trailers. Existing buildings, such as abandoned warehouse, commercial and industrial buildings can be converted to shelters rather than designing gold plated shelters designed from scratch. Shelters do not solve all problems. Addiction remains an issue. Many homeless, especially with addiction problems want the freedom to live outside rather than in supervised drug free shelters. Their preference is to shoot up at their convenience in their tents or even openly on the street.

Moving the homeless into shelters is only part of the solution. Thousands of homeless may be moved off the street, satisfying the public's concerns over their physical presence, squalor, sanitation and health risks, but it does not necessarily address the drug and alcohol addiction problems.

A different approach can be taken to the problem of street parking vehicles. A city such as Los Angeles has ample facilities with open space as well as vacant lots. The key is providing sanitary facilities on these locations.

V
CONCLUSION

Compassion and justice are a challenge with the explosion of the homeless population. The public's patience is exhausted in the West Coast cities that have lost control of the homeless problem. Compassion has left the scene while the booming economy has left the homeless behind.

Much of the increasingly large public expenditures have become expensive band-aids rather than addressing the causes or sheltering the homeless. Los Angeles shows out us that money alone does not solve the homeless problem. LA has used bonds, grants, and taxes to fund its growing homeless problem. The billions spent so far tells us a solution is not in sight. They fail to address the causes.

The problem is clear once we look at the statistics for sheltered versus
unsheltered homeless populations. The West Coast cities have done an abominable job providing shelters for the exploding homeless populations. They failed to react and respond by leaving the homeless in place, an expanding place. Shelters will not solve the causes of homelessness, but they will greatly reduce the homeless health, safety, squalor, and aesthetics problems.

Public attitudes are shifting from compassion to doing something by peaceful self-help if necessary. The spreading squalor stench, and pestilence is changing the balance. Denver voters in May 2019 rejected 83%-17% “The Right to Survive Initiative 300,” which would have allowed the homeless to camp on in public outdoor places. Politicians are beginning to take notice of the growing public outrage.

The cities and states need to reassess their approaches to the homeless problem. Let us start with the premise that the homeless problem is much more than a housing problem. It is a broad societal problem that needs an holistic approach, encompassing addiction, counseling, housing, law enforcement, medical needs, monitoring, sanitation, treatment.

Judge Carter forced Orange County and its cities to find alternative shelter if they wish to remove the homeless from public spaces. It is a good start by addressing the immediate problem, but it does not address the root causes of the growing homeless population.

[1] New York City actually has a larger homeless population than any of the West Coast cities, where the numbers are greatest in Seattle, Portland, San Francisco, and Los Angeles.
[3] Also international, even excluding the plight of the refugees, but this essay is only dealing with the homeless in the United States.
[4] A January 2019 survey found over 8,011 homeless in San Francisco, an increase of roughly 500 in two years from 7,539 in 2017. Santa Clara County was up 31% to 9,706 and Alameda County 43% to 8,022.
[5] A survey of Orange County, California found nearly 6,860 homeless in January 2019. 2899 were in shelters and 3,961 lacked shelters.
[7] The city of Los Angeles is both the largest city in the United States, and also part of the larger Los Angeles County. San Diego is also both a city and county.
[8] Often called a Paddy Wagon
[10] LA’s Skid Row has grown to 50 blocks.
[12] A fear is that the homeless digging into the levees may fatally weaken them, Emily Dooley, Homeless Digging into Levees Put California’s Capital at Risk, Bloomberg

[14] Approved by the voters on November 6, 2014.
[16] In general, see Alan During, Bring Back Flophouses, Rooming Houses, and Microapartments: Dumb urban policies wiped out the best kinds of housing for the poor, young, and single. But they’re finally making a comeback in smart cities, excepted from Alan Durning, Unlocking Home: Three Keys in Affordable Communities
[20] https://www.apnews.com/ cc40bc8c476ef469ebdc2228772176b03
[22] Ron Galperin, LA Controller, Strategy on the Street: Improving Los Angeles Homeless Service Authority’s Outreach Program
[23] Id. at 1.
[24] Id.
[25] Id. at 3.
[26] Id. at 7.
[27] Id.
[28] Id. at 33. An overlap may exist between the two categories.
[29] Id. at 9.
[31] 693 F. 3d 1022 (9th Cir. 2012).
[32] See also Lehr v. City of Sacramento, 624 F. Supp. 2d
1218 (E.D. Cal. 2009).


[34] Manning v. Caldwell, 930 F. 3d 264 (4th Cir. 2018). The criminalization of the possession of alcohol did not violate the 8th Amendment because it punished the act of possessing alcohol rather than the status of being an alcoholic.


[37] 892 P.2d 1145 (Ca. 1995). This statement is effective as of September 29, 2019.

[38] Id. at 1157, n. 12.


[42] One San Francisco block has placed large boulders on the sidewalk to prevent homeless from camping on the street. A block in Los Angeles has moved large, potted trees on the sidewalk for the same purpose.

[43] https://denver.cbslocal.com/2019/05/07/initiative-300-rejected-denver-urban-camping-ban-election-homeless/

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*Professor of Law, Dale E. Fowler School of Law, Chapman University
On November 16, 2018, the Diversity and Social Justice Forum hosted its 4th Annual Symposium entitled, "Inequality Rising: A Decade After the Housing Crisis."

After a particularly momentous year as it pertains to homelessness and housing issues in Orange County we thought it was important to take a step back and look at the progress that was made, the lessons that were learned, and the work still to come. To this end, we invited a variety of individuals involved in this work, including attorneys, academics, directors of non-profit organizations, experts, artists, and activists.

The housing crisis is a complex issue, more complex than could be addressed in a single day. There is much to understand about economic inequality, racial bias, and gender discrimination as it relates to the housing crisis. The housing crisis is merely a symptom of the same societal issues that we are very familiar with, but those social issues are so large, so entrenched in our culture, economy and politics, that any effort we undertake to bring attention to them is akin to passing a flashlight over a large and fractured system.

Despite this limited scope and the immensity of the issues that were discussed, our panelists were hopeful and united in the belief that the housing crisis is solvable. Economic anxiety in young people, local politics, recidivism, and social alienation all have tangible solutions backed by evidence and social sciences. Through their work and conversations with us, our panelists conveyed that individual ideas can manifest into powerful social change.

We hope to impart this crucial message, that matters of social justice and humanitarian rights are not too big for an individual to confront. We hope to transcend familiar barriers in order to begin the necessary work for the betterment of Orange County, and perhaps become a model for other counties experiencing similar issues.

