THE CRIMINALIZATION OF HOMELESSNESS

Spring 2024

PROFESSOR STEPHEN J. SCHNABLY
http://osaka.law.miami.edu/~schnably/HomelessnessSeminarSyllabus.html
E-mail: *schnably@law.miami.edu*

Office: G472
Tel.: 305-284-4817

READINGS, Parts I, II, III & IV

Part I

Part II

Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996)

II. Chronic Nuisances in Public Spaces

In large cities in the United States, governments own as much as 45% of the developed land area and allocate most of these public lands for use as streets and highways. In a society that not only accepts, but exalts, private property in land, why does one observe so much open-access land? The basic reason is that private firms cannot feasibly collect tolls from entrants who use spaces for no more than a few moments. As a result, market forces alone cannot supply an adequate number of transportation corridors such as streets and sidewalks. Nor can markets readily provide, in downtown areas, squares and parks for pedestrians to use briefly for gathering and relaxation.

Democratic ideals provide another rationale for public spaces. Mass gatherings and mixings occur more frequently where there are numerous sites that all can enter at no charge. To socialize its members, any society, and especially one as diverse as the United States, requires venues where people of all backgrounds can rub elbows. In Carol Rose's memorable phrase, there must be sites for "the comedy of the commons." For a romantic, the ideal is to have some spaces that replicate the Hellenic agora or the Roman forum. A liberal society that aspires to ensure equality of opportunity and universal political participation must presumptively entitle every individual, even the humblest, to enter all transportation corridors and open-access public spaces.

A. The Tragedy of the Agora

A space that all can enter, however, is a space that each is tempted to abuse. Societies therefore impose rules-of-the-road for public spaces. While these rules are increasingly articulated in legal codes, most begin as informal norms of public etiquette.

Rules of proper street behavior are not an impediment to freedom, but a foundation of it. As Chief Justice Hughes put it, the regulation of public spaces "has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." These rules are comparable to the use of Roberts' Rules of Order in a meeting. . . ..

B. The Concept of a Chronic Street Nuisance

What, if anything, should a society do when an individual perpetrates a chronic street nuisance? This category, as I define it, refers to behavior that (1) violates community norms governing proper conduct in a particular public space (2) over a protracted period of time (3) to the minor annoyance of passersby. Protracted, nonaggressive panhandling and bench squatting are paradigm examples.

At first blush, a chronic street nuisance seems too minor a matter to be worth anyone's attention, much less that of municipal authorities. An individual victimized -- even the word seems too strong -- by this sort of behavior experiences only a minor level of vexation, and usually only for an instant. The encounter will generally not elicit comment, much less official complaint, from a pedestrian. By contrast, an arrest for breach of the peace typically involves behavior anomalous enough to provoke a buzz of conversation among those who witnessed it.

Perhaps it is not surprising, then, that the crackdown ordinances of the 1990s generally have targeted, not chronic street nuisances, but single acts of disorderly conduct, such as an aggressive solicitation, the act of lying down on a busy sidewalk, or an instance of overnight sleeping in a park. Indeed, the criminal justice system generally responds to troubling incidents, not to courses

of conduct over time (with some exceptions, such as racketeering). A number of practical reasons explain this pattern. An incident is far more likely to produce a complaining witness who will agitate for prosecution. Evidence is easier to gather when the facts at issue involve behavior within a short time frame. Furthermore, risks of discriminatory enforcement probably are higher when police and prosecutors target chronic offenders.

Because the criminal justice system now focuses primarily on troubling incidents -- on the spikes on the graph of street disorder -- the ambient levels of street disorder are likely higher than optimal. A few street people disproportionately create an ambience of urban disorder …

1. Harms of Chronic Street Misconduct in General

For four interrelated reasons, the harms stemming from a chronic street nuisance, trivial to any one pedestrian at any instant, can mount to severe aggravation. First, because the annoying act occurs in a public place, it may affect hundreds or thousands of people per hour. (Contrary to what some might assert, views of offensive street conduct cannot be avoided simply by turning one's eyes.) Second, as hours blend into days and weeks, the total annoyance accumulates. Third, a prolonged street nuisance may trigger broken-windows syndrome. As time passes, unchecked street misconduct, like unerased graffiti and unremoved litter, signals a lack of social control. This encourages other users of the same space to misbehave, creates a general apprehension in pedestrians, and prompts defensive measures that may aggravate the appearance of disorder. For example, designers of a downtown office building who anticipate bench squatting may place spikes in building ledges. These spikes then serve as architectural embodiments of a social unravelling, accentuating the broken-windows signal. Fourth, some chronic street offenders violate informal time limits. In open-access public spaces suited to rapid turnover, norms require individual users to refrain from long-term stays that prevent others from exercising their identical rights to the same space. These norms support government time limits on the use of public parking spaces and campsites. They also underlie informal cutoff points on the use of, say, a drinking fountain on a hot day, a public telephone booth in a crowded airport, or a playground basketball court. The longer an individual panhandles or bench squats, the more likely pedestrians will sense that he is disrespecting an informal time limit. Even street performers and solicitors for charities, commonly well received when they first arrive at a public space, may eventually wear out their welcomes.

In the case of a mild-mannered panhandler or bench squatter, the graph of damage caused over time may be U-shaped. On first arrival, a new panhandler or bench squatter in a downtown plaza may make the regular users of the space apprehensive. After some time has passed, familiarity may allay these users' worst apprehensions, and the regular users may adapt to some degree to the newcomer's presence. Eventually, however, the marginal damage per period of time may turn upward. Observers may be increasingly annoyed that the street person is not only overusing scarce public space, but apparently has not sought out employment, family assistance, or public aid.

C. A Recommended Doctrinal Definition of a Chronic Street Nuisance

The varied enforcers of street norms, including nonstate entities, can benefit from having a test for identifying chronic street misconduct. Law, particularly the traditional law of public nuisances, suggests some formulations that any of these enforcers could use.

1. A Proposed Prima Facie Case

Public-nuisance law, a stepchild of the far more analyzed private-nuisance law, deals in part with

pervasive harms, usually minor at any instant, that persist for a long duration to the injury of the general public. Unless a member of the public has suffered special injury, a public nuisance typically is remediable solely by public officials, who may seek abatement orders or imposition of (usually minor) criminal penalties. Public-nuisance doctrine properly pays heed to both the value of the annoying activity to its sponsor and the magnitude of the harm to the public.

a. The Proposal

The following test (for lawyers, prima facie case) can serve to identify the gravamen of the offense: A person perpetrates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces. This is a strict-liability test, like that for a public nuisance; there is no required element of negligence or wrongful intent. A strict-liability test is readily administrable, a distinct advantage in light of the many actors who engage in social control of street behavior. The proposed standard is also democratic, because virtually everyone is a street user and helps shape street norms through highly diffuse and pluralistic social processes. That there is little variation in the tastes for street order between, for example, rich and poor, and black and white, should help reassure those worried about possible biases in the approach.

c. Only Acts, Not a Status, Can Create a Nuisance

The proposed legal definition of a chronic street nuisance requires a voluntary course of action such as protracted panhandling or day-after-day bench squatting. Both classical-liberal ideals and the Constitution demand that the law of street nuisances regulate a person's choices, not some unalterable status. In particular, it is impermissible to criminalize either the status of poverty or the status of homelessness (lack of regular access to a permanent dwelling). To take advantage of this legal doctrine, some advocates for street people have striven to characterize municipal crackdown ordinances that purportedly target behavior as actually targeting status.

Many advocates sincerely believe that street people are so constrained by economic and social circumstances that they lack real choices. Most (although not all) social-welfare professionals hold the view that poor people always act under duress; according to this view, society should not "blame" poor people or, under an extreme formulation, ask them to bear any responsibilities. While no one's will is fully free, virtually all of us have some capacity for self-control. Legal and ethical systems therefore properly subscribe to the proposition -- or salutary myth -- that an individual is generally responsible for his behavior. This policy, at the margin, helps foster civic rectitude.

To treat the destitute as choiceless underestimates their capacities and, by failing to regard them as ordinary people, risks denying them full humanity. Street people daily face fundamental decisions about where to eat, sleep, and pass time. More than persons living lives structured by families and employers, a street person must individually craft a daily routine.

Begging, for example, is an option, not an inevitability. Only a small percentage of disabled and destitute individuals engage in panhandling. Brandt Goldstein found that most panhandlers at Yale had consciously weighed alternatives, including holding a low-status, minimum-wage job. There is abundant evidence that chronic beggars premeditate how to increase the alms they receive. Bench squatters also have many choices about where to be, and plenty of time to move from place to place. In sum, panhandling and bench squatting are acts, not statuses. . .

E. Why "Homeless" Tends to Be a Misleading Label

The previous paragraph includes several references to the "homeless." This term is commonly applied to all poor people -- including those who reside in permanent dwellings -- who chronically make heavy use of the streets. Because the term often crops up in litigation and policy discussions, I conclude this part with some linguistic housekeeping on the differences between the "homeless" and "street people."

The nouns customarily used to describe down-and-out street people have moved with the spirit of the times. Before the 1980s, street people were usually saddled with a negative label, such as "vagrant," "derelict," "bum," "drifter," or "beggar." In the 1980s, activists encouraged journalists and scholars to relabel street people as the "homeless," a term that had been used with reference to street people only sparingly during prior decades. In the mid-1980s, the universal adoption of the term "homeless" helped engender more empathy for street people. Whenever possible in this Article, however, I refer to "street people" (or "panhandlers" or "bench squatters"), not to the "homeless." "Homeless" is an unduly ambiguous word and implies policy solutions that are inapt.

Ordinary speakers tend to attach the "homeless" label to individuals whose lives meet at least one of three quite different criteria: persons who spend the night in an emergency shelter; persons who spend the night on the "streets" (e.g., in vehicles, railroad stations, parks, and other spaces not designed for residential use); and panhandlers, daytime bench squatters, squeegee men, can collectors, and other active "street people." To be sure, the members of all three groups share a number of attributes. They tend to be destitute, socially isolated, and at most episodically employed. They also tend to be heavy users of public spaces.

Nevertheless, the composition of these three groups overlaps far less than is popularly thought. For example, although pedestrians may assume that a panhandler sleeps in a shelter or on the streets, studies indicate that, in most cities (but seemingly not in New York), a large majority of panhandlers have "regular access to a permanent dwelling" and thus fail to meet the scholarly definition of the homeless. Conversely, only a small fraction of the street and shelter homeless engage in panhandling.

The label "homeless" also has fostered misguided policies. The word implies that the problems of the people so labeled can be solved with bricks-and-mortar -- with "housing, housing, housing," as Robert Hayes and other advocates were still saying in the late 1980s. By the early 1990s, there was broad agreement that this policy response was largely off target, and the new mantra became "therapy, therapy, therapy." Brendan O'Flaherty persuasively argues that the new policy fix is no better than the old. Singling out persons labeled "homeless" for special benefits and burdens tends to entrap them in a marginal status. O'Flaherty would treat them like everyone else, not as members of a special class.

III. The Many Sources of Street Order

If a perpetrator of a chronic street nuisance were deemed an appropriate target for a sanction, who should apply the punishment? Although "legal centralists" think first of the state, another enforcer often would be preferable. An individual's behavior toward another person can be constrained by: first-party controls that the individual imposes on himself; second-party controls that the other person applies; and third-party controls administered by either (a) unofficial onlookers, (b) private organizations, or (c) the state. The suitability of the candidates varies with the information they possess about street behavior, and with their incentives and capacities to act on that information. When making street law, legislators and judges should be aware of the full panoply of enforcers and be sensitive to the relative aptitude of each.

A. Internalized Norms of Street Etiquette

Much orderly behavior is self-generated. Parents, teachers, religious leaders, and others strive to induce young people to internalize norms, including informal rules of proper conduct in public places. A person who has internalized a norm will usually comply with it to avoid guilt feelings. Most people avoid chronic panhandling and bench squatting because they would feel ashamed of themselves for doing it.

In the United States, the socialization of the young is much more haphazard than in, say, Japan. Researchers find that American street people disproportionately have spent their childhoods with severe disadvantages, including a lack of socialization to mainstream norms. …

B. Pedestrians' Self-Help Defenses

A pedestrian bothered by a street nuisance may exercise self-help against the perpetrator. While walking by an unaggressive chronic panhandler, for example, a pedestrian at minimum could decline to give alms -- a response that, if universal, would discourage panhandling by making it fruitless. A pedestrian's affirmative self-help reactions might conceivably include, in order of escalating severity and controversy: avoiding eye contact after being accosted; coldly staring back; frowning; speaking reprovingly; pushing the extended palm away; spraying mace; and throwing a punch. …

A chronic street nuisance is a nearly intractable social problem largely because an affected pedestrian is highly unlikely to do anything in response to it. The amount of damage from a single act of panhandling or bench squatting is typically insignificant; for a given onlooker, the harm can become substantial only after it has accumulated over time. …

C. Third Parties That Police the Streets

1. Individual Champions of the Public

b. Owners and Occupiers of Abutting Land

Many private third parties have stronger incentives to monitor public spaces than ordinary pedestrians do. Landlords and tenants of street-level properties tend to be especially attentive because the external benefits of greater street civility are capitalized into the value of their assets. For example, a restaurateur with a multi-year lease would want to shoo away sidewalk panhandlers who had chronically annoyed his patrons. His landlord would share this interest. Commercial leases commonly entitle the landlord to a percentage of the tenant's gross income, and, in any event, the landlord would be concerned about rent levels in postlease years. Small wonder that streetfront merchants earned Jane Jacobs's glowing admiration as "eyes upon the street."

2. Organizations That Enforce Street Decorum

Various associations other than the police may have an interest in enforcing street norms. …Most pertinently, residents of a neighborhood may form organizations for the specific purpose of governing public spaces. Familiar examples are residential block associations and groups such as "Friends of the Park." In commercial districts, where panhandlers most commonly congregate, merchants' associations are key players. A voluntary merchants' association, such as a Chamber of Commerce chapter, may face a free-rider problem and consequently be ineffective at providing public goods. One solution to the free-riding problem is formation of a Business Improvement District (BID), a government-approved organization empowered to levy assessments on all landowners within district boundaries. Although BIDs also engage in sanitation and business

promotion, the control of disorderly street people has emerged as one of their central functions. Some have hired outreach workers to offer social services to the chronically homeless. Harking back to a late-nineteenth-century tradition, an increasing number of merchants' associations appeal to pedestrians to refrain from giving cash to panhandlers (a strategy that First Amendment scholars would refer to as "more speech").

3. The Police

Members of close-knit social communities commonly are able to dispense with government peacekeepers. Indeed, police departments were unknown in the United States prior to the mid-nineteenth century. Today, because large cities are far from close-knit, even Jane Jacobs would acknowledge that police officers play an essential role in monitoring downtown spaces. In these social environments, other types of enforcers simply are unable to provide enough of the public good of street order.

In the latter half of the nineteenth century, urban police forces concentrated much of their effort on controlling street misconduct, which in that era was associated with "the dangerous class." Beginning around the turn of the century, however, police officers and prosecutors began to regard fighting violent crime as more important than dealing with disorderly behavior. Particularly in the years after 1965-1975, a decade that witnessed both a jump in violent crime and a legal revolution that eviscerated street law, police officers' concern with minor misbehavior in public spaces plunged. The 1990s backlash may signal the end of this period of relative inattention.

A conscientious foot-patrol officer strives to develop relationships with street people, partly to protect them from crime. To control someone creating a temporary disturbance in a public space, an officer is apt first to try informal methods, and to use arrest for public nuisance only as a last resort. Unlike a disturber of the peace, the perpetrator of a chronic street nuisance is highly unlikely to provoke any onlooker into making a report to the police. Because patrol officers are habitual street users, however, they themselves witness continuing violations of street norms and can keep mental records on the protractedness of offenses.

If armed with a traditional public-nuisance statute or a more particularized statute or ordinance aimed at chronic street misconduct, in practice a police officer would be inclined to invoke this statutory authority, not as a ground for making an arrest, but as the basis for a verbal warning or request to move along. Nothing more should be necessary in the overwhelming majority of cases. If a street person were to ignore this warning, the next step might be a citation. Recidivists eventually would risk a few nights in jail. A city attorney might even seek an injunction that ordered an inveterate offender not to resume the chronic pattern of begging, bench squatting, or other offense.

In some contexts, police officers are less suited than others to enforce street decorum. Given central-city pay scales, patrol officers tend to be relatively costly "eyes on the street" compared to eyes in the informal sector. Many police forces also have officers who are corrupt, capricious, and sadistic. As the next parts demonstrate, the risk of police misconduct led to several decades of judicial hostility to the enforcement of vagrancy laws, to the eclipse of informally policed Skid Rows, and, in some cities, to the creation of officially designated safe zones for disorderly people.

. . .

VI. The Federal Constitutional Rights of Individuals Who Chronically Misbehave in Public Spaces

Both informal and formal systems for zoning public spaces pose significant federal constitutional issues, although of somewhat different sorts. . . . For example, in a leading case, *Pottinger v. City of Miami*, a class action brought on behalf of Miami's street people, the plaintiffs' complaint invoked four different amendments to the United States Constitution, as well as the unenumerated federal constitutional rights of privacy and travel.

Ordinary pedestrians are not parties in these cases, and they are also unlikely to appear as witnesses. Typical is *Pottinger*, which pitted street people against city officials. Despite the best efforts of city attorneys, this lineup of parties creates a risk that a judge assigned to a street-law case will have a one-sided impression of the liberty issues at stake. For example, panhandlers who make a downtown space uninviting conceivably may infringe on other pedestrians' privacy, right of travel, "right to be left alone," and ability "peaceably to assemble" in an agora. The characterization of pedestrian interests in the prior sentence is not meant to imply a recommendation that a judge hold that a pedestrian has a federal constitutional right to inviting public spaces. The point, rather, is that the rules of street law affect the liberty interests of all who are mobile, many of whom may not be before the court.

Another important constitutional issue warrants attention at the outset. Government efforts to treat persons by category may run afoul of the Equal Protection Clause. Because neither poverty nor homelessness is a "suspect classification," the principal legal question would be de facto discrimination by race. Between 1970 and 1990, the population of street people in many downtowns went from disproportionately white to disproportionately black. A crackdown ordinance, even if racially neutral on its face, would be vulnerable to an equal protection challenge if city legislators had harbored racial animus when adopting the ordinance or if officials had administered it in a racially discriminatory fashion.

This issue is strikingly absent in street-law litigation. Although racial tensions unquestionably pervade American life, the *Pottinger* advocates and other attorneys for street people, who typically show no hesitation in making a scattershot constitutional attack, rarely plead that a crackdown policy is racially discriminatory. For a variety of reasons, in most cities this charge would be difficult to prove. Partly because the effects of alcoholism, drug addiction, and mental illness are colorblind, even in the 1980s and early 1990s, whites constituted a significant fraction of panhandlers, bench squatters, and other downtown street people. The timing of the crackdowns also does not suggest a racial motive; while black street people had begun to increase in number in the early 1980s, many cities did not start their crackdowns until a decade later. More probative still, many of the cities that implemented street-control programs in the early 1990s could not plausibly be regarded as hotbeds of anti-black animus. In Atlanta and Washington, D.C., for example, blacks dominate local politics. The likes of Berkeley, Evanston, and Seattle are hardly known for racist virulence. In general, white prejudice against blacks has been in decline since 1960; indeed, it was this decline that enabled more street blacks to go downtown in the 1970s and 1980s. Pedestrians' concerns about street disorder span all centuries, social classes, and races. While advocates and judges must be alert to evidence of racial discrimination, they should also recognize that a city can have entirely legitimate reasons for attempting to stem misconduct in public spaces.

B. Bench Squatters' Constitutional Rights

In the early 1990s, advocates initiated lawsuits to establish the rights of the street homeless to camp overnight in certain public spaces in downtown areas of large cities. The trial judge in

Pottinger v. City of Miami and the intermediate appellate court in Tobe v. City of Santa Ana (the two leading cases) ruled that the U.S. Constitution indeed requires a city to allow a bench squatter to sojourn in some public place. First Amendment issues were not central in either *Pottinger* or Tobe because bench squatting typically is too passive to constitute "expressive conduct." Rather, the advocates' early successes in both cases mainly turned on the right of travel and the right to be free from prosecution for a status crime.

1. Freedom of Travel

In the abstract, the federal constitutional right of travel might entitle a destitute person to sojourn in: (1) all city spaces; (2) most city spaces; (3) a few city spaces; or (4) none at all.

While advocates for street people can be expected to press for (1) or (2), most judges wisely have concluded that (3) and (4) are the only conceivable constitutional mandates. A city has a number of legitimate reasons for regulating chronic squatting in a well-trafficked space. A street person in New York City surely should not have the privilege of bedding down in the Children's Zoo in Central Park or on every street or sidewalk. A public space is no longer openly accessible when one individual is using it all the time. An unfettered right to squat almost anywhere, with priority given to those arriving first in time, would create a land rush on a city's choicest spots.

At the very most, the federal constitutional right of travel requires a city to permit a destitute individual to enter all open-access public spaces when alert, and camp and bench squat at a few public locations that the city has plausibly selected for that use. This outcome would permit a city to keep most of its public spaces inviting for ordinary pedestrians, while providing the destitute with ample channels for sojourning. The leading decisions all indicate that no more is required of a city. In Clark v. Community for Creative Non-Violence, for example, the Supreme Court sustained a National Park Service restriction on the establishment of campsites along the Mall and in Lafayette Park. As mentioned, these Washington venues are prime national gathering places. The Court's decision enabled park administrators to ensure that many different groups could rotate rapidly through the spaces without having to deal with entrenched squatters. The Clark majority noted that the National Park Service had provided ample camping sites at other downtown locations.

Pottinger, a high-water mark in the advocates' campaign to plead the right of travel, was a class action brought to prevent the Miami police from arresting and ousting homeless individuals squatting in Lummus and Bicentennial Parks and under I-395 overpasses. Judge Atkins, the federal district judge, held in part that Miami's practice infringed upon the plaintiffs' fundamental rights of travel. "The evidence overwhelmingly shows that plaintiffs have no place where they can be without facing the threat of arrest." Judge Atkins, however, provided only a spatially limited remedy. He ordered the parties to agree on at least two public areas, located near service centers that cater to the homeless, that could function as "safe zones" for them. In effect, *Pottinger* held that the federal right to travel required Miami officially to designate several public-space Skid Rows …

In Tobe, however, the California Supreme Court … declined even to entitle the campers to *Pottinger*-style [zones], which Santa Ana presumably would have sought to locate on sites other than its Civic Center. Instead, the court stated flatly that "[t]here is no . . . constitutional mandate that sites on public property be made available for camping to facilitate a homeless person's right to travel, just as there is no right to use public property for camping or storing personal belongings." In sum, while *Pottinger* provided interpretation (3), Tobe rendered interpretation (4).

The California Supreme Court's decision in Tobe should not, however, be read as a prod to cities to restrict street people's rights to the federal constitutional limit. Even in the absence of federal constitutional compulsion, most counties and large cities, especially, can be expected to provide some public spaces for indigent campers and bench squatters. Rather, the California Supreme Court's implicit and invaluable message in Tobe -- one that the court of the nation's most populous state was magnificently situated to deliver -- was that the time had come to largely defederalize constitutional litigation over the particulars of municipal street law.

The *Pottinger* litigation illustrates the wisdom of this message. Even though *Pottinger* stops far short of establishing an unrestricted right to camp, even its recognition of a right to sleep in a few city-approved places threatens to embroil judges in policy details that are beyond their institutional competence. Because a squatter in a public space makes heavier demands on public land resources than does the ordinary citizen, a right to sojourn at no charge is a species of welfare right. Both the U.S. Supreme Court and the state supreme courts have rightly been chary of constitutionalizing the fiercely controverted field of welfare law. A city's public-campsite policies entail decisions on, among other matters: (1) locations; (2) the quantity and quality of facilities and services; (3) admissions policies; (4) length-of-stay policies; and (5) whether an individual's continued stay is to be conditioned on compliance with work assignments or deportment rules. After *Pottinger*, Miami's decisions on all these fronts had federal constitutional dimensions. While these cases involved overnight camping, a judicial decision recognizing a federal constitutional right to bench squat would be a tar baby of comparable proportions.

2. The Eighth Amendment Ban on Criminalizing Status

Advocates for homeless street people have had some success with a closely related constitutional theory. The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment bars prosecution for a mere status, for example, being a drug addict. The normative basis for this doctrine is that having a condition one cannot alter should not by itself make one guilty of a crime. Advocates argue that destitute individuals have no control over their homelessness, extreme poverty, mental illness, or whatever, and therefore must be immune from punishment on account of an unalterable status. They therefore might argue that the Eighth Amendment would bar a city from arresting a bench squatter who had chronically occupied a plaza bench.

Like the freedom-of-travel precedents, however, the status-crime decisions at most confer a federal constitutional entitlement to access to spatially limited safe havens. True, lower court opinions in *Pottinger* and Tobe (both later reversed) did invalidate the Miami and Santa Ana ordinances for criminalizing the status of homelessness; but even those opinions stressed that the defendant cities had provided no public place where a homeless person could bed down without fear of arrest. Similarly, in Powell v. Texas, by a 5-4 margin the Supreme Court declined to reverse the conviction of a chronic alcoholic whom the Austin police had arrested for violating a statute against being found drunk "in any public place." The majority held that this was not a status crime because Mr. Powell had committed "acts" by drinking and then taking himself into a public area. In other words, Austin, Texas, did not have to permit Mr. Powell to wander at will throughout its downtown in an inebriated condition. Justice White's concurring opinion in Powell states that a city is constitutionally obliged to provide a compulsive alcoholic with some site where he would be safe from criminal prosecution. Presumably, a Skid-Row Red Zone in Austin where public drunkenness was permitted would be enough.

VII. The Relative Merits of Informal and Municipal Zoning of Public Spaces

This review demonstrates that federal constitutional law is indirectly encouraging cities to bring back Skid Rows, but in a form far more official than the 1950s version. By designating particular districts where minor street misconduct would be decriminalized, a city would be providing "alternative channels" for First Amendment expression. If the right of travel or the Eighth Amendment requires a large city to provide indigent individuals with safe havens for camping, drinking, and bench squatting, these zones would satisfy that obligation. No doubt partly on the advice of city attorneys, Orlando, Dallas, Jacksonville, and other cities have begun to set up official Red Zones for the destitute.

The constitutional revolution in street law that occurred between 1965-1975 was aimed largely at limiting police discretion. While police misconduct is unquestionably a serious and legitimate concern, it is worth considering whether informal zoning is in some respects superior to the formal zoning approach that the courts currently seem to be forcing on cities.

Questions of comparative institutional competence can be investigated through conventional tools of policy analysis. The Skid Row system was a hybrid that entailed unofficial police enforcement of informal norms that varied from neighborhood to neighborhood. Formal city zoning of public spaces is more thoroughly governmental because it directs the police to adhere to detailed municipal directives. Neither of these two systems is obviously superior to the other.

One yardstick for an institution's performance is its capacity to make optimal rules -- in this context, the various street codes and boundary lines for zones. For example, is "city hall" or "civil society" better at locating a Skid Row and deciding what can go on there? In a city that formally zoned public spaces, politicians would have to draw numerous boundary lines, some at the subblock level. Experience with conventional municipal zoning of private lands indicates that this might prove to be a capricious process, dominated by warring special interests. …

On the other hand, loosely knit social groups such as downtown pedestrians and merchants are often ineffectual norm makers and, when they do overcome their free-rider problems, may treat minorities and outsiders more viciously than a city would. Informal rulemakers also cannot produce a code as detailed as a government's. Normmakers, for example, are likely to be incapable of establishing specific hours and time limits for activities in public spaces.

Another yardstick of institutional competence is administrative efficiency. The Skid Row system granted patrol officers great discretion to divine neighborhood norms and to administer casual sanctions to enforce them. Until recent decades, in doing this, the police took advantage of the plasticity of "public nuisance," "disorderly conduct," and other broad legal definitions of obnoxious street behavior. This was a flexible and cheap system. It was also vague and discretionary, shortcomings that led the Supreme Court to try to shut it down.

The efficient pursuit of street decorum is inherently in tension with protecting unpopular people from arbitrary police actions. Street law presents the familiar dilemma of choosing between standards and rules. Compared to standards, rules promise to limit discretion and provide better notice of what is illegal. But rules commonly involve higher administrative costs than standards, are less flexible, may in fact lead to individually unjust results, and tend to be manipulated or even ignored in application.

In light of the wide diversity of public places and pedestrian behaviors, there is much to be said for standards in street law. Indeed, if it could be achieved, the first-best solution to the problem of

street misconduct would be the maintenance of a trustworthy police department, whose patrol officers would be given significant discretion in enforcing general standards against disorderly conduct and public nuisances. Certain administrative reforms could contribute to this end. Selection, training, and supervision methods can be shaped to help make police officers more trustworthy agents of constitutional values. The continuing racial integration of police forces should tend to cure some of the racist aspects of the Skid Row system of the 1950s. In some contexts, community-based policing, which assigns a particular officer to a particular neighborhood, might make a beat-patrol officer more averse to gaining a reputation for capriciousness and excessive violence.

Many observers understandably regard a street regime premised on trustworthy police officers as unrealistic. In some cities, it unquestionably is. In these locales especially, the official zoning of public spaces -- which elsewhere would be a second-best approach -- may be the best that lawmakers can do.

Having pushed cities in the direction of formal public-space zoning, judges should not strictly scrutinize the policies of municipalities that have accepted this invitation. Courts generally yield to municipal decisions that regulate private land uses. If federal judges would be deferential toward the City of Berkeley's decisions over where private landowners can operate, say, book stores, churches, and copycenters, should they not also be deferential to Berkeley's decisions about where people can chronically beg and squat on the public sidewalk?

VIII. Conclusion

Unchecked street misconduct creates an ambience of unease, and for some, of menace. Pedestrians can sense that even minor disorder in public spaces tends to encourage more severe crime. City dwellers who perceive that their streets are out of control are apt to take defensive measures. They may use sidewalks and parks less, or favor architectural designs that discourage leisurely stays in public spaces. In particular, they may relocate to more inviting locales. As modes of travel and communication improve, individuals have ever greater choices. Shoppers can switch to enclosed malls, employers can move to suburban industrial parks, and universities can shift activities to satellite branches.

… Disorderly people are not the only citizens with liberty interests at stake in these instances. Street law must also attend to the privacy and mobility interests of pedestrians of ordinary sensibility, not to mention the rights of the unusually delicate. Because demands on public spaces are highly diverse, city dwellers have historically tended to differentiate their rules of conduct for specific sidewalks, parks, and plazas. Some neighborhoods, like traditional Skid Rows, have been set aside as safe harbors for disorderly people. Other sites, like tot-lots, have been allocated as refuges for persons of delicate sensibility. A constitutional doctrine that compels a monolithic law of public spaces is as silly as one that would compel a monolithic speed limit for all streets.

The reconciliation of individual rights and community values on the streets is a profoundly difficult problem. For a problem so intractable, a pluralistic legal approach is advisable. Judges should refrain from using the generally worded clauses of the United States Constitution to create a national code that denies cities sufficient room to experiment with how to grapple with street disorder.

Stephen J. Schnably, Rights of Access and the Right to Exclude: The Case of Homelessness, in Property Law on the Threshold of the 21st Century 553-72 (G.E. van Maanen & A.J. van der Walt, eds., Institute for Transnational Research, 1996)]

I. Local Strategies for Dealing with Homeless People: Invisibility and Discipline

Few would disagree that homelessness is a major problem in the United States. To venture beyond that generalization, however, is to plunge immediately into controversy. Even the numbers are contested. The U.S. Bureau of the Census produced a controversial count of 230,000 homeless people in 1991. A more revealing study recently concluded that "about 12 million (6.5%) of the adult residents of the United States have been literally homeless at some time during their lives."

The causes of homelessness are equally a source of contention. No one who has the slightest familiarity with the problem can fail to appreciate the enormous difficulty of the question and the dangers of oversimplification. In part the difficulty stems from the nature of the homeless population itself, which varies from one locality to the next, and changes over time. At one point the population may be largely single men; at another point it may include many families (typically women with children). Though minorities are generally overrepresented among the homeless population, its racial and ethnic composition is not the same everywhere. These differences make generalizations risky, to say the least. But the risk is not merely empirical. To identify a cause (or causes) of homelessness is, of necessity, to issue a prescription for its cure, and that endeavor inevitably implicates controversial questions of social policy generally.[1]

That I cannot here provide the painstaking foundation upon which claims about the causes of homelessness ought ideally to rest is, however, no reason to hide my own position on the matter. Indeed, the argument that follows depends upon it in important ways. I believe, however, that the account of local governments' responses to homelessness, and the ways in which a right of access might either counter those responses or play into them, may give insights into strategies for dealing with homelessness even if one disagrees with the premises.

To my mind, even giving full weight to the complexity and variety of the factors involved in producing homelessness, two stand out in particular. One is the deindustrialization of the economy, with its loss of jobs that, while relatively low paying, could still support a living. The second is a precipitous decline in low-cost housing over the last fifteen years or so. The decline is attributable to a variety of social policies, including urban "renewal" and redevelopment that eliminated single-room occupancy hotels in favor of expensive condominiums, and vast cutbacks in federal low-income housing support. Together these factors have left many people at risk of falling into homelessness at any given moment — whether from loss of a job, rent increases, domestic violence, uninsured medical costs, substance abuse, or mental health problems.

[1] To take but one example, the common claim that "deinstitutionalization" caused homelessness is as much an attack on the model of social and legal advocacy that won the right of people in mental institutions to receive care in less restrictive settings — and to enjoy greater procedural safeguards before being committed — as it is an attempt to explain why there are people living on the streets. For two versions of the attack, see Myron Magnet, The Dream and the Nightmare: The Sixties' Legacy to the Underclass 76-114 (1993); Rael Jean Isaac & Virginia C. Armat, Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill (1990). For a critique of the claim that deinstitutionalization is in large degree responsible for homelessness, see Richard H. Ropers, The Invisible Homeless: A New Urban Ecology 142-168 (1988). *Cf.* David A. Snow et al., *The Myth of Pervasive Mental Illness Among the Homeless*, 33 Social Problems 407, 408 (1986) (arguing that prevalence of mental illness among homeless population has been exaggerated). *See also* James D. Wright, *The Mentally Ill Homeless: What is Myth and What is Fact?*, 35 Social Problems 182, 189-90 (1988); David A. Snow et al., *On the Precariousness of Measuring Insanity in Insane Contexts*, 35 Social Problems 192, 195 (1988).

A necessary (though likely not sufficient) element of any effective plan to deal with homelessness would be vigorous governmental action to address the underlying causes — the erosion of a base of lower income but living wage jobs, and the sharp decrease in the stock of affordable housing. The current political climate makes that unlikely. Consequently, local governments have tended to adopt either of two strategies (or more accurately, combinations of the two). What unites the two is their singular inattention to promoting democratic empowerment of the people they purport to help.

The first I will call the strategy of invisibility. The specific idea is to render homeless people invisible, whether by forcing them into hiding or driving them "the hell out of town," as one mayor put it in his bid for reelection. The strategy has been implemented in a variety of ways. Localities have passed laws prohibiting sleeping in public, placed sprinklers in parks timed to go off randomly at night, and undertaken many other forms of official harassment that target the public presence of homeless people.

An example from Miami may help illustrate the tactic. Camillus House, a private Catholic shelter located downtown, regularly serves meals to homeless people. At one point local businesses complained about seeing "derelicts" lined up outside waiting for the meals. The police began to arrest homeless people for obstructing the sidewalk outside Camillus House — even though they were doing no such thing, and even though the State Attorney's office did not prosecute homeless people for offenses of that sort. An internal police memorandum, however, proclaimed the program a great success. People would miss the meals while they were being booked, so they learned not to line up on the sidewalk; instead, they would hide in alleys around Camillus House while they were waiting. Their public presence had simply been eliminated.[2]

These tactics appear to be part of a larger trend. One could draw a connection, for example, between the strategy of invisibility and the increasing willingness to deal with the problems of the inner cities simply by excising large numbers of young African-American males from the general population, at least temporarily, through the means of imprisoning them. In both strategies, distinct and marginalized populations are targeted for treatment as enduring underclasses to be contained, with the underlying economic, social, and political structures and policies that helped marginalize them in the first place being taken for granted. In this sense, the strategy of invisibility might in Foucauldian terms be deemed one of "governmentality."

The other — at first glance more benign — strategy I will call "disciplinary," once again borrowing Foucauldian terminology. More prosaically it might be called requiring the victims to blame themselves as a condition of offering them the help of experts. Taking the background causes — the eroding of the jobs base and the stock of low-income housing — as a given, this approach promises the delivery of shelter, employment skills, and other services to needy individuals. It emphasizes taking careful case histories of homeless persons, delivering health care services, providing job training, and assisting individuals with finding housing in order to reintegrate each homeless person back into productive society. Often such programs are undertaken as public-private partnerships

[2] As the memorandum put it, the "reason for the [positive] results is that because of the arrest, they are taken from the immediate area where the food is located. They are placed in the east wing of the jail where food is not served. Consequently they do not get fed. What has occurred is that the vagrants now await food in hidden areas around the Camilus [*sic*] House." Pottinger v. City of Miami, 810 F. Supp. 1551, 1567 (S.D. Fla. 1992), *remanded*, 40 F.3d 1155 (11th Cir. 1994), *op. after remand*, No. 88-2406-CIV-Atkins (S.D. Fla. April 7, 1995), *appeal pending*.

Interestingly, Miami simply does not count people as homeless if they pick up their belongings every morning and move on rather than stay in one place. Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, Jan. 30, 1995, at 25, 38-40 (testimony of Livia Garcia, an official in Miami's homeless program). That enumeration practice itself helps render a significant segment of the city's homeless population invisible.

driven largely by downtown business interests.

Two features make this strategy disciplinary. The first is the background assumption that the causes of homelessness lie for the most part in individual failings, and that individuals must therefore immerse themselves in a programmatic routine designed to return them to normality. If they fail to do so, they face implicit threats of sanctions. One example is a plan floated by New York Mayor Rudolph Giuliani, and backed up by threats of denial of shelter, to have each homeless person sign a contract specifying steps towards "rehabilitation."

The second is the way such programs render each homeless individual a cog in a machine — the way they make the homeless person the object of individualized case management in a system over which homeless people individually and collectively have little if any control. This may show up, for example, in the imposition of rigid rules of behavior on homeless people, rules justified as necessary to teach them how to live like productive people again. Once again, though, while they may have little control over the setting of the rules, homeless people are expected to conform to them willingly and actively. The discipline is not merely external but is expected to be self-imposed: That is part of their "rehabilitation" into productive members of society.

One might attempt to justify these programs if they actually provided a way out of homelessness. But that is almost certainly what they cannot do for most homeless people. It is not just they treat as irrelevant the shortage of jobs and housing for poor people (or indeed of health care or substance abuse programs), although that is indeed a problem. Training in job skills, for example, does homeless people little good if available jobs do not pay enough for housing.[3] More fundamentally, to the extent that disciplinary programs succeed in defining self-assertion and control over one's life in terms of immersion in expert regimes and routines, the more likely they are to succeed in stunting an alternative: the development of a political identity through collective self-assertion and mobilization of homeless people themselves. Yet (as I will argue in Part III) this alternative prospect offers a better hope of forcing the political system to deal with the housing, jobs, and other needs of the very poor.

The two strategies of discipline and invisibility cannot be considered in isolation from each other. One reason is that while localities may employ them separately, the strategies are often integrally related. Consider, for example, the policy of building large shelters. In part the aim of the policy, as local officials sometimes admit, is to sweep homeless people from public view and gather them into one, more manageable — and less visible — mass. In part the aim is to render them more amenable to programs allegedly designed to foster individual reintegration into the mainstream. Once these disciplinary programs are in the place, moreover, they can be used to justify punitive measures against those who fail to rehabilitate themselves. Homeless people can then be arrested for living in public or have their children taken away from them, for example.

A second relationship between the two strategies arises from the fact that homeless people are never completely captive to the strategies of invisibility and discipline. One form of resistance involves openness and community. Individuals may refuse to hide, establishing a spot on a corner where they regularly stay; groups of homeless people may form communities of sorts centered on semi-permanent encampments, and may engage in self-help to lift themselves out of homelessness rather than rely entirely on disciplinary programs for that.[4] Other forms of resistance, however, involve concealment

[3] Here, too, the disciplinary feature comes to the fore. In the face of such clear-cut yet unaddressed obstacles, the persistence of the programs highlights their self-referential character. One cannot help but wonder whether it would be more accurate to say that the very point of the help they promise is not the provision of decent jobs and low-income housing but the acceptance of the bureaucratic routines.

[4] As one expert familiar with the homeless population in Miami testified in *Pottinger*:

and isolation. Rather than being forced into a disciplinary program (by arrests and others forms of harassment), that is, homeless people can go into hiding. Many homeless people do so simply by the way they dress: Though obviously poor, most are indistinguishable by the way they look from people with homes. Homeless people can also avoid harassment by living in more dispersed groups or even alone, moving about through the city nomadically as they carry their possessions from place to another in a shopping cart.[5] The irony is that sometimes the only realistic way homeless people may see to avoid disciplinary programs is to accommodate the strategy of invisibility.

Obviously, the picture I have presented is fairly bleak. There are, to be sure, shelter programs that do attempt to treat homeless people with a sense of dignity, actively involving them in setting policies, and encouraging a sense of community. Still, I suspect these are the exception, and in any event, there remains the task of defending homeless people against the strategies laid out above.

A right of access to public property might seem like a useful tool in that defense. If homeless people had rights of access to public spaces, it might help them resist being swept into invisibility or forced into disciplinary programs. I explore this strategy in the next Part.

B. *Homelessness and the Institutional Limitations of the Courts*

… A right of access to public spaces would need to be judicially enforced. Yet courts today are unlikely to impose sweeping, intrusive structural reforms to protect the rights of homeless people. Nor are they likely to be concerned whether the content of the rights they proclaim empower homeless people in any meaningful way. Mediated through these institutional features, the social image of the

> In the encampments, when the people were able to congregate, … they developed communities ... They had rules that they each understood. They had associates and friends to guard their belongings when they were gone. They shared their food. They found out where there ? [was] employment, they gave people the opportunity to save a little money.
>
> One example is a man that was over on Watson Island [where many homeless people lived] that had open heart surgery, and he and his companion, lady, was with him, and he, because of the situation he was in without income and having problems at S.S.I. [a federal program for poor people with severe disabilities], was staying there. As soon as he was able to get his S.S.I. started, and get a little money, he and his lady friend moved out. Now, I don?t think they could have done that as efficiently if he and his lady companion would have had to move every day. They just could not have tackled the system and be on the move every day.
>
> People — they tend to work and save their money, and part of the reason why the biggest help to the homeless is themselves getting themselves off the street is because they will find a situation where they can get a little work, where they can save a little money, and then as soon as most of them have that, they will move out.

Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, Jan. 30, 1995, at 119 (testimony of Dr. Andrew L. Cherry). On the design of welfare and other benefits procedures to make it difficult for poor people to claim all the benefits to which they are entitled, see WOLCH & DEAR, *supra* note 5, at 269 (noting that routines for applying for and receiving benefits "are deliberately designed to frustrate the applicant and recipient. One high-ranking county welfare official admitted that 'the welfare application process … was designed to be rough. It is designed quite frankly to be exclusionary.'") (quoting Robert Chaffee in Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591, 596 (1987-1988)).

[5] *See* Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, June 15, 1992, at 171-72 (testimony of Dr. David F. Fike, an expert in homelessness):

> This surprises a lot of people, but most of the homeless make substantial efforts to keep clean and keep in clean clothing. One of the other myths that is afloat is the myth of dirtiness. … The truth of the matter is that grooming and cleanliness has to do with the hiding and avoiding of harassment phenomenon. So, the other reason that most of the several thousand homeless people in Miami and the other urban areas are invisible is that most of them choose not to show the open signs of homelessness that people begin to recognize — disheveled clothing, dirty hair, not being shaven, and so forth.

See also Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, Jan. 30, 1995, at 97-99, 116-18 (testimony of Dr. Andrew L. Cherry) (noting increase in number of homeless people living nomadically out of shopping carts since Miami began clearing encampments with aim of placing people in programs).

home might transform a right of access to public property into something that supported rather than countered the strategies of invisibility and discipline.

1. *The hesitance to impose sweeping, intrusive structural reforms*. — Courts will inevitably face strong institutional pressures to limit the right of access to fairly small areas. A remedy thus limited might appear closer in one respect to a home, in the sense of providing homeless people with an identified portion of (public) property in which they were protected, rather than giving them an immunity to arrest for performing life-sustaining functions on public property wherever that might be. It is this very resemblance — this tie to a particular location — that might, however, bolster the strategy of invisibility.

The pressures to limit the right of access can perhaps most easily be understood by considering the alternatives, both of which will simply appear unacceptable to most courts. On the one hand, a court could simply declare a right of access to all public property open to the public, and leave the matter there. But the very reason for a lawsuit that might lead to such a ruling would be a policy of systematic police arrests of the homeless for performing innocent, life-sustaining conduct in public; and it would seem unduly optimistic to expect such arrests simply to cease upon a broad declaration of a right of access. Thus this course of action seems unsatisfactory.

On the other hand, a court could enjoin enforcement of the many laws used to harass homeless people — *e.g.*, ordinances that outlaw being in the parks after dark, or sleeping in public — and actively oversee implementation of the injunction. That could require instituting training programs for officers, appointing a special master to monitor performance, and taking a wide range of other actions that would significantly interfere with the autonomy of police departments and other local officials. The era of the federal courts' willingness to order intrusive, institution-wide relief to reconstruct a public entity in line with constitutional norms, however, may well have drawn to a close, at least for now. This development reflects the triumph of conservative conceptions of the judicial role, evident as early as 1976 in *Rizzo v. Goode*.[6]

Faced with these alternatives, limiting the right of access to specified areas can easily appear an attractive compromise. In *Pottinger v. City of Miami*, a federal district court proposed setting up what it called 'safe zones" in response to Miami's efforts to render homeless people invisible by driving them outside the city or keeping them constantly on the move within it.[7] Originally, these safe zones were to be in a park and under a highway underpass, where there had already been fairly large encampments of homeless people. Homeless people would be free from arrest in these safe zones, so that there would be at least someplace where their very existence was no longer criminalized. Because the relief would apply only to limited areas, it would intrude less on local officials' discretion, but would still offer some hope of freedom from harassment.

… The obvious danger is that a city could seize upon the safe zone concept and transform it from an attempt to give at least limited protection to homeless people from official harassment into a tool for pursuing the strategy of invisibility. Safe zones could be used to move homeless people out of areas where they are deemed unsightly, such as downtown business areas, into what amount to state-sponsored detention camps. Homeless people would be allowed to do their living on public property,

[6] 423 U.S. 362 (1976).

[7] 810 F. Supp. 1551 (S.D. Fla. 1992), *remanded*, 40 F.3d 1155 (11th Cir. 1994), *op. after remand*, No. 88-2406-CIV-Atkins (S.D. Fla. April 7, 1995), *appeal pending*. *Pottinger* held that Miami had violated, among other things, homeless people's constitutional right to freedom of movement and their Eighth Amendment right not to be punished for their status as homeless people. *See generally* Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-homeless Lawsuit*, 23 STETSON L. REV. 467 (1994) (account by ACLU trial counsel of strategic issues faced in lower court proceedings).

but would be forced to do so in the functional equivalent of a home in the worst sense: out of sight and (given that minorities are typically overrepresented among the homeless population) in segregated areas. And once out of public sight, their daily activities would no longer stand as a constant reproach to the failure of an economic and social policy that takes the erosion of the jobs and housing base for poor people for granted. Indeed, at worst a right of public access could serve as a very cheap form of "housing" for homeless people.

… To be sure, alternatives are conceivable. A court could break the link between a right of access to public spaces and the existence of local government programs for homeless people. It might retain a safe zone or similar remedy so long as there were any homeless people, even if in theory a locality's program for the homeless had the capacity to handle them all. That would put the burden on the locality to devise programs that were capable of operating principally by attracting people rather than by sweeping them into disciplinary programs that require the victims to blame themselves, treat them undemocratically, and fail to address the underlying structural causes of homelessness.[8] Or a court could accept in principle the link between a right of access and programs for the homeless, but closely scrutinize the latter before cutting back or denying the right of access on the theory that homeless people now had alternatives to being on the streets.

It is not, in other words, the inevitable fate of a right of access that the courts withdraw it in such a way as to fit all too neatly into a disciplinary strategy. But neither should we be too quick to discount the risk that that is what will happen. Given the limited experience with rights of access, gauging that risk is difficult. The federal court in Miami is the only one to have ordered safe zones to date (though other cities have established encampments without court order), and Miami is far from being able to assert convincingly that it currently has programs in place sufficient to handle all homeless people. The *Pottinger* court has indicated that it might be willing to rule on "the reasonableness of the alternatives presented to involuntarily homeless persons" by Miami's programs at some point when they could arguably accommodate everyone, though it is unclear how searching its scrutiny would turn out to be.[9] It makes sense to press the courts to engage in such scrutiny, but the fact is that courts will find it very tempting to withdraw or cut back upon rights of access by homeless people without seriously questioning disciplinary programs that localities put in place.

III. PROPERTY THEORY AND THE POWER OF IMAGES

A. *Alternatives to Judicial Enforcement of Rights*

… An alternative strategy to relying mainly on the courts would have to begin with the recognition that homeless people are not, in fact, inert or completely beaten down. On the contrary, homeless people have formed unions in various cities around the country.[10] They have marched to city halls,[11]

[8] Granted, some homeless people with severe mental illnesses might lack the capacity to make an informed decision about accepting help. But unless one believes that mental illness is the primary cause of homelessness, that most homeless people become mentally ill because of their homelessness, or that more than a trivial minority of homeless people choose to be homeless — propositions I reject — the primary burden ought to be on homeless programs to attract homeless people.

[9] Pottinger v. City of Miami, No. 88-2406-CIV-Atkins (S.D. Fla. April 7, 1995), slip op. at 8 n.7, *appeal pending*.

[10] *E.g.*, Faye Fiore, *For at Least a Day, the Homeless Aren't Voiceless*, L.A. TIMES, May 6, 1990, at B1; Jim Yardley, *Union for Homeless Seeks Clout*, ATLANTA J. & CONST., Dec. 27, 1992, at A3; Daryl Strickland, *Homeless Gather Under 1 Roof to Organize Union*, CHI. TRIB., March 9, 1986, at 3; *Free Medical Care for Homeless, Poor Is Aim of New Union in Philadelphia*, DAILY LABOR REPORT (BNA) NO. 70, at A-12 (April 11, 1985) (available in Lexis/News Library). *See also, e.g.*, ROPERS, *supra* note 8, at 198-208 (political organizing by homeless people and supporters in Los Angeles).

[11] *E.g.*, Marlon Millner, *Homeless Tell Mayor of Alleged Police Harassment*, ATLANTA J. & CONST., July 26, 1994, at C5.

invaded city council meetings,[12] occupied local housing offices,[13] and initiated drives to register to vote,[14] all in an effort to give themselves their own voice in politics.

Nor are homeless people without political allies. Granted, much of the political organizing around homelessness has relied heavily on appeals to the charity of the better-off that reinforce the notion of homeless people as passive victims. Still, even those efforts have made some headway in putting affordable housing and related matters on the agenda.[15] Further, the millions of people who at some point in their lives have experienced homelessness, or who are at risk for it, form a natural base of political allies for homeless people. The more homeless people can resist being pathologized as deviant failures rather than viewed as ordinary people with problems that afflict or threaten to afflict many others, the more easily they will be able to build such alliances.

Rights of access to public property, even in the form of safe zones, might play a useful role in organizing by homeless people and their allies. While some homeless people may become relatively isolated and nomadic, many others form semi-permanent communities, with both practical and spiritual benefits. For example, many homeless people work, and they can often count on someone in the encampment to watch their personal possessions during the day. Protecting and recognizing a number of safe zones or similar areas spread throughout the city, to a large extent reflecting pre-existing encampments at sites chosen by homeless people themselves from their admittedly limited options, could facilitate further development of community — especially if the encampments were protected from being arbitrarily closed down by local officials.[16] Further, the greater sense of personal security that freedom from constant police harassment would provide not only would be desirable in itself, but could also facilitate political organizing of homeless people in coalition with other groups.

In turn, even minimally enhanced possibilities of organizing might at least help make it possible for homeless people to put demands for housing, jobs, health care, and other needs on the political agenda with greater force. It could also help them resist the provision of such needs through disciplinary programs of the sort I have described. The key factor would be to make attempts to gain rights of access part of a broader political struggle to address the conditions that give rise to homelessness and near homelessness. In the context of that struggle, the potential for safe zones or other rights of access to be turned against homeless people would be diminished. …

The current political climate is, of course, far less conducive to organizing by any politically marginalized and oppressed group, including homeless people and their allies. There is always a risk that the organizational efforts will fail, and that rights of access will then more easily be deployed against homeless people. But only those who comfortably have nothing at stake — and homeless people are not among them — could take that risk as a call to inaction.

[12] *E.g.*, Fiore, *supra* note 39.

[13] *See Homeless Families Will 'Move In' to Housing Director's Office Today*, PR NEWSWIRE, Aug. 25, 1995 (available in Lexis/News File).

[14] *See* Christine Dempsey, *Assistant Registrar Named for Homeless*, HARTFORD COURANT, Aug. 19, 1994, at D4; Jerry Thornton, *Homeless Rise to Be Counted*, CHI. TRIBUNE, March 31, 1986, at 3.

[15] *See* Lucie White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271, 291-301 (1990-91).

[16] Indeed, such protection would be especially crucial, for political organizing would make homeless people at any given encampment even more visible, and therefore more vulnerable.

What is it about the homeless that inspires such overt antipathy from main? stream society? What is so special about their particular variety of deviance that elicits such a vehement and violent response to their presence? After all, "the homeless" as a class lack almost all indicia of societal power, posing no viable political, economic, or military threat to the dominant culture.

Demonization and Disease

In mainstream publications, both academic and journalistic, even depictions intended to be sympathetic to the homeless often contribute to a mindset of demonization. One of the most enduring signs of this is the association of homelessness with images of dirt, filth, decay, and disease. Henry Miller notes that historically the vagrant was seen as a person of "many vices and debilities; was sickly and suffered from the ravages of tuberculosis, typhus, cholera, scrofula, rickets, and other disorders too numerous to mention; was apt to be a member of the despised races; [and whose] life was characterized by all the usual depravities: sexual license, bastardy, prostitution, theft." Miller's analysis suggests two related strands that contribute to homeless stigmatization. The first arises from invocations of disorder, illegality, and immorality and leads to processes of regulation, criminalization, and enforcement. The second is the disease and decay image, which leads to processes of sanitization, sterilization, and quarantine. In a sense, these two spheres are inseparable, leading to the same ends of exclusion, eradication, and erasure. Both strands converge in another sense vis-a-vis the homeless who occupy spaces that, like themselves, are often viewed as dirty and disorderly and thus require regulation and sterilization; as Mike Davis opines, "public spaces," like the homeless, are imbued with "democratic intoxications, risks, and unscented odors."

The analysis in this essay considers the "disease" metaphor to be conceptually distinct from the "disorder" image. This arises out of the "Disneyfication" of urban space that geographers have often noted, since the Disney metaphor (and reality) is one of antiseptic sterility and disinfected experience, of shiny surfaces and squeaky-clean images.

In analyzing "new urban spaces," Wright thus observes: "In effect, street people, camping in parks, who exhibit appearances at odds with middle-class comportment, evoke fears of 'contamination' and disgust, a reminder of the power of abjection. Homeless persons embody the social fear of privileged consumers, fear for their families, for their children, fear that 'those' people will harm them and therefore must be placed as far away as possible from safe neighborhoods."

Disturbingly, many proponents of regulating and criminalizing the homeless readily embrace such disease metaphors and their ethnocidal implications. Robert Ellickson (1996), Yale Law School Professor of Property and Urban Law, for example, implicitly affirms the image through his "revulsion at body odors and the stink of urine and feces" (Waldron, 2000). "Others, including many city officials, celebrate gentrification for reversing urban decay and boosting the tax base. They often refer to it as 'revitalization,' drawing on the metaphors of disease, deterioration, death, and rebirth". As Jeff Ferrell observes, "drawing on evocative images of filth, disease, and decay, economic and political authorities engage in an ideological alchemy through which unwanted individuals become [a] sort of 'street trash' [and which] demonizes economic outsiders, stigmatizes cultural trespassers, and thereby justifies the symbolic cleansing of the cultural spaces they occupy." Countless newspaper editorials, including cartoons, contribute to these trends by depicting the homeless as vile, malodorous,

and dangerous which is starkly evident in an Arizana Republic editorial image of Tempe's major downtown thoroughfare, Mill Avenue.

Disorderly Conduct: The Absurdity of Anti-Homeless Legislation

It is not much of a stretch to move from this sense of "spatial cleansing" and "cultural sanitization" to patterns of criminalization and enforcement. As Smith notes, "increasingly, communities are using the criminal law to cleanse their streets of homeless survivors." Whereas the "disease" metaphor is predicated on a view of the homeless as physical pestilence, the "disorder" image upon which criminalization often is based arises from a view of the homeless as a "moral pestilence" and a "threat to the social order" .

Such tautologies were prominently displayed in an article written soon after passage of a Seattle ordinance that criminalized sitting on sidewalks:

> "This is not aimed at the homeless, it is aimed at the lawless," says Seattle City Attorney Mark Sidran. By "the lawless" Sidran and other city officials mean people who, lacking anywhere else to go, sit down on the sidewalk. Jim Jackson, an Atlanta businessman, confidently declares that his city's new laws will "not punish anyone but the criminal." San Francisco's Mayor Frank Jordan assures us that "homelessness is not a crime. It is not a crime to be out there looking like an unmade bed. But if criminal behavior begins then we will step in and enforce the law" .

The logical flaw in this "official" position is all too apparent: "But if criminal behavior begins .... " "We punish only the criminal." "It is aimed at the lawless." All of these statements are made in reference to conduct such as sitting on the sidewalk that, before passage of this recent spate of laws, had been legal and generally seen as innocent acts. Now, by virtue of a law prohibiting sitting, an entire category of people is made "criminal" for acts committed before the law existed! The lesson? If you want to eliminate a particular social class or subculture or deviant group, locate some behavior that is largely peculiar to that group and make it illegal.

Ferrell notes that the daily lives of the homeless "are all but outlawed through a plethora of new statutes and enforcement strategies regarding sitting, sleeping, begging, loitering, and 'urban camping." As Mitchell emphasizes, "if homeless people can only live in public, and if the things one must do to live are not allowed in public space, then homelessness is not just criminalized; life for homeless people is made impossible." The implications and intentions are all too clear:

> By in effect annihilating the spaces in which the homeless must live, these laws seek simply to annihilate homeless people themselves .... The intent is clear: to control behavior and space such that homeless people simply cannot do what they must do in order to survive without breaking laws. Survival itself is criminalized .... In other words, we are creating a world in which a whole class of people simply cannot be, entirely because they have no place to be .

Apology Rejected

With anti-homeless ordinances rapidly proliferating, their proponents and apologists have redoubled their efforts to construct justifications for laws restrict-ing conduct in public places. Standard justifications have included public health and safety, economics, and aesthetics .

Another theme of such "quality of life" campaigns, one that has become something of a mantra for its proponents, is the notion of "civility." As Ellickson predicted, "cities, merchants, and pedestrians will increasingly reassert traditional norms of street civility." One of the staunchest proponents of the concept has

been Rob Teir , who begins from a premise that public spaces are primarily spaces of commerce, shopping, and recreation. Teir laments that "homeless people have taken over parks, depriving everyone else of once-beautiful places," but believes that through "fair-minded law enforcement and 'tough love' ... urban communities can reclaim their public spaces." Another proponent similarly notes that a "perception grew that [the homeless], and not the community as a whole, 'owned' the areas they occupied," and concludes that efforts ought to be undertaken toward "reclaiming public spaces from 'the homeless"' . Likewise, Chuck Jackson , the director of a downtown Houston "business improvement district" , claims that the homeless have "colonized public areas." As Neil Smith points out, however, a more accurate label for such "civility" arguments is "revanchism," namely, the establishment of a vengeful policy bent on regaining original areas lost in war. "This revanchist urbanism represents a reaction against the supposed 'theft' of the city, a desperate defense of a challenged phalanx of privileges, cloaked in the populist language of civic morality, family values, and neighbor-hood security. It portends a vicious reaction against minorities, the working class, homeless people, the unemployed, women, gays and lesbians, immigrants."

Nonetheless, proponents such as Teir continue to argue that "measures aimed at maintaining street order help mostly the poor and the middle class [since] the well off can leave an area when it gets intolerable. It is the rest of us who depend on the safety and civility of public spaces." The problem is that it is precisely the "well-off' who have "stolen" and "colonized" the public places of the city, literally and legally converting supposedly prized havens of public space into exclusionary domains of private property. As Mitchell observes, the concept of "civility" has often been invoked historically "to assure that the free trade in ideas in no way threatened property rights." The essence of such "civility," then, is to protect and reinforce private property claims advanced by "urban stakeholders," including "central business district property owners, small business owners, real estate developers, and elected officials" . The Web site of the Downtown Tempe Community, Inc. , a pro-business lobbying entity, for example, emphasizes that "we seek ordinances that advance our strategy of order and civility in the public space. Working with our private property owners, we seek cooperation on interdependent security is-sues."8 The DTC further claims that such efforts have "made the downtown a safer place." It must be noted that images of "public safety" and "community standards" specifically exclude the homeless and the poor from participation, since these groups are constructed as not part of the community, the public, or those with a stake in political decisions and city affairs.

Breaking Down "Broken Windows"

Another significant justification for anti-homeless laws, one that has received much attention and critical treatment, is the "broken windows" theory. Originating in a landmark Atlantic Monthly article, the theory's chief proponents, James Wilson and George Kelling, argue that "disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken." The authors go on to hypothesize that "serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window." They conclude that "the police and the rest of us ought to recognize the importance of maintaining, intact, communities without broken windows." In other words, the aim ought to be the maintenance of communities without "broken people," since they represent the source and origin of the crime problem, the first step on the slippery slope from "untended property" to "un-tended behavior" to "serious street crime."

Robert Ellickson attempts to link one step to the next in this suspect syllogism: "A regular beggar is like an unrepaired broken window – a sign of the absence of effective social-control mechanisms in that public space .... Passersby, sensing this diminished control, become prone to committing additional, perhaps more serious, criminal acts."

[M]any scholars and commentators have de-nounced "broken windows" as discriminatory in intent and application, funda-mentally unfair, logically flawed, and unsupported by studies of criminality and behavior. Jeremy Waldron , for example, asks two related and pointed questions: "Relative to what norms of order are bench squatters or panhandlers or smelly street people described as 'signs of disorder' ?" and "What is to count as fixing the window, when the 'broken window' is a human being?" In addressing the first, Waldron's answer is in the form of a question reminiscent of objections raised to the "civility" proponents: "Are these the norms of order for a complacent and self-righteous society, whose more prosperous members are trying desperately to sustain various delusions about the situation of the poor?" In terms of the second, Waldron notes that "giving him money" is not an accepted response under the theory, nor is the provision of "public lavatories and public shower facilities. Instead, fixing the window is taken to mean rousting the smelly individual and making him move out of the public park or city square ... as though the smartest way to fix an actual broken window were to knock down the whole building, or move it to just outside the edge of town." Unless attention is paid to the factors contributing to what caused the window to break in the first place, "fixing" the window is only a band-aid solution, since more broken windows are likely to develop from the same socioeconomic conditions.

A final objection to "broken windows" as social policy is suggested by Waldron in the implicit derogation that comes when human beings are compared "even figuratively to things." Waldron wonders what would have ensued if Wilson and Kelling's article had been titled "Broken People." The central premise of the theory thus rests on a blatant form of dehumanization, figuratively in its principles, but literally in its widespread deployment as the cutting edge of urban social policy. This is another way of expressing the tired and dangerous characterization of the homeless as pathological deviants or structural victims and serves to undermine their agency, autonomy, and dignity. However, the impressive adaptability, social solidarity, and inherent resistance often dem-onstrated by street people and their communities of coping effectively rebut such dominant conceptions.

Policing "Pleasantville": The Private Security Matrix

Business improvement districts play a role in policing entertainment districts in particular and urban space in general, since "the typical BID involves a quasi-law enforcement force whose job includes, in large part, removing people who appear to be homeless from the BID areas" . Besides "arresting beggars" , BIDs "typically focus on 'broken win-dows' in the literal sense, cleaning streets and providing a visible, uniformed presence, all toward the goal of making public spaces more inviting" .12 Kelling and Coles note that many BIDs have a "uniformed presence" that often serves as the "eyes and ears" of the police, and they are in "radio contact with the police, and are trained to report suspicious behavior."

Thus, Jones and Newburn discern that "a 'new feudalism' is emerging, in which private corporations have the legal space and economic incentives to do their own policing. In this view, mass private property has given large corporations a sphere of independence and authority which can rival that of the state."

Leonard C. Feldman, Citizens Without Shelter: Homelessness, Democracy, and Political Exclusion (2004)

CRIMINOLOGICAL JUSTIFICATION OF THE NEW POLICIES: BROKEN WINDOWS, CITIZEN FEAR, AND FUTURE CRIMINALITY

The "broken-windows" theory of disorder and crime, and its order-maintenance prescriptions, have played a significant role in justifying the new public-space ordinances. For instance, in *Young v. New York City,* a case concerning a panhandling prohibition in New York City subways, a New York federal court heard testimony from George Kelling, one of the authors of *Fixing Broken Windows,* and cited that study approvingly in upholding the prohibition. Several other courts have discussed the broken-windows approach to "disorder" in public spaces in order to establish that a significant or compelling government interest is served by the statute under review. The broken-windows theory is, I argue, a modified version of the future-criminality justification for vagrancy law. Accompanying *both* the vagrancy/production and homelessness/consumption regimes is the criminological theory that seemingly innocuous behavior (loafing, begging, sitting, panhandling) breeds crime. There is also an important difference, however. Whereas the criminological theory underlying the vagrancy/production approach articulated a *direct* link between vagrancy and crime (vagrants turn into criminals without the discipline of forced labor), the contemporary anti-homeless approach articulates a *mediated* link: panhandlers present the appearance of disorder that signifies to others (criminals) that the space lacks the social controls needed to stop crime.

The broken-windows argument starts with a metaphor—a metaphor that brings to mind other metaphors, such as domino theories and slippery slopes, concerning the descent into disorder when an initial event is not prevented. The claim is that a single broken window left unrepaired signals to passersby that no one cares and therefore breaking more windows is cost free; likewise, disorderly conduct in public space, left uncorrected, signals that the mechanisms of social control are in abeyance and therefore criminal acts can flourish. Kelling and Coles state that "disorderly behavior unregulated and unchecked signals to citizens that the area is unsafe. Responding prudently, and fearfully, citizens will stay off the streets, avoid certain areas, and curtail their normal activities and associations." These prudent and fearful citizens, in withdrawing from public space, "also withdraw from roles of mutual support, . . . thereby relinquishing the social controls they formerly helped to maintain." The result is "increasing vulnerability to an influx of more disorderly behavior and serious crime."[80]

In the original *Atlantic Monthly* article on the broken-windows theory of crime, Kelling and James Q. Wilson seem to suggest that disorderly behavior such as public drinking, loitering by groups of youths, and

panhandling (which appears to be their preoccupation) sends two distinct signals to two groups. To "citizens," the message is to stay away and be afraid. To "criminals," the message is to come and capitalize on the absence of informal social-control mechanisms: "Disorderly behavior unregulated and unchecked signals to citizens that the area is unsafe [while] muggers and robbers, whether opportunistic or professional, believe they reduce their chances of being caught . . . if they operate on streets where potential victims are already intimidated by prevailing conditions. If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger." In the broken-windows theory, panhandlers do not become criminals, but they are crimogenic. They frighten upstanding citizens, create a climate of fear and intimidation that is receptive to crime, and send signals to criminals that this climate exists: "Serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window."[81] From vagrancy as a moral pestilence and the vagrant as the "chrysalis" to the panhandler as "the first broken window": both metaphors concern future criminality, but the broken-windows theory places citizen fear and withdrawal as the mediating link between panhandling and more serious crime.

This more complicated version of the future-criminality argument (an argument rejected by Justice Douglas in *Papachristou*) recasts the "moral disease" of vagrancy into a behavioral analysis of public spaces. Just as emphasis on "conduct" avoids overt criminalization of suspect identities, the broken-windows justification of conduct-based ordinances avoids any claims about the vagrant or panhandler's character and immorality; it is a new criminological vision or theory unmoored by the deep chains of pathology and criminal identity. Nevertheless, the broken-windows discourse succeeds in dividing the world into two groups: upstanding but fearful citizens who prudently avoid disordered public spaces, and homeless panhandlers who are the personification of broken windows. Although Kelling and Coles claim to have avoided the criminalization of status via a focus on behavior, their "text of behavior is in need of a subtext of identity," as Schram puts it in the context of welfare reform.[82] They find it in the irresponsible panhandler-as-broken window.

If the key mediator between disorder and crime is citizens' fear of disorder, one might ask whether their fear of panhandlers is justified. Does citizen fear of some kinds of disorder reflect prudence and citizen fear of other forms reflect prejudice? Such questions cannot be asked within the broken-windows theory, because citizen fear of disorder turns out to be its

own justification. Kelling and Coles claim that it is "neither an unreasonable nor extreme reaction, since disorder does indeed precede or accompany serious crime and urban decay."[83] But disorder, they argue, leads to crime *because* citizens fear it and withdraw from public spaces. Thus they create an undifferentiated category of disorder and, in a circular argument, close off questions about the reasonableness of citizen fear.

That citizen fear of homeless persons and panhandlers is central in the creation of public-space restrictions can be seen in the lead-up to the passage of the Baltimore City Council's aggressive-solicitation ordinance: a "Security Task Force" made up of members of the Downtown Partnership (which administers a "special taxing district" and provides "supplementary security" as part of the blurring of private/public boundaries in urban spaces), city officials, police officers, and "community representatives" issued a report on "people causing anxiety" and concluded that "two discrete populations of people . . . cause much of the public anxiety downtown: aggressive beggars or panhandlers who intimidate and harass other individuals, and the hardcore homeless, whose situations are exacerbated by a range of economic, physical, or social problems."[84]

Even if we grant Kelling and Coles's claim that citizen fear of panhandlers and homeless persons leads to crime because fearful citizens withdraw from public spaces and create crimogenic conditions, our effective responses are not limited to the prohibition of panhandling and public sleeping. We might instead break out of the circularity of the argument, questioning whether such fear is justified, and whether a more appropriate response is for domiciled citizens to refuse sanctuary in their fear, and to remain engaged in public spaces with "social disorder."

This is the recommendation of Richard Sennett, who, in *The Uses of Disorder,* urges urban dwellers to overcome a desire for complete control and certainty and to become receptive to disorder, uncertainty, and difference. Urban planning and policy, according to Sennett, should be oriented toward fostering unplanned encounters between strangers to help them overcome their fears of disorder and difference. Such unplanned encounters would permit the experience of difference in a milieu that prevents those differences from being converted into otherness. Sennett claims that "what should emerge in city life is the occurrence of social relations, *and especially relations involving social conflict,* through face to face encounters." He argues that when day-to-day conflictual contact with strangers (who are the bearers of difference) is lacking, reified, purified identities will form. These purified selves, "unused to the daily shocks of confrontation and the expression of ineradicable conflict, react with . . . volatility to the disorders of oppressed

groups in the city, and meet the hostility from below with an oppressive hand." Day-to-day contact with strangers prevents their becoming wholly "other"—not because one "sees past" the difference and "discovers" that these others are "really" no different from ourselves but, rather, because the demand for mutual survival, the reality of interdependence, the impossibility of withdrawal prevent the dynamics of identity/difference from taking an ugly turn: "Confronted with the need to act, to deal with human differences in order to survive, it seems plausible that the desire for a mythic solidarity would be defeated by this very necessity for survival."[85]

Sennett's reasoning suggests that even if broken-windows policing succeeds in excluding social disorder from the consumptive public sphere, domiciled citizens' fear of disorder will only increase as they become unused to face-to-face encounters with difference and, as Susan Bickford points out, they rely more exclusively on media stereotypes for representations of others who are "zoned out" of purified spaces. But Bickford also cautions against "demonizing fear as deeply undemocratic." It is no easy task to determine which citizen fears are justified and which are unjustified: "Sometimes . . . democratic politics requires citizens to act in certain ways in spite of fear and risk, and a political ethic of courage might help to revitalize democratic politics in an inegalitarian society. But surely public life cannot require of us that we never act on our fears. How do I know when to act against or in spite of my fears, and how do I know when my fear is discerning in a way that should guide my actions? These are challenging and disturbing judgments to make, and part of the uncertainty that enclosed spaces help us avoid is the uncertainty of how to act with respect to a disturbing stranger."[86]

It is important not to dismiss the fears of domiciled citizens in disorderly public spaces. But it is also important not to accept fear of disorder as an unquestioned basis of public policy, for the security that broken-windows policing and anti-homeless legislation create for the domiciled in public spaces is simultaneously the creation of insecurity for those who are excluded from the consumptive public sphere: "If the consuming white middle-class public comes to feel at risk in the presence of those who do not look or act like them, then purifying public space of risk for them means increasing danger, discomfort, or outright exclusion for those typed as alien or unknown."[87] The broken-windows argument closes off these lines of thought in a circular argument concerning citizen fear as both the (intermediary) cause of crime and the justification for the policing of disorder. Although Bickford is right to suggest that there is no easy answer to the question of when citizen fear of disorder is justified and reasonable and when it should

be overcome, one way of getting a better handle on this question is to disaggregate the forms of disorder that Kelling and Coles consistently conflate.

Indeed, a recent study of New York City panhandlers and sidewalk vendors suggests that the broken-windows theory may suffer from an unrigorous definition of disorder. Mitchell Duneier, in *Sidewalk,* discovers a complex urban ecology of panhandlers, vendors of printed matter, and the housed citizens who support them. Frequently, according to Duneier, panhandlers and vendors become the eyes and ears on the street that help to sustain social order. Some vendors and panhandlers do act abusively and seek to intimidate passersby, but for the most part, Duneier says, "their presence on the street enhances social order." Furthermore, their presence fosters the sorts of encounters across social and cultural boundaries that Sennett suggests can make citizens less fearful: the vendors' tables became "a site for the interaction that weakens the social barriers between persons otherwise separated by vast social and economic inequalities."[88]

Duneier suggests not that we abandon broken-windows approaches to policing but rather that they be better targeted so as to avoid the blanket harassment of street-dwellers, panhandlers, and sidewalk vendors. This requires us to refuse the easy identification of physical forms of disorder—literal broken windows, graffiti, and other vandalism—with actual existing persons: "How do Wilson and Kelling know when they see instances of *social* broken windows that tell potential criminals that they can break the law? 'Social disorder' is not the same as a public telephone that has been vandalized. The men working on Sixth Avenue may be viewed as broken windows, but this research shows that most of them have actually become public characters who create a set of expectations, for one another and strangers, . . . that 'someone cares.'"[89] Whereas Wilson and Kelling's assertion that "the panhandler is the first broken window" offers a new version of the future-criminality defense of vagrancy law, Duneier's study suggests that such forms of "social disorder" may neither warrant fear and withdrawal on the part of domiciled citizens nor send encouraging messages to opportunistic criminals.

An act relating to unauthorized public camping and public sleeping; creating s. 125.0231, F.S.; providing definitions; prohibiting counties and municipalities from authorizing or otherwise allowing public camping or sleeping on public property without certification of designated public property by the Department of Children and Families; authorizing counties to designate certain public property for such uses for a specified time period; requiring the department to certify such designation; requiring counties to establish specified standards and procedures relating to such property; authorizing the department to inspect such property; authorizing the Secretary of Children and Families to provide certain notice to counties; providing applicability; providing an exception to applicability during specified emergencies; providing a declaration of important state interest; providing applicability; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 125.0231, Florida Statutes, is created to read:

125.0231 Public camping and public sleeping.—

(1) As used in this section, the term:

(a) "Department" means the Department of Children and Families.

(b)1. "Public camping or sleeping" means:

a. Lodging or residing overnight in a temporary outdoor habitation used as a dwelling or living space and evidenced by the erection of a tent or other temporary shelter, the presence of bedding or pillows, or the storage of personal belongings; or

b. Lodging or residing overnight in an outdoor space without a tent or other temporary shelter.

2. The term does not include:

a. Lodging or residing overnight in a motor vehicle that is registered, insured, and located in a place where it may lawfully be.

b. Camping for recreational purposes on property designated for such purposes.

(2) Except as provided in subsection (3), a county or municipality may not authorize or otherwise allow any person to regularly engage in public camping or sleeping on any public property, including, but not limited to, any public building or its grounds and any public right-of-way under the jurisdiction of the county or municipality, as applicable.

(3) A county may, by majority vote of the county's governing body, designate property owned by the county or a

municipality within the boundaries of the county to be used for a continuous period of no longer than 1 year for the purposes of public camping or sleeping. If the designated property is within the boundaries of a municipality, the designation is contingent upon the concurrence of the municipality by majority vote of the municipality's governing body.

(a) A county designation is not effective until the department certifies the designation. To obtain department certification, the county shall submit a request to the Secretary of Children and Families which shall include certification of, and documentation proving, the following:

1. There are not sufficient open beds in homeless shelters in the county for the homeless population of the county.

2. The designated property is not contiguous to property designated for residential use by the county or municipality in the local government comprehensive plan and future land use map.

3. The designated property would not adversely and materially affect the property value or safety and security of other existing residential or commercial property in the county or municipality and would not negatively affect the safety of children.

4. The county has developed a plan to satisfy the requirements of paragraph (b).

Upon receipt of a county request to certify a designation, the

department shall notify the county of the date of receiving the request, and of any omission or error, within 10 days after receipt by the department. The department shall certify the designation within 45 days after receipt of a complete submission from the county, and the designation shall be deemed certified on the 45th day if the department takes no action.

(b) Except as provided in paragraph (e), if a county designates county or municipal property to be used for public camping or sleeping, it must establish and maintain minimum standards and procedures related to the designated property for the purposes of:

1. Ensuring the safety and security of the designated property and the persons lodging or residing on such property.

2. Maintaining sanitation, which must include, at a minimum, providing access to clean and operable restrooms and running water.