Dominique Boubion
Co-Chair of the Diversity & Social Justice Forum
September, 2019
Hosted by Professor Wendy Seiden, Co-Director of the Bette and Wylie Aitken Family Protection Clinic, this panel welcomed Eve Garrow, Brooke Wietzman, and David Gillanders to the stage. After introductions, Brooke opened with a description of her early career with the Elder Law and Disability Rights Center ("ELDR Center") and using that as a platform to work with the underserved in Orange County. She used her experience to visit with those experiencing homelessness and talking with them to assess their needs. To this day her clients are primarily older women and working poor and almost all have unmet health needs. When the opportunity arose for her to passionately advocate in the courtroom on behalf of her clients, she was already working closely and among the homeless population of Orange County. Through her work she made sure that the legal decisions were being made with an eye towards justice, but then followed through in order to ensure enforcement.

Eve Garrow spoke next about our historical position in a New Gilded Age where income inequality and stark poverty are higher than they have been since before the Great Depression. She spoke mainly about the political response to the lawsuit. She stressed that we must hold our elected officials responsible for their stochastic rhetoric. She spoke about how oppression of a group is often accompanied by an attempt to frame the effects of that oppression as a result of inherent characteristics of that group – and how that is being used to portray the oppressed homeless as criminal and dangerous elements that need to be "dealt with." Eve concluded with a portrayal of a movement where legal advocacy is used in conjunction with a national social movement, a movement that changes hearts and minds and redistributes resources away from the already wealthy to those who need it most – perhaps by providing housing to those who need it.

David Gillanders spoke about his work providing direct services to folks on the streets to get them into shelters and ultimately help them find and keep permanent housing. He praised the lawsuit against the county since it puts pressure on politicians in the community to act to solve and prevent homelessness. The response by politicians and the new avenues to house people shows how the courtroom and the streets need to be connected in strategy, because the effects can be amplified if activists and lawyers are working together. By providing true homes to people, they stop being homeless, they have incentives to get treatment, find jobs, and take care of their kids. David ended with an exploration of how a hurt or injustice to a community member is a hurt and injustice to the community as well.
et me just start by saying what a
tremendous honor it is to be here.
This is such an incredible lineup of
experts and heroes on these
panels, and I’m also just so in awe
of the student leaders in the Diversity and
Social Justice Forum, Amir and Dominique, and the team, for organizing
this really impressive event and for tackling
this really crucial issue. Round of applause
for their leadership. Thank you to Dean
Parlow for the very kind introduction.

As Dean Parlow mentioned, I am a staff
attorney at Public Counsel. We are a public
interest law firm working primarily in LA
County. Most of my work at Public Counsel focuses on affordable housing
policy and homelessness policy. I also serve
on the Los Angeles County Regional
Planning Commission where we tackle
homeless and housing issues in LA County,
so I’m very excited to be here. I loved this
morning’s panel and I’m very excited to keep learning from this afternoon’s
dialogue.

Right now, I am actually not going to
talk about housing policy – at least not
directly. I was invited to talk about my
work in the LA Street Vendor Campaign
and our work to end the criminalization of
low-income entrepreneurs and to improve
economic opportunities for sidewalk
vendors. Instead of just telling the story of
this campaign I’d like to present it as a case
study in the movement lawyering model. I
think this has important considerations in
adjusting our housing crisis.

I was a bit worried that talking about
street vending might seem a little out of
place but the panel this morning touched
on these issues perfectly, and I’m excited to
expand on this idea of a legal strategies
connected to social movements. I’m excited
to talk about the campaign through
movement lawyering lens here at this
symposium because I was in law school not
that long ago. I know how important spaces
and convening like this can be to think
about and to look at alternative models of
lawyering and advocacy and community
partnerships that you might not see in the
"day-to-day" law school curriculum.

The organizers of the symposium have
really brilliantly organized our panels today
to show different types of legal arenas: The
Courtroom, The Community, and The
Code. My goal here is to add a dimension
to that: to situate these different legal arenas
as different legal strategies within an overall
approach to lawyering that is grounded in
community leadership and grassroots
organizing.
"Movement lawyering is 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."

Scott Cummings
Movement Lawyering, Univ. of Illinois Law Review 1645 (2017)

WHAT IS MOVEMENT LAWYERING?

THE FOUR ELEMENTS

So, what do I mean by movement lawyering? There’s a wealth of legal scholarship on community lawyering, [also referred to as] movement lawyering or law and organizing. As result, there are many different definitions and perspectives. I want to highlight one that that I think will be helpful for our conversation today. This is from Scott Cummings at UCLA:

“Movement lawyering is the mobilization of law through deliberately planned and interconnected advocacy strategies inside and outside of formal lawmaking spaces by lawyers who are accountable to politically marginalized constituencies to build power in those constituencies to produce and sustain democratic social change goals that they define.”

These are the four elements of a lawyer’s role that I want to pull out to reflect on the lawyer’s role in the street vending campaign. We see (1) accountability to community organizing and leadership: an approach that has those that are most affected, and the organizers working with them, as the central leaders and decision makers. And those folks pursuing (2) enduring social change systemic reform: pursuing social change in policy through structural and systemic change, as well as broader cultural attitudes, as we were talking about this morning. To get there, we can deploy (3) multidimensional strategies, where the law is a resource, both in the court and outside of the court. And yet, the law is just one of many tools that are available to pursue this movement. All of this is (4) rooted in movement building. Inherent to this is the idea that social movements are not lawyer-centric. The objectives transcend the legal centered orientation in pursuit of the bigger picture goal of returning power to community and changing the bigger structural issues of inequality that we see.

I want to use these elements to reframe the story of the movement, in Los Angeles and eventually statewide, to decriminalize and to legalize street vending. I want to tell the story through the eyes of a lawyer and, as you’ll see, not to glamorize the role of a lawyer, but, rather, to help us think about and reflect on a particular approach, and to learning the lessons that it might offer us, especially as we continue navigating the housing crisis that we are all grappling with.


CASE STUDY

MOVEMENT LAWYERING TO LEGALIZE AND DECRIMINALIZE STREET VENDING

WHO ARE THE SIDEWALK VENDORS?

Who are sidewalk vendors? What do I mean when I talk about sidewalk vendors? In LA County its estimated that there are 50,000 people who work as sidewalk vendors. We aren’t talking about food truck vendors or luncheons; we are talking about the smaller scale operations, the folks that are selling food and goods on the sidewalk, or from their person in parks.

This is an informal economy, so we don’t have a good census. While we don’t have great data on the demographics, what we know from working with the community, and anecdotally, is that a majority of vendors are women, often single heads of household. Many vendors are recent immigrants. For the most part vending is not a lucrative activity. Vendors are subsistence earners: they’re working to survive in extreme poverty through basic commerce in their communities.

Why People are Engaged in Sidewalk Vending

Why do people turn to sidewalk vending? For many, it is an economic necessity. It is a way to make a living after being excluded from the formal economy. It is a way to augment low wages, or the wage theft that occurs in our economy. And, it also provides for flexibility, right? It allows folks to balance work with other needs, such as childcare and support for elderly family members.

It is also entrepreneurship. It’s a way to start a business. Certainly not all, but many of the vendors that we work with dream of turning their food cart into a truck, and turning their truck into a brick and mortar business one day. Sidewalk vending offers that point of entry – that first scale at which they can build a business and pursue the American dream of entrepreneurship and building out economic mobility.

The Impact on the Local Economy

In addition to all of these benefits to the individual, it is also an important part of the local economy. As we’ve learned, vendors buy local. They purchase supplies from local shops and help sustain other local small businesses in their neighborhoods and communities. In many cases, they circulate capital in neighborhoods that are ignored by mainstream capital investment, banks, and other lending institutions. A lot of the time vendors are providing culturally significant food and merchandise that is not available in traditional retail.

One of the things that we’ve learned over the years working with vendors, in Los Angeles, in particular, is that often sidewalk vendors who sell fruit and vegetables may be the only source of healthy food retail. In food desert communities that don’t have access to full-service grocery stores or other opportunities for healthy food, the fruit and vegetable vendors provide a crucial community service by making these goods available.

In addition to all of this, the economic multipliers of the vending economy are really significant. There was 2015 study that showed that vendors contribute hundreds of millions of dollars in economic output. If this sector was legalized and formalized, it would produce significant contributions to state and local tax revenue.

Despite the Benefits, Sidewalk Vending is Still Criminalized

Yet, despite these benefits, the important reasons that people turn to sidewalk vending, the contribution to our communities, sidewalk vending is
routinely criminalized throughout the state. In many jurisdictions like Los Angeles there is a total prohibition of sidewalk vending. It is just absolutely, categorically not allowed throughout the city. In other jurisdictions, there might be a program that licenses sidewalk vending, but the restrictions are so heavy and onerous that no one can actually come into the system, or only a few vendors in the entire city are able to come in.

These entrepreneurs face a Catch 22: vending without a permit is considered a crime and is often prosecuted as a misdemeanor or an infraction and, thus, face criminal charges. Yet, there is no opportunity to actually get a permit to vend. As a result, they are trapped in this cycle.

**The Long Term Impacts of Criminalizing Street Vending**

The impacts of this criminalization are severe and have devastating consequences. Vendors routinely face arrest. There’s the potential for jail time just as a result of selling fruits and vegetables on the sidewalk. The fines that vendors face can be enormous and if they are unable to pay, the fines can snowball into further criminal justice debt, and further criminal charges, and even more serious criminal charges.

Vendors often report property confiscation as part of the interaction with law enforcement. We heard a lot this morning about practices involved in taking people’s belongings. It is something vendors face as well. We often hear stories about folks who are cited, and in their interaction with law enforcement, not only are they getting a citation and a fine, but they have to watch their equipment being destroyed or taken away without information about how to retrieve it. That equipment is a street vendor’s livelihood. It is how they make their living. It has an enormous impact on folks who are doing this work just to try to survive.

These consequences are especially severe for immigrant populations. Criminal prosecution can jeopardize eligibility for immigration and citizenship programs. There is a new executive order from the current administration in which some immigrant vendors are at even greater risk for deportation as a result of a vending citation. Unfortunately, this is not just a hypothetical risk or a hypothetical threat. It is something we have seen across the state.

There was one recent high-profile story of a woman in San Bernardino County, a mother six, who was arrested and detained by I.C.E. After she was released, she spent over six months in a detention facility completely separated from all of her children. She continues to face a deportation proceeding all simply as a result of selling corn on the sidewalk in her neighborhood.

**THE BEGINNING OF THE LOS ANGELES STREET VENDOR CAMPAIGN**

It’s from these injustices, that we considered to be deep injustices, that the LA Street Vendor Campaign was created. LA Street Vendor Campaign is a coalition of community based organizations and vendor leaders who are working to advance opportunities and to protect vendor rights. First and foremost, this is a vendor lead movement comprised of community organizers that bring vendors together to mobilize around this issue. The community-based organizations plug in to support that vendor lead movement.

In many ways, the campaign was formed to change the harmful criminalization policies that we were seeing in Los Angeles. From the beginning, the approach to this has been just as important as the policy outcomes. The work is rooted in pursuing policy change but in a way that builds leadership and organizing capacity in the communities that are most affected. In developing strategy, we took our lead from the experts in what it means to be a vendor: those who are most impacted by these policies.
A CITYWIDE PROBLEM CALLS FOR A CITYWIDE SOLUTION.

As the movement has grown it has expanded to be much more than just about changing policy. We create programs that provide technical assistance, education to vendors, support to obtain business licenses to formalize their business structure, and capacity building. We create grant and micro-lending programs to help reduce cost barriers to entry. We also provide direct legal services and legal support to individual vendors who are facing the impacts of this criminalization.

Lawyer’s Role in the Campaign

So, what is the lawyer’s role in all of this? We can look at the way that lawyers have engaged in this campaign by returning to the four elements of movement lawyering.

We see accountability to vendor leaders, first and foremost, in a campaign to change both local vending policy. There are also broader systems of oppression and injustice, which we approached through multidimensional strategies that are both legal and non-legal, all within the context of building an enduring movement. I will talk about each of these aspects a bit more, but I want to talk about the history of the campaign over the last several years through each of these elements, to shine a light on a particular approach to lawyering in this type of setting.

MOVEMENT LAWYERING

ELEMENT ONE

ACCOUNTABILITY TO COMMUNITY ORGANIZING AND LEADERSHIP

The genesis of the campaign occurred when a few vendors in the Boyle Heights neighborhood of Los Angeles approached the local community based organization, the East LA Community Corporation, or ELACC. The vendors went to ELACC for help after they were criminalized and displaced from where they were working, from where they were vending.

Organizers at ELACC quickly got to work: did some research, engaged with others, and quickly identified the city ordinance that was in place. This city policy was enacted decades earlier and created this complete and total prohibition on sidewalk vending across the city. It also criminalized and imposed criminal penalties on anyone who was working as a vendor in violation of that code section.