3. Coordinating with the regional managing entity to provide access to behavioral health services, which must include substance abuse and mental health treatment resources.

4. Prohibiting illegal substance use and alcohol use on the designated property and enforcing such prohibition.

(c) Within 30 days after certification of a designation by the department, the county must publish the minimum standards and procedures required under paragraph (b) on the county's and, if applicable, the municipality's publicly accessible websites.

The county and municipality must continue to make such policies and procedures publicly available for as long as any county or municipal property remains designated under paragraph (a).

(d) The department may inspect any designated property at any time, and the secretary may provide notice to the county recommending closure of the designated property if the requirements of this section are no longer satisfied. A county and, if applicable, a municipality must publish any such notice issued by the department on the county's and, if applicable, the municipality's publicly accessible websites within 5 business days after receipt of the notice.

(e) A fiscally constrained county is exempt from the requirement to establish and maintain minimum standards and procedures under subparagraphs (b)1.-3. if the governing board of the county makes a finding that compliance with such requirements would result in a financial hardship.

(4)(a) A resident of the county, an owner of a business located in the county, or the Attorney General may bring a civil action in any court of competent jurisdiction against the county or applicable municipality to enjoin a violation of subsection (2). If the resident or business owner prevails in a civil action, the court may award reasonable expenses incurred in bringing the civil action, including court costs, reasonable attorney fees, investigative costs, witness fees, and deposition costs.

(b) An application for injunction filed pursuant to this subsection must be accompanied by an affidavit attesting that:

1. The applicant has provided written notice of the alleged violation of subsection (2) to the governing board of the county or applicable municipality.

2. The applicant has provided the county or applicable municipality with 5 business days to cure the alleged violation.

3. The county or applicable municipality has failed to take all reasonable actions within the limits of its governmental authority to cure the alleged violation within 5 business days after receiving written notice of the alleged violation.

(5) This section does not apply to a county during any time period in which:

(a) The Governor has declared a state of emergency in the county or another county immediately adjacent to the county and has suspended the provisions of this section pursuant to s. 252.36.

(b) A state of emergency has been declared in the county under chapter 870.

Section 2. The Legislature hereby determines and declares that this act fulfills an important state interest of ensuring the health, safety, welfare, quality of life, and aesthetics of Florida communities while simultaneously making adequate provision for the homeless population of the state.

Section 3. Section 125.0231(4), Florida Statutes, as created by this act, shall take effect January 1, 2025, and applies to causes of action accruing on or after that date.

Section 4. Except as otherwise expressly provided in this act, this act shall take effect October 1, 2024.

Mitch Perry, Advocates hailed a new law to help stabilize FL's housing crisis, but implementation has been rocky, Florida Phoenix, Oct. 13, 2023

Local officials on the ground working to help alleviate Florida's housing crisis are now asking for a favor when the Legislature convenes in 2024: Fix the unintended consequences that came out of a signature policy initiative in the state Senate.

Florida lawmakers have already been hearing from elected local officials in the past few weeks, saying they need to readdress what's called the "Live Local Act," the new law that passed earlier this year to deal with issues that are hampering affordable housing and development in Florida.

"The Live Local Act, which I think your hearts are in the right place on it and we have a real workforce housing problem here in Hillsborough County, but what it does is it bypasses us as a local government when it comes to the land use and zoning," Hillsborough County Commissioner Michael Owen, of Tampa Bay, said at a legislative delegation last month. "I would ask that you all take a look at it next year."

That was a reference to the law that says a proposed development need only be "administratively approved" without having to get approval by a board of county commissioners if the project satisfies certain regulations.

Another twist? The law allows housing to be built in areas previously zoned only for industrial purposes.

At another recent legislative delegation meeting — in Pasco County — County Commissioner Jack Mariano said the Live Local Act was a "great thing for a lot of areas." But he added that the law is also detrimental to long-term efforts by county officials to bring more businesses to the area, now that housing developments are allowed to be built in areas zoned as industrial.

Overall, officials in other communities say they're grateful for the hefty pot of state money — $711 million that was listed as the appropriation for the Live Local Act initiative, according to legislative records. But at the same time, they're unhappy about the law's inability to account for the unique characteristics inherent in each community when it comes to their comprehensive plans, by imposing a "one-size" fits all framework.

Florida's two-month legislative session will begin Jan. 9, 2024, and some local government officials have been calling on state lawmakers to file a "glitch" bill even before the new session begins in January.

The Senate moved quickly

The Live Local Act was Senate President Kathleen Passidomo's signature policy initiative going into the 2023 legislative session, and the bill moved quickly through both legislative chambers last spring.

Some Democrats criticized the measure for banning local governments from implementing rent control laws, but the legislation passed unanimously by the Senate on just the second day of the session. The House passed it a few weeks later and Gov. Ron DeSantis signed it into law in March.

The law gives tax breaks to developers who create multifamily and mixed-use residential properties with at least 70 units in any area zoned for commercial, industrial or mixed-use if at least 40% of those units are dedicated to affordable units for a period of 30 years.

But there's been pushback from local officials.

“I think it’s too early to really know all the potential unintended consequences of this legislation,” says Seminole County Commissioner Lee Constantine, in east Central Florida.

In his role as the [now former] president of the Florida Association of Counties, Constantine says he and his staff worked with Senate President Passidomo and her staff on suggestions as the bill was being drafted. He says the organization supported the proposal mostly because of the additional funding for state housing programs.

“Clearly the funding was needed and important, but we have never made any bones about the fact that we felt that there were some things that we did have concerns about,” he said about the final legislation. “Primarily taking away local governments ability in certain situations to govern when it comes to zoning and comp plans and we did feel that there would be, and we have suggestions for working towards suggestions on a glitch bill this year.”

Killing a crucial goal

Located on the west-central coast of Florida, Pasco County has been known as a bedroom community for people who work in Tampa and St. Petersburg because of its lower housing costs.

Local officials have worked for decades on recruiting more businesses in Pasco communities. But allowing housing to be built in areas zoned as industrial —now in the new law — will kill that crucial goal.

“Right now, 43% of our workforce commute outside the county, and it’s really what we call a talent drain,” says David Engel, the economic growth director for Pasco County.

“Our goal for a number of years is to balance our community so that we have job opportunities for our local labor force to avoid commuting ten to twelve hours a week in a car and causing our roadways to clog. So when we start taking indiscriminately industrial zoned areas that were earmarked for employment and we start inserting affordable housing projects inside of them, it causes quite a setback for us, because the employment is essential.”

Engel is an urban planner who was involved in housing policy for decades in New York.

“We applaud the state of Florida for providing some types of revenue, but to put a predominant amount of burden on counties and localities like Pasco County is not reasonable,” he says. “It undermines the broad approach of dealing with our workforce and affordable housing issues for our unmet needs. And it’s something that we would respectfully request be reconsidered.”

A six-month moratorium

In Doral, about 13 miles west of Miami, Mayor Christi Fraga and the city council approved a six-month moratorium on new development applications earlier this summer to give the city time to consider potential changes to its comprehensive plan and land development regulations in reaction to passage of the Live Local Act.

Fraga says that was needed to contend with a proposal from a South Florida developer that came to her before the Live Local Act passed this spring. The development includes the construction of 623 new apartments in five towers between 10 and 12 stories tall, according to the South Florida Business Journal. The new law says a city or county may not restrict the height of a proposed development below the highest currently allowed for commercial or residential development within one mile of the development or three stories, whichever is higher.

"I felt it was just not consistent with that area – not anything that we would allow with our zoning code – and I rejected his proposal right from the start and just told him that it was definitely not something that anybody would be willing to welcome in that zone or that area, especially with the kind of zoning that he had," she says. "And that's when he told me that he was keeping an eye on the Live Local Act and if it passed, he was going to be utilizing the law." (The developer – the Apollo Companies – did not respond to multiple requests for comment).

Fraga calls the Live Local Act another preemption bill that takes powers away from local governments when it comes to land use decisions. She says the moratorium was needed because the law didn't create any procedures for cities to implement any safeguards.

"There was nowhere where our code could address applications such as the one we saw on a parcel that is 18 acres next to a traditional neighborhood with potential 14-story buildings," she says.

The legislation's criteria for what qualifies as an affordable housing project was expanded to include households who make up to 120% of average median income (AMI). That means that in a place like Miami-Dade County, a single person making up to $81,960 or a family of four making up to $117,000 is now eligible.

20 Local Live Act projects

Take for example the case of a proposed development on a closed golf course in Plant City, located east of Tampa in Hillsborough County. The planning board there has twice rejected a mixed-use proposal as being incompatible with the local community. But unbowed and undeterred, the developer, Walden Lake LLC, recently resubmitted a new proposal which they say will now qualify as a Live Local Project, according to the Plant City Observer.

The proposal has 1,530 multifamily units and 468 townhome-style units made up of studio, one and two-bedroom unit up to three stories high.

The attorney representing Walden Lake LLC, Jacob T. Cremer, a partner with Stearns Weaver Miller in Tampa, said that his firm learned about the Live Local Act after the Plant City planning board rebuked their proposal for a second time earlier this year.

That's when they pivoted towards providing more affordable housing in their package under the law to get it through a third time. And under the Act if it does receive administrative approval from Plant City, they won't need to go through the planning board – meaning that the public won't have the ability to weigh in on it.

Nick Brown is president of Save Walden Lake, a neighborhood association that has been opposing plans for developing that area for years. He says he appreciates the intent of the Live Local Act to "enable schoolteachers, policemen and firemen to be able to live close to where they work." But he says that the developer's new proposal is a complete "perversion" of the intent of the law, and says that his group is prepared to legally challenge it if it moves forward.

For his part Cremer says his firm is now working on upwards of twenty Local Live Act projects. He says developers are still trying to figure out if they can take advantage of the law so it works for them.

"The 40% affordable housing requirement is pretty substantial and so they have to make sure that it works for their investors and their lenders," Cremer said. "So that takes a lot of time on the front end and we're finding that it takes a long time to work with the local governments on these

submittals because this is cutting edge stuff…when you're working on something cutting edge like this, it does take some time to figure it out and see how it works and work through the kinks."

A spokesperson for Senate President Passidomo tells the Phoenix that it's too soon right now to determine whether any changes need to be made to the legislation.

"President Passidomo has been monitoring the implementation of Live Local over the summer, and she is familiar with the concerns raised by local government," said Katie Betta, deputy chief of staff for communications. "She is always open to listening to local concerns – Live Local is the product of listening to such concerns over many years. As we … prepare for the upcoming session in January, she will continue to monitor the implementation closely."

Deborah Acosta, Florida's Live Local Act Sparks New Wave of Housing Legislation, Wall Street Journal, Dec. 12, 2023

Less than six months after Florida enacted legislation to encourage more workforce housing, dozens of developers are rushing ahead with projects that qualify for tax breaks under the new law.

The legislation, known as the Live Local Act, offers developers tax breaks and allows them to bypass local zoning rules if enough workforce housing is built. The act is meant to create more housing for middle-income renters who make 120% of an area's median income or less.

Many teachers, paralegals and other professionals have been squeezed out of Miami, Tampa and other expensive Florida cities as rents soared.

Real-estate lawyers say they are working overtime so that their clients' projects qualify for tax breaks next year.

"I have them in every major city—Tampa, Orlando, Miami—and we're in a mad dash to get them done," said Anthony De Yurre, a lawyer at Bilzin Sumberg who says he's personally handling more than 40 different Live Local projects.

In some instances, developers are switching from pure market-rate projects to ones that include workforce housing to take advantage of the tax incentives.

Cymbal DLT, a developer that specializes in market-rate multifamily housing, was already halfway through construction on its latest project when the Live Local Act was enacted. Now, all 341 units in the Laguna Gardens project will be workforce housing.

Asi Cymbal and Hector Dela Torres, the top two executives at Cymbal DLT, refer to their project as "attainable luxury" because the apartments are open with floor-to-ceiling windows, thick soundproof walls between units and lush walking paths and a large pond.

"There's been a lot of talk about creating attainable luxury in South Florida and there wasn't a vehicle like this to make it available to our community," said Dela Torres, who like his partner grew up in government-subsidized housing in New York City.

Miami developer Matt Martinez has focused on multimillion-dollar homes, shopping centers and other commercial properties. But as soon as the new legislation went into effect, he purchased more than 2 acres of land near the city of Homestead in Miami-Dade County to develop multifamily garden-style apartments for workforce housing.

"Our type of deals wouldn't necessarily pencil without the benefit," said Martinez. "Our plan is to build 1,500 workforce housing units in the state of Florida over the next five years."

South Florida wasn't hurting for new rental housing before the Live Local Act. Developers have swarmed the Miami region to build more apartments as a share of inventory than in any other major metropolitan area. But about 90% of the rental projects under construction are luxury units, according to data firm CoStar Group.

The Miami metro area also has the highest share of so-called cost-burdened renters of any major U.S. metropolitan area: 61% of its rental population are spending 30% or more of household income on housing, according to a report released this year by the Joint Center for Housing Studies at Harvard University.

Many politicians felt the state needed to do something, and the Live Local Act received broad bipartisan support when it passed in March.

Still, not everyone in the state has been pleased with all the results. Some projects, like a residential building that would tower over the rest of Miami Beach's Ocean Drive, are already getting pushback from the city's mayor and other locals. Another municipality, Doral, enacted a six-month moratorium on any Live Local Act developments.

But more transplants to the state are making use of the act to build. James Curnin left New York City to build luxury homes in Miami Beach and then multifamily apartments in Miami's Bay Harbor.

In October, he went into contract on land in Miami's Wynwood neighborhood to develop apartments in an area that is zoned industrial. If it weren't for the new law, Curnin wouldn't have bought the land, he said, because the land was zoned to allow for only 14 units.

"I can put 150 apartments here, so it made the numbers make a lot more sense," he said. While 40% of the units will be workforce housing, he's planning to make them all luxury, with finished closets, high-end amenities, and a rooftop padel court.

.

Lawrence Mower & Barbara Behrendt, Lawmakers look to fix affordable housing act after outcry across state, Tampa Bay Times, Feb. 9, 2024

TALLAHASSEE — When Florida lawmakers passed legislation to create thousands of affordable housing units last year, it was considered long-overdue relief for low- and middle-income Floridians.

The Live Local Act, as it was called, was a top priority for the Senate president, and no one blanched at its $711 million price tag.

Less than a year later, communities across the state are in uproar. Local officials complain of proposed developments ruining the character of neighborhoods. Some say they've lost control of local planning.

And the law has allowed developers to avoid millions in local taxes without providing much affordable housing for lower-income residents.

A report on one of the bill's key components shows that fewer than 500 new apartments meriting tax breaks are affordable for Floridians earning 80% or less of the median income.

Senate President Kathleen Passidomo, R-Naples, and other state lawmakers have recognized the outrage. The Senate on Wednesday unanimously passed a "glitch" bill addressing some — but not all — of the complaints. The legislation still has to pass the House.

Passidomo said she wants to keep working with local governments, and the law could change in future years to accommodate complaints. But she said the Live Local Act's success will take years to realize.

"The market is going to dictate what is going to be built," she said. "We have to let this play out."

That's little comfort to local officials who believe the legislation hasn't delivered enough affordable housing.

"It's absolutely absurd," said Pasco County Commissioner Jack Mariano after watching the bill pass on Wednesday. "It doesn't help the regular working people."

"Historic" housing support

After years of inaction, last year's Live Local Act was considered Florida's most meaningful housing legislation in decades.

Instead of continuing the Legislature's trend of reassigning affordable housing money, the act devoted a record amount of funding to encourage building. Another $100 million went to no-interest loans for Florida workers.

And apartment developers were given tax incentives if they designated at least 70 units as affordable housing, available to people earning up to 120% of the area's median income. In comparison, the state's affordable apartment-building program focuses on units serving people earning only up to 60% of the area's median income.

The goal was to create more workforce housing — and to break local governments' grip on new developments.

After seeing communities reject affordable housing projects, Passidomo wanted Live Local to cut through red tape. The act did just that, allowing affordable housing developments to bypass zoning, density and height requirements.

Communities were anxious over losing control, and some advocates noted that the legislation didn't appear to benefit Floridians making 60% or less of area median income, a level that affordable housing buildings have traditionally sought to help.

Still, the legislation sailed through the Legislature with bipartisan support and was praised by most affordable housing advocates for its record funding. Gov. Ron DeSantis called it "historic" while signing the bill.

After taking effect in July, it quickly prompted clashes between developers and local officials and residents.

Concerns over neighborhoods

In Miami Beach, the owners of the iconic Clevelander Hotel and Bar announced in September they wanted to replace the property with a 30-story tower, with 40% of units qualifying under the higher range of what the Live Local Act designated as "affordable." The mayor called it the "worst idea ever" because it would "destroy" the city's Ocean Drive skyline, and the owners shrank the proposal to 18 stories.

In Doral, a 17-acre high-rise development was proposed next to a community of two-story townhomes. City officials blocked it by invoking a six-month building moratorium. Projects in Weston and Hollywood also were met with resistance.

Few communities have been as vocal against the Live Local Act as Pasco County, which has ample housing but lacks enough jobs. In December, commissioners threatened to sue apartment developers that build on industrial or commercial property. County officials want to preserve those areas to attract jobs.

Senate Bill 328, approved Wednesday, addresses one of the concerns raised by local governments. It would prohibit developments from being higher than 150% of the next-tallest building if it's adjacent to a neighborhood of at least 25 single-family homes.

But it also prohibits communities from using other methods to restrict the size of buildings.

Sen. Alexis Calatayud, R-Miami, who sponsored the bill, called it an "enhancement" to the Live Local Act that preserves the "character of communities."

What's 'affordable'?

SB 328 does nothing to address some of the biggest complaints from communities: tax credits for housing that they don't consider affordable.

The Live Local Act gives apartment developers property tax exemptions of 75% or 100% if they offer at least 70 units that are affordable for households making up to 120% of the area's median income. In Tampa Bay, that's $104,280 for a family of four, according to federal data. It's $123,840 in Miami-Dade County.

Local officials say those standards stretch the definition of who would qualify for affordable housing. They say developers don't have to lower their rents to qualify for tax breaks. Meanwhile, those tax breaks could cost local governments millions in tax revenue.

In Gainesville, six of the seven apartment complexes that have applied for tax exemptions are student housing around the University of Florida, City Commissioner Bryan Eastman told a Senate committee last week.

Full-time college students usually don't qualify for affordable housing programs because students are often subsidized by student loans or their parents, Eastman said. The Live Local Act has no such exemption, and he said the tax exemptions could deprive the city of $3 million in revenue per year.

"A bill that was designed to house low-income residents may be used to give tax exemptions for luxury student housing," Eastman said.

Data from the first six months of the Live Local Act shows that 83 apartment complexes around the state met standards for credits. Those complexes listed 40% of their inventory — about 9,500 units — as affordable under the Live Local Act's more generous definition of households earning 120% of the area median income.

Less than 500 units were designated for people who earn 80% or less of the area median income — $82,560 for a family of four in Miami-Dade County and $69,520 in Tampa Bay.

In Pasco County, two existing apartment complexes that tout "luxury" features have applied for tax credits. The website for Tapestry Cypress Creek offers a clubhouse and saltwater pool. The Gallery at Trinity Apartments features pickleball and an "elite" putting green.

Collectively, the two complexes applied for tax credits because 266 of their 629 units qualify for 120% of the area's median income. None were below 80%. The owners of the apartments have not responded to requests for comment.

When asked by a fellow senator about "luxury" apartments qualifying for tax credits, Calatayud said it "meets the spirit of the legislation" as long as the units are 10% below market rate.

"So good on those Pasco guys that get to move into there," Calatayud said.

David Goldstein, Pasco County's chief assistant county attorney, sent demand letters Wednesday to the two complexes asking them not to apply for the exemptions or to rescind them, claiming the tax credits are unconstitutional because the developments are not a charity. Those tax breaks could cost county coffers as much as $86 million through 2059.

The letter states that the rents charged for a two-bedroom apartment in the complexes "are not affordable to the average Pasco County sheriffs deputy, firefighter or school teacher."

According to federal guidelines, the area median income in Pasco County, which is lumped into the Tampa Bay area, is $89,400. At 120%, a one-bedroom apartment is considered affordable up to $1,957 per month. A two-bedroom would be $2,349.

The Tampa Bay area including Pasco already has a surplus of rental units serving people earning between 80% and 120% of the median income, said Mariano, the Pasco commissioner. He pointed to University of Florida data that shows the area lacks about 380,000 cheaper units — one-bedrooms that cost no more than $1,305 per month and two-bedrooms under $1,566.

Pasco argued to state leaders that the existing Live Local income targets for affordable housing don't meet what Pasco needs, and proposed language to allow each community to define its need.

"It just can't be a one-size-fits-all solution," Pasco County Commissioner Kathryn Starkey told the Tampa Bay Times. She called the tax exemption "corporate welfare."

"It's a tax giveaway with no benefit whatsoever."

Miami Herald staff writer Aaron Leibowitz contributed to this report.

Aaron Leibowitz & Ana Ceballos, Bill making it easier to demolish historic Florida buildings heads to DeSantis' desk, Miami Herald, 03/06/2024

Legislation giving developers more power to knock down historic buildings near Florida's coast without interference from local governments is heading to Gov. Ron DeSantis' desk.

The Florida House passed the measure on an 86-29 vote on Wednesday, despite objections from city officials and historic preservationists in Miami Beach who said the bill threatens to wipe out some of the city's iconic Art Deco architecture. Lawmakers from the Tampa Bay area also raised concerns about the impact potential developments would have on vulnerable coastal communities.

An art piece is pictured in front of the Faena Miami Beach on Nov. 12, 2022. The Faena is one of many historic Art Deco buildings in Miami Beach that would be more difficult to preserve under legislation heading to the desk of Gov. Ron DeSantis.

The proposal has been retooled since last year, when similar legislation passed in the Senate before dying in the House amid an uproar from residents in Miami Beach and several other coastal communities.

Language that could soon be signed by the governor now would exempt St. Augustine, Key West, the town of Palm Beach and buildings along Ocean Drive in South Beach, House sponsor Spencer Roach, R-North Fort Myers, said Tuesday during debate on the bill.

But many buildings in the Mid-Beach and North Beach neighborhoods of Miami Beach could still be affected. That includes Art Deco hotels along Collins Avenue like the Faena, Sherry Frontenac, Casablanca and Carillon.

The legislation would also limit the power of local historic preservation boards like the one in Miami Beach, which has the authority to dictate whether historic structures can be demolished and mandate that certain elements be preserved when structures are rebuilt. About 2,600 buildings in Miami Beach are part of locally designated historic districts.

Proponents of the bill say the changes are crucial to ensuring building safety and resiliency against flooding near Florida's coast — and that local governments can sometimes frustrate that goal by preventing old structures from being knocked down.

"The problem we are trying to solve is that we have some local jurisdictions where the governing body — and sometimes this is even outsourced to a local historic board, which in some cases they are acting as a de facto zoning commission — [is] arbitrarily denying someone's permit to demolish a structure and rebuild a new structure," Roach said during Tuesday's debate. "What we are trying to get rid of is the unfairness of a governing commission violating their own zoning standard arbitrarily and capriciously."

Roach emphasized that his legislation doesn't override local zoning requirements and that any new structure built in place of one that is demolished would need to conform to local regulations. (A different piece of legislation known as the Live Local Act, which became law last year and was revised during this year's

legislative session, does allow developers to sidestep local zoning if they agree to build workforce housing.)

Four House Republicans voted against the bill, including Fabian Basabe of Miami Beach and Linda Chaney of St. Pete Beach. Several Miami-Dade and Tampa Democrats were also among the "no" votes: Christopher Benjamin and Felicia Robinson of Miami Gardens, Kevin Chambliss of Homestead, Ashley Gantt of Miami, Dotie Joseph of North Miami, Michele Rayner and Lindsay Cross of St. Petersburg, as well as Susan Valdes, Dianne Hart and Fentrice Driskell of Tampa.

Cross said Wednesday that she worries Roach's bill will have a negative impact on coastal communities and unfairly force local governments to allow the maximum height and density permitted for new structures after an older building is torn down. She said cities should have been given more flexibility and an opportunity to show they are taking "common-sense steps" to protect against storms and flooding.

"Raising building standards for new construction is actually the right thing to do, but not everything needs to be built to the maximum height and building size," Cross said.

Daniel Ciraldo, executive director of the Miami Design Preservation League, which advocates for preserving Art Deco structures in Miami Beach, said the bill is the latest example of Tallahassee lawmakers preempting local governments from making decisions about their own communities.

"We think that local community planning and consensus building is the best way to make your community resilient," Ciraldo said in an interview Wednesday. "These folks in Tallahassee are writing laws that are impacting places around the state where they don't live."

WHAT AREAS WILL BE AFFECTED?

The legislation would apply to buildings that sit at least partially on the seaward side of the state's coastal construction control line, a boundary that hugs the coast and is meant to restrict construction near beaches. Such buildings could be subject to demolition in three cases: if they do not meet FEMA flood codes, are deemed unsafe by a local building official or are ordered to be demolished by a local government.

Exemptions from the new rules include single-family homes; buildings individually listed in the National Register of Historic Places, like the Fontainebleau in Miami Beach; buildings in historic districts listed in the National Register of Historic Places before 2000, like the Miami Beach Architectural District in South Beach; and buildings on barrier islands with fewer than 10,000 residents.

Last week, the Florida Senate approved the bill with just two "no" votes: Shevrin Jones, D-West Park, whose district includes parts of Miami Beach, and Lori Berman, D-Boynton Beach. Sen. Jason Pizzo, D-Miami, and Sen. Tracie Davis, D-Jacksonville, did not vote.

Jones had proposed an amendment sought by the Miami Design Preservation League that would have removed the provision that says coastal buildings could be demolished if they don't meet FEMA standards for flood-resistant materials and elevated structures in vulnerable areas. Preservationists say few historic buildings conform to those rules.

The Senate bill's sponsor, Bryan Avila, R-Miami Springs, called the amendment "unfriendly" before it failed.

MIAMI BEACH LEADERS PUSH BACK

At a committee hearing last month, Miami Beach City Commissioner Alex Fernandez said the system the city has in place doesn't need to be changed. Miami Beach officials have worked cooperatively with owners of historic buildings to revitalize several Art Deco gems, he noted, including a $500 million

renovation of The Raleigh and an $85 million makeover of the Shelborne.

An amendment that would have allowed local governments to consider the impact of new development in a particular coastal area was voted down Tuesday. The sponsor of that proposal, Rep. Cyndi Stevenson, R-St. Johns, said demolition of coastal structures isn't always the best approach.

"Building back bigger and stronger is not the best solution in all locations in our coastal high-hazard areas, but it is certainly a step ahead in some areas," Stevenson said. "Intensive construction on our vulnerable coast is one of the reasons we are experiencing [high] insurance costs."

AUGUST 8, 2023

Florida's New Live Local Act Offers Land Use and Tax Benefits

Holland & Knight Alert

Pedro Gassant | Alessandria San Roman | Lawrence E. Sellers

PDF

Highlights

- Florida Gov. Ron DeSantis signed into law Senate Bill 102, the Live Local Act (the Act), on March 28, 2023, with an effective date of July 1, 2023.
- The Act mandates that a local government authorize the development of multifamily rentals on sites that are zoned as mixed-use residential, commercial or industrial if at least 40 percent of the residential units in a proposed multifamily development will, for a period of at least 30 years, be affordable to individuals making up to 120 percent of the local area median income (AMI).

- In addition, a county or municipality must apply the highest "allowed" density on any land within its jurisdiction to the proposed multifamily development, while the maximum height is determined based on the highest currently allowed height for commercial and residential development located within 1 mile of the proposed development. At a minimum, the Act mandates that a local jurisdiction allow the proposed development to build to a height of three stories.
- The Act provides that certain developments will be eligible for a 75 percent or 100 percent ad valorem tax exemption, depending on the level of rent restriction for the units, which will first apply to the 2024 tax roll and require a certification notice issued by the Florida Housing Finance Corporation (FHFC).

Florida Gov. Ron DeSantis signed into law Senate Bill 102 on March 28, 2023, with an effective date of July 1, 2023. Commonly referred to as the Live Local Act (the Act), it has significant land use, zoning and tax benefits that will now be available to developers and investors. This Holland & Knight alert provides a general outline of the Act's impact on land use and zoning, as well as a general summary of the Act's benefits from a tax perspective.

Land Use and Zoning Benefits

The Act mandates that a local government authorize the development of multifamily rentals on sites that are zoned as mixed-use residential,[1] commercial or industrial if at least 40 percent of the residential units in a proposed multifamily development will, for a period of at least 30 years, be affordable to individuals making up to 120 percent of the local area median income (AMI), referred to as the Threshold Requirement.

The Act provides that a county or municipality cannot require a proposed multifamily development that will comply with the Threshold Requirement to obtain a land use, zoning, special exception, conditional use approval, variance or comprehensive plan amendment with respect to building height, zoning and density.

Once a multifamily project complies with the Threshold Requirement, a county or municipality must apply the highest "allowed" density on any land within its jurisdiction to the proposed multifamily development. Furthermore, once a project complies with the Threshold Requirement, the local jurisdiction cannot restrict the height of the proposed development below the highest currently allowed height for a commercial or residential development located in the local jurisdiction within 1 mile of the proposed development. At a minimum, the Act mandates that a local jurisdiction allow the proposed development to build to a height of three stories.

There are a panoply of issues associated with the ability to utilize the Act. For example, there are various jurisdictions in South Florida that do not provide for a density per acre but provide for a "pool" of units that can apply to properties. Naturally, one of the questions that arises is regarding the "maximum" density in such jurisdictions. Notwithstanding such issues, the Act provides a path that certainly is tailored toward increasing the inventory of affordable and workforce housing in Florida.

Tax Benefits

The Act provides that certain developments will be eligible for a 75 percent or 100 percent ad valorem tax exemption, depending on the level of rent restriction for the units. If at least 71 units are affordable to natural persons earning up to 80 percent of the AMI,[2] then each unit provided to such persons qualifies for a 100 percent ad valorem tax exemption. If at least 71 units are affordable to natural persons earning more than 80 percent of the AMI and up to 120 percent of the AMI, then each unit provided to such persons is eligible for a 75 percent ad valorem tax exemption. These exemptions first apply to the 2024 tax roll and require a certification notice issued by the Florida Housing Finance Corporation (FHFC).

New Tax Exemptions

This exemption applies throughout Florida without further action by local governments.

The Act defines eligible property to include units in a "newly constructed" multifamily project containing more than 70 units dedicated to housing natural persons or families below certain income thresholds. Newly constructed is defined as an improvement substantially completed within five years before the property owner's first application for the exemption. The units must be occupied by such persons or families and rent limited so as to provide affordable housing at either the 80 percent to 120 percent AMI threshold. Rent for such units also may not exceed 90 percent of the fair market value rent as determined by a rental market study. If an occupied unit qualifies for this exemption and the following year it is vacant on Jan. 1, the vacant unit is eligible for the exemption provided it meets the other requirements and a reasonable effort is made to lease the unit to eligible persons or families.

Units subject to a recorded agreement with the FHFC under Ch. 420, F.S., to provide affordable housing and property receiving an exemption under Section 196.1979, F.S., as created by a local affordable housing exemption ordinance, are not eligible to receive this exemption.

Procedure

The exemption first applies to the 2024 tax roll and will be repealed on Dec. 31, 2059.

To receive this exemption, a property owner must 1) file a certification form with the FHFC and 2) submit an application by March 1 to the local property appraiser, accompanied by the certification notice from the FHFC.

As part of the FHFC certification process, a property owner must submit a request on a form that includes:

1. the most recent market study (the study must have been conducted by an independent certified general appraiser in the preceding three years)

2. a list of units for which the exemption is sought

3. the rent amount received for each unit

4. a sworn statement restricting the property for a period of no less than three years to provide affordable housing

The certification process is administered within the FHFC. The agency's responsibilities include publishing the deadline for submission, reviewing each request, sending certification notices to both the successful property owner and appropriate property appraiser, and notifying unsuccessful property owners with reasons for any denial.

Penalty

If the property appraiser determines that an exemption has been improperly granted within the last 10 years, the property appraiser must serve the owner with a notice of intent to record a tax lien. Such property will be subject to the taxes improperly exempted, plus a penalty of 50 percent and 15 percent annual interest. Penalty and interest amounts do not apply to exemptions erroneously granted due to clerical mistake or omission by the property appraiser.

For Further Assistance

If you have any questions or would like assistance regarding the recent Act requirements, please contact one of the authors.

Mischaël Cetoute, a former law clerk in the firm's Miami office, contributed to this alert.

Notes

[1] The zoning districts that comprise mixed-use districts are anticipated to be an issue in certain municipalities. For example, are Planned Area

Developments or Planned Developments mixed-use districts?

[2] In Miami-Dade, the area median income is $68,300. The upper income threshold for all of the programs (120 percent AMI) is $81,960. Miami-Dade County's Workforce Housing Development Program includes families whose incomes are within 60 percent to 140 percent AMI. Therefore, while units restricted from 120 percent to 140 percent AMI qualify in the county, the aforementioned units do not count toward the minimum of 70 units required by the Live Local Act.

Overview of the Live Local Act (SB 102)

May 9, 2023

AFFORDABLE HOUSING CATALYST PROGRAM

Sponsored by the
Florida Housing Finance Corporation

FLORIDA HOUSING COALITION

About the Florida Housing Coalition

- Statewide nonprofit organization that is primarily a training and technical assistance provider to local governments and nonprofits on all things affordable housing
- Our work covers:
  - Compliance with local, state, and federal affordable housing programs
  - Affordable housing program design
  - Capacity building for nonprofit housing providers
  - Land use planning for affordable housing
  - Research & data gathering
- We can provide free training & technical assistance to you under the Catalyst Program

Presenters

Kody Glazer,
Legal & Policy Director
Glazer@flhousing.org

Ali Ankudowich,
Technical Advisor
Ankudowich@flhousing.org

Live Local Act – topics covered today

I. Funding
II. Property tax incentives
III. Land use & zoning
IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

Live Local summary – array of affordable housing policies

- **Funding and tax credits.** Up to **$811 million** for affordable housing programs.
- **Tax incentives.** Three new property tax incentives and sales tax exemption for specified affordable housing developments.
- **Land use tools & role of local government.** Facilitating affordable housing in commercial, industrial, and mixed-use areas & more.
- **Publicly-owned land.** Encouraging local governments to adopt best practices.
- **State housing strategy.** State guidance on affordable housing policy.
- **Technical assistance.**

Live Local Act

Senate Bill 102
(Calatayud – Miami-Dade)

House Bill 627
(Busatta Cabrera – Miami-Dade)

Addresses a variety of housing policies including funding, tax incentives, and substantial amendments to the state's housing strategy.

3/8/23: Passed Senate unanimously

3/23/23: Passed House 103-6

3/29/23: Signed into Law

I. Funding

II. Property tax incentives
III. Land use & zoning
IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

What are the Sadowski Trust Funds?

Sadowski Housing Coalition
Housing = Jobs

- Established in 1992
- Consists of two trust funds:
  - **State Housing Trust Fund** – primarily funds the State Apartment Incentive Loan (SAIL) program
  - **Local Government Housing Trust Fund** – funds the State Housing Initiatives Partnership (SHIP) program
- Funded by a portion of documentary stamp taxes collected on real estate transactions
- Collections in the trust funds are directly tied to the real estate market – the hotter the real estate market, the more money in the affordable housing trust funds

FLORIDA HOUSING COALITION

Funding in the Live Local Act

- Provides up to **$811 million** for affordable housing programs (including up to $100 million in a new tax credit program)

Program	Live Local Act	FY 22-23	FY 21-22
SHIP	$252m	$209.475m	$146.7m
SAIL	$259m*	$53.25m	$62.5m
Hurricane Housing Recovery		$150m	
Hometown Hero Program	$100m (from GR)	$100m (from SHTF)	
Inflation Response Program	$100m**		
Live Local Tax Donation Program	(up to $100m***)		
Total funding**	**$811,000,000**	**$512,725,000**	**$209,200,000**

*Discussed on subsequent slides
** If not used by 12/1/23, goes to SAIL
***For SAIL – dependent on contributions to the program
****This does not include member projects or homelessness grant programs.

FLORIDA HOUSING COALITION

Sadowski fully funded & more!

- The Live Local Act **fully funds** the Sadowski Trust Fund programs.
- **AND**
  - Provides an extra $150 million/year for 10 years for a SAIL-like program
  - Up to $100 million/year for SAIL through the new Live Local Tax Donation Program
  - Up to $100 million not used on inflation response program in 2023 to SAIL
- This does not include the value of the new local property tax incentives for certain affordable housing developments.

State Housing Initiatives Partnership (SHIP) program

- Administered by the Florida Housing Finance Corporation (FHFC)
- Deploys funds to 67 counties and 55 eligible municipalities
- Each SHIP jurisdiction develops a Local Housing Assistance Plan (LHAP) that governs its uses of the funding
- SHIP statute provides a series of "set-asides" that local governments must adhere to including:
  - At least 75% for construction-related activities
  - At least 65% for ownership; no more than 25% for rental housing
  - At least 30% for VLI households and at least 30% for LI households; remaining funds up to 140% of AMI
  - No more than 10% on admin expenses

Projected SHIP Distribution Estimates for 2023-24

SHIP allocation based on SB 102, includes DR holdback

PROJECTED SHIP DISTRIBUTION ESTIMATES FOR FY 2023-24

($252,000,000)

LOCAL GOVERNMENT	COUNTY TOTAL	COUNTY SHARE/ CITY SHARE
ALACHUA	3,286,537	1,621,249
Gainesville		1,665,288
BAKER	350,000	350,000
BAY	2,111,922	1,697,141
Panama City		414,781
BRADFORD	350,000	350,000
BREVARD	7,189,654	3,945,682
Cocoa		227,912
Melbourne		996,486
Palm Bay		1,452,310
Titusville		567,264
BROWARD	22,534,548	3,988,613
Coconut Creek		662,516
Coral Springs		1,543,617
Davie		1,223,626
Deerfield Beach		1,000,534
Fort Lauderdale		2,163,317
Hollywood		1,773,469
Lauderhill		856,313
Margate		671,530
Miramar		1,581,925
Pembroke Pines		1,960,506
Plantation		1,077,151
Pompano Beach		1,302,497
Sunrise		1,115,460
Tamarac		831,525
Weston		781,949
CALHOUN	350,000	350,000
CHARLOTTE	2,260,559	2,031,564
Punta Gorda		228,995
CITRUS	1,814,501	1,814,501
CLAY	2,587,678	2,587,678
COLLIER	4,476,074	4,255,404
Naples		220,670
COLUMBIA	818,222	818,222
DE SOTO	409,396	409,396
DIXIE	350,000	350,000
DUVAL	11,836,251	11,836,251
ESCAMBIA	3,777,215	3,149,442
Pensacola		627,773
FLAGLER	1,435,374	320,088
Palm Coast		1,115,286
FRANKLIN	350,000	350,000
GADSDEN	513,413	513,413
GILCHRIST	350,000	350,000

LOCAL GOVERNMENT	COUNTY TOTAL	COUNTY SHARE/ CITY SHARE
GLADES	350,000	350,000
GULF	350,000	350,000
HAMILTON	350,000	350,000
HARDEE	350,000	350,000
HENDRY	461,405	461,405
HERNANDO	2,282,869	2,282,869
HIGHLANDS	1,182,573	1,182,573
HILLSBOROUGH	17,412,196	12,813,635
Tampa		4,598,561
HOLMES	350,000	350,000
INDIAN RIVER	1,888,820	1,888,820
JACKSON	572,956	572,956
JEFFERSON	350,000	350,000
LAFAYETTE	350,000	350,000
LAKE	4,624,711	4,624,711
LEE	9,174,678	5,688,301
Cape Coral		2,379,911
Fort Myers		1,106,466
LEON	3,427,786	1,132,540
Tallahassee		2,295,246
LEVY	513,413	513,413
LIBERTY	350,000	350,000
MADISON	350,000	350,000
MANATEE	4,825,503	4,174,060
Bradenton		651,443
MARION	4,498,384	3,753,002
Ocala		745,382
MARTIN	1,859,122	1,859,122
MIAMI-DADE	20,155,423	13,238,082
Hialeah		1,668,869
Miami		3,355,878
Miami Beach		610,709
Miami Gardens		840,481
North Miami		441,404
MONROE	967,006	967,006
NASSAU	1,093,333	1,093,333
OKALOOSA	2,476,127	2,234,952
Fort Walton Beach		241,175
OKEECHOBEE	454,017	454,017
ORANGE	16,943,828	13,261,934
Orlando		3,681,894
OSCEOLA	4,877,511	3,230,375
Kissimmee		943,311
St. Cloud		703,825

LOCAL GOVERNMENT	COUNTY TOTAL	COUNTY SHARE/ CITY SHARE
PALM BEACH	17,389,885	12,463,331
Boca Raton		1,140,776
Boynton Beach		935,576
Delray Beach		768,633
Wellington		707,768
West Palm Beach		1,373,801
PASCO	6,795,605	6,795,605
PINELLAS	11,137,539	5,783,723
Clearwater		1,364,349
Largo		964,511
St. Petersburg		3,024,956
POLK	8,825,249	6,835,155
Lakeland		1,378,504
Winter Haven		611,590
PUTNAM	855,454	855,454
ST. JOHNS	3,398,088	3,398,088
ST. LUCIE	4,015,093	890,548
Fort Pierce		548,060
Port St. Lucie		2,576,485
SANTA ROSA	2,260,559	2,260,559
SARASOTA	5,182,320	4,535,048
Sarasota		647,272
SEMINOLE	5,531,749	5,531,749
SUMTER	1,606,321	1,606,321
SUWANNEE	513,413	513,413
TAYLOR	350,000	350,000
UNION	350,000	350,000
VOLUSIA	6,550,339	4,565,586
Daytona Beach		887,571
Deltona		1,097,182
WAKULLA	409,396	409,396
WALTON	922,385	922,385
WASHINGTON	350,000	350,000
TOTAL	246,436,400	246,436,400
DR Holdback & Catalyst		5,563,600
TOTAL APPROPRIATION		252,000,000

SHIP allocation based on SB 102, includes DR holdback, uses current Catalyst appropriation

03.2023

State Apartment Incentive Loan (SAIL) program

- Administered by the Florida Housing Finance Corporation
- Provides low or no-interest loans on a competitive basis for the development of affordable housing
- Can be used for new construction and acquisition/rehab
- Generally can only serve households at or below 60% of Area Median Income (AMI) – except in the Keys
- SAIL statute and rule contain key terms to follow regarding compliance, monitoring, and structuring

The Live Local Act funds the traditional SAIL program at **$109 million in non-recurring dollars** plus what is collected through the Live Local Tax Donation Program.

The remaining **$150 million in recurring dollars** is deployed through the SAIL infrastructure but for specific projects listed in the next slide.

FLORIDA HOUSING COALITION

How the $150 million/year for 10 years for SAIL-like program will be spent

70% for projects that:	Rehab/new construction
	Addressing urban infill
	Provide for mixed-use housing
	Provide housing near military installations
30% for projects that:	Use or lease public lands
	Address needs of adults aging out of foster care
	Meet needs of elderly persons
	Provide housing in areas of rural opportunity

Notes:

- FHFC will have the discretion to issue RFAs for this $150m
- Local governments, developers, & advocates should follow the FHFC RFA process and start planning for local projects to support

FLORIDA HOUSING COALITION

Florida Hometown Hero Program

- LLA codifies the Hometown Hero Program in state statute at s. 420.5096 and funds it at $100 million for FY 23-24
- Provides down-payment and closing cost assistance to eligible first-time homebuyers
- Eligibility criteria for applicants:
  - Income not to exceed 150% of state median income or local median income, whichever is greater
  - Must be a Florida resident and employed full-time (35 hours or more/week) by a Florida-based employer
  - First-time homebuyer (does not apply to active duty servicemember or veterans)

Florida Hometown Hero Program

- Terms of assistance:
  - Loan due at closing if property is sold, refinanced, rented, or transferred, unless approved by FHFC
  - Minimum of $10,000 and up to 5% of first mortgage loan, not exceeding $35,000
- Other provisions:
  - Can be used to purchase manufactured homes constructed after July 13, 1994 which are permanently affixed to real property
  - Intended to be a revolving loan program
  - Can be paired with SHIP and other sources of down payment

I. Funding

II. Property tax incentives

III. Land use & zoning
IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

Property tax incentives in the Live Local Act

1. Local option affordable housing property tax exemption
2. Nonprofit land used for affordable housing with a 99-year ground lease
3. "Missing middle" property tax exemption

1. Local option affordable housing property tax exemption

- Authorizes local governments to provide property tax exemptions for specified affordable housing developments.
- **Eligible developments:**
  - Contain at least 50 or more units
  - At least 20% of the units must be affordable to households at or below 60% AMI
- Tax exemptions only apply to the affordable units
- Applies to new and existing developments
- Property tax exemptions allowed are based on % of affordability
  - <100% of the units are affordable = up to 75% property tax exemption:
  - 100% of the units are affordable = up to 100% property tax exemption

1. Local option affordable housing property tax exemption

- Other provisions:
  - Maximum rents based on HUD's Multifamily Tax Subsidy Projects Income Limits or 90% of Fair Market Value as determined by a local rental market study, whichever is less
  - Exemption only applies to the taxes levied by the unit of government granting the exemption
  - Process for how localities can implement this optional tool
  - City or counties must post list of properties that receive the exemption on its website
  - Exemption authorized by City or County expires "before the fourth January 1 after adoption"; can be renewed after expiration
  - Penalties for noncompliance

2. Nonprofit land used for affordable housing w/99-year ground lease exemption

- New s. 196.1978(1)(b)
- Property tax exemption applies to **land** owned entirely by a nonprofit that:
  - 1) is leased for a minimum of 99 years
  - 2) is predominately used to provide affordable housing to households up to 120% AMI
- Land is considered "predominately used" for affordable housing if the square footage of the improvements on the land for affordable housing is greater than 50% of all the square footage of the improvements
- Tax exemption is for the **land** only – not the improvements

Opportunities with the new nonprofit land exception

- How does this new exemption differ from the existing nonprofit housing property tax exemption at s. 196.1978(1)?
  - 99-year ground leases will now explicitly qualify for the exemption
- May increase partnerships between nonprofit landowners and for-profit developers
- Community Land Trusts – CLT homeowners now get property tax-free land

3. "Missing middle" property tax exemption

- New s. 196.1978(3)
- Provides a property tax exemption to "newly constructed" multifamily developments that have **more than 70 affordable units** for households up to 120% AMI
- Tax exemption only applies to the affordable units
- Tiered property tax exemptions:
  - Units affordable to 80-120% AMI = 75% property tax exemption
  - Units affordable to <80% AMI = 100% property tax exemption

3. "Missing middle" property tax exemption

- Other provisions
  - Maximum rents based on HUD's Multifamily Tax Subsidy Projects Income Limits or 90% of Fair Market Value as determined by a local rental market study, whichever is less
  - Statute provides process for applying for exemption
  - Units subject to an agreement with FHFC to provide affordable housing to ELI, VLI, and LI households are not eligible for this exemption
  - Penalties for noncompliance
- The intent of this provision is to incentivize non-FHFC subsidized affordable developments

Effect of the "Missing middle" property tax exemption

- Effectiveness will depend on relationship between $ for rents a market-rate developer could charge vs. property tax savings if rented to households at or below 120% AMI
- Will work differently in different markets
- May impact local willingness to devote local dollars to affordable housing initiatives

Comparing the "Missing Middle" exemption and the Local Option Property Tax Exemption

	Section 8 "Missing Middle" Property Tax Exemption	Section 9 Local Option Property Tax Exemption
Local discretion?	No	Yes
Type of development	Multifamily rental developments w/**more than 70 affordable units** Must be "newly constructed" as defined by the Act.	Multifamily rental developments w/50 or more units that set aside at least 20% of the units as affordable housing. Does not have to be "newly constructed" – can apply to existing development.
Affordability requirement	More than 70 units must be affordable of not less than three years after exemption granted	At least 20% of the development must be affordable
Income eligibility	Up to 120% AMI	Up to 60% AMI
Rent limit	No more than rent limit chart derived from the Multifamily Tax Subsidy Projects Income Limits published by HUD or 90% of fair market value rent as determined by a local rental market study	No more than rent limit chart derived from the Multifamily Tax Subsidy Projects Income Limits published by HUD or 90% of fair market value rent as determined by a local rental market study
Exemption authorized	Units at 80-120% AMI = 75% exemption Units <80% AMI = 100% exemption	Up to 75% exemption if fewer than 100% of units are affordable Up to 100% exemption if 100% of units are affordable

I. Funding
II. Property tax incentives

III. Land use & zoning

IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

A local government cannot regulate the **use, density, or height** of an affordable housing development if a proposed **rental** project is:

- Multifamily or mixed-use residential in any area zoned for commercial, industrial, or mixed use;
- At least 40% of units are affordable for households up to 120% AMI for at least 30 years
- If mixed-use, at least 65% is residential

Local government cannot require a development authorized under this preemption to obtain a zoning/land use change, special exception, conditional use approval, variance, or comp plan amendment for **use, density, or height.**

FLORIDA HOUSING COALITION

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

Affordable housing developments allowed under this preemption are entitled to:

Use

- Allowed to build multifamily rental or mixed-use in commercial, industrial, or mixed-use zones without a zoning or land development change

Density

- Highest density allowed on any land in the City or County where residential development is allowed

Height

- Highest currently allowed height for a commercial or residential development within 1 mile of the proposed development or 3 stories, whichever is higher

FLORIDA HOUSING COALITION

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

Additional provisions:

- All other state and local laws apply.
  - Ex) setbacks, parking, concurrency, max lot coverage, environmental all still apply – all of which can indirectly limit density and height
- If a proposed project satisfies the existing LDRs for multifamily developments and is otherwise consistent with the comprehensive plan, project must be administratively approved (will help prevent NIMBY opposition to certain affordable housing developments)
- LGs must consider reducing parking requirements if project within one-half mile of a major transit stop

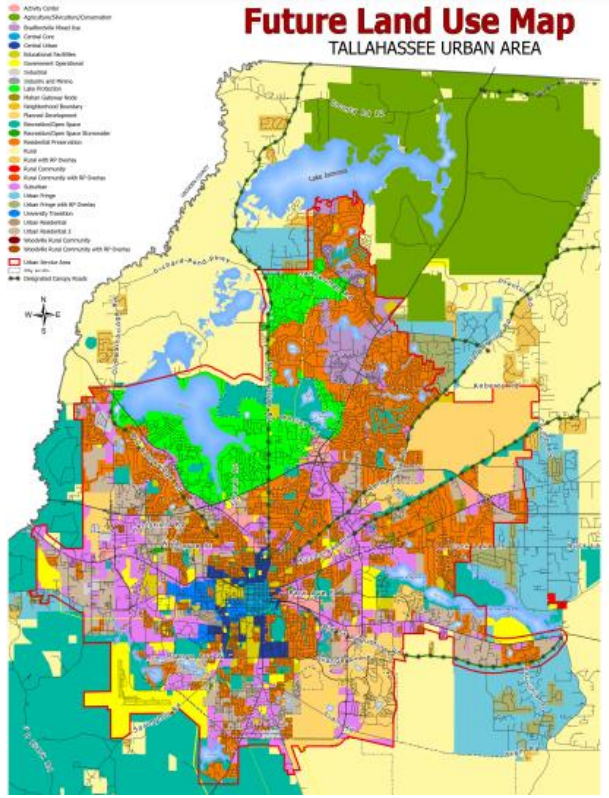
FLORIDA HOUSING COALITION

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

- **20% Rule – mixed-use only:**
  - **Cities.** If a city has less than 20 percent of total land use designated for commercial or industrial use, only mixed-use residential is allowed with this tool.
  - **Counties.** If proposed project is within boundaries of a multicounty independent special district 1) created to provide municipal services; 2) is not authorized to levy ad valorem taxes, 3) and less than 20 percent of land in that district is designated for commercial or industrial use, then mixed-use only.

What should local governments do now re: these land use standards for AH?

- Start studying your City or County's commercial, industrial, and mixed-use sites that could utilize this new statutory tool
- Examine your:
  - Future land use maps and zoning codes
  - Height and density regulations
  - Other regulations (setbacks, parking, max lot coverage, environmental/resiliency standards, etc.) that influence the use of this tool
- Ask:
  - How much land is eligible for this new tool?
  - What types of projects can be expected on eligible parcels?
  - How can the City/County facilitate affordable housing on eligible parcels?



FLORIDA HOUSING COALITION

How Can LLA Work for You?

- Opportunity to evaluate LLA in coordination with existing local regulations and incentives to increase the supply of affordable housing. May include incentivizing housing production in targeted areas over others.
- This tool can facilitate redevelopment/infill projects to convert underutilized commercial & industrial properties into affordable housing
- Can facilitate increased mixed-use and access – both physical access between residential and non-residential and access via affordability.
- Can save staff time – no need to rezone parcels for housing uses

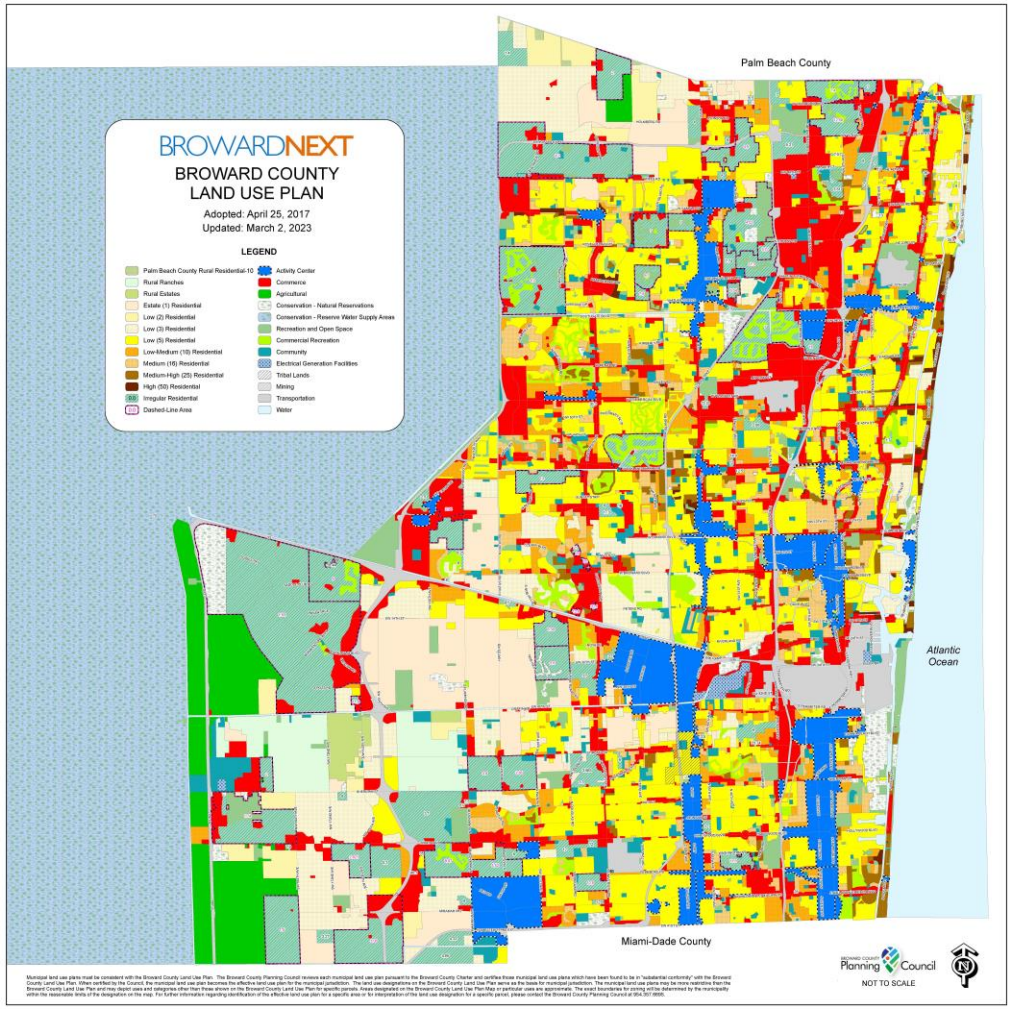
Broward Metropolitan Planning Organization (MPO) Vision 2100

Broward County Land Use Plan

➲ STRATEGY TR-1: Prioritize new development and redevelopment to existing and planned downtowns and major transit corridors and transit hubs.

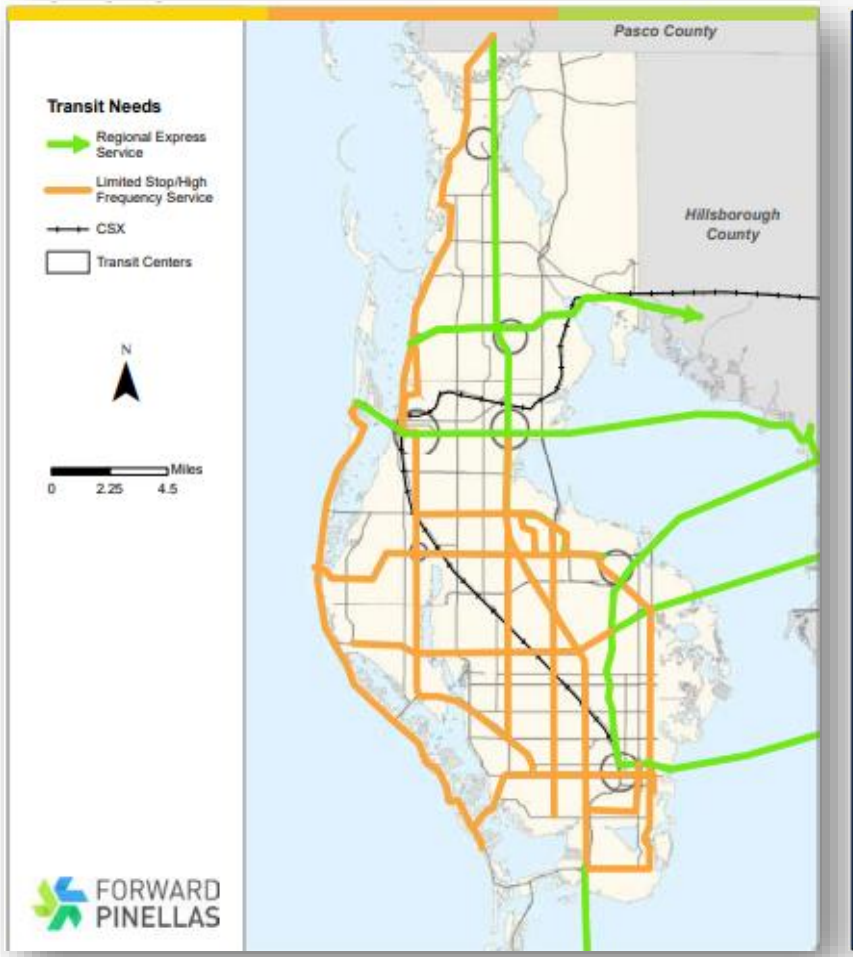
Implementation strategies include:

- Broward County Land Use Plan amendments for appropriately located "activity center," such as downtowns and transit corridors and hubs shall be given preference when considering new or redevelopment proposals.
- Within established and planned "activity centers," Broward County shall utilize multi-modal levels of service standards, and take all committed and funded modes of transportation fully into account when considering development proposals.
- To facilitate the availability of affordable housing in proximity to public facilities, services, amenities, and economic opportunities, the County's "Affordable Housing Density Bonus Program" shall be structured to target established and planned "activity centers," such as downtowns and transit corridors and hubs.



Pinellas Corridor Planning

- Key objectives
  - Multijurisdictional corridor plans
    - Alternate US 19
    - Roosevelt/East Bay Drive
    - US 19/34th Street
    - Ulmerton Road
  - Adopting local housing density bonus options
  - Funding programs to promote development of housing near transit corridors



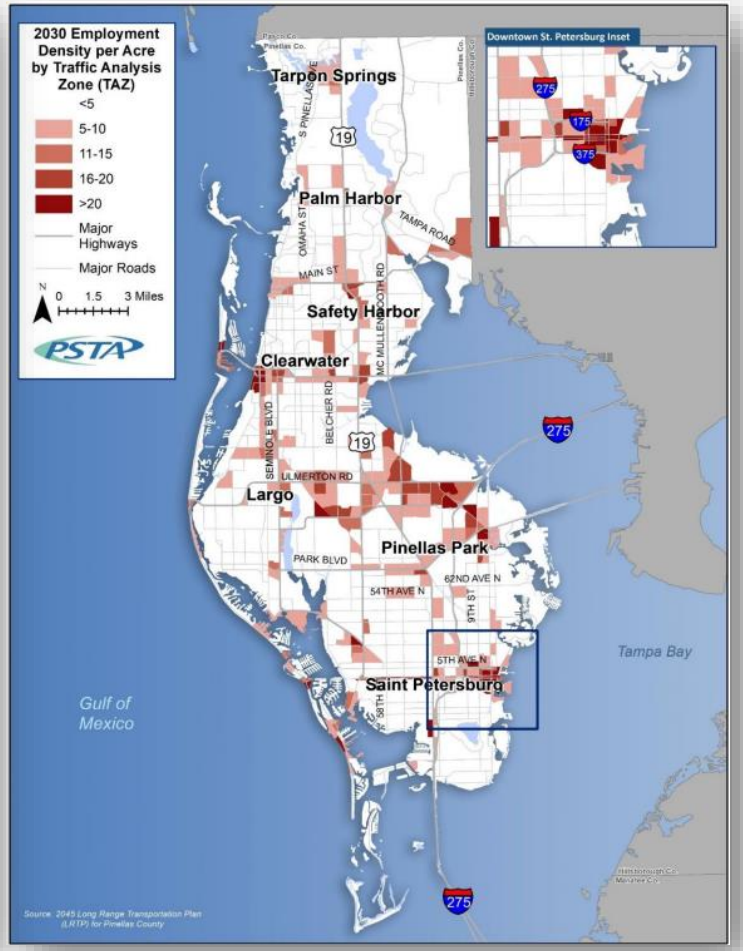


Photo Source: https://psta.net/media/4784/fy2021-2030-tdp.pdf

Model Corridor: Alternate US 19

- Investment Corridor Transition Plan process underway
- SB102 in the context of the transition plan
  - Identifying sites along route that may qualify for land use tool (administrative approval – see Goal 11 of Pinellas Housing Compact Action Plan)
  - Site testing/case studies to
    - Explore site design considerations
    - determine additional incentives needed for developments to pencil
    - How sites support goals in Pinellas Housing Compact Action Plan (specifically Goals 2, 3, 4 and 5)
  - Opportunities for strategic site acquisition
  - Permanent or long-term affordability requirements with funding

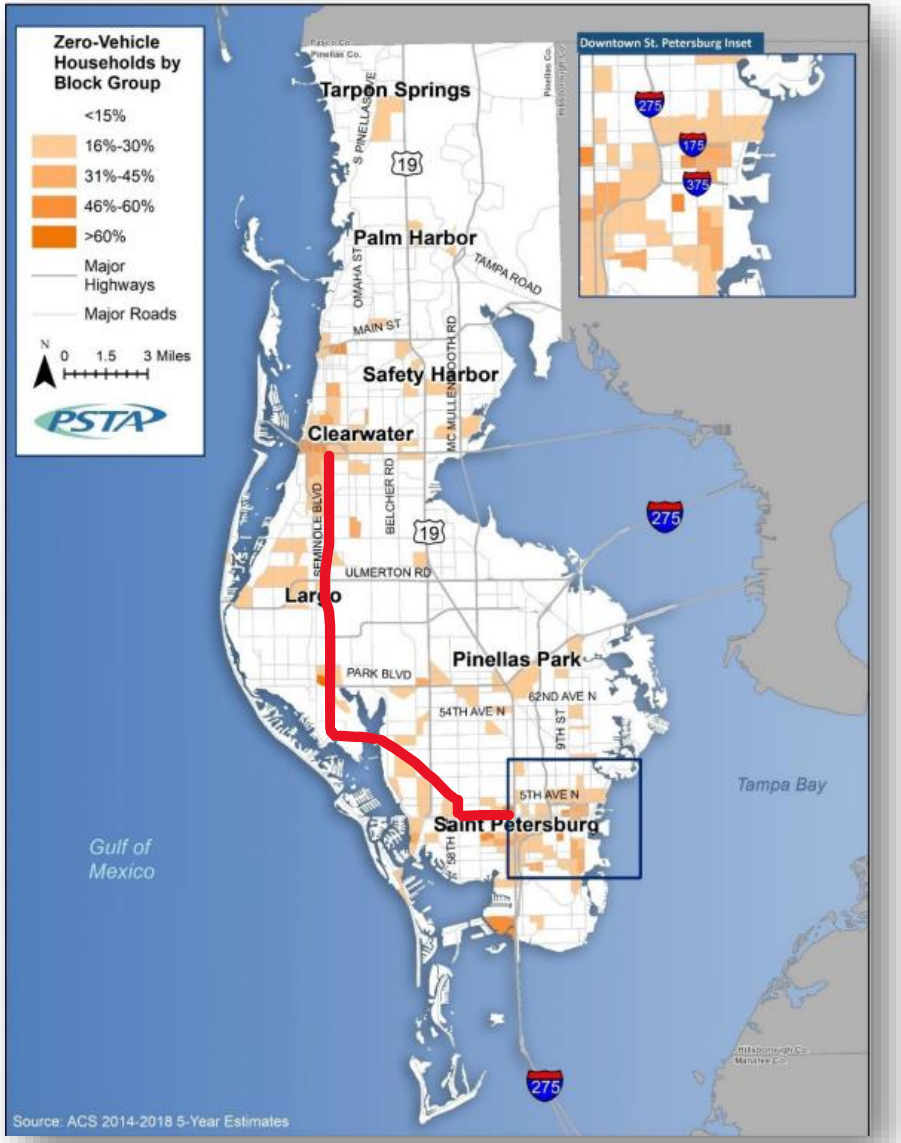
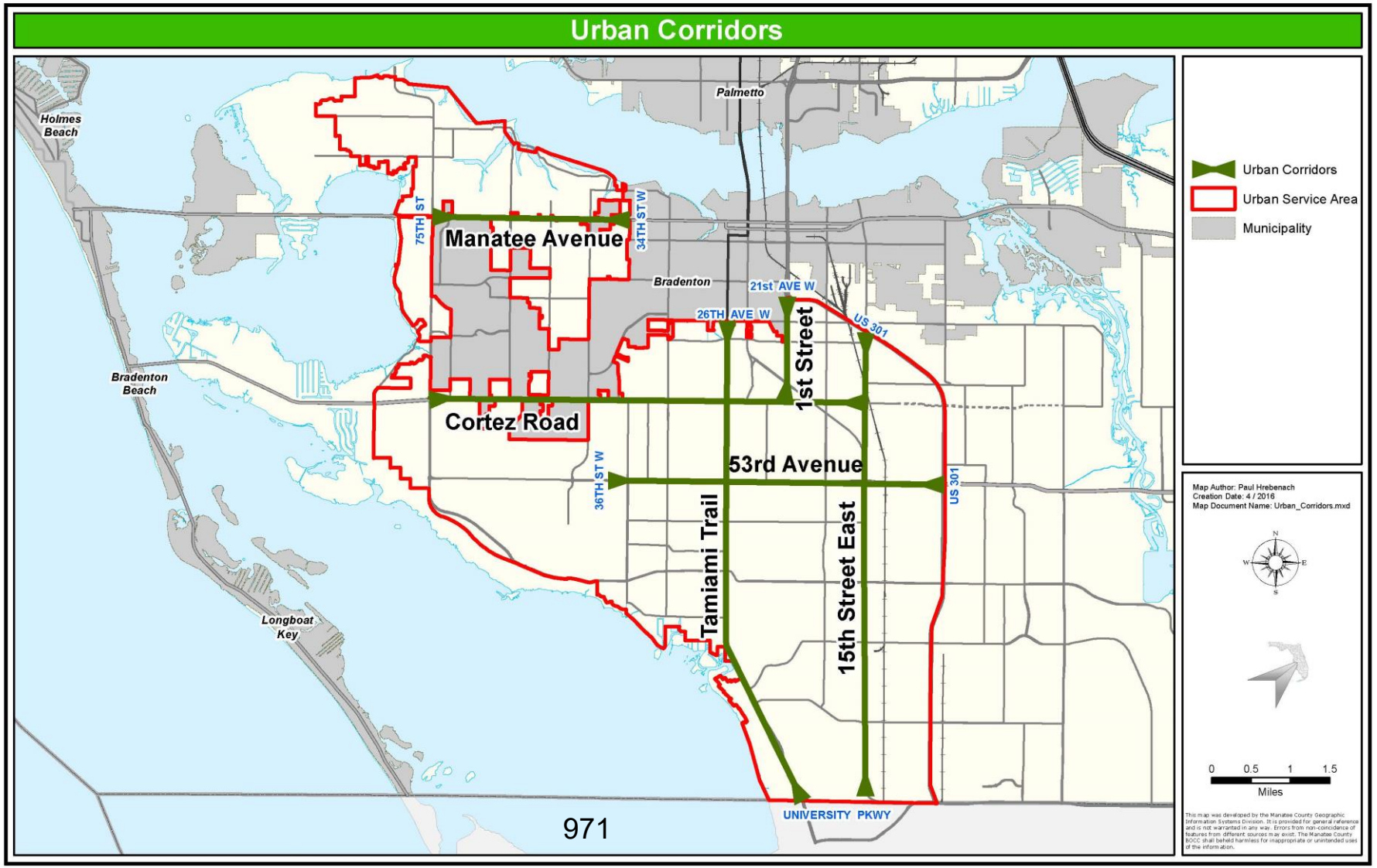


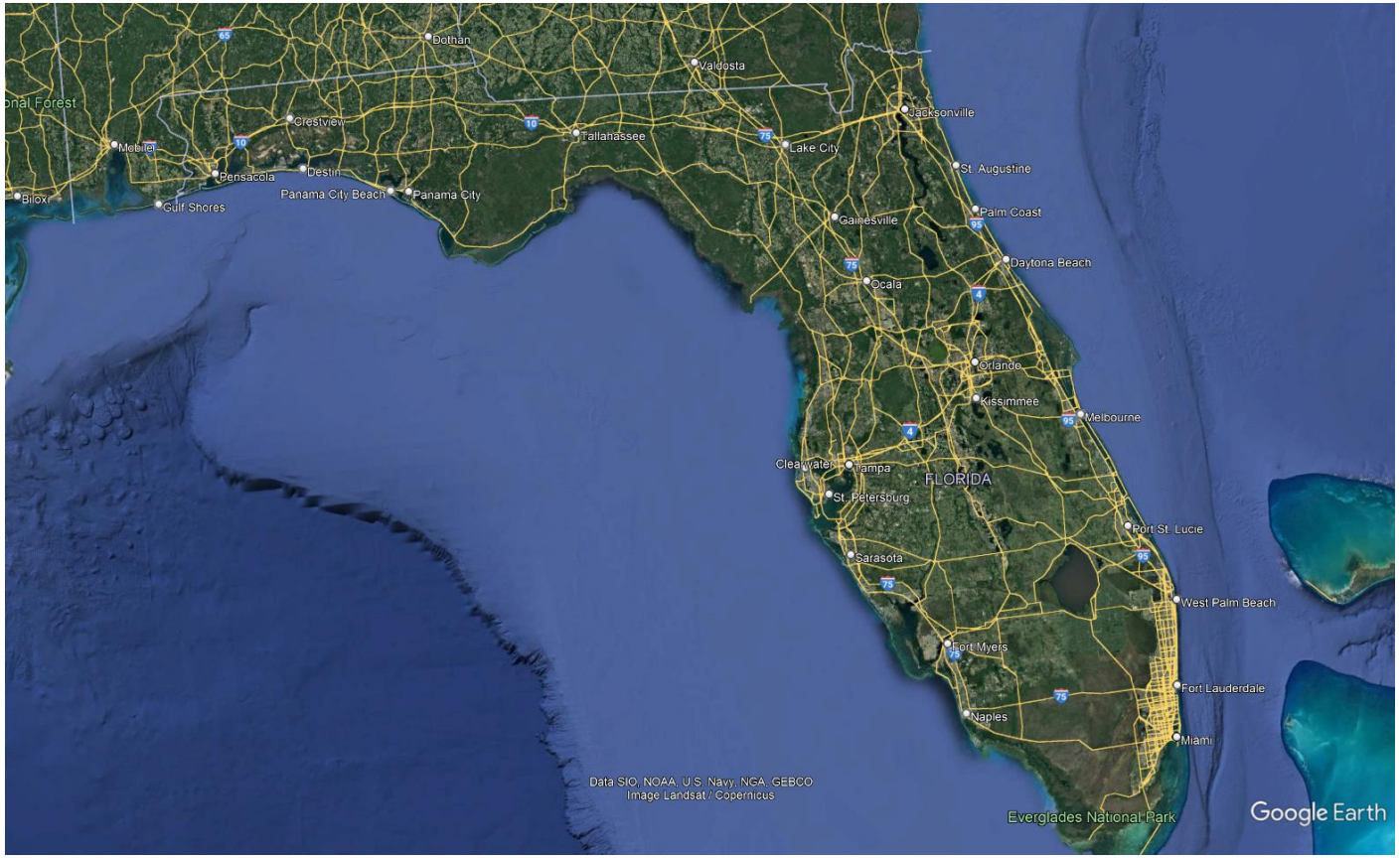
Photo Source: https://psta.net/media/4784/fy2021-2030-tdp.pdf

Manatee County Urban Corridors



Potential for Corridor Redevelopment with LLA & Targeted Incentives

- Countless commercial thoroughfares, main streets, downtown corridors statewide
- Coordination with FDOT on state roadway design - 336.045(6), F.S.



Frequently asked questions (so far) on this land use tool

- Does the tool apply to Planned Unit Developments (PUDs)?
- Who is responsible for compliance monitoring on the affordable units?
- What land development regulations apply to multifamily developments in order to require an administrative approval?
- In which ways can local government still regulate affordable housing developments under this preemption?

When in doubt, consult your City or County Attorney.

We are still in the very early stages of LLA and there are a number of nuanced legal interpretations to sort through.

FLORIDA HOUSING COALITION

"HB 1339" (2020) land use tool amended

F.S. 125.01055(6)/166.04151(6): currently allows local government to approve affordable housing developments on any parcel zoned for a **residential**, **commercial**, or **industrial** use without needing a rezoning or comprehensive plan amendment.

<u>What the Live Local Act does:</u>

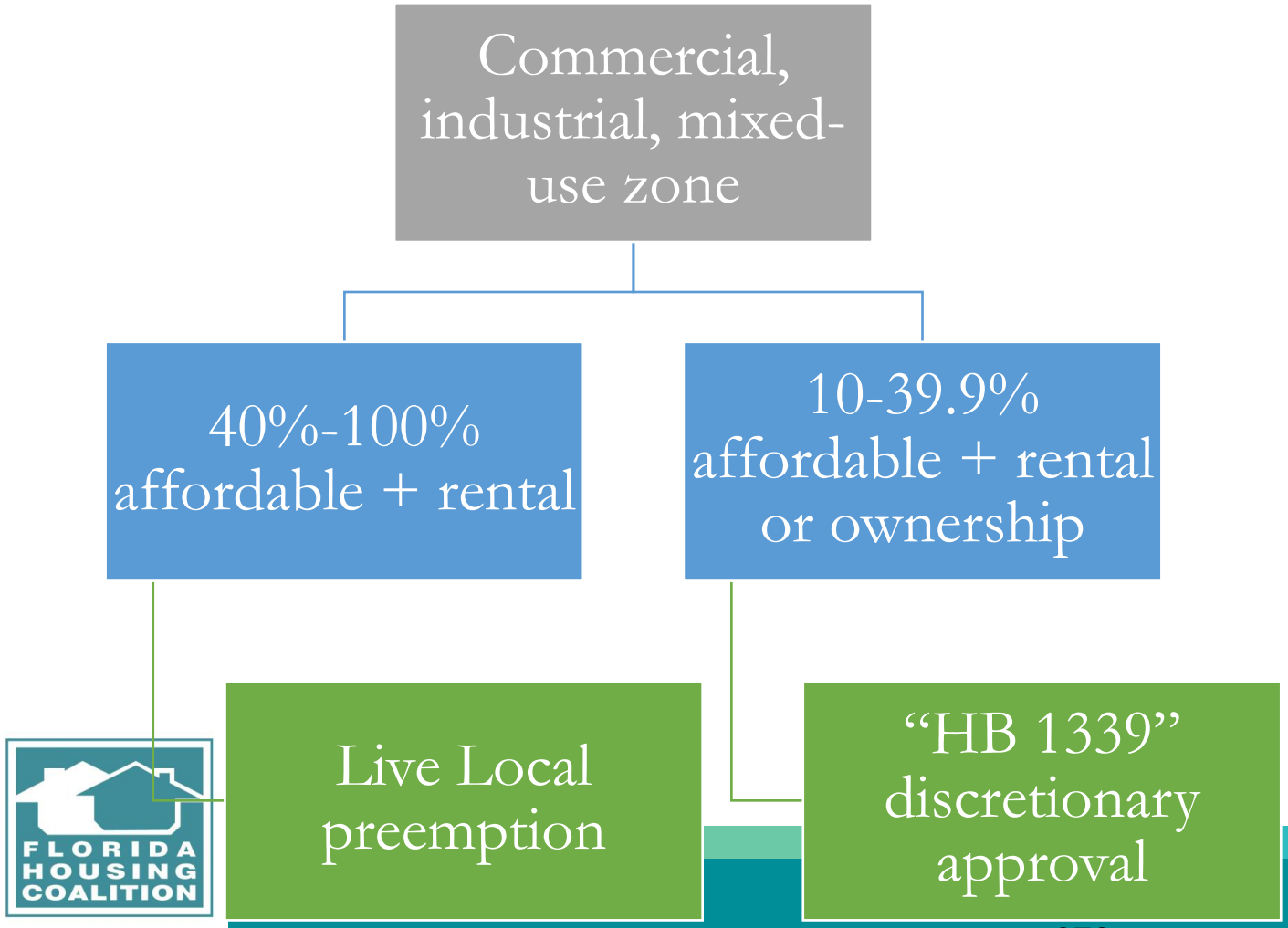
- Strikes out "residential"
- Removes the prohibition on SAIL funded projects

Comparing the new land use tool in SB 102 (2023) and HB 1339 (2020)

	F.S. 125.01055(7)/166.04151(7) – New Live Local tool	125.01055(6)/166.04151(6) – Existing HB 1339 tool as amended by the Live Local Act
Local discretion?	Not for use, density, and height	Yes
Eligible zones	Commercial, industrial, mixed-use	Commercial, industrial
Types of development	Multifamily rental or mixed use residential	Any multifamily or mixed-use residential project (rental or ownership)
Affordability requirement	At least 40% of the units must be affordable for 30 years	At least 10% of the units must be affordable
Local authority	Preempted on certain standards regarding use, height, or density All other state and local laws apply	Discretion to regulate in any manner

FLORIDA HOUSING COALITION

Comparing the new land use tool in SB 102 (2023) and HB 1339 (2020)



- Can use HB 1339 discretionary approval as a "carrot" to build in desired locations
- Possibility - allow developer to build less % of affordable housing in exchange for building away from certain areas intended to be kept for commercial or industrial

I. Funding
II. Property tax incentives
III. Land use & zoning

IV. Using publicly-owned land for affordable housing

V. Amendments to state housing strategy & other reforms

FLORIDA HOUSING COALITION

Using publicly-owned land for AH (Sections 4 & 7)

Background: **F.S. 125.379/166.0451** – Florida's "surplus land" laws

- Requires every city and county, at least every three years, to identify publicly-owned lands that are "appropriate for use as affordable housing"
- Lands identified as "appropriate" for affordable housing are to be placed on an affordable housing inventory list
- Lands placed on the inventory list may be used for affordable housing purposes

Caveats:

- Publicly owned land does not have to be on this inventory list to be used for AH
- Goal of the statute is **transparency/accountability** with the spirit of using more publicly owned land for affordable housing

Using publicly-owned land for AH (Sections 4 & 7)

The Live Local Act amends the state's "surplus land" laws to **newly apply to all dependent special districts**

- "Dependent special district" defined at s. 189.012
- Examples of dependent special districts:
  - Community redevelopment agencies (CRAs)
  - Port authorities
  - Neighborhood improvement districts
  - Housing authorities
  - Water and sewer districts
  - Special taxing districts
  - Development authorities
  - Water and sewer districts
  - Soil and water conservation districts
- See handout for complete list of dependent special districts in Florida (615 in total)

Using publicly-owned land for AH (Sections 4 & 7)

- **Requires** local governments to adopt an affordable housing inventory list by **Oct. 1, 2023** and every 3 years thereafter (restarts the clock)
- **Requires** local governments to make the inventory list of properties appropriate for affordable housing publicly available on its website.
- **Encourages** local governments to adopt best practices for surplus land programs, including:
  - "a) Establishing **eligibility criteria** for the receipt or purchase of surplus land by developers;
  - b) Making the **process** for requesting surplus lands **publicly available**; and
  - c) **Ensuring long-term affordability** through ground leases by retaining the right of first refusal to purchase property . . . and by requiring reversion of property not used for affordable housing within a certain timeframe."