In response, initially, there were thoughts, such as: Okay, maybe let’s try to solve this problem – we have these vendors from the neighborhood – maybe we can think about creating a farmers market. Or, something in the neighborhood that would allow vendors to continue doing their work in a slightly different setting that wasn’t illegal under the eyes of the city. In doing outreach and learning about these systems, ELACC quickly realized that was not the right approach: this was a citywide problem. Folks were experiencing this criminalization and these injustices in neighborhoods across the city. A citywide problem calls for a citywide solution.

Gaining Momentum

ELACC quickly pivoted their thinking to: how do we address this issue; how do we change this policy that’s resulting in criminalization in low income communities and communities of color across the city. They began coordinating with other organizations in the city that were also looking at this issue. For example, LA Food Policy Council was thinking about how to help and support street food vending through their work in food justice in Los Angeles.

Another organization, Leadership for Urban Renewal Network (LEARN), was doing a lot of really exciting and innovative thinking about expanding access to capital in low income communities. In creating new lending programs, they had identified
street vendors as being the type of entrepreneur that could really benefit from these types of services. These groups got together to come up with a strategy to support the vendors through their efforts to change policy. Eventually my organization, Public Counsel, was brought in to help think about what policy and legal tools were needed to help support.

**MOVEMENT LAWYERING ELEMENT TWO**

**ENDURING SOCIAL CHANGE AND SYSTEMIC REFORM**

With these groups coming together and starting to organize outside of Boyle Heights, and across the city, we were able to build a little momentum. Through organizing, we created some pressure that resulted in two city council members introducing a motion that asked the city to start thinking about reporting back on maybe the possibility of eventually legalizing street vending— and if all of that sounds sort of vague and noncommittal, it’s because it is.

The way that legislation happens in Los Angeles is like this: You start with a motion. Then, city departments report back with ideas. Eventually the council committees hear these “report backs” and, think: Okay, well, maybe there’s a policy here. Maybe we’ll ask the attorney to draft something. Then, if you have the political will of a majority of the council, maybe it gets adopted as an ordinance.

This is the process, the way that policy change gets started. So, when that motion was introduced in 2013, it was a pivotal and important moment for the campaign. It really started the legislative process, started this policy advocacy phase of the campaign. At that moment the campaign, the coalition, was faced with a choice: we could let the process play out and hope that at the end of that there would be an ordinance that was inclusive and reflects the needs of the vendors.

Through organizing, we created some pressure that resulted in two city council members introducing a motion that asked the city to start thinking about reporting back on maybe the possibility of eventually legalizing street vending— and if all of that sounds sort of vague and noncommittal, it’s because it is.

I think we can recognize the fact that the Los Angeles city council members, their staff members and city officials, they aren’t vendors. They don’t know what it means to be a vendor, and what it means to work in this informal economy.

**Who Are the Experts?**

There was a recognition that the experts on this issue, on what will work and what won’t work, are the vendors themselves. Because street vending has been relegated to the informal economy for so long, these are the folks that have had to create their own system to make this economy work. The vendors are the real experts in what a vending policy can look like and should look like.

The choice was sort of a no-brainer. Instead of just letting the process play out and hoping for a good outcome, we decided to be proactive and actually think about what it would take to create our own policy and have an affirmative campaign, to come up with a vendor lead policy process. This was a space where the attorneys were able to plug-in in a really meaningful way.

This was a process that was a lot of fun, but also very long and very iterative.
**PARTICIPATORY POLICY MAKING**

**STEP ONE**

Organize Town Halls

The first step that we took was to organize a series of town hall meetings across the city. Recognizing that vending was happening across LA, we organized town hall meetings in different neighborhoods, I think five or six of them. We would invite vendors, stakeholders, small businesses, advocates, and community members to come in and have a conversation about vending in their neighborhood. What does it look like? What are the challenges? What are the issues that we face? How do we navigate these challenges? What might a policy look like — one that balances the needs of low income entrepreneurs with safety and accessibility?

We did a lot of listening and a lot of note-taking at those town halls. After each of those town halls were over, somebody came over to my office with a stack of notes this tall from all of those meetings. From there, we got to work in terms of trying to distill those notes into something that would sort of approximate a policy outline.

**STEP TWO**

Establish a Policy Outline

The first iteration of this outline was just pulling themes and issues that we saw in different neighborhoods, from these different working groups by bringing them together. We were trying to create something to give some rough structure to these ideas and to these notes in order to identify where there was alignment, where there were questions to be answered, and where there were disagreements.

The first version of that document had many more questions than answers, but it was the first attempt to try to distill these ideas into a cohesive package that folks could respond to.

**STEP THREE**

Back into the Field

From there, we went right back out. Because we work with incredible organizers, the town halls themselves were not isolated individual incidents or events. They morphed into neighborhood-based working groups. As a result, folks there we’re invited to come back and to take leadership to hold periodic convenings and meetings to talk about issues that vendors are facing in their neighborhoods.

We were able to go back to each of those working groups and present the outline that we had put together in response to the initial town halls. The objective was to find out: what’s here that we did get right, and what did we get wrong, what’s missing? Where is there disagreement? How do we resolve that?

At this point it was mostly listening, but we also paired this with some legal education and some community education. It became clear that the vendor leadership wanted to pursue policy change. We provided education on what that looks like in the city of LA. What is the process for enacting a new policy? Who are the decision makers? What are the public hearing requirements and how can we think about using those requirements to our advantage and leverage those points of intervention to move the policy forward? And, what legal constraints might exist?

I said before that the vendors are the experts on what works and what doesn’t, but as we moved toward a potential city policy, there were issues of preemption to deal with.

We know our federal programs, like the Americans with Disabilities Act, are going to dictate certain requirements about space on the sidewalk. We know that there are state laws about food safety that are going to impact the process for food vendors to get permitted through the county health department. We educated vendors about those constraints so that we could conversations about policy ideas that fit within the contours of the law.

**STEP FOUR**

Input From Scholars and Experts

We did another round of input and feedback, then we took that feedback and made further refinement to this policy outline. We got it into better shape, where it started to look a little more like something that you might think a policy platform would look like. From there we were at a place where we could start going out to allies and other experts. We had academics and policy experts in the coalition who would weigh in from a policy standpoint. We also went outside of the coalition to get advice and input on how to craft this into a responsive and meaningful policy.