FLORIDA HOUSING COALITION

Section 4 & 7 opportunities

- Makes **more publicly owned land available** for permanently affordable housing development
- **Increases transparency** for affordable housing land inventory lists and processes
- **Improves land disposition procedures** through best practices
- **Better partnerships** with nonprofit housing developers

Hillsborough County website for surplus lands

Surplus County Lands

Surplus County Lands

Real Property that serves no future use for the County may be declared surplus and sold. The methods of disposing of the County's Surplus Property are outlined in the State Statute.

Available Properties

Listed below are all of the available surplus properties for sale. If none are listed, that means we do not have any properties available at this time.

- **Kinnan Street and Oak Preserve Boulevard**

To submit a bid:

1. **Print and complete the required documentation** associated with the parcel, including:
   - **Bid Proposal Form** (Printable) | **Bid Proposal Form** (Fillable)
   - Legal Description Exhibit "A" from the appropriate surplus parcel (see properties on the map for Exhibit A)

FLORIDA HOUSING COALITION

COJ.net > Departments > Neighborhoods > Housing and Community Development Division > Surplus Property Donation Program

Surplus Property Donation Program

According to Section 125.379, *Florida Statutes*, and Chapter 122, *Ordinance Code*, the City of Jacksonville/Duval County is required every three years to adopt an inventory list of all real property within the city to which the City/County holds fee simple title that is appropriate for use as potential affordable housing. City ordinance 2020-207-E approves and adopts an inventory list of all real property within the City of Jacksonville to which the City holds fee simple title that is appropriate for use as potential affordable housing; declares the parcels listed on the Affordable Housing Inventory List to be surplus to the needs of the City; and authorizes the sale of the parcels.

Pursuant to Chapter 122, Ordinance Code, the properties on the affordable housing list may be donated on a first come-first served basis with a restriction that requires the development of the property as permanent affordable housing within 24 months after the donation as evidenced by receipt of a certificate of occupancy.

I. Funding
II. Property tax incentives
III. Land use & zoning
IV. Using publicly-owned land for affordable housing

V. Amendments to state housing strategy & other reforms

Amendments to the State Housing Strategy

- The LLA substantially rewrites the State Housing Strategy at s. 420.0003 of the Florida Statutes
- Includes subsections on state and local policies to increase the supply of affordable housing, implementation goals, research and data gathering, and technical assistance
- Examples:
  - "State and local governments shall provide incentives to encourage the private sector to be the primary delivery vehicle for the development of affordable housing."
  - "State-funded development should emphasize use of developed land, urban infill, and the transformation of existing infrastructure in order to minimize sprawl, separation of housing from employment, and effects of increased housing on ecological preservation areas."

Encouraging local governments to adopt best practices

- **Section 26** of the bill has several provisions encouraging local governments to adopt best practices. These provisions include:
  - "Local government shall provide incentives to encourage the private sector to be the primary delivery vehicle for the development of affordable housing." (lines 1927-1929)
  - "Local governments should consider and implement innovative solutions . . . Innovative solutions include: (lines 1937-1957)
    - "Utilizing publicly held land to develop affordable housing . . ."
    - "Community-led planning that focuses on urban infill, flexible zoning, redevelopment of commercial property into mixed-use property . . ."
    - "Project features that maximize efficiency in land and resource use, such as high density, high rise, and mixed use."
    - "Modern housing concepts such as manufactured homes, tiny homes, 3D-printed homes, and accessory dwelling units."

Other policies in the Live Local Act

- Requires local governments to post expediting permitting procedures online
- Precludes state funding for housing to local governments whose comprehensive plans have been found not in compliance with Chapter 163
- Provides sales tax relief for building materials for certain affordable housing developments
- Addresses using nonconservation state owned land for affordable housing

Other policies in the Live Local Act

- Expands Florida Job Growth Grant Fund to support public infrastructure projects to facilitate the production of affordable housing
- Directs OPPAGA to produce policy reports on affordable housing issues
- Amends FHFC board makeup
- Authorizes FHFC to contract with the Catalyst Program to provide training to local governments specifically on using publicly-owned land for affordable housing

Other policies in the Live Local Act

- Expands Florida Job Growth Grant Fund to support public infrastructure projects to facilitate the production of affordable housing
- Directs OPPAGA to produce policy reports on affordable housing issues
- Amends FHFC board makeup
- Authorizes FHFC to contract with the Catalyst Program to provide training to local governments specifically on using publicly-owned land for affordable housing

Live Local's impact on AHAC Strategies

Strategy	Relevant section(s) of the Live Local Act
a. Expedited Permitting	38
b. Fee waivers	8, 9
c. Flexibility in densities	3, 5, 26
d. Reservation of infrastructure capacity	25
e. Affordable accessory residential units	26
f. Reduction of parking and setback requirements	3, 5, 26
g. Flexible lot configurations	3, 5, 26
h. Modification of street requirements	3, 5, 26
i. Housing impact statement	
j. Inventory of publicly owned lands	4, 7, 26, 32
k. Support of development near transit, major employment centers, and mixed-use	3, 4, 5, 7, 26, 32

Training and technical assistance offered by FHC

- Virtual question and answer sessions with local government staff and nonprofits through the Catalyst Program
- Formal trainings to housing organizations including AHACs, MPOs, and housing councils
- Implementation technical assistance
- We will soon be drafting implementation materials to assist local governments implement the tools in the LLA
- For assistance, please contact Kody Glazer at glazer@flhousing.org

Summary of Senate Bill 328 (2024) - Final

Amendments to the Live Local Act

Contact: Kody Glazer, Chief Legal and Policy Officer, glazer@flhousing.org

As of February 28, 2024 the House and Senate have officially passed Senate Bill 328 – the 2024 Legislative Session's Live Local Act amendment bill. This bill amends the Live Local Act's land use preemption, the "Missing Middle" Property Tax Exemption, and funds the Hometown Hero Housing Program at $100 million. The next step is for this bill to be sent to the Governor's desk for final signature. Note that the bill will go into effect right upon it becoming a law – it will not need to wait until July 1 like most other bills.

Amendments to the Live Local Act's Land Use Preemption

SB 328 makes several amendments to s. 125.01055(7) and s. 166.04151(7) of the Florida Statutes which govern the Live Local Act's land use preemption. This land use preemption was designed to facilitate eligible affordable housing developments on parcels zoned for commercial, industrial, and mixed-use by providing favorable use, density, height, and administrative approval standards.

Eligible Zoning & Applicability

- Amends the phrase "if at least 40 percent of the residential units in a proposed multifamily **rental** development are, for a period of at least 30 years, affordable as defined in s. 420.0004" to "if at least 40 percent of the residential units in a proposed multifamily development are **rental units that**, for a period of at least 30 years, affordable as defined in s. 420.0004." This amended phrase opens the possibility for a split multifamily ownership and rental development as long as least 40% of the total units are rental *and* affordable.
- Provides that proposed multifamily developments that are located in a transit-oriented development or area, as defined by the local government, must be mixed-use residential to receive approval with the tool and "otherwise complies with requirements of the county's regulations applicable to the transit-oriented development or area except for use, height, density, and floor area ratio as provided in this section or as otherwise agreed to by the county and the applicant for the development."

Height and Density Allowances

- Newly provides that local governments cannot limit the floor area ratio of a proposed development below 150% of the highest currently allowed floor area ratio on any land where residential development is allowed in the jurisdiction under the jurisdiction's land development regulations.
- Clarifies that the maximum density and height allowances do not include any "bonuses, variances, or other special exceptions" provided in the jurisdiction's land development regulations as incentives for development.
- Allows local governments to limit the maximum height allowance if the proposed development is adjacent to, on two more sides, a parcel zoned for single-family residential use that is within a single-family residential development with at least 25 contiguous single-family homes to 150 percent of the tallest building on property within one-quarter mile of the proposed development or 3 stories, whichever is higher.

Additional Provisions

- Provides that each local government must maintain a policy on its website containing the expectations for administrative approval under the tool.
- Reduces the buffer for local governments to "consider" reducing parking requirements from ½ mile of a "major transit stop" to ¼ mile of a "transit stop." This will establish a lower buffer and encourage reducing parking requirements for projects near any transit stop, not just a "major" transit stop.
- Requires local government to reduce parking requirements by 20% for proposed developments within ½ mile of a "major transportation hub" that have available parking within 600 feet of the proposed development and eliminates parking requirements for a proposed mixed-use residential development within an area recognized as a transit-oriented development or area.
- Provides that proposed developments located within ¼ mile of a military installation may not be administratively approved.
- Provides that the land use preemption does not apply to "airport-impact areas as provided in s. 333.03" and removes the exception for recreational and commercial working waterfront.
- Creates clear criteria for when the preemption does not apply in close proximity to an airport.
- Clarifies that developments authorized with the preemption are treated as a conforming use even after the sunset of the preemption statute (2033) and the development's affordability period unless the development violates the affordability term. If a development violates the affordability term, the development will be treated as a nonconforming use.
- Provides that an applicant who submitted an application, written request, or notice of intent to utilize the mandate before the effective date of the bill may notify the local government by July 1, 2024, of its intent to proceed under the prior provisions of the mandate.

Amendments to the "Missing Middle" Property Tax Exemption

SB 328 makes a few amendments to the Missing Middle Property Tax Exemption enacted at s. 196.1978(3) of the Florida Statutes. This exemption was designed to provide tiered ad valorem property tax exemptions to developments with more than 70 affordable rental units to households at or below 120% AMI.

Provisions

- Extends exemption eligibility to developments with more than 10 affordable units if the development is located in an area of critical state concern.
- Clarifies the exemption only applies to the affordable units within an eligible development.
- Provides how a property appraiser shall determine the value of an affordable unit eligible for the exemption.
- Authorizes the county property appraiser to "request and review additional information necessary" to determine eligibility for the exemption.

Florida Hometown Hero Program

SB 328 funds the Hometown Hero Program at $100 million using federal Coronavirus State Fiscal Recovery Fund dollars.

Shubin Law Group
PROFESSIONAL ASSOCIATION

THE EUCLID GROUP

Amendments to Live Local Act (SB 328) - a.k.a. the "Glitch Bill"

February 29, 2024

Florida's state legislature has adopted significant changes to the landmark affordable housing legislation passed last year known as the Live Local Act. Senate Bill 328 has been adopted by both the Senate and House and will become law upon receiving the Governor's signature. A summary of the amendments are below:

Zoning/Land Use

- **Height** — (i) maintains the relevant radius for determining max height at 1 mile; (ii) adds a new height limitation to address situations where a property is "adjacent to" a single-family residential neighborhood of 25 or more contiguous homes – in such instance, the local government may restrict the height of a proposed development to 150% of the tallest building on property "adjacent to" the proposed development or 3 stories, whichever is higher; the bill provides that the term "adjacent to" means those properties sharing more than one point of a property line, but does not include properties separated by a public road; (iii) developments cannot look to other projects having received special approvals, or approvals under the Act, to establish a project's height limit.
- **Industrial** — Properties zoned for industrial uses continue to qualify for zoning preemption benefits provided under the Act.
- **FAR** — Confirms that local governments cannot restrict floor area ratio (FAR) below 150% of the highest currently allowed FAR under the local government's regulations. Clarifies that FAR and Floor Lot Ratio are interchangeable.
- **Nonconforming Status** — Requires that developments authorized under the Act be treated as conforming even after the statute's effectiveness and the development's affordability period expires.
- **Parking** — (i) requires local governments to reduce parking requirements by 20% if a qualifying project is within one-half mile of a "major transportation hub" or has available parking within 600ft of the site; and (ii) a local government must eliminate parking requirements for proposed mixed-use projects within a transit-oriented development development or area.
- **Rental v. For Sale Units** — clarifies that only the affordable units in qualifying projects must be rentals; the market units may be for sale.
- **Proximity to Airports & Military Installations** — carve outs added for property near military installations and airport-impacted areas.

- **Bonuses** — Adds that a county or municipality must administratively approve bonuses for density, height, or FAR if the proposed development satisfies the necessary conditions for receiving said bonus. Clarifies that a local government's "highest currently allowed" density, height, and FAR does not include any bonuses, variances, or other special exceptions provided in their regulations.
- **Local Implementation Policy —** requires local governments to publish their policy containing procedures and expectations for the administrative approval of qualifying developments on their website.

Ad Valorem Tax

- **10 units v. 70 units** — decreases the number of units required to be eligible for an ad valorem exemption for qualifying projects, provided the project is within an "area of critical state concern (Florida Keys), as designated by 30.0552 or Chapter 28-36, Florida Administrative Code."
- **Appraisal Methodology** — requires that when calculating the value of a unit for applying the Act's ad valorem exemption, the property appraiser must consider the proportionate share of the residential common areas, including the land, attributable to such unit.

Appropriations

- Appropriates $100 million in non-recurring funds for the Hometown Heroes Program

Applicability

- Provides that applicants who submitted development proposals before this act's effective date can inform the local government by July 1, 2024, to proceed under old regulations or adjust their proposals according to the new act.

We have followed SB328 closely and are continuously fielding calls from clients to help them understand what it means for their projects. Contact us for more information.

Mark Grafton
Cell: 305-401-3565
Office: 305-381-6060
Mgrafton@shubinlawgroup.com

Shubin Law Group, P.A. is a Florida law firm specializing in visioning large-scale real estate projects, getting them entitled, and resolving the disputes that often arise out of those projects www.Shubinlawgroup.com	The Euclid Group is a full-service land-use development and real estate consulting firm based in Florida. www.theeuclidgrp.com

HOUSING NOT HANDCUFFS

A Litigation Manual

NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

ABOUT THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

The National Law Center on Homelessness & Poverty is the only national organization dedicated solely to using the power of the law to end and prevent homelessness. We work with federal, state and local policymakers to draft laws that prevent people from losing their homes and to help people out of homelessness. We have been instrumental in enacting numerous federal laws, including the McKinney-Vento Act, the first major federal legislation to address homelessness. The Act includes programs that fund emergency and permanent housing for homeless people; makes vacant government properties available at no cost to non-profits for use as facilities to assist people experiencing homelessness; and protects the education rights of homeless children and youth. We ensure its protections are enforced, including through litigation.

We aggressively fight laws criminalizing homelessness and promote measures protecting the civil rights of people experiencing homelessness. We also advocate for proactive measures to ensure that people experiencing homelessness have access to permanent housing, living wage jobs, and public benefits.

For more information about our organization, access to publications, and to contribute to our work, please visit our website at www.nlchp.org.

This litigation manual is offered as an advocacy tool for use as part of the Housing Not Handcuffs Campaign (HNH Campaign). Housing Not Handcuffs was initiated by the National Law Center on Homelessness & Poverty and more than 100 participating organizations to end the criminalization of homelessness and to promote housing policies. You can learn more about the HNH Campaign at www.housingnothandcuffs.org.

LAW CENTER BOARD OF DIRECTORS*

Edward McNicholas
Chair
Sidley Austin LLP

Bruce Rosenblum
Vice-Chair
The Carlyle Group

Kirsten Johnson-Obey
Secretary
NeighborWorks

Robert C. Ryan
Treasurer
American Red Cross

Eric A. Bensky
Schulte, Roth & Zabel LLP

Paul F. Caron
Microsoft Corporation

Bruce J. Casino
Attorney

Rajib Chanda
Simpson Thacher & Bartlett LLP

Dwight A. Fettig
Porterfield, Fettig & Sears LLC

Julia M. Jordan
Sullivan & Cromwell LLP

Steve Judge
Private Equity Growth Capital Council (retired)

Father Alexander Karloutsos
Greek Orthodox Archdiocese of America

Georgia Kazakis
Covington & Burling LLP

Pamela Malester
Office for Civil Rights, U.S. Dept. of Health and Human Services (retired)

Tashena Middleton Moore
Attorney

G.W. Rolle
Missio Dei Church

Erin Sermeus
OWN TV

Jeffrey A. Simes
Goodwin Procter LLP

Vasiliki Tsaganos

Robert Warren
People for Fairness Coalition

Maria Foscarinis
President
Executive Director
NLCHP

**Affiliations for identification purposes only*

LAW CENTER STAFF

LaToya Ball
Administrative Manager

Tristia Bauman
Senior Attorney

Janet Hostetler
Deputy Director

Grace Beal
Development & Communications Assistant

Janelle Fernandez
Law & Policy Program Coordinator

LaTissia Mitchell
Executive & Development Specialist

Michael Santos
Attorney

Eric Tars
Senior Attorney

Maria Foscarinis
Executive Director

ACKNOWLEDGMENTS

The Law Center thanks Tristia Bauman, Janet Hostetler, Janelle Fernandez, Eric Tars, Maria Foscarinis, and Elizabeth Dennis for their contributions to this report.

Special thanks to the law firm Sheppard Mullin Richter & Hampton LLP for its generous pro bono support and assistance in updating the report and case summaries. In particular, the Law Center thanks Daniel Brown, Nicole Bagood, and David Poell.

We are grateful to the funders whose support enables us to carry out our critical work, including the Herb Block Foundation, the Deer Creek Foundation, and the Ford Foundation.

Finally, we thank the 2017 members of our Lawyers Executive Advisory partners (LEAP) program for their generous support of our organization: Akin Gump Strauss Hauer & Feld LLP; Arent Fox LLP; Covington & Burling LLP; Debevoise & Plimpton LLP; Dechert LLP; DLA Piper LLP; Fried, Frank, Harris, Shriver & Jacobson LLP; Goodwin Procter LLP; Hogan Lovells US LLP; Latham & Watkins LLP; Manatt, Phelps & Phillips, LLP; Microsoft Corporation; Schulte Roth & Zabel LLP; Sheppard, Mullin, Richter & Hampton LLP; Sidley Austin LLP; Simpson Thacher & Bartlett LLP; Sullivan & Cromwell LLP; and WilmerHale.

The Law Center would also like to thank Megan Godbey for the report design.

The Law Center is solely responsible for the views expressed in this report.

Cover photo credits:
Francis Storr | Flickr
Glasseyes View | Flickr
Beth H | Flickr
Dave Kaylor

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Since the previous edition of this manual was published in 2014, there has been significant litigation challenging the criminalization of homelessness, almost all of it dealing with evictions of homeless encampments and bans on panhandling.

Most recent cases have upheld the legal rights of homeless persons to perform various life-sustaining behaviors in public places. Since 2014, favorable results[1] were obtained in:

- 75% of cases challenging evictions of homeless encampments and/or seizure and destruction of homeless persons' belongings.
- 57% of cases challenging enforcement of camping and/or sleeping restrictions.
- 100% of cases challenging laws restricting begging and solicitation.

Particularly notable recent developments include:

- A ruling from a federal appeals court applied new Supreme Court First Amendment precedent to strike down an anti-panhandling ban and affected courts and cities across the country.
- A statement of interest brief filed by the U.S. Department of Justice stated that making it a crime for people who are homeless to sleep in public places, particularly in the absence of sheltered alternatives, unconstitutionally punishes them for being homeless.

Crisis of Homelessness

Stagnated wages, rising rents, and a grossly insufficient social safety net have left millions of people homeless or at-risk - including at least 1.36 million homeless children enrolled in U.S. public schools. A lack of affordable housing is the leading cause of homelessness, and the crisis is rapidly worsening. Today, there is a shortage of 7.4 million affordable and available rental homes for our nation's poorest renters. This shortage has left millions of households paying more than they can sustainably afford for housing, and it has caused homelessness across the country.

While emergency shelter is not a solution to homelessness, some American cities task homeless shelters with meeting both emergency needs and longer term systemic shortages of permanent housing. As a result, communities with shelter space often lack sufficient beds for all individuals and families that are homeless. This leaves homeless people across the country with no choice but to struggle for survival in public places.

Criminalization of Homelessness: Trends and Consequences

Despite a lack of affordable housing and shelter space, many cities have chosen to threaten, arrest, and ticket homeless persons for performing life-sustaining activities – such as sleeping or sitting down - in outdoor public space. Indeed, the Law Center's November 2016 report on the criminalization of homelessness, "Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities" revealed that laws civilly and criminally punishing homelessness are prevalent and dramatically increasing across the country.[2] For example, half of all cities have one or more laws restricting camping in public, and city-wide bans on camping have increased by 69% since 2006.

In addition to laws that civilly and criminally punish homelessness, the Law Center has noted a rise in governmental practices designed to remove homeless people from public view that may not result in ticketing or arrest. Evictions of homeless encampments, for example, may be justified as a public health and safety measure even in the absence of a camping ban. Not only do these practices displace homeless people from public space without offering them any other place to go, but they may also result in the loss of homeless persons' personal property.

Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. Instead, criminalizing homelessness wastes precious public resources on policies that do not work to reduce homelessness. Quite the opposite, arrests, unaffordable tickets, and displacement from public space for doing what any human being must do to survive can make homelessness more difficult to escape.

1 Favorable results in these cases include success in securing injunctions to prevent enforcement of the challenged laws, awards of monetary damages, and settlements that modified laws or altered patterns of enforcement to comport with the civil rights of homeless people.

2 Housing not Handcuffs, Ending the Criminalization of Homelessness in U. S. Cities, Nat'l Lat Center on Homelessness & Poverty (2016) [hereinafter "Housing Not Handcuffs"].

Court Challenges to Laws Restricting Camping and Sleeping

When there are fewer affordable housing units and shelter beds available than people who need them, people are left with no choice but to live outdoors and in public space. Despite a lack of alternative places to live, cities across the country have enacted laws making the life-sustaining activities of homeless people in public space a crime or civil offense.

In many cities, police or other government officials conduct evictions or "sweeps" of public areas where homeless people are living, seizing, destroying, or otherwise causing the loss of homeless people's personal property. This property often includes food, clothing, medicine, identification, and irreplaceable personal items, such as photographs. Evictions also cause homeless people to be displaced from their communities, further harming and marginalizing them, without providing any place for them to go.

Increasingly, however, legal challenges to laws punishing sleeping and camping in public, and challenges to the practice of homeless sweeps, have been successful on constitutional grounds. Key recent decisions include:

Eighth Amendment Challenges to Camping/Sleeping Prohibitions

In Eighth Amendment challenges to anti-camping ordinances and enforcement, plaintiffs argue that enforcement of such laws violates the Eighth Amendment prohibition against cruel and unusual punishment.

- On August 6, 2015, The United States Department of Justice filed a statement of interest in the Law Center's case of *Bell v. Boise*, arguing that making it a crime for people who are homeless to sleep in public places, particularly in the absence of sheltered alternatives, unconstitutionally punishes them for being homeless[3] The Justice Department urged the court to adopt the rationale of *Jones v. City of Los Angeles*, a Ninth Circuit decision which held that criminalizing life-sustaining conduct in public by homeless people, in the absence of any available alternative, is tantamount to criminalizing homeless status in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[4] As stated by the Justice Department in its filing, "[i]t should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment. Sleeping is a life-sustaining activity—i.e., it must occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless."[5]
- In *Cobine v. City of Eureka*,[6] eleven homeless plaintiffs who (along with approximately 150 other homeless people) had continuously camped in the Palco Marsh area of Eureka, California filed suit in federal court against the city when, under the authority of an anti-camping ordinance, the city began issuing notices of eviction and confiscating personal property. The plaintiffs filed suit noting that homeless individuals outnumber emergency shelter beds by a factor of nearly three to one, and arguing that criminalizing public camping in a city without adequate shelter space violated their Eighth Amendment rights. The U.S. District Court for the Northern District of California enjoined the Eureka from enforcing the anti-camping ordinance until the city provided the plaintiffs with shelter and followed specific procedures for storing confiscated property.[7]

Challenges to the constitutionality of anti-camping ordinances have also been raised as defenses to criminal charges under such laws. For example:

In *The City of North Bend v. Joseph Bradshaw*,[8] a homeless plaintiff was criminally charged with unlawful camping after he was found asleep outside with his belongings. In his defense, Joseph Bradshaw argued that enforcement of the anti-camping ordinance against him violated his right to be free from cruel and unusual punishment under the Eighth Amendment. The Municipal Court for the City of Issaquah in King County concluded that enforcement of the camping ban violated Mr. Bradshaw's constitutional rights to travel and to be free from cruel and unusual punishment.

Fourth and Fourteenth Amendment Challenges to Evictions of Homeless Encampments

Evictions of encampments of homeless people have also been successfully challenged on Fourth and Fourteenth Amendment grounds when residents' possessions are confiscated or destroyed without adequate notice and other due process protections. Key recent decisions include:

- In *Allen v. City of Pomona*,[9] fourteen homeless plaintiffs filed suit on behalf of a class against the City of Pomona arising out of the City's policy and practice of seizing and destroying homeless persons' property, without notice and over the objections of the property owners, in violation of plaintiffs' Fourth and Fourteenth Amendment rights. The plaintiffs' complaint detailed several instances where police officers had permanently deprived plaintiffs of their most essential belongings, including food stamp cards, medication, tents, blankets, state-issued identification cards, birth certificates, and treasured family heirlooms with sentimental value. In

3 *Bell v. Boise* 993 F. Supp. 2d 1237, (D. Idaho 2014). US Statement of Interest available at https://www.justice.gov/crt/file/761211/download.

4 *Jones v. City of Los Angeles*.444 F.3d 1118 (9th Cir.2006). The Jones opinion was vacated pursuant to settlement, but still has persuasive value.

5 *Bell v. Boise* 993 F. Supp. 2d 1237, (D. Idaho 2014). US Statement of Interest available at https://www.justice.gov/crt/file/761211/download.

6 *Cobine v. City of Eureka*, No. C 16-02239 (JSW), 2016 WL 1730084 (N.D. Cal. May 2, 2016).

7 The plaintiffs also argued that the city's seizure of their property violated their Fourth and Fourteenth Amendment rights to be secure from government seizure without due process of the law.

8 *City of North Bend v. Bradshaw*, Case No. Yl 32426A (North Bend Muni. Ct. Jan. 13, 2015).

9 *Allen v. City of Pomona*, No. 16-cv-1859 (C.D. Cal. filed Mar. 18, 2016).

August, 2016, the city and the plaintiffs agreed to a sweeping settlement agreement that, among other relief, provided plaintiffs with priority with regards to permanent housing resources developed by the city to the maximum extent allowed by law.

- In *Mitchell v. City of Los Angeles*, homeless individuals, the Los Angeles Community Action Network, and the Los Angeles Catholic Worker filed suit to challenge the City's practice of seizing and destroying homeless persons' property during arrests and street cleanings. The federal district court ordered the City to stop seizing and destroying homeless persons' property, to improve its property storage procedures, and to make critical belongings like tents and medication available within 24 hours after the seizure.

First Amendment Challenges to Laws Restricting Begging and Solicitation

For many homeless people who do not have income from employment or government benefits, panhandling may be the best option for survival. Unfortunately, too many local governments, instead of finding ways to help homeless persons obtain income, housing, and social services, seek to prohibit panhandling. There have been several successful challenges to panhandling laws since 2015 when the U.S. Supreme Court clarified First Amendment law on content-based restrictions on protected speech in *Reed v. Town of Gilbert*. Indeed, our research finds that panhandling bans have been found unconstitutional on First Amendment grounds in every legal challenge decided since *Reed*. Key recent decisions include:

- The first case to apply *Reed* to panhandling cases was *Norton v. City of Springfield,*[10] the Law Center's successful Seventh Circuit challenge to Springfield, Illinois' panhandling law, which restricted vocal pleas for immediate donations of cash. Explaining that *Reed* describes content based discrimination as a "law [that] applies to particular speech because of the topic discussed *or* the idea or message expressed,"[11] the Seventh Circuit found that Springfield's ordinance regulates speech "because of the topic discussed" and that the law lacked a compelling justification.

- In *Thayer v. City of Worcester*,[12] plaintiffs sought a preliminary injunction against enforcement of two City of Worcester ordinances restricting panhandling. Plaintiffs alleged that the ordinances, which prohibited aggressive panhandling and walking on traffic medians for purposes of soliciting donations, were content based restrictions on speech in violation of the First Amendment right to free speech. On appeal, the First Circuit held that the laws did not violate the First Amendment, but the judgment of the First Circuit was vacated following *Reed* and the matter was remanded to the trial court for further consideration in light of the new precedent. On remand, the trial court found that the ordinances failed to pass muster under the First Amendment because they were not sufficiently tailored to the public interests they were purportedly designed to address.

- In *Homeless Helping Homeless, Inc. v. City of Tampa*,[13] a charity offering emergency shelter to homeless people brought suit in federal court against the City of Tampa, Florida to challenge a city ordinance banning the solicitation of "donations or payment" in parts of downtown Tampa. The court agreed with Homeless Helping Homeless that soliciting "donations or payment" is a form of speech protected by the First Amendment, that Tampa's ordinance constituted a regulation of that speech in a traditional public forum, and that Tampa's ordinance is a content-based regulation of that speech. After the city of Tampa admitted that no compelling government interest supported the ordinance, the court held that the ordinance failed the strict scrutiny test and did not pass constitutional muster, and permanently enjoined Tampa from enforcing it.

This Manual

This litigation manual provides an overview of legal theories that have been used successfully to challenge criminalization policies and practices, and it also sets forth several important considerations for bringing litigation on behalf of homeless people. In addition, it includes numerous summaries of cases that have been brought over the years to protect the civil and human rights of homeless people.

Success in preventing the criminalization of homelessness will not, however, achieve the long-term goal of ending homelessness by ensuring that all Americans have access to safe and affordable housing in neighborhoods of opportunity. It is critical that litigation strategies support organizing and policy advocacy efforts to ensure that legal challenges help secure solutions to the underlying causes of homelessness.

10 *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and *Norton v. City of Springfield* 806 F.3d 411 (7th Cir. 2015).

11 *Id.*

12 *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) and *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015).

13 *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016).

INTRODUCTION

Homelessness is a national crisis, with rising rents, historically low vacancy rates, and a grossly insufficient social safety net leaving millions of people homeless or at-risk - including at least 1.36 million homeless children enrolled in U.S. public schools. Today, there is a shortage of 7.4 million affordable and available rental units for our nation's poorest renters.[14] This housing gap leaves millions of individuals and families across the country spending more than they can sustainably afford to keep roofs over their heads – or leaves them unable to afford housing at all.

Many American cities have fewer emergency shelter beds than people who need shelter. Because homelessness is driven by a large and critical shortage of affordable housing, many individuals and families need help not just for one or two nights, but for long periods of time. Yet many communities continue to treat shelters as the answer to all homelessness, tasking shelters with meeting both emergency needs and longer term systemic shortages of permanent housing. As a result, communities with shelter space often lack sufficient beds for all individuals and families that are homeless. This leaves homeless people across the country with no choice but to struggle for survival in public places.

Although many people experiencing homelessness have literally no choice but to live outside and in public places, laws and enforcement practices punishing the presence of visibly homeless people in public space continue to grow. Homeless people, like all people, must engage in activities such as sleeping or sitting down to survive. Yet, in communities across the nation, these harmless, unavoidable behaviors are punished as crimes or civil infractions.

Our recent report on national trends in criminalization, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* analyzed laws that prohibit the life-sustaining activities of homeless people in 187 cities nationwide since 2006. This analysis revealed that laws civilly or criminally punishing homeless are prevalent and dramatically rising across the country.

We also analyzed local enforcement practices, including increasingly common evictions of homeless encampments upon little or no notice. These evictions, or homeless "sweeps", not only displace homeless people from public space, but they often result in the loss or destruction of homeless persons' few possessions. The loss of these items, which can include critical identification documents, protective tents, or even needed medical equipment, can be devastating to homeless people. Yet, these sweeps are often conducted by governments with no plan to house or adequately shelter the displaced encampment residents. Instead, homeless people are merely dispersed to different public places, leading to the inevitable reappearance of outdoor encampments

Laws criminally or civilly punishing homeless persons' life-sustaining activity are ineffective policies that fail to address the underlying causes of homelessness. Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. Instead, arrests, unaffordable tickets, and the collateral consequences of criminal convictions make it more difficult for people to exit homelessness and get back on their feet. For example, even misdemeanor convictions can make someone ineligible for subsidized housing under local policy, and criminal records are routinely used to exclude applicants for employment or housing. These barriers to income and housing can prolong a person's homelessness, or even make it permanent.

Criminalization laws also waste precious taxpayer dollars on policies that do not work to reduce homelessness**.** Criminalization is the most expensive and least effective way of addressing homelessness. A growing body of research comparing the cost of homelessness--including the cost of criminalization--with the cost of providing housing to homeless people shows that ending homelessness though housing is the most affordable option over the long run.

Moreover, criminalization policies often violate homeless persons' constitutional and human rights. A number of lawsuits challenging violations of homeless persons' constitutional rights have been filed since the Law Center released its last advocacy manual in 2014. Most recent cases have upheld the legal rights of homeless persons to perform various life-sustaining behaviors in public places. Litigation surrounding evictions of homeless encampments (also known as "sweeps") and restrictions on panhandling have been especially prevalent since 2014, and the following trends have emerged:

- 75% of cases challenging evictions of homeless encampments and/or seizure and destruction of homeless persons' belongings.
- 57% of cases challenging enforcement of camping and/or sleeping bans.
- 100% of cases challenging laws restricting begging and solicitation.

This litigation manual is a companion piece to *Housing Not Handcuffs*. It is meant to be a resource for legal advocates working on the ground to combat criminalization in their communities. This manual evaluates recent trends in criminalization case law, describes successful legal challenges to criminalization policies and practices, and provides case summaries from criminalization litigation broken down by category of prohibited conduct.

14 Nat'l Low Income Hous. Coal., "Study Shows Massive Shortage of Affordable Hous. For Lowest Income Households in Am., (Mar. 2, 2017), available at http://nlihc.org/press/releases/7544.

LEGAL STRATEGIES TO COMBAT CRIMINALIZATION OF HOMELESSNESS

Lawyers have various legal strategies available to combat criminalization measures. Criminal defense lawyers can use constitutional arguments in criminal proceedings to challenge a charge against a homeless person. Constitutional and other legal challenges can also be brought proactively against a municipality to challenge civil rights violations faced by homeless persons. Further, attorneys can mitigate some of the worst collateral consequences of the criminalization of homelessness by providing representation to homeless individuals subject to civil or criminal citations or challenges, even without raising constitutional challenges. This manual focuses on considerations when bringing proactive civil rights litigation.

Overview[15]

Homeless individuals and service providers have brought various legal challenges to municipal ordinances or statutes that criminalize homelessness. Claims may be brought under 42 U.S.C. § 1983 against laws that violate rights guaranteed by the U.S. Constitution. State constitutions may offer differing or broader protections. In addition, human rights protected under international law can provide persuasive theories that have gained traction in some courts.

Challenging Bans on Camping and/or Sleeping in Public

Because many municipalities do not have adequate affordable housing or shelter space to meet the need, homeless people are often left with no alternative but to live and sleep in public spaces. Many municipalities have enacted laws imposing criminal penalties upon homeless individuals for sleeping outside. In 2016, the Law Center found that laws prohibiting camping[16] have increased by 69% since 2006, with as many as a third of cities nationwide banning the activity throughout the entire community.[17] Laws prohibiting sleeping in public are slightly less common, with 27% banning sleeping either city-wide or in particular public places.[18] Enforcement of these laws may result in unaffordable tickets, loss or destruction of personal property, or even jail time for the "crime" of trying to survive outdoors.

Laws punishing people for sleeping outside have been challenged in courts as a violation of homeless persons' civil rights. Some courts have found that laws criminally punishing the life-sustaining activities of homeless people amounts to criminalization of homeless status in violation of the **Eighth Amendment's** prohibition against cruel and unusual punishment. In reaching this conclusion, courts have looked at whether the number of homeless people exceeds the amount of available emergency shelter to determine whether criminalization of activities such as camping in public are voluntary conduct or conduct inextricably linked with homeless persons' status.

On August 6, 2015, the U.S. Department of Justice filed a statement of interest brief in *Bell v. Boise*, a lawsuit filed by the Law Center in federal district court on behalf of six homeless plaintiffs who were convicted under laws that criminalized sleeping or camping in public.[19] The statement of interest advocates for the application of the analysis set forth in *Jones v. City of Los Angeles*, a Ninth Circuit decision that was subsequently vacated pursuant to a settlement.[20] In *Jones*, the court considered whether the city of Los Angeles provided sufficient shelter space to accommodate the homeless population. The court found that, on nights when individuals are unable to secure shelter space, enforcement of anti-camping ordinances violated their constitutional rights.

The position of the Justice Department was underscored in subsequent remarks made by then-Attorney General Loretta Lynch at a White House convening on incarceration and poverty, and

15 This manual does not create an attorney and client relationship with you. The information herein is not offered as legal advice and should not be used as a substitute for seeking professional legal advice. It does not provide an exhaustive list of considerations to be worked out before bringing litigation in any particular case.

16 Camping bans may also be broadly written to prohibit simply sleeping outside, or using any resource to protect oneself from the elements. See Housing Not Handcuffs, supra note 2.

17 The Law Center surveyed 187 cities and assessed the number and type of municipal codes that criminally or civilly punish the life-sustaining behaviors of homeless people. The results of our research show that the criminalization of necessary human activities is prevalent and increasing in cities across the country. See Housing Not Handcuffs, supra note 2.

18 Id.

19 U.S. Dep't of Just. Statement of Interest brief in Bell v. Boise available athttps://www.justice.gov/crt/ file/761211/download.

20 *Jones v. City of Los Angeles,* 444 F.3d 1118, 1126 (9th Cir. 2016).

again in a Department of Justice community policing newsletter dedicated to the criminalization of homelessness.[21] Beyond constitutional concerns, the federal government has repeatedly condemned the criminalization of homelessness as ineffective and expensive public policy. For example, the U.S. Interagency Council on Homelessness stated in its guidance on encampments that, "the forced dispersal of people from encampment settings is not an appropriate solution or strategy, accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide such lasting solutions to people who have been sleeping and living in the encampment."[22]

> *"Many homeless individuals are unable to secure shelter space because city shelters are over capacity or inaccessible to people with disabilities," said Principal Deputy Assistant Attorney General Vanita Gupta, former head of the U.S. Department of Justice Civil Rights Division. "Criminally prosecuting those individuals for something as innocent as sleeping, when they have no safe, legal place to go, violates their constitutional rights. Moreover, enforcing these ordinances is poor public policy. Needlessly pushing homeless individuals into the criminal justice system does nothing to break the cycle of poverty or prevent homelessness in the future. Instead, it imposes further burdens on scarce judicial and correctional resources, and it can have long-lasting and devastating effects on individuals' lives."*

Laws banning sleeping and camping in public have also been challenged as violating the **fundamental right to travel**. Laws illegally penalize travel if they deny a person a "necessity of life."[23] Advocates have contended that arresting people for sleeping outside violates the fundamental right to travel by denying access to a necessity of life, i.e. a place to sleep. At least one court has found that if people are arrested for sleeping in public, those arrests have the effect of preventing homeless people from moving within a city or traveling to a city, thereby infringing upon their right to travel.[24]

Challenging Evictions of Homeless Encampments ("Sweeps")

Some municipalities have engaged in sudden evictions of homeless encampments - often referred to as "sweeps" or "clean ups" - in areas where homeless individuals sleep, rest, and store belongings. During sweeps, police or city workers may confiscate and destroy belongings. Although it is appropriate for city, county, and state governments to clean public areas, courts have found that seizing and destroying homeless persons' personal property may violate their **Fourth Amendment** rights to be free from unreasonable searches and seizures. In addition, courts have found that failing to follow certain procedures when managing confiscated private property may violate due process rights under the **Fourteenth Amendment**.[25]

Challenging Bans on Loitering, Loafing, and Vagrancy

Laws prohibiting loitering, loafing, or vagrancy, are common throughout the country. Similar to historical Jim Crow, Anti-Okie, and Ugly laws, these modern-day ordinances grant police a broad tool for excluding visibly poor and homeless people from public places. In 2016, the Law Center found that 32% of cities prohibit loitering, loafing, or vagrancy throughout entire communities – an 88% increase since 2006.

Municipalities have used broadly-worded loitering ordinances to target homeless individuals in public spaces. The Supreme Court has held that such ordinances are **unconstitutionally vague** when they do not give clear notice of the prohibited conduct or would allow for selective or arbitrary enforcement.[26]

Challenging Bans on Sitting or Lying Down in Public

Bans on sitting or lying down in public are another common form of criminalization ordinance. Although every human being must occasionally rest, laws that restrict resting activities in public are increasingly common. In 2016, the Law Center found that 47% of cities prohibit sitting and lying down in public.[27] This represents a 52% increase since 2006.[28]

Laws restricting sitting or lying down in public have been challenged as violating the **fundamental right to travel**.[29]

Challenging Bans or Restrictions on Panhandling

In the absence of employment opportunities or other sources of income, begging may be a homeless person's best option for obtaining the money that they need to purchase food, public transportation fare, medication, or other necessities. Despite this, many communities have restricted or banned begging or panhandling. In 2016, the Law Center found that 61% of cities studied nationwide restrict or ban panhandling in some or all public places.[30]

Laws prohibiting panhandling, solicitation, or begging may infringe on the **First Amendment** right to free speech. Courts have found begging to be protected speech and laws that target speech based on content must satisfy strict scrutiny to be constitutional.[31] This means that content-based restrictions on speech must be narrowly tailored to achieve a compelling governmental interest.[32] Even

21 U.S. Dept. of Justice, Community Policing Dispatch (Dec. 2015), https://cops.usdoj.gov/html/dispatch/12-2015/index.asp.
22 United States Interagency Council on Homelessness, Ending Homelessness for People Living in Encampments: Advancing the Dialogue (August 2015) available at https://www.usich.gov/resources/uploads/asset_library/Ending_Homelessness_for_People_Living_in_ Encampments_Aug2015.pdf.
23 *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258-59 (1974).
24 *Pottinger v. City of Miami*, 76 F.3d 1154 (11th Cir. 1996).
25 *Mitchell v. City of Los Angeles*, Case No.: 16-cv-01750 SJO (JPR) (C.D. Cal. April 2016).
26 *Chicago v. Morales*, 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).
27 Housing Not Handcuffs, supra note 2.
28 Id.
29 *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), aff'd, 78 F.3d 1425 (9th Cir. 1996).
30 Housing Not Handcuffs, supra note 2.
31 *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)
32 Id.

where a restriction is content neutral, a panhandling ordinance may still be unlawful if it restricts more speech than is necessary to achieve a legitimate government interest or it fails to leave open ample alternative channels for begging speech.[33]

In addition, some courts have found laws prohibiting begging or panhandling to be unconstitutionally vague where the ordinances do not provide clear notice of the conduct prohibited and could be enforced it in an arbitrary or discriminatory manner.[34]

Challenging Laws Banning Living in Vehicles

Sleeping in one's own vehicle is often a last resort for people who would otherwise be forced to sleep on the streets. A dramatically growing number of cities across the nation, however, have chosen to impose criminal or civil punishments on people who live in their private vehicles, despite their lack of housing options. In 2016, the Law Center found that 39% of cities prohibit living in vehicles.[35] This represents an increase of 143% since 2006.[36]

Laws prohibiting living in vehicles have been challenged as being **unconstitutionally vague** or inviting arbitrary enforcement in violation of due process.[37]

Persuasive Human Rights Theories

Human rights theories provide useful tools when challenging ordinances criminalizing homelessness. Legal arguments supported by human rights treaties ratified by the U.S. can be used to ensure domestic law complies with such treaties, which have the same binding force as federal law.[38] Further, under international law, once the U.S. signs a treaty, it is obligated not to pass laws that would "defeat the object and purpose of [the] treaty."[39]

The Law Center has laid a solid base for using human rights in policy advocacy and litigation against criminalization measures. Federal documents recognize human rights standards as relevant to criminalization, including a 2012 report by the U.S. Interagency Council on Homelessness that acknowledged that "in addition to violating domestic law, criminalization measures may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights"[40] That language was subsequently echoed by the U.S. Department of Justice (DOJ)[41] and U.S. Department of Housing & Urban Development (HUD).[42] At the international level, two of the three treaty bodies which oversee human rights treaties ratified by the U.S., the Human Rights Committee (HRC) and Committee on the Elimination of Racial Discrimination (CERD), have specifically condemned the criminalization of homelessness in the U.S. and called on the U.S. to "[a]bolish laws and policies making homelessness a crime."[43] The third treaty body to which the U.S. is subject, the Committee Against Torture, considered such recommendations at its review of U.S. compliance in November 2014,[44] and has asked the U.S. to address the issue at its upcoming review in 2018.[45]

While human rights treaties may not currently be enforceable on their own in U.S. domestic courts, judges in both state and federal settings have looked to human rights law and jurisprudence in a number of cases.[46] In addition, lawyers can also cite to these sources to support policy advocacy.[47] Numerous resources and networks exist to help litigators use these rich resources in their advocacy.[48]

Cruel and Unusual Punishment

On multiple occasions, the U.S. Supreme Court has looked to international law in interpreting the scope of the Eighth Amendment protection against cruel and unusual punishment.[49] The Law Center has strategically built up commentary from the HRC and numerous other U.N. human rights monitors addressing criminalization of homelessness as cruel, inhuman, and degrading treatment – the international equivalent of our Eighth Amendment

33 *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and *Norton v. City of Springfield* 806 F.3d 411 (7th Cir. 2015).

34 See, e.g., *Atchison v. City of Atlanta*, No 1:96-CV-1430 (N.D. Ga. July 17, 1996) (granting preliminary injunction).

35 Housing Not Handcuffs, supra note 2.

36 Housing Not Handcuffs, supra note 2.

37 *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014)

38 U.S. Const. art. VI, § 2; Id. art. II, § 2, cl. 2.

39 The Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331.

40 U.S. Interagency Council on Homelessness, Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness 8 (2012), https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf.

41 Letter from Lisa Foster, Director, Office for Access to Justice, U.S. Dept. of Justice, to Seattle City Councilors, (Oct.13, 2016), (https://assets.documentcloud.org/documents/3141894/DOJ-ATJ-Letter-to-Seattle-City-Council-10-13-2016.pdf); Matthew Doherty, *Incarceration and Homelessness: Breaking the Cycle,* Community Policing Dispatch, U.S. Dept. of Justice Community Oriented Policing Services, vol. 8, Issue 12 (Dec. 2015), https://cops.usdoj.gov/html/dispatch/12-2015/index.asp.

42 U.S. Dept. of Housing & Urban Development, *Alternatives to Criminalizing Homelessness,* https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/.

43 U.N. Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (2014); Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12 (2014).

44 Concluding observations on the combined third to fifth periodic reports of the United States of America, adopted by the Committee at its fifty-third session (3-28 Nov. 2014), 19 Dec. 2014, available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_us_concluding_observations_2014.pdf.

45 Committee Against Torture, *List of issues prior to submission of the sixth periodic report of the United States of America,* CAT/C/USA/QPR/6 ¶ 46 (2016), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/019/66/PDF/G1701966.pdf?OpenElement.

46 *See* Opportunity Agenda, Human Rights in State Courts (2014), http://opportunityagenda.org/human_rights_state_courts_2014.

47 See, e.g., Leo Morales, An open letter to Mayor Bieter & Boise City Council re: proposed Ordinance 38-14, criminalizing houselessness in Boise, ACLU of Idaho (Sept. 23, 2014), https://acluidaho.org/an-open-letter-to-mayor-bieter-boise-city-council-re-proposed-ordinance-38-14-criminalizing-houselessness-in-boise/.

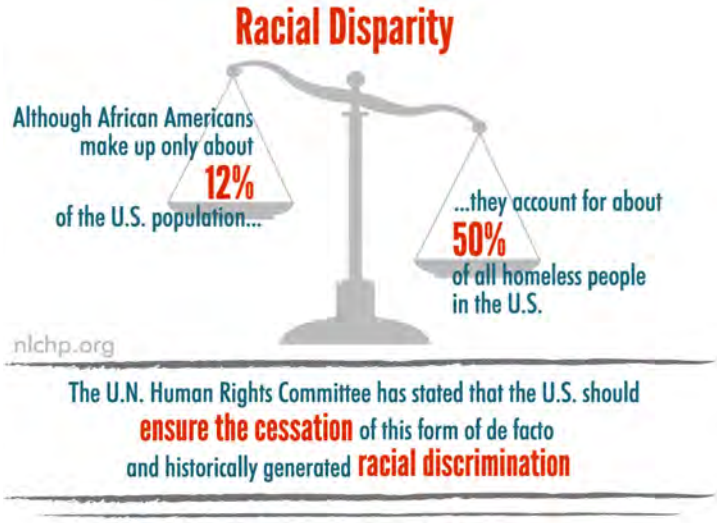
48 *See, e.g.* American University Washington College of Law Center for Human Rights and Humanitarian Law, *Local Human Rights Lawyering Project,* http://www.wcl.american.edu/humright/center/locallawyering.cfm; Columbia Law School Human Rights Institute, Bringing Human Rights Home Lawyers Network, http://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network.

49 *See, e.g. Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005); *Graham v. Florida*, 130 S. Ct. 2011; 176 L. Ed. 2d 825 (2010).; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

standard - to provide evidence of an international norm that can guide judges to make similar findings domestically.[50] Rather than simply enjoining such laws only to see communities make minimal changes to the laws but continue criminalizing practices, international law may also provide support for more expansive remedies – such as provision of housing – to address underlying constitutional violations.[51]

Freedom of Movement

In *In Re White*, the California Court of Appeals cited the right to freedom of movement recognized in international law to support its conclusion that both the U.S. and California Constitutions protect the right to intrastate and intra-municipal travel.[52] The petitioner challenged a condition of her probation that barred her from being in certain defined areas of the city. The HRC, which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), has emphasized that the right to movement and the freedom to choose your own residence are important rights that should only be breached by the least intrusive means necessary to keep public order.[53] Further, in *Koptova v. Slovak Republic*, the CERD, which oversees the International Covenant on the Elimination of Racial Discrimination (ICERD), held that municipal resolutions in villages in the Slovak Republic, which explicitly forbade homeless Roma families from settling in their villages, and the hateful context in which the resolutions were adopted, violated the right to freedom of movement and residence within the border of a country in violation of the ICERD.[54]



Equal Protection/Freedom from Discrimination

Laws criminalizing aspects of homelessness, such as bans on sleeping or sitting in public, or the selective enforcement against homeless people of neutral laws such as those prohibiting loitering or public intoxication may violate human rights law. Both the ICCPR and ICERD, which the U.S. has signed and ratified, prohibit discrimination on the basis of race, and both the ICCPR and the Universal Declaration of Human Rights, a non-binding U.N. declaration, also protect against discrimination on the basis of property and "other status," which can include homelessness.[55] Laws that have a disparate impact on homeless individuals who are members of racial minorities have also been held to violate the ICERD and the ICCPR. In response to reports that "some 50 % of homeless people are African American although they constitute only 12 % of the U.S. population," the HRC stated that the "[U.S.] should take measures, including adequate and adequately implemented policies, to ensure the cessation of this form of de facto and historically generated racial discrimination,"[56] and the CERD expressed concern "at the high number of homeless persons, who are disproportionately from racial and ethnic minorities ... and at the criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging, and lying in public spaces" and called on the government to take corrective action.[57] The U.S. Supreme Court has also looked to international law in interpreting our own equal protection standards under the Fourteenth Amendment.[58]

50 *See* U.N. Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (2014); U.N. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Raquel Rolnik, Mission to the United States of America*, ¶ 95, U.N. Doc. A/HRC/13/20/Add.4 (Feb. 12, 2012) [hereinafter UNHRC, *Report of Raquel Rolnik*]; U.N. Human Rights Council, *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*, ¶¶ 65, 66(c), U.N. Doc. A/HRC/21/39 (July 18, 2012); U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶¶ 48-50, 78(c), U.N. Doc. A/67/278 (Aug. 9, 2012); Special Rapporteurs on the Rights to Adequate Housing, Water and Sanitation, and Extreme Poverty and Human Rights, *USA: "Moving Away from the Criminalization of Homelessness, A Step in the Right Direction"* (Apr. 23, 2012), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12079&LangID=E; UNHRC, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, Addendum, Mission to the United States of America,* A/HRC/18/33/Add.4, Aug. 2, 2011; Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Stigma and the Realization of the Human Rights to Water and Sanitation*, U.N. Doc. A/HRC/21/42 (July 2, 2012); U.N. Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diéne, Mission to the United States of America*, U.N. Doc. A/HRC/11/36/Add.3 (Apr. 28, 2009) [hereinafter UNHRC, *Report of Diéne*].

51 Eric Tars, Heather Maria Johnson, Tristia Bauman & Maria Foscarinis, *Can I Get Some Remedy? Criminalization of Homelessness and the Obligation to Provide an Effective Remedy,* 45 Col. HRLR 738 (2014), http://nlchp.org/documents/HLRL_Symposium_Edition_Spring2014_Can_I_Get_Some_Remedy.

52 *In Re White*, 158 Cal. Rptr. 562, 567 (Ct. App. 1979).

53 Human Rights Committee, General Comment 27, Freedom of movement (Art. 12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

54 *Koptova v. Slovak Republic*, (13/1998), CERD, A/55/18 (8 August 2000).

55 See International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter "ICCPR"]; Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (194; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969).

56 Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), available at http://hrlibrary.umn.edu/usdocs/hruscomments2.html.

57 Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12 (2014), available at https://www.state.gov/documents/organization/235644.pdf.

58 Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12 (2014); Lawrence v. Texas, 539 U.S. 558 (2003); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

Freedom from Forced Evictions

Evictions that remove people from public spaces or outdoor encampments (sometimes referred to as "sweeps"), frequently without notice or housing relocation, may violate homeless people's right to freedom from forced evictions under international law. Forced evictions are described as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[59]According to human rights law, "[e]victions should not result in rendering individuals homeless or vulnerable to the violation of other human rights."[60] In addition, "[n]otwithstanding the type of tenure [including the illegal occupation of land or property]," under human rights law "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[61] For homeless individuals affected by sweeps, human rights law requires that municipalities "take all appropriate measures, to the maximum of [their] available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[62] This principle has been applied in cases from South Africa establishing that homeless people could not be evicted unless alternative shelter was available.[63]

59 For an excellent summary of forced evictions under international law, see UN HABITAT and UN Office of the High Commissioner for Human Rights, Forced Evictions, Fact Sheet No. 25 Rev. 1I (2014), http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf.

60 UN Committee on Economic, Social and Cultural Rights,

61 UN Committee on Economic, Social and Cultural Rights, General Comment 4, *The right to adequate housing* (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

62 *See* General Comment No. 7.

63 See, e.g., *Occupiers of 51 Olivia Road, Berea Township and Another v. City of Johannesburg and Others*, (24/07) [2008] ZACC 1 (19 Feb. 2008); Michael Clark, Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government, SERI (2013), http://www.seri-sa.org/images/Evictions_Jurisprudence_Nov13.pdf.

CONSIDERATIONS FOR BRINGING LITIGATION

Before a complaint is ever filed, counsel must consider a wide range of factors to present the strongest case.

Factual Research: Topics to Investigate

Counsel should seek to learn as much as possible about the ordinance or statute that will be challenged. This includes developing a firm understanding of the law's enactment, the jurisdiction's history of and policies regarding enforcement of the ordinance or statute, the municipality's relationship with shelters and other service providers, and difficulties homeless individuals may have complying with the ordinance. This research may be conducted by interviewing homeless individuals and service providers, reviewing municipal documentation found online, and by submitting public records requests.

The jurisdiction's history of, or policies regarding, enforcement can be critical to persuading a court that the problems identified in the eventual complaint are real, concrete, and recurring (and, therefore, not subject to dismissal on mootness or ripeness grounds). The types of questions counsel should ask about the nature of the enforcement should include:

(1) whether there have been changes in frequency or magnitude of enforcement;

(2) whether any notable swings in enforcement efforts are tied to particular events, political trends, enactment of new laws, or local citizen complaints;

(3) whether enforcement spikes during certain seasons or times of day;

(4) whether enforcement is focused on a particular area (and, conversely, whether some locations do not see enforcement); and

(5) whether enforcement is selective, meaning specific groups, such as homeless individuals, or a certain subset of the homeless population, are targeted.

Most importantly, counsel should note how potential defendants are enforcing the statute vis-à-vis specific individuals: is law enforcement issuing verbal warnings or citations, arresting violators, mandating relocation to a local shelter, or enforcing the law through some other means? Identifying municipal or police policies on enforcement is also important. Initial research on policies can be done by reviewing materials (such as press releases and reports) on a municipality's website and reviewing statements made to news media and in municipal or city council meetings. These facts will be critical in determining which legal claims have the greatest chance of success.

Local service providers (such as shelters, food kitchens, clinics, and other social service organizations that serve indigent individuals) can serve as useful resources to understanding the municipality's attitude toward homelessness. Those service providers that are critical of criminalization practices may be important allies in working with plaintiffs and gathering factual information. They may also serve as informal consultants who can help counsel understand the conditions and challenges facing the local homeless population. In contrast, some service providers may not be receptive to assisting in challenges or may be hesitant to publicly support such efforts because of their relationships with the municipality and/or its police department. It may be persuasive to some service providers who participate in their local HUD Continuum of Care to note that HUD assigns two points on their funding application for Continuums that can answer specifically what steps they are taking to end criminalization in their funding application. Participating or assisting in a lawsuit may help with that. [64]

Counsel should examine additional barriers that may hinder homeless individuals' abilities to comply with the ordinance or statute at issue. For example, if making an Eighth Amendment argument where the availability of shelter space may be important, consider barriers to shelter use:

- Age, gender, and family composition restrictions on who may use shelter can leave homeless people with few or no shelter options;
- Mental health issues, such as Post Traumatic Stress Disorder, may make a group shelter setting medically inappropriate or unavailable;

64 *See* U.S. Dept. of Housing & Urban Development, NOTICE OF FUNDING AVAILABILITY FOR THE 2016 CONTINUUM OF CARE PROGRAM COMPETITION, 35 (2016), https://www.hudexchange.info/resources/documents/FY-2016-CoC-Program-NOFA.pdf; National Law Center on Homelessness & Poverty, *The Cost of Criminalizing Homelessness Just Went Up By $1.9 Billion* (2015), http://www.nlchp.org/press_releases/2015.09.18_HUD_NOFA_criminalization.

- Accessibility issues or lack of accommodations for persons with disabilities may render shelter unavailable;
- Religious differences may inhibit an individual from seeking shelter or services from providers that require or include religious services;
- Sobriety requirements can prevent homeless people struggling with alcohol or other addiction from accessing shelter; and
- Location/transportation issues may also limit access to available services, particularly if these are located away from public transportation or if individuals' physical disabilities make transportation difficult.

Public Records Requests

A search of ordinances most likely applied to homeless persons, such as anti-camping, anti-sitting, and other similar laws, can provide information about enforcement against homeless people.

Local law enforcement will have information on arrests and citations for misdemeanor violations by homeless individuals. One way to search for such arrests and citations is by address. Many times a homeless person will list a local shelter or service provider as his or her address when arrested or cited. Police departments may have other ways of listing homeless persons' address in their records, such as "unknown," "no address," "homeless," or "transient."

Public records requests can be made of federal, state, and local governments. The federal Freedom of Information Act (FOIA) gives the public a right to obtain copies of certain documents from federal government agencies and applies to records held by agencies in the executive branch of government. Every U.S. state and some cities have passed laws similar to the federal FOIA that permit the public to request records from state and local agencies.

Public records requests can be helpful in identifying practices within your city that are negatively impacting homeless individuals. Information obtained from public records requests can help identify recurring civil rights violations that will help develop a litigation strategy, should other forms of advocacy with the city fail.

How to Make the Request:

Determine what records you need.

When making a request, it is important to describe the document you are seeking as precisely as possible and include enough information that the record will be reasonably identifiable. This is also important because there may be a copying or processing fee for records requests. See the list below for ideas on what information can be requested.

Identify the agency that has the records.

Public records requests should be directed to the agency that prepared, owned, or retains the records. If it is unclear which agency has the particular records, requests can be sent to multiple agencies.

Make a request to the agency in writing.

The websites of many state agencies provide detailed instructions on how to make public records requests and contain a form that can be used to submit such requests. If the agency in question does not provide such information, a letter should be sent to the agency reasonably describing the records requested and clearly marked as a public records request.

Request a fee waiver if needed.

Agencies can sometimes impose a significant cost for requesting documents; if this will be a barrier for your litigation, make sure to request a fee waiver in your initial application and explain you are making the request on behalf of an impoverished client and for the public good

Follow up on the request.

The federal FOIA requires a response within 20 working days, and state public records laws also impose deadlines by which the agency must respond. The request may be denied in whole or in part, but the agency is required to explain the reasons for denial. Negotiation may be helpful if the agency denies or challenges the scope of the request.

What to Request:

The different types of information advocates may consider seeking through a public records request include the following:

- All available records related to arrest, citation, warning or other actions taken by police officers in relation to violations under anticamping, anti-panhandling, loitering, and/or other ordinances used in your community to target homeless individuals;
- Any and all internal police department statements of policy, practice, guidance, or similar documents relating to the enforcement of any of the ordinances for which you are seeking records;
- All records related to sweeps and policies related to cleaning public spaces;
- All records related to citizen complaints to the police department related to homeless persons;
- All communications between the police department and city officials related to homelessness;
- Any records related to jail capacity, the cost of incarceration, and judicial resources involved in prosecuting homeless individuals; and
- All records related to official figures on the size of the local homeless population and the maximum capacity of local homeless shelters.

Issues to Consider in Working with Plaintiffs

Working effectively with plaintiffs is one of the most important aspects of litigation.[65]

Individual Plaintiffs

When filing a case in federal or state court, counsel should consider whether plaintiffs (1) meet the legal requirements of Article III standing and/or the relevant state law equivalent; (2) have claims not barred by applicable statutes of limitation; (3) have compelling facts; and (4) will be able to participate at depositions and trial. Plaintiffs who have ties within the homeless community and will be able to offer counsel guidance on the issues faced by, and remedies most likely to benefit, the homeless community can be particularly helpful.

To have standing, a plaintiff must demonstrate that he or she has personally suffered or will imminently suffer an injury that is fairly traceable to defendant's conduct and that a favorable decision is likely to redress the injury.[66] Injuries to constitutional rights are generally sufficient to establish standing. Where injunctive relief is sought, a plaintiff must further demonstrate a likelihood of future harm from the unconstitutional enforcement; this additional requirement is unnecessary for claims for monetary damages. While some courts have found that plaintiffs without convictions under anti-camping ordinances lack standing,[67] other courts have found that homeless plaintiffs have standing to challenge anti-camping or anti-sleeping ordinances, even if they have not yet been convicted under the ordinances.[68] Counsel should also anticipate challenges to individual standing where a plaintiff, who seeks only injunctive relief, is no longer homeless, is incarcerated, or has moved from the area.[69]

Beyond standing requirements, however, there are several specific considerations counsel should consider when bringing litigation on behalf of homeless individuals.

First, counsel should consider the number of individual plaintiffs appropriate for an action. A large number of individual plaintiffs can be helpful. Unsheltered homeless individuals may move or become unavailable for other reasons. Further, a large number of plaintiffs will serve to underscore the severity of the issues raised in the litigation. A demographically diverse group of plaintiffs, where possible, may likewise represent the broad harm of a given ordinance.

Second, counsel should think carefully about how to address the potential vulnerabilities of specific plaintiffs, including to prepare those plaintiffs for deposition and trial and identify where supplemental information or expert testimony may need to be procured. Plaintiffs will likely need to explain the circumstances of their past and current living situations and how they became homeless, their employment history, any medical or mental health issues that impact their claims or damages, any criminal record and periods of incarceration, and the circumstances of their citations. Plaintiffs' mental health or criminal histories may also impact the weight given to their testimony. Counsel should consider from the outset whether protective orders may be needed with respect to confidential or sensitive information about the plaintiffs.

Third, counsel should consider how to stay in communication with plaintiffs throughout the duration of any litigation. There are a variety of ways to do so. Some homeless individuals will have email addresses that they check regularly. Others will routinely stay at the same shelter and will be accessible on a regular basis at the same location. To ensure that counsel does not lose touch with plaintiffs (and that counsel is not surprised by any unexpected developments), it is advisable to schedule regular meetings.

Fourth, counsel should discuss possible remedies with individual plaintiffs upfront to determine whether and how to pursue injunctive relief, monetary damages, and/or other relief.

Class Actions – A Special Case

A class action can demonstrate the severity of the issues addressed in litigation. However, counsel must consider whether the requirements embodied in Rule 23 of the Federal Rules of Civil Procedure and/or state law equivalent can be met, as well as the relative strategic merits of a class action. Some legal services organizations are prohibited from participating in class actions as either counsel or party. Filing a lawsuit as a class action has the benefit of being able to seek relief for a large group of individuals.

65 In addition to the issues discussed here, counsel should be aware of any jurisdictional, organizational, or ethical rules or limitations related to establishing the attorney-client relationship.
66 *Dennis Hollingsworth et al. v. Kristin M. Perry*, 133 S. Ct. 2652, 2661 (2013).
67 *Johnson v. Dallas*, 61 F.3d 442, 445 (5th Cir. 1995).
68 *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006).
69 *Cf. Poe v. Snyder*, 834 F.Supp.2d 721, W.D. Michigan (2011).

However, obtaining certification of the class is an additional hurdle to overcome in a lawsuit and may be a better option for certain types of suits than others.

Organizational Plaintiffs

Organizations may be named as plaintiffs if they can demonstrate standing and injury. An organization may be able to establish standing in a representative capacity if: 1) its members would otherwise have standing to sue in their own right, 2) the interests it seeks to protect are germane to the organization's interest, and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. An organization that suffers injury in its own right may have standing to sue. For example, an organization that has or will suffer economic harm or a diminution in membership due to unlawful conduct may be able to establish standing as an organizational plaintiff. Having organizations as plaintiffs can be an advantage, in the event that individual plaintiffs' claims are mooted out. Religious groups, shelters, and other service providers may have a stake in the outcome of litigation challenging an ordinance.

Issues to Consider in Identifying Defendants

While conducting pre-trial research, counsel will need to identify defendants. This may include examining the actions of various government entities, including state and local governments and their agencies and law enforcement departments. Actions may be brought against specific individuals, based upon the level of individual knowledge and conduct. Counsel must give special consideration to issues of sovereign and qualified immunity and the requirement of § 1983 that liability is grounded in an official municipal policy.[70]

70 *Erwin Chemierinsky, Constitutional Law: Principles & Policies* 488-89 (2d ed. 2002).

© Karen Neoh

Drafting the Complaint

In addition to working with plaintiffs to identify the appropriate claims and defendants, counsel has other strategic considerations when drafting the complaint.

Level of Detail

Counsel should consider the appropriate level of detail in drafting the complaint. At minimum, complaints filed in federal court must meet the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure, *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Complaints filed in state court may be subject to pleading requirements under state civil procedure laws. In both federal and state courts, the complaint can be an opportunity to educate the court, the media, and the public on the effects of criminalizing homelessness.

Jury Demand

Counsel should consider whether a bench trial or jury trial is preferable given the specific claims and parties. This will likely involve research and considering a local counsel's perspective on the court and the potential jury pool.

Remedies

Challenges to criminalization measures have been most successful where plaintiffs have sought specific declaratory and/or injunctive relief.[71] Monetary damages may also be sought and awarded, though these have been awarded more frequently where a plaintiff's property has been seized or destroyed.[72] Given the needs of the specific plaintiffs, appropriate remedies may also include reimbursement of criminal fines and costs of incarceration, and expungement of violations of the challenged ordinances. Attorneys' fees and litigation costs should also be sought, when available.

In deciding whether to grant a preliminary injunction, courts frequently consider four factors, whether: (1) the moving party is likely to prevail on the merits of his or her claim, (2) the moving party will suffer irreparable injury unless the injunction issues, (3) the threatened injury outweighs the harm the injunction may do to the opposing party, and (4) the injunction would not be contrary to the public interest.[73] Irreparable harm is defined as harm that the plaintiff would suffer absent a preliminary injunction and that cannot later be compensated by damages or a decision on the merits.[74] Some courts do not structure or weigh the factors in any particular order, allowing the judge to exercise more discretion in determining whether a preliminary injunction should be issued; other courts will provide more guidance as to how to weigh or order similar factors.[75]

Filing the Complaint or Sending a Demand Letter?

Sending a demand letter to the defendants, prior to filing the complaint, may provide an opportunity to educate decision-makers and resolve the matter outside of litigation. For instance, the municipality may be willing to amend the objectionable ordinance or put in place a policy clarifying it and limiting enforcement against persons experiencing homelessness. Counsel who is familiar with municipal decision-makers will have the best sense of whether this is an appropriate strategy. Preliminary research will help inform counsel as to the most appropriate tone of any demand letter and other negotiations with municipalities.

71 See e.g. *Jones v. City of Los Angeles*, 444 F.3d at 1120, 1138 (noting that plaintiffs sought a declaratory judgment that enforcement violates homeless persons' rights to be free from cruel and unusual punishment and an injunction against enforcement from 9:00 p.m. to 6:30 a.m. and in cases of medical necessity).

72 See, e.g., *Pottinger v. Miami*, 810 F. Supp. at 1570 ("[A] homeless person's personal property is generally all he owns; therefore . . . its value should not be discounted.").

73 E.g. *Vision Center v. Opticks, Inc.*, 596 F.2d 111 (5th Cir. 1979); *Trak Inc. v. Benner Ski KG*, 475 F. Supp. 1076, 1077 (D. Mass. 1979); *SK&F, Co. v. Premo Pharmaceutical Laboratories, Inc.,* 625 F.2d 1055, (3d Cir. 1980). *CPG Products Corp. v. Mego Corp.,* 502 F. Supp. 42 (S.D. Ohio 1980); *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111 (7th Cir. 1997)

74 *Sampson v. Murray*, 415 U.S. 61 (1974) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

75 *Lancor v. Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir.1985) (heightened importance of probability of success); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992) (making the first two factors requirements); *Ilapak Research & Development S.A. v. Record SpA.*, 762 F. Supp. 1318 (N.D. Ill. 1991) (acknowledging that Seventh Circuit courts are to employ a sliding scale approach).

Discovery

Plaintiffs' Discovery

Discovery provides important opportunities for factual development of the case – particularly in the context of challenges to criminalization measures for which many of the relevant documents will be exclusively in the defendants' possession. Counsel should strategically consider the use of interrogatories, requests for admission, and requests for production to gain information and documentary support needed to prove each element of plaintiffs' affirmative case.

Key categories of documents that may be available through discovery include: (1) copies of citations, police records or reports, audio-recordings, and emails relating to violations of the challenged ordinances; (2) guidance and instructions on enforcement, whether formal or informal (such as in emails), and training materials on the challenged ordinances; (3) internal communications regarding enforcement policies and practices; (4) annual or periodic reports or data relating to enforcement; (5) defendants' organizational/hierarchy charts; (6) reports or policy documents regarding the ordinances at issue or homelessness; (7) defendants' submissions to federal or state government agencies that pertain to homelessness (e.g. submissions to HUD); and (8) citizen complaints or other materials defendants may use to justify their practices. Materials that can be used to demonstrate an official policy or custom are of particular importance in litigating claims brought under § 1983.

As in other litigation, the meet and confer process is an opportunity to negotiate discovery and protection of confidential or sensitive information in documents. However, where defendants attempt to "hide" information or otherwise obstruct discovery, motions to compel may be necessary to secure materials critical to proving the case.

Depositions provide additional opportunities to develop information necessary to support the affirmative case, particularly with respect to proving an official policy or custom. Documents received earlier in discovery will help identify key witnesses to depose, including officers who have issued citations, persons responsible for the training or supervision of officers, and decision-makers who have created policy or have acquiesced to existing policy.

Defendants' Discovery

Counsel may encounter particular challenges when working with plaintiffs to respond to defendants' discovery requests. Plaintiffs who are homeless and have no reliable place to store their belongings may not have access to the documents sought. To the extent requests seek materials relating to enforcement, responsive documents may already be in the defendants' possession. Counsel can assist plaintiffs in procuring documents from medical providers, employers, and government agencies; however, this process may be time-consuming. Further, such materials may contain confidential or sensitive information that should be produced only subject to a protective order.

Memory issues may also be a hurdle both in responding to requests and in depositions. For instance, plaintiffs who frequently violate the challenged ordinances, out of necessity, may not recall the specific circumstances that led to the violation for which they were cited or arrested. Care should be given to adequately prepare plaintiffs for questioning.

Third-Party Discovery

Shelters and other service providers may also have key materials and information needed in litigation. Service providers who are supportive of the litigation may be willing to provide documents or information without a subpoena or court order. Defendants will likely also seek such discovery from third-party service providers.

Experts

Experts can play an important role in helping fact-finders better understand conditions faced by many homeless individuals and reasons why compliance with ordinances may be impossible. Experts may address the conditions and causes of homelessness, the local conditions and availability of adequate shelter and services, safety concerns at shelters and in sleeping outdoors, and the effects of medical and mental health issues on compliance with the ordinances at issue.

Summary Judgment

Based on the information gleaned in discovery, counsel should evaluate whether there is sufficient evidence to seek summary judgment as to some or all of plaintiffs' claims, or as to liability.

Trial

When litigation leads to trial, counsel should carefully consider trial strategy and themes in light of the locality, its population and potential jury pool (or, if plaintiffs have selected a bench trial, in light of the judge's prior jurisprudence). Counsel should consider the most effective way to convey a compelling message about the impact of the given ordinance on the lives of the plaintiffs. In crafting the affirmative case, counsel should consider which witnesses and evidence can best support that message and the elements of each claim. Counsel should carefully consider the likely strengths and weaknesses of plaintiffs' and other witnesses' trial testimony. As with depositions, counsel must take special care to prepare trial witnesses.

Settlement

Settlement negotiations may offer for the opportunity for a constructive solution that may balance the rights of homeless individuals with a municipality's goals. Settlements can also include remedies that would be unavailable from a trial. Settlements may limit enforcement against homeless individuals under certain circumstances, such as when shelters are full, or in specified locations or during certain hours. Settlements have frequently included funds set aside to assist homeless individuals. Conditions for settlement need to be clear to the parties involved, others similarly situated, and law enforcement, so that all understand what is permitted. To prevent future violations of rights, settlement conditions should also be tailored to allow effective monitoring.

Chapter 5: Causes of Action

5.1.A Express Causes of Action, Section 1983, Elements of the Claim

The two principal statutes creating general causes of action for the enforcement of rights created by federal law are the Reconstruction Civil Rights Acts, particularly Section 1983, and the Administrative Procedure Act. Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law, while other Reconstruction statutes authorize more limited claims against private parties who violate federal rights. The Administrative Procedure Act authorizes a narrower variety of suits against federal officials and agencies. Section 1983 litigation has vindicated constitutional and statutory rights in the context of health, welfare, education, housing, employment, and prison law in litigation against state, county, or municipal officials. The Administrative Procedure Act has vindicated similar rights by correcting federal agency action or by forcing specific federal agency action.

5.1.A. Section 1983

The Reconstruction Civil Rights Acts, enacted during the 1860s and 1870s, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in more limited situations, by private parties acting alone. The most important of these statutes is Section 1983. Section 1983 creates no substantive rights. Rather, it creates a vehicle for enforcing existing federal rights. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The elements of a Section 1983 case are "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a "person" acting "under color" of state law. The "laws" referred to include those statutes that confer individual rights on a class of persons that include the plaintiff....