**STEP FIVE**

Finalize the Document

From there, we went back to the vendor groups to do more "ground truthing," to make sure that everything we incorporated from that outside feedback made sense and didn’t conflict with priorities and principles. We had conversations about how to build that out and get it to a place where it would look like a city policy. Eventually, through this iterative process we got to a document that really reflected a policy outline and a policy platform.

I’m happy to go into a lot of detail with anybody who is interested in what that says but for now I’ll just highlight the big takeaway. The policy platform it came in three main pillars.
THE THREE PILLARS OF SB 946

I

The first pillar is a recommendation for a policy that affects decriminalization—ending criminal penalties for sidewalk vending for low income entrepreneurs. In its place, there is enforcement. If there are rules that need to be enforced and in compliance that can happen through an administrative setting.

Every jurisdiction has an administrative program to impose fines for minor violations of the code that don’t rise to the level of a criminal penalty, such as an infraction or a misdemeanor. First and foremost, we were pushing for decriminalization as a way to try and protect vulnerable workers and immigrant communities, given the shifting dynamics locally and federally.

II

The second pillar is really saying: that’s great, moving forward vendors should not be criminalized people that are trying to provide for their family and working and building a business should not be subject to these criminal penalties—but what about everyone who has endured the impact of this injustice over the many years? So, we also pushed for a retroactive relief provision.

The idea was to provide an opportunity to create mechanisms for vendors to get prior citations and convictions, including pending convictions, dismissed in order to free them from the burdens of criminal records as a result of vending.

III

The third pillar, and the majority of the policy, was about the inclusive permitting system. This was to making sure that vending was allowed across the city instead of confined to small districts, like we had seen in other cities, and in other approaches that don’t work. The permitting system broadens the opportunity and economic inclusion and creates an inclusive process so that vendors can get a permit without having to pay enormous fees, or provide unnecessary identification provisions. It also sets the regulations about where vending would be allowed. We were striking the pragmatic balance between having an inclusive program where folks are able to work and respond to the market while also allowing accessibility under their police power for the protection of health, safety and welfare.

It became this really tangible thing that we could use for advocacy. This is a document that vendors could hold in their hand, carry, and produce in meetings with the mayor’s office, in meetings with city council offices, and at public hearings.

STEP SIX
Finalize the Document

Once we had this vendor-driven, vendor-approved, vendor-affirmed policy platform, it came back to the lawyer to translate it, to turn that platform into the sort of technocratic legal language that you would see in a city ordinance. We went to work shifting it into policy or ordinance language and eventually produced a model ordinance, with findings and everything. It was the ordinance to legalize, decriminalize and regulate vending in Los Angeles.

STEP SEVEN
Take it to City Council

I would love to tell you that we then handed it to the city attorney and they said This is great! We adopted it! But that did not happen, at all. But we knew that, right?

We knew that we were not city council, and the vendors don’t have legislative authority. But it was an important process to develop leadership in the movement, to develop expertise, to demonstrate expertise.

It became this really tangible thing that we could use for advocacy. This is a document that vendors could hold in their hand, carry, and produce in meetings with the mayor’s office, in meetings with city council offices, and at public hearings. This was a vendor driven policy made by the experts, by those who are most impacted by how this policy would look.
DIRECT ADVOCACY

HOW A LAWYER CAN HELP

After the participatory policy making, the next phase of the campaign was the phase of direct advocacy.

We had countless meetings with elected officials. At these meetings, vendors were always in the room leading the conversation and shaping the narrative with their lived experiences. As attorneys, we helped the vendors develop talking points and develop a message strategy that was rooted in the policy platform which they lead and put together.

Public Hearings

We also held over a dozen public hearings on this issue. The campaign organized to pack the hall of each of these hearings to leverage the hearing as a platform to share their stories and to elevate their experiences. Here, the attorneys support by working on talking points for public comment, explaining the process, interpreting the council action. We supported vendors in sharing their story and their advocacy points with the broader city council and the public.

Comment Letters

The attorneys of the campaign also took the lead in drafting really detailed comment letters. Every time the city produced a report back or folks who were opposed to vending would put something out, we were able to respond with a detailed letter. It included a targeted legal analysis as to why it was a good idea for the city to legalize and decriminalize street vending with detailed, nuanced policy recommendations. Each of those points were rooted in that vendor driven policy platform that we cultivated.

Activism

Advocacy obviously extends outside the walls of city hall. The campaign organized mass mobilization strategies, collective action, civil disobedience, and other strategies to draw attention to this policy debate. Here, lawyers can have supporting roles in monitoring protests, coordinating with legal observers, and providing talking points.

Shift the Public Narrative

While there was a lot of intensive work on policy analysis and advocacy, another thing that we were very intentional about was trying to avoid having tunnel vision on policy change. Because it is also about these cultural shifts and it’s about changing the public narrative in a really sustainable way so that eventually any policy victories can be made sustainable and can be built on.

Our targets are not just the council members, or the assembly members. We are also working on editorial boards and media work. We searched for other opportunities to help elevate the vendors’ voices in order to change the broader perceptions about what it is to do this work, what low wage work looks like, and the dignity of work in our economy and in our communities.

Find the Intersections

As it was touched on in the panel this morning, a big part of this is acknowledging and exploring the intersections with other movements. We can’t really talk about ending criminalization of vendors and advancing economic inclusion without also talking about broader immigrant rights efforts and issues of labor exploitation, gentrification, criminalization of poverty, criminalization of homelessness, or the food justice movement, just to name a few. The campaign is intentional about acting in solidarity with these efforts and movements.

We used any platform we are able to in order to cultivate around the issue of sidewalk vending, acknowledging these intersections, and to advance careful coordination and strategies, and to talk about the bigger structural issues and underlying factors.

MOVEMENT LAWYERING ELEMENT THREE

MULTIDIMENSIONAL STRATEGIES

Now that we’ve looked at how the lawyers are plugging in to support this vendor lead movement for social change and for systemic policy reform, I will return to the four elements of movement lawyering. I will discuss the specific tools and tactics that lawyers are able to deploy.

We see a number of coordinated legal tactics that are deployed simultaneously. The point I want to make here is that there was not a singular legal strategy, but there were multiple strategies happening together and in coordination.

Transactional Legal Services

I have talked a bit about the systemic policy reform and what the
legal strategies were around systemic policy reform, but there is also transactional capacity building. How do we leverage transactional legal services? How can we bring corporate law to bear on helping individual vendors build their capacity as small businesses? For this, we look at things like incorporation, help with issues of liability insurance – things that vendors, as entrepreneurs and as businesses, want to confront.