A Section 1983 complaint filed in federal court must name a defendant who is not immune under the Eleventh Amendment and who is acting under color of state law, and must seek relief not barred by the Eleventh Amendment. If the plaintiff establishes a violation of a federal right, defendants may in certain circumstances avoid liability for damages by proving a qualified immunity.

5.1.A.1. Finding a Federal Right

By its terms, Section 1983 can be used to remedy the deprivation of "rights" granted to the plaintiff under the Constitution, federal statutes, and regulations implementing these statutes. Constitutional provisions that are enforceable by a private party under Section 1983 consist of those which create personal rights and either explicitly apply to the states, or have been held to apply to the states by operation of the Fourteenth Amendment.

In contrast to the relatively straightforward expression of individual "rights" protected by the Constitution, whether a statutorily created "right" exists has posed something of a challenge to plaintiffs.

Under the separation of powers doctrine, only the legislative branch has the power to create statutory causes of action. Hence, the ability of a private party to successfully sue to enforce a statute

depends on whether Congress, in enacting the statute, has given the plaintiff a "private right of action." As noted, these rights are sometimes expressly granted by statute. All other rights are "implied," and a court's task is to discern the intent of Congress. The two avenues for enforcing implied rights of action are either to sue directly under the statute or to litigate using the vehicle provided by 42 U.S.C. § 1983.

In *Cort v. Ash*, the Supreme Court enunciated a four-part test to determine whether Congress intended to imply a right to sue directly under a federal statute. In general, a plaintiff asserting the right is required to show that (1) membership in the class for whose benefit the statute was enacted, (2) evidence of Congress' intent to confer a private remedy, (3) that a right to sue would be consistent with the statutory purpose, and (4) that the cause of action is not one traditionally relegated to the states to a degree that implying a right to sue would be inappropriate. In short, under this doctrine, the plaintiff must show that Congress intended to grant both a private right and a private remedy.

In the years following *Cort*, the judiciary became less willing to find rights of action implied directly under a statute, and plaintiffs began turning to Section 1983–the alternative path for enforcing rights created by federal statute. In *Maine v. Thiboutot*, decided five years after *Cort*, the Supreme Court held for the first time that Section 1983 could be used to remedy the deprivation of rights created by a federal statute….

However, not every federal law creates a "right" enforceable by a private plaintiff. As the Supreme Court became increasingly hostile to the use of Section 1983 to enforce federal statutes, it has continued to narrow its conception of the term. For this reason, one should understand the Court's principal objections to the use of Section 1983 to enforce federal statutes.

The … test for finding a right enforceable under Section 1983 was set forth in *Wilder v. Virginia Hospital Association*. It asks whether (1) Congress intended the particular statutory provision to benefit the plaintiff, (2) the provision is so vague or amorphous as to make judicial enforcement difficult or impractical, and (3) the statute imposes a binding obligation on the government. After these inquiries, a fourth arises: (4) did Congress create a comprehensive mechanism for enforcing the statute which implies that it intended to deny a private right of action? …[R]esolution of this first inquiry—the extent to which the plaintiff is "benefited" by the statute—will usually be the key to whether Section 1983 can be invoked to enforce a federal statute.

5.1.A.1.a. Did Congress intend the law to so directly benefit the plaintiff, such that those in his or her place are the "unmistakable focus" of the statute?

With respect to a number of federal programs for low-income people, a strong argument can be made that Congress' mandates are, in *Gonzaga*'s terms, "phrased in terms of the persons protected." However, since many of these statutes were enacted under the Constitution's Spending Clause, specific provisions of the statutes are written in a form which directs a federal agency to spend money so long as the state or other recipient complies with Congress' rules (e.g., "the state's plan shall provide ..."). Not surprisingly, government attorneys have argued with some success that such statutory provisions are "focus[ed] on the person regulated rather than the individuals protected" and hence, "create 'no implication of an intention to confer rights on a particular class of persons.'" This sort of argument underscores the fact that advocates need to find language in the statutory provision sought to be enforced indicating that Congress "intended to confer individual rights upon a class of beneficiaries."

5.1.A.1.b. Is the alleged "right" so vague or amorphous as to make it unenforceable?

[T]he second issue a prospective plaintiff must ask is whether the statute contains a standard by

which to measure the state or local agency's compliance with the law. In *Suter v. Artist M.*, the Court found that the plaintiff could not enforce the requirement, found in the Adoption Assistance and Child Welfare Act, that a state make "reasonable efforts" to avoid the removal of children from their parents' homes. The Court held that the statute failed to set forth standards to judge the "reasonableness" of the state's compliance with the law and was, therefore, too vague and amorphous to allow judicial enforcement. …

5.1.A.1.c. Does the statute create a binding obligation?

In Pennhurst State School and Hospital v. Halderman, the first decision to limit the use of Section 1983 to enforce a federal statute, the Supreme Court considered the ostensibly "rights producing" language found in the Developmentally Disabled Assistance and Bill of Rights Act. The Court ruled that congressional rhetoric about a disabled "bill of rights" found in the statute's declaration of policy could not create enforceable rights since the law did not tie a state's receipt of federal funding to the state's compliance with the purported bill of rights. The statutory language was held to be "hortatory" rather than mandatory. Therefore, the third question a prospective plaintiff must consider is whether the statute sought to be enforced actually requires the state or local agency to do something.

5.1.A.1.d. Does the statute contain a comprehensive enforcement mechanism?

If the statute at issue passes muster under the prongs above, Section 1983 is presumed to provide a remedy unless the defendant shows that the enactment contains a "comprehensive enforcement mechanism" whose breadth or scope suggests that Congress viewed that mechanism as the sole means for statutory enforcement.…

5.1.A.1.e. Does the enactment of a statute by Congress under its Spending Power undermine the enforceability of the statute under Section 1983?

Defendants have argued that legislation enacted under Congress' spending power, Article I, Section 8 of the Constitution, generally creates only voluntary programs which the states are free to reject. Consequently, a state's decision to participate in such a program results only in contractual obligations that cannot rise to the level of being "the supreme law of the land." Although the issue has not come before the Supreme Court, two circuit courts of appeal have rejected this contention: *Antrican v. Odom*and *Westside Mothers v. Haveman*. . . .

5.1.A.1.f. To what degree can a federal regulation create rights enforceable under Section 1983?

[E]very recent appellate decision to address the issue has [held] … that regulations cannot independently create rights, and are enforceable under Section 1983 only to the extent that the regulations merely "flesh out" a statutory provision which itself creates the right.…

5.1.A.2. "Persons" Acting "Under Color of State Law" Under Section 1983

A Section 1983 action can be brought only against a person acting "under color of [state] law." Liability lies against those "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Although the term "person" was originally thought to refer only to human beings, the concept was broadened in *Monell v. New York City Department of Social Services* to include cities and local governments whose custom, policy or practice caused the deprivation. [And] when the defendant is a government employee doing his or her job and acting under apparent government authority, she or he is very likely a "state actor. When a private actor is involved, as is increasingly the case with the trend towards "privatization" of government services, the waters are somewhat murkier.

Martin A. Schwartz, Fundamentals of Section 1983 Litigation, 17 Touro L. Rev. 525 (2001)

I. INTRODUCTION

My subject is the fundamentals of Section 1983 litigation. I thought it might help to start with a fact pattern in a typical police misconduct case. It is a fact pattern that I will come back to at different points during my presentation.

Let us assume that we have a plaintiff, Paula Plaintiff, who was arrested. Paula claims that the arresting officer used excessive force during the course of the arrest, and she has asserted a claim for compensatory damages against the police officer. She is also seeking punitive damages. Let us assume that she asserted a claim against the municipality as well. Note that although Paula can bring a claim against the municipality for compensatory damages, municipalities remain immune from punitive damages. Judge Calabresi of the Second Circuit wrote a long opinion indicating that it may be time to reconsider that issue. However, in this case Paula does not seek punitive damages against the municipality.

Let us assume that her claim against the municipality is based upon a failure of the municipality to train and supervise its police officers properly with respect to the use of force in making arrests. It goes without saying that the complaint would also assert a claim for attorney's fees, and there might be supplemental state law claims as well.

II. ELEMENTS OF THE SECTION 1983 CLAIM

The first question to be confronted is: what are the elements of Paula's Section 1983 claim for relief? If you look at the Supreme Court decisional law, it is quite consistent in articulating two, and only two, elements that Paula must allege. She must allege a violation of her federally protected rights, and that the violation occurred under color of state law. This description is incomplete, however, because there are actually four elements of a Section 1983 claim for relief, and in municipal liability cases, there are five elements. Paula must first allege a deprivation of her federally protected rights. Secondly, she has to allege causation by satisfying a type of proximate cause requirement that is read into Section 1983. As the third element she must allege that the deprivation of her federal rights was caused by a "person." Finally, she must allege that this person acted under color of state law. Additionally, since Paula is also seeking to establish municipal liability, she must also establish that the violation of her federally protected rights was attributable to the enforcement of some type of municipal policy or practice.

A) DEPRIVATION OF A FEDERALLY PROTECTED RIGHT

One of the most important principles of Section 1983 litigation is that Section 1983 itself does not give the plaintiff any rights; it does not create any rights; it does not establish any rights. Section 1983 is the procedural vehicle that authorizes the assertion of a claim based upon the deprivation of a federal right created by some source of federal law other than Section 1983. That source of federal law is usually the Federal Constitution. In some cases, it is a federal statute, but it must be a federal statute other than Section 1983.

Paula claims that excessive force was used against her by the police officer during the course of her arrest. Given her claim, it is easy in Paula's case to identify the constitutional right at issue. Paula's claim is based upon the Fourth Amendment. Consequently, she must show that the use of force by the police officer was objectively unreasonable.

It must be noted, however, that although it is easy to identify the constitutional claim in Paula's case, in many cases it is not easy to figure out what the constitutional violation is. In my opinion,

one of the great difficulties with Section 1983 litigation is determining the basis of the constitutional claim. This difficulty arises because Section 1983 incorporates all, or at least virtually all, of the individual rights in the Federal Constitution and makes them all potentially enforceable against defendants who acted under color of state law. Even for constitutional scholars, it is often difficult to figure out whether a constitutional violation exists because there is not always Supreme Court decisional law on point.

B) CAUSATION

The second element, causation, encompasses a type of proximate cause requirement that is built into Section 1983. I refer to a "type" of proximate cause requirement because although courts sometimes refer to the requirement as "proximate cause," courts also use other language, such as "causal connection." In addition, in municipal liability cases, other language like "direct causal connection" or "affirmative link" may appear. One of the unsettled questions is whether the causation requirement in Section 1983 is intended to be the same proximate cause requirement that exists with respect to common law torts, or whether the causation requirement is different under Section 1983. This question has not yet been resolved by the United States Supreme Court. The differences in the way causation is characterized, from decision to decision, might simply be attributed to the use of different language by the Court. Still, it remains somewhat of an unsettled question as to whether the causation requirement in Section 1983 is intended to be precisely the same as the proximate cause requirement that is used for common law tort cases. . . .

C) A "PERSON" WITHIN THE MEANING OF SECTION 1983

The third element is that the defendant must be a "person" within the meaning of Section 1983. State and municipal officials who are sued in their personal capacities are clearly "persons" within the meaning of Section 1983 and they may be sued under Section 1983. Municipalities and other municipal entities are also considered "persons" within the meaning of Section 1983 as a result of the *Monell* decision. If a plaintiff chooses to sue a municipal official in the official's official capacity, that is considered the same thing as suing the municipality. If you think about it then, there is no reason to sue a municipal official in his or her official capacity. The plaintiff can simply name the municipality as a defendant. There are a fairly large number of decisions holding that if the plaintiff names both the municipality and a particular municipal official in that official's official capacity as defendants, the official capacity claim should be dismissed as redundant. The official capacity claim is redundant because it does not add anything to the litigation.

One interesting point to note here, which is not an overwhelming point but worth mentioning in order to avoid needless headaches, is that departments of municipalities, like police departments and sheriffs departments, departments of corrections, and commissions, are usually held to be not suable entities. They are not "persons" within the meaning of Section 1983. Since they are not suable entities, and are commonly dismissed as party defendants, the plaintiff's lawyer should not bother naming them as defendants, but should name the municipality itself.

In attempting to sue a state or state agency under Section 1983, the plaintiff must take into account that states and state agencies sued for monetary relief under Section 1983 are not considered Section 1983 "persons." The interpretation of the word "person" under Section 1983 is thus in harmony with Eleventh Amendment decisional law. The plaintiff can, however, get prospective relief against a state government by naming the appropriate state official in his or her official capacity. The plaintiff cannot sue the state or the state agency for prospective relief, but the plaintiff is able to obtain prospective relief against the responsible state official in his or her official

capacity.

D) ACTION UNDER COLOR OF STATE LAW

Assuming that we have a "person" who is suable under Section 1983, the plaintiff must show that this person acted under color of state law. The easiest case for a finding of action under color of state law is where the state or local official acted while carrying out his or her official responsibilities in accordance and compliance with state law. Difficulty arises when the official acts in violation of state law. If you think about it, Paula Plaintiff's claim presents this type of issue. If she alleges that the officer used excessive force, there is a good probability that the officer was using force in violation of state law standards.

The key question here, and sometimes it is an easier question to ask than to answer, is whether the official was using state authority. Was the official acting pursuant to the power of the state? Was the official using, albeit abusing, state authority? An official who uses, but abuses, state authority by acting in violation of state law nevertheless is said to be acting under color of state law?

As you go down the line, this issue gets tougher and tougher. The next question to ask is: how are officials who use state authority in violation of state law defined? How do we distinguish them from officials who may have been acting in a purely private capacity? In the examples that come to mind, there are two groups of cases where this is a recurrent issue. One example is the school teacher abuse cases where public school teachers abuse students. The question in those cases is whether the teacher was acting as an individual, or alternatively, whether the teacher was exercising, albeit abusing, state authority.

How about private companies or private individuals? They will be found to have acted under color of state law only when they are engaged in state action.

III. THE IMMUINITY DEFENSES

Let us now look at the immunity defenses. My hypothetical police officer here has been sued for damages in his personal capacity. When there is a personal capacity claim against a public official under Section 1983, that official is very likely to raise an immunity defense. Common law immunities have been read into Section 1983 by the United States Supreme Court. Although there is nothing in Section 1983 itself that speaks to the question of immunity, the Supreme Court's position is that when Congress adopted the original version of Section 1983 back in 1871, Congress intended that the common law immunities be considered part of the Section 1983 cause of action.

A) ABSOLUTE IMMUNITY

Some officials are entitled to absolute immunity. This is the cat's pajamas of immunity because absolute means absolute. Even if the official acted in bad faith or with malice, and even if the official violated clear federal law, the official will be protected from personal liability if she has absolute immunity. So the question becomes: who are these lucky souls? They are mainly judges, prosecutors, legislative officials, and witnesses.

Most officials, however, and now we are talking about executive and administrative officials, have a somewhat lesser immunity we call qualified immunity. Qualified immunity will protect them as long as they do not violate clearly established federal law.

B) QUALIFIED IMMUNITY

Other than the question of whether the plaintiff has been able to establish a violation of a federally protected right, this is the most critical issue in Section 1983 litigation. In *Harlow v. Fitzgerald,*

the Supreme Court attempted to simplify qualified immunity. *Attempted*, because qualified immunity continues to be nothing short of a nightmare. The court attempted to simplify qualified immunity by turning the qualified immunity defense into a legal issue that could be determined as a matter of law by federal district court judges early in the litigation. The idea was that qualified immunity would be a test of objective reasonableness, of whether the official acted in an objectively reasonable fashion. The test would determine whether the official acted in such a fashion by asking the question: did this official violate clearly established federal law? Officials who act in violation of clearly established federal law are considered officials who did not act in an objectively reasonable fashion and are, therefore, not protected by qualified immunity. On the other hand, officials who violate federal law, but not clearly established federal law, are viewed as having acted in an objectively reasonable fashion and, therefore, would be protected from personal liability by the qualified immunity defense.

V. MUNICIPAL LIABILITY

Municipal liability is the last issue I want to address. Because there is no respondeat superior liability under Section 1983, in order to establish municipal liability the plaintiff has to show that, in some way, the violation of her federally protected rights was attributable to the enforcement of a municipal policy or practice. Municipal entities, unlike public officials, cannot assert the official's common law immunities, so that, even if the municipal official is protected by an absolute immunity or qualified immunity because the official acted in an objectively reasonable manner, the municipality is still potentially subject to Section 1983 liability. This is one of the main reasons that Section 1983 plaintiffs often couple their personal liability claims with municipal liability claims. The other big reason is to get to the deeper pocket municipal entity.

While Section 1983 complaints commonly assert claims against municipal entities, Section 1983 plaintiffs very often have great difficulties establishing municipal liability. The reason for that is, if one looks at the different potential bases for establishing municipal liability, one finds difficult problems for Section 1983 plaintiffs.

One possibility would be for the plaintiff to rely upon a formally promulgated policy by the municipality, for example, by the city council. The problem is that the formally promulgated policy is often not there. For instance, in police misconduct cases, municipalities typically do not have policies that allow police officers to use unreasonable force, to brutalize individuals, or to make arrests without probable cause. A formally promulgated policy is a potential basis of municipal liability, but it is not found in many cases. It is just not there.

The second possibility is for the plaintiff to be able to show a custom or practice. This custom or practice could be a custom or practice of the higher echelon municipal officials, the policy makers. Alternatively, it could be a practice by lower echelon employees, which, if sufficiently pervasive, gives the higher ups actual, or at least constructive, knowledge as to what is taking place. Although the law recognizes custom or practice as a basis for municipal liability, sufficient evidence to establish the claim is often lacking. These claims are very difficult to prove. It is also very time consuming to find that kind of evidence, requiring a lot of investigation and discovery. The number of plaintiffs who are able to actually prove a municipal custom or practice is quite few in number.

The third possibility is a final decision by a municipal policy maker. This is a possibility, but again, very often, the wrong that the plaintiff is complaining about was not a wrong of a final policy maker of the municipality. Very often, it was the police officer on the beat, or some subordinate employee that engaged in conduct that violated the plaintiff's rights.

Fred Smith, Local Sovereign Immunity, 116 Colum. L. Rev. 409 (2016)

Local governments serve as republican dispensaries of core sovereign functions. Across the country, citizens elect a range of representatives to exact taxes and allocate limited resources in service of the public good. Whether they are called city councilpersons or aldermen, county commissioners or supervisors, local elected representatives often play this crucial role. [L]ocal governments … dispense core sovereign functions. This focus exposes two competing lessons. On the one hand, if it is true that damages suits and intrusive judgments can cripple the ability of states to carry out core sovereign functions, the same is presumably true of local governments as well. On the other hand, the expansive role local governments play in Americans' everyday lives means that a lack of constitutional accountability for constitutional violations is of both pressing and profound concern.

A. *Local Sovereign Interests*

1. *Police Power*.--A guiding principle of federalism, and concomitant state sovereignty, is that states retain a "general police power" that the national government lacks. In *Gonzales v. Oregon*, the Court posited that "the structure and limitations of federalism ... allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."' This general police power permits states to legislate, and sometimes litigate, on behalf of the safety and health of those within its borders. In *United States v. Morrison*, a case often hailed and lamented as a quintessential example of federalism jurisprudence, the majority noted that it could "think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."

These cases have sometimes acknowledged the role that local governments play in carrying out these powers. Even a cursory observation of local governments confirms this role. Cities and counties across the nation have police forces that respond to disturbances; initiate arrests for major and minor crimes; enforce court orders; and even enforce locally crafted ordinances. When a person dials 911 and reports an emergency, the first responder is likely not an employee of a state government in a distant state capital, but a local policeperson or firefighter. Local governments are critical players in carrying out states' residual police power.

2. *Education*.--In *United States v. Lopez*, the United States Supreme Court famously invalidated the Gun Free School Zones Act on the grounds that it exceeded constitutionally authorized federal power. Concurring, Justice Kennedy opined that "[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant." The federal act invaded this sovereignty in part because of the traditional role states have played in educating children. "An interference of these [state functions] occurs here, for it is well established that education is a traditional concern of the States." Because schools are "owned and operated by the States or their subdivisions," Justice Kennedy reasoned that the Court had "a particular duty to ensure that the federal-state balance is not destroyed."

Among the state's subdivisions that own and operate schools are local governments. Local governments largely fund public schools and public schools constitute a significant portion of state budgets. And often, it is local city councils and school boards that make decisions about policies and resources in those schools. Local governments, then, play a critical role in carrying out this traditional state function.

*** * ***

Leading scholars have astutely identified the tension inherent in treating local governments as arms of the state for some purposes, and as laboratories of democracy for other purposes. But there are ways in which these conceptions are reconcilable. In ways we have come to accept, states vest local government with historically sovereign powers to protect, educate, and allocate taxes. And like state officials, locally elected representatives often make decisions about how to wield this formidable sovereign power.

B. ***Lawsuits as a Threat to Sovereign Functions***

State sovereignty jurisprudence often also adduces states' collective role as exactors and stewards of tax dollars. In *Alden*, the Court explained this concern as follows: "Private suits against nonconsenting States may threaten their financial integrity, and ... strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public fisc ...."

Accordingly, a state has the important role of tending to its own treasury in ways that comport with the public will and public good. And when that treasury is depleted, the state's survival is imperiled. "Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process." For example, as previous commentators have documented, "states faced staggering debts ... in the aftermath of the Revolutionary and Civil Wars." Allowing judicial enforcement of those debts would have presented severe challenges to states' survival.

The Court's observation in *Alden* about "financial integrity" resembles an insight found in cases protecting local government's role in managing the public fisc. In *City of Newport v. Fact Concerts, Inc.*, when the Court rejected punitive damages against cities, it reasoned, "To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities." Local governments, after all, often exact sales and property taxes and allocate them for the public good.

This concern even looms in cases that involve prospective, rather than retrospective, relief. Prevailing plaintiffs in § 1983 cases are entitled to attorneys' fees, including suits for injunctions and declaratory relief. At oral argument in *Los Angeles County v. Humphries*, the case that expanded the heightened causation requirement to suits for prospective relief, several justices identified a potential injustice to taxpayers. The issue of attorneys' fees arose at least twenty-six times during oral argument. As Justice Scalia put it, "I suspect ... the case is mostly about attorneys' fees."

Lawsuits and execution of legal judgments threaten local treasuries and, therefore, their ability to engage their sovereign functions. Just as executing judgments against states could "[endanger] government buildings or property which the State administers on the public's behalf," the same could be said of cities. Courts, after all, sometimes award property to a prevailing party in execution of a judgment. And as Professor Michael McConnell has observed, courts have on rare occasions awarded government property to litigants in execution of judgments against cities. For example, the case of *Estate of DeBow v. City of East St. Louis* involved a decision by a court to award a park and city hall building in execution of a judgment. The Illinois Appellate Court found that awarding city hall to a litigant violated public policy. Still, the court simultaneously upheld the portion of the same execution order that awarded a litigant 220 acres of city-owned vacant

ground.

What is more, as Professor Michelle Anderson has demonstrated, when a city's dollars or property disappear, sometimes cities themselves fall as well. Legal judgments against Mesa, Washington, and Half Moon Bay, California, mark recent examples of legal judgments bringing cities to the brink of collapse.

C. *Accountability*

In government, the power to help citizens is inevitably bundled with the power to harm them. One does not need to travel into the realm of the hypothetical to consider what types of injustices can thrive when powerful local governments are immune from suit.

1. *Municipal Immunity Pre*-Monell.--Prior to 1978, local governments were immune from suit under § 1983. And during that time, a number of local governments abused their sovereign role as custodians of education.

In 1954, the Supreme Court issued its landmark decision in *Brown v. Board of Education*, unanimously using its equitable power to overturn de jure segregation in American schools as a violation of the Fourteenth Amendment's Equal Protection Clause. "Today, education is perhaps the most important function of state and local governments," the Court observed. "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society .... It is the very foundation of good citizenship."

Nonetheless, neither *Brown* nor its sequel a year later proved sufficient to overcome many local governments' recalcitrant and ominous commitment to "segregation now, segregation tomorrow, and segregation forever." The overwhelming majority of school districts throughout the South did not integrate until the late 1960s and early 1970s. Indeed, when they finally did, local school districts were primarily motivated by something that was not at stake in *Brown* and its progeny: money. That is, a substantial number of school districts desegregated following the passage of a federal law that tied conditional grants to school districts in exchange for "[d]ismantling the dual system of education in the South." To encourage meaningful integration, economists recently demonstrated, a district needed to be paid roughly $1,200 per pupil.

This necessarily means that the threat of private suits for prospective relief, pursuant to the court's equitable authority, was insufficient to convince school districts to desegregate schools. We will never know whether schools would have integrated earlier if monetary damages for psychic and emotional harms had been among the remedies available to school children throughout the South.

2. *Municipal Immunity Post*-Monell.--Today, it is not uncommon for a plaintiff to lack any remedy for a constitutional violation committed by a local agent. The following case typifies this phenomenon.

Jesse Buckley is a resident of Florida whom a police deputy stopped for speeding in March 2004. At the time of the traffic stop, Buckley was homeless and asked the deputy to take him to jail. He allowed himself to be handcuffed, but then, after exiting the car, fell to the ground and sobbed uncontrollably. "My life would be better if I was dead," he told police. The officer threatened to tase Buckley if he refused to stand, but Buckley refused to stand. "I don't care anymore-tase me." The officer then tased the handcuffed, sobbing man three times into different areas of his back and chest. The shocks lasted roughly five seconds per round.

Buckley sued the officer and Washington County, Florida, for excessive force under the Fourth Amendment's prohibition against unreasonable seizures. A federal district court dismissed the claim against the County on a motion for summary judgment. That court, which viewed a video of the incident, noted that "[t]he only apparent purpose for using the taser was to cause the restrained Buckley, who had not been violent or dangerous, to get into [the deputy's] car." The district court also acknowledged that an official investigation conducted by Washington County, Florida exonerated the officer of any wrongdoing and failed to discipline him. Further, the city lacked a written policy on the proper use of a taser when used without darts. Still, the court found that even if the deputy violated the Constitution, the County could not be held liable under the stringent "policy or custom" requirement.

The following year, in a routine unpublished opinion, the Eleventh Circuit dismissed the claim against the deputy as well on qualified immunity grounds. To be sure, a majority on an Eleventh Circuit panel apparently agreed that, at a minimum, the third instance of tasering was unconstitutional. As Judge Beverly Martin wrote, "[T]he Fourth Amendment forbids an officer from discharging repeated bursts of electricity into an already handcuffed misdemeanant--who is sitting still beside a rural road and unwilling to move-- simply to goad him into standing up." But the two-judge majority concluded that the officer was entitled to qualified immunity, reasoning that previous case law could not have given him "fair and clear notice" that his conduct violated the Constitution. This meant that despite the constitutional violation, the plaintiff was left with no constitutional remedy.

Scholars such as Professor Pamela Karlan have shown that federal dockets are replete with cases like Buckley's--where immunities and the municipal causation requirement conspire to immunize local governments and their officials for conduct that violates the Constitution.

Regularly leaving plaintiffs without this remedy undermines representative government. Apposite are the words of Representative Samuel Shellabarger, the author of § 1983, who shepherded the provision through the House of Representatives: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation." The frequency with which plaintiffs are left without remedy for constitutional violations raises questions about whether this legislative promise is adequately fulfilled today.

The rights-remedies gap also presents substantial challenges to federalism and the reimagined zone of autonomy anticipated by the framers of the Fourteenth Amendment. As the Court recognized in 1880 in *Ex parte Virginia*, "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." Thus, when Congress enacts legislation pursuant to that amendment, "not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."

It diminishes these insights when courts refuse to correct constitutional violations on grounds of federalism and autonomy. Indeed, Professor Spaulding has observed that odes to federalism that ignore this monumental history are not just incomplete, but dangerous, because they "turn[] on a chillingly amnesic reproduction of antebellum conceptions of state sovereignty." They relegate the promise of the 42nd Congress to, as Justice Robert Jackson said in another context, "only a

promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

*** * ***

While there are ways that suits against cities challenge representative government and federalism, cases as epic as *Brown* and as commonplace as *Buckley* dramatize a competing concern: Failure to enforce constitutional guarantees also challenges both representative government and the federal structure as reborn during Reconstruction. Any judicially crafted municipal immunity should aim to calibrate these competing demands on foundational ideals.

Federal Rules of Civil Procedure, Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under

Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Shriver Center, Federal Practice Manual for Legal Aid Attorneys[1]

Chapter 7: Class Actions

7.1 Whether to Bring a Class Action

When engaging in strategic litigation planning, counsel must determine whether the case can and should be brought as a class action. The ramifications of filing a case as a class action must be carefully considered and discussed with the potential class representative(s). Counsel must initially determine whether the case meets the requirements for a class action. If these requirements are likely to be satisfied, several additional considerations are relevant in deciding whether to bring a case as a class action: (1) can the case be won; (2) are there sufficient resources to bring a class action; (3) does having a class facilitate bringing a case to judgment; (4) is a class necessary for relief?

7.1.A. Probability of Success on the Merits

Counsel's assessment of the strength of a case on the merits is always a factor in deciding whether to bring a case, whether framed as a class action or not. However, a judgment in a class action will likely have preclusive effect for the class on class members named or described in the judgment. If plaintiffs win, relief will benefit all affected individuals, including class members with very small claims who might not otherwise sue. However, if plaintiffs lose, the judgment has claim-preclusive effect on all class members and those in privity with them unless absent class members are subsequently able to establish lack of jurisdiction, lack of notice or inadequate representation. The potential for claim preclusion underlies the fundamental due process issues inherent in class action practice. . . .

7.1.B. Resources

Another factor to consider is whether your program has sufficient resources to bring the class action. On the one hand, if the issue is not litigated as a class action, a systemic problem may remain unresolved, and numerous individual cases may have to be brought. This results in duplicative effort. On the other hand, bringing a class action commits program resources to a time-consuming, frequently long-term lawsuit in which zealous representation requires fully litigating the interests of the entire class. …

7.1.C. Effects on the Litigation Process

The third set of considerations relates to how a certified class affects the process of bringing the case to judgment. … Most important is the possibility that the named plaintiff's legal issue will be resolved, thereby requiring a class to avoid mootness. If concern about mootness is the only reason to bring a class action, counsel should assess whether it could be avoided some other way, such as by joining several plaintiffs, having an organizational plaintiff, or by bringing a claim for damages, including nominal damages.

Further, in a class action, a plaintiff class may be allowed much broader discovery than an individual party. However, filing a case as a class action may also result in more vigorous discovery of the named plaintiff(s), particularly on issues relating to plaintiff's adequacy of representation, typicality, and knowledge of the meaning of class representation. …

[1] http://federalpracticemanual.org/

Filing a class action may allow more opportunities for media exposure and public education and awareness about the issues of the case. On occasion, this coverage can be helpful in surfacing witnesses or other useful evidence. In some cases, however, it may create a public backlash that might harm the named plaintiffs' case. Named representatives should be prepared to have the glare of publicity focused on them personally.

Finally, counsel should consider the likelihood that defendants will appeal the case. Defendants may be more likely to appeal an adverse judgment in a class action than in an individual case. Indeed, Rule 23(f) of the Federal Rules of Civil Procedure permits interlocutory appeals of class certification decisions, with a possibility of a stay pending appeal. This issue must be discussed with the named plaintiffs.

7.1.D. Effects on Relief

Several issues relating to relief are critical considerations in deciding whether to bring the case as a class action. These include whether to seek preliminary relief on behalf of named plaintiffs or the class, how tolling of the statute of limitations affects plaintiffs or class claims, and settlement negotiation. …

Litigation strategy and settlement negotiations may create potential conflicts between the named plaintiffs and the class. The general rule is that named plaintiffs have a fiduciary duty to absent class members and are not allowed to abandon their representation or settle in such a way that significantly prejudices the class. At the same time, named plaintiffs may be responsible for regular and lengthy monitoring of the decree or judgment on behalf of the class. These problems are certainly not insurmountable, but they must be carefully discussed with the named plaintiffs before filing. Following this discussion, a retainer should be signed which should detail the agreements made on settlement, negotiation, attorney fees, commitments regarding appellate representation, and provisions for terminating representation.

7.4 Resolution of Class Actions

Class counsel may determine that settlement of the case is appropriate. If a settlement is reached the court will hold a fairness hearing on the settlement and counsel must give notice of the settlement to class members. As in other aspects of class action litigation, the negotiation between the parties will be scrutinized by the court during the fairness hearing. The court will consider any conflicts between named plaintiffs and the class and issues such as attorney fees. Negotiation, notice of settlement and fairness proceedings are discussed below.

7.4.A. Negotiations

Ethical considerations are somewhat different in class action lawsuits. Class action negotiations are at risk of greater collusion between counsel because there is less client control than in individual suits and because the client to whom counsel is accountable may be "amorphous and widespread." Defendants often seek to negotiate plaintiffs' attorney fees as part of the overall settlement. The Supreme Court addressed this issue in *Evans v. Jeff D.*, which held that this behavior on the part of defense counsel was not unethical. However, the *Manual for Complex Litigation* suggests that courts reviewing such settlements should examine them for the "fairness of the allocation between damages and attorney fees, noting that "[t]he ethical problem will be eased if the parties agree to have the court make the allocation."

Persons initiating the class action must be kept apprised of negotiations as they develop. In one disciplinary action, an attorney was suspended and required to pay a fine when he failed to inform his clients about negotiations, entered into a secret agreement in which he was to receive $225,000 in fees, agreed not to represent anyone with related claims and agreed to keep the agreement confidential. The District of Columbia Court of Appeals found this conduct to have violated eight different ethical rules. Courts have cautioned against the inadequacy of lawyer representation and the temptation that lawyers might face, particularly where the individual claims were small, to sell out the class.

Counsel may seek to settle a putative class action prior to class certification. A "settlement class" is one that has been certified at the same time the settlement has been approved. Certification at the time of settlement approval binds all members of the class who have not opted out to the judgment. Settlement classes must satisfy all the requirements of Rule 23(a) and (b). Whether a class action would be manageable is not considered in settlement classes since the matter, by definition, does not proceed to trial. Because of increased possibilities of collusion, settlement classes are subject to more searching scrutiny.

7.4.B. Notice and Settlement

As with many other aspects of class actions, during notice, settlement and fairness proceedings, the court is the protector of the class or putative class. Some courts describe the role of the court at this stage of the proceedings as a fiduciary one. Individual litigants are generally free to compromise their claims and plaintiffs are free to dismiss them voluntarily or, if the complaint has been answered, with the agreement of the defendant under Rule 41(a). Cases filed as class actions generally require more, as detailed in Rule 23(e), and this specific exception is indicated in Rule 41(a).

The 2003 amendments to Rule 23(e) are substantial and are designed to enhance judicial oversight of settlements. Rule 23(e)(1)(A) now provides that court approval is required for “any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a *certified* class.” [Emphasis supplied.] This language was added to “resolve any ambiguity” of the previous language and to make clear that 23(e) applies only to a “certified class” and not to settlements with proposed class representatives that resolve only individual claims. This amendment reverses the rule in most circuits requiring approval of the settlement of pre-certification class actions.

The approval by the court is a two-step process: the settlement is presented to the court, which makes a preliminary fairness evaluation. If the preliminary evaluation does not cast doubt on its fairness, the court directs that notice be given for a formal fairness hearing.

Rule 23(e)(1)(B) requires notice where the settlement binds the class through claim or issue preclusion and is not required when the settlement only binds the individual class members. Settlement notice must be prepared in a reasonable manner in all class action settlements, regardless of whether it is a (b)(1), (b)(2) or (b)(3) class. This notice must explain the proposed settlement or dismissal to the class members , specify a means for them to file objections to the proposed terms, set forth any deadline for filing such objections, and inform them of the date of the hearing where their objections will be considered. The form of such a notice should be submitted to the court for approval either as part of the settlement agreement itself or by separate motion. "Reasonable" notice is most commonly notice by mail, but may be supplemented or, when appropriate, replaced by notice by publication. Rule 23 does not necessarily require the party sending the notice to “exhaust every conceivable method of identification.” This notice need not be individualized. Because

both the class and the defendants seek approval of the settlement, courts have shifted the burdens and costs of providing notice to the defendants when appropriate.

Defendants in settled class actions are now required to provide notice of such settlement within ten days of the filing of the agreement on certain federal and state officials. Generally, unless the defendant is a depository institution, the U.S. Attorney General must be served with such notice. The appropriate state official is defined in 28 U.S.C. § 1715(a)(2) and is often the primary regulator of the defendant. The content of the notice is prescribed in 28 U.S.C. § 1715(b). Of potential concern to plaintiffs is that the court may not give final approval of a proposed settlement until at least 90 days from the date the last defendant made notice on the appropriate government officials. With the exception set forth in 28 U.S.C. § 1715(e)(3), a class member is not obligated to comply with the agreement and is not bound by it if this notice is not provided.

7.4.C. Fairness Hearings

The court is required to ensure that the settlement is fair, adequate, reasonable, and not based on collusion. Some courts also consider whether the settlement furthers the public interest. The court has a "heavy, independent duty" in making the approval as the settlement process is more susceptible to abuse than the "adversarial process." As described by the *Manual for Complex Litigation*, the role of the court is to be a "skeptical client" as there is "typically no client with motivation, knowledge, and resources to protect its own interests." The court must balance a variety of factors in reaching this determination of fairness. These standards are expressed in various ways by the courts but fundamentally involve the following inquiries : 1) a comparison of the strength of the plaintiff's case against the recovery proposed in the settlement); 2) the complexity and risks of continued litigation; 3) the presence of collusion in reaching a settlement; 4) the comments of class members; and 5) the stage of the proceedings and the amount of discovery completed. Rule 23(h) sets forth in detail the requirements necessary for a court to award attorney fees in class actions.

The 2003 Amendments added Rule 23(e)(3) requiring the parties to identify any side agreements to the settlement. This rule authorizes the court to require disclosure of "related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification." Rule (c)(3) does not contemplate discovery of information related to such agreements.

A court approving a class action settlement must make findings of facts and conclusions of law to support its conclusion that the proposed settlement is fair, reasonable, and adequate. Those findings must identify and apply the factors employed to draw that conclusion and must be sufficiently detailed to provide an adequate explanation to the class and to the appellate court for possible review. Class members are, of course, permitted to make objections to the proposed settlement and the court should address those objections in its findings and conclusions. The court may only approve or disapprove the agreement; the court may not rewrite it.

The standard of review for decisions regarding settlements is "abuse of discretion." However, a review of an interpretation of the agreement is *de novo*. Orders disapproving class settlement are generally not subject to interlocutory review. The Supreme Court held in *Devlin v. Scardelletti* that class members who objected to a class settlement were permitted to appeal approval of the settlement without needing to intervene.

I. INTRODUCTION

Named Plaintiffs Christos Sourovelis, Doila Welch, Norys Hernandez, and Nassir Geiger ("Plaintiffs"), on behalf of themselves and all others similarly situated under Federal Rule of Civil Procedure 23(b)(2), bring this putative class action pursuant to 42 U.S.C. § 1983 against the City of Philadelphia, Mayor James F. Kenney, and Police Commissioner Richard Ross, Jr. (collectively, the "City Defendants"); the Philadelphia District Attorney's Office (the "D.A.'s Office") and District Attorney Seth R. Williams (together, the "D.A. Defendants"); and Sheila A. Woods–Skipper, Jacqueline F. Allen, Joseph H. Evers, and Charles A. Mapp (the "First Judicial District Defendants") (all together, "Defendants") to enjoin and declare unconstitutional the City of Philadelphia's civil forfeiture policies and practices. Plaintiffs' Second Amended Complaint asserts seven claims, all of which allege that Defendants' policies and practices violate the Due Process Clause of the Fourteenth Amendment.

Plaintiffs seek to certify a Rule 23(b)(2) class on their fifth claim for relief ("Count Five"). In Count Five, Plaintiffs claim that the City and D.A. Defendants have a policy and practice of retaining forfeited property and its proceeds for use in funding the D.A.'s Office and the Philadelphia Police Department, including paying the salaries of the prosecutors who manage the civil forfeiture program, thereby providing the D.A.'s Office and the Philadelphia Police Department with a direct financial stake in the outcome of civil forfeiture proceedings. Plaintiffs allege that this arrangement creates a conflict of interest, injects impermissible bias into the civil forfeiture process, and violates Plaintiffs' rights to the fair and impartial administration of justice under the Due Process Clause of the Fourteenth Amendment.

For the reasons that follow, the Court will certify a Rule 23(b)(2) class with respect to Plaintiffs' requests for (1) a declaratory judgment declaring unconstitutional the City and D.A. Defendants' policy and practice of retaining forfeited property and its proceeds for use by the D.A.'s Office and the Police Department; and (2) an injunction enjoining that policy and practice. However, the Court will decline to certify a Rule 23(b)(2) class with respect to Plaintiffs' request for an injunction ordering the return of forfeited property on the basis of the alleged constitutional violations.

II. BACKGROUND

Civil forfeiture statutes permit states and the federal government to file actions, under certain circumstances, to obtain ownership of private real and personal property that is related to certain categories of criminal activity. In Pennsylvania, the Controlled Substances Forfeiture Act, 42 Pa. Cons. Stat. Ann. §§ 6801 and 6802 (the "CSFA"), provides that certain real and personal property that is connected to a violation of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa. Cons. Stat. Ann. §§ 780–101 to 780–144, is subject to forfeiture by the Commonwealth of Pennsylvania. 42 Pa. Cons. Stat. Ann. § 6801. The CSFA sets forth the property that is subject to forfeiture by the Commonwealth, see id., and provides a procedure for the forfeiture proceedings, which must be filed in the court of common pleas of the judicial district where the property is located, see id. § 6802.

Plaintiffs' claims in this action relate to property forfeited through civil forfeiture proceedings brought by the D.A.'s Office in the Court of Common Pleas of Philadelphia County. The majority of the property, Plaintiffs allege, was forfeited pursuant to the CSFA. Second Am. Compl. ("SAC") ¶ 41, ECF No. 157. According to Plaintiffs, Philadelphia's civil forfeiture program is one of the largest municipal forfeiture programs in the country, and "unprecedented in scale." Plaintiffs allege that the D.A.'s Office forfeited over $90 million worth of property from 1987 to 2012 through civil forfeiture proceedings, , yielding an average of $5.6 million in forfeiture revenue each year, . Forfeiture data Plaintiffs obtained from the Pennsylvania Office of the Attorney General indicates that the D.A.'s Of-

fice collected over $72.6 million in forfeiture revenue from fiscal years 2002 through 2014. . Plaintiffs allege that this amount constitutes nearly one-fifth of the general budget of the D.A.'s Office as appropriated by the City of Philadelphia.

Plaintiffs allege that the City and D.A. Defendants seize large quantities of personal property for forfeiture, including cash, cell phones, clothing, jewelry, prescription medication, and licensed firearms. . Plaintiffs claim that the majority of the cash seized involves small amounts of money. . For example, in 2010, Philadelphia filed 8,284 currency forfeiture petitions, with an average of $550 at issue in each case. . Plaintiffs also allege that the City and D.A. Defendants file civil forfeiture petitions on 300 to 500 real properties (mostly private residences) each year. . Approximately 100 of these real properties are forfeited and sold at auction annually; and a significant majority of the remaining cases settle under threat of civil forfeiture..

Plaintiffs' Second Amended Complaint alleges that a number of Defendants' civil forfeiture policies and practices are unconstitutional. With respect to Count Five, specifically, Plaintiffs allege that the City and D.A. Defendants retain the proceeds of civil forfeiture proceedings, which provide the Defendants with a direct financial incentive in the outcome of the proceedings. According to Plaintiffs, the D.A.'s Office and Philadelphia Police Department have a written agreement to share proceeds obtained from forfeiture proceedings, , and use a large portion of the forfeiture revenue to pay salaries. Plaintiffs obtained data from the Pennsylvania Office of the Attorney General indicating that the D.A.'s Office spent over $28.5 million of its forfeiture revenue on salaries from fiscal years 2002 through 2014, including the salaries of the prosecutors who administer Philadelphia's civil forfeiture program. Plaintiffs claim that the City and D.A. Defendants' direct financial stake in civil forfeiture proceedings brings irrelevant and impermissible factors into the investigative and prosecutorial decision-making process, which in turn creates a conflict of interest, actual bias, potential for bias, and/or appearance of bias that violates Plaintiffs' rights to the fair and impartial administration of justice guaranteed by the Due Process Clause of the Fourteenth Amendment.

III. PROCEDURAL HISTORY

Plaintiffs' Second Amended Complaint asserts the following seven claims:

(1) the City and D.A. Defendants' policy and practice of failing to provide notice or a hearing before seizing real property violates the Due Process Clause of the Fourteenth Amendment (Count One);

(2) the City and D.A. Defendants' policy and practice of requiring real property owners to waive their constitutional and statutory rights in order to obtain access to their property or have the forfeiture petition withdrawn violates the Due Process Clause of the Fourteenth Amendment (Count Two);

(3) Defendants' policy and practice of failing to provide a prompt, post-deprivation hearing violates the Due Process Clause of the Fourteenth Amendment (Count Three);

(4) Defendants' policy and practice of repeatedly "relisting" forfeiture proceedings violates the Due Process Clause of the Fourteenth Amendment (Count Four);

(5) the City and D.A. Defendants' retention of forfeited property and its proceeds violates the Due Process Clause of the Fourteenth Amendment (Count Five);

(6) Defendants' policy and practice of prosecutors controlling forfeiture hearings violates the Due Process Clause of the Fourteenth Amendment (Count Six);

(7) Defendants' administration of civil forfeiture and related proceedings, including notices to property owners, the timing of filings, and access to court hearings, violates the Due Process Clause of the Fourteenth Amendment (Count Seven).

IV. PROPOSED CLASS

Plaintiffs seek to certify the following class under

Rule 23(b)(2) with respect to their fifth claim for relief:

> All persons who hold legal title to or otherwise have a legal interest in property against which a civil-forfeiture petition was filed by the Philadelphia District Attorney's Office on or after August 11, 2012, or will in the future be filed, in the Court of Common Pleas of Philadelphia County.

V. LEGAL STANDARD

A party seeking class certification must satisfy Rule 23(a) of the Federal Rules of Civil Procedure and the requirements of one of the subsections of Rule 23(b). Wal–Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Under Rule 23(a), Plaintiffs must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). With respect to Rule 23(b), Plaintiffs here seek to certify a class under Rule 23(b)(2), which is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. (23)(b)(2).

"Rule 23 does not set forth a mere pleading standard," but instead, "[a] party seeking class certification must affirmatively demonstrate [her] compliance with the Rule—that is, [she] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Dukes, 564 U.S. at 350, 131 S.Ct. 2541. The Supreme Court has repeatedly "recognized ... that 'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' "

The Supreme Court has also recognized that "[f]requently[,] th [is] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.' " Dukes, 564 U.S. at 351, 131 S.Ct. 2541. That is, "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id..

VI. DISCUSSION

A. Rule 23(a)

The City and D.A. Defendants concede that Plaintiffs' proposed class satisfies numerosity and that the proposed class counsel adequately represents the class. They challenge only commonality, typicality, and Plaintiffs' ability to adequately represent the class. Nonetheless, the Court must satisfy itself, through a "rigorous analysis," that all of the prerequisites of Rule 23(a) are met. See Dukes, 564 U.S. at 350–51, 131 S.Ct. 2541

For the reasons discussed below, the Court finds that Plaintiffs have met their burden to demonstrate that their proposed class satisfies the Rule 23(a) requirements of numerosity, commonality, and adequacy of representation. However, the Court finds that Plaintiffs' claims are not typical of the entire proposed class in one respect: Plaintiffs' property was subject to civil forfeiture pursuant to the CSFA, specifically, and Plaintiffs seek to certify a class of all persons whose property was subject to civil forfeiture, regardless of the legal basis for the forfeiture.

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The Third Circuit has explained that "no minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the [numerosity] prong" has been met.

The putative class consists of thousands of individuals who have a legal interest in property against which a civil forfeiture petition was filed. As this

number is far greater than forty, the Court finds that numerosity is satisfied.

2. Commonality

Rule 23(a)(2) requires a showing of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality element requires that the named plaintiffs "share at least one question of fact or law with the grievances of the prospective class." Rodriguez v. Nat'l City Bank, 726 F.3d 372, 382 (3d Cir. 2013) (quoting Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)). To satisfy the commonality requirement, class claims "must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350, 131 S.Ct. 2541. As the Third Circuit has explained, "[m]eeting this requirement is easy enough: '[W]e have acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable.' "

Plaintiffs' action challenges Defendants' civil forfeiture policies and practices. In Count Five, Plaintiffs challenge the City and D.A. Defendants' policy and practice of retaining forfeited property, alleging that the policy and practice creates a conflict of interest that violates the Due Process Clause. See SAC ¶¶ 338–46. The legal and factual questions involved in determining whether or not there is a due process violation and Plaintiffs are entitled to relief include (1) how the proceeds of civil forfeiture actions are distributed; (2) whether the manner in which the proceeds are distributed creates a conflict of interest; (3) whether that conflict of interest, if it exists, deprives litigants in civil forfeiture proceedings of due process of law; and (4) whether an order enjoining the City and D.A. Defendants' retention of forfeiture proceeds and declaring the City and D.A. Defendants' practices unconstitutional would provide relief for the due process violation. .

These common questions are "capable of classwide resolution" because the City and D.A. Defendants allegedly retain all of the property forfeited through civil forfeiture proceedings, and, under Plaintiffs' proposed class definition, every putative class member has a legal interest in property against which a civil forfeiture petition was filed.

3. Typicality

Rule 23(a)(3) requires that the class representatives' claims be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). The typicality inquiry is "intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." Where claims of the representative plaintiffs arise from the same alleged wrongful conduct on the part of the defendant, the typicality prong is satisfied. " '[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct."

[T]he Court finds that Plaintiffs' claims are materially different from the claims of a portion of the proposed class, which prevents Plaintiffs' claims from being typical of the claims of that subgroup of putative class members.

Plaintiffs, like all other putative class members, have a legal interest in property against which a civil forfeiture petition was filed. However, unlike a portion of the proposed class, Plaintiffs' property was subject to forfeiture under the CSFA—i.e., the forfeiture of their property had a statutory basis. Plaintiffs do not limit their proposed class to persons against whose property civil forfeiture proceedings were filed pursuant to the CSFA or on any other statutory basis. Instead, Plaintiffs seek to certify a class consisting of all persons against whose property civil forfeiture proceedings were filed, regardless of the legal basis for the forfeiture, including forfeiture based on principles of common law.

Given that the legal basis for the forfeitures, including the extent to which the forfeitures were authorized by state statute, may be highly relevant to Plaintiffs' claims, the Court finds that Plaintiffs' claims are not typical of the claims of those persons whose property was subject to forfeiture pursuant to a legal basis other than the CSFA. See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001) ("The typicality inquiry .... centers on whether 'the named plaintiffs' individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' ". Here, putative class members whose property was subject to civil forfeiture proceedings based on common law forfeiture may have additional arguments regarding the legality of those forfeiture proceedings that Plaintiffs, and other putative class members whose property was subject to forfeiture under the CSFA, do not have. Accordingly, the Court will remove from the class definition those persons whose property was subject to non-CSFA forfeiture. Plaintiffs' claims are typical of the claims of the remainder of the proposed class—those persons whose property was subject to forfeiture pursuant to the CSFA—and therefore the Court finds that typicality is satisfied with respect to the narrower class definition proposed by the Court.

4. Adequacy of Representation

Rule 23(a)(4) requires representative parties to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the "qualifications of the counsel to represent the class," and second, it must assess whether there are "conflicts of interest between named parties and the class they seek to represent." Class counsel must be "qualified, experienced, and generally able to conduct the proposed litigation.".

The Court finds that Plaintiffs' proposed counsel, the Institute for Justice and local counsel David Rudovsky, are qualified to represent the putative class. As the Court found in its order granting final approval of the settlement of Counts One and Two, Plaintiffs' counsel have represented that they have considerable experience litigating complex cases involving constitutional issues, the Institute for Justice has substantial knowledge of the applicable law given its previous experience in civil forfeiture cases, counsel performed extensive work to investigate potential claims and develop legal theories, and counsel will devote sufficient resources to vigorously litigate this case. The City and D.A. Defendants do not challenge the adequacy of class counsel.

Regarding the adequacy of the class representatives, the Court finds that Plaintiffs' interests are aligned with those of absent class members, given the Court's narrower definition of a class consisting of persons against whose property civil forfeiture proceedings were initiated pursuant to the CSFA. See supra at 22–23. Plaintiffs' property was forfeited pursuant to the same statute as absent class members, and based on the same alleged policies and procedures challenged in Plaintiffs' fifth claim for relief. The City and D.A. Defendants' sole argument that Plaintiffs will not adequately represent the class is again that Mr. Geiger does not have a claim because he failed to follow available procedures, which is incorrect. See supra at 22.

B. Rule 23(b)(2)

A party seeking certification under Rule 23(b)(2) must establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief.".

Plaintiff seek three forms of relief relating to their claims in Count Five: (1) an entry of judgment declaring the City and D.A. Defendants' policy and practice of retaining all forfeited property and its proceeds unconstitutional under the Due Process

Clause of the Fourteenth Amendment, SAC at 68; (2) the entry of preliminary and permanent injunctions prohibiting the City and D.A. Defendants from engaging in that unconstitutional policy and practice, id. at 69; and (3) an entry of judgment requiring the City and D.A. Defendants to dismiss all civil forfeiture proceedings against Plaintiffs and class members, provide "restitution in the form of return of all property seized from the Named Plaintiffs and class members," and remove all restraints imposed against Plaintiffs' and class members' real property as a consequence of the forfeiture petition.

The City and D.A. Defendants do not object to the certification of a class with respect to the first two forms of relief. Where the parties disagree, however, is whether or not class certification is appropriate with respect to Plaintiffs' request for "restitution." Both sets of parties urge the Court to separately consider Plaintiffs' restitution claim: (1) Plaintiffs request that, should the Court decline to certify Plaintiffs' restitution claim, the Court alternatively certify a class as to Count Five with respect to liability only, deferring the question of restitution until a later date, see Pls.' Mem. at 23; and (2) the City and D.A. Defendants request that, should the Court decide to certify Plaintiffs' claims for declaratory and injunctive relief with respect to Count Five, the Court refuse to certify Plaintiffs' restitution claim.

For the reasons discussed below, the Court agrees that Plaintiffs' requests for (1) a declaration that the City and D.A. Defendants' policies and procedures are unconstitutional and (2) an injunction enjoining those practices and procedures are suitable for class certification under Rule 23(b)(2). However, the Court finds that Plaintiffs' request for a judgment ordering the return of property should not be certified under Rule 23(b)(2).

1. Requests for Declaratory Relief and an Injunction Enjoining the Allegedly Unconstitutional Policy and Practice

The first two forms of relief Plaintiffs request in Count Five are (1) a declaration that the City and D.A. Defendants' policy and practice of retaining forfeited property violates due process; and (2) an injunction enjoining that policy and practice. The City and D.A. Defendants do not challenge the certification of Count Five with respect to these two requests for relief; they do not dispute that the policies and procedures used in civil forfeiture proceedings "apply generally to the class," Fed. R. Civ. P. 23(b)(2), nor do they argue that a claim seeking a declaration that those policies and procedures are unconstitutional is not suitable for class treatment under Rule 23(b)(2).

Plaintiffs' requests for a declaration that certain governmental policies and practices are unconstitutional and an injunction enjoining those policies and practices are classic examples of the types of claims that should be certified under Rule 23(b)(2).

Plaintiffs claim that the D.A. and City Defendants retain proceeds from all civil forfeiture proceedings the D.A. Defendants initiate, which would impact the civil forfeiture proceedings of all of the putative class members. Plaintiffs therefore allege that the City and D.A. Defendants have "act[ed] on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). A declaration that the City and D.A. Defendants' policy and practice is unconstitutional and an injunction enjoining that policy and practice would benefit the entire putative class equally, and thus would be "appropriate respecting the class as a whole." Id. There are also no "disparate factual circumstances" relating to the constitutionality of the City and D.A. Defendants' retention of civil forfeiture profits, and cohesiveness is therefore satisfied.

Accordingly, class certification of Plaintiffs' request for declaratory and injunctive relief in Count Five is appropriate under Rule 23(b)(2), and the Court will grant Plaintiffs' motion for class certification with respect to these two requests for relief.

2. Request for an Entry of Judgment Ordering the Return of Property

The bulk of the parties' arguments regarding class certification of Count Five relate to Plaintiff's third request for relief: an injunction ordering the return of forfeited property. See SAC at 70 (requesting "an entry of judgment requiring Defendants to ...

return ... all property seized from the Named Plaintiffs and class members").

The City and D.A. Defendants argue that this particular request for relief cannot be certified under Rule 23(b)(2) because the rule does not permit certification of claims for "restitution." The City and D.A. Defendants further argue that because the majority of the property forfeited in Philadelphia is cash, and the amount of forfeited cash will differ for each class member, Plaintiffs' request for restitution amounts to an claim for "individualized monetary damages," which is prohibited in a Rule 23(b)(2) class action under the Supreme Court's holding in Dukes. The City and D.A. Defendants also argue that these damages are not "incidental" to Plaintiffs' request for injunctive and declaratory relief. Finally, the City and D.A. Defendants argue that the proposed class cannot be certified under Rule 23(b)(2) because it is not sufficiently cohesive, as required by the Third Circuit in Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998).

In response, Plaintiffs contend that "incidental restitution, even when it consists of returning monies, is appropriate under Rule 23(b)(2)," and that their request for the return of property falls into that category. Plaintiffs further argue that this incidental restitution in no way conflicts with Dukes because the "relief here requires no calculation or case-by-case analysis—simply the mechanistic return of property," and all of the City and D.A. Defendants' asserted "individualized" defenses are either waived or invalid.

For the reasons discussed below, the Court does not agree with the City and D.A. Defendants that restitution claims may never be certified under Rule 23(b)(2). However, the Court finds that the Supreme Court's decision in Dukes, 564 U.S. at 360–61, 131 S.Ct. 2541, prevents the certification of Plaintiffs' request for an injunction ordering the return of property, because (1) the relief to which the putative class members are entitled includes individualized monetary damages, and (2) the restitution sought is not incidental to Plaintiffs' requests for injunctive and declaratory relief. As a result, the Court need not address the City and D.A. Defendants' separate argument that certification of Plaintiffs' restitution claim is not permissible because the class is not sufficiently cohesive.

a. Restitution Claims Under Rule 23(b)(2)

The City and D.A. Defendants argue that restitution claims of any kind cannot be certified under Rule 23(b)(2). The D.A. Defendants further argue that Rule 23(b)(2) does not encompass restitution claims because (1) Rule 23(b)(2) permits only "final injunctive relief or corresponding declaratory relief," and does not specifically list "restitution" as an available remedy, and (2) restitution requires ascertainability so it properly fits under Rule 23(b)(3), which also requires ascertainability. The City and D.A. Defendants are incorrect.

Certification of a class action under Rule 23(b)(2) is warranted only where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Neither the Supreme Court nor the Third Circuit has addressed whether an action seeking restitution is the sort of injunctive relief properly sought under Rule 23(b)(2). However, district courts in other circuits that have addressed the question have classified an order requiring the return of property as the type of injunctive relief that is permissible under Rule 23(b)(2).

Although the Supreme Court has not addressed the question of restitution, it has made clear that where plaintiffs solely seek monetary damages, their claims may be certified only under Rule 23(b)(3), not Rule 23(b)(2). On the basis of the prohibition against certifying class actions under Rule 23(b)(2) for claims solely involving monetary damages, the Third Circuit has previously rejected attempts by putative class action plaintiffs to shoehorn damages claims into Rule 23(b)(2) by asking for an injunction instead of damages. In In re School Asbestos Litigation, the Third Circuit affirmed the district court's denial of a Rule 23(b)(2) class where plaintiffs sought "mandatory injunctive relief in the form of certain remedial action and restitution for expenditures already incurred to ameliorate asbestos hazards." 789 F.2d at 1008. The district court

concluded, and the Third Circuit agreed, that "despite the plaintiffs' ingenuity the claims in this suit were essentially for damages." Id. The class therefore could not be certified under Rule 23(b)(2), because the rule does not permit certification of "an action for money damages." Id.

Following In re School Asbestos Litigation, other courts in this Circuit have denied certification of a Rule 23(b)(2) class where plaintiffs' request for restitution was actually a request for money damages and plaintiffs sought no other declaratory or injunctive relief. These cases do not, as the D.A. Defendants claim, provide support for a blanket prohibition on the certification of restitution claims under Rule 23(b)(2).

The D.A. Defendants' additional arguments that restitution claims can never be certified under Rule 23(b)(2) also fail. The D.A. Defendants argue that restitution is not permissible under Rule 23(b)(2) because restitution cannot be implemented unless class members are ascertainable, and Rule 23(b)(2) does not require ascertainability. This argument does not follow logic. The exclusion of Rule 23(b)(3)'s ascertainability requirement from Rule 23(b)(2) does not mean that actions satisfying the ascertainability requirement cannot be certified under Rule 23(b)(2).

The D.A. Defendants also claim that restitution is prohibited under Rule 23(b)(2) because the rule does not specifically list "restitution" as an available remedy, and instead refers only to "injunctive relief or corresponding declaratory relief." But an injunction ordering restitution is itself a form of injunctive relief, and the sole case the D.A. Defendants cite in support of their argument does not hold otherwise. In Thorn v. Jefferson–Pilot Life Ins. Co., 445 F.3d 311 (4th Cir. 2006), the Fourth Circuit affirmed the district court's refusal to certify a Rule 23(b)(2) class where the plaintiffs sought (1) an injunction prohibiting the defendant insurance company from collecting any future premiums on its allegedly discriminatory policies, (2) restitution in the form of money equivalent to the difference in premium payments made by African–American and white policyholders, and (3) punitive damages and legal fees. Id. at 316, 330–32. The court found that the plaintiffs' sole injunctive relief had already been granted, leaving only the plaintiffs' claims for monetary restitution, punitive damages, and legal fees. Id. at 330–32. Applying the pre-Dukes standard that monetary damages are permitted under Rule 23(b)(2) so long as they do not predominate over a request for injunctive or declaratory relief—a standard that is no longer good law—the court concluded that Rule 23(b)(2) certification was not appropriate because the plaintiffs' only requested relief was monetary damages. Id. Like the other cases the D.A. Defendants cite, Thorn supports only the well-established principle that plaintiffs cannot obtain Rule 23(b)(2) class certification when they are solely seeking monetary damages.

Therefore, as Plaintiffs correctly point out, the City and D.A. Defendants have not identified any blanket prohibition against seeking restitution in a Rule 23(b)(2) action. The cases the City and D.A. Defendants cite establish only that restitution claims may not be certified under Rule 23(b)(2) if the restitution sought is merely another means of seeking monetary damages as the sole relief.

That rule does not bar Plaintiffs' restitution claim here. The "restitution" Plaintiffs seek is the return of property, some of which is personal property, including cash, but some of which is also real property. While the cash Plaintiffs seek could be considered a form of monetary damages, it is clearly not the sole relief Plaintiffs seek, as they also seek the return of other forms of property, as well as other declaratory and injunctive relief. Therefore, the Court will not deny certification of Plaintiffs' restitution claim under Rule 23(b)(2) on that basis.

b. Individualized Monetary Damages

The City and D.A. Defendants also argue that Plaintiffs' restitution claim cannot be certified under Rule 23(b)(2) pursuant to Dukes, 564 U.S. at 360, 131 S.Ct. 2541, because the restitution Plaintiffs seek constitutes "individualized monetary damages."

In Dukes, the Ninth Circuit affirmed the district

court's certification of a Rule 23(b)(2) class of approximately one and a half million current and former female employees of Wal–Mart with respect to the plaintiffs' claim that Wal–Mart engaged in gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, by denying female employees equal pay and/or promotions. Plaintiffs sought injunctive and declaratory relief, punitive damages, and back pay. Id. The Supreme Court reversed the Ninth Circuit order affirming the district court's certification of the class, finding that the plaintiffs' claims for back pay could not be certified under Rule 23(b)(2) because that rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."

The Supreme Court explained that "claims for individualized relief" do not satisfy Rule 23(b)(2) because "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' "Just as Rule 23(b)(2) "does not authorize certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," it similarly does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. Instead, the Court explained, "individualized monetary claims belong in Rule 23(b)(3)."

Relying on Dukes, the City and D.A. Defendants claim that Plaintiffs' restitution claim cannot be certified because it requires the Court to award "individualized monetary damages." First, the City and D.A. Defendants argue that the monetary damages Plaintiffs seek are individualized because each putative class member forfeited a different amount of cash or property, suffered varying amounts of emotional and mental harm, and spent varying amounts on legal services. Second, the City and D.A. Defendants argue that they have defenses to restitution for certain categories of putative class members and individual putative class members that they are entitled to litigate on an individual basis.

In response, Plaintiffs argue that the injunction they seek is not "individualized" because the "relief here requires no calculation or case-by-case analysis—simply the mechanistic return of property." Plaintiffs explain that the Court could issue one single classwide order requiring the City and D.A. Defendants to return all property that was seized from the putative class members, that is, property seized in civil forfeiture proceedings initiated in the Court of Common Pleas of Philadelphia County after August 11, 2012. In this way, Plaintiffs argue, their request for restitution cannot be compared to a case in which "each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," as the Supreme Court characterized an individualized award. See id. at 22. Plaintiffs further argue that the Court's ability to satisfy their restitution claim through one single injunction also distinguishes the instant action from the post-Dukes cases cited by the City and D.A. Defendants in which courts denied Rule 23(b)(2) class certification.

Plaintiffs may be correct that the Court could award the relief that Plaintiffs seek through the issuance of one single injunction, and therefore that their request for relief is not "individualized" in that manner. However, the question is not whether the relief Plaintiffs are seeking is individualized, but whether the relief putative class members are entitled to is individualized. See Dukes, 564 U.S. at 360–61, 131 S.Ct. 2541 (holding that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages" (emphasis added)).

As the City Defendants note, plaintiffs in actions brought pursuant to 42 U.S.C. § 1983 may seek recovery for emotional and mental harm, legal fees, and other compensatory and punitive damages. Plaintiffs do not dispute that the calculation of these types of additional damages would require individualized inquiries. Instead, Plaintiffs argue

that they are not seeking those types of damages here, so the fact that such damages may require individualized inquiries is not relevant to the question of whether or not Plaintiffs' restitution claim itself is individualized. However, Plaintiffs miss the point. The potential that individual class members may have valid claims for damages that Plaintiffs are not pursuing in this action implicates the precise due process concerns identified by the Supreme Court in Dukes, and it is therefore highly relevant to this Court's evaluation of whether or not it should certify Plaintiffs' restitution claim.

The Supreme Court explained in Dukes that where monetary relief is sought in a class action, particular class members may be collaterally estopped from individually seeking compensatory damages that they might otherwise be entitled to receive. A class judgment only binds class members as to matters actually litigated, and some federal courts have therefore concluded that a class action seeking only injunctive relief does not bar later claims for monetary damages. Where, by contrast, plaintiffs in a class action seek a form of monetary damages, later claims for additional or different damages could be precluded.

District courts in this circuit have acknowledged the possibility of preclusion where named plaintiffs seek certification of only certain types of damages claims and absent class members may have additional, different damages claims. For example, in Gaston v. Exelon Corp., 247 F.R.D. 75 (E.D. Pa. 2007), the court noted that it was "likely" that were plaintiffs' equitable claims to be litigated on a class basis, "claim preclusion would bar members of the class from later seeking compensatory and punitive damages." Id. at 88 n.22. In Gates v. Rohm & Haas Co., 265 F.R.D. 208 (E.D. Pa. 2010), aff'd, 655 F.3d 255 (3d Cir. 2011), the court identified a potential conflict where the named plaintiffs brought only medical monitoring and property loss claims and absent class members may have had additional personal injury claims that could have been precluded in later actions. The court ultimately determined that the risk of preclusion was not fatal to certification because plaintiffs sought certification under Rule 23(b)(3), which would provide class members with notice and the opportunity to opt out of the class. The preclusion issue identified in Gaston and Gates is a concern here, as the restitution Plaintiffs seek could be considered a form of compensatory damages for the purposes of preclusion. And, in contrast to Gates, Plaintiffs here seek certification under Rule 23(b)(2), not Rule 23(b)(3). Unlike in a Rule 23(b)(3) class action, absent class members in a Rule 23(b)(2) class action ordinarily receive no notice of their membership in the class and no right to opt out of the litigation. As the Supreme Court explained in Dukes, these protections are not included in a Rule 23(b)(2) class action because they are presumed "unnecessary" where a class "seeks an indivisible injunction benefiting all its members at once." Where a Rule 23(b)(2) class action includes claims for monetary relief, by contrast, it creates the possibility that "individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from." Accordingly, as the D.A. Defendants point out, "[w]ith such claims, class members must be permitted 'to decide for themselves whether to tie their fates to the class representatives' or go it alone—a choice that Rule 23(b)(2) does not ensure that they have.' "

Plaintiffs' dogged insistence that their restitution claim should be certified because they are not seeking "individualized" compensatory and punitive damages on behalf of putative class members highlights a related concern identified by the Supreme Court: permitting monetary damages in a Rule 23(b)(2) action "creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief" in order to obtain certification. Dukes, 564 U.S. at 364, 131 S.Ct. 2541. Perhaps Plaintiffs are not pursuing other types of damages in this action precisely because it would make obtaining certification under Rule 23(b)(2) more difficult. Class representatives should not be permitted to preference one form of available relief over another that might be more beneficial to certain putative class members—in this case, choosing restitution over other forms of compensatory damages—in an action in which individual class members are not notified about the

action and are not given the ability to opt-out. Indeed, the very reason that notice and opt-out rights are not required in a Rule 23(b)(2) class action—as the Supreme Court explained—is that the relief is beneficial to the class as a whole.

Here, restitution may be adequate relief for some class members, but it may be inadequate for others. For example, the City and D.A. Defendants state that large portions of the forfeited property at issue has been sold or liquidated. For putative class members whose property has been sold, liquidated, or lost, a simple order awarding that property returned may be insufficient to compensate for their losses. Even if the injunction were to order the City and D.A. Defendants to pay the value of the property in the case of lost or sold property, that value may be difficult to determine and, accordingly, whatever metric is used to compute the value may not adequately compensate all class members for their losses. This is especially true in the case of the putative class members who forfeited their real property. Further, for those putative class members—like Plaintiffs Sourovelis, Hernandez, and Geiger—whose property has already been returned, restitution alone would not provide any compensation for the losses they suffered as a result of the deprivation of their property for weeks or months, such as the need to find alternate living arrangements. Thus, restitution would not necessarily benefit "the class as a whole." See Fed. R. Civ. P. 23(b)(2).

As putative class members are entitled to "individualized monetary damages," certification of Plaintiffs' restitution claim under Rule 23(b)(2) is not appropriate under Dukes. In accordance with the reasoning expressed by the Supreme Court in Dukes, in an action where class members will be bound by the outcome and will not be aware of the action or have the ability to opt out, the Court will not force the entire putative class to accept one particular form of damages and be precluded from receiving other forms of damages to which they may be entitled. As a result, the Court will not certify a class under Rule 23(b)(2) with respect to Plaintiffs' request for restitution on their fifth claim for relief.

VII. CONCLUSION

The Court will certify a class on Count Five of Plaintiff's Second Amended Complaint pursuant to Rule 23(b)(2) with respect to Plaintiff's requests for (1) a declaration that the City and D.A. Defendants' policy and practice of retaining forfeited property and its proceeds violates the Due Process Clause; and (2) an injunction enjoining that policy and practice. However, the Court will not certify a Rule 23(b)(2) class with respect to Plaintiff's request for the entry of judgment requiring the return of property. In addition, the Court will modify the class definition to limit the class to those persons against whose property civil forfeiture proceedings were initiated pursuant to the CSFA.

An appropriate order follows.

FIGHTING THE CRIMINALIZATION OF HOMELESSNESS: ANATOMY OF AN INSTITUTIONAL ANTI-HOMELESS LAWSUIT

Benjamin S. Waxman*

I. INTRODUCTION

In November 1988, the Miami Chapter of the American Civil Liberties Union (ACLU) learned that the City of Miami, once again, planned to "sweep" homeless persons from the route of the Orange Bowl Parade and related festivities.[1] Subsequent interviews of homeless persons and advocates revealed that the city, through its police department, was routinely mistreating, arresting, and destroying the property of homeless persons for little more than living in public.[2] A series of strategic meetings of ACLU attorneys and University of Miami law professors culminated in the drafting and filing of a request for a preliminary injunction and a federal class action civil rights lawsuit against Miami.

The request for preliminary injunctive relief was denied.[3] However, four years later, after certifying the lawsuit a class action,[4] and after holding the city in contempt for violating a subsequent preliminary injunction,[5] and conducting a week long bench trial,

---

* Attorney with Robbins, Tunkey, Ross, Amsel & Raben, P.A. of Miami, Florida. B.S.B., University of Minnesota; J.D., University of Miami. Mr. Waxman is also a member of the Board of Directors for the Greater Miami Chapter of the American Civil Liberties Union.

1. Christine Evans, *ACLU Sues to Stop Arrest of Homeless*, MIAMI HERALD, Dec. 24, 1988, at 2D.

2. Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (*Pottinger II*).

3. *Id.* at 1555.

4. Pottinger v. City of Miami, 720 F. Supp. 955, 957 (S.D. Fla. 1989) (*Pottinger I*). The class consists of homeless persons living in public places:

> [I]n the geographic area bound on the north by Interstate 95, on the south by Flagler Street, on the east by Biscayne Bay, and on the west by Interstate 95, within the City of Miami, who have been, expect to be, or will be arrested, harassed, or otherwise interfered with by members of the City of Miami Police Department for engaging in the ordinary and essential activities of daily living in public due to the lack of other adequate alternatives.

Id. at 960.

5. *Pottinger II*, 810 F. Supp. at 1555-56. On April 26, 1990, based on two incidents during which Miami police officers burned the personal belongings of homeless persons who were arrested for sleeping in a municipal park, the district court ordered police not to destroy property collected at the time of contact with homeless persons and

United States District Court Judge C. Clyde Atkins ruled in the plaintiffs' favor.[6] The court held in *Pottinger v. City of Miami* that the City of Miami had a policy of harassing and arresting homeless persons, strictly based on their homeless status, for the purpose of driving them from the public domain.[7] The court granted declaratory and injunctive relief[8] and ordered a jury trial to determine monetary damages.[9] The decision is currently pending on appeal in the United States Court of Appeals for the Eleventh Circuit.[10]

Several law review articles have explored the constitutional foundations upon which the *Pottinger* decision relies.[11] However, little has been written about the practical aspects of filing and litigating such an institutional anti-homeless lawsuit. The goal of this Article is to share practical information and knowledge gained through representing the plaintiffs in *Pottinger*.[12] It is the author's

---

to follow their own written policy of preserving property obtained during such contacts. *Id.* Approximately one year later the city was held in contempt of this order when it again destroyed the property of homeless persons whom the city was removing from certain public areas. *Id.* at 1556.

6. *Id.* at 1583-84.

7. *Id.* at 1583. The court found that the City of Miami, through a municipal policy, had violated the Eighth Amendment's ban against punishment based on status. *Id.* at 1561-65. The court ruled that police officers' summary seizure and destruction of homeless persons' belongings violated their Fourth and Fifth Amendment rights to be free from unreasonable seizures and takings of personal property. *Id.* at 1570-73, 1570 n.30. Judge Atkins concluded that the city's arrest of the plaintiffs for harmless conduct enjoying other constitutionally protected activities violated their Fourteenth Amendment right to procedural due process. *Id.* at 1575-77. Finally, the court held that Miami's arrests and harassment of homeless persons unjustifiably infringed on their fundamental right to travel in violation of their Fourteenth Amendment right to equal protection under the law. *Id.* at 1578-83.

8. *Id.* at 1584-85.

9. *See id.* at 1570 n.30.

10. Pottinger v. City of Miami (consolidated), Nos. 91-5316 (contempt order) & 92-5145 (final judgment) (11th Cir. April 16, 1991 & Dec. 4, 1992). It is anticipated that the appeal will be argued and decided by the end of 1994. In the face of the city's assurance that it was no longer arresting homeless persons based on their status, the court of appeals stayed enforcement of the district court's injunctive relief, pending its final decision. Order Granting City of Miami's Motion to Suspend and/or Stay Injunction, Pottinger v. City of Miami, Nos. 91-5316 & 92-5145 (11th Cir. June 25, 1993).

11. *See generally* Michael D. Granston, *Rethinking the Fourth Amendment Rights of the Homeless*, 20 Search & Seizure Law Rep. 97 (Feb. 1993); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631 (1992); Paul Ades, Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989); Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 MIAMI L. REV. 417 (Nov.-Jan. 1990-91).

12. The other ACLU cooperating attorneys were Dade County Public Defender

hope to identify and explore some of the issues involved in this type of litigation and to encourage other attorneys to represent homeless persons against public institutions with anti-homeless policies.

II. THE NEED FOR INSTITUTIONAL LITIGATION

Homelessness in America continues to grow at an alarming rate.[13] If significant strides are to be made in reducing homelessness, large scale challenges to the anti-homeless policies of governments and public sector agencies must be initiated.

The importance of filing actions seeking to redress the unique claims of individual homeless persons cannot be overstated. For many homeless persons, accessing state and federal entitlements may be all that is needed to "get off the streets." For others, redressing a wrongful eviction may prevent a lengthy bout with homelessness.[14] However, such actions will probably not have the impact necessary to change how the public, and ultimately government, perceives and copes with homelessness. These basic perceptions must be changed before government will develop a more humane and effective policy to reduce homelessness.

Public sensitivity about the plight of the homeless has increased substantially in recent years. This is evidenced by regular media attention, the proliferation of homeless advocacy groups, and the daily participation of religious and civic organizations in homeless relief efforts. Unfortunately, this sensitivity has not been ac-

---

Valerie Jonas, Miami civil rights lawyer Maurice Rosen (until his death in early 1992), and Dade County Public Defender Rodney Thaxton.

13. *Pottinger II*, 810 F. Supp. at 1554, 1558.

14. For example, in New York City, one study estimates that providing counsel to those facing eviction could prevent 4,873 families and 3,567 individuals from seeking emergency shelter each year. Community Training and Resource Center and City-Wide Task Force on Housing, Inc., *Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel* at iv (1993).

companied by a recognition that homeless persons have certain inalienable, fundamental constitutional rights.[15] Institutional litigation which challenges a municipality's approach to the problem of homelessness on constitutional grounds will force the government entity and its constituents to reevaluate its policies and practices regarding treatment of the homeless.