By providing transactional legal support, we were helping to build out that coalition governance as well, right? Since this is a broad based coalition with vendor leaders multiple organizations with a lot of strategy conversations. Bringing a transactional legal lens in order to help the coalition come up with governance documents, as well as decision making procedures so that those decisions can be made in a clear and predictable way. This was done to advance the coalition and the campaign movement.

**Direct Representation**

We rely heavily on legal clinics that the National Lawyers Guild puts together, and law school clinics, to help provide direct representation to vendors who have been given citations and who need help from an attorney in court to navigate the criminal justice system. And to help with that ticket defense at the same time, because we can’t just ignore that the criminalization continues while we are moving toward this policy agenda.

There is affirmative litigation as well. Public Counsel was not involved in this case but we have allies and partners who brought a case against the city challenging practices around confiscation of personal property in a particular neighborhood.

The point that I want to try and drive home is that we’re trying to deploy all of these different legal strategies but these aren’t happening in isolation from each other. These are very closely coordinated. For example, through the direct representation clinics, we learn about widespread practices that could be challenged through affirmative litigation which then informs the policy strategy.

The policy change can only really be considered a win if vendors have the capacity to enter the system and the resources that they need to be successful in this new legalization framework.

**CONSIDER THE SCALE OF INTERVENTION**

In addition to coordinating multiple different legal strategies, the legal dimension here is to consider the scales of legal intervention. We think about applying and doing legal work at the individual scale: working with individual vendors to build their capacity as business owners and to navigate the legal system, then thinking about policy change.

Much of our policy change has been at the city of Los Angeles level, so we were looking at interventions at the local scale. But, there was always this recognition that the impacts and the forces that create the challenges that we see at the individual and local level, transcend those scales.
POISED FOR SUCCESS AT
THE STATE LEVEL

Earlier this year we had a very exciting and important opportunity to scale our legal work up to the state level through Senate Bill 946. As the movement was building and gaining momentum in Los Angeles, we started to get calls from vendors and advocates from other jurisdictions who would tell us about their experiences and the challenges they were facing in other cities.

It was obvious that these challenges are not unique to Los Angeles. We were seeing them play out in different communities across the state. Folks were reaching out to ask how they can build a campaign in their city. At the same time, we were starting to feel and experience challenges relating to political will at the local level.

Over the years, we had moved the policy conversation but the city council had not been ready to get it over the finish line. They were dragging their feet in terms of finalizing the policy that would legalize street vending. While this was happening, Senator Lara, our state senator reached out and told us that he was interested in offering a bill that would support sidewalk vendors across California.

While he was developing his bill, he came down to visit our campaign and to talk to some of the vendor leaders in the campaign and the coalition. We had a really great conversation. Not only were the vendors able to share their stories and their experiences about what it’s like to be a vendor in a city that criminalizes vending, but because of the work that went into developing this policy platform, we were also able to have a really deep and nuanced policy conversation with the senator.

Eventually, Senator Lara introduced SB 946 which, in many ways, scales up much of the LA Street Vendor Campaign platform to state legislation.

About SB 946
SB 946 is a bill that decriminalizes sidewalk vending; eliminates criminal penalties for people working as sidewalk vendors, offers programs for retroactive relief for vendors who have been caught up in the unjust consequences of criminalization and to dismiss citations. It creates standards for local jurisdictions to balance their police power to regulate safety with fair and inclusive programs to welcome low income entrepreneurs into the economy.

Lawyer’s Role at the State Level
Here, the lawyers for the campaign were able to provide a lot of support to vendors advocate at the statewide level. We conducted legal and policy analysis of the bill. We educated vendors about the parameters of the bill, and how it would impact our strategy.

Locally, we helped vendors put talking points together and brainstorm about advocacy strategies. Fifty-plus vendors got on a bus and drove through the night up to Sacramento so that they could testify in front of the Senate. They met with legislators and elected officials to tell their story and talk about the importance of decriminalization and economic opportunity.

SUCCESS REALIZED
I’m very excited to say that this law was approved by the legislature and signed by the governor in September and will go into effect on January 1 of 2019.

It’s important and it’s a big deal. There are tens of thousands of immigrants and low-income workers across the state who now have the ability to pursue their work and pursue building their business without criminalization. Cities now have guidelines that they can use to welcome these entrepreneurs into the formal economy. It is a really exciting development and a direct result of building power locally, then spiraling that up through leadership of the people who are most impacted by the policy.

Just to recap where we are on this journey, back in 2010-2011 vendors identified a problem and began organizing. As a result a coalition formed with community organizers community based organizations and non-profits supporting a vendor lead movement for reform and this movement pursued policy change at the direction of vendor leaders.

The strategies were focused more broadly on things like leadership development and sustainable movement building within this ecosystem of all of the movements for social justice. As we have seen, the many different tactics that were deployed were vendor supported, including coordinated legal tactics and strategic operations at these different legal scales.

But the legal strategies were always just one strategy, or one tool in the toolbox. We did not employ a legal centric approach. We always used legal strategies that augment or are part of a bigger approach that involve organizing strategies, media communication strategies, direct action, and leveraging and layering all these different tools for bigger picture broader social justice movement building.

All of that, I think, has resulted in this current moment, where vending has finally been decriminalized across the state. And, as a result of the new bill that goes into effect on January 1st, 2019, suddenly the city of Los Angeles is moving more quickly, and is set to adopt legalization rules before the end of this year.
**Sustainable Structural Change**

**Movement Lawyering Element Four**

**Rooted in Movement Building**

We are at this place at the end of this timeline where we are finally getting to some of the policy goals that we had envisioned when we started building this coalition, and when vendors started organizing themselves and getting people together so many years ago. But as I mentioned it's about more than just policy change.

From a movement lawyering lens, we see this focus on situating the policy within a broader movement. One way to look at this is to contrast it with how we might traditionally think of a lawyer's approach to an issue like street vending legalization.

I showed this graphic just to illustrate how we are often taught to think about a lawyer's role in legalization to a problem that's conceptualized as a legal problem. We start with a policy, a set of laws that we think are harming or creating harm for a vulnerable population. In our case, it's the criminalization of low-income workers and immigrant entrepreneurs.

If we define that problem as a legal problem, then we look for a legal strategy to change the law. We see, for example, impact litigation or peer policy advocacy as this way to strike down a bad law and hopefully replace it with a different policy or law that would presumably have better results. In this frame we see a central role for the attorney.

There's a legal problem that requires a legal solution which calls for a legal actor. This isn't wrong. I don't want to suggest that this is wrong, but if you look at it in isolation then you have to ask: how is success defined? Is that success scale-able? How sustainable can that success be? And where does this operate in relation to similar processes and intersecting issues?