III. DEFINING GOALS AND OBJECTIVES

As with any lawsuit, the first and most important step is to define the litigation objectives. In the broadest sense, the primary goal of a *Pottinger*-type lawsuit is to expose and reverse an institutional anti-homeless policy. In *Pottinger*, the plaintiffs sought to alter the way Miami viewed and treated the homeless. The plaintiffs believed the city viewed the homeless as criminals worthy of brutal and inhumane treatment. The plaintiffs wanted the city to recognize homelessness as a social and economic condition over which the homeless had little genuine control. The plaintiffs sought to protect their fundamental civil liberties guaranteed by the United States and Florida constitutions.

A more specific objective of this type of litigation is to enjoin the law enforcement strategy a municipality or agency employs to criminalize homelessness. The plaintiffs' attorney should begin by examining the local laws used to arrest homeless persons to uncov-

---

15. Violations of these rights have resulted in the recent litigation of several class action lawsuits. On September 23, 1993, United States District Judge U.W. Clemon of the Northern District of Alabama, Southern Division, entered a preliminary injunction enjoining the City of Huntsville from "harassing, intimidating, detaining or arresting [homeless citizens of Huntsville, Alabama], *solely because of their status as homeless persons*, for walking, talking, sleeping, or gathering in parks or other public places in the City of Huntsville." Joe Church v. City of Huntsville, No. 93-C-1239-S (N.D. Ala. Sept. 23, 1993) (emphasis in original). This preliminary injunction was supported by a finding that Huntsville had an unannounced but official policy of isolating and removing its homeless citizens from its city limits. *Id.* The preliminary injunction is pending review in the United States Court of Appeals for the Eleventh Circuit (No. 93-6827). A class action lawsuit has been filed against the City of San Francisco by homeless persons challenging the city's anti-homeless law enforcement practices. Bobby Joe Joyce v. City & County of San Francisco, No. C-93-4149 DLJ (N.D. Cal. Nov. 23, 1993). A similar lawsuit was filed in the Orange County Superior Court of California challenging the City of Santa Ana's enforcement of a local ordinance prohibiting public camping and storage of personal property. The superior court denied relief, but its decision has recently been reversed by the California Court of Appeals for the Fourth Appellate District. Tobe v. City of Santa Ana, No. G014257 (Cal. Ct. App. 4th Dist. Feb. 2, 1994). The appellate court found the ordinance unconstitutional on right to travel, cruel and unusual punishment, vagueness, and overbreadth grounds. *Id.*, slip op. at 13-21.

er any facial constitutional defects. Such laws are often subject to challenge based on vagueness,[16] overbreadth,[17] unequal protection,[18] or First Amendment grounds.[19] Even if the laws are not facially invalid, they may be unconstitutional as applied.

In *Pottinger*, the plaintiffs sought to enjoin Miami from enforcing a variety of broadly-worded ordinances and statutes which proscribed largely harmless conduct against the homeless.[20] None

16. *E.g.*, Kolender v. Lawson, 461 U.S. 352, 358-62 (1983) (invalidating loitering and prowling statute because it failed to give fair warning of illegal conduct and failed to establish minimum guidelines to govern law enforcement); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (striking down vagrancy ordinance found to be vague "both in the sense it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . and because it encourages arbitrary and erratic arrests and convictions") (citations omitted). *Contra* Whiting v. Town of Westerly, 942 F.2d 18, 22 (1st Cir. 1991) (rejecting vagueness challenge to ordinance prohibiting nighttime sleeping in public or semipublic places); Hershey v. City of Clearwater, 834 F.2d 937, 940-41 n.5 (11th Cir. 1987) (rejecting, *in dicta*, vagueness challenge to pre-amendment version of ordinance prohibiting sleeping in a vehicle in public).

17. *E.g.*, City of Pompano Beach v. Capalbo, 455 So. 2d 468, 470-71 (Fla. 4th DCA 1984) (declaring ordinance prohibiting sleeping in a motor vehicle facially unconstitutional because it criminalizes inoffensive conduct), *rev. denied*, 461 So. 2d 113 (Fla.), *cert. denied*, 474 U.S. 824 (1985); State v. Penley, 276 So. 2d 180, 181 (Fla. 2d DCA) (same), *cert. denied*, 281 So. 2d 504 (Fla. 1973). *Contra Whiting*, 942 F.2d at 21-22 (rejecting overbreadth argument because sleeping in public is not constitutionally protected); *Hershey*, 834 F.2d at 940 n.5 (upholding similar ordinance against overbreadth challenge).

18. *E.g.*, Parr v. Municipal Court for Monterey-Carmel, 479 P.2d 353, 358 (Cal. 1971) (striking down ordinance prohibiting sitting on sidewalks or steps and lying or sitting on lawns because it discriminated against "hippies" based on their status).

19. *E.g.*, Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (striking ordinance prohibiting loitering in public to beg on freedom of speech grounds), *aff'g* 802 F. Supp. 1029 (S.D.N.Y. 1992). *Contra* Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (3d Cir. 1992) (upholding library regulations which effectively bar admission of homeless persons against their First Amendment right to receive information challenge), *rev'g* 705 F. Supp. 181 (D.N.J. 1991); Young v. New York Transit Auth., 903 F.2d 146 (2d Cir.) (upholding ordinance prohibiting begging and panhandling in subway system), *cert. denied*, 498 U.S. 984 (1990); Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (striking on freedom of speech grounds an ordinance prohibiting accosting person in public place for the purpose of begging). The *Blair* case is currently on appeal. Oral arguments were made February 16, 1993. *Blair*, No. 92-15447 (9th Cir. Feb. 16, 1993).

20. *Pottinger II*, 810 F. Supp. at 1559-60 nn.10-14. Miami's police department arrested homeless persons for violating ordinances prohibiting obstructing streets and sidewalks, MIAMI, FLA. CODE § 37-53.5 (1992); sleeping in public, *id.* § 37-63; loitering and prowling, *id.* §§ 37-34, 35, FLA. STAT. § 856.021 (1992) and being in public parks during proscribed hours, MIAMI, FLA. CODE § 38-3. For examples of arrest strategies and anti-homeless ordinances in other cities, see National Law Center on Homelessness & Poverty, *Go Directly to Jail, A Report Analyzing Local Anti-Homeless Ordinances* (Dec. 1991).

of these laws appeared to be facially unconstitutional. Additionally, if a judge declared any of these laws unconstitutional as applied, then city inevitably would have continued its policy of enforcing other facially constitutional laws.[21] Thus, the plaintiffs sought to enjoin the use of *any* law against homeless persons which would ultimately criminalize their public presence.

Another important objective of this type of litigation is to educate the community about homelessness in an attempt to change public opinion. In Miami, the anti-homeless policy was fueled largely by the complaints of local merchants that the unsightly and menacing presence of homeless persons was destroying their businesses.[22] The local merchants claimed homeless persons were sleeping on the sidewalks, bathing in the roadways, and urinating in the alleys adjacent to their businesses. They also attributed large portions of street crime to homeless persons.[23] Such portrayals serve to dehumanize the homeless.

Litigants must strive to give the homeless a human face, showing them as people deserving of rights and dignity as they struggle against circumstances often beyond their control. In *Pottinger*, the plaintiffs proved that the needs of homeless persons far exceeded the resources available to them. For instance, while it was estimated that Miami had approximately 6,000 homeless,[24] the city had fewer than 700 shelter beds.[25] Additionally, it was established that most homeless people are ineligible for all forms of government assistance besides food stamps.[26] By identifying the needs of the homeless and the lack of available resources, this type of litigation

---

21. Prior to 1988, the ordinance Miami police most frequently used to arrest homeless persons prohibited sleeping in public. MIAMI, FLA. CODE § 37-63. In Hershey v. City of Clearwater, 834 F.2d 937, 940 (11th Cir. 1987), the court partially invalidated a similar Clearwater ordinance. In response, the City of Miami suspended enforcement of (but did not repeal) § 37-63 and shifted its enforcement emphasis to its previously, little-used park curfew ordinance. *Pottinger II*, 810 F. Supp. at 1566.

22. The city introduced into evidence a number of written complaints of downtown business merchants about the presence and obnoxious activities of homeless persons.

23. The city offered the elimination of crime in its parks as justification for arresting homeless people engaged in harmless, non-criminal conduct such as congregating or lying down in public. The court rejected this justification finding that the arrests were the results of sweeps targeting areas where homeless persons were known to congregate, and not the result of citizen complaints. *Pottinger II*, 810 F. Supp. at 1582. Additionally, the court found that the city had failed to present any evidence that homeless persons committed the crimes reported in the citizens' complaints the city introduced into evidence. *Id.*

24. *Id.* at 1564.

25. *Id.*

26. *Id.*

will go far to change public opinion and anti-homeless policies.

Another goal may be to obtain classwide compensatory damages. Damages awarded to the entire class can be used collectively at the clients' discretion, to provide shelter, support services, and general assistance to the homeless. This litigation goal is exemplified by the case *Simer v. Rios*.[27] There the United States Court of Appeals for the Seventh Circuit acknowledged a theory of "fluid recovery [which] is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case . . . . In a fluid recovery the money is . . . used to fund a project which will likely benefit the members of the class."[28] Although the Seventh Circuit rejected a *per se* fluid recovery approach where class members cannot be identified, it also rejected the argument that a fluid recovery mechanism is unconstitutional. The court held that the appropriateness of fluid recovery must be determined on a case-by-case basis considering the policies of "deterrence, disgorgement, and compensation."[29]

Another important objective is obtaining compensatory damages for the specific injuries individual homeless persons have suffered. Many homeless persons simply need to be compensated for their personal property which has been seized and destroyed, lost employment opportunities resulting from wrongful arrests, and for

---

27. 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982).

28. *Id.* at 675 (citations omitted).

29. *Id.* at 675-76. The case of *Dellums v. Powell* also supports an award of class-wide compensatory damages. 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). The court considered the propriety of granting class-wide damages to demonstrators who had been arrested during a demonstration at the United States Capitol. The damages awarded by the jury were for false arrest, violation of First Amendment rights, cruel and unusual punishment, and malicious prosecution. *Id.* at 174 n.6. Although the court expressed doubt that a uniform class award for First Amendment damages could include an element of emotional harm, it made clear that an award of class-wide damages for certain injuries, based on the likelihood that all members of the class had suffered those injuries, is appropriate. *Id.* at 210. The court stated:

> The class award must focus on the injury sustained by all members of the class — the value that each one of them would necessarily place on the rights of free expression and assembly in the circumstances of this case. The class award for fourth amendment damages included an element for humiliation of arrest and detention, []which may be deemed inescapable for any false detention . . . . In sum, class-wide damages must be those which necessarily arise from events which made this action appropriate for class treatment in the first place: [T]he decision that the group as a whole should be arrested; the uniform booking procedures; and the assumption all the demonstrators were essentially in the same position . . . .

Id. at 210 (footnote omitted).

the fear, embarrassment, and humiliation they suffer on a daily basis. An institutional anti-homeless lawsuit is ineffectual for recovering these damages. In *Pottinger*, nearly five years have passed since the lawsuit was filed. While the lawsuit contemplates a jury trial for damages if the constitutional claims are upheld on appeal,[30] for many homeless persons any financial renumeration will be far too little, far too late. Instead, individual actions for return of property or personal injury would be far more efficient and effective for achieving this objective.

IV. CLIENT RELATIONS

Although sharing the singular characteristic of being without shelter, homeless persons are as diverse as any community straddling racial, ethnic, socio-economic, and educational lines. There are certainly some common denominators, but each homeless person has a unique background, perspective about his or her homelessness, and expectations for the future. The attorney must reach out and develop the trust of these persons who have been discriminated against by the institutions the attorneys appear to represent. An attorney must ensure that the plaintiffs' expectations about winning the lawsuit are realistic. Counsel must advise their clients they are fighting an uphill battle which may take years to resolve. Additionally, counsel must explain that a successful lawsuit will not necessarily translate into monetary awards for individual plaintiffs. The lawsuit may result only in a declaration that the governmental agency is mistreating the homeless and the behavior must stop.

Maintaining client contact is an important and difficult task. Homeless people are highly mobile. Many pass in and out of homelessness on a monthly or weekly basis. For these reasons, it is essential to develop a rapport with a core group of homeless persons who will be active participants in the lawsuit. This can be done by assigning litigation-related tasks and encouraging them to attend, and get others to attend, all court proceedings. These participants can then communicate the status of the lawsuit to other homeless persons and bring the complaints and concerns of these less involved persons to the attorney's attention.

30. *See Pottinger II*, 810 F. Supp. at 1570 n.30.

V. PRE-FILING DISCOVERY/INVESTIGATION

Once the litigation objectives are defined, extensive pre-filing investigation should be initiated. The three most important sources of information concerning anti-homeless policy and practices are the plaintiffs, newspaper articles, and various public records.

A. The Plaintiffs

The most important source of information regarding the factual bases for the lawsuit will be the homeless plaintiffs. Get to know them. Ask them to explain how they have been mistreated or abused by the municipality, police, or other governmental entity. Ask them what can be done to alleviate their plight and compensate them for past wrongs. Fully exploring the circumstances of the plaintiff's homelessness, and the ways in which the institutional defendant compounds it, will provide a wealth of information to support a variety of different theories of liability.

B. News Articles

Local newspaper articles can be invaluable in uncovering institutional policies and practices intended to criminalize homelessness. They will provide numerous leads to other information sources including reporters, community activists, homeless persons, and other homeless advocacy groups. Additionally, these articles will give an essential historical perspective that may establish the existence of long-standing anti-homeless practices.

C. Public Records

Public records are another source of pre-filing discovery. These records typically can be obtained with relative ease and minimum expense. For instance, in *Pottinger*, a large portion of the documentary evidence consisted of arrest records.[31] The attorneys requested these records to determine the extent of the arrest practice and the circumstances under which homeless persons were arrested (e.g., time of day, location, identity of arresting officer or unit, drug charges, and/or weapons related offenses charged). To obtain rele-

31. The plaintiffs introduced into evidence approximately 3,500 arrest records. *Pottinger II*, 810 F. Supp. at 1559 n.9, 1561. These were culled from several times as many computerized arrest reports.

vant arrest records, the attorneys requested a cross-section of two characteristics. First, to identify homeless persons, the attorneys requested arrest records for which the defendant when asked for a home address either gave no home address, gave the address of one of the primary homeless shelters, or gave the streets of Miami.[32] The search was further limited by seeking only records of arrests under ordinances and statutes that proscribed largely harmless conduct but which were being used to target homeless persons.[33]

Attorneys should obtain and review various governmental memoranda. Minutes from city commission, council, department, or agency meetings, including any legislative history, are fruitful sources of policies underlying governmental action. Although they are often long and tedious to review, they may contain incriminating statements expressing an impermissible purpose for the anti-homeless conduct. Additionally, internal documents, such as police memoranda, should be carefully reviewed to determine who is directing any anti-homeless policy and how it is being effectuated.[34] These internal communications may serve as the linch pin of the entire action.

D. Ethical Considerations

Whenever an attorney files a lawsuit raising novel legal arguments, the attorney must be particularly wary of the ethical obligation not to file frivolous lawsuits. Federal Rule of Civil Procedure 11 and local rules provide that when an attorney signs a pleading it is a certificate that

> the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . .[35]

Although the advisory committee notes make clear the rule should

---

32. *Id.* at 1559 n.9.

33. See *supra* note 19 for examples of these ordinances.

34. The plaintiffs in *Pottinger* introduced various police department internal memoranda indicating Miami's primary purpose in arresting homeless persons was to keep them moving "in order to 'sanitize' the parks and streets." *Pottinger II*, 810 F. Supp. at 1561, 1567.

35. FED. R. CIV. P. 11.

not chill an attorney's enthusiasm or creativity in pursuing novel factual or legal theories, it obviously requires a minimum amount of pre-filing investigation.[36] Conducting a thorough pre-filing investigation and extensive legal research will serve to satisfy this obligation.

VI. FINANCING THE LAWSUIT

Initiating any type of institutional litigation can be expensive. Pre-filing investigation and discovery entail obtaining, copying, and disseminating volumes of information, deposing and securing deposition transcripts for numerous witnesses, and paying travel expenses and related witness fees. In *Pottinger*, 3,500 arrest records[37] were selected from probably three times as many that counsel reviewed. At fifteen cents a page, this expense alone exceeded five hundred dollars. The attorneys took more than twenty depositions; more than ten were transcribed for use at trial. These expenses neared five thousand dollars. Long distance telephone and copying costs were substantial. Expenses for this type of lawsuit can quickly climb to ten thousand dollars.

A litigation philosophy consistent with the available budget must be adopted early in the process. Compromises and cost cuts will have to be made. Although it is ideal to depose any witness with information relevant to the lawsuit and to have each of these depositions transcribed, foregoing less important depositions may be necessary.

Homeless advocacy groups and other community organizations may provide funding for institutional anti-homeless litigation. Some of these organizations have funds set aside specifically for court cases.[38] Others readily can obtain contributions or conduct fundraising for this purpose.[39]

A motion should be filed to proceed *in forma pauperis*.[40] Although the significant benefits of this status do not take effect until

---

36. *Id.*, advisory committee's notes.

37. *Pottinger II*, 810 F. Supp. at 1559 n.9.

38. Subject to approval, organizations such as the American Civil Liberties Union, the National Coalition for the Homeless, and the National Law Center on Poverty and Homelessness all have funds to sponsor various types of anti-homeless litigation.

39. Support often comes with strings attached. Care must be taken to explain the litigation objectives and make clear that litigation decisions will be made by the clients and the attorneys, not the organizations.

40. *See* 28 U.S.C. § 1915 (1988).

any necessary appeal,[41] requesting such certification reflects the reality that homeless persons are indigent and have no more funds to support litigation than they do to secure shelter. Many statutes, including the Federal Civil Rights Act, have fee shifting provisions.[42] Unfortunately, while these statutes provide a basis to recover costs, expenses, and often attorney's fees at the end of the case if the plaintiffs prevail, they do not provide a basis for securing funds at the beginning of the litigation when they are most needed.

An argument can be made that a municipality or other institutional defendant should share the cost of gathering and producing relevant documents. These documents may be essential to prove an unconstitutional pattern and practice. Public records laws often require that such information be stored in a manner accessible to the public and set a cap on the amount that can be charged for its retrieval.[43] To the extent there is substantial expense associated with retrieving and assembling this information, plaintiffs who fall prey to alleged civil rights violations should not have to bear these expenses. Therefore, an argument can be made that the court, through its equitable powers, should shift some of the litigation expenses to the defendant.

Non-lawyer volunteers can perform many tasks essential to a successful lawsuit. The key is to identify delegable tasks. Volunteers can be found among the homeless clients, community organizations, local law schools, and even high schools. Once the lawyers establish criteria for identifying relevant and useful information, volunteers can be used to review computerized records and information, municipal or agency notes and memoranda, and commission or council meeting minutes. Volunteers can be used to search through local media archives for pertinent articles. They can be used to help assemble, organize, and even quantify some of this information.

Many litigation related expenses can be donated or discounted. A large court reporting company, upon being advised of the nature of the lawsuit, may be willing to provide services for free or at discounted rates. Experts from any discipline who have an interest in

41. Section 1915 authorizes the district court to direct the United States to pay copying, printing, and transcription expenses for the appeal. It also authorizes an indigent litigant to proceed in the trial court without prepayment of fees and costs and requires officers of the court to issue and serve all process.

42. *See* 42 U.S.C. § 1988 (Supp. III 1991).

43. Public Records, ch. 119, FLA. STAT. (1993). The general policy of the state is "that all state, county, and municipal records shall at all times be open for a personal inspection by any person." FLA. STAT. § 119.01(1) (1993).

homeless advocacy may agree to assist in exchange for reimbursement of expenses. Professors and other academicians may be willing to consult, conduct research in their field of expertise, or testify without payment for their time.

Successful federal civil rights litigants are entitled to reimbursement for attorney's fees and litigation expenses.[44] Thus, careful contemporaneous records must be kept of all litigation expenses and legal services rendered to support any claim. A log must be kept of all long distance telephone calls, postage fees, and copy expenses.[45] The same level of detail should be given to attorney services. Although the recovery of costs and attorney fees is not a primary goal of the lawsuit, imposition of these expenses on the defendant helps deter future civil rights violations and encourages other potential plaintiffs' attorneys to take on similar risky, but potentially renumerative, cases.[46]

VII. FRAMING THE LAWSUIT

Institutional homeless litigation is of relatively recent origin. There are few reported federal and state cases dealing specifically with the constitutional and statutory rights of homeless persons as a class. The limits of this type of litigation are being explored. Given the novelty of this type of lawsuit and the need to greatly expand state and federal court recognition of homeless rights, attorneys should opt for a shotgun approach in framing the lawsuit. Most modern anti-homeless ordinances and statutes have not been subjected to constitutional scrutiny. It is important to give courts every possible opportunity to invalidate the law or government policy. Thus, the complaint should be crafted in the most creative, expansive way possible. Both federal and state constitutional, statutory, and common law grounds should be explored.

---

44. 42 U.S.C. § 1988 (Supp. III 1991).

45. *E.g.*, Cappeletti Bros., Inc. v. Broward County, 754 F. Supp. 197, 198 (S.D. Fla. 1991) (stating nonstatutory costs such as postage, long distance calls, photocopying, travel, paralegals, expert witnesses, and computerized legal research may be included in the definition of attorney's fees in a civil rights case).

46. *See* The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1988)).

A. Federal Constitutional Grounds

Many provisions of the federal Bill of Rights ostensibly protect homeless persons from governmental anti-homeless policies and practices. Rights have been asserted, successfully and unsuccessfully, under the First Amendment free speech clause.[47] It seems apparent, too, that an anti-homeless policy intended to fracture homeless encampments and to drive homeless persons from the public domain would impinge on First Amendment associational rights.[48]

Under the Fourth Amendment, it has been established that even homeless persons enjoy a reasonable expectation of privacy of personal belongings kept in closed satchels or bags,[49] or otherwise arrange to make obvious that the property belongs to someone.[50] This expectation remains intact even though the personalty is located on public property.[51] The government cannot seize and destroy such personal property.[52] Additionally, although the court in *Pottinger* rejected such a claim, a Fourth Amendment pretext argument can be made for arrests or other seizures of homeless persons for harmless conduct that ostensibly violates misdemeanor ordinances or statutes.[53] Such seizures are unconstitutional if an objectively reasonable police officer would not have made them absent some impermissible purpose.[54]

Under the Fifth Amendment due process clause, arguments can be made on both procedural and substantive grounds. With regard to procedural due process, it should be argued that arresting homeless people under misdemeanor ordinances and statutes, that ap-

---

47. Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (striking down anti-loitering to beg ordinance), *aff'g* 802 F. Supp. 1029 (S.D.N.Y. 1992). *Contra* Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (3d Cir. 1992) (upholding public library regulations), *rev'g* 705 F. Supp. 181 (D.N.J. 1991); Young v. New York Transit Auth., 903 F.2d 146 (2d Cir.) (upholding ordinance prohibiting begging in the subway system), *cert. denied*, 498 U.S. 894 (1990); Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (striking down ordinance prohibiting accosting person in public place for purpose of begging).

48. *See* Sawyer v. Sandstrom, 615 F.2d 311, 315-17 (5th Cir. 1980).

49. State v. Mooney, 588 A.2d 145, 154-61 (Conn.), *cert. denied*, 112 S. Ct. 330 (1991).

50. *Pottinger II*, 810 F. Supp. at 1571-73.

51. *Id.*; *Mooney*, 588 A.2d at 154-61.

52. *Pottinger II*, 810 F. Supp. at 1570-73; *see* Soldal v. Cook County, Ill., 113 S. Ct. 538, 544 (1992) (holding that the Fourth Amendment protects personal property from illegal seizure regardless of expectation of privacy).

53. *Pottinger II*, 810 F. Supp. at 1569.

54. *E.g.*, United States v. Guzman, 864 F.2d 1512, 1515-18 (10th Cir. 1988); United States v. Smith, 799 F.2d 704, 709-10 (11th Cir. 1986).

pear to outlaw harmless conduct, is overbroad[55] and that these laws, as applied to homeless persons, are vague and fail to give fair notice of the conduct they criminalize.[56] In *Pottinger*, the court found that to be overbroad, a law must "reach [] a substantial amount of constitutionally protected conduct."[57] The court held that the laws police used to arrest the plaintiffs were overbroad as applied because they violated the homeless' Eighth Amendment right to be free from punishment based on status and their fundamental right to freedom of movement.[58] With regard to substantive due process, it should be argued that the core rights protected by the due process clause include the right to live unsheltered in public.[59] The court in *Pottinger* determined that the life-sustaining activities homeless people must conduct in public are not fundamental rights.[60] The court found it unnecessary to address the plaintiffs' substantive due process claim separate from their equal protection claim because they are based on the same standard.[61]

Fifth Amendment equal protection arguments can be formulated by asserting either a suspect class status or a violation of fundamental rights. Although the Supreme Court has repeatedly held that poverty is not a suspect class,[62] the court in *Pottinger* stated that it was not willing to summarily dismiss such a claim on behalf

---

55. *E.g.*, Tobe v. City of Santa Ana, No. G014257, slip. op at 18 n.11 (Cal. Ct. App. 4th Dist. Feb. 2, 1994); City of Pompano Beach v. Capalbo, 455 So. 2d 468, 470-71 (Fla. 4th DCA 1984), *rev. denied*, 461 So. 2d 113 (Fla.), *cert. denied*, 474 U.S. 824 (1985); State v. Penley, 276 So. 2d 180, 180-81 (Fla. 2d DCA), *cert. denied*, 281 So. 2d 504 (Fla. 1973).

56. *E.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Tobe*, No. G014257, slip op. at 18.

57. *Pottinger II*, 810 F. Supp. at 1577 (citing Hershey v. City of Clearwater, 834 F.2d 937, 940 n.5 (11th Cir. 1987) (citation omitted)).

58. *Id.*

59. *Cf.* Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The *Meyer* court defined liberty as:

> [T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399.

60. *Pottinger II*, 810 F. Supp. at 1578.

61. *Id.* at 1575 n.32.

62. *E.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988); Maher v. Roe, 432 U.S. 464, 470-71 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 27-28 (1973). *See also Pottinger II*, 810 F. Supp. at 1578.

of homeless persons.[63] The question of whether this unique class of impoverished persons is so disenfranchised and politically powerless so as to be entitled to suspect class status has never been addressed by the United States Supreme Court.[64] The court in *Pottinger* found an equal protection violation based on the city's lack of a compelling justification[65] for violating the plaintiffs' fundamental right[66] to interstate[67] and intrastate travel.[68]

An argument should also be made under the Fifth Amendment takings clause that the summary seizure and destruction of homeless persons' belongings constitutes an unconstitutional taking without compensation. In *Pottinger*, relying on the same facts that supported its finding of a Fourth Amendment violation, the court held that Miami's police practice of seizing and destroying the plaintiffs' personal belongings violated the Fifth Amendment's taking clause.[69]

Perhaps the most significant and potentially far reaching conclusion of the court in *Pottinger* was that the criminalization of essentially inoffensive, harmless conduct in which involuntarily homeless persons must engage in public to survive — sleeping, sitting, standing, and eating — constitutes punishment based on status in violation of the Eighth Amendment's cruel and unusual punishment clause.[70] The decision seems firmly founded upon long standing Supreme Court precedent.[71] Although a conviction general-

---

63. *Pottinger II*, 810 F. Supp. at 1578.

64. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); *Matter of Mota*, 788 P.2d 538, 543 (Wash. 1990); Washington County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

65. The city offered parks and public areas esthetics, tourism and downtown business promotion, and general crime prevention as its reasons for arresting homeless persons. *Pottinger II*, 810 F. Supp. at 1581-83. These justifications were rejected by the court as inadequate. *Id.*

66. The court in *Pottinger* rejected the notion that essential life sustaining activities such as eating, sleeping, sitting, and standing are "fundamental" rights for purposes of equal protection analysis. *Pottinger II*, 810 F. Supp. at 1578. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984); Whiting v. Town of Westerly, 942 F.2d 18, 21-22 (1st Cir. 1991).

67. *Pottinger II*, 810 F. Supp. at 1578-81. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); Edwards v. California, 314 U.S. 160, 181-82 (1941) (Douglas, Jackson, J.J., concurring).

68. *Pottinger II*, 810 F. Supp. at 1579. *See, e.g.*, Lutz v. City of York, Penn., 899 F.2d 255, 268 (3d Cir. 1990); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648-49 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); *Tobe*, No. G014257, slip op. at 14-16.

69. *Id.* at 1570 n.30.

70. *Id.* at 1561-65; *see Tobe*, No. G014257, slip. op. at 16-17.

71. *See* Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660

ly is necessary to invoke Eighth Amendment protection,[72] the cruel and unusual punishment clause also places substantive limits on what types of conduct can be made criminal.[73] In other words, if the ordinance or statute contemplates forbidding homeless persons from performing certain acts that they must perform to survive, the law will be challengeable even without a conviction. Thus, this limitation on the exercise of police powers should be attacked by both *per se* and as applied constitutional challenges.[74]

B. Constitutional Torts

The full range of constitutional torts, including false arrest,[75] malicious prosecution,[76] malicious abuse of process,[77] should be examined in assessing a government entity's mistreatment of homeless persons. If a city has an anti-homeless policy, it is likely that arrests of homeless persons unsupported by probable cause are being made and that lawful or unlawful process (i.e. warrantless arrests and seizures of property) is being initiated for an improper purpose.

In *Pottinger*, a claim for malicious abuse of process was rejected because the court concluded that the action does not lie where the improper motive (driving the homeless from the public domain) arises before the lawful arrest process.[78] The court noted that the tort of malicious abuse of process generally involves some form of extortion.[79] It is submitted that in *Pottinger* the action was well-founded where one police officer testified homeless people were detained longer than others after arrest to keep them off the streets

---

(1962). *Accord* Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

72. *E.g.*, City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 243 (1983); Hamm v. DeKalb County, 774 F.2d 1567, 1572 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

73. Ingraham v. Wright, 430 U.S. 651, 666 (1977).

74. The Ninth Amendment's general limitation on the power of the federal government and reservation of rights to the individual also arguably protects an involuntarily homeless person's right to live in public. The Fourteenth Amendment's due process and equal protection clauses generally protect the same rights from state infringement as the Fifth Amendment's due process clause protects from federal infringement.

75. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984).

76. *Id.* § 119.

77. *Id.* § 121. *See* Jennings v. Shuman, 567 F.2d 1213, 1217-19 (3d Cir. 1977).

78. *Pottinger II*, 810 F. Supp. at 1565-69.

79. *Id.*

longer and the officers routinely destroyed the property of homeless persons following their arrests. The city's implicit threat or extortion through its policy was, "if you homeless people do not stay out of our public areas, we are going to continue arresting and detaining you and destroying your property."

C. State Constitutional Grounds

In addition to federal constitutional grounds, state constitutional grounds should also be fully considered for expressing violations of the rights of homeless persons. The courts of many states are actively exploring the limitations of state constitutional rights and are finding that they provide greater rights and more protection than their federal constitutional counterparts.[80] Specifically, some state courts have found that their state constitutions provide greater protection against unreasonable searches and seizures[81] and cruel and unusual punishment,[82] and provide greater rights to due process of law[83] and equal protection.[84] Moreover, many states like Florida have independent, self-standing constitutional provisions protecting a right to privacy and decisional autonomy.[85] This can provide the essential foothold for arguing that even persons who choose to exist without a home have certain fundamental privacy rights that the sovereign cannot violate absent some compelling state interest.[86]

---

80. *E.g.*, Traylor v. State, 596 So. 2d 957, 962-63 (Fla. 1992); State v. Ball, 471 A.2d 347, 350-51 (N.H. 1983). *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

81. *E.g.*, State v. Quino, 840 P.2d 358 (Haw. 1992); State v. Cordova, 784 P.2d 30 (N.M. 1989). Florida courts are limited to interpreting Florida's constitutional provision consistent with the United States Supreme Court's interpretation of the Fourth Amendment. FLA. CONST. art. I, § 12.

82. Florida's constitution prohibits cruel *or* unusual punishment, indicating an intent to provide more protection than the parallel provision in the United States Constitution's Eighth Amendment. FLA. CONST. art. I, § 17 (emphasis added). *See* Tillman v. State, 591 So. 2d 167, 169 n.2 (Fla. 1991).

83. *See, e.g.*, State v. Williams, 623 So. 2d 462 (Fla. 1993) (holding that law enforcement's manufacture of crack cocaine violates Florida's due process guarantee); Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991) (holding Florida's Contraband Forfeiture Act constitutional if construed in accordance with Florida's due process protection).

84. *See, e.g., Traylor*, 596 So. 2d at 969.

85. FLA. CONST. art. I, § 23.

86. *Cf. In re* Guardianship of Browning, 568 So. 2d 4 (Fla. 1990) (stating that a person or guardian has a fundamental right to reject medical treatment or terminate life

The court in *Pottinger* rejected the plaintiffs' argument that Miami's arrests of homeless individuals for conducting basic human activities in public violated their fundamental privacy rights.[87] The court observed that, although the plaintiffs had demonstrated a reasonable expectation of privacy in their personal effects, "the law does not yet recognize an individual's legitimate expectation of privacy in such activities as sleeping and eating in public."[88] Efforts should persist to legitimize an individual's expectation of privacy in performing such activities in public where the person has nowhere else to go. The Florida Supreme Court has, for instance, made clear its commitment to the doctrine of primacy[89] and has invited the Bar of Florida to assist it in exploring the limitations of the rights protected by its Declaration of Rights.[90]

D. Federal and State Statutory Grounds

Homeless advocates must survey and explore federal and state statutory rights while preparing their complaint. For instance, the federal Fair Housing Act prohibits discrimination in housing based on race, color, religion, sex, disability, family status, or national origin.[91] Homeless persons often suffer discrimination in housing based on a combination of one or more of these characteristics and their homelessness. For instance, it might be argued that because of a disproportionally high incidence of homelessness among per-

---

support systems); Shaktman v. State, 553 So. 2d 148 (Fla. 1989) (stating that a person has a reasonable expectation of privacy in telephone numbers dialed); *In re* T.W., 551 So. 2d 1186 (Fla. 1989) (stating that a pregnant minor has a fundamental right to terminate a pregnancy); Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544 (Fla. 1985) (stating that a person has a reasonable expectation of privacy in financial records held by banking institutions); Mozo v. State, 19 Fla. L. Weekly D141, D144-45 (Fla. 4th DCA Jan. 19, 1994) (discussing Florida's privacy provision and finding protection for communications over cordless telephones).

87. *Pottinger II*, 810 F. Supp. at 1573-75.

88. *Id.* at 1575.

89. *Traylor*, 596 So. 2d at 962-63, 982-83. Primacy is the doctrine which requires state courts to give primary and independent consideration to their state constitutions when called upon to decide matters of fundamental rights. *Id.*

90. In the recent case of Kurtz v. City of North Miami, 625 So. 2d 899 (Fla. 3d DCA 1993), the court found that Florida's constitutional right to privacy protected a person's right to engage in the lawful act of cigarette smoking outside the workplace where the person was seeking employment. Although the court emphasized that the city regulation which prohibited employment of smokers effected the applicant's private conduct in her own home, it is unlikely the case would have been decided differently had the applicant done all her smoking in outdoor, public places.

91. 42 U.S.C. §§ 3601-3631 (1988).

sons of a particular protected population, a public housing program could not refuse admittance to an otherwise qualified homeless person. Likewise, the Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities or who are perceived to have disabilities.[92] The ADA prohibits such discrimination in the "full and equal enjoyment of any place of . . . public accommodation."[93] Under this law, too, a city could not refuse to provide available housing to a qualified homeless person because of his or her homelessness.[94]

State laws can also be used creatively to protect the rights of homeless persons. Florida, for instance, has a public policy, stated in various statutes, of maintaining the family unit.[95] This policy could be used to prevent any state action, such as harassing and arresting homeless persons for living in public, which might threaten the integrity of the family unit.[96] Additionally, state laws imposing an obligation to educate children[97] arguably carry with them an obligation to provide a reasonable home environment that will facilitate the educational process. Finally, Florida public health laws impose an obligation on local governments to maintain public areas in such a way as to minimize conditions that threaten the health or life of any individual.[98]

VIII. CHOOSING PLAINTIFFS

One fundamental question needing early resolution is the choice of a plaintiff. The lawsuit can be filed on behalf of a single homeless person or small group of homeless persons, or brought as

---

92. *Id.* §§ 12101-12213 (Supp. IV 1992).

93. *Id.* § 12181(a).

94. *See id.* § 12181(7)(K) (Supp. IV 1992).

95. *See, e.g.*, FLA. STAT. §§ 39.001(2)(b) & (e) (1993) (intent to provide care, safety, and protection of children in an environment that fosters healthy development and preserve and strengthen a child's family ties); *id.* §§ 39.002(1)(b) & (c) (intent to provide children with a stable home and safe and nurturing environment); *id.* § 39.01(42) (provision of preventative services to children to promote stable living environment and to promote and strengthen family life); *id.* §§ 409.801-803 (Family Policy Act intended to protect, preserve, and enhance stability and quality of family).

96. Legal Services of Greater Miami, Inc. has filed a class action lawsuit on behalf of homeless children against the Florida Department of Health & Rehabilitative Services to force the provision of shelter based on these state policies. Brown v. Towey, Case No. 91-54813 (Fla. 11th Jud. Cir. 1991).

97. *See, e.g.*, FLA. STAT. § 39.002(1)(f) (1993) (children to be provided with equal opportunity and access to quality and effective education).

98. FLA. STAT. § 386.01 (1993) (defining sanitary nuisance).

a class action under Federal Rule of Civil Procedure 23 or similar state rules. The choice of the plaintiff will have a major impact on the course of the litigation.

The primary advantage of bringing an anti-homeless policy lawsuit on behalf of a single homeless person or a small group of homeless persons is the substantially greater degree of manageability. Given the inherently difficult task of maintaining regular contact with homeless persons, the fewer plaintiffs an attorney represents, the easier it will be to maintain contact. Additionally, the fewer clients an attorney represents in one litigation, the easier it is to set litigation goals and priorities. Due to the widely varied backgrounds and circumstances of homeless persons, their interests in pursuing this type of litigation are extremely diverse. Some primarily seek financial renumeration for the injuries they have suffered as a result of wrongful arrests and harassment. Some wish to vindicate their underlying constitutional rights. Some want to preserve the right to live in public and to roam at will from place to place. Limiting the number of plaintiffs will likely lead to greater client consensus about litigation objectives.

Seeking class certification also has several disadvantages. First, it often requires a significant diversion of limited litigation resources. It may involve separate and additional discovery and will probably entail an additional and possibly lengthy evidentiary hearing. The certification of class also may inject error into any judgment. Although the court in *Pottinger* certified the plaintiffs as a class under Federal Rule of Civil Procedure 23(b)(2), Miami is challenging this ruling on appeal arguing it is "fundamentally flawed" because the definition provided by the court for "homeless persons" was vague and overbroad.[99]

Bringing a class action lawsuit also will present certain ethical dilemmas. Can an attorney competently and effectively represent a class of persons whose interests are so diverse and with whom maintaining regular contact is so difficult? How does the attorney proceed when different members of the class desire different courses of litigation? Even if the attorney maintains contact with a core group of the class, is this sufficient representation of the entire class? For all of these difficulties, it would appear that any judgment obtained on behalf of an individual homeless person or a small group of homeless persons in a non-class action lawsuit would

99. See *supra* note 4 for the class definition in *Pottinger*.

be equally applicable to similarly situated homeless persons in future litigation.[100]

Several reasons favor filing a class action suit. First, a class action suit most accurately reflects the reality of a local government's mistreatment of homeless persons. In the language of Rule 23(b)(2), the government agency opposing the class will have acted or refused to act on grounds generally applicable to the entire class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.[101] Although seeking class certification may require an expenditure of additional legal resources and necessitate additional evidentiary hearings, preparation of the pleadings and for any hearing will force the litigants to crystalize their theory of liability and marshal their evidence early in the case. It will provide an opportunity to more fully educate the court early about the facts underlying the lawsuit so the court will have a greater understanding of the case throughout the remaining pretrial proceedings. Most importantly, bringing the case as a class action lawsuit broadens the scope of the testimony that can be introduced at trial. Instead of focusing on the injuries sustained by an individual homeless person or small group of homeless persons, the plaintiffs will be able to bring in evidence of a more general nature concerning the plight of all homeless people.

IX. CHOOSING DEFENDANTS

Choosing the defendants is another litigation-defining task. Any governmental official who may be responsible for any aspect of anti-homeless policy may be sued in his or her official or personal capacity. Potential defendants may include a mayor, city or county commissioners, a city or county manager, and officials within the police department. Naming individuals focuses attention on the misconduct of those officials and may create political pressure for one or more defendants to settle the case. Naming individuals may force these officials to seek individual counsel and create conflicts between the defendants. This may be useful in dividing the interests of the defendants, thereby encouraging settlement or making them more vulnerable to adverse verdicts at trial. However, naming

100. *See generally* United States v. Mendoza, 464 U.S. 154, 158-59 n.4 (1984) (discussing offensive use of collateral estoppel by a nonparty to a prior lawsuit).

101. FED. R. CIV. P. 23(b)(2).

individual defendants will also complicate the litigation by involving more parties and their attorneys. It will also evoke litigation over whether a particular official enjoys qualified immunity.[102] This will require additional legal resources and may ultimately necessitate an interlocutory appeal.[103]

Choosing a municipality as a defendant has its own advantages and disadvantages. One advantage is that by naming one defendant, the plaintiffs will have challenged the misconduct of every municipal official acting in the locale. However, to establish municipal liability, the plaintiffs must prove that the municipality maintained an unconstitutional policy and that the policy caused the injuries suffered by the plaintiffs.[104] Plaintiffs will have to prove the existence of a policy established by an upper-level official with policymaking authority or a well-established and widespread pattern or practice that constitutes a custom or usage with the force of law.[105] A significant disadvantage is that in Florida, and presumably in many other states, a federal civil rights litigant cannot obtain punitive damages against a municipality.[106]

X. CHOOSING THE FORUM

A federal civil rights action filed pursuant to 42 U.S.C. § 1983 alleging a violation of federal or state constitutional rights can be brought both in state and federal court. Several considerations bear on this decision. Perhaps most importantly, a judicial decision impacting a municipality's anti-homeless policy will have significant political implications. An elected state court judge may be wary to condemn a municipality's anti-homeless policy and uphold the rights of this politically unpopular class. On the other hand, a life-appointed federal judge, if provided case law supporting such a decision, should have little difficulty finding municipal liability.

---

102. Qualified immunity is a defense to liability for monetary damages of government officials (including police officers) performing discretionary functions where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

103. *See* Sims v. Metropolitan Dade County, 972 F.2d 1230, 1233 (11th Cir. 1992).

104. *E.g.*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694-95 (1978); Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

105. City of St. Louis v. Praprotnik, 485 U.S. 112, 125-27 (1988); *Monell*, 436 U.S. at 691; *Bordanaro*, 871 F.2d at 1155-56; Depew v. City of St. Mary's, Ga., 787 F.2d 1496, 1499 (11th Cir. 1986).

106. FLA. STAT. § 768.28(5) (1993).

Additionally, a federal district judge will likely be far more familiar with the intricacies of federal constitutional litigation than a state court trial-level judge. This situation may be reversed in cases relying upon state constitutional claims. When bringing a case to a speedy conclusion is the overriding concern, filing in state court will probably be the best choice.

XI. BENCH OR JURY TRIAL

Generally, a plaintiff has the right to a jury trial in any action for money damages.[107] Typically, a request for a jury trial must be made at the time of the initial complaint.[108] Once trial by jury is requested, the defendant may be able to insist upon it notwithstanding the plaintiff's later decision to request a trial by the court.[109]

In deciding between judge and jury, the plaintiffs obviously will want to select the fact finder most likely to rule in their favor. A jury trial will be the longer and more complicated option. Given the probable natural prejudice of most people against homeless persons, substantial energies will have to be spent developing voir dire questions to identify venire persons whose prejudices will prevent them from rendering a verdict in the plaintiff's favor. It may be very useful to engage a jury consultant or to conduct a mock trial. If the plaintiffs consider pursuing a bench trial, the judge's political orientation and attitude must be carefully considered.

If the plaintiffs initially request a jury trial and later opt for a bench trial and the defendants oppose the change, a court should favorably consider a motion to bifurcate the liability from the damages portion of the trial. This would allow the court to sit as the finder of fact regarding liability, while preserving the defendants' right to a trial by jury on damages. In *Pottinger*, the plaintiffs sought primarily injunctive and declaratory relief and only, incidentally, monetary damages. The court granted a motion to bifurcate placing the judge in the role of fact finder regarding liability.[110] The court concluded that the equitable issues were "the very heart" of the plaintiffs' class action for which there was no adequate remedy at law. Under these circumstances, the court concluded that it

107. U.S. CONST. amend. VII; FED. R. CIV. P. 38(a).
108. FED. R. CIV. P. 38(b).
109. FED. R. CIV. P. 39(a).
110. *Pottinger II*, 810 F. Supp. at 1557.

was entitled to first resolve the equitable claims even though the results might be dispositive of issues involved in the legal claims.[111]

XII. PUBLICITY

Homelessness is a matter of great public interest. A comprehensive media strategy should be planned in advance. Attorneys should contact local news reporters and advise them of the lawsuit and offer them access to background material. Press releases and conferences announcing the filing of the lawsuit and continuing litigation progress will keep the media actively interested in the case. Introduce the news media to the plaintiffs, show where the homeless live, and have the homeless tell their stories. Any homeless person interviewed in the context of a class action lawsuit will be seen as representing an entire class. Thus, they should be screened and prepared carefully for any media contact.

Before implementing a publicity strategy, the relevant ethical rules must be consulted.[112] Publicity restrictions are greatest in criminal cases or civil matters triable to a jury.[113] Generally, a lawyer is permitted to make extrajudicial statements, without elaboration, regarding the general nature of the claim, information contained in a public record, the general nature of an investigation of the matter, and the scheduling or result of any step in the litigation.[114]

XIII. SELECTION OF WITNESSES

In a lawsuit challenging a municipality's efforts to criminalize homelessness, the plaintiffs will generally call three types of witnesses. First, experts will testify about the plight of the homeless and the nature of the municipal misconduct against homeless persons. Second, homeless persons will testify about their own experiences, including the injuries they have suffered as a result of the

---

111. *Pottinger II*, Order on Motion to Bifurcate, filed June 11, 1993, at 3. *See, e.g.*, Katchen v. Landy, 382 U.S. 323, 339 (1966); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-80 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 509-10 (1959).

112. RULES REG. FLA. BAR, Rule of Professional Conduct 4-3.6 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980).

113. RULES REG. FLA. BAR, Rule of Professional Conduct 4-3.6(b) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(A), (B) (1980).

114. RULES REG. FLA. BAR, Rule of Professional Conduct 4-3.6(c) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(C) (1980).

municipal anti-homeless policies or practices. Third, other members of the local community will testify about their observations of the municipality's anti-homeless policies and practices.

A. Experts

Experts can testify about the causes and the involuntary nature of homelessness, its local demographics, the circumstances under which homeless people live, and the difficulties they encounter as a group attempting to reenter society. Experts qualified to give this testimony are sociologists, anthropologists, or social workers who have experience dealing with homeless persons. Medical doctors can testify about the health conditions of the homeless. Public health experts can discuss the risks of exposure to unsanitary living conditions not only to the homeless, but to the surrounding community as well. Mental health experts can testify about the psychological and emotional problems that contribute to the plaintiffs' homelessness and burdens their difficult reintegration into society.

Law enforcement experts may be able to testify about the objective unreasonableness of certain police procedures and practices in dealing with homeless persons. The expert may be able to assist in analyzing arrest records or internal police memoranda and identifying a *de facto* policy of harassing homeless persons within the local police department. Since these experts may have many years of experience in police departments, they may have been involved in anti-homeless policies or procedures themselves. This will give them a particularly enlightened vantage point and should make them very credible witnesses.

B. Homeless Witnesses

Selecting homeless witnesses is a difficult task. These witnesses will probably have a spotted, if not lengthy, criminal record.[115] Many are substance abusers. These circumstances are part of the culture of homelessness, which the experts have hopefully explained at trial. Nevertheless, the defendants will undoubtedly highlight these facts and use them to discredit the plaintiffs. While these facts will likely carry little weight with the judge, they will

115. A large part of a homeless person's criminal record may be attributable to arrests for being homeless.

probably prejudice public opinion and the jury.

Any homeless person who testifies will be viewed by the finder of fact as a representative of homeless persons as a class. Witnesses should understand that their participation is a commitment to a potentially lengthy course of proceedings. They will have to agree to appear for meetings, depositions, and hearings. They must understand and be committed to the litigation goals. Many homeless persons are zealots or have hidden agendas for being involved in such a lawsuit. Thus, it is essential to thoroughly prepare any such witnesses for testimony and any out-of-court interviews.

C. Community Members

Many people in the community will have valuable information regarding a municipality's anti-homeless animus. Homeless advocates may be able to testify about the lack of adequate shelter, services, and assistance available to homeless persons in the community. They may also be able to testify about any municipal anti-homeless policy or practice and incidents of official homeless mistreatment and discrimination with which they have been involved.

XIV. TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTION LITIGATION

Often it is the imminence of a certain event involving homeless harassment that inspires the filing of an institutional anti-homeless lawsuit. Under these circumstances, the immediate relief of a temporary restraining order (TRO) or preliminary injunction may be necessary. A TRO may be granted without notice to the adverse party if the plaintiffs clearly demonstrate, by affidavit or verified complaint, that immediate and irreparable injury, loss, or damage will result before the adverse party can be heard in opposition and if adequate efforts have been made to provide notice to the opponent.[116] A preliminary injunction may only be issued upon notice and a hearing to the adverse party.[117] To secure such extraordinary relief, plaintiffs must show (1) a substantial likelihood of success on the merits; (2) that plaintiffs will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs any damage the proposed injunction may cause the opposing

116. FED. R. CIV. P. 65(b).
117. FED. R. CIV. P. 65(a).

party; and, (4) that the injunction, if issued, would not be adverse to the public interests.[118]

Although the main goal of requesting a TRO or preliminary injunction is to secure emergency relief, there are other incidental benefits. The injunction requires the plaintiffs, early in the lawsuit, to clearly articulate their theories of liability and the nature of the relief sought. Conducting the hearing on a preliminary injunction will assist the attorneys in identifying the strengths and weaknesses of the case. The injunction pleadings and the hearing will allow the plaintiffs to begin educating the judge about the nature of the plaintiffs' plight and the mistreatment suffered at the hands of the defendants.

In considering a request for a preliminary injunction, the court will necessarily consider the merits of the plaintiff's claims. However, the complexity of the factual and legal issues of this type of lawsuit make them difficult to fully address in the context of a TRO or preliminary injunction hearing. Thus, if the trial court is disinclined to grant the requested relief, it should be requested not to deny the request based on the failure to demonstrate a substantial likelihood of success on the merits.[119] In *Pottinger*, the district judge denied the plaintiffs' request for a preliminary injunction. The denial was based initially on the court's conclusion that it could not fashion an injunction with the degree of specificity required by Rule 65(d).[120] The court went on to analyze the four factors that must be considered in resolving a motion for a preliminary injunction. After finding that the second, third, and fourth factors weighed against issuing the injunction, the court noted that it need not determine the likelihood of ultimate success on the merits.[121]

XV. TRIAL

The finder of fact must be educated about the nature of homelessness and the anti-homeless policies enforced by the defendant against these vulnerable people. Trial counsel must pay particular attention to detail and not assume the factfinder has any

118. *E.g.*, Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 180-82 (5th Cir. 1975); Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 (1973).

119. *Pottinger II*, 810 F. Supp. at 1555.

120. FED. R. CIV. P. 65(d). The plaintiffs in *Pottinger II* sought to enjoin the Miami police from, *inter alia*, harassing homeless persons.

121. *Pottinger II*, 810 F. Supp. at 1583-85.

particular knowledge about homelessness. Additionally, the attorney may need to overcome substantial prejudices of the factfinder against homeless persons. It is essential to personalize the homeless to the finder of fact.

Given the complexity and novelty of the issues, it is useful to organize the presentation of the case around themes or analogies to more familiar situations. In *Pottinger*, the plaintiffs urged that the city's harassment of them was like roach control by a professional exterminator.[122] By the plaintiffs' analogy, the city sought to dry up their food supply, destroy their nests, research and develop new poisons, and keep them on the move.[123]

XVI. POST-VERDICT ADMINISTRATION

Regardless of the ultimate outcome, the plaintiffs' lawyers responsibilities may continue well into the future. If a judgment is entered in favor of the defendant, a determination of whether to appeal must be made. The homeless clients must be fully apprised of their appellate rights. If a decision is made to appeal, the attorney must take all necessary steps to preserve that right including filing post-verdict motions and filing any documents necessary to invoke the plaintiffs' appellate rights. If plaintiffs' counsel do not intend to continue with representation on appeal, they should endeavor to secure qualified appellate counsel.

If the court rules in the plaintiffs' favor, counsel must insure that the defendant lives up to the letter and spirit of any injunctive or other relief. This may require further meetings with the defendant, monitoring records that will reflect the defendant's compliance, or attending various collateral proceedings. Any deviations from the court's ruling must be brought immediately to the trial court's attention. This may require filing one or more post-judgment orders to show cause why the defendant should not be held in contempt. Throughout all post-judgment proceedings, counsel must continuously strive to keep the plaintiffs informed as to the status of the lawsuit.

---

122. *Id.* at 1555, 1567. *See also* Plaintiff's Post-Trial Memorandum filed July 20, 1992.

123. *Pottinger II*, 810 F. Supp. at 1555, 1567. *See also* Plaintiff's Post-Trial Memorandum filed July 20, 1992.

XVII. CONCLUSION

Municipalities throughout the United States continue to experiment with strained and novel ways to effectuate anti-homeless policy. In far too many communities, being homeless is a crime. If institutional anti-homeless policies are to be eliminated and replaced by thoughtful and effective programs to reduce homelessness consistent with constitutional and statutory rights, more large scale lawsuits like *Pottinger* must be filed and prosecuted.

In many respects, a class action lawsuit to protect constitutional and statutory rights of homeless persons is no different than any other complex, civil rights litigation. The key to successful litigation is to simplify the issues and to present a compelling case that will allow the finder of fact to rule in the plaintiffs' favor. It is hoped that this Article will provide a starting point for devising an effective litigation strategy for any attorney contemplating filing a *Pottinger*-type lawsuit.

James D. Wright & Amy M. Donley, Poor and Homeless in the Sunshine State: Down and Out in Theme Park Nation (2011)

12

A Tale of Two Cities: Homeless Politics and Services in Miami and Orlando

What to do with, for, or about the homeless has bedeviled American cities[1] since the current outbreak of homelessness began in the late 1970s and early 1980s. In this, Florida cities are no exception. In the early 1980s, vast segments of the city of Miami, Florida's largest metro area, approximated Third World homelessness conditions, with immense homeless camps under many of the bridges and overpasses, thousands of street people wandering about the city, and a quasi-official policy of dispersal, indifference, and repression. Street sweeps, demolition of homeless camps, and the confiscation and destruction of homeless peoples' belongings were near-daily occurrences. Much of this went on with the tacit consent of local government and the implicit approval of many downtown business and development interests. And with good reason: the uncontrolled growth of homelessness in downtown Miami was threatening to destroy the quality of urban life.

Homelessness wasn't doing much for the quality of life in Orlando in those years either. Articles in the local paper, the Orlando *Sentinel,* circa late-1980s, routinely referred to the "flood of homeless people" in the city's streets and public places.[2] By 1987, the homeless situation in Orlando was sufficiently alarming to the city's Downtown Development Board that they coughed up $350,000 to help a group of concerned citizens, mostly people of faith, open a shelter to get homeless men off the streets at night. (This shelter eventually became the Coalition's Pavilion, which has been featured in many previous chapters.) An article in the New Orleans *Times-Picayune* compared the homeless situation

to be dismissed, was Hurricane Andrew, the devastating 1992 Category 5 hurricane that leveled the better part of South Florida and rendered thousands of its victims homeless. Andrew was the object lesson, there for anyone to see, that innocent people could become homeless for reasons beyond their control, and that being homeless was not necessarily the homeless person's fault.

The *Pottinger* suit bubbled through the legal system for four years before it was decided in favor of the plaintiffs in the U.S. District Court for the Southern District of Florida in November 1992. Ironically, and perhaps not coincidentally, this was just three months after Hurricane Andrew had destroyed an estimated 25,500 homes and inflicted serious damage on an additional 100,000—no time to be insensitive to the needs of the homeless! The ruling was a slam-dunk. The court found that Miami's practice of arresting people for "harmless life sustaining activities that they are forced to perform in public" was in violation of the Eighth Amendment (these arrests were found to constitute cruel and unusual punishment), the due process clause of the Fourteenth Amendment, and also "burdened the fundamental right to travel in violation of the Equal Protection Clause." Police seizure and destruction of homeless persons' property was found to be in violation of the Fourth Amendment guarantee against unreasonable search and seizure. For relief, the court ordered the City of Miami to comply with the plaintiffs' requests for declaratory and injunctive relief. The City was required to establish safe zones where homeless people could stay without being arrested for "life-sustaining activities." The injunction defined eleven specific "life-sustaining misdemeanors," e.g., being in a park after curfew hours; eating, sleeping, sitting, congregating, or camping in public places; public nudity, urination or defecation; living or sleeping in a vehicle; and the like, for which homeless persons could not be arrested (or even warned about). The police were also ordered to stop arresting homeless people for these activities and to stop confiscating and destroying their property. Numerous other provisions to protect Miami's homeless population from official abuse, harassment, and discrimination were also made.

The City, of course, immediately appealed the court's decision, challenging the basis and scope of the injunction. The appeal was heard two years later, in December 1994, was remanded to the District Court for clarification, and was reheard in April 1995, at which point the original findings and injunction were basically upheld. In February 1996, the entire matter was referred to mediation and a mediation agreement was reached in December 1997, nearly a decade after the original suit was

filed. (In the interim, Pottinger himself had died—where, when, or how, no one seems to know.) The agreement provided for law enforcement training, policy, and protocols to prevent the arrests, harassment, or destruction of the property of homeless people; for an advisory committee to monitor compliance and investigate complaints; for a compensation fund of $600,000 to be disbursed in $1,500 lots via pre-loaded debit cards to homeless persons who had been injured by the unconstitutional conduct of the Miami police; and for "reasonable" attorney's and expert witness fees, a small chunk of which went to the senior author of this book for his testimony on behalf of the plaintiffs.[4]

Despite the decision to appeal the Court's ruling, the City was under no illusions about the likely outcome. In an off-the-record conversation with the plaintiff's expert witness, the city attorney defending the case admitted, "We really don't have a leg to stand on." Even before the appeal was heard, Miami-Dade County took two dramatically positive and significant steps forward. First, a systematic 1992 assessment of the regional homeless problem determined that the problem was far too large to be solved by the private sector alone and that some sort of dedicated, ongoing source of public funding for homeless services would be necessary. The Florida State Legislature, supported by then-Governor Lawton Chiles and acting on the request of the Miami-Dade County Commission, passed legislation enabling a 1 percent "add-on" sales tax on food and beverages sold by establishments with gross annual revenues exceeding $400,000. This tax was implemented in Miami-Dade County in 1993 without significant opposition and now provides about $14 million per year in dedicated funding for homeless services (with 15 percent of the revenue dedicated to domestic violence shelters). Affluent people in Miami who run up a hundred-dollar bar bill get dinged for one extra buck, and the result is eight figures of dedicated annual revenue to fund homeless services. How many site visits does it take to figure out that this must be a significant element in the Miami success story?

In addition to the food and beverage tax, on May 18, 1993, the Miami-Dade County Commission appointed a Task Force on Homelessness to determine what services Miami should be trying to provide to its homeless people with the new revenues. The Task Force was charged with developing a plan to comply with *Pottinger*, but went beyond mere compliance to create a truly comprehensive approach to dealing with the region's homelessness problem. A central part of the plan, the *Dade County Community Homelessness Plan*, was to create the Miami-Dade County Homeless Trust "to oversee that portion of the Food and Bever-

age tax dedicated to homeless programs and to ensure that the proceeds are used in a manner which will provide the greatest benefit to homeless persons and the community as a whole" (Task Force on Homelessness 1994: 21).

Significantly, the co-chairs of the Task Force on Homelessness that created the Community Homeless Plan were then-Commissioner Alex Penelas and Mr. Alvah H. Chapman, Jr. Penelas was at the time the youngest county commissioner in Dade County history. On October 1, 1996, he became the first Executive Mayor of Miami-Dade County, serving in that capacity until 2004—i.e., throughout the formative period of the Homeless Trust and the Community Homeless Plan. From the Trust's inception in 1994 until the end of his tenure as Mayor, Penelas also served as the Trust's chair. Mayor Penelas was an enormously charismatic and influential figure who was voted "America's sexiest politician" by *People* in 1999. That the Community Homeless Plan was *his* plan made a huge difference in getting Miami's influential citizens to take the plan seriously.

Penelas' co-chair was Alvah Chapman, one-time publisher of *The Miami Herald*, chairman of the Knight Ridder newspaper chain, and by all accounts one of South Florida's most influential philanthropic and civic leaders. Chapman's list of accomplishments includes literally scores of philanthropic and charitable activities. In 1995, he became the founding chairman of the Community Partnership for the Homeless, the private partner of the Miami-Dade County Homeless Trust and the entity that operates the Homeless Assistance Centers. The downtown Homeless Assistance Center is adorned by Chapman's bust. It is doubtlessly a fair assessment that pretty much anyone Penelas could not "deliver" to the service of the homeless plan, Chapman could—and this kind of political leadership was also a decisive factor in Miami's long-term success.

Significantly, Penelas was succeeded as Executive Mayor by the current incumbent, Mayor Carlos Alvarez, a former director of the Miami-Dade Police Department. Alvarez has also embraced the cause of homelessness and sits voluntarily as a member of the Board of Directors of the Homeless Trust. Numerous other influential community members also serve on the Trust's Board of Directors, which is chaired by Ronald L. Book, described in *Newsweek* as "one of the state's most powerful lobbyists." Clearly, Miami's Homeless Trust has never suffered for lack of political clout.

Over time, the Miami-Dade County Homeless Trust became the regional lead agency for the U.S. Department of Housing and Urban

Development's "Continuum of Care" (CoC). Each year, HUD awards an array of program funds to local communities to combat homelessness and requires that all applications from a particular area or jurisdiction be coordinated through a single "Continuum of Care" lead agency. Thus, the Homeless Trust has become the organization responsible not only for overseeing the distribution of proceeds from the Food and Beverage Tax, but also for organizing the entire community-wide Continuum of Care effort, an effort that directly or indirectly involves scores of community agencies and programs. Considering both HUD funds and tax revenues, the Trust has annual revenues of more than $40 million.

Most homeless service providers in the Miami CoC also fund-raise independently of the Homeless Trust and operate homeless programs other than those funded by the Trust, so the Trust's $40 million is only a down-payment on the annual cost of providing direct services to Miami's homeless people. According to David Raymond, Executive Director of the Homeless Trust, the total annual expenditure on direct homeless services in Miami-Dade County is at least *twice* the Trust's $40 million, including leveraged funds—i.e., $75 or $80 million each year and quite possibly more than that. In contrast, the Orlando Mayor's Working Committee on Homelessness (about which we will provide more later) estimated in its 2004 report that the equivalent figure for the Orlando metropolitan area was on the order of $10 million; today's figure, according to Orlando's Homeless Services Network, may be closer to $20 million, but surely not much more than that.[5] Miami-Dade County is about twice as populous as the Orlando metro area but spends four or five times more money each year to feed, clothe, treat, shelter, and house its homeless population.

Equally as impressive is the vision expressed in the original Dade County Community Homelessness Plan and the degree to which that plan has been followed in the decade and a half since. In 1994, the homeless population of Miami-Dade was estimated to be about 6,000 persons (at the time, figures of eight or even ten thousand were also being promulgated, but a count of about 6,000 was cited repeatedly in the *Pottinger* proceedings and no one on either side contested this figure). In contrast, the public emergency housing system in early 1990s Miami consisted of some 230 emergency shelter beds and perhaps 50 transitional beds. Non-profit organizations added about 600 emergency beds to the overall capacity, most of them targeted to single men. Finally, there were perhaps 500 "treatment" beds in mental health and substance abuse programs serving a predominantly homeless clientele.

At the outside, the total capacity in 1994 was adequate to provide shelter and some minimal services to not more than one out of four homeless people in Dade County.

The Task Force's plan to address the shortfall was a three-stage system of services: *temporary care* to "provide immediate short term housing and basic support services to persons now residing in public places"; *primary care* to provide transitional housing with treatment and rehabilitation to homeless persons found in need of substance abuse treatment, vocational training, mental health treatment, or basic education; and *advanced care*, defined in the plan as "supported long term housing such as church assisted housing, supported Single Room Occupancy residence, and assisted apartment or other residential arrangements" (p. 5). In contemporary parlance, these are immediately recognizable as emergency assistance, transitional care, and permanent housing—i.e., what we now know as the HUD Continuum of Care. So in its thinking about a comprehensive continuum of services, the original Community Homeless Plan was quite forward-thinking.

To support and promote the three-stage services system, the plan envisioned aggressive outreach whereby professionals and volunteers from the emergency shelters would "visit homeless people to urge them to enter into the centers." This outreach function was expected to be a "formal networking system between provider agencies and law enforcement personnel to ensure a humane and sensitive approach to dealing with homeless persons" (p. 9). These observations led directly to the Miami-Dade County outreach program, a network of more than fifty paid outreach workers, many of them formerly homeless people, who work out of the Miami police department's Neighborhood Enhancement Centers to reach out to street people and bring them into the Continuum of Care. And while this outreach function is not without problems, it would be nearly impossible for a homeless person to be on the streets of Miami or Dade County for more than forty-eight hours without being approached by an outreach worker and referred to a treatment center or emergency shelter, depending on apparent need.

The Task Force was clear that the first priority would be emergency shelter through the Homeless Assistance Centers. The original plan was for 1000-1500 new emergency beds, but as they evolved, the two centers came to serve approximately 750 homeless people and families nightly (with other providers making up the difference). The first center opened in downtown Miami in October 1995; the second began operations in October 1998 at the former Homestead Air Force Base in South

Miami-Dade County (ground zero, incidentally, for Hurricane Andrew in Florida). Construction of the first HAC, then, was well underway before the City's *Pottinger* appeal was even heard. In fact, the appellate court noted favorably that since the 1992 order, the City and its private partners had begun construction of homeless shelters that would address some of the problems that undergirded the district court's ruling. Rather than endless hemming and hawing about where to locate a shelter, the Community Partnership for the Homeless (CPH) found a suitable site, negotiated a "good neighbor" agreement with the surrounding community, and stuck a shovel in the dirt. This is indicative of what can be accomplished with the kind of political leadership and funding CPH and the Homeless Trust have enjoyed over the years.

CPH now provides daily food, shelter, and case management services to about 750 homeless men, women, and children on two separate physical campuses. The annual budget for the overall CPH operation is about $12 million. The Coalition for the Homeless of Central Florida also provides daily food, shelter, and case management services to about 750 homeless men, women, and children on two separate physical campuses. And the annual budget for their operation is about $3.5 million. Is it any surprise that the HACs seem to realize better outcomes?

In addition to 1000-1500 new emergency shelter beds, the plan also envisioned 750 new "primary care" beds within three years. There was no stated goal for stage-three permanent supported housing, only the recognition that such would be the "final stage" in the continuum of care and that "during the next five years, considerable attention must be placed on expanding advanced care facilities for homeless adults and families" (p. 14). As indicated, the plan also anticipated the need for an extensive program of outreach and likewise a need "to coordinate interagency prevention efforts."

The Homeless Trust as it exists today bears a striking resemblance to what the Task Force on Homelessness envisioned fifteen years ago. The outreach system has already been described. As of 2008-09, the Homeless Trust and its Continuum of Care had developed the following capacity:[6]

- 1,402 emergency shelter beds, 786 beds for single individuals and 616 set aside to shelter families, with another 132 emergency beds currently under development. The total shelter capacity in place or in development amounts to 1,534 beds, compared to the original target of 1000-1500. (In 2009, 54 additional emergency shelter beds were added to the capacity, bringing the total to 1,588.)

- 1,895 transitional treatment beds for homeless people with alcohol, drug, psychiatric, physical or other disabilities (versus the original target of 750).
- Some 2,666 units of permanent supported housing already on-line, with a goal to add a hundred new units per year. All told, the Homeless Trust and its partners command approximately 6,000 units of housing for formerly homeless people, almost half of which is supported housing with wrap-around services and the remainder of which is mainstream affordable housing for very low income people.

Today, including clients seen in the homeless prevention program, the Trust and its many collaborators serve 19,000 people annually. The Continuum of Care consists of some twenty-seven agencies and providers working together in a well-coordinated network along with innumerable other collaborations with various city, county, and regional entities. With a few exceptions, the homeless encampments have been largely eliminated, the number of homeless people living in the streets has declined from an estimated 6,000 at the time of *Pottinger* to somewhere around a thousand today (the "official" number from the most recent count is 1,074), and a very extensive and aggressive system of outreach has been established throughout the county to assure that homeless people are aware of the services available to them.

As one Miami stakeholder explained to us in an interview, the key to the Trust's success is that they took a "visionary plan, implemented it, and have stuck with it from the beginning. They have provided consistency and steadiness of vision, have established coordination among the providers, manage their money well, and bring in lots of it." These are not things that would be said of Orlando, whose leaders have a long, sorry history of indifference to a succession of homelessness plans, recommendations, and reports, up to and including the current "Ten 2 End" plan to eliminate chronic homelessness in the Orlando community.

Miami's initial Community Homeless Plan certainly did not envision the end of homelessness, but in the past decade, Miami, along with about 350 other U.S. cities (now including Orlando), have developed and have begun to implement ten-year plans to end homelessness. With program models developed and promulgated by the Interagency Council on Homelessness and the National Alliance to End Homelessness, and with new funding in the pipeline from HUD, many cities have (more or less) realistic aspirations to be rid of homelessness, or at least chronic homelessness, once and for all.[7]

Miami's paradigm for ending homelessness (the same as in many other cities) is to "close the front door and open the back door," i.e.,

to be aggressive about preventing people and families from becoming homeless in the first place and even more aggressive about getting them out of shelters and back into housing once they have become homeless. Yet a third piece is to develop housing infrastructure to provide acceptable housing options to low income people.

Miami's Homeless Trust has relatively successful programs focused on homeless prevention through rent assistance and case management, rapid rehousing of persons and families who have fallen into homelessness, and Housing First (an intervention strategy discussed at length in Chapter Four). Of these, homeless prevention has proven the most vexing. A well-worn cliché promises that "an ounce of prevention is worth a pound of cure." However, the number of people on the verge of becoming homeless is so large (see Chapter Two) that trying to prevent a significant fraction of them from becoming homeless may be like trying to bail out a sinking ocean liner with a teaspoon. Most homeless prevention programs find themselves overwhelmed by demand that quickly depletes the resources available, and in this Miami is no exception. Thus, in terms of sheer economic efficiency, it may be necessary to let people become homeless, intercept them as early in the process as possible, then get them back into housing quickly—i.e., rapid rehousing instead of homeless prevention.

As for infrastructure development, Miami's Homeless Trust has advocated aggressively for the "30:30" campaign, an effort to set aside 30 percent of the affordable housing stock for people at or below 30 percent of the area median income. They have also forged dozens of collaborative arrangements with affordable housing developers and providers, some of whom receive Trust funding and many of whom do not. No big city has enough affordable housing to satisfy the need and probably won't anytime soon, and no city will be able to eliminate homelessness completely so long as this remains true. But Miami and its Homeless Trust are at least making the effort.

In their meta-evaluation of CoC evaluations, Burt et al. (2002) conclude that the question about ending homelessness needs to be divided into two distinct questions: (1) Has the system managed to generate more and better exits from homelessness? (2) Has it prevented fewer entries? In Miami, the answer to the first question is a qualified "yes." With 2,666 units of permanent supportive housing to work with, being "fed" by nearly 2,000 transitional treatment beds, little of which existed when the Trust was formed sixteen years ago, homeless people in Miami have vastly better exit chances today than they did before. And clearly,

there are many fewer homeless people on the streets. On the other hand, both the treatment programs and the permanent housing programs have waiting lists, and vacancies in the permanent housing programs are rare, so "exit" remains problematic for many.

As for limiting new entries into homelessness, a massive investment of resources in homeless prevention would be required and that is probably not in the cards anywhere, the federal Homelessness Prevention and Rapid Rehousing Program (HPRP) notwithstanding. As Burt et al. explain

> With possibly one or two exceptions, none of the communities we visited appears to have reduced the entry of newly homeless people into the system, or the overall volume of homeless people served by the system. To do so will require addressing the two ends of the CoC, prevention and affordable housing, neither of which can be done without significant involvement of mainstream agencies and strong support from the wider community.

Miami has clearly gone further than most CoCs in bringing "mainstream agencies and the wider community" to the table, so while ending homelessness altogether is an audacious and unattainable goal, it is less improbable in Miami than in most American cities.

Conclusions: Miami and Orlando Compared

One question we asked nearly everyone we talked to in the evaluation of Miami's Homeless Trust is why the Trust has been so successful, especially in comparison to other CoCs around the country, many of whom have floundered. Outstanding leadership is the most common answer we got. The principal author of the Dade County Community Homeless Plan, Alex Penelas, who was a County Commissioner at the time, went on two years later to become Miami-Dade's first Executive Mayor, and during his entire term as Mayor also sat as the Chairman of the Board of the Miami-Dade County Homeless Trust. The principal authors of the various Orlando homelessness plans were (1) obscure social work professors from the University of Central Florida; (2) a consultant to a Mayor whose term of office ended within weeks of her plan's publication; (3) the co-chairs of Dyer's working committee, attorney Terry Delahunty and the Executive Director of the Christian Service Center, Robert Stuart; and (4) Tracy Schmidt, Chief Financial Officer of CNL, an Orlando-based financial and insurance group, who chaired the original Regional Commission on the Homeless. All of these are talented and well-meaning people, but none commanded the clout in the Orlando region that Penelas and his co-chair Alvah Chapman did in Miami-Dade. Likewise, the current Chairman of the Board of the Miami-Dade Homeless Trust is often described as one of the most powerful political lobbyists in the State of Florida. The Chairman of the Board of the Homeless Services Network is the Executive Director of the Health Care Clinic for the Homeless—a very talented guy, to be

sure, but not someone whose very presence causes politicians to tremble. In short, Orlando has suffered because no local Leviathan has stepped forward to champion the homeless cause.

A second obvious difference is Miami's food and beverage tax, a dedicated source of funds that provides $14 million each year for homeless services. Among other things, these funds have allowed Miami-Dade to aggressively pursue grant opportunities that require cash matches, whereas Orlando passes annually on numerous grant opportunities because the requisite cash match cannot be found. Needless to add, losing the *Pottinger* suit was an important impetus for the passage of this tax and for the formation of the Task Force on Homelessness that developed the Community Homelessness Plan.

A third point, perhaps less obvious but doubtlessly important, is that the Miami-Dade County metropolitan region has been administered by a county-wide metropolitan government since 1957 (Mohl 1984). This was the nation's first "metro" government and is routinely cited as one of the most successful examples of consolidated urban government anywhere in the country. Beginning in 1957, Miami-Dade metro government slowly and successfully expanded its powers and usurped many of the functions of the county's (then) twenty-seven independently incorporated municipalities, all of which continue to exist, elect mayors and other officials, and otherwise act like real cities, but each of which is very much in the back seat when it comes to driving metro-wide policies like the homelessness plan. (The original twenty-seven municipalities have since expanded to thirty-five.) This, of course, did not happen without a struggle. The metro government in Miami-Dade has endured vociferous opposition ever since the July 1957 referendum. But the many successes of regionalized government in Miami-Dade—in areas such as expressways, mass transit, modernized law enforcement, region-wide development policies and land use codes, strict pollution controls, regional water management, and numerous others where real progress could only be made with a regional approach—simply overwhelmed localist attacks. So, when a regional plan was presented in 1994 to deal with what was obviously a regional homelessness problem, no one looked askance or worried that their pockets were being picked. The contrast with parochial Orlando and the surrounding county and municipal governments could scarcely be sharper. Clearly, the homelessness issue and many others have suffered as a result.

Fourth, the Miami business community seems to have a more enlightened view of homeless issues than the Orlando business community.

Both cities, of course, have Downtown Development Boards (DDB) or Authorities that are concerned about the effects of homelessness on tourism, the business climate, people's willingness to come downtown, and the overall downtown image. And both Boards have expressed concerns about panhandling, public feedings, and homeless people inhabiting public spaces and sleeping in the streets, and have championed ordinances to deal with these issues. But in Orlando, the Downtown Development Board seems to regard homelessness as a nuisance that needs to be eliminated whereas Miami's Downtown Development Authority (DDA) looks on homelessness as a problem that needs to be solved.

The Orlando DDB was represented on the Mayor's Working Committee on Homelessness and provided numerous memos and documents outlining the concerns of the business community. Quoting from one of these, "The Downtown Development Board fields numerous complaints related to panhandling, public urination and a wide variety of loitering from people using our downtown. In particular, panhandling throughout downtown, mass feeding programs and congregations in Heritage Square top the list of complaints." A later passage added, "Many people are uncomfortable and feel threatened by their exposure to this activity," meaning exposure to the alleged activities of the homeless: panhandling, public urination, etc. And finally, "It is common to receive reports that businesses are hesitant to entertain clients because of the concern related to a large downtown homeless population. A good number of potential visitors and customers are also hesitant to venture downtown due to the concentration of homeless individuals in the Central Business District (CBD). In addition, there has been widespread acknowledgement of the devastating impact of concentrated homeless care providers within the Parramore neighborhood."[13] The policy recommendations from the Board to the Committee were a public awareness campaign to discourage people from giving to panhandlers (a recommendation that the Committee accepted), a code amendment to "prohibit public meal distribution/feeding programs throughout downtown" (this was also done, as discussed previously), prohibition of "impromptu worship services for the homeless in Lake Eola Park" and elsewhere in the CBD, greater outreach to street people, and an extension of the Parramore moratorium to the entire downtown core.

Like its Orlando equivalent, the Miami Downtown Development Authority says that it receives three main complaints from residents, visitors, and business owners in the downtown area: "too little parking, too much litter and filth, and too many homeless people." There

is a "persistent homeless problem here in downtown" and over half of all emergency shelter beds are within the DDA district boundaries (i.e., downtown Miami). Also like Orlando, the Miami DDA supported a "no-panhandling zone" ordinance that was eventually enacted. But our contact at the Miami DDA was also quick to distinguish between panhandlers and homeless people and to stress that most of the panhandlers in downtown Miami are *not* homeless. Many, we were assured, are out-and-out criminals that try to appear homeless but have places to live. These people also prey on homeless people in the downtown core (a point later confirmed to us by the Miami Police Department). The Miami DDA was also more than willing to sit down with the Homeless Trust and other advocacy groups to "soften" the ordinance so that the rights and interests of homeless people would be protected to the maximum extent possible.

Miami's DDA staff is even encouraged to volunteer at the Homeless Assistance Center. "We want staff to understand the issue." For a business-oriented group, the DDA is engaged in homeless issues in a relatively progressive way. That is, they seem genuinely concerned about the welfare of homeless people, not just with keeping the streets "clean." "We are not taking proper care of our homeless population—if they are mentally ill and such and we are just leaving them out on the street to be subjected to crime and so forth, it's inhumane" (Donley and Wright 2010).

One of the organized activities that grew out of the Mayor's Working Committee on Homelessness was a "fact-finding" trip to Miami by a group from Orlando—people from the Mayor's Office, from the Working Committee, various service providers, a columnist from the local newspaper, etc. Shortly after their return, the Orlando *Sentinel* ran an editorial "call to arms" urging Orlando's civic and political leaders to follow Miami's lead in providing world-class facilities for Orlando's needy, destitute, and homeless. Alas, neither the fact-finding group nor the *Sentinel* editorial mentioned any of the following salient points of difference between the two cities and their respective situations:

(1) The editorial remarked on the outpouring of concern, civic virtue, and resources that led to the creation of Miami's outstanding Homeless Assistance Centers, but failed to mention that all of this resulted (at least to some extent) from a court decision against the city in the *Pottinger* case. It is certainly possible that the HACs and the larger system of homeless services would have been created regardless of the *Pottinger* decision, but there can be no denying that *Pottinger* put some urgency into the process. At one point, the

appellate judge became so exasperated by the City's foot-dragging that he threatened to put Miami into receivership unless something significant was done. The Community Homelessness Plan, the Miami-Dade County Homeless Trust, and the food and beverage tax were the "significant somethings" the court was looking for.

(2) Miami's downtown HAC is right in the middle of a historically African American, economically depressed, but obviously redeveloping area called Overtown. The shelter is literally within blocks of schools, churches, commercial establishments, and relatively pleasant residential neighborhoods. Here the important lesson—not mentioned in the *Sentinel* editorial—would seem to be that a large, well-designed, and capably managed facility for homeless people is not incompatible with neighborhood revitalization—not in Miami's Overtown and not in Orlando's Parramore either. Yet the struggle to relocate the Coalition and its Men's Pavilion out of Parramore continued for another five years.

(3) As pointed out earlier, the budget for Miami's HAC facilities is more than $12 million per year, about three to four times the operating budget for the Coalition. The Coalition serves about the same number and mix of homeless people with a third of the HAC's budget and well less than half the number of staff. Exhortations to provide better services to homeless people are gratuitous unless there is a plan to provide the necessary staff and other resources and invidious when the vast differences in existing resources are not acknowledged.

(4) As we have seen, much of the money Miami spends on the HACs and other homeless services comes from its dedicated funding source, the 1 percent food and beverage tax. Every observer of the Miami scene agrees that a dedicated funding stream makes all the difference. Yet nothing in the *Sentinel* editorial spoke to the issue of where the money for improved services was going to come from. People in Central Florida are notoriously tax-aversive. A recent referendum to add one cent to the local sales tax to fund transportation improvements was resoundingly defeated despite consistent poll results identifying traffic congestion as the number one threat to the quality of life. More taxes to pay for homeless services? Not a chance!

The *Sentinel* editorial concluded that "Central Florida won't bloom into a world-class community until there is a broad and effective plan to address homelessness." Agreed! Yet, as we have shown in this chapter, Central Florida's leaders have largely ignored a succession of "broad and effective plans" stretching back to at least 1999 and continuing to the present day. Central Florida may well boast world-class theme parks, a beckoning climate, a shiny new Performing Arts Center, a new Events Center, and perhaps one day soon, an NBA championship. But we will not become a world-class *community* until we realize that effectively addressing homelessness in Central Florida entails more than finding creative ways to keep our homeless citizens out of Lake Eola Park.

Ryan J. Dowd, No Other Choice: Litigating and Settling Homeless Education Rights Cases, 23 N. Ill. U. L. Rev. 257 (2003)

INTRODUCTION

It is estimated that in 2001 one million children were forced to experience the traumas of being without a home. Along with the stigma of the title "homeless," these children were sick more often than before and often witnessed domestic violence. They were angry, fearful, depressed; and they were hungry. These children are part of the families that make up nearly forty percent of the homeless people in America; the families that are the fastest growing segment of the homeless population. And homelessness is on the rise.

Homeless children and youth also face barriers to education, an area that is particularly vital to families interested in breaking the cycle of poverty. There are immunization requirements and guardianship requirements to be dealt with, as well as the often insurmountable problem of transportation. Homeless children are highly mobile, changing schools frequently. This mobility is detrimental to homeless children who disproportionately have had to repeat grades and attend special education classes.

Though the problem is large, the situation is not as bleak as it appears. There is progress. Legislatures, both federal and state, have been working on solutions to the problems of educating homeless children and youth for fifteen years now. The legislation has improved exponentially in that time from the original 1987 McKinney Act, with its vague language and meager $5,000,000 appropriation, to the latest federal reauthorization of the McKinney Act which adds greater specificity and comes with a $50,000,000 annual appropriation. States, beginning with Illinois and New York, are responding to the call to assure that education rights cover every homeless child. Though the legislation regarding homeless children and youths' education appears to improve almost annually, enforcement of the granted rights continues to be a significant problem. Many school administrators remain ignorant of the law, or may even hold homeless people in disdain.

Since a private right of action was guaranteed by *Lampkin v. District of Columbia*, advocates for homeless children have had another available avenue of enforcement. Homeless children and parents can sue states or local school districts and officials to force schools to grant homeless children and youth their rights. Though not the preferred method of helping schools into compliance, litigation may be the only method available for districts completely unwilling to help homeless children and youth. Litigating can be particularly effective, especially when a settlement can be reached.

This comment seeks to accomplish four tasks in regard to litigating homeless education rights cases: 1) to map out major issues surrounding enforcement of homeless education rights for those unfamiliar with this area; 2) to spur on dialogue about the appropriate role of, and strategy for, litigation and settlement, particularly in light of the most recent changes in federal law; the literature seems especially void as to the specific role of settling; 3) to more thoroughly document the experiences and wisdom of the attorneys in major cases that have occurred to date while bringing the cases together into a framework in which they can be compared and contrasted; and 4) more ambitiously, seek to provide an initial roadmap for someone contemplating litigation: the hope is that an attorney can develop a long-range plan and have an understanding of what lies ahead at the early stages of conflict with a school.

To these ends, this comment is structured in a linear fashion to trace the litigation and settlement

process from beginning to end. *Section I: Background* introduces the major statutes and case law effecting homeless children and youth. The statutory portion addresses federal law, various state laws and the potential for state regulations. The case law portion introduces the reader to the three main recent cases and touches on earlier, less relevant cases.

Section II: Seeking Alternatives briefly mentions alternatives to litigation that have been superbly detailed in articles by other authors.

Section III: Litigating addresses an assortment of issues related to going to court, from considerations before filing and reasons for litigating, to what specific laws and constitutional provisions to sue under.

Section IV: Settling provides a detailed look into the process of settling and actual settlement documents related to homeless education rights cases. This section is more thorough than the others because of the general inattention given to the role of settlement. Settlements may prove to be especially crucial in some jurisdictions for securing every available right for homeless students.

Section V: Post Settlement/Decision traces the rather lengthy process and battles that ensue after "victory" has already been achieved. Included here is implementation, monitoring, getting to an amicable relationship, and using litigation in one jurisdiction to pressure compliance in another.

Section VI: The Future raises other issues and possible solutions for ensuring compliance with homeless education rights laws in the future.

I. BACKGROUND

This section seeks to give a general overview of the sources of legal rights and precedent in the area of educational rights for homeless children and youth. Part A addresses Subtitle VI-B of the Stewart B. McKinney Homeless Assistance Act, blossoming state laws and potential state regulations. Part B deals primarily with the three most recent critical cases on homeless education rights and also gives a quick summary of earlier, less critical cases.

A. STATUTES AND REGULATIONS

1. The McKinney Act.

In 1987 Congress passed the *Stewart B. McKinney Homeless Assistance Act*. This act was the "first systematic attempt to address the needs of the homeless." Dealing with a wide range of issues related to homeless people in the United States, Subtitle VII-B (later changed to VI) dealt specifically with the educational rights of homeless children. Though a step in the right direction, the McKinney Act required an overhaul in 1990. The 1990 amendments to the Act particularly attacked barriers to enrollment. Again in 1994 the education portion of the McKinney Act was strengthened as part of the "Improving America's Schools Act of 1994."

Most recently, the McKinney Act's Education for Homeless Children and Youth (EHCY) program was reauthorized and enhanced as part of the "No Child Left Behind Act of 2001" on January 8, 2002. The new reauthorization keeps the basic form of the prior legislation, while improving it in many ways.

The education for homeless children and youth section of the McKinney Act, as revised, basically is a grant and subgrant program for state and local educational agencies. The Act also bestows responsibilities on state educational agencies (SEAs), local educational agencies (LEAs), and the Secretary of Education. In the process of giving responsibilities to these entities homeless children

and youth receive additional rights.

Stated in a very abbreviated way, the funded SEA must first establish an Office of the Coordinator for Education of Homeless Children and Youth to gather pertinent information and generally oversee compliance and coordination. The SEA must also develop an extensive state plan and provide technical assistance to local educational agencies. Local educational agencies (LEAs) have similar responsibilities, including designating a liaison for homeless children and youth, coordinating with social service agencies and other LEAs, making homeless students and parents aware of their rights and opportunities and generally assuring compliance. Both state and local educational agencies that are funded must "review and revise any policies that may act as barriers to the enrollment of homeless children and youths," and train appropriate school personnel. The Secretary of Education must, among other things, provide technical assistance, review state plans and report to Congress.

As stated above, in the process of giving state and educational agencies responsibilities, homeless children acquire a new set of rights. The more important rights among these are: to not be segregated into schools or classrooms for homeless students; to have some dispute resolution process for the administration of their rights; to have access to appropriate nutrition programs; to have access to appropriate preschool, before, after, and summer school programs; and to not be isolated, segregated, or stigmatized because of their homelessness. Additionally, a homeless student has a right to go to school in two different places: 1) he or she may stay in his or her school of origin for the duration of homelessness, or 2) he or she may transfer to the school in the district covered by the shelter or other temporary living situation. The decision between the two schools is to be determined by the child's "best interest" (which is essentially the parents' wishes "to the extent feasible," with a presumption towards the school of origin). To further this end of school choice and enrollment, records, proof of residency, and other documentation, as well as guardianship issues and dress code requirements, are not to delay enrollment. Additionally, homeless children and youth have a right to special transportation to the school of origin.

Finally, the Education for Homeless Children and Youth portion of the McKinney Act also provides many needed definitions. Besides defining "local educational agency," "Secretary," "State," "unaccompanied youth," and "enrollment," the recent reauthorization adds an expanded definition of the term "homeless children and youths." This inclusive definition uses the traditional phrase of "individuals who lack a fixed, regular, and adequate nighttime residence" and specifies that it includes a number of specific categories, among them children who are doubled up with other families and "migratory children."

B. CASE LAW

There have been three recent major cases regarding homeless education rights. The first one, *Lampkin v. Washington D.C.*, went before a federal circuit court and was denied certiorari by the United States Supreme Court. The other two cases, *Salazar v. Edwards* and *Collier v. Board Of Education of Prince George's County*, were both eventually settled out of court. In addition, there are a variety of smaller and older cases that warrant mention.

1. Lampkin v. Washington, D.C.

The most important case for homeless education rights is *Lampkin v. Washington D.C.* In this federal case, ten homeless parents, on behalf of their homeless children, and the National Law Center on Homelessness and Poverty sued the District of Columbia, the Mayor of the District of

Columbia, the District of Columbia public schools, and the Superintendent of the District of Columbia public schools. The plaintiffs brought suit under 42 U.S.C. § 1983 (1995) contending that the defendants had failed to comply with requirements of the McKinney Act, and that they had denied them equal protection under the Fifth Amendment of the United States Constitution. Specifically, the homeless families and the National Law Center on Homelessness and Poverty alleged that the defendants had:

> (1) failed to implement a best interest standard in placing homeless children in schools; (2) failed to ensure transportation to and from the school that is in the best interest of homeless children to attend; (3) failed to coordinate social services and public education for homeless children, and to ensure access to comparable educational services and school meal programs; and (4) failed to provide access to free, appropriate public education for homeless children.

Initially, the plaintiffs sought a preliminary injunction, while the defendants sought a dismissal. In this original trial proceeding the preliminary injunction was denied and the motion to dismiss was granted because District Judge Lamberth determined that, pursuant to *Suter v. Artist*, there was no private right of action under the educational portion of the McKinney Act. The Equal Protection claim was also dismissed as having passed rational basis scrutiny.

On appeal, two of the three appellate judges found the McKinney Act to be enforceable by the plaintiff appellants and found that they could therefore invoke section 1983. One circuit judge sided with Judge Lamberth and dissented. The Supreme Court of the United States denied the District of Columbia's writ of certiorari.

When remanded to district court again, Judge Lamberth found for the homeless children, their parents, and the National Law Center on Homelessness and Poverty. The order specifically required that Washington D.C. "identify homeless children at the time they first arrive at the intake center, and refer these children within seventy-two hours for requisite educational services ... while the children are on a waiting list for shelter." Further, the defendants had to provide bus tokens to all homeless children traveling more than 1.5 miles to school, offer bus tokens to parents who escort their young children to school, and eliminate delays in their bus token distribution system. Judge Lamberth offered the District the opportunity of using a reasonable income eligibility standard for token revocation, and the option of using a dedicated bus service instead of tokens.

In the weeks after the injunctive order, the District of Columbia sought to give back McKinney funds so as to evade requirements that it considered cost prohibitive. Stating, "there is now no law to apply," Judge Lamberth dissolved the injunction but denied the District's motion to vacate the order itself. In the conclusion of the opinion, Judge Lamberth stated that "[d]efendants have succeeded in circumventing the requirements of the McKinney Act, thereby denying District citizens the federal assistance that would otherwise have been available."

2. Salazar v. Edwards

In 1992 attorneys for homeless parents and children filed a class action suit in Chicago, Illinois, after an expansive study by the Homeless Advocacy Project of the Legal Assistance Foundation of Chicago and multiple letters threatening to sue. The plaintiff classes were (a) homeless children in Chicago, and (b) parents or guardians of homeless children in Chicago. The defendants were the Illinois State Coordinator of Homeless Children and Youth, the Board of Education of the City

of Chicago, the General Superintendent of the Chicago Public Schools, the State Superintendent of Education, and the individual members of the Illinois State Board of Education. Suit was brought under the following laws: state law which grants every child the right to attend school from age five to twenty, the 1990 version of the McKinney Act through 42 U.S.C. § 1983, the due process clause of the Fourteenth Amendment to the United States Constitution, and the due process clause of the Illinois State Constitution. The complaint alleged that the "local defendants" in Chicago had done the following: failed to adopt the appropriate policies and rules, denied homeless children the opportunity to remain in their home schools, imposed "burdensome transfer requirements" on students who did not remain in their schools of origin, denied transportation, failed to consider parental wishes for school placement, provided no notice of rights, provided no opportunity to challenge school placement, failed to locate and enroll homeless children, and ignored the violations once made aware of them. The "state defendants" were alleged to have: (a) not revised their own policies and not ensured that Chicago revised its own, (b) not coordinated "with other relevant programs and services" and not ensured that Chicago coordinated with the programs, (c) not ensured that Chicago used a "procedure for prompt resolution of placement disputes," (d) not addressed Chicago's enrollment delays for homeless students, (e) not adopted policies "that ensure that homeless children are not isolated or stigmatized" and (f) failed to ensure that Chicago adopted such policies, not generally ensured that Chicago complied with the McKinney Act and not addressed these violations when made aware of them.

Attorneys sought a temporary restraining order for five of the children to which the Chicago Public Schools "immediately agreed to provide the relief requested." After the temporary restraining order, there was a year of fruitless negotiations, followed by the state defendants filing a motion to dismiss. The court granted the motion to dismiss based on the then-current lower court decision in *Lampkin v. District of Columbia*, holding there was no right to private action in the McKinney Act and no right to education in Illinois. The plaintiffs appealed, and while the appeal was pending a number of significant things happened. First, Illinois passed its premier legislation, the Education for Homeless Children Act. The important 1994 amendments to the McKinney Act were also passed, strengthening homeless education rights. Finally, *Lampkin v. District of Columbia* was overturned by a Circuit Court and the Supreme Court denied certiorari. The defendants conceded that the McKinney Act was enforceable and the case went back to trial.

The plaintiffs filed an amended complaint, based on the newly developed state and federal laws, to which the defendants filed a new motion to dismiss, claiming mootness and that the homeless children "must first 'exhaust' the administrative remed[ies]" in the new Illinois law. The motion to dismiss was denied, and intense settlement negotiations began after a second request for a temporary restraining order.

Eventually, the parties reached an extensive settlement agreement. The Chicago Public Schools seemed to have all but ignored the initial settlement, prompting the plaintiffs' attorneys to file a motion to enforce the settlement agreement. On August 3, 1999 Judge Michael Getty determined that there had "been widespread non-compliance with the McKinney Act, the Illinois Homeless Education Act, and the Settlement Agreement ... by the Chicago Board of Education." He further detailed six areas where Chicago was out of compliance and gave a twelve-point order. Parties negotiated another settlement that largely mirrored the first settlement. Since the implementation of the second settlement the lead attorney for the homeless children and families states that the relationship between the schools and homeless children, parents, and their advocates has improved dramatically.

3. Collier v. Board Of Education of Prince George's County

Beginning in 1995 the Baltimore-based Public Justice Center took up the cause of homeless children's education rights, marking their initial efforts with a statewide survey in 1997. Shortly thereafter, Maryland developed regulations which mirrored the McKinney Act, and the Public Justice Center set about measuring compliance with the new regulations and McKinney. Most initial barriers to education were peacefully resolved over the telephone, but multiple violations that the school board would not resolve prompted the Public Justice Center to file suit against Prince George's County.

The Public Justice Center brought a class action lawsuit in federal court with two plaintiff classes similar to the "children" and "parent" classes in *Salazar*. Defendants in this case were the Board of Education of Prince George's County and the Superintendent of Schools for Prince George's County Public Schools. Suit was brought under the McKinney Act, without invoking 42 U.S.C. § 1983 (1995). The complaint specifically alleges that the Board of Education failed to: (a) utilize a "best interest" standard for school placement, (b) observe parental wishes for school placement, (c) "provide comparable services, including transportation services," and (d) review and revise policies "which act as a barrier to the enrollment of homeless children in school."

Attorneys for the children successfully requested a temporary restraining order and a preliminary injunction to get the individual children to school. Following these victories, the school board sought settlement negotiations, which derailed once before resulting in an elaborate and powerful settlement document in September of 2001. As of December 2001, Laurie Norris, lead attorney for the plaintiffs, reported that compliance was going "slow" but was underway.

II. SEEKING ALTERNATIVES

There are many alternatives to litigation that advocates can and should seek before considering taking the situation to court. Two articles on homeless education rights detail these alternative methods for ensuring compliance with the McKinney Act and other homeless education rights legislation. There are five primary methods of advocating compliance without resorting to litigation: factual development, ongoing compliance monitoring, parent and community education, public policy advocacy, and pressing for collaboration between public and private sector community service agencies. It should also be noted that these methods also serve an important function in litigation if that becomes necessary.

Factual development entails documenting noncompliance and making state and local agencies aware of violations. Demands can then be made for voluntary compliance. In both *Salazar* and *Collier* litigation was preceded by extensive reports. In *Lampkin*, "litigation was preceded by factual development, coalition building, reporting, and notification to the D.C. school board that demanded compliance." The information developed initially will be invaluable later if litigation becomes necessary.

Advocates can accomplish compliance monitoring by ensuring that all interested parties scrutinize specific acts of noncompliance against specific homeless children and that these specific acts are reported to the appropriate authorities. Advocates state that "[t]his approach can be effective, efficient, and relatively speedy in remedying violations." Both lead attorneys in *Salazar* and *Collier* claimed that being in touch with families "on the front line" afforded them an extra level of respect from opposition parties who knew the attorneys to be well informed. Additionally, in *Collier*, most violations could be cleared with telephone calls.

Public education involves making "parents, service and shelter providers, school personnel, and other community members" aware of available rights for homeless children and youth. Homeless parents cannot ask for services for their children if neither they, nor anyone else, knows that the services are available and mandated. In Prince George's County, the Public Justice Center combined its statewide monitoring and fact-finding campaign with frequent stops to educate people at homeless shelters. As for Chicago, law students were trained to teach homeless people and their service providers about applicable rights.

Public Policy is another important element in the struggle to assure the access of homeless children and youth to an appropriate education. This process can add additional rights through state laws and regulations as well as educate officials and the public about the plight of homeless children and youth. In Maryland, Illinois, and Washington D.C., the same people who were litigating were also struggling for state laws and regulations and improvements to the federal statutes.

Collaboration between public and private community agencies requires bringing together related agencies to work on the problem of educating homeless students. Janice Johnson Hunter, Michael Willis and Maria Foscarinis mentioned the U.S. Department of Health and Human Services, as well as Head Start programs and shelter providers. In fact, the latest amendments to the McKinney Act mandate that educational agencies coordinate with housing agencies to minimize disruptions to homeless children's education.

III. LITIGATING

At some point the situation may reach a critical mass, where litigation becomes the only available option to address the systemic barriers to homeless children and youth accessing an education. Again, it must be stressed that litigation is only a method of last resort for ensuring that homeless children and youth have access to education; litigation, in the words of Laurie Norris of the Public Justice Center, is for when there is "no other choice."

This section addresses a variety of topics related to litigating homeless education rights cases. First is a list of reasons for litigating, followed by a short discussion of when it is appropriate to litigate. Next is an important segment on cautions that one should consider when deciding whether to litigate. The following topics delve more specifically into litigation issues, such as preparation for filing, whether to bring suit as a class action, whether to sue in state or federal court, and various considerations for the complaint. The litigation section concludes by briefly addressing the all-important temporary restraining order and preliminary injunctions.

There are a number of simple reasons to litigate in order to enforce homeless education rights. The McKinney Act "contains no statutory mechanisms for the administrative enforcement of the beneficiaries' rights," so there is no automatic method of ensuring compliance. Further, the United States Department of Education has been negligent in its enforcement of McKinney provisions. Many of the states are no better in their enforcement. In the absence of other interested parties willing to hold school districts and states accountable, it may sometimes have to be homeless families themselves and their advocates who demand education. In many situations advocates can achieve voluntary compliance, but in other places and times litigation may be necessary.

It may be time to file suit when all alternatives fail, particularly when state and/or local educational agency officials ignore documented violations and demands for compliance. Laurene Heybach, lead attorney in *Salazar v. Edwards*, reports knowing it was time to litigate when school officials refused to implement any suggestions from advocates for fear that such action would be an

admission of responsibility to homeless children.

There are a number of cautionary notes that an attorney should consider before initiating litigation. First, litigating or settling homeless education cases can be expensive, due to both out-of-pocket expenses and attorney time. Second, homeless education cases can span a number of years.

Litigating homeless education rights cases is not a hit-and-run process. It requires a strong commitment to homeless children and a willingness to take responsibility for their education. There is a significant amount of assistance that a lawyer advocate can do for homeless children without litigating, by making the more informal phone calls and writing letters to try to get voluntary compliance. Finally, one should be aware of possible unintended consequences, similar to those in *Lampkin v. District of Columbia*, where the District returned its McKinney funds to evade its responsibilities. Though this problem is hopefully peculiar to Washington, D.C., one should keep this potential problem in mind.

With that said, let us now move into the litigation process. There is a significant amount of preliminary information that one will need to gather for litigation. Most of this information should be available from the prelitigation alternative methods detailed in Section II. What are the specific violations by the state or local educational agency: Transportation? Best interest determinations for placement? Preschool enrollment? Information is critical. For instance, despite the massive amount of fact-finding work done by the Public Justice Center, lead attorney Laurie Norris states that she wishes they would have had even more hard facts at their disposal. It is worth noting that the attorneys in both *Salazar* and *Collier* felt that it was very important that they continued the information gathering process with families and shelter staff throughout the entire suit.

The discovery process will also be pivotal for gathering the necessary information. Deposing school officials will help to highlight the "corporate culture" of the school system, and will reveal its specific weaknesses and faults. Furthermore, attorneys for the homeless children and youth should be seeking expert witnesses to provide testimony. The Public Justice Center in *Collier* sought a transportation expert and a McKinney Act expert, settling instead for just an extremely experienced McKinney expert. *Salazar* utilized education and social work experts to provide information about the effects of high levels of mobility on a child's education. Besides providing the necessary testimony, these experts can provide advice on solutions to the problem in the jurisdiction, and are, therefore, a crucial resource to have.

Armed with the pertinent information, there are a number of options for the lawsuit. Class action suits have proven viable for enforcing homeless education rights. Class actions were utilized in both *Salazar v. Edwards* and *Collier v. Board of Education*, though *Lampkin* was an individual case, as were all prior cases. There is an assumption that class actions have greater reach than individual suits, though the individual nature of *Lampkin* did not stop it from having universal effects. An additional concern to be aware of is that, given the episodic nature of homelessness, individual cases are particularly likely to become moot. This comment is geared towards class action lawsuits, but the principles should be the same for individual cases.

In preparing the complaint an attorney must address a number of issues, including who the plaintiffs and defendants will be, and what law(s) will be used. In the two class action cases to date, two clear classes have emerged: (a) the children class, made up of homeless children denied education, and (b) the parent class, made up of the parents and guardians of homeless children denied education. Though the school district ultimately decides who is denied their rights and can therefore sue, it may be worth the time to carefully consider which individual children should be

representatives of their class. Preferably, one will want children whose experiences are across the spectrum of violations being committed by the educational agency. *Lampkin* was brought by ten parents whose children had experienced varying problems, while *Salazar* was initiated by five sets of parents and children who had experienced a number of areas of noncompliance in Chicago.

Additionally, advocates will want to pay close attention to situations where the schools have made themselves look particularly tyrannous. With homeless education cases, there are inevitably going to be many such horror stories that can be cited to the media and in the complaint in order to show the plight of homeless children.

In the most recent three cases, advocates have chosen a variety of different defendants, for varying reasons. A listing of possible defendants includes: the local educational agency superintendent (*Lampkin, Salazar, Collier*), the local educational agency board of education (*Salazar, Collier*), the city itself (*Lampkin*), the Mayor (*Lampkin*), the public school system (*Lampkin*), the state coordinator of the homeless education program (*Salazar*), the state superintendent of schools (*Salazar*), and the individual members of the state board of education (*Salazar*). Much of the decision of whom to bring suit against will be decided by statutes that determine who has control and responsibility for the schools, as well as who the actual violators are, but there is a bit of strategy involved too. For instance, in *Salazar*, the decision was made to sue state entities because they could stand in the way of enforcement by claiming that settlement items were in conflict with something at the state level. This decision turned out to be very appropriate because the state defendants made changes as a result of the settlement that benefited the entire state. The state is also a possible defendant because of pressure they might then put on the local educational agency to comply. In *Collier*, attorneys chose to keep the lawsuit simpler by suing the superintendent and the school board collectively, rather than each school board member individually.

Just as there are a number of possible defendants, there are also a variety of possible laws under which to file. The obvious and most powerful three are homeless-education-specific state laws and regulations as well as the McKinney Act. There are also a number of other avenues available that have had varying success. In *Lampkin*, attorneys argued a Fifth Amendment equal protection violation, in that Washington D.C. provided the necessary transportation to "mentally and physically handicapped children" but not homeless children. The *Salazar* complaint alleged due process violations under both the Illinois and federal constitutions. There also may be state laws that are not specific to homeless children; for instance, in Illinois all students have the right to finish the school year at their school, even if they move out of the residency area. Besides the variety of laws utilized, 42 U.S.C. § 1983 has been used sporadically. Both *Lampkin* and *Salazar* brought their claims through § 1983, while *Collier* did not.

One last comment about the complaint warrants mentioning. A homeless education case is probably not the appropriate place for notice pleading. Homeless children barred from school are especially sympathetic individuals, and the complaint is an exceptional place to convey the tragic experiences that these children and their parents undergo. The more information provided about the elaborate barriers that homeless families face in trying to enroll in and get to school, the better initial impact one will have upon the judge and the opposing side.

At least three cases have had important experiences with temporary restraining orders and/or preliminary injunctions. Attorneys in *Salazar* initially sought a temporary restraining order on behalf of five children. Attorneys in the case noted that "[b]ecause the restraining order was sought very close to the end of the school year, plaintiffs' demands could be regarded as modest and easily

achievable." Bringing the requests in court prompted the Chicago Public Schools to comply "immediately." The next temporary restraining order that attorneys sought, in the second wave of litigation after the amended complaint, resulted in an initial agreement to comply as well. Unfortunately, the Chicago Public Schools did not act as they said they would and the judge eventually entered an order for the child seeking admission at a neighborhood school.

In the Illinois case *In re: The Educational Interests of J.C., S.G. and M.G.*, the final legal outcome was disappointing, but the successful use of a temporary restraining order provides an important lesson. The trial judge ordered the school of origin to provide transportation for the children to their respective schools, giving the family enough time to get their section 8 housing expedited. In the end, they were able to provide proof of housing within the district and keep the children in their school of origin, uninterrupted.

Ryan J. Dowd, No Other Choice: Litigating and Settling Homeless Education Rights Cases, 23 N. Ill. U. L. Rev. 257 (2003)

IV. SETTLING

Settling, where possible, may almost be a panacea for enforcing and securing homeless education rights in noncompliant states and localities. The two cases that have settled out of court have led to settlement documents which granted rights that were generally superior to, and certainly far more specific than, existing state and federal laws. Surprisingly though, little attention has been given to the role of settling such cases. This section addresses a number of issues related to the process of settling, including reasons to strive for a settlement and tools for leveraging a settlement, and then the section looks at the ideal elements, based on *Salazar* and *Collier*, that an attorney should strive to achieve in a homeless education rights settlement.

A. THE PROCESS

Advocates cite a number of benefits of settling over going to trial. Settlement documents can reach a level of specificity and detail that a judge would be unlikely to order. For example, the *Collier* settlement specifies exactly who needs to sign which documents, as well as where documents are to be filed. By contrast, the *Lampkin* injunction, in a more general fashion, orders the District of Columbia to identify homeless children at intake centers and refer them to "requisite educational services," and to "offer bus tokens to all homeless children who travel more than 1.5 miles ... to school." Furthermore, settlement documents also have the potential to provide substantive rights that a judge would not be likely to mandate. For example, both the *Salazar* settlements and the *Collier* settlement address school fee waivers, something not mentioned in the McKinney Act or Illinois law.

Settling also has the likely advantage of the defendants complying more with rules that they helped to promulgate. Settling instead of going to trial may help to preserve some remnant of goodwill upon which to build. In Chicago, advocates and school personnel have been able to achieve a working relationship after nearly ten years of litigation and negotiations. This working relationship and belated commitment are important for homeless children in the long-term and are more likely to be achieved through settlement than trial.

In most cases, settling will achieve results faster than going to trial. The ten-year track of *Salazar* is probably atypical given its historical place in the middle of the battle over the enforceability of the McKinney Act. Newly revised and created legislation, as well as the precedents of *Lampkin, Salazar* and *Collier,* are more likely to create a situation closer to *Collier*. In this case, the Public Justice Center was able to witness change in the schools a mere four months after filing suit. Even the expedited trial process could not have accomplished the intended goals that quickly.

Settlements do have two potential problems that warrant mentioning. Laurie Norris of the Public Justice Center warns against "settling at all costs," where in the give-and-take of negotiations you are forced to give up important rights and objectives. In the two cases that have settled so far, neither lead attorney reports having had to relinquish any important objectives to which they were entitled. Additionally, Laurene Heybach, from experience, cautions of "a certain kind of defendant that thinks you're the kind of lawyer that, if they sign a piece of paper, the problem will go away." This difficulty appears to have surfaced after the first *Salazar* settlement, but was remedied through tenacity and persistence.

Advocates have reported a few additional tools available in homeless education rights cases for

leveraging a settlement and securing the best settlement document possible. Obviously the media is a strong ally in the process and should be used extensively. As stated above, homeless children who are not allowed to go to school are especially sympathetic characters, and the media has so far been very interested in covering battles over their education rights. Other allies besides the media should be utilized, including community and religious groups. In Chicago, the attorneys for *Salazar* employed a mass letter writing campaign to pressure the Chicago Public Schools to stop fighting homeless children. The Public Justice Center sought to enlist the aid of a grass-roots community organization, in order to have parents "making a clamor". Though they were not able to find such a grass roots organization in the area, they did work the Prince George's County Homeless Services Partnership, an organization of homeless service providers, into the settlement document. The state might also be an additional source of leverage against the local educational agency, particularly if the state has shown a commitment to homeless children in the past.

Both lead attorneys in *Salazar* and *Collier* report that the best tool against complacent schools is extensive, reliable and timely information. Thorough work with homeless families before and during litigation commands the respect of opponents and conveys to them that the "homeless kids problem" is not going to go away without changes, as well as keeps an attorney aware of developments in the treatment of homeless children and youth. Laurie Norris reports that it was "crucial" to the *Collier* case that "they know that we know that they have problems." She also added that the few depositions that the Public Justice Center conducted of school officials proved invaluable in highlighting the nuances of the situation within Prince George's County.

B. THE SETTLEMENT DOCUMENT

The settlements that have been created so far are broad, powerful documents that deserve detailed treatment at this point. First, this article will address settlement documents in homeless education rights cases in a general sense. Then it will analyze the specific components, based upon *Salazar* and *Collier*, that an attorney should strive to get into a homeless education rights settlement.

Generally speaking, a homeless education rights settlement should seek to do three things for homeless children and youth in the jurisdiction: Enforce, Explain and Expand. "Enforce" refers to assuring that schools are actually doing what they are required to do by law. Much of a settlement document in this area will mirror state and federal laws, reiterating rights that should already have been provided. "Explain" means providing specificity to the general language contained in the McKinney Act and state law. The McKinney Act leaves broad discretion to the state and local educational agencies, discretion which can easily be abused through apathy or open hostility to the educational needs of homeless children and youth. An example of a settlement document adding specificity would be where the *Collier* settlement document establishes a bright line rule for "feasibility," which entails transporting children who are thirty-five miles or less from their school of origin. Quite differently, the McKinney Act was completely nonspecific as to when transportation was and was not to be provided. "Expand" refers to areas in which settlement documents can actually provide homeless children and youth additional rights which they did not previously have under existing law. As stated above, *Salazar* and *Collier* have referred to fee waivers, which are not addressed in the McKinney Act. All three E's outlined above have been achieved in *Salazar* and *Collier*, and are presumably achievable in other jurisdictions.

Settlement documents for homeless education rights cases need to be highly specific. The defendant educational agency will have already demonstrated its incompetence in working under the deferential aspirational language of the McKinney Act. Thus, the settlement document should

enter the situation to provide clear guidelines and a specific process for how homeless children and youth in the jurisdiction are to be treated: language that takes into account how educational bureaucracies operate will be incorporated most seamlessly and have the best chance of being complied with. For instance, the *Collier* settlement lays out specific numbers of copies of forms to be distributed to homeless shelters, and requires that all pertinent documents are to be filed in a "single central repository of files" which is to be "organized by student name." Attorneys in both *Salazar* and *Collier* report that the defendants in their cases appreciated the level of specificity and detail in the settlement documents. Laurene Heybach said that the additional specificity benefits schools because it provides clear guidance for what rights are available to homeless children, and everyone then knows that in other situations it is a special request which may be denied. Laurie Norris states that educational bureaucracies are more welcoming of settlement language that fits into processes that they are already familiar with.

There may be a role for aspirational language in some situations. For instance, in the second *Salazar* settlement, it was very important to the Chicago Public Schools to include that "[a]s a result of the joint efforts of [the Chicago Public Schools] and plaintiffs, [the Chicago Public Schools] [are] endeavoring to develop the premier homeless education program in the country." This language fit into the general theme of the second *Salazar* settlement, in which the plaintiffs sought to give Chicago a program that it could be proud of. The strategy and the language of enabling Chicago to have "bragging rights" over its Homeless Education Program worked remarkably well in the second settlement in *Salazar*.

One last general warning is worth mentioning before addressing the individual elements of a settlement document. Attorneys for both *Salazar* and *Collier* stressed the importance of going into the settlement writing process with as much information as possible. Laurene Heybach cautions against writing a settlement document without knowing the nuts and bolts of the problem in the specific jurisdiction, or else there is the danger of creating a settlement that looks good on paper but does not work as applied to a specific school. Laurie Norris highlighted the need to talk to as many people as time allows. In the case of *Collier*, despite collecting ideas from dozens of sources in the months since settling, Norris has received great ideas from other jurisdictions that she wishes she had known about prior to writing the settlement.

Before getting into the specific topics that should be covered, it is appropriate now to give a brief synopsis of the three pertinent settlement documents. While all are powerful in scope and force, they take varied approaches and each have particular points where they are especially effective.

The initial *Salazar* settlement ("*Salazar I*") was a thorough and commanding document that has influenced both settlements since. The major headings are: introduction, definitions, disclaimer, procedures for seeking approval of the settlement agreement, enrollment, transportation, dispute resolution process, training, coordination with other governmental and social service agencies, notification, homeless retention and return program, production of information, enforcement, waiver and release, and attorney fees. Very much oriented towards the rights of homeless children and youth, *Salazar I* is particularly strong in statements of what the Chicago Public Schools shall and shall not do. For instance, under enrollment, *Salazar I* reads definitively "[n]o school shall deny enrollment ... or delay the enrollment or transfer of any homeless child or youth unable to produce school, medical, or residency records." Detailed in its definitions and affirmation of rights, *Salazar I* grants a little more discretion on the finer points of procedure.

The second *Salazar* settlement ("*Salazar II*") is nearly identical to *Salazar I*, making important

changes in a few areas and slightly tweaking several others. *Salazar II* is characterized by the same strong prohibitions and affirmative duties, as well as deference to the finer points, as is *Salazar I*. Using the new leverage of the Chicago Public Schools' continued violations, *Salazar II* gets tougher in some areas, for instance, the situations in which public transportation passes can be revoked from parents accompanying their child to school has been narrowed from *Salazar I*. Salazar *II* also fairly makes some language looser where appropriate. An example is where *Salazar I* admonished the Chicago Public Schools to "take steps to identify and to enroll homeless children" and *Salazar II* changes that statement to "take reasonable steps." *Salazar II* also added that Chicago is endeavoring to create the "premier homeless education program in the country."

The authors of the *Collier* settlement ("*Collier*") relied heavily on *Salazar I* and *II* for ideas to incorporate into their document. Nonetheless, *Collier* approaches the problems of educating homeless children and youth slightly differently than *Salazar I* or *II*. *Collier* is less definitive in its statements of prohibition and affirmative duties than the *Salazar* settlements, preferring instead to heavily outline specific processes and documents that the Prince George's County public schools are to use. The major headings in *Collier* are: revision of policy; forms; outreach and coordination with social services and housing agencies; training of school personnel; identifying, tracking and serving homeless children and youth; transportation; appeals; evaluation; and monitoring compliance.

Taking the varying provisions that attorneys in *Salazar* and *Collier* were able to achieve in their settlements, a vision of the ideal components emerges. It is unlikely in any settlement negotiations that an attorney would be able to get all the specifics outlined below, but they serve as a model and a good beginning position from which to negotiate.

There are twelve topic areas that a homeless education rights settlement should attempt to address: preliminary information, informing, enrollment, identifying, forms, transportation, success, training, special personnel, coordination, disputes/appeals, compliance and court related. They will each individually be discussed in the following sections, with references to the specific provisions in *Salazar I, Salazar II*, and *Collier*.

1. Preliminary Information

Two preliminary/introductory issues need to be addressed by a settlement document: revision of policies and definitions.

The policy of a noncompliant educational agency will probably need to be revised, particularly in light of recent changes to the McKinney Act. *Salazar I* took the approach of laying out specific elements that should be included in the policies of Illinois and Chicago Public Schools. In fact, specific policy documents were attached as exhibits, with the statement in the settlement that each would "formally adopt, implement and comply" with the attached documents. In this area *Collier* took a more deferential approach, ordering the Prince George's County Board of Education to revise its policies so they would comply with the settlement agreement and the Maryland Education Regulations. *Collier* did require the Board of Education to run their proposed policy by the counsel for the plaintiffs. *Salazar II*, because *Salazar I* had already created a written policy, orders the Chicago Public Schools to "comply with the requirements" of the policy, utilizing the affirmative "shall" in places where *Salazar I* had required them to "formally adopt, implement and comply with [a policy that mandates the specific behavior]."

It is probably best to lay out a number of definitions early on as *Salazar I* and *II* did. Perhaps the

most important of the definitions provided is for "Homeless person, child or youth" or "Homeless individual." Both documents use the standard definition laid out in the older versions of the McKinney Act, as well as incorporating the more expansive definition from the U.S. Department of Education's Preliminary Guidance for the Education of Homeless Children and Youth Program. *Salazar II* adds an important paragraph about self-identification as "[o]ne method of determining homelessness," and that school personnel should be trained to recognize "common signs of homelessness," as well as receive sensitivity training in dealing with homeless families.

2. Informing

Homeless families can only take advantage of rights of which they are aware. To this end, a homeless education rights settlement should provide a number of methods for informing and educating individuals of the particular educational rights available to homeless children and youth.

The principal means of informing homeless parents' of their children's options is through flyers, brochures, posters and other written documents. For instance, *Collier* outlines exactly what is to be included in "an easy-to-understand flyer or brochure, at or below reading grade level 5," while *Salazar I* and *II* make provisions for a "written notice" of educational rights. This brochure or flyer in *Collier* is also to be assembled along with all pertinent forms into a "parent pack." Attorneys in *Collier* had also hoped to get a flyer or brochure with a wallet-size punch out card containing a mini-version of available rights and services. Besides the generic form of rights, *Collier* mandates creation of a special brochure of available transportation services. "[A] large informational poster, at or below reading grade level 5" containing the same information as the flyer or brochure is also required by the *Collier* settlement.

It is important that all informational documents and forms be created in multiple languages, depending on the linguistic makeup of the jurisdiction. *Salazar I* and *Collier* provide for Spanish and English. Mindful of the makeup of Chicago, *Salazar II* adds Polish to the list of mandated languages.

Advocate lawyers have developed a variety of creative ways for dispersing these printed informational resources to homeless families. Schools have been required to display posters and notices of rights in prominent places, keep notices and policies on hand, and distribute written notices and brochures to all parents twice per year.

School personnel can be required to inform parents face-to-face of available rights and services. The most powerful method may be frequent visits to shelters to educate families . . .

3. Enrollment

Enrollment encompasses school placement, immunizations and physicals, records, and segregation. Settlement provisions in this area will tend to largely mirror the prevailing state or federal statutes, merely enforcing existing law.

As to school placement, *Salazar II* does a fantastic job in outlining that homeless children and youth have the option of enrolling in:

> (1) the school he or she attended when permanently housed; or
>
> (2) the school in which he or she was last enrolled; or
>
> (3) any school that non-homeless children and youth who live in the attendance area in which the child or youth is actually living are eligible to attend.

One will want to be sure to provide a statement of duration of placement. The best language comes from the recent amendment to the McKinney Act, providing that homeless children and youth may remain in the school of origin for "the duration of [their] homelessness." Strong language is necessary in the area of school placement in order to overcome the ambiguity of the McKinney Act where it states, in regard to the best interest determination, a "local educational agency shall ... *to the extent feasible*, keep a homeless child or youth in the school of origin ...." *Salazar I* and *II* overcome the feasibility standard by essentially removing it and putting the entire choice of which school to attend in the hands of the student and her parents.

A homeless education rights settlement should address the potential barriers and delays created by various records, immunizations, and physicals. *Salazar I* and *II* poignantly require immediate enrollment, mandating that school officials must then verify homelessness, acquire necessary school records, and attempt to get "documentation of immunizations or physicals." Similarly when a child or youth needs a medical examination or immunizations, school personnel must provide a reference "to a physician or clinic, including free clinics ..."

With the extensive treatment in the recent McKinney Amendment it should not be difficult to get a local educational agency to close any remaining segregated schools, assuming they are not in one of the exempted four counties. *Salazar II* specifically says that "[n]o homeless child or youth shall be discriminated against, segregated from the mainstream school population, or isolated on the basis of his or her homelessness."

4. Identifying

The requirement that local educational agencies take steps to identify homeless children and youth is a hard area to work into specifics, though it is especially vital in assuring that homeless children and youth receive an education. Anyone writing a settlement should consult various jurisdictions for ideas on how they go about identifying homeless children and youth.

Collier incorporates a few inventive measures for Prince George's County to use in identification efforts. First, every student withdrawing or enrolling in school is to be asked if their decision is related to homelessness. The School Board also is required to collaborate with shelters and social service agencies to have homeless children identified to their schools "to the extent permitted by law." Finally, schools are to keep records of every self-identified homeless child or youth, specifically utilizing a "Tracking Form for Homeless Students."

5. Forms

Additional forms will probably need to be created in a school system that has been apathetic to the needs of homeless children and youth. *Collier* mandates an omnibus form with the following sections: (a) school choice for homeless students; (b) transportation request; (c) request for services for homeless students; (d) request for waiver of school fees; (e) notice of denial of services; and (f) right to appeal. The most important form to be created is probably the appeal/grievance form. *Collier* requires an appeals form separate from the omnibus form. The Chicago "Homeless Education Dispute Resolution Process Form" is an extensive four-copy document with places for information from the parent/guardian and an area for the "Principal's Action on the Complaint."

A few other provisions about forms should be considered. *Salazar I* and *II* were especially far thinking in requiring school officials to offer to assist parents, guardians and others in filling out forms. Also, it is probably best to provide for mechanisms to have forms distributed. For instance,

Collier requires that 200 omnibus forms and 200 appeal forms be delivered to each homeless shelter in the county. Finally, it may be necessary to specify where and how completed forms are to be maintained. *Collier* creates a "single central repository of files organized by student name in the office of the [Homeless Education Coordinator]." A single location for storage assures convenient access to forms and is likely to make monitoring of the schools' actions easier.

6. Transportation

Transportation is an area of the settlement that will probably have to be individually developed to fit the needs and resources of the jurisdiction. For instance, Laurie Norris reports that while *Salazar I* and *II* could utilize public transportation extensively, that was not possible in Prince George's County, which does not have the elaborate public transportation of Chicago.

Advocates will want to consider existing structures, like bus routes and public transportation, as well as the particular situation of homeless families in the area, such as where the shelters are located. A fair amount of old-fashioned creativity is probably also necessary.

7. Success

The term "success" is used here to reference the variety of programs and rights that can be afforded homeless children and youth once they have been admitted and transported to school. This area is limitless; an attorney should definitely contact other jurisdictions and consult the literature to see what other schools are doing to ensure the success of homeless children and youth.

The most obvious provision to assist homeless children and youth is tutoring. Also, students will need access to special education, free meal programs, school supplies, clothing, medical care, counseling, and before/after/summer school programs. Truancy programs could be especially helpful in the chaotic lives of homeless families. Additionally, advocates should consider provisions necessary to aid with the specific needs of homosexual homeless students and unaccompanied youth.

The most interesting element of the *Salazar* and *Collier* settlements is the attention given to waivers of school fees. Though not specifically mentioned in the McKinney Act, various school fees can be a substantial barrier to the success of homeless children and youth. This link makes them an appropriate provision in a settlement. The same argument might be used for countless other necessities.

8. Training

If progress is going to be made in the long term, certain key people and groups will need to be educated about the problems homeless children and youth encounter in trying to get an education, and the special laws related to them.

Salazar I, *Salazar II* and *Collier* all mandate the training of school personnel. *Salazar II* outlines a system in which principals, liaisons, and "those school clerks who work with the homeless population" receive mandatory annual training. The principals then train the staff at their schools. *Collier* details that most school personnel will be trained extensively initially, and receive annual "refresher sessions" thereafter.

The *Collier* settlement goes on to require the Prince George's County Board of Education to educate other crucial groups. Staff is to make biannual trips to all shelters to train shelter staff, as well as to the Department of Social Services, and its contracted agencies. Other groups may need to be trained depending on the jurisdiction, such as the Prince George's County Homeless Services

Partnership was in *Collier*.

Special attention should be given to whom conducts the training sessions. *Collier* requires that "[p]ersons selected to conduct the in-service programs shall be appropriately qualified, shall be specially trained to present the curriculum, and shall be capable of communicating effectively the material in the curriculum." In this case, attorneys learned after the settlement was complete that Prince George's County has a Staff Development Department that is specially trained in teaching teachers and other school personnel.

9. Special Personnel

The McKinney Act creates two new types of special school personnel: the state coordinator and the local liaison. Additionally, many local educational agencies have a local Homeless Education Coordinator. These positions can be created and given tasks and responsibilities in a settlement.

School personnel who are appointed and trained as liaisons/contacts at individual schools are an important resource for parents and other staff with questions or concerns. Realizing this need for an in-school resource person, *Salazar I* mandated that every school with a homeless shelter in its attendance area have a liaison. Judge Getty, in his order on the motion to enforce, required the Chicago Public Schools to provide a liaison at all schools. This requirement was written into *Salazar II* and Chicago actually discovered that they liked having a liaison at all schools.

The *Collier* settlement details a lot of tasks to be done by the Homeless Education Coordinator for the school system. For example, the Coordinator's office is to house the Single Central Repository where all completed forms are catalogued, maintain records of training and shelter visits and the Coordinator "or her designee shall, within three school days of receipt, review all forms, confirm such review by signing off on the forms, take [appropriate action], keep a written record ..., and file all forms."

A final note on personnel is important. People are everything. It is a difficult prospect to negotiate for staff changes, and a judge is very unlikely to order it, but real change may require getting the right people into the right positions. Even if this cannot officially be bargained for, advocates should consider it if they are attempting to assist reform in any school system.

10. Coordination with other Agencies

Homelessness is such a multifaceted problem that any approach to educating homeless children and youth should incorporate coordination with other agencies. Which agencies are appropriate in a given location may vary from jurisdiction to jurisdiction.

Salazar I and *II* opted for a general statement of commitment to coordinate, whereas *Collier* created a more specific plan. *Collier* requires coordination with the Department of Social Services, local homeless shelters, and the local homeless service providers organization. Housing agencies are also appropriate, which *Collier* made passing reference to, and are added to the latest revision of the McKinney Act. This new McKinney provision could be particularly powerful for future settlements in order to gain specific coordination with housing agencies.

11. Disputes / Appeals

Any homeless education rights settlement will want to provide for a competent dispute resolution or appeals process. The design may vary depending on existing bureaucratic structures and the specific history of violations, but *Salazar* and *Collier* do provide well-planned models.

Salazar I and *II* have a two level process. Initially, the principal is given until the "end of the next school day" to resolve the grievance. If the problem is not resolved in that time, the Regional Education Officer attempts to work out a solution "to the parents' satisfaction," before bringing the parties together and issuing a decision "in an impartial manner within four school days." The Regional Education Officer's decision is the final level within the schools. The *Salazar* settlements are also careful to include assistance with forms and notice of rights.

Collier provides for a more elaborate four level appeals process. Initially, the principal is given five school days to resolve the dispute to the satisfaction of the parent before it is automatically elevated to the Office of Appeals. The Office of Appeals has ten days to reach a satisfactory decision before it is again elevated automatically to the school board. The Board of Education then has thirty days to hold a hearing and reach a disposition, after which the parent may elevate the dispute to the Maryland State Department of Education. Unfortunately, *Collier* had to make an undesirable concession by providing that "[t]hroughout the appeals process, the student may continue to attend the school of origin if the parent arranges and pays for transportation for the student."

12. Compliance

Establishing a procedure for ensuring compliance with the settlement agreement is one of the more important parts of the document. A well-written compliance portion can make a powerful and inexpensive method of acquiring the necessary documents and information to measure progress.

Salazar I, *Salazar II*, and *Collier* took varied approaches to ensuring compliance. *Salazar I* has a "Production of Information" section and an "Enforcement" section. The Production of Information section required the Chicago Public Schools to provide a detailed report to the plaintiffs' counsel for three years and an even more expansive report to the Illinois State Board of Education. The Illinois State Board of Education had to supply the plaintiffs' counsel with information on the winning grant made to raise awareness of the rights of homeless children and youth. The "Enforcement" section provides that "[a]ny class member ... may file a motion seeking enforcement of the term or terms of this Agreement. The filing of such motion shall reinstate the lawsuit. The Court shall retain continuing jurisdiction ..."

Salazar II leaves the "Production of Information" section open for new negotiations, providing that, if no agreement can be reached, similar information to *Salazar I* will be required. The "Enforcement" section provides for specific procedures for individual and systemic violations, and concludes with the statement about the right to file a motion to enforce.

Collier establishes three separate elements for ensuring compliance. The "Evaluation" section creates a system for in-house monitoring by the Department of Research and Evaluation. Here, the Associate Superintendent of Accountability and Assessment completes an annual evaluation that is reviewed by the plaintiffs' counsel. The second part is the "Monitoring Compliance" section which establishes that an assigned individual will "be responsible to monitor [the Board of Education's] compliance with" the settlement and the appropriate laws. Additionally, Prince George's County must provide a monthly report, similar to the annual reports in *Salazar*, which plaintiffs' counsel is paid to review at a reduced hourly rate. As in *Salazar, Collier* concludes with the statement that the settlement is enforceable by members of the classes and that the court retains jurisdiction.

V. POST SETTLEMENT / DECISION

Once the battles of trial or settlement are achieved, the war is not won quite yet. *Salazar*, which required a motion to enforce, is the best example of this principle. This section briefly outlines the process of implementation, monitoring, developing an amicable relationship and using the success in one jurisdiction for another. The purpose for laying out these considerations is so that they can be planned for ahead of time.

Once an order has been made or a settlement reached, the educational agency still has yet to implement the plan. The Public Justice Center has discovered that this process might not be as easy as one would expect. Implementation in *Collier* has been slower than expected, and filled with minor struggles. In *Salazar* it would appear that much of the implementation process never even occurred in Chicago after the first settlement. An attorney should be aware of, and prepared for, these potential difficulties.

An educational agency with a history of denying homeless children and youth their educational rights will need to be monitored after the "final" resolution is reached. A well-written settlement will ensure the production of the information necessary for monitoring, but even that will not necessarily ensure compliance. The Public Justice Center has committed itself to monitoring the Prince George's County Board of Education for at least four years, and attorneys in *Salazar* have already spent five years monitoring Chicago since their initial settlement.

An easily overlooked area of the post settlement or decision process is the need to reform the relationship between homeless advocates and the school system. This need to reach a working relationship is particularly important to consider before and during litigation and settlement. The hostility created from court actions is counterproductive to securing homeless children and youth educational rights in the long term. Attorneys in *Salazar* have reached a model relationship, where advocates from the Chicago Coalition for the Homeless call the Chicago Public Schools three times per week and meet with officials regularly. Attorneys in *Collier* are actively striving to secure this type of relationship. For instance, they have consciously chosen not to take certain issues to court for fear of damaging the rapport any more than necessary. The important thing to note here is that *Salazar* provides a model of, and proves the possibility of, a working relationship with a school system after litigation.

The last line of a Washington Post article quotes Laurie Norris as saying "We're not going to stop with the other counties .... We hope we don't have to file another lawsuit. Hopefully, this will serve as a lesson to the other counties." The process of litigating against one educational agency should help to bring others into compliance "voluntarily." The Public Justice Center, in the months after settling with Prince George's County, specifically held presentations for the other counties outlining homeless education rights and the *Collier* suit. They hope to create a packet, based on the materials created from the *Collier* case, outlining acceptable samples of forms, processes and policies, fully in compliance with the McKinney Act, which can be adopted wholesale. Attorneys in the *Salazar* case have taken their skills, developed in Chicago, into the suburbs, and have used their experiences to help other advocates and jurisdictions nationally.

Board Of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Board of Education of Oklahoma City sought dissolution of a decree entered by the District Court imposing a school desegregation plan. The District Court granted relief over the objection of respondents Robert L. Dowell et al., black students and their parents. The Court of Appeals for the Tenth Circuit reversed, holding that the Board would be entitled to such relief only upon " '[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions....' ". We hold that the Court of Appeals' test is more stringent than is required either by our cases dealing with injunctions or by the Equal Protection Clause of the Fourteenth Amendment.

I

This school desegregation litigation began almost 30 years ago. In 1961, respondents, black students and their parents, sued petitioners, the Board of Education of Oklahoma City (Board), to end *de jure* segregation in the public schools. In 1963, the District Court found that Oklahoma City had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system—one that was intentionally segregated by race. In 1965, the District Court found that the School Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one-race schools. Residential segregation had once been state imposed, and it lingered due to discrimination by some realtors and financial institutions. The District Court found that school segregation had caused some housing segregation. In 1972, finding that previous efforts had not been successful at eliminating state imposed segregation, the District Court ordered the Board to adopt the "Finger Plan," under which kindergarteners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1–4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.

In 1977, after complying with the desegregation decree for five years, the Board made a "Motion to Close Case." The District Court held in its "Order Terminating Case":

> "The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court....
>
> "... The School Board, as now constituted, has manifested the desire and intent to follow the law. The court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
>
> "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court....
>
> "... Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal."

This unpublished order was not appealed.

In 1984, the School Board faced demographic changes that led to greater burdens on young black children. As more and more neighborhoods became integrated, more stand-alone schools were established, and young black students had to be bused farther from their inner-city homes to outlying white areas. In an effort to alleviate this burden and to increase parental involvement, the Board adopted the Student Reassignment Plan (SRP), which relied on neighborhood assignments for students in grades K–4 beginning in the 1985–1986 school year. Busing continued for students in grades 5–12. Any student could transfer from a school where he or she was in the majority to a school where he or she would be in the minority. Faculty and staff integration was retained, and an "equity officer" was appointed.

In 1985, respondents filed a "Motion to Reopen the Case," contending that the School District had not achieved "unitary" status and that the SRP was a return to segregation. Under the SRP, 11 of 64 elementary schools would be greater than 90% black, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed. The District Court refused to reopen the case, holding that its 1977 finding of unitariness was res judicata as to those who were then parties to the action, and that the district remained unitary. The District Court found that the School Board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and nondiscriminatory. Because unitariness had been achieved, the District Court concluded that court-ordered desegregation must end.

The Court of Appeals for the Tenth Circuit reversed. It held that, while the 1977 order finding the district unitary was binding on the parties, nothing in that order indicated that the 1972 injunction itself was terminated. The court reasoned that the finding that the system was unitary merely ended the District Court's active supervision of the case, and because the school district was still subject to the desegregation decree, respondents could challenge the SRP. The case was remanded to determine whether the decree should be lifted or modified.

On remand, the District Court found that demographic changes made the Finger Plan unworkable, that the Board had done nothing for 25 years to promote residential segregation, and that the school district had bused students for more than a decade in good-faith compliance with the court's orders. The District Court found that present residential segregation was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation. It also found that the district had maintained its unitary status, and that the neighborhood assignment plan was not designed with discriminatory intent. The court concluded that the previous injunctive decree should be vacated and the school district returned to local control.

The Court of Appeals again reversed, holding that " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate.' " That court approached the case "not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." Relying on *United States v. Swift & Co.,* 286 U.S. 106 (1932), it held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforseen conditions," and "dramatic changes in conditions unforseen at the time of the decree that ... impose extreme and unexpectedly oppressive hardships on the obligor." Given that a number of schools would return to being primarily one-race schools under the SRP, circumstances in Oklahoma City had not

changed enough to justify modification of the decree. The Court of Appeals held that, despite the unitary finding, the Board had the " 'affirmative duty ... not to take any action that would impede the process of disestablishing the dual system and its effects.' "

We granted the Board's petition for certiorari. We now reverse the Court of Appeals.

II

We must first consider whether respondents may contest the District Court's 1987 order dissolving the injunction which had imposed the desegregation decree. Respondents did not appeal from the District Court's 1977 order finding that the school system had achieved unitary status, and petitioner contends that the 1977 order bars respondents from contesting the 1987 order. We disagree, for the 1977 order did not dissolve the desegregation decree, and the District Court's unitariness finding was too ambiguous to bar respondents from challenging later action by the Board. …

… We … decline to overturn the conclusion of the Court of Appeals that while the 1977 order of the District Court did bind the parties as to the unitary character of the district, it did not finally terminate the Oklahoma City school litigation. In *Pasadena City Bd. of Education v. Spangler,* 427 U.S. 424 (1976), we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court.

III

The Court of Appeals relied upon language from this Court's decision in *United States v. Swift and Co., supra,* for the proposition that a desegregation decree could not be lifted or modified absent a showing of "grievous wrong evoked by new and unforeseen conditions." It also held that "compliance alone cannot become the basis for modifying or dissolving an injunction." We hold that its reliance was mistaken.

In *Swift,* several large meat-packing companies entered into a consent decree whereby they agreed to refrain forever from entering into the grocery business. The decree was by its terms effective in perpetuity. The defendant meatpackers and their allies had over a period of a decade attempted, often with success in the lower courts, to frustrate operation of the decree. It was in this context that the language relied upon by the Court of Appeals in this case was used.

United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), explained that the language used in *Swift* must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed. "*Swift* teaches ... a decree may be changed upon an appropriate showing, and it holds that it may not be changed ... if the purposes of the litigation as incorporated in the decree ... have not been fully achieved." In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the school board.

In *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*), we said:

> "[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation...."

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. *Brown* considered the "complexities arising from the *transition* to a system of public education freed of racial discrimination" in holding that the implementation of desegregation was to proceed "with all deliberate speed." *Green* also spoke of the "*transition* to a unitary, nonracial system of public education."

Considerations based on the allocation of powers within our federal system, we think, support our view that quoted language from *Swift* does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in *Swift,* are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs. The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.

A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders is obviously relevant. In this case the original finding of *de jure* segregation was entered in 1961, the injunctive decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER took no part in the consideration or decision of this case.

Justice MARSHALL, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

Oklahoma gained statehood in 1907. For the next 65 years, the Oklahoma City School Board maintained segregated schools—initially relying on laws requiring dual school systems; thereafter, by exploiting residential segregation that had been created by legally enforced restrictive covenants. In 1972—18 years after this Court first found segregated schools unconstitutional—a federal court finally interrupted this cycle, enjoining the Oklahoma City School Board to implement a specific plan for achieving actual desegregation of its schools.

The practical question now before us is whether, 13 years after that injunction was imposed, the same School Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggests that 13 years of desegregation was enough. The Court remands the case for further evaluation of whether the purposes of the injunctive decree were achieved sufficient to justify the decree's dissolution. However, the inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant "vestige" of *de jure* segregation.

In my view, the standard for dissolution of a school desegregation decree must reflect the central aim of our school desegregation precedents. In *Brown v. Board of Education,* 347 U.S. 483 (1954) (*Brown I*), a unanimous Court declared that racially "[s]eparate educational facilities are inherently unequal." This holding rested on the Court's recognition that state-sponsored segregation conveys a message of "inferiority as to th[e] status [of Afro–American school children] in the community that may affect their hearts and minds in a way unlikely ever to be undone." Remedying this evil and preventing its recurrence were the motivations animating our requirement that formerly *de jure* segregated school districts take all feasible steps to *eliminate* racially identifiable schools.

I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions. Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed. I therefore dissent. …

II

I agree with the majority that the proper standard for determining whether a school desegregation decree should be dissolved is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved. I strongly disagree with the majority, however, on what must be shown to demonstrate that a decree's purposes have been fully realized. In my view, a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools. …

B

The majority suggests a more vague and, I fear, milder standard. Ignoring the harm identified in *Brown I,* the majority asserts that the District Court should find that the purposes of the decree have been achieved so long as "the Oklahoma City School District [is now] being operated in compliance with the commands of the Equal Protection Clause" and "it [is] unlikely that the Board would return to its former ways." Insofar as the majority instructs the District Court, on remand, to "conside[r] whether the vestiges of *de jure* segregation ha[ve] been eliminated as far as practicable," the majority presumably views elimination of vestiges as part of "operat [ing] in compliance with the commands of the Equal Protection Clause." But as to the scope or meaning of "vestiges," the majority says very little.

By focusing heavily on present and future compliance with the Equal Protection Clause, the majority's standard ignores how the stigmatic harm identified in *Brown I* can persist even after the State ceases actively to enforce segregation. It was not enough in *Green,* for example, for the school district to withdraw its own enforcement of segregation, leaving it up to individual children and their families to "choose" which school to attend. For it was clear under the circumstances that these choices would be shaped by and perpetuate the state-created message of racial inferiority associated with the school district's historical involvement in segregation. In sum, our school-desegregation jurisprudence establishes that the *effects* of past discrimination remain chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated.

III

Applying the standard I have outlined, I would affirm the Court of Appeals' decision ordering the District Court to restore the desegregation decree. For it is clear on this record that removal of the decree will result in a significant number of racially identifiable schools that could be eliminated. . . .

Against the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation. Therefore, such schools must be eliminated whenever feasible. …

In its concern to spare local school boards the "Draconian" fate of "indefinite" "judicial tutelage," the majority risks subordination of the constitutional rights of Afro–American children to the interest of school board autonomy. The courts must consider the value of local control, but that factor primarily relates to the feasibility of a remedial measure, not whether the constitutional violation has been remedied. *Swann* establishes that if further desegregation is "reasonable, feasible, and workable," then it must be undertaken. In assessing whether the task is complete, the dispositive question is whether vestiges capable of inflicting stigmatic harm exist in the system and whether all that can practicably be done to eliminate those vestiges has been done. The Court of Appeals concluded that "on the basis of the record, it is clear that other measures that are feasible remain available to the Board [to avoid racially identifiable schools]." The School Board does not argue that further desegregation of the one-race schools in its system is unworkable and in light of the proven feasibility of the Finger Plan, I see no basis for doubting the Court of Appeals' finding.

We should keep in mind that the court's active supervision of the desegregation process ceased in 1977. Retaining the decree does not require a return to active supervision. It may be that a modification of the decree which will improve its effectiveness and give the school district more flexibility in minimizing busing is appropriate in this case. But retaining the decree seems a slight burden on the school district compared with the risk of not delivering a full remedy to the Afro–American children in the school system.

IV

Consistent with the mandate of *Brown I,* our cases have imposed on school districts an unconditional duty to eliminate *any* condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation. The racial identifiability of a district's schools is such a condition. Whether this "vestige" of state-sponsored segregation will persist cannot simply be ignored at the point where a district court is contemplating the dissolution of a desegregation decree. In a district with a history of state-sponsored school segregation, racial separation, in my view, *remains* inherently unequal.

I dissent.

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)

Justice WHITE delivered the opinion of the Court.

In these cases, the District Court denied a motion of the sheriff of Suffolk County, Massachusetts, to modify a consent decree entered to correct unconstitutional conditions at the Suffolk County Jail. The Court of Appeals affirmed. The issue before us is whether the courts below applied the correct standard in denying the motion. We hold that they did not and remand these cases for further proceedings.

I

This litigation began in 1971 when inmates sued the Suffolk County sheriff, the Commissioner of Correction for the State of Massachusetts, the mayor of Boston, and nine city councilors, claiming that inmates not yet convicted of the crimes charged against them were being held under unconstitutional conditions at what was then the Suffolk County Jail. The facility, known as the Charles Street Jail, had been constructed in 1848 with large tiers of barred cells. The numerous deficiencies of the jail, which had been treated with what a state court described as "malignant neglect," *Attorney General v. Sheriff of Suffolk County,* 394 Mass. 624, 625, 477 N.E.2d 361, 362 (1985), are documented in the decision of the District Court. See *Inmates of Suffolk County Jail v. Eisenstadt,* 360 F.Supp. 676, 679–684 (Mass.1973). The court held that conditions at the jail were constitutionally deficient:

> "As a facility for the pretrial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy. The court finds and rules that the quality of incarceration at Charles Street is 'punishment' of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial; and therefore it violates the due process clause of the Fourteenth Amendment." *Id.,* at 686.

The court permanently enjoined the government defendants: "(a) from housing at the Charles Street Jail after November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial and (b) from housing at the Charles Street Jail after June 30, 1976 any inmate who is awaiting trial." *Id.,* at 691. The defendants did not appeal.

In 1977, with the problems of the Charles Street Jail still unresolved, the District Court ordered defendants, including the Boston City Council, to take such steps and expend the funds reasonably necessary to renovate another existing facility as a substitute detention center. *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., June 30, 1977), App. 22. The Court of Appeals agreed that immediate action was required:

> "It is now just short of five years since the district court's opinion was issued. For all of that time the plaintiff class has been confined under the conditions repugnant to the constitution. For all of that time defendants have been aware of that fact.
>
> . . . . .
>
> "Given the present state of the record and the unconscionable delay that plaintiffs have already endured in securing their constitutional rights, we have no alternative but to affirm the district court's order to prohibit the incarceration of pretrial detainees at the Charles St. Jail." *Inmates of Suffolk County Jail v. Kearney,* 573 F.2d 98, 99–100 (CA1 1978).

The Court of Appeals ordered that the Charles Street Jail be closed on October 2, 1978, unless a

plan was presented to create a constitutionally adequate facility for pretrial detainees in Suffolk County.

Four days before the deadline, the plan that formed the basis for the consent decree now before this Court was submitted to the District Court. Although plans for the new jail were not complete, the District Court observed that "the critical features of confinement, such as single cells of 80 sq. ft. for inmates, are fixed and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions, are included. There are unequivocal commitments to conditions of confinement which will meet constitutional standards." *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., Oct. 2, 1978), App. 51, 55. The court therefore allowed Suffolk County to continue housing its pretrial detainees at the Charles Street Jail.

Seven months later, the court entered a formal consent decree in which the government defendants expressed their "desire ... to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees." *Inmates of Suffolk County Jail v. Kearney*, Civ. Action No. 71–162–G (Mass., May 7, 1979), App. to Pet. for Cert. in No. 90–954, p. 15a. The decree specifically incorporated the provisions of the Suffolk County Detention Center, Charles Street Facility, Architectural Program, which—in the words of the consent decree—"sets forth a program which is both constitutionally adequate and constitutionally required." *Id.*, at 16a.

Under the terms of the architectural program, the new jail was designed to include a total of 309 "[s]ingle occupancy rooms" of 70 square feet, App. 73, 76, arranged in modular units that included a kitchenette and recreation area, inmate laundry room, education units, and indoor and outdoor exercise areas. See, *e.g., id.*, at 249. The size of the jail was based on a projected decline in inmate population, from 245 male prisoners in 1979 to 226 at present. *Id.*, at 69.

Although the architectural program projected that construction of the new jail would be completed by 1983, *ibid.*, work on the new facility had not been started by 1984. During the intervening years, the inmate population outpaced population projections. Litigation in the state courts ensued, and defendants were ordered to build a larger jail. *Attorney General v. Sheriff of Suffolk County,* 394 Mass. 624, 477 N.E.2d 361 (1985). Thereupon, plaintiff prisoners, with the support of the sheriff, moved the District Court to modify the decree to provide a facility with 435 cells. Citing "the unanticipated increase in jail population and the delay in completing the jail," the District Court modified the decree to permit the capacity of the new jail to be increased in any amount, provided that:

> "(a) single-cell occupancy is maintained under the design for the facility;
>
> "(b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program;
>
> "(c) any modifications are incorporated into new architectural plans;
>
> "(d) defendants act without delay and take all steps reasonably necessary to carry out the provisions of the Consent Decree according to the authorized schedule." *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., Apr. 11, 1985), App. 110, 111.

The number of cells was later increased to 453. Construction started in 1987.

In July 1989, while the new jail was still under construction, the sheriff moved to modify the consent decree to allow the double bunking of male detainees in 197 cells, thereby raising the

capacity of the new jail to 610 male detainees. The sheriff argued that changes in law and in fact required the modification. The asserted change in law was this Court's 1979 decision in *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), handed down one week after the consent decree was approved by the District Court. The asserted change in fact was the increase in the population of pretrial detainees.

The District Court refused to grant the requested modification, holding that the sheriff had failed to meet the standard of *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932):

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The court rejected the argument that *Bell* required modification of the decree because the decision "did not directly overrule any legal interpretation on which the 1979 consent decree was based, and in these circumstances it is inappropriate to invoke Rule 60(b)(5) to modify a consent decree." *Inmates of Suffolk County Jail v. Kearney,* 734 F.Supp. 561, 564 (Mass.1990). The court refused to order modification because of the increased pretrial detainee population, finding that the problem was "neither new nor unforeseen." *Ibid.*

The District Court briefly stated that, even under the flexible modification standard adopted by other Courts of Appeals, the sheriff would not be entitled to relief because "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation—perhaps even the most important element." *Id.*, at 565. Finally, the court rejected the argument that the decree should be modified because the proposal complied with constitutional standards, reasoning that such a rule "would undermine and discourage settlement efforts in institutional cases." *Ibid.* The District Court never decided whether the sheriff's proposal for double celling at the new jail would be constitutionally permissible.

The new Suffolk County Jail opened shortly thereafter.

The Court of Appeals affirmed, stating: "[W]e are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." *Inmates of Suffolk County Jail v. Kearney,* 915 F.2d 1557 (CA1, 1990), judgt. order reported at 915 F.2d 1557, App. to Pet. for Cert. in No. 90–954, p. 2a. We granted certiorari. 498 U.S. 1081, 111 S.Ct. 950, 112 L.Ed.2d 1039 (1991).

II

In moving for modification of the decree, the sheriff relied on Federal Rule of Civil Procedure 60(b), which in relevant part provides:

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...."

There is no suggestion in these cases that a consent decree is not subject to Rule 60(b). A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in

nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees. The District Court recognized as much but held that Rule 60(b)(5) codified the "grievous wrong" standard of *United States v. Swift & Co., supra,* that a case for modification under this standard had not been made, and that resort to Rule 60(b)(6) was also unavailing. This construction of Rule 60(b) was error.

Swift was the product of a prolonged antitrust battle between the Government and the meat-packing industry. In 1920, the defendants agreed to a consent decree that enjoined them from manipulating the meat-packing industry and banned them from engaging in the manufacture, sale, or transportation of other foodstuffs. 286 U.S., at 111, 52 S.Ct., at 461. In 1930, several meat-packers petitioned for modification of the decree, arguing that conditions in the meat-packing and grocery industries had changed. *Id.,* at 113, 52 S.Ct., at 461. The Court rejected their claim, finding that the meat-packers were positioned to manipulate transportation costs and fix grocery prices in 1930, just as they had been in 1920. *Id.,* at 115–116, 52 S.Ct., at 462–463. It was in this context that Justice Cardozo, for the Court, set forth the much-quoted *Swift* standard, requiring "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" ... as a predicate to modification of the meat-packers' consent decree.

Read out of context, this language suggests a "hardening" of the traditional flexible standard for modification of consent decrees.. But that conclusion does not follow when the standard is read in context.. The *Swift* opinion pointedly distinguished the facts of that case from one in which genuine changes required modification of a consent decree, stating:

> "The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.... The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." 286 U.S., at 114–115, 52 S.Ct., at 462.

Our decisions since *Swift* reinforce the conclusion that the "grievous wrong" language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees. *Railway Employes* emphasized the need for flexibility in administering consent decrees, stating: "There is ... no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."

There is thus little basis for concluding that Rule 60(b) misread the *Swift* opinion and intended that modifications of consent decrees in all cases were to be governed by the standard actually applied in *Swift.* That Rule, in providing that, on such terms as are just, a party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application, permits a less stringent, more flexible standard.

The upsurge in institutional reform litigation since *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased. See, *e.g., Philadelphia Welfare Rights Organization v. Shapp,* 602 F.2d 1114, 1119–1121 (CA3 1979), cert. denied, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 660 (1980),

in which modification of a consent decree was allowed in light of changes in circumstances that were beyond the defendants' control and were not contemplated by the court or the parties when the decree was entered.

The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation. The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions."

Petitioner Rufo urges that these factors are present in the cases before us and support modification of the decree. He asserts that modification would actually improve conditions for some pretrial detainees, who now cannot be housed in the Suffolk County Jail and therefore are transferred to other facilities, farther from family members and legal counsel. In these transfer facilities, petitioners assert that detainees may be double celled under less desirable conditions than those that would exist if double celling were allowed at the new Suffolk County Jail. Petitioner Rufo also contends that the public interest is implicated here because crowding at the new facility has necessitated the release of some pretrial detainees and the transfer of others to halfway houses, from which many escape.

For the District Court, these points were insufficient reason to modify under Rule 60(b)(5) because its "authority [was] limited by the established legal requirements for modification...." 734 F.Supp., at 566. The District Court, as noted above, also held that the suggested modification would not be proper even under the more flexible standard that is followed in some other Circuits. None of the changed circumstances warranted modification because it would violate one of the primary purposes of the decree, which was to provide for "[a] separate cell for each detainee [which] has always been an important element of the relief sought in this litigation—perhaps even the most important element." *Id.*, at 565. For reasons appearing later in this opinion, this was not an adequate basis for denying the requested modification. The District Court also held that Rule 60(b)(6) provided no more basis for relief. The District Court, and the Court of Appeals as well, failed to recognize that such rigidity is neither required by *Swift* nor appropriate in the context of institutional reform litigation.