**The Metrics of Success**

A movement lawyering approach doesn't at all reject the idea of lawyers tackling legal problems with legal tools, it merely folds that work into a much bigger set of considerations and is oriented around a broader set of priorities.

From this movement lawyering lens, when the legal work is oriented around bigger movement building principles, then we see that the policy change is important but it operates within. It intersects with other interconnected purposes and objectives.

Policy change, like legalizing street vending, is situated within connected movements for economic inclusion and social justice. For any change to be enduring, the work must be concerned with movement leadership.

For a lawyer, that means that accountability to leadership, setting the strategies. Seeing the development and growth of that leadership is just as important of an outcome as any policy change. Ultimately, this is all to reshape the bigger asymmetries of power and structural inequalities.

With this orientation the legal tools are focused not just on the narrow legal problem but they are being deployed strategically towards other bigger and multiple connected purposes. There is a policy change component but there is also building capacity and community leadership augmenting non-legal strategies, like direct action, messaging, communication, organizing and supporting that grassroots organizing in a meaningful way.

The metrics for success change. Again, the policy change matters, it is really important, but so does the way that you approach that policy change and the power and the leadership can be created in the community through that particular approach.
GETTING STARTED

I've been talking about all of this through the lens of the street vending campaign.

This broader movement lawyering approach is also directly relevant to housing justice. It is an approach that I think we heard a lot about this morning. Some of the attorneys on our panel this morning are practicing this approach, we are going to hear from other attorneys later this afternoon where this is the orientation and the approach housing justice work.

To close I’d like to raise questions we might consider in thinking about the how the movement lawyering approach might be relevant to housing justice issues.

What legal supports do local front line organizations need in order to build and to sustain their capacity for this work?

What do we see as the systemic causes of housing insecurity and barriers to economic mobility?

How does work as an attorney intersect with those broader systemic causes?

What are the intersections with things like criminalization and labor standards?

How do we build power to engage all of those intersections and bring them out?

Scales of intervention are important in housing and legal work.

Reconsider timelines and metrics of success.

Doug Smith is a Lecturer of Law and co-teaches Community Economic Development Clinic with Professor Scott Cumming at UCLA School of Law. He is currently a Staff Attorney in the Community Development Project at Public Counsel, where he works with community-based organizations, community organizers, and resident leaders in low-income communities across LA County to advance a variety of grassroots movements for social justice and equity. Smith joined Public Counsel in 2013 as an Equal Justice Works Fellow.

In addition to his work as a Staff Attorney, Smith has been appointed to serve as a Commissioner on the Los Angeles County Regional Planning Commission. He has also served as guest lecturer and panelist at a variety of conferences and academic institutions, including UCLA School of Law.

Smith received his B.A. cum laude in Political Science and History from the University of Oregon. He earned his J.D. at UCLA School of Law, and M.A. in Urban and Regional Planning at UCLA School of Public Affairs. While in law school, Smith was the Emil Joseph Stache Scholar, specialized in public interest law and policy, and was a Managing Editor for the Journal of Environmental Law & Policy.

Smith’s publications have appeared in The Los Angeles Times, The San Francisco Chronicle, KCET, and the Journal of Affordable Housing & Community Development, among others.
Hosted by Community Superstar Ricky Reneer, Jr., this panel welcomed Laura Kanter from the LGBT Center of Orange County, Pat Davis and David Duran of National lawyers Guild and Housing is a Human Right, and Ugochi Anaebere-Nicholson from the Public Law Center of Orange County ("PLC"). After brief introductions, Laura Kanter began with a discussion of the housing problems that LGBTQI youth face. She emphasized that transgender women of color still face some of the most intense discrimination. Laura introduced the concepts of micro- and macro-terrorism as it affects the LGBTQI community, including continuing issues of criminalization and stigmatization. As a result of legal and illegal discrimination, abuse at home, lack of family support, and a lack of safety in schools, LGBTQI individuals are pushed to the streets.

Ugochi Anaebere-Nicholson spoke next about the legal strategies that the PLC is using to prevent discrimination and keep people housed. Housing is incredibly insecure for those with criminal records and people of color are illegally steered away from affordable and federally funded housing because of their criminal backgrounds. The PLC has been successful applying a ‘disparate impact’ approach to their lawsuits by showing that housing policies regarding formerly incarcerated people are being selectively applied to people of color. This creates a presumption of discrimination that the housing authorities must overcome in court, or house the petitioner. Ugochi concluded with several case studies from her work with PLC showing how this approach works successfully to ensure housing authorities are fulfilling their obligations to house the vulnerable.

David Duran explored his work in the last several years getting to know the members of homeless communities and providing direct services such as rides and referrals to health centers. He explained the hardships he has seen, especially in his role as a National Lawyers Guild legal observer, watching individuals be arrested or removed from the homes they have created for themselves by agents of the state. David explained the precarious nature, life on the street and the struggles that folks face just to use the bathroom, find food, store their personal belongings, and seek medical care. David concluded with a heart-wrenching story of a phone call he received from a man who was not getting the health care, legal services, shelter, or psychiatric care he needed. The man was found dead in a shelter only a few hours later.

Pat Davis joined David at the podium to share her work with the elderly women she meets on the streets. She explained it as an extension of the feminist work she did in her youth at health clinics and women’s shelters. She explained some volunteers have had working in the legal framework, when so many basic services are still not being met.
Moderated by Jill Replogle, Housing, Health & Economy editor for Southern California Public Radio, this panel invited Professor Kenneth Stahl, Elizabeth Hansburg of People for Housing and Cesar Covarrubias, Executive Director of the Kennedy Commission, to the stage. Professor Stahl opened the discussion with a critical examination of the housing crisis in Southern California through the lenses of land use decisions and developer incentives. He posited that building more housing overall, in all cost brackets, is the way forward to alleviating most of the negative impacts of the housing crisis. There is currently a deficit of 60,000 units that needs to be made up, without even looking at precarious or under-housing. He spoke on behalf of renters and young people who are being kept out of the housing market based on the politics of older, mostly white, homeowners and their political decisions. In order to combat NIMBYISM, Professor Stahl says we need to challenge the incentives that cities, states, and counties are giving to homeowners and wealthy developers and push policies that ensure development to expand the housing stock.

Cesar Covarrubias spoke next about his work with the Kennedy Commission exploring the effect of housing costs on those that are housed, but who are spending 50-60% of their income on housing, effectively forcing them down into poverty. Working families are suffering during this housing crisis, as most of those experiencing homelessness are working and large swaths of the population are overburdened with housing costs. In order to afford a two-bedroom apartment in orange county, a single person, without children, would need to be earning close to $36/hour — a luxury that few in Orange County enjoy. The Kennedy Commission specifically has worked to push legislation at the state and local level to encourage development and more building to ease the burden on working poor. They have also worked with developers to encourage more beneficial ratios of luxury and affordable housing during the building process.

Elizabeth Hansburg, an urban planner by trade, stated that she would echo most of Professor Stahl’s points while expanding the conversation into the values we want to see emboldened by our housing decisions. She discussed the value of housing outside of a market system, and the paradigm shift towards a de-commodification of housing. She boldly presented a vision of housing as infrastructure, as a right to a home presented parallel to rights to education, roads, and sewer systems that are all funded by local government. In a principled system, these values would be expressed in the politic decisions of the voting population, and Elizabeth sees her work as convincing people to vote in line with these values. She then pushed back a little against measures such as housing vouchers as a vehicle for housing justice, as they are woefully inadequate in a housing crisis.
Thank you, Speakers of the 4th Annual Symposium!
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DOMINIQUE BOUBION
Dominique Boubion is a third-year law student at Chapman Dale E. Fowler School of Law. Beginning in her first year of law school, Dominique served as a board member of the Diversity and Social Justice Forum, and helped found the Chapman University Chapter of the National Lawyers Guild. Dominique is an active competing board member of the Alternative Dispute Resolution competition team, and she looks forward to becoming an advocate in the courtroom as a civil rights attorney.

ALEXIS JUGAN
Alexis Jugan is a second-year law student at Chapman Dale E. Fowler School of Law. In her time at Chapman, she has invested herself in several forums that aim to confront gender and racial disparities in the legal community. She believes it is essential to mobilize young people of all cultures and backgrounds to advocate for politically marginalized populations. At school, she serves as Co-Chairperson for the Diversity and Social Justice Forum and as the Secretary for the Black Law Student Association. Alexis looks forward to addressing racial and socioeconomic discrimination in the legal field throughout her career.

AUSTIN JONES
Austin Jones is a second-year law student at Chapman Fowler School of Law. He believes that diversity is essential to the development and shaping of institutions. Austin has a desire to represent historically marginalized people and provide restorative opportunities for those who have been victims and offenders. At school, he serves as the Vice President of Public Interest Law Foundation, Treasurer of the Christian Legal Society, and Treasurer of the Criminal Law Society. Austin looks forward to pursuing a career in criminal law in order to be a voice for those who often go unheard.

CONNOR SMITH
Connor Smith is a third year J.D. candidate at Chapman Fowler School of Law. Connor is interested in nothing short of revolution that will finally allow the workers and the young to seize control of their destiny. During his time at Chapman, he has gained valuable exposure and insight into the inter workings of the State Dependency Court, and the criminal justice system. Connor founded the Chapman University Chapter of the National Lawyers Guild to bring together like-minded individuals to pursue social justice (and convince the revisionists and liberals that revolution is the only option). After graduation, Connor looks forward to fleeing California to the high alpine valleys of Montana.

BRADFORD ODUGUWA
Bradford Oduguwa is a third-year law student at the Dale E. Fowler School of Law. He believes in criminal justice reform from within and has taken steps to be involved in that change. At school, he is constantly working on becoming a better advocate as President of Moot Court and an active member of the Mock Trial Competition Board. As a former Law School Ambassador for the Thurgood Marshall Bar Association, Bradford looks forward to a career partnering with other minority lawyers in Orange County in hopes of building a strong legal community.

DAENARA BURGESS
Daenara Burgess is a second-year law student at Chapman Fowler School of Law. At school, she serves as the Chair of Public Relations of the Diversity and Social Justice Forum and as the Vice-President of the Immigration Law Society. She has a strong passion for public interest law and protecting the rights of historically marginalized groups. Daenara has experience working with domestic violence victims and looks forward to a postgraduate career in immigration law.
CALL FOR PAPERS

The Chapman University Dale E. Fowler School of Law Diversity & Social Justice Forum’s publication is published once a year and is seeking articles for publication that discuss issues of social justice, including any aspect of the underlying legal or humanitarian concerns, legal or policy solutions, or the work of movements organizing to address the problem. We aim to publish practice-oriented articles that discuss barriers to justice and the strategies implemented to overcome those barriers both in the courtroom and in the streets.

The Diversity and Social Justice Forum values the diverse opinions and perspectives that comprise our student body at the Fowler School of Law. As it is our goal to promote a climate of engagement and dialogue with a wide spectrum of views and values, it is our privilege to invite you to submit an essay or legal article that is inspired by your individual interests, experience, and expertise.

The Forum provides content that speaks directly to socially conscious law students and legal practitioners through its scholarly articles and essays with socially relevant themes. To this end, The Forum publishes content that is thought provoking and acts as a useful guide to the legal community. The essays and legal articles may explore alternative lawyering methods, highlight an experience that calls into question current practices, or discuss a perspective held by a minority within a movement, among other topics. To ensure that the Diversity and Social Justice Forum reaches its goal not to confine itself to an echo chamber, we encourage submission from all students of varying points of view.

The invitation to submit scholarly works for consideration will be open to the Chapman family and the legal community at large. The Forum is dedicated to content that inspires and compels social change, and it is an opportunity to showcase the scholarly work of our student body; as such, priority consideration for publication will be given to current students. If you are a member of a student organization that wants their voice to be represented, The Forum would like to welcome you to its pages both virtual and in print.

Volume IV of The Forum will be published in September of 2020, and available for circulation at the Sixth Annual Symposium, in addition to nonprofit organizations, cultural institutions and community-based groups across Los Angeles and Orange County.

The deadline to submit a completed work is May 1, 2020. We will accept submissions on a rolling basis.

Submissions should be no more than 5000 words in length, not including footnotes. Once a submission is selected, our editors will work with the author to prepare the submission for publication. Citations should conform to The Bluebook: A Uniform System of Citation (20th edition, 2015). Authors will retain copyrights after publication.

Please address inquiries and unsolicited submissions to: dsjforum@gmail.com.

Please list “Submission Inquiry for 2020 DSJF Publication” in your subject heading. Articles may be submitted via email to dsjforum@gmail.com.

If you would like more information about the symposium or publication, please visit our website at https://www.chapman.edu/law/publications/diversity-social-justice/index.aspx
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CONTACT

DSJForum@gmail.com

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