It is urged that any rule other than the *Swift* "grievous wrong" standard would deter parties to litigation such as this from negotiating settlements and hence destroy the utility of consent decrees. Obviously that would not be the case insofar as the state or local government officials are concerned. As for the plaintiffs in such cases, they know that if they litigate to conclusion and win, the resulting judgment or decree will give them what is constitutionally adequate at that time but perhaps less than they hoped for. They also know that the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b). Whether or not they bargain for more than what they might get after trial, they will be in no worse position if they settle and have the consent decree entered. At least they will avoid further litigation and perhaps will negotiate a decree providing more than what would have been ordered without the local government's consent. And, of course, if they litigate, they may lose.

III

Although we hold that a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that a modification will be

warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.

A

A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law.

1

Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous. Such a modification was approved by the District Court in this litigation in 1985 when it became apparent that plans for the new jail did not provide sufficient cell space. *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., Apr. 11, 1985), App. 110. Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles, *New York State Assn. for Retarded Children, Inc. v. Carey,* 706 F.2d, at 969 (modification allowed where State could not find appropriate housing facilities for transfer patients); *Philadelphia Welfare Rights Organization v. Shapp,* 602 F.2d, at 1120–1121 (modification allowed where State could not find sufficient clients to meet decree targets); or when enforcement of the decree without modification would be detrimental to the public interest, *Duran v. Elrod,* 760 F.2d 756, 759–761 (CA7 1985) (modification allowed to avoid pretrial release of accused violent felons).

Respondents urge that modification should be allowed only when a change in facts is both "unforeseen and unforeseeable." Brief for Respondents 35. Such a standard would provide even less flexibility than the exacting *Swift* test; we decline to adopt it. Litigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree.

Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.. If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Accordingly, on remand the District Court should consider whether the upsurge in the Suffolk County inmate population was foreseen by petitioners. The District Court touched on this issue in April 1990, when, in the course of denying the modification requested in this litigation, the court stated that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen. It has been an ongoing problem during the course of this litigation, before and after entry of the consent decree." 734 F.Supp., at 564. However, the architectural program incorporated in the decree in 1979 specifically set forth projections that the jail population would decrease in subsequent years. Significantly, when the District Court modified the consent decree in 1985, the court found that the "modifications are necessary to meet the *unanticipated increase* in jail population and the delay in completing the jail." *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G

(Mass., Apr. 11, 1985), App. 110 (emphasis added). Petitioners assert that it was only in July, 1988, 10 months after construction began, that the number of pretrial detainees exceeded 400 and began to approach the number of cells in the new jail. Brief for Petitioner in No. 90–954, p. 9.

It strikes us as somewhat strange, if a rapidly increasing jail population had been contemplated, that respondents would have settled for a new jail that would not have been adequate to house pretrial detainees. There is no doubt that the original and modified decree called for a facility with single cells. *Inmates of Suffolk County Jail v. Kearney*, Civ. Action No. 71–162–G (Mass., Apr. 11, 1985), App. 110. It is apparent, however, that the decree itself nowhere expressly orders or reflects an agreement by petitioners to provide jail facilities having single cells sufficient to accommodate all future pretrial detainees, however large the number of such detainees might be. Petitioners' agreement and the decree appear to have bound them only to provide the specified number of single cells. If petitioners were to build a second new facility providing double cells that would meet constitutional standards, it is doubtful that they would have violated the consent decree.

Even if the decree is construed as an undertaking by petitioners to provide single cells for pretrial detainees, to relieve petitioners from that promise based on changed conditions does not necessarily violate the basic purpose of the decree. That purpose was to provide a remedy for what had been found, based on a variety of factors, including double celling, to be unconstitutional conditions obtaining in the Charles Street Jail. If modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible. That cannot be the rule. The District Court was thus in error in holding that even under a more flexible standard than its version of *Swift* required, modification of the single cell requirement was necessarily forbidden.

2

A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.

This was the case in *Railway Employes v. Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961). A railroad and its unions were sued for violating the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which banned discrimination against nonunion employees, and the parties entered a consent decree that prohibited such discrimination. Later, the Railway Labor Act was amended to allow union shops, and the union sought a modification of the decree. Although the amendment did not require, but purposely permitted, union shops, this Court held that the union was entitled to the modification because the parties had recognized correctly that what the consent decree prohibited was illegal under the Railway Labor Act as it then read and because a "court must be free to continue to further the objectives of th[e] Act when its provisions are amended."

Petitioner Rapone urges that, without more, our 1979 decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447, was a change in law requiring modification of the decree governing construction of the Suffolk County Jail. We disagree. *Bell* made clear what the Court had not before announced: that double celling is not in all cases unconstitutional. But it surely did not cast doubt on the legality of single celling, and petitioners were undoubtedly aware that *Bell* was pending when they signed the decree. Thus, the case must be judged on the basis that it was immaterial to petitioners that double celling might be ruled constitutional, *i.e.*, they preferred even in that event to agree to a decree which called for providing only single cells in the jail to be built.

Neither *Bell* nor the Federal Constitution forbade this course of conduct. Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. But we have no doubt that, to "save themselves the time, expense, and inevitable risk of litigation," petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement. Accordingly, the District Court did not abuse its discretion in entering the agreed-upon decree, which clearly was related to the conditions found to offend the Constitution.

To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. The position urged by petitioners

> "would necessarily imply that the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards.... Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action."

While a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law. For instance, in *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 437–438, 96 S.Ct. 2697, 2705–2706, 49 L.Ed.2d 599 (1976), we held that a modification should have been ordered when the parties had interpreted an ambiguous equitable decree in a manner contrary to the District Court's ultimate interpretation and the District Court's interpretation was contrary to intervening decisional law. And in *Nelson v. Collins*, 659 F.2d 420, 428–429 (1981) (en banc), the Fourth Circuit vacated an equitable order that was based on the assumption that double bunking of prisoners was *per se* unconstitutional.

Thus, if the sheriff and commissioner could establish on remand that the parties to the consent decree believed that single celling of pretrial detainees was mandated by the Constitution, this misunderstanding of the law could form a basis for modification. In this connection, we note again, see *supra*, at 755, that the decree itself recited that it "sets forth a program which is both constitutionally adequate and constitutionally *required.*" (Emphasis added.)

B

Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance. In evaluating a proposed modification, three matters should be clear.

Of course, a modification must not create or perpetuate a constitutional violation. Petitioners contend that double celling inmates at the Suffolk County Jail would be constitutional under *Bell*. Respondents counter that *Bell* is factually distinguishable and that double celling at the new jail would violate the constitutional rights of pretrial detainees. If this is the case—the District Court

did not decide this issue, 734 F.Supp., at 565–566—modification should not be granted.

A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires. The court should not "turn aside to inquire whether some of [the provisions of the decree] upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition." *Swift,* 286 U.S., at 116–117, 52 S.Ct., at 463.

Within these constraints, the public interest and "[c]onsiderations based on the allocation of powers within our federal system," *Dowell, supra,* 498 U.S., at 248, 111 S.Ct., at 637, require that the district court defer to local government administrators, who have the "primary responsibility for elucidating, assessing, and solving" the problems of institutional reform, to resolve the intricacies of implementing a decree modification. *Brown v. Board of Education,* 349 U.S. 294, 299, 75 S.Ct. 753, 755–756, 99 L.Ed. 1083 (1955). See also *Missouri v. Jenkins,* 495 U.S. 33, 50–52, 110 S.Ct. 1651, 1662–1663, 109 L.Ed.2d 31 (1990); *Milliken II,* 433 U.S., at 281, 97 S.Ct., at 2757. Although state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation, a court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree. To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion. The District Court seemed to be of the view that the problems of the fiscal officers of the State were only marginally relevant to the request for modification in this case. 734 F.Supp., at 566. Financial constraints may not be used to justify the creation or perpetuation of constitutional violations, but they are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification.

IV

To conclude, we hold that the *Swift* "grievous wrong" standard does not apply to requests to modify consent decrees stemming from institutional reform litigation. Under the flexible standard we adopt today, a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance. We vacate the decision below and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS took no part in the consideration or decision of these cases.

Justice O'CONNOR, concurring in the judgment. … Portions of the Court's opinion might be read to place new constraints on the District Court's discretion that are, in my view, just as misplaced as the ones with which the District Court fettered itself the first time.

Most significantly, the Court observes that the District Court recognized single celling as " 'the most important element' " of the decree. *Ante,* at 759 (quoting 734 F.Supp., at 565). But the Court decides that "this was not an adequate basis for denying the requested modification." *Ante,* at 759.

This conclusion is unsupported by any authority. Instead, the Court offers its own reasoning: "If modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible. That cannot be the rule." *Ante,* at 762.

This sweeping conclusion strikes me as both logically and legally erroneous. It may be that the modification of one term of a decree does not *always* defeat the purpose of the decree. See *supra,* at 766. But it hardly follows that the modification of a single term can *never* defeat the decree's purpose, especially if that term is "the most important element" of the decree. If, for instance, the District Court finds that the respondents would never have consented to the decree (and a decade of delay in obtaining relief) without a guarantee of single celling, I should think that the court would not abuse its discretion were it to conclude that modification to permit double celling would be inequitable. Similarly, were the court to find that the jail was constructed with small cells on the assumption that each cell would hold but one inmate, I doubt that the District Court would exceed its authority under Rule 60(b)(5) by concluding that it would be inequitable to double cell the respondents. To the extent the Court suggests otherwise, it limits the District Court's discretion in what I think is an unwarranted and ill-advised fashion.

The same is true of the Court's statement that the District Court should "defer to local government administrators ... to resolve the intricacies of implementing a decree modification." *Ante,* at 764. To be sure, the courts should defer to prison administrators in resolving the day-to-day problems in managing a prison; these problems fall within the expertise of prison officials. But I disagree with the notion that courts must defer to prison administrators in resolving whether and how to modify a consent decree. These questions may involve details of prison management, but at bottom they require a determination of what is "equitable" to all concerned. Deference to one of the parties to a lawsuit is usually not the surest path to equity; deference to these particular petitioners, who do not have a model record of compliance with previous court orders in this case, is particularly unlikely to lead to an equitable result. The inmates have as much claim as the prison officials to an understanding of the equities. The District Court should be free to take the views of both sides into account, without being forced to grant more deference to one side than to the other.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

When a district court determines, after a contested trial, that a state institution is guilty of a serious and persistent violation of the Federal Constitution, it typically fashions a remedy that is more intrusive than a simple order directing the defendants to cease and desist from their illegal conduct.

In June 1973, after finding that petitioners' incarceration of pretrial detainees in the Charles Street Jail violated constitutional standards, the District Court appropriately entered an injunction that went "beyond a simple proscription against the precise conduct previously pursued." It required petitioners to discontinue (1) the practice of double celling pretrial detainees after November 30, 1973, and (2) the use of the Charles Street Jail for pretrial detention after June 30, 1976.

Petitioners did not appeal from that injunction. When they found it difficult to comply with the double-celling prohibition, however, they asked the District Court to postpone enforcement of that requirement. The court refused and ordered petitioners to transfer inmates to other institutions. The Court of Appeals affirmed. When petitioners found that they could not comply with the second part of the 1973 injunction, the District Court postponed the closing of the Charles Street Jail, but set another firm date for compliance. While petitioners' appeal from that order was pending, the parties entered into the negotiations that produced the 1979 consent decree. After the Court of Appeals affirmed the District Court's order and set yet another firm date for the closing of the

Charles Street Jail, the parties reached agreement on a plan that was entered by the District Court as a consent decree.

The facility described in the 1979 decree was never constructed. Even before the plan was completed, petitioners recognized that a larger jail was required. In June 1984, the sheriff filed a motion in the District Court for an order permitting double celling in the Charles Street Jail. The motion was denied. The parties then negotiated an agreement providing for a larger new jail and for a modification of the 1979 decree. After they reached agreement, respondents presented a motion to modify, which the District Court granted on April 11, 1985. The court found that modifications were "necessary to meet the unanticipated increase in jail population and the delay in completing the jail as originally contemplated." App. 110. The District Court then ordered that nothing in the 1979 decree should prevent petitioners

> "from increasing the capacity of the new facility if the following conditions are satisfied:
>
> "(a) single-cell occupancy is maintained under the design for the facility;
>
> "(b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program...."

There was no appeal from that modification order. Indeed, although the Boston City Council objected to the modification, it appears to have been the product of an agreement between respondents and petitioners.

In 1990, 19 years after respondents filed suit, the new jail was completed in substantial compliance with the terms of the consent decree, as modified in 1985.

III

It is the terms of the 1979 consent decree, as modified and reaffirmed in 1985, that petitioners now seek to modify. The 1979 decree was negotiated against a background in which certain important propositions had already been settled. First, the litigation had established the existence of a serious constitutional violation. Second, for a period of almost five years after the entry of the 1973 injunction—which was unquestionably valid and which petitioners had waived any right to challenge—petitioners were still violating the Constitution as well as the injunction. See *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d, at 99. Third, although respondents had already prevailed, they were willing to agree to another postponement of the closing of the Charles Street Jail if petitioners submitted, and the court approved, an adequate plan for a new facility.

Obviously any plan would have to satisfy constitutional standards. It was equally obvious that a number of features of the plan, such as the site of the new facility or its particular architectural design, would not be constitutionally mandated. In order to discharge their duty to provide an adequate facility, and also to avoid the risk of stern sanctions for years of noncompliance with an outstanding court order, it would be entirely appropriate for petitioners to propose a remedy that exceeded the bare minimum mandated by the Constitution. Indeed, terms such as "minimum" or "floor" are not particularly helpful in this context. The remedy is constrained by the requirement that it not perpetuate a constitutional violation, and in this sense the Constitution does provide a "floor." Beyond that constraint, however, the remedy's attempt to give expression to the underlying constitutional value does not lend itself to quantitative evaluation. In view of the complexity of the institutions involved and the necessity of affording effective relief, the remedial decree will often contain many, highly detailed commands. It might well be that the failure to fulfill any one

of these specific requirements would not have constituted an independent constitutional violation, nor would the absence of any one element render the decree necessarily ineffective. The duty of the District Court is not to formulate the decree with the fewest provisions, but to consider the various interests involved and, in the sound exercise of its discretion, to fashion the remedy that it believes to be best. Similarly, a consent decree reflects the parties' understanding of the best remedy, and, subject to judicial approval, the parties to a consent decree enjoy at least as broad discretion as the District Court in formulating the remedial decree.

From respondents' point of view, even though they had won their case, they might reasonably be prepared to surrender some of the relief to which they were unquestionably entitled—such as enforcing the deadline on closing the Charles Street Jail—in exchange for other benefits to be included in an appropriate remedy, even if each such benefit might not be constitutionally required. For example, an agreement on an exercise facility, a library, or an adequate place for worship might be approved by the court in a consent decree, even if each individual feature were not essential to the termination of the constitutional violation. In fact, in this action it is apparent that the two overriding purposes that informed both the District Court's interim remedy and respondents' negotiations were the prohibition against double celling and the closing of the old jail. The plan that was ultimately accepted, as well as the terms of the consent decree entered in 1979, were designed to serve these two purposes.

The consent decree incorporated all the details of the agreed upon architectural program. A recital in the decree refers to the program as "both constitutionally adequate and constitutionally required." That recital, of course, does not indicate that either the court or the parties thought that every detail of the settlement—or, indeed, *any* of its specific provisions—was "constitutionally required." An adequate remedy was constitutionally required, and the parties and the court were satisfied that this program was constitutionally adequate. But that is not a basis for assuming that the parties believed that any provision of the decree, including the prohibition against double celling, was constitutionally required.

IV

The motion to modify that ultimately led to our grant of certiorari was filed on July 17, 1989. As I view these cases, the proponents of that motion had the burden of demonstrating that changed conditions between 1985 and 1989 justified a further modification of the consent decree. The changes that occurred between 1979 and 1985 were already reflected in the 1985 modification. Since petitioners acquiesced in that modification, they cannot now be heard to argue that pre–1985 developments—either in the law or in the facts—provide a basis for modifying the 1985 order. It is that order that defined petitioners' obligation to construct and to operate an adequate facility.

Petitioners' reliance on *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), as constituting a relevant change in the law is plainly misplaced. That case was pending in this Court when the consent decree was entered in 1979. It was the authority on which the sheriff relied when he sought permission to double cell in 1984, and, of course, it was well known to all parties when the decree was modified in 1985. It does not qualify as a changed circumstance.

The increase in the average number of pretrial detainees is, of course, a change of fact. Because the size of that increase had not been anticipated in 1979, it was appropriate to modify the decree in 1985. But in 1985, the steady progression in the detainee population surely made it foreseeable that this growth would continue. The District Court's finding that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen," *Inmates of Suffolk County Jail v. Kearney*,

734 F.Supp. 561, 564 (Mass.1990), is amply supported by the record.

Even if the continuing increase in inmate population had not actually been foreseen, it was reasonably foreseeable. Mere foreseeability in the sense that it was an event that "could conceivably arise" during the life of the consent decree, see *ante,* at 760, should not, of course, disqualify an unanticipated development from justifying a modification. But the parties should be charged with notice of those events that reasonably prudent litigants would contemplate when negotiating a settlement. Given the realities of today's society, it is not surprising that the District Court found a continued growth in inmate population to be within petitioners' contemplation.

Other important concerns counsel against modification of this consent decree. Petitioners' history of noncompliance after the 1973 injunction provides an added reason for insisting that they honor their most recent commitments. Petitioners' current claims of fiscal limitation are hardly new. These pleas reflect a continuation of petitioners' previous reluctance to budget funds adequate to avoid the initial constitutional violation or to avoid prolonged noncompliance with the terms of the original decree. The continued claims of financial constraint should not provide support for petitioners' modification requests.

The strong public interest in protecting the finality of court decrees always counsels against modifications. Cf. *Teague v. Lane,* 489 U.S. 288, 308–310, 109 S.Ct. 1060, 1074–1075, 103 L.Ed.2d 334 (1989) (plurality opinion); *Mackey v. United States,* 401 U.S. 667, 682–683, 91 S.Ct. 1160, 1174–1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). In the context of a consent decree, this interest is reinforced by the policy favoring the settlement of protracted litigation. To the extent that litigants are allowed to avoid their solemn commitments, the motivation for particular settlements will be compromised, and the reliability of the entire process will suffer.

It is particularly important to apply a strict standard when considering modification requests that undermine the central purpose of a consent decree. In his opinion in *New York State Assn. for Retarded Children, Inc. v. Carey,* 706 F.2d 956 (CA2 1983), Judge Friendly analyzed the requested modifications in the light of the central purpose "of transferring the population of Willowbrook, whose squalid living conditions this court has already recited, to facilities of more human dimension as quickly as possible." *Id.,* at 967. The changes that were approved were found to be consistent with that central purpose. In this action, the entire history of the litigation demonstrates that the prohibition against double celling was a central purpose of the relief ordered by the District Court in 1973, of the bargain negotiated in 1979 and embodied in the original consent decree, and of the order entered in 1985 that petitioners now seek to modify. Moreover, as the District Court found, during the history of the litigation petitioners have been able to resort to various measures such as "transfers to state prisons, bail reviews by the Superior Court, and a pretrial controlled release program" to respond to the overcrowding problem. 734 F.Supp., at 565. The fact that double celling affords petitioners the easiest and least expensive method of responding to a reasonably foreseeable problem is not an adequate justification for compromising a central purpose of the decree. In this regard, the Court misses the point in its observation that "[i]f modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible." *Ante,* at 762. It is certainly true that modification of a consent decree would be impossible if the modification of *any* one term were deemed to defeat the purpose of the decree. However, to recognize that *some* terms are so critical that their modification would thwart the central purpose of the decree does not render the decree immutable, but rather assures that a modification will frustrate neither the legitimate expectations of the parties nor the core remedial

goals of the decree.

After a judicial finding of constitutional violation, petitioners were ordered in 1973 to place pretrial detainees in single cells. In return for certain benefits, petitioners committed themselves in 1979 to continued compliance with the single-celling requirement. They reaffirmed this promise in 1985. It was clearly not an abuse of discretion for the District Court to require petitioners to honor this commitment.

I would affirm the judgment of the Court of Appeals.

Horne v. Flores, 557 U.S. 433 (2009)

From the Court's Syllabus:

> A group of English Language–Learner (ELL) students and their parents (plaintiffs) filed a class action, alleging that Arizona, its State Board of Education, and the Superintendent of Public Instruction (defendants) were providing inadequate ELL instruction in the Nogales Unified School District (Nogales), in violation of the Equal Educational Opportunities Act of 1974 (EEOA), which requires States to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f). In 2000, the Federal District Court entered a declaratory judgment, finding an EEOA violation in Nogales because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual costs of ELL instruction in Nogales. The District Court subsequently extended relief statewide and, in the years following, entered a series of additional orders and injunctions. The defendants did not appeal any of the District Court's orders. In 2006, the state legislature passed HB 2064, which, among other things, increased ELL incremental funding. The incremental funding increase required District Court approval, and the Governor asked the state attorney general to move for accelerated consideration of the bill. The State Board of Education, which joined the Governor in opposing HB 2064, the State, and the plaintiffs are respondents here. The Speaker of the State House of Representatives and the President of the State Senate (Legislators) intervened and, with the superintendent (collectively, petitioners), moved to purge the contempt order in light of HB 2064. In the alternative, they sought relief under Federal Rule of Civil Procedure 60(b)(5). The District Court denied their motion to purge the contempt order and declined to address the Rule 60(b)(5) claim. The Court of Appeals vacated and remanded for an evidentiary hearing on whether changed circumstances warranted Rule 60(b)(5). On remand, the District Court denied the Rule 60(b)(5) motion, holding that HB 2064 had not created an adequate funding system. Affirming, the Court of Appeals concluded that Nogales had not made sufficient progress in its ELL programming to warrant relief.

As Justice Alito, writing for the majority, summarized, "the District Court and the Court of Appeals misunderstood both the obligation that the EEOA imposes on States and the nature of the inquiry that is required when parties such as petitioners seek relief under Rule 60(b)(5) on the ground that enforcement of a judgment is "no longer equitable." Both of the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction instead of fairly considering the broader question whether, as a result of important changes during the intervening years, the State was fulfilling its obligation under the EEOA by other means. The question at issue in these cases is not whether Arizona must take "appropriate action" to overcome the language barriers that impede ELL students. Of course it must. But petitioners argue that Arizona is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances. Rule 60(b)(5) provides the vehicle for petitioners to bring such an argument. …"

He wrote at length about the majority's concerns as to consent decrees in "institutional reform cases":

> Rule 60(b)(5) serves a particularly important function in what we have termed "institutional reform litigation." *Rufo, supra,* at 380, 112 S.Ct. 748. For one thing, injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing

law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment.

Second, institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education. See *Missouri v. Jenkins,* 515 U.S. 70, 99, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution".

Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs. See *Jenkins, supra,* at 131, 115 S.Ct. 2038 (THOMAS, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds").

Finally, the dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. See, *e.g.*, McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal Forum 295, 317 (noting that government officials may try to use consent decrees to "block ordinary avenues of political change" or to "sidestep political constraints"); Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1294–1295 ("Nominal defendants [in institutional reform cases] are sometimes happy to be sued and happier still to lose"); R. Sandler & D. Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 170 (2003) ("Government officials, who always operate under fiscal and political constraints, 'frequently win by losing' " in institutional reform litigation).

Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins,* 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004). See also *Northwest Environment Advocates v. EPA,* 340 F.3d 853, 855 (C.A.9 2003) (Kleinfeld, J., dissenting) (noting that consent decrees present a risk of collusion between advocacy groups and executive officials who want to bind the hands of future policymakers); *Ragsdale v. Turnock,* 941 F.2d 501, 517 (C.A.7 1991) (Flaum, J., concurring in part and dissenting in part) ("[I]t is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches"); Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal Forum 19, 40 ("Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination").

States and localities "depen[d] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." Where "state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents," they are constrained in their ability to fulfill

their duties as democratically-elected officials. American Legislative Exchange Council, Resolution on the Federal Consent Decree Fairness Act (2006), App. to Brief for American Legislative Exchange Council et al. as *Amici Curiae* 1a–4a.

It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief. But in recognition of the features of institutional reform decrees, we have held that courts must take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees. *Rufo,* 502 U.S., at 381. A flexible approach allows courts to ensure that "responsibility for discharging the State's obligations is returned promptly to the State and its officials" when the circumstances warrant. In applying this flexible approach, courts must remain attentive to the fact that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." *Milliken* v. *Bradley,* 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). "If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers."

For these reasons, a critical question in this Rule 60(b)(5) inquiry is whether the objective of the District Court's 2000 declaratory judgment order—*i.e.,* satisfaction of the EEOA's "appropriate action" standard—has been achieved. If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper. We note that the EEOA itself limits court-ordered remedies to those that "are *essential* to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added).

Dissenting, Justice Breyer observed:

…[T]he Court's discussion of standards raises a far more serious problem. In addition to the standards I have discussed, *supra,* at 2615 – 2616, our precedents recognize *other,* here outcome-determinative, hornbook principles that apply when a court evaluates a Rule 60(b)(5) motion. The Court omits some of them. It mentions but fails to apply others. As a result, I am uncertain, and perhaps others will be uncertain, whether the Court has set forth a correct and workable method for analyzing a Rule 60(b)(5) motion.

First, a basic principle of law that the Court does not mention—a principle applicable in this case as in others—is that, in the absence of special circumstances (*e.g.,* plain error), a judge need not consider issues or factors that the parties themselves do not raise. That principle of law is longstanding, it is reflected in Blackstone, and it perhaps comes from yet an earlier age. 3 Commentaries on the Laws of England 455 (1768) ("[I]t is a practice unknown to our law" when examining the decree of an inferior court, "to examine the justice of the ... decree by evidence that was never produced below"); *Clements v. Macheboeuf,* 92 U.S. 418, 425, 23 L.Ed. 504 (1876) ("Matters not assigned for error will not be examined"); see also *Savage v. United States,* 92 U.S. 382, 388, 23 L.Ed. 660 (1876) (where a party with the "burden ... to establish" a "charge ... fails to introduce any ... evidence to support it, the presumption is that the charge is without any foundation"); *McCoy v. Massachusetts Inst. of Technology,* 950 F.2d 13, 22 (C.A.1 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal" for "[o]verburdened trial judges cannot be expected to be mind readers"). As we have recognized, it would be difficult to operate an adversary system of justice without applying such a principle. See *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996

(1927). But the majority repeatedly considers precisely such claims. See, *e.g., ante,* at 2602 – 2604 (considering significant matters not raised below); *ante,* at 2606 – 2607 (same).

Second, a hornbook Rule 60(b)(5) principle, which the Court mentions, *ante,* at 2593, is that the party seeking relief from a judgment or order "*bears the burden* of establishing that a significant change in circumstances warrants" that relief. *Rufo,* 502 U.S., at 383, 112 S.Ct. 748 (emphasis added); cf. *Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) (party moving for relief from judgment must make a "sufficient showing" of change in circumstances). But the Court does not apply that principle. See, *e.g., ante,* at 2604 – 2605, and 2606 n. 22 (holding that movants potentially *win* because of *failure* of record to show that English-learning problems do *not* stem from causes other than funding); see also *ante,* at 2601 – 2603 (criticizing lower courts for failing to consider argument not made).

Third, the Court ignores the well-established distinction between a Rule 60(b)(5) request to *modify* an order and a request to set an unsatisfied judgment entirely aside—a distinction that this Court has previously emphasized. Cf. *Rufo, supra,* at 389, n. 12, 112 S.Ct. 748 (emphasizing that "we do not have before us the question whether the entire decree should be vacated"). Courts normally do the latter only if the "party" seeking "to have" the "decree set aside entirely" shows "that the decree has served its purpose, and there is no longer any need for the injunction." 12 J. Moore et al., Moore's Federal Practice § 60.47[2][c] (3d ed.2009) (hereinafter Moore). Instead of applying the distinction, the majority says that the Court of Appeals "strayed" when it referred to situations in which changes justified setting an unsatisfied judgment entirely aside as " 'likely rare.' " *Ante,* at 2595.

Fourth, the Court says nothing about the well-established principle that a party moving under Rule 60(b)(5) for relief that amounts to having a "decree set aside entirely" must show *both* (1) that the decree's objects have been "attained," *Frew,* 540 U.S., at 442, 124 S.Ct. 899, *and* (2) that it is unlikely, in the absence of the decree, that the unlawful acts it prohibited will again occur. This Court so held in *Dowell,* a case in which state defendants sought relief from a school desegregation decree on the ground that the district was presently operating in compliance with the Equal Protection Clause. The Court agreed with the defendants that "a finding by the District Court that the Oklahoma City School District was being operated in compliance with ... the Equal Protection Clause" was indeed relevant to the question whether relief was appropriate. 498 U.S., at 247, 111 S.Ct. 630. But the Court added that, to show entitlement to relief, the defendants must *also* show that "it was unlikely that the [school board] would return to its former ways." *Ibid.* Only then would the "purposes of the desegregation litigation ha[ve] been fully achieved." *Ibid.* The principle, as applicable here, simply underscores petitioners' failure to show that the "changes" to which they pointed were sufficient to warrant entirely setting aside the original court judgment.

Fifth, the majority mentions, but fails to apply, the basic Rule 60(b)(5) principle that a party cannot dispute the legal conclusions of the judgment from which relief is sought. A party cannot use a Rule 60(b)(5) motion as a substitute for an appeal, say, by attacking the legal reasoning underlying the original judgment or by trying to show that the facts, as they were originally, did not then justify the order's issuance. *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 263, n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978); *United States v. Swift & Co.,* 286 U.S. 106, 119, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (party cannot claim that injunction could not lawfully have been applied "to the conditions that existed at its making"). Nor can a party require a court to retrace old legal ground, say, by re-making or rejustifying its original "constitutional decision every time an effort [is] made to enforce or modify" an order. *Rufo, supra,* at 389–390, 112 S.Ct. 748 (internal

quotation marks omitted); see also *Frew, supra,* at 438, 124 S.Ct. 899 (rejecting argument that federal court lacks power to enforce an order "unless the court first identifies, at the enforcement stage, a violation of federal law").

Sixth, the Court mentions, but fails to apply, the well-settled legal principle that appellate courts, including this Court, review district court denials of Rule 60(b) motions (of the kind before us) for abuse of discretion. A reviewing court must not substitute its judgment for that of the district court. Particularly where, as here, entitlement to relief depends heavily upon fact-related determinations, the power to review the district court's decision "ought seldom to be called into action," namely only in the rare instance where the Rule 60(b) standard "appears to have been misapprehended or grossly misapplied." The Court's bare assertion that a court abuses its discretion when it fails to order warranted relief, fails to account for the deference due to the District Court's decision.

I have just described Rule 60(b)(5) standards that concern (1) the obligation (or lack of obligation) upon a court to take account of considerations the parties do not raise; (2) burdens of proof; (3) the distinction between setting aside and modifying a judgment; (4) the need to show that a decree's basic objectives have been attained; (5) the importance of not requiring relitigation of previously litigated matters; and (6) abuse of discretion review. Does the Court intend to ignore one or more of these standards or to apply them differently in cases involving what it calls "institutional reform litigation"? …

Second, insofar as the Court goes beyond the technical record-based aspects of this case and applies a new review framework, it risks problems in future cases. The framework it applies is incomplete and lacks clear legal support or explanation. And it will be difficult for lower courts to understand and to apply that framework, particularly if it rests on a distinction between "institutional reform litigation" and other forms of litigation. Does the Court mean to say, for example, that courts must, on their own, go beyond a party's own demands and relitigate an underlying legal violation whenever that party asks for modification of an injunction? How could such a rule work in practice? See *supra,* at 2618 – 2619. Does the Court mean to suggest that there are other special, strict pro-defendant rules that govern review of district court decisions in "institutional reform cases"? What precisely are those rules? And when is a case an "institutional reform" case? After all, as I have tried to show, see *supra,* at 2616 – 2617, the case before us cannot easily be fitted onto the Court's Procrustean "institutional reform" bed.

Third, the Court may mean its opinion to express an attitude, cautioning judges to take care when the enforcement of federal statutes will impose significant financial burdens upon States. An attitude, however, is not a rule of law. Nor does any such attitude point towards vacating the Court of Appeals' opinion here. The record makes clear that the District Court did take care. See *supra,* at 2615. And the Court of Appeals too proceeded with care, producing a detailed opinion that is both true to the record and fair to the lower court and to the parties' submissions as well. I do not see how this Court can now require lower court judges to take yet greater care, to proceed with even greater caution, while at the same time expecting those courts to enforce the statute as Congress intended.

42 U.S.C.A. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

(R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330; Pub.L. 102-166, Title I, §§ 103, 113(a), Nov. 21, 1991, 105 Stat. 1074, 1079; Pub.L. 103-141, § 4(a), Nov. 16, 1993, 107 Stat. 1489; Pub.L. 103-322, Title IV, § 40303, Sept. 13, 1994, 108 Stat. 1942; Pub.L. 104-317, Title III, § 309(b), Oct. 19, 1996, 110 Stat. 3853; Pub.L. 106-274, § 4(d), Sept. 22, 2000, 114 Stat. 804.)

The Attorneys Fees Provision of the Federal FOIA Statute, 5 USC § 552(a)(4)(E)(i)

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--
(I) a judicial order, or an enforceable written agreement or consent decree; or
(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

9.4 Attorney Fees

Updated 2013 by Richard Rothschild (http://federalpracticemanual.org/acknowledgements#rothschild), 2016 by Jeffrey S. Gutman (http://federalpracticemanual.org/acknowledgements#gutman)

Court-awarded attorney fees are critical in preserving access to the courts for poor people. Some legal aid programs depend on fee awards for their very survival.[1] Without attorney fees, numerous federal laws protecting rights to housing, health care, and other necessities would remain unenforced. The risk of having to pay plaintiffs' attorney fees frequently induces settlement and deters illegal governmental and corporate conduct. Therefore, legal aid advocates need to have a working knowledge of fee issues.

The subject of court-awarded attorney fees has inspired books, even multivolume treatises.[2] This section instead focuses chiefly on the major issues presented in fee litigation: how a plaintiff qualifies as a prevailing party; entitlement to fees; how to calculate a reasonable fee; timing of fee motions and the "*Jeff D.* problem" of defendants forcing plaintiffs' counsel to waive fees as a condition of achieving a settlement on the merits.

9.4.A. Prevailing Party Standard After *Buckhannon*

To qualify for a fee award under most federal fee-shifting statutes, a litigant must be a "prevailing party."[3] Two issues that often arise are (1) how much the litigant has to win and (2) what form the victory must take.[4]

As for the first question, the Supreme Court has held that a plaintiff need not win every single issue or even the "central issue" in order to obtain prevailing party status. A prevailing party is "one who has succeeded on any significant claim affording it some of the relief sought . . . ."[5] Losing on some issues may or may not result in a reduced fee-award amount.[6] It does not affect "the availability of a fee award *vel non*."[7]

In *CRST Van Expedited, Inc. v. EEOC*,[8] the Supreme Court considered the circumstances under which the defendant was deemed to be a prevailing party. In that case, the defendant company prevailed in a Title VII sexual harassment case on grounds that did not reach the merits of the EEOC's claims. The Court held the defendant may nevertheless be a prevailing party "even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."[9] As noted below, the defendant prevails for merits or nonmerits reasons if the plaintiff's "claim was frivolous, unreasonable, or groundless."[10] It would make little sense if Congress' policy of "sparing defendants from the costs of *frivolous* litigation,"[11] depended on the distinction between merits-based and non-merits-based frivolity. Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.

The second question—what form the victory must take for the plaintiff—became problematic after *Buckhannon Board v. West Virginia Department of Health and Human Resources*.[12] In *Buckhannon*, the Supreme Court held that voluntary change in behavior by a defendant caused by a pending lawsuit did not qualify the plaintiff as a prevailing party for fee purposes. After *Buckhannon*, whether a plaintiff who is victorious in a practical sense is a prevailing party for fee purposes depends roughly on how much judicial involvement was involved in the victory.

At one end of the spectrum, winning a judgment obviously qualifies a plaintiff as a prevailing party in most cases. The major qualification is that the judgment must require "some action (or cessation of action) by the defendant."[13] The relief awarded must "materially alter the legal relationship between the parties."[14] An injunction or declaratory judgment typically does so.[15] The judicial declaration alone does not suffice. The judgment may be for nominal relief, although in such cases a court may deny fees altogether to the prevailing plaintiff.[16]

At the other end of the spectrum, under *Buckhannon*, simply filing a lawsuit that prompts defendants to change illegal behavior voluntarily (i.e., acting as a "catalyst") does not qualify the plaintiffs as prevailing parties. The *Buckhannon* Court disapproved the catalyst theory of recovery because it permitted an award "where there is no judicially sanctioned change in the legal relationship of the parties."[17] Even in such situations, however, plaintiffs' counsel may still seek a final judgment if the interests and desires of the clients permit. Defendants are likely to claim that their voluntary changes in policy render the case moot. As the *Buckhannon* Court noted, however, mootness is to be found only when "it is clear that the allegedly wrongful behavior could not reasonably be expected to recur."[18]

Somewhere in the middle of the spectrum are victories achieved either by interlocutory orders or by settlement. Even in pre-*Buckhannon* jurisprudence, winning an interlocutory order that merely kept a suit alive did not transform litigants into prevailing parties.[19] Preliminary injunctions, however, are a different matter because, as with final judgments, they order defendants to act or to refrain from acting. Most lower courts have held that a preliminary injunction based on a finding that the plaintiff is likely to prevail on the merits can qualify the plaintiff as a prevailing party.[20] By contrast, where an injunction merely preserves the status quo without reaching the merits, the plaintiff's victory may lack sufficient "judicial *imprimatur*" to qualify the plaintiff as a prevailing party.[21] While expressly declining to decide whether a preliminary injunction victory can qualify a plaintiff as a prevailing party, the Supreme Court has held that plaintiffs who obtain preliminary injunctions but ultimately lose on the merits are not entitled to fees.[22]

Another difficult question is how much "judicial *imprimatur*" for the change of the legal relationship between the parties is needed for a settlement agreement to qualify a plaintiff as a prevailing party.[23] *Buckhannon* states that a plaintiff who secures a court-ordered consent decree is a prevailing party.[24] However, a litigant who achieves success through a "private settlement" is not.[25] Private settlements lack the "judicial approval and oversight involved in consent decrees" and often cannot be enforced in federal court.[26] In a case where the claim to prevailing party status is based entirely on a settlement agreement, the court must determine whether a particular agreement is closer to a consent decree or to a private settlement.[27] The major factors that the courts have looked at are the extent to which the district court was involved in approval of the settlement terms and whether the district court retains jurisdiction to enforce the agreement.[28]

In response to *Buckhannon*, Congress restored the ability to recover fees as a catalyst in Freedom of Information Act (FOIA) cases. An FOIA complainant has "substantially prevailed" and is eligible for fees if the complainant has obtained relief through "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[29]

9.4.B. Entitlement to Fees Under Major Fee-Shifting Statutes

Once a plaintiff demonstrates that she is a prevailing party, showing entitlement to fees usually is not difficult under most federal fee-shifting statutes.

9.4.B.1. Civil Rights Attorney Fees Awards Act and Other Statutes: Double Standard for Plaintiffs and Defendants

Some statutes, such as the Fair Labor Standards Act, provide that a prevailing plaintiff "shall" be entitled to fees.[30] Other statutes, such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, specify that a court "may" award fees to the prevailing party.[31] Recognizing, however, that statutes such as Section 1988 are private attorney general measures intended to encourage litigation enforcing important rights, the courts employ a double standard. A prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"[32] By contrast, a prevailing defendant may recover an attorney fee only where the suit was "frivolous, unreasonable, or without foundation."[33]

Section 1988, the most widely used fee-shifting statute, authorizes fee awards in actions to enforce civil rights laws, including 42 U.S.C. § 1983 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.C.&vol=42&sec=1983&sec2=undefined&sec3=undefined&sec4=undefined&bUrl=http://federalpracticemanual.org/node/54/edit). A lawsuit that redresses a state or local government violation of rights guaranteed by federal statute is a Section 1983 action within the meaning of Section 1988 and may thus qualify for a fee award.[34] State governments do not enjoy Eleventh Amendment immunity against Section 1988 fee awards.[35]

9.4.B.2. Equal Access to Justice Act—Substantial Justification Standard

The Equal Access to Justice Act (EAJA) presents different entitlement questions. Under the EAJA a party who prevails in litigation against the federal government "shall" be awarded fees "unless the court finds that the position of the United States was substantially justified . . . ."[36] If either the government's prelitigation position or its litigation position lacks substantial justification in both law and fact, the court shall award fees.[37]

While the government is not automatically assessed fees merely because it loses a case, neither does it escape a fee award just because its position is not frivolous. To meet the substantial justification test, the government's position must be "justified to a degree that could satisfy a reasonable person," which requires the government to carry its burden to demonstrate "a reasonable basis both in law and fact."[38]

Although parties often argue that EAJA motions should be controlled by "objective factors" such as the number of times the issue on the merits was litigated previously, the Supreme Court has stated that none of these factors is dispositive in itself.[39] Most district courts decide substantial justification questions on an "I know it when I see it" basis. Once the district court grants or denies a motion, the court of appeals is required to use a deferential abuse-of-discretion standard on appeal.[40]

Another practical hurdle EAJA litigants may have to surmount is the Supreme Court's decision in *Astrue v. Ratliff* that attorney fees belong to the litigant rather than counsel and therefore are subject to offsets when the prevailing plaintiff owes money to the federal government.[41] When there is no preexisting debt, however, courts generally have honored retainer agreements assigning the right to plaintiff's counsel to collect attorney fees.[42]

9.4.C. Calculation of Reasonable Fees: The Lodestar Calculation

Under the leading case of *Hensley v. Eckerhart*, the amount of a statutory fee award is determined by the lodestar method: "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[43]

9.4.C.1. Reasonable Number of Hours

What constitutes "hours reasonably expended" is the most frequently debated question in fee litigation.

9.4.C.1.a. Documentation Requirements

Courts and opposing counsel examine whether the hours are well documented. Some courts permit attorneys to reconstruct hours.[44] However, inadequate documentation may result in a reduced fee award.[45] Attorneys, paralegals, and law clerks should begin keeping contemporaneous time records as soon as they realize that a matter may become a case, erring on the side of overinclusiveness. They should record the date, the time spent to complete a task broken down into six-minute increments, and, most important, a sufficiently detailed description of what was done. As one court stated, records should give "enough information as to what hours were devoted to various activities and by whom for the district court to determine if the claimed fees are reasonable."[46] For example, "telephone call" or "research" are inadequate entries, but a court will approve "telephone call with Smith re failure to produce administrative record" or "research re summary judgment motion."[47] Ideally, there should be a separate entry for each telephone call, research project, or other activity. Bundling several activities into one entry, which is known as block billing, can be costly. One circuit court has approved a 20% reduction in compensation for the block-billed hours.[48] Block-billing makes it difficult for courts to assess the number and reasonableness of the hours billed for each task.

9.4.C.1.b. Overall Billing Judgment Decisions

Hensley states that,"[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . ."[49] However, attorneys seeking court-awarded fees are expected to exercise voluntary "billing judgment," excluding from a fee request "hours that are excessive, redundant, or otherwise unnecessary . . . ."[50] In lengthy, multi-counsel litigation, where justifying every time entry or use of personnel would be difficult, some plaintiffs' attorneys propose a voluntary across-the-board billing judgment reduction, which courts often appreciate.[51] In other instances, where particular recorded activity seems vulnerable, plaintiffs' counsel should consider making discrete reductions.

Where counsel has exercised appropriate billing judgment, district courts do not have unlimited discretion to reduce fees. At least one Court of Appeals has held that while the district court "can impose a small reduction, no greater than 10 percent-a 'haircut'-based on its exercise of discretion and without a more specific explanation," greater reductions require clear explanations.[52]

9.4.C.1.c. Compensable Phases of Litigation

A court may award fees for work on all phases of a lawsuit from prelitigation work,[53] through postjudgment monitoring,[54] including time spent on the fee issue itself.[55] There are some limits, however, on awards for prelitigation services. Time spent "years before the complaint was filed" is unlikely to be compensated.[56] Time spent in administrative proceedings must be "both useful and of a type ordinarily necessary to advance the . . . litigation . . . ."[57] When a plaintiff can make that showing, however, a court may award fees for administrative advocacy even when that advocacy was directed at third parties.[58]

9.4.C.1.d. Compensable Activities

Space does not permit a discussion of which litigation activities are compensable and which are not. When a fee opponent challenges a particular activity, such as attorney travel time, a good place to start researching is one of the fee treatises.[59]

Perhaps the most frequently occurring challenge is to time spent by co-counsel communicating with each other. The Supreme Court has held that district courts have discretion to include conferencing time in a fee award.[60] No court, to our knowledge, has denied compensation altogether for conferences.[61]

A subsidiary issue in some cases is the number of hours spent on counsel communications. Plaintiffs may need to demonstrate to a district court, through copies of agendas or through lead counsel's declarations, why the number of meetings held was necessary and how the meetings actually contributed to the efficiency of the litigation. When counsel do so, some courts award fully compensatory fees even when large numbers of conferencing hours are at issue.[62]

9.4.C.1.e. Compensation for Less than Complete Success

Fee opponents often seek reductions based on the argument that the plaintiffs were only partly successful. Plaintiffs rarely win all conceivable relief while prevailing along the way at every stage on all legal theories advanced. Courts do not, however, require that level of success to award fully compensatory fees.

Less than Complete Relief. Frequently plaintiffs win some, but not all, of the equitable relief prayed for, or relatively small amounts of money in damage cases. In neither event is a reduction in fees necessarily warranted. The *Hensley* Court deemed it insignificant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.[63] Lawsuits seeking only damages present different issues. The Supreme Court in *Farrar v. Hobby* held that if a plaintiff wins only nominal damages, a court "usually" denies fees altogether.[64] Even in nominal damage cases, however, as suggested by Justice O'Connor's concurring opinion, a court may award higher fees. Whether it does depends on factors such as the difference between the damage amounts sought and awarded, the significance of the legal issue on which the plaintiff prevailed, and whether the litigation vindicated a public purpose.[65] Several circuit courts have adopted Justice O'Connor's analysis as the rule for nominal-damages cases.[66]

The Court has rejected limiting the amount of fees in a civil rights damages suit to the same percentage that a personal injury lawyer would receive and affirmed a fee award that was nearly eight times the damages recovery.[67] Limiting fees to a percentage of the damages recovery would be inconsistent with the purpose of Section 1988, which "was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases."[68]

Unsuccessful Proceedings. A prevailing plaintiff need not prevail at every stage in a suit to receive fully compensatory fees. As the Ninth Circuit recognized in refusing to reduce fees for time spent unsuccessfully defending against a writ of certiorari: "Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war."[69] Relying on *Hensley*, the Ninth Circuit analogized unsuccessful claims to unsuccessful proceedings where the plaintiff ultimately prevailed.[70]

Unsuccessful Issues. Neither does a plaintiff need to win every issue raised in the complaint. Rather, fees for time spent litigating an unsuccessful claim are denied only where that claim "is distinct in all respects from . . . successful claims . . . ."[71] By contrast, where "a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."[72] Claims are "related" under this analysis when they arise from the same facts or related legal theories.[73]

9.4.C.2. Reasonable Hourly Rates

In *Blum v. Stenson* the Supreme Court held that Section 1988 fees awarded to legal aid programs that do not charge their clients fees should be calculated at rates comparable to those charged by private attorneys in the community with comparable experience.[74] The Court rejected as inconsistent with the legislative history of Section 1988 the argument that fees should be limited to the internal costs of the relatively low salaries paid by legal aid programs.

9.4.C.2.a. Market Rates and How to Prove Them

The *Blum* Court noted Congress' direction that "'the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . .'"[75] The fee applicant has the burden of proving relevant market rates through evidence "in addition to the attorney's own affidavits . . . ."[76] This evidence often includes:

- declarations from attorneys in a range of private law firms in the relevant community reporting hourly rates charged by those firms for attorneys with the same law school graduation date as the fee applicant;[77]
- excerpts from hourly rate surveys;[78]
- fee award orders specifying past hourly rates awarded for the work of attorneys in the case; and
- other fee award orders in the jurisdiction stating hourly rates for attorneys of comparable experience.

9.4.C.2.b. Frequently Occurring Hourly Rate Issues

Five frequently recurring issues concerning reasonable hourly rates follow:

First, the parties may disagree on which city's prevailing rates apply when plaintiff's counsel practices outside the forum jurisdiction. While this issue can cut both ways, it appears to occur most frequently when an out-of-town big-city lawyer wins in a jurisdiction where prevailing rates are relatively low. Generally the forum community's rates are applicable unless the plaintiff can show that "local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.'"[79] A declaration from the director of the legal services program serving the forum community sometimes can help prove this point.

Second, in suits lasting many years, the defendants may argue that compensation must be limited to "historical rates": the market rates prevailing for each of the years the suit was litigated. The Supreme Court has held, however, that "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of [Section 1988]."[80] Thus, in multiyear litigation against a defendant other than the federal government, a court should either award current rates for the entire case—the easiest solution—or award historical rates augmented by a multiplier to compensate for delay in payment.[81]

Third, if the defendants are represented by law firms charging relatively low hourly rates, they may argue that plaintiffs' counsel should be limited to those same rates. Noting that firms representing large institutional defendants such as governments and insurance companies charge low rates to keep repeat business, the courts have rejected these arguments. These firms are "not in the same legal market as private plaintiff's attorneys who litigate civil rights cases."[82]

Fourth, defendants often seek reduction in hourly rates or an overall fee reduction by contending that too much of the work on behalf of the plaintiffs was done by experienced attorneys at the high end of the hourly rate scale. Fee opponents often argue that plaintiffs' counsel should not be awarded "big firm rates" because a large firm would have litigated the case differently, assigning most of the work to associates. Some courts have accepted this argument.[83] Most have rejected it for two reasons. First, small firms and legal aid programs do not have the same luxury as do big firms in choosing to throw armies of associates into the fray.[84] More important, the reason experienced attorneys command higher hourly rates, the courts have realized, is that they are often much more efficient: "Presumably, the skill and experience of the partners places them further along the learning curve and enhances their ability to operate efficiently so that the higher partner rate is likely to be offset, at least in part, by a reduction in the number of hours multiplying that rate."[85]

Fifth, defendants may argue that compensation for the work of paralegals and law clerks should be limited to the amounts that plaintiffs' counsel paid them rather than market rates. The Supreme Court, however, has held that courts should compensate paralegal and law clerk time at market rates if the prevailing practice in the relevant community was to bill that time separately.[86]

9.4.C.2.c. Equal Access to Justice Act Hourly Rate Issues—Statutory Cap and Exceptions

The Equal Access to Justice Act (EAJA) presents an entirely different framework for computing hourly rates. Under the EAJA attorney fees are limited to $125 per hour, subject to certain exceptions.[87]

Inflation Adjustment. Hourly rates may be adjusted to account for increases in the cost of living since March 1996, when Congress set the EAJA hourly rate limit at $125.[88] Although an inflation increase is not automatic, in practice most courts award it, usually unopposed. The adjusted hourly rate equals $125 per hour increased by the percentage increase in the consumer price index for urban consumers (CPI-U).[89] Unlike with other fee statutes, courts must use historical rather than current rates in awarding EAJA fees because of sovereign immunity concerns.[90] Thus, in multiyear litigation the rate for each year is $125 increased by the percentage CPI-U hike from March 1996 through that year.[91]

Market Rates for Special Expertise and in Other Situations. An EAJA fee applicant may be awarded higher market rates if "the court determines that . . . a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."[92] This requires an extensive showing that (1) the prevailing attorneys possessed specialized expertise; (2) the expertise was needed in the litigation; and (3) the skills needed could not have been obtained at the normal EAJA rates.[93]

As for the first factor, the Supreme Court held that possessing exceptional litigation skills is not good enough. The prevailing attorney must have "distinctive knowledge or specialized skill . . . ."[94] The circuit courts have taken different approaches in construing the *Underwood* requirements. The First, Seventh, Ninth, and Eleventh Circuits have interpreted *Underwood* to allow an enhancement in situations where the attorneys had specialized expertise in a particular area of law.[95] By contrast, the D.C., Fourth, and Fifth Circuits have construed *Underwood* quite narrowly.[96] Most other circuit courts have not squarely addressed this issue.

Even when the prevailing attorney possesses specialized expertise, the attorney must make a strong factual showing that the case could not have been brought by a smart generalist. Lead counsel should demonstrate to the court how the suit could only have been litigated by attorneys with existing contacts in the field or knowledge of hard-to-access rules and authorities. Plaintiffs also need to submit a declaration from a knowledgeable attorney showing the absence of other qualified counsel to litigate such a case.

In addition to authorizing fees generally against the government when no substantial justification can be shown for the government's position, the EAJA subjects the federal government to fees "to the extent that any other party would be liable under the common law or under the terms of any statute which specially provides for such an award."[97] Under this provision, market rates are awarded under equitable fee doctrines such as when the government acts in bad faith, and under statutes other than the EAJA that both apply to the federal government and have fee-shifting provisions.[98]

9.4.C.3. Multipliers

Earlier Supreme Court cases such as *Hensley* contemplated that the lodestar could be augmented by a multiplier in appropriate circumstances.[99] Later cases, however, rendered the multiplier rare in federal court. Most prominently, the Court in *City of Burlington v. Dague* held that courts may not award contingency multipliers to account for either the exceptional riskiness of a particular case or the riskiness of certain kinds of litigation.[100] Previously, the Court had discouraged the use of multipliers based on such factors as the novelty and difficulty of the litigation or the exceptional quality of the representation; the Court reasoned that these factors are generally subsumed within the lodestar.[101] Post-*Dague,* two courts have approved multipliers based on the extreme unpopularity of a case.[102] Another court ordered a multiplier for exceptional results after a 36-year landmark desegregation lawsuit.[103] In addition, where a federal court exercises supplemental jurisdiction over state claims and state law permits multipliers, federal courts are free to augment the lodestar.[104]

In *Perdue v. Kenny A.*,[105] the Court held that there is a "strong presumption" that the lodestar calculation is reasonable, but that there may be a "few" circumstances in which superior attorney performance is not represented in the lodestar calculation. In such cases, the lodestar amount would not have been sufficient to attract competent counsel initially. The Court identified three bases for a possible enhancement: that the hourly rate does not adequately measure the attorney's true market value, such as when the rate is keyed only to the number of years out of law school, 2) the performance involves an "extraordinary" outlay of expenses and litigation is protracted and 3) the performance involves an unanticipated delay in the recovery of fees.[106] Any enhancement must be objective, reasonable and subject to meaningful appellate review.

While *Perdue* left the door slightly ajar for future multipliers, the opinion and its predecessors suggest a more practical approach for fee applicants. The *Perdue* Court recognized that "'brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience.'"[107] But "'in those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.'"[108] Counsel who have performed exceptionally can use this reasoning to justify seeking higher hourly rates than would normally be warranted by their number of years of experience.

9.4.D. Timing of Fee Petitions

Neither Section 1988 nor most federal fee-shifting statutes specify when the fee motion must be filed.

9.4.D.1. Civil Rights Act and Most Other Cases—Governed by Rule 54 and Local Rules

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure (http://www.jureeka.net/Jureeka/US.aspx?doc=FRCP&rule=undefined&bUrl=http://federalpracticemanual.org/node/54/edit)requires fee motions to be filed no later than 14 days after entry of judgment "[u]nless otherwise provided by statute or order of the court . . . ." For purposes of this rule, a local rule setting a different fee motion deadline is an "order of the court," and the local rule governs.[109]

Some local rules, however, also impose short deadlines for fee motions, which may require counsel to seek an order postponing the deadline or to postpone having a judgment entered until fee papers are prepared. Rule 54 requires only that the fee applicant state the basis for an award and either the amount or "fair estimate" of the amount; thus, the rule appears to permit counsel to file placeholder motions with details to be filled in later.

9.4.D.2. Equal Access to Justice Act Timing Issues

The Equal Access to Justice Act (EAJA) requires fee motions to be filed within 30 days of "final judgment."[110] This in turn is defined as "a judgment that is final and not appealable, and includes an order of settlement."[111]

Fee petitions may also be filed pending appeal; the EAJA merely precludes fee petitions after the 30-day limit.[112] Fee claimants and the government argued for years over what starts the EAJA clock running in Social Security Act cases until the Supreme Court decided the issue in *Shalala v. Schaeffer*.[113] A plaintiff is a prevailing party, the Court held, when she obtains a "sentence four remand" under the Social Security Act: "a judgment modifying or reversing the decision of the Secretary . . . ."[114] By contrast, a "sentence six remand," which merely contemplates that new evidence will be introduced is not a judgment for attorney-fee purposes.[115] Thus, a sentence four remand has the potential to start the clock running for an EAJA fee motion.

The *Schaeffer* Court also held, however, that a sentence four remand order merely triggers the duty to enter judgment and is not a judgment itself. For the 30-day clock to begin running, the district court, pursuant to Rule 58, must enter a judgment "on a separate document."[116]

9.4.E. The "*Jeff D.*" Problem–Forced Fee Waivers and Lump Sum Settlement Offers

Ordinarily a legal aid organization agrees to represent the client without charging a fee, except for recovering court-awarded fees. There are two potential problems with defense settlement offers in most cases handled by legal aid attorneys: (1) the offer is conditioned upon waiver of attorney fees or (2) in cases seeking monetary relief, the defendant offers a lump-sum inclusive of all damages and attorney fees and does not identify the amount of the award allocated to fees. Simultaneously negotiating the best settlement terms for the client and an award of fees for the legal work can create a conflict of interest between attorney and client.

The Supreme Court has acknowledged this problem, but has decided that encouraging settlements is a more important policy objective than helping plaintiff's attorneys avoid an ethical challenge. In *Evans v. Jeff. D.*, the Court held that conditioning a settlement offer on the merits on plaintiffs waiving their claim for Section 1988 fees is permissible.[117] *Jeff D.* has made it very difficult to challenge attorney fee waiver settlement offers, but not impossible. At least two courts, relying upon dictum in *Jeff D.*, have held that suits may proceed challenging an alleged wholesale government policy of demanding fee waivers to deny counsel to disfavored classes of litigants.[118]

Because such suits would not be easy to litigate and win, the goal should be to avoid *Jeff D.* offers in the first place. Some private attorneys have done so by including a provision in the client retainer agreement stating the attorney's hourly rate, and specifying that the client owes that amount if the client, against attorney's advice, accepts a settlement offer that precludes a fee recovery.

This is not a viable option for legal aid programs. For legal aid attorneys, the key to minimizing *Jeff D.* problems is appropriate communication with opposing counsel and with clients. Some opposing counsel, who would never think to make a *Jeff D.* offer to a private attorney, might make such an offer to a legal services attorney, seeking to take advantage of the attorney's perceived idealism. Legal services attorneys need to convey to opposing counsel and the entire legal community, through consistent word and action, that of course, in addition to relief for their clients, they expect their programs to be paid no matter what. Consistently conveying this attitude will discourage *Jeff D.* offers. Client communication is also critical. Clients who are educated on the importance of the case and kept well informed throughout the litigation have been known to reject *Jeff D.* offers.

Even when there is no demand for waiver of fees, incorporating fees in a lump-sum settlement offer presents a serious challenge to the plaintiff's attorney. The attorney must negotiate the maximum monetary and non-monetary relief for the client while also trying to recover fees. Because law firms representing indigent civil rights plaintiffs typically limit their requirement for the client to pay attorney fees to what can be recovered from the defendant, there is also an ethical challenge when the lump-sum does not allocate the portion of the award that represents the amount included for the fees of the plaintiff's attorney. Where damages will be sought, the client retainer agreement needs to address specifically the possibility of a lump-sum settlement offer. The agreement needs to specify that the fees will be calculated in a certain way, and that an accounting of the total fees will be shown to the client at the time a settlement offer is made. Even with full disclosure and agreement from the client, negotiating these lump-sum settlement offers is challenging.

Updated 2013 by Richard Rothschild (http://federalpracticemanual.org/acknowledgements#rothschild), 2016 by Jeffrey S. Gutman (http://federalpracticemanual.org/acknowledgements#gutman)

---

1. From 1995 to 2009, annual legislation appropriating funds to the Legal Services Corporation (LSC) prohibited LSC grant recipients from claiming attorney fees in most cases. The appropriation measure for 2010 eliminated the prohibition, and LSC then suspended its corresponding regulation, 45 C.F.R. § 1642.3 (http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+45%2FSubtitle+B%2FChapter+Xvi&oldPath=Title+45%2FSubtitle+B&isCollapsed=true&selectedYearFrom=2010&ycord=2335). The National Legal Aid and Defender Program Enhancement Committee subsequently prepared a useful memorandum setting forth guidance to LSC funded organizations (but useful to any legal aid office) on how to document time, revise retainer and co-counseling agreements and collect attorney fees. *See* the Ohio Legal Services website for more information, www.ohiolegalservices.org (http://www.ohiolegalservices.org/). In addition, programs should seek attorney's fees in cases pending at the time of passage of the appropriations bill. *See* Rochelle Bobroff, *Legal Services Attorney Fees Are Obtainable in Pending Cases* (http://www.povertylaw.org/clearinghouse-review/issues/2010/2010-july-august/bobroff), 44 Clearinghouse Review 157 (July-Aug. 2010).
2. See, e.g., 2 Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation, Statutory Attorney's Fees (4th ed. 2013-2 Supplement).
3. Not all statutes require a recipient of attorney fees to be the prevailing party. Under the National Childhood Vaccine Injury Act of 1986, a court may award attorney fees in connection with an unsuccessful petition for compensation for injuries caused by vaccines if the petition "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought . . ." 42 U.S.C. (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap6A-subchapXIX-part2-subparta-sec300aa-15.pdf)§ 300aa-15 (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap6A-subchapXIX-part2-subparta-sec300aa-15.pdf)(e)(1). In *Sebelius v. Cloer* (http://scholar.google.com/scholar_case?q=133+S.+Ct.+1886&hl=en&as_sdt=400003&case=5490231058864401508&scilh=0), 133 S. Ct. 1886 (2013), the Court held that fees could be awarded under this statute even for an untimely petition brought in good faith. *See Hardt v. Reliance Standard Life Insurance Company* (http://scholar.google.com/scholar_case?q=Hardt+v.+Reliance+Std.+Life+Ins.+Co.&hl=en&as_sdt=400003&case=11497813361210864705&scilh=0), 560 U.S. 242 (2010) (holding that under ERISA provision, 29 U.S.C. § 1132(g)(1) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title29/pdf/USCODE-2009-title29-chap18-subchapI-subtitleB-part5-sec1132.pdf), which allows court to award fees to either party in its discretion, party must demonstrate "some degree of success on the merits" to be awarded fees).
4. For a detailed discussion of these issues, see Gill Deford, *The Imprimatur of (https://sites.google.com/a/povertylaw.org/federal-practice-manual/Home/chapter-9/goog_1668336678)*Buckhannon (https://sites.google.com/a/povertylaw.org/federal-practice-manual/Home/chapter-9/goog_1668336678) *on the Prevailing-Party Inquiry (http://www.povertylaw.org/clearinghouse-review/issues/2008/2008-july-august-issue/deford)*, 42 Clearinghouse Review 122 (July-Aug. 2008).
5. *Texas Teachers Association v. Garland School District* (http://scholar.google.com/scholar?as_q=489+U.S.+782&num=10&as_epq=&as_oq=&as_eq=&as_occt=any&as_sauthors=&as_publication=&as_ylo=&as_yhi=&as_sdt=3&as_sdtf=&as_sdts=14&btnG=Search+Scholar&
489 U.S. 782 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=489&page=782&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 791 (1989).
6. *See* Section 9.4.C.1 (node/54) of this MANUAL.
7. *Texas Teachers Association*, 489 U.S. at 793.
8. 136 S. Ct. 1642 (https://scholar.google.com/scholar_case?q=van+expedited&hl=en&as_sdt=6,43&as_ylo=2016&case=2214445524648138285&scilh=0) (2016).
9. *Id.* at 1651. The Court declined to decide whether the nonmerits grounds of a decision must be preclusive in nature. *Id.* at 1653.
10. *Id.* at 1652 (quoting *Christiansburg Garment Co. v. EEOC* (https://scholar.google.com/scholar_case?case=17214233781367753575&q=van+expedited&hl=en&as_sdt=6,43&as_ylo=2016&scilh=0), 434 U.S. 412, 422 (1978)).
11. *Fox v. Vice* (https://scholar.google.com/scholar_case?q=fox+v+vice&hl=en&as_sdt=6,43&case=4612481658703000905&scilh=0), 563 U.S. 826, 840 (2011).

12. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources* (http://scholar.google.com/scholar_case?case=18016879269718488474&q=532+U.S.+598&hl=en&as_sdt=400003), 532 U.S. 598, 603 (2001).
13. *Hewitt v. Helms (http://scholar.google.com/scholar_case?case=11839869470487121881&q=482+U.S.+755&hl=en&as_sdt=400003)*, 482 U.S. 755 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=482&page=755&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 761 (1987).
14. *Lefemine v. Wideman* (http://scholar.google.com/scholar_case?q=133+S.+Ct.+9&hl=en&as_sdt=400003&case=4742107456975861399&scilh=0), 133 S. Ct. 9, 11 (2012) (per curiam).
15. *Id.*
16. *Farrar v. Hobby (http://scholar.google.com/scholar_case?case=4029288770020466344&q=506+U.S.+103&hl=en&as_sdt=400003)*, 506 U.S. 103 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=506&page=103&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 115 (1992).
17. *Buckhannon*, 532 U.S. at 605.
18. *Id.* at 609 (quoting (http://scholar.google.com/scholar_case?case=5440560917097220943&q=528+U.S.+167&hl=en&as_sdt=400003)*Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Incorporated (http://scholar.google.com/scholar_case?q=528+U.S.+167&hl=en&as_sdt=400003&case=5440560917097220943&scilh=0)*, 528 U.S. 167 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=528&page=167&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 189 (2000)). Mootness is discussed in detail in Chapter 3 (node/18) of this MANUAL.
19. *Hanrahan v. Hampton (http://scholar.google.com/scholar_case?case=6663162207011683080&q=446+U.S.+754&hl=en&as_sdt=400003)*, 446 U.S. 754 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=446&page=754&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1980).
20. *See, e.g.*, *Higher Taste, Incorporated v. City of Tacoma* (http://scholar.google.com/scholar_case?q=717+F.3d+712&hl=en&as_sdt=400003&case=4310479920149108527&scilh=0), 717 F.3d 712, 716 (9th Cir. 2013); *Common Cause/Georgia v. Billups* (http://scholar.google.com/scholar_case?q=554+F.3d+1340&hl=en&as_sdt=400003&case=12174496308777056971&scilh=0), 554 F.3d 1340, 1355-56 (11th Cir. 2009); *People Against Police Violence v. City of Pittsburgh* (http://scholar.google.com/scholar_case?q=520+F.3d+226&hl=en&as_sdt=400003&case=12675496623981351187&scilh=0), 520 F.3d 226, 232-33 (3d Cir. 2008) ("nearly every Court of Appeals to have addressed the issue has held that relief obtained via a preliminary injunction can, under appropriate circumstances, render a party 'prevailing.'"); *Dearmore v. City of Garland* (http://scholar.google.com/scholar_case?q=519+F.3d+517&hl=en&as_sdt=400003&case=13169766913744860608&scilh=0), 519 F.3d 517, 523-24 (5th Cir. 2008); *Preservation Coalition of Erie County v. Federal Transit Administration (http://scholar.google.com/scholar_case?q=356+F.3d+444&hl=en&as_sdt=400003&case=5764137047917108180&scilh=0)*, 356 F. 3d 444 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=356&page=444&bUrl=http://federalpracticemanual.org/node/54/edit), 451 (2d Cir. 2004). *But see Smyth v. Rivero (http://scholar.google.com/scholar_case?case=16743744066824115818&q=282+F.3d+268&hl=en&as_sdt=400003)*, 282 F.3d 268 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=282&page=268&bUrl=http://federalpracticemanual.org/node/54/edit), 276-77 (4th Cir. 2002) (doubting that winning a preliminary injunction can ever qualify a plaintiff as the prevailing party).
21. *See, e.g.*, *Race v. Toledo-Davila* (http://scholar.google.com/scholar_case?q=291+F.3d+857&hl=en&as_sdt=400003&case=9815521401935248305&scilh=0), 291 F.3d 857 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=291&page=857&bUrl=http://federalpracticemanual.org/node/54/edit), 858-59 (1st. Cir. 2002).
22. *Sole v. Wyner* (http://scholar.google.com/scholar_case?case=4951396588320626640&q=551+U.S.+74&hl=en&as_sdt=400003), 551 U.S. 74 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=551&page=74&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (2007).
23. *Buckhannon*, 532 U.S. at 605.
24. *Id.* at 604.
25. *Id.*
26. *Id.* at 604 n.7.
27. For a discussion on how to structure settlements in light of *Buckhannon*, see Section 9.2 (http://federalpracticemanual.org/node/52) of this MANUAL.
28. *See, e.g., Perez v. Westchester County Department of Corrections (http://scholar.google.com/scholar_case?q=587+F.3d+143&hl=en&as_sdt=400003&case=14111759391179137998&scilh=0)*, 587 F.3d 143 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=587&page=143&bUrl=http://federalpracticemanual.org/node/54/edit), 149-53 (2d Cir. 2009); *Aranov v. Napolitano* (http://scholar.google.com/scholar_case?q=562+F.3d+84&hl=en&as_sdt=400003&case=5864363049908039324&scilh=0), 562 F.3d 84, 88-95 (1st Cir. 2009) (en banc); *Campaign for Responsible Transplantation v. Food and Drug Administration (http://scholar.google.com/scholar_case?q=511+F.3d+187&hl=en&as_sdt=400003&case=16290367056779793368&scilh=0)*, 511 F.3d 187 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=511&page=187&bUrl=http://federalpracticemanual.org/node/54/edit) (D.C. Cir. 2007); *Roberson v. Giuliani* (http://scholar.google.com/scholar_case?case=5018211508198817767&q=346+F.3d+75&hl=en&as_sdt=400003), 346 F.3d 75 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=346&page=75&bUrl=http://federalpracticemanual.org/node/54/edit) (2d Cir. 2003); *Barrios v. California Interscholastic Federation* (http://scholar.google.com/scholar_case?q=277+f3d+1128&hl=en&as_sdt=400003&case=11483109072269469 81&scilh=0), 277 F.3d 1128, 1134-35 n.5 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002); *American Disability Association, Incorporated v. Chmielarz* (http://scholar.google.com/scholar_case?q=289+F.3d+1315&hl=en&as_sdt=400003&case=11135143812204789242&scilh=0), 289 F.3d 1315 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=289&page=1315&bUrl=http://federalpracticemanual.org/node/54/edit), 1320 (11th Cir. 2002); *Smyth v. Rivero* (http://scholar.google.com/scholar_case?case=16743744066824115818&q=282+F.3d+268&hl=en&as_sdt=400003), 282 F.3d 268 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=282&page=268&bUrl=http://federalpracticemanual.org/node/54/edit), 278-81 (4th Cir. 2002) (http://www.povertylaw.org/poverty-law-library/case/51300/51346); *Truesdell v. Philadelphia Housing Authority* (http://scholar.google.com/scholar_case?q=290+F.3d+159&hl=en&as_sdt=400003&case=8308778875884971615&scilh=0), 290 F.3d 159 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=290&page=159&bUrl=http://federalpracticemanual.org/node/54/edit), 165 (3d Cir. 2002).
29. Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(ii) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title5/pdf/USCODE-2009-title5-partI-chap5-subchapII-sec552.pdf).
30. 29 U.S.C. § 216(b) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title29/pdf/USCODE-2009-title29-chap8-sec216.pdf). For a list of other federal attorney-fee provisions, see Gary F. Smith, *Federal Statutory Attorney Fees: Common Issues and Recent Cases* (http://www.povertylaw.org/clearinghouse-review/issues/1994/19941101/500650), 28 Clearinghouse Review 744, 746 (Nov. 1994).
31. 42 U.S.C. § 1988 (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap21-subchapI-sec1988.pdf). A potentially illuminating recent example outside the traditional legal services context involved an interpretation of the identical fee-shifting language in the Copyright Act. *Kirtsaeng v. John Wiley & Sons, Inc.* (https://scholar.google.com/scholar_case?q=kirtsaeng&hl=en&as_sdt=6,43&as_ylo=2016&case=15816775820778768377&scilh=0), 136 S. Ct. 1979 (2016). There, the Court tried to interpret the fee provision in a manner that would further the purpose of the Copyright Act. It determined that this purpose would be better served by a test that gave "substantial weight to the reasonableness of a losing party's position" and considered other relevant factors than one that gave "special consideration to whether a lawsuit resolved an important and close legal issue and thus 'meaningfully clarifie[d]' copyright law." *Id.* at 1985, 1986-89. In this context, the "substantial weight" test is not equivalent to a presumption against fee shifting."
32. *Hensley v. Eckerhart (http://scholar.google.com/scholar_case?case=5179727217217722884&q=461+U.S.+424&hl=en&as_sdt=400003)*, 461 U.S. 424 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=461&page=424&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 428 (1983) (citations omitted).
33. *Hughes v. Rowe* (https://scholar.google.com/scholar_case?q=449+U.S.+5&hl=en&as_sdt=6,43&case=7507738104613994389&scilh=0), 449 U.S. 5, 14 (1980) (quoting *Christiansburg Garment Co. v. EEOC (http://scholar.google.com/scholar_case?case=17214233781367753575&q=434+U.S.+412&hl=en&as_sdt=400003)*, 434 U.S. 412, 421 (1978) (internal quotation marks omitted)). *See James v. City of Boise (https://scholar.google.com/scholar_case?q=136+S.+Ct.+685&hl=en&as_sdt=6,43&case=9828718838641798 20&scilh=0)*, 136 S. Ct. 685 (2016) (per curiam).
34. *Maine v. Thiboutot (http://scholar.google.com/scholar_case?case=6831866857583820 33&q=448+U.S.+1&hl=en&as_sdt=400003)*, 448 U.S. 1, 9 (1980).
35. *Maher v. Gagne (http://scholar.google.com/scholar_case?case=18723449319439602 86&q=448+U.S.+122&hl=en&as_sdt=400003)*, 448 U.S. 122, 130-33 (1980); *Hutto v. Finney (http://scholar.google.com/scholar_case?case=12687903120774416800&q=437+U.S.+678&hl=en&as_sdt=400003)*, 437 U.S. 678, 693-700 (1978).
36. 28 U.S.C. § 2412(d)(1)(A) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf). The fee petition must, among other things, affirmatively allege that the government's litigation position was not substantially justified. *Scarborough v. Principi (http://scholar.google.com/scholar_case?case=2656699428655665709&q=541+U.S.+401&hl=en&as_sdt=400003)*, 541 U.S. 401 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=541&page=401&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 408 (2004).
37. 28 U.S.C. § 2412(d)(2)(D) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
38. *Pierce v. Underwood (http://scholar.google.com/scholar_case?case=16266758494798074149&q=487+U.S.+552&hl=en&as_sdt=400003)*, 487 U.S. 552 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=487&page=552&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 565 (1988).
39. *Id.* at 568-69. In *Pierce* itself, for example, the Court did not find it dispositive that the government had lost 11 straight times on the same issue. *Id.* at 569. Neither did the Court agree with the government that a Supreme Court grant of certiorari and a stay on the same issue compelled a conclusion that the government's position must have been substantially justified. *Id.*
40. *Id.* at 559-63.
41. *Astrue v. Ratliff* (http://scholar.google.com/scholar_case?q=560+U.S.+586&hl=en&as_sdt=400003&case=12201163316551010265&scilh=0), 560 U.S. 586 (2010).

42. *See Gors v. Colvin (http://scholar.google.com/scholar_case?q=gors+v.+colvin&hl=en&as_sdt=400003&case=4019768891100190655&scilh=0)*, No. Civ. 12-4162 (D.S.D. March 12, 2013) ("Post-*Ratliff* the approach of most courts has been to honor such fee assignments in the absence of the litigant's pre-existing debt to the United States.") (citing *Walker v. Astrue* (http://scholar.google.com/scholar_case?q=walker+v.+astrue&hl=en&as_sdt=400003&case=13062388592856915754&scilh=0), No. 2:09-cv-960 (M.D. Ala. April 5, 2011) (*Ratliff* does not explicitly reject the practice of awarding fees to attorneys where the litigant has assigned them "'in cases where the plaintiff does not owe a debt to the government . . .'"); *Wigginton v. Astrue* (http://scholar.google.com/scholar_case?q=wigginton+v.+astrue&hl=en&as_sdt=400003&case=9953078089422893967&scilh=0), No. 3:09CV00101 (E.D. Ark. April 4, 2011) (same); *Blackwell v. Astrue* (http://scholar.google.com/scholar_case?q=blackwell+v.+astrue&hl=en&as_sdt=400003&case=13139830019926523459&scilh=0), No. CIV 08-1454 (E.D. Cal. March 21, 2011) (same); *Dornbusch v. Astrue* (http://scholar.google.com/scholar_case?q=dornbusch+v.+astrue&hl=en&as_sdt=400003&case=11410441520644296774&scilh=0), No. 09-CV-1734 (D. Minn. March 1, 2011) (same)).
43. *Hensley*, 461 U.S. at 433.
44. *See Kline v. City of Kansas City, Missouri, Fire Department* (http://scholar.google.com/scholar_case?q=245+F.3d+707&hl=en&as_sdt=400003&case=5727062690702400537&scilh=0), 245 F.3d 707 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=245&page=707&bUrl=http://federalpracticemanual.org/node/54/edit) (8th Cir. 2001); *Riordan v. Nationwide Mutual Fire Insurance Comapny* (http://scholar.google.com/scholar_case?case=17236208163369261129&q=Riordan+v.+Nationwide+Mut.+Fire+Ins.+Co.&hl=en&as_sdt=400003), 977 F.2d 47 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=977&page=47&bUrl=http://federalpracticemanual.org/node/54/edit), 53 (2d Cir. 1992); *Davis v. City & County of San Francisco* (http://scholar.google.com/scholar_case?case=3666364257626200153&q=976+F.2d+1536&hl=en&as_sdt=400003), 976 F.2d 1536 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=976&page=1536&bUrl=http://federalpracticemanual.org/node/54/edit), 1542 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (http://scholar.google.com/scholar_case?case=3917182333463789463&q=984+F.2d+345&hl=en&as_sdt=400003) (9th Cir. 1993); *Carter v. Sedgwick County* (http://scholar.google.com/scholar_case?case=2528903534524106340&q=929+F.2d+1501&hl=en&as_sdt=400003), 929 F.2d 1501 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=929&page=1501&bUrl=http://federalpracticemanual.org/node/54/edit), 1506 (10th Cir. 1991).
45. *Hensley*, 461 U.S. at 433.
46. *Rode v. Dellarciprete* (http://scholar.google.com/scholar_case?case=7070944502101813099&q=892+F.2d+1177&hl=en&as_sdt=400003), 892 F.2d 1177 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=892&page=1177&bUrl=http://federalpracticemanual.org/node/54/edit), 1191 (3d Cir. 1990).
47. For a comparison of what one court considered to be adequate and inadequate time records, see *Chrapliwy v. Uniroyal Inc. (http://scholar.google.com/scholar_case?case=8084661960747524243&q=583+F.+Supp.+40&hl=en&as_sdt=400003)*, 583 F. Supp. 40, 47 (N.D. Ind. 1983). Interestingly, the time summaries the court approved broke down time by quarter hours rather than tenths, and several of the entries were block billed. Neither practice is likely to pass judicial muster today.
48. *Welch v. Metropolitan Life Insurance Company*, 480 F.3d 942 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=480&page=942&bUrl=http://federalpracticemanual.org/node/54/edit), 948 (9thCir. 2007). At the same time, the Court of Appeals stated that the reduction could not be imposed across-the-board because many of the time entries were not block-billed. *See also Torres-Rivera v. O'Neill-Cancel (http://scholar.google.com/scholar_case?case=3672298485522622324&q=524+F.3d+331&hl=en&as_sdt=400003)*, 524 F.3d 331 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=524&page=331&bUrl=http://federalpracticemanual.org/node/54/edit), 340 (1st Cir. 2008).
49. *Hensley*, 461 U.S. at 435.
50. *Id.* at 434.
51. *See, e.g., Davis*, 976 F.2d at 1543.
52. *Moreno v. City of Sacramento* (http://scholar.google.com/scholar_case?case=7370407832041871360&q=534+F.3d+1106&hl=en&as_sdt=400003), 534 F.3d 1106 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=534&page=1106&bUrl=http://federalpracticemanual.org/node/54/edit), 1112 (9th Cir. 2008).
53. *Webb v. County Board of Education (http://www.google.com/url?q=http%3A%2F%2Fcaselaw.lp.findlaw.com%2Fscripts%2Fgetcase.pl%3Fnavby%3Dcase%26court%3Dus%26vol%3D471%26page%3D234&sa=D&sntz=1&usg=AFrqEzf5F7swGSLL-qYrfv9_rscgDOdW3g)*, 471 U.S. 234 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=471&page=234&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 243 (1985).
54. *Pennsylvania v. Delaware Valley Citizens' Council* (http://scholar.google.com/scholar_case?case=14007603328527739 21&q=478+U.S.+546&hl=en&as_sdt=400003), 478 U.S. 546 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=478&page=546&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 559 (1986).
55. *See, e.g., Gagne v. Maher (http://scholar.google.com/scholar_case?case=8721328187969217175&q=594+F.2d+336&hl=en&as_sdt=400003)*, 594 F.2d 336 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=594&page=336&bUrl=http://federalpracticemanual.org/node/54/edit), 344 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122 (http://scholar.google.com/scholar_case?case=18723449319439602 86&q=448+U.S.+122&hl=en&as_sdt=400003) (1980), *cited with approval, Immigration & Naturalization Service v. Jean (http://www.google.com/url?q=http%3A%2F%2Fcaselaw.lp.findlaw.com%2Fscripts%2Fgetcase.pl%3Fnavby%3Dcase%26court%3Dus%26vol%3D496%26page%3D154&sa=D&sntz=1&usg=AFrqEzeai_K6IdHYnI* 496 U.S. 154 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=496&page=154&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 162 (1990). In *Jean* the Court held that, under the Equal Access to Justice Act (EAJA), fees for time spent on the fee issue should be awarded without a separate inquiry over whether the government's position on the fee issue was substantially justified.
56. *Webb*, 471 U.S. at 242.
57. *Id.* at 243.
58. *Delaware Valley Citizens' Council*, 478 U.S. at 558-59.
59. *See, e.g.*, Schwartz & Kirklin, *supra* note 2, § 4.07[F] at 4-101 (collecting cases dealing with compensability of travel time).
60. *Riverside v. Rivera (http://www.google.com/url?q=http%3A%2F%2Fcaselaw.lp.findlaw.com%2Fscripts%2Fgetcase.pl%3Fnavby%3Dcase%26court%3Dus%26vol%3D477%26page%3D561&sa=D&sntz=1&usg=AFrqEzdVRcSwSpLsysHZbADA)*, 477 U.S. 561 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=477&page=561&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 573 n.6 (1986).
61. *See, e.g., In re Continental Illinois Securities Litigation (http://scholar.google.com/scholar_case?case=8701845183385648132&q=962+F.2d+566&hl=en&as_sdt=400003)*, 962 F.2d 566 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=962&page=566&bUrl=http://federalpracticemanual.org/node/54/edit), 570 (7th Cir. 1992) (holding that unjustified across-the-board cuts in attorney fees for time spent in conference was an abuse of discretion); *Berberena v. Coler* (http://scholar.google.com/scholar_case?case=13024638387835500 09&q=753+F.2d+629&hl=en&as_sdt=400003), 753 F.2d 629 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=753&page=629&bUrl=http://federalpracticemanual.org/node/54/edit), 633 (7th Cir. 1985) (in "a difficult case with significant social effects . . . the participation of [four] attorneys . . . in . . . strategy conferences and negotiations 'may indeed have been crucial . . . .'"); *Scelta v. Delicatessen Support Services, Incorporated* (http://scholar.google.com/scholar_case?q=203+F.+Supp.+2d+1328&hl=en&as_sdt=400003&case=9030366254811063966&scilh=0), 203 F. Supp. 2d 1328, 1333 (M.D. Fla. 2002 (http://www.jureeka.net/Jureeka/US.aspx?doc=FloridaCases&bUrl=http://federalpracticemanual.org/node/54/edit)); *McKenzie v. Kennickell* (http://scholar.google.com/scholar_case?case=14046463809853183420&q=645+F.+Supp.+437&hl=en&as_sdt=400003), 645 F. Supp. 437, 450 (D.D.C. 1986) ("conferences between attorneys to discuss strategy and prepare for oral argument are an essential part of effective litigation . . . there is no reason or authority for allowing only one lawyer to charge for time that more than one lawyer justifiably spent").
62. *See, e.g., United States v. City & County of San Francisco (http://scholar.google.com/scholar_case?case=4129040219444046687&q=748+F.+Supp.+1416&hl=en&as_sdt=400003)*, 748 F. Supp. 1416, 1421 (N.D. Cal. 1990), *aff'd in relevant part sub nom. Davis (http://scholar.google.com/scholar_case?case=3666364257626200153&q=976+F.2d+1536&hl=en&as_sdt=400003)*, 976 F.2d 1536 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=976&page=1536&bUrl=http://federalpracticemanual.org/node/54/edit) (counsel compensated for 3,500 hours in conferences with co-counsel and clients); *Riverside*, 477 U.S. at 573 n.6 (affirming compensation for 197 hours of conversation between two attorneys); *Palmigiano v. Garrahy* (http://scholar.google.com/scholar_case?case=10350480004937280947&q=466+F.+Supp.+732&hl=en&as_sdt=400003), 466 F. Supp. 732, 743 (D. R.I. 1979), *aff'd*, 616 F.2d 598 (http://scholar.google.com/scholar_case?case=3810666049454344982&q=616+F.2d+598&hl=en&as_sdt=400003) (1st Cir. 1980) (attorneys fully compensated for 208 hours spent in conference). *See also In re Olson (http://scholar.google.com/scholar_case?case=11442384065085381&q=884+F.2d+1415&hl=en&as_sdt=400003)*, 884 F.2d 1415 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=884&page=1415&bUrl=http://federalpracticemanual.org/node/54/edit), 1429 (D.C. Cir. 1989) (limiting compensation for conferencing hours to 10 percent of total fee request).
63. *Hensley*, 461 U.S. at 436 n.11.
64. *Farrar v. Hobby (http://scholar.google.com/scholar_case?case=4029288770020466344&q=506+U.S.+103&hl=en&as_sdt=400003)*, 506 U.S. 103 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=506&page=103&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 115 (1992).

65. *Id.* at 121-22 (O'Connor, J., concurring). *See, e.g., Barber v. T.D. Williamson, Incorporated (http://scholar.google.com/scholar_case?q=254+F.3d+1223&hl=en&as_sdt=400003&case=3984589032457572447&scilh=0),* 254 F.3d 1223 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=254&page=1223&bUrl=http://federalpracticemanual.org/node/54/edit), 1229-33 (10th Cir. 2001) (evaluating factors); *O'Connor v. Huard* (http://scholar.google.com/scholar_case?case=12534176370722954 99&q=117+F.3d+12&hl=en&as_sdt=400003), 117 F.3d 12 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=117&page=12&bUrl=http://federalpracticemanual.org/node/54/edit), 17-18 (1st Cir. 1997) (affirming a lodestar fee award, where nominal damages award achieved individual plaintiff's goal and served as a deterrent).
66. *See, e.g., Hawa Abdi Jama v. Esmor Correctional Services (http://scholar.google.com/scholar_case?case=7419261553014123846&q=577+F.3d+169&hl=en&as_sdt=400003),* 577 F.3d 169 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=577&page=169&bUrl=http://federalpracticemanual.org/node/54/edit), 174-76 (3rd Cir. 2009); *Mercer v. Duke University* (http://scholar.google.com/scholar_case?q=401+F.3d+199&hl=en&as_sdt=400003&case=4205545425507538379&scilh=0), 401 F.3d 199 (http://scholar.google.com/scholar_case?case=7419261553014123846&q=577+F.3d+169&hl=en&as_sdt=400003), 204 (4th Cir. 2005), and cases cited there.
67. *Riverside*, 477 U.S. at 564-65, 581 (plurality opinion); *id.* at 581-86 (Powell, J., concurring in judgment) (rejecting argument to limit fees to one-third of damages).
68. *Id.* at 586 (Powell, J., concurring).
69. *Cabrales v. County of Los Angeles* (http://scholar.google.com/scholar_case?case=16484297123379678568&q=935+F.2d+1050&hl=en&as_sdt=400003), 935 F.2d 1050 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=935&page=1050&bUrl=http://federalpracticemanual.org/node/54/edit), 1053 (9th Cir. 1991).
70. *Id.* ("Just as time spent on losing claims can contribute to the success of other claims, time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory").
71. *Hensley*, 461 U.S. at 440.
72. *Id.* By contrast, when a portion of a suit is frivolous, entitling the defendant to attorney fees under 42 U.S.C. (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21-subchapI-sec1988.pdf) § 1988 (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21-subchapI-sec1988.pdf) and similar statutes, the defendant is entitled to reimbursement only "for costs that the defendant would not have incurred but for the frivolous claims." *Fox v. Vice* (http://scholar.google.com/scholar_case?q=563+US+2&hl=en&as_sdt=400003&case=4612481658703000905&scilh=0), 131 S. Ct. 2205, 2211 (2011).
73. *Id.* at 435.
74. *Blum v. Stenson (http://scholar.google.com/scholar_case?case=14012192812481338663&q=465+U.S.+886&hl=en&as_sdt=400003),* 465 U.S. 886, 892-(http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=465&page=886&pinpoint=892&bUrl=http://federalpracticemanual.org/node/54/edit)96 (1984).
75. *Id.* at 893 (citing S. Rep. No. 94-1011, at 6 (1976)).
76. *Id.* at 896 n.11.
77. Specific hourly rate information is more persuasive than a declaration of a private attorney that merely says the attorney has looked over the rates sought and thinks they are "reasonable." The latter type of declaration "might properly be characterized by a reviewing court as one given out of courtesy, but it provides little or no evidentiary support for an award." *Norman v. Housing Authority of Montgomery* (http://scholar.google.com/scholar_case?case=12171627398426186975&q=836+F.2d+1292&hl=en&as_sdt=400003), 836 F.2d 1292 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=836&page=1292&bUrl=http://federalpracticemanual.org/node/54/edit), 1304 (11th Cir. 1988).
78. *See, e.g., Salazar v. District of Columbia (http://scholar.google.com/scholar_case?case=9500732964034030420&q=123+F.+Supp.+2d+8&hl=en&as_sdt=400003)*, 123 F. Supp. 2d 8,14 (D.D.C. 2000) (relying upon National Survey Center and National Law Journal surveys to determine reasonable hourly rates in the District of Columbia). *But see Davis*, 976 F.2d at 1547 (rejecting reliance on a different survey because, among other reasons, the survey reported only statewide average rates rather than rates specific to San Francisco, where case was litigated).
79. *Barjon v. Dalton* (http://scholar.google.com/scholar_case?case=8348008322994770761&q=132+F.3d+496&hl=en&as_sdt=400003), 132 F.3d 496 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=132&page=496&bUrl=http://federalpracticemanual.org/node/54/edit), 500 (9th Cir. 1997), *cert. denied*, 525 U.S. 827 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=525&page=827&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1998) (quoting *Gates v. Deukmejian* (http://scholar.google.com/scholar_case?case=916466970969798 4454&q=987+F.2d+1392&hl=en&as_sdt=400003), 987 F.2d 1392 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=987&page=1392&bUrl=http://federalpracticemanual.org/node/54/edit), 1405 (9th Cir. 1992)).
80. *Missouri v. Jenkins (http://scholar.google.com/scholar_case?case=8733218411511751532&q=491+U.S.+274&hl=en&as_sdt=400003),* 491 U.S. 274 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=491&page=274&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 284 (1989).
81. Because waivers of sovereign immunity are strictly construed, fee awards against the federal government after multiyear litigation may not include a multiplier for delay or be based on current hourly rates. *Library of Congress v. Shaw (http://scholar.google.com/scholar_case?case=6160901089183031511&q=478+U.S.+310&hl=en&as_sdt=400003)*, 478 U.S. 310, 317-(http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=478&page=310&pinpoint=317&bUrl=http://federalpracticemanual.org/node/54/edit)20 (1986).
82. *Trevino v. Gates (http://scholar.google.com/scholar?hl=en&as_sdt=400003&q=99+F.3d+911&btnG=Search)*, 99 F.3d 911 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=99&page=911&bUrl=http://federalpracticemanual.org/node/54/edit), 925 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=520&page=1117&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1997). *Accord Malloy v. Monahan (http://scholar.google.com/scholar_case?case=7793809105649286862&q=73+F.3d+1012&hl=en&as_sdt=400003)*, 73 F.3d 1012 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=73&page=1012&bUrl=http://federalpracticemanual.org/node/54/edit) (10th Cir. 1996); *Brooks v. Georgia Board of Elections* (http://scholar.google.com/scholar_case?case=6781724410793971064&q=997+F.2d+857&hl=en&as_sdt=400003), 997 F.2d 857 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=997&page=857&bUrl=http://federalpracticemanual.org/node/54/edit), 869-70 (11th Cir. 1993).
83. *See, e.g., Lopez v. San Francisco Unified School District (http://scholar.google.com/scholar_case?case=11877287395304441726&q=385+F.+Supp.+2d+981&hl=en&as_sdt=400003),* 385 F. Supp. 2d 981, 992 (N.D. Cal. 2005) (holding that attorney fees should be reduced when tasks could have been delegated to less experienced attorneys in typical firm environment); *Finkelstein v. Bergna* (http://scholar.google.com/scholar_case?case=6352295019916843572&q=804+F.+Supp.+1235&hl=en&as_sdt=400003), 804 F. Supp. 1235, 1237-38 (N.D. Cal. 1992) (awarding 0 per hour for some of work by plaintiffs' lead counsel and 0 per hour (still a high rate for 1992) for less complex work). *See also McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund (http://scholar.google.com/scholar_case?case=5637756412846363429&q=450+F.3d+91&hl=en&as_sdt=400003),* 450 F.3d 91 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=450&page=91&bUrl=http://federalpracticemanual.org/node/54/edit), 98 n.6 (2d Cir. 2006) (approving cautiously of district court's reduction in solo practitioner's rate based on fact that larger firms incur greater overhead.
84. *See, e.g., Hutchison v. Amateur Electronic Supply, Incorporated (http://scholar.google.com/scholar_case?q=42+F.3d+1037&hl=en&as_sdt=400003&case=14039217184772654333&scilh=0)*, 42 F.3d 1037 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=42&page=1037&bUrl=http://federalpracticemanual.org/node/54/edit), 1048 (7th Cir. 1994) ("plaintiff asserts that her counsel was essentially a sole practitioner with only part-time associates and law clerks during much of this litigation. If true, the district court's reduction for what it saw as top-heavy staffing cannot be sustained.").
85. *American Petroleum Institute. v. Environmental Protection Agency* (http://scholar.google.com/scholar_case?q=72+F.3d+907&hl=en&as_sdt=400003&case=13315817339089855256&scilh=0), 72 F.3d 907 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=72&page=907&bUrl=http://federalpracticemanual.org/node/54/edit), 916 (D.C. Cir. 1996) ("often, as audits reveal, there is so much senior time billed for reviewing, revising, and discussing the document that it usually would be cheaper to have the senior lawyer simply sit down and draft it"). *Accord Daggett v. Kimmelman (http://scholar.google.com/scholar_case?case=5278859427903744325&q=811+F.2d+793&hl=en&as_sdt=400003)*, 811 F.2d 793 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=811&page=793&bUrl=http://federalpracticemanual.org/node/54/edit) (3d Cir. 1987); *Muehler v. Land O'Lakes, Incorporated* (http://scholar.google.com/scholar_case?q=617+F.+Supp.+1370&hl=en&as_sdt=400003&case=3005874399107804092&scilh=0), 617 F. Supp. 1370, 1379 (D. Minn. 1985); *Laffey v. Northwest Airlines, Incorporated* (http://scholar.google.com/scholar_case?q=572+F.+Supp.+354&hl=en&as_sdt=400003&case=5339183872184679499&scilh=0), 572 F. Supp. 354, 366 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (http://scholar.google.com/scholar_case?case=16617800214992945662&q=746+F.2d+4&hl=en&as_sdt=400003) (D.C. Cir. 1985). *See also* Gary Greenfield, *Efficient Litigation: An Ethical Imperative?* 20 American Lawyer 38 (April 1994).
86. *Jenkins*, 491 U.S. at 284-89. *Accord, Richlin Security Service Company v. Chertoff* (http://scholar.google.com/scholar_case?q=128+S.+Ct.+2007&hl=en&as_sdt=400003&case=3258512745862945424&scilh=0), 128 S. Ct. 2007 (2008) (same conclusion for fees awarded under Equal Access to Justice Act).
87. 28 U.S.C. § 2412(d)(2)(A) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
88. *Id.*; *Sorenson v. Mink* (http://scholar.google.com/scholar_case?case=8828475195936420339&q=239+F.3d+1140&hl=en&as_sdt=400003), 239 F.3d 1140 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=239&page=1140&bUrl=http://federalpracticemanual.org/node/54/edit), 1148 (9th Cir. 2001). Before 1996, the limit was per hour, subject to the same statutory exceptions. *Id.*
89. *Sorenson*, 239 F.3d at 1148. See *Zheng Liu v. Chertoff* (http://scholar.google.com/scholar_case?case=15105983029303412827&q=538+F.+Supp.+2d+1116&hl=en&as_sdt=400003), 538 F. Supp. 2d 1116, 1124 (D. Minn. 2008 (http://www.jureeka.net/Jureeka/US.aspx?doc=FedDistCts2001&ct=D.Minn.&year=2008&bUrl=http://federalpracticemanual.org/node/54/edit)) ("Court may use the CPI-U to adjust EAJA rate for inflation"); *Associationn of American Physicians and Surgeons v. Food and Drug Administration* (http://scholar.google.com/scholar_case?case=12239795322170130335&q=391+F.+Supp.2d+171&hl=en&as_sdt=400003), 391 F. Supp.

2d 171, 178 n.5 (D.D.C. 2005 (http://www.jureeka.net/Jureeka/US.aspx?doc=FedDistCtsDDC&year=2005&bUrl=http://federalpracticemanual.org/node/54/edit)) (accepting plaintiff's request for increase over 5 limit for cost-of-living expense based on CPI).

90. *Kerin v. United States Postal Service* (http://scholar.google.com/scholar_case?case=12922304582349319696&q=218+F.3d+185&hl=en&as_sdt=400003), 218 F.3d 185 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=218&page=185&bUrl=http://federalpracticemanual.org/node/54/edit), 194 (2d Cir. 2000); *Masonry Masters, Incorporated v. Nelson* (http://scholar.google.com/scholar_case?q=105+F.3d+708&hl=en&as_sdt=400003&case=11002349028907932020&scilh=0), 105 F.3d 708 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=105&page=708&bUrl=http://federalpracticemanual.org/node/54/edit), 711-13 (D.C. Cir. 1997).
91. *Sorenson*, 239 F.3d at 1148.
92. 28 U.S.C. § 2412(d)(2)(B) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
93. *Rueda-Menicucci v. Immigration & Naturalization Service* (http://scholar.google.com/scholar_case?case=24643289425916643 1&q=132+F.3d+493&hl=en&as_sdt=400003), 132 F.3d 493 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=132&page=493&bUrl=http://federalpracticemanual.org/node/54/edit), 496 (9th Cir. 1997) (denying rate increase where special expertise was unnecessary to successful result); *Raines v. Shalala* (http://scholar.google.com/scholar_case?case=13099480827510446782&q=44+F.3d+1355&hl=en&as_sdt=400003), 44 F.3d 1355 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=44&page=1355&bUrl=http://federalpracticemanual.org/node/54/edit), 1360-61 (7th Cir. 1995); *Pirus v. Bowen* (http://scholar.google.com/scholar_case?case=4752031469487310117&q=869+F.2d+536&hl=en&as_sdt=400003), 869 F.2d 536 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=869&page=536&bUrl=http://federalpracticemanual.org/node/54/edit), 541-42 (9th Cir. 1989).
94. *Underwood*, 487 U.S. at 572.
95. *See Raines*, 44 F.3d at 1361 ("an identifiable practice specialty not easily acquired by a reasonably competent attorney" can be considered a special factor warranting fee enhancement); *Pirus*, 869 F.2d at 541-42 (fee enhancement available for specialized expertise in social security class actions); *Jean v. Nelson* (http://scholar.google.com/scholar_case?case=13244121820722558079&q=863+F.2d+759&hl=en&as_sdt=400003), 863 F.2d 759 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=863&page=759&bUrl=http://federalpracticemanual.org/node/54/edit), 774 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=496&page=154&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1999) (immigration law expertise may qualify). *See Atlantic Fish Spotters Association. v. Daley (http://scholar.google.com/scholar_case?case=5771182819407827559&q=205+F.3d+488&hl=en&as_sdt=400003)*, 205 F.3d 488 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=205&page=488&bUrl=http://federalpracticemanual.org/node/54/edit), 491 (1st Cir. 2000) (holding that practice experience in fisheries can be special factor, but such expertise was not required in this case).
96. *Select Milk Producers, Incorporated. v. Johanns* (http://scholar.google.com/scholar_case?q=400+F.3d+939&hl=en&as_sdt=400003&case=9108954804078046604&scilh=0), 400 F.3d 939 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=400&page=939&bUrl=http://federalpracticemanual.org/node/54/edit), 950-51 (D.C. Cir. 2005) (concluding that "expertise acquired through practice" was not a "special factor" that could warrant an enhanced fee); *F.J. Vollmer Company v. Magaw* (http://scholar.google.com/scholar_case?case=4500915806776590907&q=102+F3d.+591&hl=en&as_sdt=400003), 102 F3d. 591 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=102&page=591&bUrl=http://federalpracticemanual.org/node/54/edit), 598 (D.C. Cir. 1996) (market rate fees "available only for lawyers whose specialty 'requir[es] technical or other education outside the field of American law'"); *Estate of Cervin v. Commissioner* (http://scholar.google.com/scholar_case?case=10863606816158766559&q=200+F.3d+351&hl=en&as_sdt=400003), 200 F.3d 351 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=200&page=351&bUrl=http://federalpracticemanual.org/node/54/edit), 354 (5th Cir. 2000); *Hyatt v. Commissioner (http://scholar.google.com/scholar_case?case=10863606816158766559&q=200+F.3d+351&hl=en&as_sdt=400003)*, 315 F.3d 239 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=315&page=239&bUrl=http://federalpracticemanual.org/node/54/edit), 253 (4th Cir. 2002).
97. 28 U.S.C. § 2412(b) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
98. *See, e.g. Hyatt v. Shalala (http://scholar.google.com/scholar_case?case=3461850712729235149&q=6+F.3d+250&hl=en&as_sdt=400003)*, 6 F.3d 250 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=6&page=250&bUrl=http://federalpracticemanual.org/node/54/edit) (4th Cir. 1993) (refusal of federal government to follow binding circuit precedent in social security cases amounted to bad faith warranting market rate fees); *D & M Watch Corporation v. United States* (http://scholar.google.com/scholar_case?case=7012287446769381974&q=795+F.+Supp.+1172&hl=en&as_sdt=400003), 795 F. Supp. 1172, 1177 (Ct. Int'l Trade 1992) (market rate fees when Customs Service acted in bad faith); *Library of Congress v. Shaw (http://scholar.google.com/scholar_case?case=6160901089183031511&q=478+U.S.+310&hl=en&as_sdt=400003)*, 478 U.S. 310 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=478&page=310&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 319 (1986) (noting that Congress waived sovereign immunity to permit Title VII lawsuits and attorney-fee awards against the United States).
99. *Hensley*, 461 U.S. at 434.
100. *City of Burlington v. Dague (http://scholar.google.com/scholar_case?case=2557094556311036785&q=505+U.S.+557&hl=en&as_sdt=400003)*, 505 U.S. 557 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=505&page=557&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1992).
101. *See, e.g, Blum*, 465 U.S. at 898-99. Counsel may wish to use this discussion to support relatively high hourly rates.
102. *Oberfielder v. Bertolli* (http://archive.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/060403/$File/01-17302.PDF), 67 Fed. Appx. 408, 411 (9th Cir. 2003) (applying multiplier where "the undesirability of the case is at least partially confirmed by Oberfelder's difficulty in obtaining legal representation and the consequent need for the district court to appoint pro bono counsel"); *Guam Society of Obstetricians & Gynecologists v. Ada* (http://scholar.google.com/scholar_case?q=100+F.3d+691&hl=en&as_sdt=400003&case=17737780869428922444&scilh=0), 100 F.3d 691 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=100&page=691&bUrl=http://federalpracticemanual.org/node/54/edit), 697 (9th Cir. 1996); *Brotherton v. Cleveland* (http://scholar.google.com/scholar_case?case=6548502335887695571&q=141+F.+Supp.+2d+907&hl=en&as_sdt=400003), 141 F. Supp. 2d 907 (S.D. Ohio 2001 (http://www.jureeka.net/Jureeka/US.aspx?doc=FedDistCts1989&ct=S.D.%20Ohio&bUrl=http://federalpracticemanual.org/node/54/edit)).
103. *Geier v. Sundquist* (http://scholar.google.com/scholar_case?case=8761850233406696742&q=372+F.3d+784&hl=en&as_sdt=400003), 372 F.3d 784 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=372&page=784&bUrl=http://federalpracticemanual.org/node/54/edit), 795-96 (6th Cir. 2004).
104. *Mangold v. California Public Utilities Commission* (http://scholar.google.com/scholar_case?case=12139321477714645916&q=67+F.3d+1470&hl=en&as_sdt=400003), 67 F.3d 1470 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=67&page=1470&bUrl=http://federalpracticemanual.org/node/54/edit), 1478-79 (9th Cir. 1995) (affirming 2.0 multiplier under California state law in discrimination case).
105. *Perdue v. Kenny A.* (http://scholar.google.com/scholar_case?case=5577757377388451017&q=130+S.+Ct.+1662&hl=en&as_sdt=400003), 559 U.S. 542 (2010).
106. *Id.* at 554-56. The Supreme Court previously approved of an enhancement to account for unanticipated delays in payment. *Jenkins*, 491 U.S. at 284. *But see Shaw*, 478 U.S. at 321-23 (no compensation for delay in suits against federal government).
107. *Id.* at 555 n.5.
108. *Id.* (*citing Blum v. Stenson (http://scholar.google.com/scholar_case?q=465+U.S.+886&hl=en&as_sdt=400003&case=14012192812481338663&scilh=0)*, 465 U.S. 886, 898 (1984)).
109. *Tire Kingdom, Incorporated v. Morgan Tire & Auto, Incorporated (http://scholar.google.com/scholar_case?q=253+F.3d+1332&hl=en&as_sdt=400003&case=2378374591455974 16&scilh=0)*, 253 F.3d 1332, 1335 (11th Cir. 2001).
110. 28 U.S.C. § 2412(d)(1)(B) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf). The Supreme Court has held that a timely fee petition could be amended after 30 days to cure a failure to allege that the government's litigation position was not substantially justified. *Scarborough v. Principi (http://www.google.com/url?q=http%3A%2F%2Fwww.law.cornell.edu%2Fsupct%2Fhtml%2F02-1657.ZO.html&sa=D&sntz=1&usg=AFrqEzeLU4toB-wGyJ-YLNPA68zRX4O98A)*, 541 U.S. 401 (2004).
111. 28 U.S.C. § 2412(d)(2)(G) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
112. *Pierce v. Barnhart (http://scholar.google.com/scholar_case?case=16007039865400532999&q=440+F.3d+657&hl=en&as_sdt=400003)*, 440 F.3d 657, 662 (5th Cir. 2006); *Scafar Contracting, Incorporated v. Secretary of Labor (http://scholar.google.com/scholar_case?q=325+F.3d+422&hl=en&as_sdt=400003&case=9568620970664157 8&scilh=0)*, 325 F.3d 422, 431-32 (3rd Cir. 2003); *McDonald v. Schweiker (http://scholar.google.com/scholar_case?case=12983762680330844849&q=726+F.2d+311&hl=en&as_sdt=400003)*, 726 F.2d 311, 314 (7th Cir. 1983); *accord Cervantez v. Sullivan (http://scholar.google.com/scholar_case?case=4060794530324562901&q=739+F.+Supp.+517&hl=en&as_sdt=400003)*, 739 F. Supp. 517, 519 (E.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 229 (http://scholar.google.com/scholar_case?case=10372843251227687529&q=963+F.2d+229&hl=en&as_sdt=400003) (9th Cir. 1992). *See also Adams v. Securities & Exchange Commission (http://scholar.google.com/scholar_case?q=287+F.3d+183&hl=en&as_sdt=400003&case=12162269570492348 44&scilh=0)*, 287 F.3d 183, 187-88 (D.C. Cir. 2002) (noting that Congress, in amending EAJA, adopted *McDonald* approach).
113. *Shalala v. Schaeffer (http://scholar.google.com/scholar_case?case=14438680212630649759&q=509+U.S.+292&hl=en&as_sdt=400003)*, 509 U.S. 292 (1993).
114. *Id.* at 300, *citing* 42 U.S.C. § 405(g) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap7-subchapII-sec405.pdf), fourth sentence.
115. *Id.* at 298.
116. *Id.* at 302.
117. *Evans v. Jeff D. (http://scholar.google.com/scholar_case?case=17948293160115901520&q=475+U.S.+717&hl=en&as_sdt=400003)*, 475 U.S. 717 (1986).

118. *Bernhardt v. County of Los Angeles (http://scholar.google.com/scholar_case?case=11617238915944960848&q=279+F.3d+862&hl=en&as_sdt=400003)*, 279 F.3d 862 (9th Cir. 2002) (Section 1988 (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap21-subchapI-sec1988.pdf) suit); *Johnson v. District of Columbia (http://scholar.google.com/scholar_case?case=3150176998005423948&q=190+F.+Supp.+2d+34&hl=en&as_sdt=400003)*, 190 F. Supp. 2d 34, 42-44 (D.D.C. 2002) (provision in Individuals with Disabilities Education Act (IDEA), court relied in part on IDEA's right to counsel provision to distinguish *Jeff D.*).

‹ Previous Section (/chapter9/section3) | Top of Page | (/chapter9) Next Section › (/chapter9/section5)

Chief Justice REHNQUIST delivered the opinion of the Court.

Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Buckhannon Board and Care Home, Inc., which operates care homes that provide assisted living to their residents, failed an inspection by the West Virginia Office of the State Fire Marshal because some of the residents were incapable of "self-preservation" as defined under state law. See W. Va.Code §§ 16–5H–1, 16–5H–2 (1998) (requiring that all residents of residential board and care homes be capable of "self-preservation," or capable of moving themselves "from situations involving imminent danger, such as fire"); W. Va.Code of State Rules, tit. 87, ser. 1, § 14.07(1) (1995) (same). On October 28, 1997, after receiving cease and desist orders requiring the closure of its residential care facilities within 30 days, Buckhannon Board and Care Home, Inc., on behalf of itself and other similarly situated homes and residents (hereinafter petitioners), brought suit in the United States District Court for the Northern District of West Virginia against the State of West Virginia, two of its agencies, and 18 individuals (hereinafter respondents), seeking declaratory and injunctive relief that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA), 102 Stat. 1619, 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*

Respondents agreed to stay enforcement of the cease-and-desist orders pending resolution of the case and the parties began discovery. In 1998, the West Virginia Legislature enacted two bills eliminating the "self-preservation" requirement, see S. 627, I 1998 W. Va. Acts 983–986 (amending regulations); H.R. 4200, II 1998 W. Va. Acts 1198–1199 (amending statute), and respondents moved to dismiss the case as moot. The District Court granted the motion, finding that the 1998 legislation had eliminated the allegedly offensive provisions and that there was no indication that the West Virginia Legislature would repeal the amendments.

Petitioners requested attorney's fees as the "prevailing party" under the FHAA, 42 U.S.C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee and costs"), and ADA, 42 U.S.C. § 12205 ("[T]he court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs"). Petitioners argued that they were entitled to attorney's fees under the "catalyst theory," which posits that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. Although most Courts of Appeals recognize the "catalyst theory," the Court of Appeals for the Fourth ***9** Circuit rejected it in *S–1 and S–2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (C.A.4 1994) (en banc) ("A person may not be a 'prevailing party' ... except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought"). The District Court accordingly denied the motion and, for the same reason, the Court of Appeals affirmed in an unpublished, *per curiam* opinion. Judgt.

order reported at 203 F.3d 819 (C.A.4 2000).

To resolve the disagreement amongst the Courts of Appeals, we granted certiorari, 530 U.S. 1304, 121 S.Ct. 28, 147 L.Ed.2d 1050 (2000), and now affirm.

In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Under this "American Rule," we follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). Congress, however, has authorized the award of attorney's fees to the "prevailing party" in numerous statutes in addition to those at issue here, such as the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e–5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C. § 1973*l* (e), and the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988. See generally *Marek v. Chesny*, 473 U.S. 1, 43–51, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) (Appendix to opinion of Brennan, J., dissenting).

In designating those parties eligible for an award of litigation costs, Congress employed the term "prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.—Also termed *successful party*." This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases.

In *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) *(per curiam)*, we reviewed the legislative history of § 1988 and found that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Our "[r]espect for ***0** ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). We have held that even an award of nominal damages suffices under this test. See *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. See *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). Although a consent decree does not always include an admission of liability by the defendant, see, *e.g., id.*, at 126, n. 8, 100 S.Ct. 2570, it nonetheless is a court-ordered "chang[e][in] the legal relationship between [the plaintiff] and the defendant." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (citing *Hewitt*, *supra*, at 760–761, 107 S.Ct. 2672, and *Rhodes v. Stewart*, 488 U.S. 1, 3–4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) *(per curiam)*). These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. 489 U.S., at 792–793, 109 S.Ct. 1486; see also *Hanrahan*, *supra*, at 757, 100 S.Ct. 1987 ("[I]t seems clearly to have been the intent of Congress to permit ... an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the *trial court* or *on appeal* " (emphasis added)).

We think, however, the "catalyst theory" falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal rela-

tionship of the parties. Even under a limited form of the "catalyst theory," a plaintiff could recover attorney's fees if it established that the "complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted." Brief for United States as *Amicus Curiae* 27. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary. Indeed, we held in *Hewitt* that an interlocutory ruling that reverses a dismissal for failure to state a claim "is not the stuff of which legal victories are made." 482 U.S., at 760, 107 S.Ct. 2672. See also *Hanrahan, supra,* at 754, 100 S.Ct. 1987 (reversal of a directed verdict for defendant does not make plaintiff a "prevailing party"). A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

The dissenters chide us for upsetting "long-prevailing *Circuit* precedent." *Post,* at 1850 (opinion of GINSBURG, J.) ***1** (emphasis added). But, as Justice SCALIA points out in his concurrence, several Courts of Appeals have relied upon dicta in our prior cases in approving the "catalyst theory." See *post,* at 1849; see also *supra,* at 1839, n. 5. Now that the issue is squarely presented, it behooves us to reconcile the plain language of the statutes with our prior *holdings.* We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, see, *e.g., Farrar, supra,* at 112, 113 S.Ct. 566, or obtained a court-ordered consent decree, *Maher, supra,* at 129–130, 100 S.Ct. 2570—we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, see *Hanrahan,* 446 U.S., at 759, 100 S.Ct. 1987, or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by "*judicial* relief," *Hewitt, supra,* at 760, 107 S.Ct. 2672 (emphasis added). Never have we awarded attorney's fees for a nonjudicial "alteration of actual circumstances." *Post,* at 1856 (dissenting opinion). While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the "merit" requirement of our prior cases and award attorney's fees where the plaintiff's claim "was at least colorable" and "not ... groundless." *Post,* at 1852 (internal quotation marks and citation omitted). We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief. *Post,* at 1856 (internal quotation marks and citation omitted).

Petitioners nonetheless argue that the legislative history of the Civil Rights Attorney's Fees Awards Act supports a broad reading of "prevailing party" which includes the "catalyst theory." We doubt that legislative history could overcome what we think is the rather clear meaning of "prevailing party"—the term actually used in the statute. Since we resorted to such history in *Garland,* 489 U.S., at 790, 109 S.Ct. 1486, *Maher,* 448 U.S., at 129, 100 S.Ct. 2570, and *Hanrahan, supra,* at 756–757, 100 S.Ct. 1987, however, we do likewise here.

The House Report to § 1988 states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," H.R.Rep. No. 94–1558, p. 7 (1976), while the Senate Report ***2** explains that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," S.Rep. No. 94–1011, p. 5 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912. Petitioners argue that these Reports and their reference to

a 1970 decision from the Court of Appeals for the Eighth Circuit, *Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421 (C.A.8 1970), indicate Congress' intent to adopt the "catalyst theory." We think the legislative history cited by petitioners is at best ambiguous as to the availability of the "catalyst theory" for awarding attorney's fees. Particularly in view of the "American Rule" that attorney's fees will not be awarded absent "explicit statutory authority," such legislative history is clearly insufficient to alter the accepted meaning of the statutory term. *Key Tronic,* 511 U.S., at 819, 114 S.Ct. 1960; see also *Hanrahan, supra,* at 758, 100 S.Ct. 1987 ("[O]nly when a party has prevailed on the merits of at least some of his claims ... has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney" (quoting H.R.Rep. No. 94–1558, at 8)).

Petitioners finally assert that the "catalyst theory" is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees. They also claim that the rejection of the "catalyst theory" will deter plaintiffs with meritorious but expensive cases from bringing suit. We are skeptical of these assertions, which are entirely speculative and unsupported by any empirical evidence (*e.g.,* whether the number of suits brought in the Fourth Circuit has declined, in relation to other Circuits, since the decision in *S–1 and S–2*).

Petitioners discount the disincentive that the "catalyst theory" may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal. "The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits," *Evans v. Jeff D.,* 475 U.S. 717, 734, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.

And petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted: "It is well settled that a defendant's ***3** voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks and citations omitted). If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs. Cf. *Marek v. Chesny,* 473 U.S., at 7, 105 S.Ct. 3012 ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff" (internal quotation marks and citation omitted)).

We have also stated that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and have accordingly avoided an interpretation of the fee-shifting statutes that would have "spawn[ed] a second litigation of significant dimension," *Garland, supra,* at 791, 109 S.Ct. 1486. Among other things, a "catalyst theory" hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that "will

likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct." Brief for United States as *Amicus Curiae* 28. Although we do not doubt the ability of district courts to perform the nuanced "three thresholds" test required by the "catalyst theory"—whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct; whether the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense, see *post,* at 1852 (dissenting opinion)—it is clearly not a formula for "ready administrability." *Burlington v. Dague,* 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

Given the clear meaning of "prevailing party" in the fee-shifting statutes, we need not determine which way these various policy arguments cut. In *Alyeska,* 421 U.S., at 260, 95 S.Ct. 1612, we said that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a "roving authority." For the reasons stated above, we hold that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205.

The judgment of the Court of Appeals is

Affirmed. …

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

The Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not "prevail," and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. A court-approved settlement will do.

***0** The Court's insistence that there be a document filed in court—a litigated judgment or court-endorsed settlement—upsets long-prevailing Circuit precedent applicable to scores of federal fee-shifting statutes. The decision allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. Concomitantly, the Court's constricted definition of "prevailing party," and consequent rejection of the "catalyst theory," impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.

In my view, the "catalyst rule," as applied by the clear majority of Federal Circuits, is a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights. Nothing in history, precedent, or plain English warrants the anemic construction of the term "prevailing party" the Court today imposes. …

II

A

The Court today detects a "clear meaning" of the term prevailing party, *ante,* at 1843, that has heretofore eluded the large majority of courts construing those words. "Prevailing party," today's opinion announces, means "one who has been awarded some relief by the court," *ante,* at 1839. The Court derives this "clear meaning" principally from Black's Law Dictionary, which defines a "prevailing party," in critical part, as one "in whose favor a judgment is rendered," *ibid.* (quoting Black's Law Dictionary 1145 (7th ed.1999)).

One can entirely agree with Black's Law Dictionary that a party "in whose favor a judgment is rendered" prevails, and at the same time resist, as most Courts of Appeals have, any implication that *only* such a party may prevail. In prior cases, we have not treated Black's Law Dictionary as preclusively definitive; instead, we have accorded statutory terms, including legal "term [s] of art," *ante,* at 1839 (opinion of the Court); *ante,* at 1846 (SCALIA, J., concurring), a contextual reading. See, *e.g., Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 395–396, n. 14, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (defining "excusable neglect," as used in Federal Rule of Bankruptcy Procedure 9006(b)(1), more broadly than Black's defines that term); *United States v. Rodgers,* 466 U.S. 475, 479–480, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984) (adopting "natural, nontechnical" definition of word "jurisdiction," as that term is used in 18 U.S.C. § 1001, and declining to confine definition to "narrower, more technical meanings," citing Black's). Notably, this Court did not refer to Black's Law Dictionary in *Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), which held that a consent decree could qualify a plaintiff as "prevailing." The Court explained:

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of [42 U.S.C.] § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.,* at 129, 100 S.Ct. 2570.

The spare "prevailing party" language of the fee-shifting provision applicable in *Maher,* and the similar wording of the fee-shifting provisions now before the Court, contrast with prescriptions that so tightly bind fees to judgments as to exclude the application of a catalyst concept. The Prison Litigation Reform Act of 1995, for example, directs that fee awards to prisoners under § 1988 be "proportionately related to the *court ordered relief* for the violation." 110 Stat. 1321–72, as amended, 42 U.S.C. § 1997e(d)(1)(B)(i) (1994 ed., Supp. V) (emphasis added). That statute, by its express terms, forecloses an award to a prisoner on a catalyst theory. But the FHAA and ADA fee-shifting prescriptions, modeled on 42 U.S.C. § 1988 unmodified, see *supra,* at 1851, n. 1, do not similarly staple fee awards to "court ordered relief." Their very terms do not foreclose a catalyst theory.

B

It is altogether true, as the concurring opinion points out, *ante,* at 1843–1844, that litigation costs other than attorney's fees traditionally have been allowed to the "prevailing party," and that a judgment ***4** winner ordinarily fits that description. It is not true, however, that precedent on costs calls for the judgment requirement the Court ironly adopts today for attorney's fees. Indeed, the first decision cited in the concurring opinion, *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), see *ante,* at 1843, tugs against the restrictive rule today's decision installs.

In *Mansfield,* plaintiffs commenced a contract action in state court. Over plaintiffs' objections, defendants successfully removed the suit to federal court. Plaintiffs prevailed on the merits there, and defendants obtained review here. See 111 U.S., at 380–381, 4 S.Ct. 510. This Court determined, on its own motion, that federal subject-matter jurisdiction was absent from the start. Based on that determination, the Court reversed the lower court's judgment for plaintiffs. Worse than entering and leaving this Courthouse equally "emptyhanded," *ante,* at 1845 (concurring opinion), the plaintiffs in *Mansfield* were stripped of the judgment they had won, including the "judicial finding ... of the merits" in their favor, *ante,* at 1844 (concurring opinion). The *Mans-*

field plaintiffs did, however, achieve this small consolation: The Court awarded them costs here as well as below. Recognizing that defendants had "prevail[ed]" in a "formal and nominal sense," the *Mansfield* Court nonetheless concluded that "[i]n a true and proper sense" defendants were "the losing and not the prevailing party." 111 U.S., at 388, 4 S.Ct. 510.

While *Mansfield* casts doubt on the present majority's "formal and nominal" approach, that decision does not consider whether costs would be in order for the plaintiff who obtains substantial relief, but no final judgment. Nor does "*a single case* " on which the concurring opinion today relies, *ante,* at 1845 (emphasis in original). There are, however, enlightening analogies. In multiple instances, state high courts have regarded plaintiffs as prevailing, for costs taxation purposes, when defendants' voluntary conduct, mooting the suit, provided the relief that plaintiffs sought. The concurring opinion ***5** labors unconvincingly to distinguish these state-law cases. A similar federal practice has been observed in cases governed by Federal Rule of Civil Procedure 54(d), the default rule allowing costs "to the prevailing party unless the court otherwise directs." See 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2667, pp. 187–188 (2d ed. 1983) (When "the defendant alters its conduct so that plaintiff's claim [for injunctive relief] becomes moot before judgment is reached, costs may be allowed [under Rule 54(d)] if the court finds that the changes were the result, at least in part, of plaintiff's litigation.") (citing, *inter alia*, *Black Hills Alliance v. Regional Forester,* 526 F.Supp. 257 (D.S.D.1981)).

In short, there is substantial support, both old and new, federal and state, for a costs award, "in [the court's] discretion," *supra,* at 1851, n. 1, to the plaintiff whose suit prompts the defendant to provide the relief plaintiff seeks.

C

Recognizing that no practice set in stone, statute, rule, or precedent, see *infra,* at 1861, dictates the proper construction of modern civil rights fee-shifting prescriptions, I would "assume ... that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer,* 507 U.S., at 388, 113 S.Ct. 1489 (defining "excusable neglect") (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) (defining "bribery")); see also, *e.g., Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (defining "substantially" in light of ordinary usage); *Rutledge v. United States,* 517 U.S. 292, 299–300, n. 10, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (similarly defining "in concert"). In everyday use, "prevail" means "gain victory by virtue of strength or superiority: win mastery: triumph." Webster's Third New International Dictionary 1797 (1976). There are undoubtedly situations in which an individual's goal is to obtain approval of a judge, and in those situations, one cannot "prevail" short of a judge's formal declaration. In a piano competition or a figure skating contest, for example, the person who prevails is ***6** the person declared winner by the judges. However, where the ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential. Western democracies, for instance, "prevailed" in the Cold War even though the Soviet Union never formally surrendered. Among television viewers, John F. Kennedy "prevailed" in the first debate with Richard M. Nixon during the 1960 Presidential contest, even though moderator Howard K. Smith never declared a winner. See T. White, The Making of the President 1960, pp. 293–294 (1961).

A lawsuit's ultimate purpose is to achieve actual relief from an opponent. Favorable judgment may be instrumental in gaining that relief. Generally, however, "the judicial decree

is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant ...." *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). On this common understanding, if a party reaches the "sought-after destination," then the party "prevails" regardless of the "route taken." *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (C.A.5 1985).

Under a fair reading of the FHAA and ADA provisions in point, I would hold that a party "prevails" in "a true and proper sense," *Mansfield*, 111 U.S., at 388, 4 S.Ct. 510, when she achieves, by instituting litigation, the practical relief sought in her complaint. The Court misreads Congress, as I see it, by insisting that, invariably, relief must be displayed in a judgment, and correspondingly that a defendant's voluntary action never suffices. In this case, Buckhannon's purpose in suing West Virginia officials was not narrowly to obtain a judge's approbation. The plaintiffs' objective was to stop enforcement of a rule requiring Buckhannon to evict residents like centenarian Dorsey Pierce as the price of remaining in business. If Buckhannon achieved that objective on account of the strength of its case, see *supra*, at 1852–1853—if it succeeded in keeping its doors open while housing and caring for Ms. Pierce and others similarly situated—then Buckhannon is properly judged a party who prevailed.

III

As the Courts of Appeals have long recognized, the catalyst rule suitably advances Congress' endeavor to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal.

The catalyst rule stemmed from modern legislation extending civil rights protections and enforcement measures. The Civil Rights Act of 1964 included provisions for fee awards to "prevailing parties" in Title II (public accommodations), 42 U.S.C. § 2000a–3(b), and Title VII (employment), § 2000e–5(k), but not in Title VI (federal programs). The provisions' central purpose was "to promote vigorous enforcement" of the laws by private plaintiffs; although using the two-way term "prevailing party," Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant may obtain fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation").

Once the 1964 Act came into force, courts commenced to award fees regularly under the statutory authorizations, and sometimes without such authorization. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262, 270–271, n. 46, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In *Alyeska*, this Court reaffirmed the "American Rule" that a court generally may not award attorney's fees without a legislative instruction to do so. See *id.*, at 269, 95 S.Ct. 1612. To provide the authorization *Alyeska* required for fee awards ***7** under Title VI of the 1964 Civil Rights Act, as well as under Reconstruction Era civil rights legislation, 42 U.S.C. §§ 1981–1983, 1985, 1986 (1994 ed. and Supp. V), and certain other enactments, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994 ed. and Supp. V).

As explained in the Reports supporting § 1988, civil rights statutes vindicate public policies "of the highest priority," S.Rep. No. 94–1011, p. 3 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) *(per curiam)*), yet "depend heavily upon private enforcement," S.Rep. No. 94–1011, at 2, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910. Persons who

bring meritorious civil rights claims, in this light, serve as "private attorneys general." *Id.,* at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912; H.R.Rep. No. 94–1558, p. 2 (1976). Such suitors, Congress recognized, often "cannot afford legal counsel." *Id.,* at 1. They therefore experience "severe hardshi[p]" under the "American Rule." *Id.,* at 2. Congress enacted § 1988 to ensure that nonaffluent plaintiffs would have "effective access" to the Nation's courts to enforce civil rights laws. *Id.,* at 1. That objective accounts for the fee-shifting provisions before the Court in this case, prescriptions of the FHAA and the ADA modeled on § 1988. See *supra,* at 1851, n. 1.

Under the catalyst rule that held sway until today, plaintiffs who obtained the relief they sought through suit on genuine claims ordinarily qualified as "prevailing parties," so that courts had discretion to award them their costs and fees. Persons with limited resources were not impelled to "wage total law" in order to assure that their counsel fees would be paid. They could accept relief, in money or of another kind, voluntarily proffered by a defendant who sought to avoid a recorded decree. And they could rely on a judge then to determine, in her equitable discretion, whether counsel fees were warranted and, if so, in what amount.

Congress appears to have envisioned that very prospect. The Senate Report on the 1976 Civil Rights Attorney's Fees Awards Act states: "[F]or purposes of the award of counsel fees, parties may be considered ***8** to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief.*" S.Rep. No. 94–1011, at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912 (emphasis added). In support, the Report cites cases in which parties recovered fees in the absence of any court-conferred relief. The House Report corroborates: "[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. *A court should still award fees* even though it might conclude, as a matter of equity, that *no formal relief,* such as an injunction, is needed." H.R.Rep. No. 94–1558, at 7 (emphases added). These Reports, Courts of Appeals have observed, are hardly ambiguous. Compare *ante,* at 1842 ("legislative history ... is at best ambiguous"), with, *e.g., Dunn v. The Florida Bar,* 889 F.2d 1010, 1013 (C.A.11 1989) (legislative history "evinces a clear Congressional intent" to permit award "even when no formal judicial relief is obtained" (internal quotation marks omitted)); *Robinson v. Kimbrough,* 652 F.2d 458, 465 (C.A.5 1981) (same); *American Constitutional Party v. Munro,* 650 F.2d 184, 187 (C.A.9 1981) (Senate Report "directs" fee award under catalyst rule). Congress, I am convinced, understood that " '[v]ictory' in a civil rights suit is typically a practical, rather than a strictly legal matter." *Exeter–West Greenwich Regional School Dist. v. Pontarelli,* 788 F.2d 47, 51 (C.A.1 1986) (citation omitted).

IV

The Court identifies several "policy arguments" that might warrant rejection of the catalyst rule. See *ante,* at 1842–1843. A defendant might refrain from altering its conduct, fearing liability for fees as the price of voluntary action. See *ante,* at 1842. Moreover, rejection of the catalyst rule has limited impact: Desisting from the challenged conduct will not render a case moot where damages are sought, and even when the plaintiff seeks only equitable relief, a defendant's voluntary cessation of a challenged practice does not render the case moot "unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Ante,* at 1843 (quoting *Friends of Earth, Inc.,* 528 U.S., at 189, 120 S.Ct. 693). Because a mootness dismissal is not easily achieved, the defendant may be impelled to settle, negotiating fees less generous than a court might award. See *ante,* at 1843. Finally, a catalyst rule would "require analysis of the defendant's

subjective motivations," and thus protract the litigation. *Ibid.*

The Court declines to look beneath the surface of these arguments, placing its reliance, instead, on a meaning of "prevailing ***9** party" that other jurists would scarcely recognize as plain. See *ibid.* Had the Court inspected the "policy arguments" listed in its opinion, I doubt it would have found them impressive.

In opposition to the argument that defendants will resist change in order to stave off an award of fees, one could urge that the catalyst rule may lead defendants promptly to comply with the law's requirements: the longer the litigation, the larger the fees. Indeed, one who knows noncompliance will be expensive might be encouraged to conform his conduct to the legal requirements before litigation is threatened. Cf. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 Vand. L.Rev. 1069, 1121 (1993) ("fee shifting in favor of prevailing plaintiffs enhances both incentives to comply with legal rules *and* incentives to settle disputes"). No doubt, a mootness dismissal is unlikely when recurrence of the controversy is under the defendant's control. But, as earlier observed, see *supra,* at 1857, why should this Court's fee-shifting rulings drive a plaintiff prepared to accept adequate relief, though out-of-court and unrecorded, to litigate on and on? And if the catalyst rule leads defendants to negotiate not only settlement terms but also allied counsel fees, is that not a consummation to applaud, not deplore?

As to the burden on the court, is it not the norm for the judge to whom the case has been assigned to resolve fee disputes (deciding whether an award is in order, and if it is, the amount due), thereby clearing the case from the calendar? If factfinding becomes necessary under the catalyst rule, is it not the sort that "the district courts, in their factfinding expertise, deal with on a regular basis"? *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 548 (C.A.3 1994). Might not one conclude overall, as Courts of Appeals have suggested, that the catalyst rule "saves judicial resources," *Paris v. Department of Housing and Urban Development,* 988 F.2d 236, 240 (C.A.1 1993), by encouraging "plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought"? *Morris v. West Palm Beach,* 194 F.3d 1203, 1207 (C.A.11 1999).

The concurring opinion adds another argument against the catalyst rule: That opinion sees the rule as accommodating the "extortionist" who obtains relief because of "greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit.*" *Ante,* at 1847 (emphasis in original). This concern overlooks both the character of the rule and the judicial superintendence Congress ordered for all fee allowances. The catalyst rule was auxiliary to fee-shifting statutes whose primary purpose is "to promote the vigorous enforcement" of the civil rights laws. *Christiansburg Garment Co.*, 434 U.S., at 422, 98 S.Ct. 694. To that end, courts deemed the conduct-altering catalyst that counted to be the substance of the case, not merely the plaintiff's atypically superior financial resources, media ties, or political clout. See *supra,* at 1852–1853. And Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise "discretion." See *supra,* at 1851, n. 1. So viewed, the catalyst rule provided no berth for nuisance suits, see *Hooper,* 37 F.3d, at 292, or "thinly disguised forms of extortion," *Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1206 (C.A.8 1999) (citation omitted).

V

As to our attorney's fee precedents, the Court correctly observes, "[w]e have never had occasion to decide whether the term 'prevailing party' allows an award of fees under the 'catalyst theory,' " and "there is language in our

cases supporting both petitioners and respondents." *Ante,* at 1839, n. 5. It bears emphasis, however, that in determining whether fee shifting is in order, the Court in the past has placed greatest weight not on any "judicial *imprimatur*," *ante,* at 1840, but on the practical impact of the lawsuit. In *Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), in which the Court held fees could be awarded on the basis of a consent decree, the opinion nowhere relied on the presence of a formal judgment. See *supra,* at 1853; *infra,* n. 14. Some years later, in *Hewitt v. Helms,* 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), the Court suggested that fees might be awarded the plaintiff who "obtain[ed] relief without [the] benefit of a formal judgment." *Id.,* at 760, 107 S.Ct. 2672. The Court explained: "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced," or "if the defendant, under pressure of [a suit for declaratory judgment], alters his conduct (or threatened conduct) towards the plaintiff," *i.e.,* conduct "that was the basis for the suit, the plaintiff will have prevailed." *Id.,* at 761, 107 S.Ct. 2672. I agree, and would apply that analysis to this case.

The Court posits a " 'merit' requirement of our prior cases." *Ante,* at 1841. *Maher,* however, affirmed an award of attorney's fees based on a consent decree that "did not purport to adjudicate [plaintiff's] statutory or constitutional claims." 448 U.S., at 126, n. 8, 100 S.Ct. 2570. The decree in *Maher* "explicitly stated that 'nothing [therein was] intended to constitute an admission of fault by either party.' " *Ibid.* The catalyst rule, in short, conflicts with none of "our prior *holdings*," *ante,* at 1841.

* * *

The Court states that the term "prevailing party" in fee-shifting statutes has an "accepted meaning." *Ante,* at 1842. If that is so, the "accepted meaning" is not the one the Court today announces. It is, instead, the meaning accepted by every Court of Appeals to address the catalyst issue before our 1987 decision in *Hewitt,* see *supra,* at 1851–1852, n. 4, and disavowed since then only by the Fourth Circuit, see *supra,* at 1852, n. 5. A plaintiff prevails, federal judges have overwhelmingly agreed, when a litigated judgment, consent decree, out-of-court settlement, or the defendant's voluntary, postcomplaint payment or change in conduct in fact affords redress for the plaintiff's substantial grievances.

When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation. Today's decision does not provide one. The Court's narrow construction of the words "prevailing party" is unsupported by precedent and unaided by history or logic. Congress prescribed fee-shifting provisions like those included in the FHAA and ADA to encourage private enforcement of laws designed to advance civil rights. Fidelity to that purpose calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure. I would so hold and therefore dissent from the judgment and opinion of the Court.

Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 2 Wash. U. J.L. & Pol'y 33 (2003)[1]

… What does it mean to be a public interest lawyer? … The prevailing view of the public interest lawyer is relatively narrow in scope. Given the persistent nexus between wealth and access to legal representation, our multi-layered society is always in need of lawyers committed to serving poor and under-represented people who would not otherwise have access to crucial legal advice. Our society is equally in need of lawyers who are committed to upholding rights and addressing issues that do not generally attract adequate financial backing, such as civil rights, immigrant rights, child poverty, and today more than ever, those who get caught, perhaps innocently, in the cross-fire of our war on terrorism. I believe that these lawyers deserve special recognition because they devote their careers to the public interest and they do so usually at a substantial personal financial sacrifice.

At the same time, the circle of lawyers who serve the public interest can be viewed as much broader than we sometimes think. In the profession of law, the public interest is always implicated, and we mistake ourselves by assuming otherwise. This premise is as true for a corporate transactional lawyer with Fortune 500 clients as it is for a public defender or an impact litigation attorney. The weighty legal and moral obligations that attorneys face leave ample room to vindicate the public interest if they so choose. Thus, even in the justifiable pride of electing a legal career explicitly dedicated to the public interest, one must never be so jealous of the term 'public interest' as to forget or deny that all lawyers are almost preternaturally so dedicated-- else how can we invite our fellow lawyers to that higher purpose?

Indeed, I firmly believe that a prosecutor who wisely and fairly uses his or her power to forego prosecuting someone when the interest of justice so requires furthers the public interest just as much as a public defender who, from the trenches, defends the criminally-accused indigent. A partner in a major law firm who works to ensure that his or her corporate clients treat their employees in a non-discriminatory manner, or that his or her clients take the high road even as they pursue the bottom line (for example, consider Enron or Worldcom) furthers the public interest just as much as the plaintiffs' lawyer who sues the corporation for discrimination or the government lawyer who charges the corporate executive with fraud and malfeasance.

One of the biggest and most significant civil rights cases I have tried in my 23 years on the bench, a case which challenged widespread unconstitutional conditions at the foremost maximum security prison in California,[1] was litigated by a small prison law group in partnership with one of the country's leading law firms in high-tech litigation and transactional work. The partners and associates at that firm worked in a pro bono capacity and expended tremendous resources, including advancing costs well in excess of a million dollars, on behalf of this very important case. The public interest prison law group could not possibly have handled the case by themselves. The large law firm, in my view, personified the spirit and essence of public interest law.

Whether you can devote your life to being a public interest lawyer as I first defined that term, or whether your career path takes you in other or more varied directions, I hope that you will always consider how your position affects and implicates the public interest, and how you can strive to serve and further the public interest in whatever way your position permits.

…[I]t is no accident that lawyers have shaped our constitutional history as well as the day-to-day events of our society at large. Lawyers are peculiarly equipped, by training and experience, to be partisans for a cause and to take the lead in the vigorous and frank discussions of our society's needs and problems. They have long functioned as architects as well as artisans of social reform, redesigning, reshaping, and creating not only legal institutions, but social, economic, and political institutions as well. To give one obvious example, it was largely lawyers who shaped and managed Franklin Delano Roosevelt's New Deal Administration in l932, a program which brought us out of the most devastating depression in our country's history and positioned us to become the most powerful and prosperous country in the world. And in the early 1960s, lawyers of all colors and backgrounds, young and old, joined the civil rights movement en masse, and made it possible for Dr. Martin Luther King, Jr. to fashion the most successful civil rights movement in our nation's history, one based upon a willingness to go to jail for passive resistance to immoral laws.…

…[T]here are new challenges for those practicing in the public interest, and that these challenges come from different directions. First, as some of our social problems grow more intractable and complex, it becomes much more challenging for lawyers to tackle them through judicial avenues. It is much easier to bring a lawsuit in response to an incident of blatant discrimination than it is to prove forms of discrimination which are no less devastating in their

[1] Judge, United States District Court, Northern District of California.

results, but which occur in more subtle or indirect forms. …At the same time, we have seen federal funding for legal services drastically slashed, and legal aid offices around the country have had to consolidate or close to meet bare-bones funding limits set by the Legal Services Corporation. Studies show that at least eighty percent of the legal needs of the poor still go unmet.[2]

Strict restrictions on the types of cases that legal aid offices can bring have also been imposed. For example, legal aid offices are no longer allowed to bring class action cases,[3] which further impedes their ability to efficiently and effectively enforce important rights. Before this restriction was in place, a legal aid office in northern California brought a class action in federal court, Sneede v. Kizer,[4] contending that the State of California was improperly interpreting the Medicaid statute, and in the process depriving thousands of class members of medical benefits to which they were legally entitled. Legal Aid won that case, and thousands of Californians began to receive critically important medical benefits. Under today's restrictions, this class action could not be brought, and the important rights at stake could never be vindicated, at least not by a legal aid office, except on a one-client-at-a-time basis.

The current restrictions on impact litigation are, for me, particularly ironic. Back in the early days of Lyndon Johnson's war on poverty, when I directed the East Bayshore Neighborhood Legal Center, we would dutifully represent our clients on an individual basis in their grievances against landlords, collection agencies, and the like. I remember clearly when the lightbulb went off for legal aid offices around the country that the best way to fight the systemic problems faced by our clients was to conduct so-called impact litigation, which strikes at the heart of the problem that needs to be addressed. It is a pity this has been stopped.

Not only are resources more scarce, and social issues often more difficult to identify and address, but a more conservative Supreme Court has also significantly impacted the practice of public interest law. In recent years, Supreme Court decisions have dramatically changed the landscape for citizens and lawyers seeking to enforce civil rights or environmental laws.

For example, in three decisions in the 1998-99 Term the Court resoundingly pronounced the inviolability of state sovereignty in the federal system.[5] In the three decisions, all decided by a majority of the same five justices, the Court dramatically curtailed the power of Congress to provide a judicial forum for redress of state infringement of federal rights.

We need not debate the soundness or the wisdom of this jurisprudential trend to expand states' rights in order to understand the concerns of the civil rights community where, historically speaking, the term "states' rights" has been considered synonymous with racial segregation and Jim Crow laws that perpetuated second class citizenship for blacks in our southern states.

Further compounding this effect is the growing trend to label decisions upholding or expanding civil rights as the product of judicial activism, with the pejorative implication that such decisions represent an attempt by judges to improperly disregard legal precedent or to thwart "the will of the legislature" or "the will of the people." Conversely, decisions that are consistent with a more politically conservative outlook are typically portrayed as products of judicial restraint.

It seems to me, however, that the term 'judicial activism' ultimately depends upon whose ox is being gored, and not upon judicial, political, or social persuasion. The truth is that the term 'judicial activism' is not a particularly coherent concept to begin with. All judges are required to act in every case, and every form of judicial action bears some social consequences, if only for the parties involved. Thus, the claim that a judge who maintains the status quo is quiescent whereas a judge whose decisions modify the status quo is active seems to me to be a distinction without a difference. In reality, there are plenty of issues on a conservative agenda that would require active judging to implement, just as there are a host of liberal issues that will only hold firm if judges are restrained in approaching them. …

The true nature of the judicial activism debate can, in my view, be fairly easily and obviously exposed, as was recently done by Professor William P. Marshall of the University of North Carolina.[6] After comprehensively analyzing the decisions of the Supreme Court since 1995, Professor Marshall concluded that the current court is actually the most "activist" in our history.[7] Among other things, he found that it has invalidated over twenty-six federal laws in the last six years.[8] In striking contrast, he tells us that during the entire first 200 years following ratification of the constitution, the Supreme Court only struck down a grand total of 127 federal laws, an average of a little more than one law every two years.[9] …

Of course, no discussion of the challenges facing public interest lawyers would be complete without addressing the very real obstacles to effectuating social change through civil rights litigation, obstacles that have been revealed all

too clearly by the last 25 years of civil rights history in this country.

The singular civil rights case of the last century, in my view, was Brown v. Board of Education.[15] When Brown was decided in 1954, the black community rejoiced in a way it had not since Joe Louis defeated Max Schmeling in an historic heavyweight boxing match. There was great optimism throughout the land that, with the overturning of Plessy v. Ferguson,[16] the days of segregated education in this county were on their way to becoming an unpleasant memory. However, painful experience has shown that this historic judicial ruling cannot, without legislative and executive action, and without grass-roots mobilization, achieve the degree of social change that many, infused with the optimism of the 1950s and 60s, may have hoped for.

Nearly half a century later, we must concede that our public schools are more segregated than ever.[17] The New York Times recently reported on a new study by the Civil Rights Project at Harvard University that shows that white, black and Latino school children are more isolated within their own racial groups than they ***42** were 30 years ago.[18] This is certainly not what Thurgood Marshall and others expected would be the legacy of Brown as they savored their legal victory in 1954. Indeed, the limits on the ability of courts alone to achieve social change cannot be more clearly illustrated than with the case of Brown v. Board of Education.

Interestingly, as the Harvard study found, demographics alone do not account for the rapid re-segregation of schools that has been occurring over the last ten years.[19] Another significant factor has been the recent termination of court-ordered desegregation remedial plans.[20] Since the early 1990s when the Supreme Court began making it easier to terminate such plans, many school districts have lifted desegregation orders.[21] Thus, while Brown can be used to starkly illustrate the limits of the courts, it also serves to underscore their power. When courts utilized the full extent of their remedial power to enforce Brown vigorously through desegregation orders, it had a substantial impact. However, as soon as the courts were required to step back, the force of Brown quickly dissipated, and schools re-segregated. As an aside, I might mention that I've seen this same pattern in prison reform cases, once the court ceases to supervise the constitutional remedies it has ordered. …

That these formidable challenges exist, however, is no reason to stand back or give up on the courts as a component for social change. On the contrary, the courts remain at center stage, and rightly so, as our nation continues to grapple with the social issues of the day. After all is said and done, we are a nation of laws. As a result, our laws are not only symbols, but necessary avenues for our own development and evolution as a free society. It is simply the nature of a society based on the rule of law that change will evolve, at least in part, through our courts. As such, the lawyers and the public, will always press for social changes through the courts. Neither side of the political spectrum will be immune from this pressure.

Moreover, the significance of public interest litigation cannot always be measured by just one scale. For instance, the fact that Brown did not successfully prod our nation to a fully integrated public school system does not undermine the historical enormity of that decision. For the black school child, living with the knowledge and conviction that some measure of his or her plight is the result of unjust and legally disapproved conduct is a fundamentally different reality than having to live with the pain that such conduct is perfectly condoned and legal. Even if very little in day-to-day life changes and there is just the expectation of some material betterment, the knowledge that one's experience finds vindication in the eyes of the law is a good bit of what empowerment means. I think that this is especially true in democratic societies. I have been told by civil rights leaders from Martin Luther King to the remarkable Robert Moses of the Student Non-Violent Coordinating Committee that the new-found expectation that, unlike past administrations, John F. Kennedy would respond to Bull Connors's police dogs and fire hoses in Birmingham, was critically important fuel for the civil rights movement. While our experience with Brown and other civil rights cases may provide a ***44** sobering dose of realism for the public interest litigator, it should not be cause for discouragement. One need not look far to see that courts remain vitally involved in the critical social issues of the day….

Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (2d ed. 2008)

The Prisoners' Rights "Revolution"

Over the past several decades there has been a great deal of litigation involving the rights of prison inmates. Prior to the 1960s, the courts had adopted a hands-off policy to prisoner suits, refusing to consider the merits of suits challenging prison conditions, rules, and regulations (Comment 1963). This position changed in the early 1960s when the Court held that section 1983 of the Civil Rights Act of 1871 gave prisoners standing in federal courts to make such challenges (*Cooper* v. *Pate* 1964). By the late 1960s and early 1970s, the Court loosened tight restrictions on prisoners providing legal assistance to each other (*Johnson* v. *Avery*), on mail censorship (*Procunier* v. *Martinez* 1974), on freedom of religion (*Cruz* v. *Beto* 1972), and held that denial of medical care to an inmate can constitute cruel and unusual punishment in violation of the Eighth Amendment (*Estelle* v. *Gamble* 1976). A 1972 case (*Haines* v. *Kerner* 1972), allowed a prisoner to proceed with a suit seeking damages resulting from prison disciplinary regulations, while in 1974 the Court invalidated prison disciplinary proceedings that did not provide any due process protections (*Wolff* v. *McDonnell* 1974). In this latter case, Justice White, writing for the majority, noted that "there is no iron curtain drawn between the Constitution and the prisons of this country" (1974, 555–56). While the Burger Court became increasingly hostile to prisoners' suits, it did not repudiate earlier decisions.[3]

At the same time as the Court was liberalizing prisoners' access to federal courts, the number of prisoners skyrocketed.[4] These increases "created a severe crowding problem"[5] that exacerbated tensions and worsened the already often inadequate delivery of services. Indeed, even before the dramatic rise in prison populations, most of the nations' maximum-security prisons were old, deteriorating, and woefully underfunded, barely able, if at all, to provide even minimal levels of services (Cobb 1985).

In the wake of these occurrences there was a flood of prisoner suits,

3. See, for example, *Meachum* v. *Fano* (1976), rejecting a Fourteenth Amendment due process argument that prison transfers require a fact-finding hearing; *Bell* v. *Wolfish* (1979), upholding the "double-bunking" of pre-trial detainees against a Fifth Amendment due process challenge; and *Rhodes* v. *Chapman* (1981), upholding double-celling in an Ohio prison against Eighth and Fourteenth Amendment challenge.

4. See, for example, Finn (1984); Jacobs (1984); Malcolm (1989, 1990, 1991); Selke (1985).

5. Finn (1984, 319). For example, by 1989 the California prison system was "routinely operating" at 175 percent of capacity (Malcolm 1989, 1).

nearly all of which started and ended in the federal district courts. While the first decision invalidating the prison system of an entire state came in 1970 (*Holt* v. *Sarver*), by 1983 prison systems in eight states had been declared unconstitutional (Taggart 1989, 246). By 1986, forty-five states had at least one prison facility involved in litigation and in thirty-seven states correctional administrations or individual prisons were operating under federal court orders (Brakel 1986). What were the results?

Changes in Prisons

The results of prison litigation are not entirely clear. While one school of thought believes that the "collective result of this litigation has been nothing less than the achievement of a legal revolution within a decade" (Orland 1975, 11), the key question is whether this "legal revolution" translated into a revolution in prison conditions. The careful scholar will want to know what changes occurred and whether they can be credited to the courts. In the material that follows I suggest that change varied and that the presence of the constraints and the conditions best explains why litigation worked in some places and not in others.

Overall, the consensus view is that, while some changes have been made, serious problems remain. Although litigation has sometimes succeeded in eliminating the "most severe overcrowding and the most painful and onerous conditions," the contribution of the courts has been "strictly limited" to "only" those achievements (Angelos and Jacobs 1985, 112). Improvements in prisoner health have been reported (Brakel 1986, 64), as has the lessening of the likelihood of "arbitrary abuse" (Turner 1979, 640), but prison overcrowding continues to be a serious problem.[6] One study of four prison reform cases concluded that while "the court orders eliminated the worst abuses and ameliorated the harshest conditions," they failed to deal with "underlying issues and problems" and "were directed more toward symptoms than causes" (Harris and Spiller 1976, 25, 26).[7] As James Jacobs puts it, "there seems to be no agreement on which side is winning" (Jacobs 1980, 430).[8]

There are also the issues of prison construction and the expenditure of funds for the corrections system. Here, the essential argument is that courts have put prison reform on the political agenda and forced states to expend resources to correct constitutionally deficient conditions. The executive director of the American Civil Liberties Union's (ACLU) National Prison Project

6. An example is the Pennsylvania prison riot of October 1989, which occurred in a prison designed for 1,826 inmates but holding 2,607. As of September 30, 1989, the entire Pennsylvania prison system was "about 48 percent over capacity," a situation described as "typical . . . throughout the country" (Hinds 1989, 9).

7. See also Mays and Taggart (1985).

8. When asked if court orders and injunctions were effective in accomplishing the changes intended by the judge, the respondents to a California corrections administrators' survey split fairly evenly (Project 1973, 529).

has argued that prison litigation "exposes the sordid conditions in our prisons to public scrutiny" (Bronstein 1984b, 324).[9] And Justice Brennan, writing in 1981, stated that "the courts have emerged as a critical force behind efforts to ameliorate inhumane conditions." He found it "clear that judicial intervention has been responsible, not only for remedying some of the worst abuses by direct order, but also for 'forcing' the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal systems" (*Rhodes* v. *Chapman* 1981, 359).

Scholars who have closely examined the link between judicial action and prison construction are less sanguine (Finn 1984; Hopper 1985; Peirce 1987). Even ACLU prison litigator Bronstein has noted that "most prison construction is not in response to law suits" but rather "in response to a real need, or at least a perceived need" (Bronstein 1984a, 346). Similarly, studies of the effect of judicial action on expenditures have also found mixed results (Harriman and Straussman 1983; Taggart 1989). A recent study found that "judicial intervention does not ensure a budgetary response" and concluded that "spending is shaped in large measure by forces much more compelling and forceful than a single discrete event such as a court order" (Taggart 1989, 267, 268; cf. Feeley 1989).

Finally, there is the issue of prison violence. Although court-ordered reform is aimed in general at improving the treatment of prisoners, and specifically at reducing arbitrary use of force, there is some evidence suggesting that such reform leads to an increase in prison violence, at least in the short run.[10] Additional factors such as "changes in society" (Project 1973, 494), growing prison populations, and younger, less tractable inmates, have had an effect (Brakel 1986, 6). But overall, as a former Texas prison guard put it, "while prisoners in many institutions now have enhanced civil rights . . . they live in a lawless society at the mercy of aggressive inmates and cliques" (Marquart and Crouch 1985, 584). And by 1986, Brakel concluded that the "contemporary wisdom in corrections is that despite more than a decade of close scrutiny and mandated reforms, many prisons are less safe than they were in the pre-reform days" (Brakel 1986, 6).

In sum, then, it appears that change has been uneven. Many of the worst conditions have been improved to at least minimal standards, but problems still abound. The task that remains is to explain why the change has been so uneven—why there was some change, but only some.

Explaining Judicial Outcomes: Constraints and Conditions

For change to occur as a result of litigation, reformers must overcome the three constraints and then have present at least one of the four conditions.

9. See also Yarbrough (1984, 277).

10. Alpert, Crouch, and Huff (1984, 299); Chilton (1989, 16); Marquart and Crouch (1985, 575, 580); Mays and Taggart (1985, 41–42).

With prison reform, courts overcame only one of the constraints entirely. In individual cases, other constraints were overcome. When this occurred, and when one of the conditions was present, meaningful change occurred. Failure to successfully overcome the constraints, or the lack of at least one of the conditions, meant that court-ordered change was frustrated.

Reformers were able to overcome the problem of lack of precedent. As the brief case discussion indicated, by the early 1970s the Court had essentially opened the court-house doors to prisoner suits. Much of the success here was based on the civil rights litigation of the 1950s and 1960s as well as the reform of criminal procedure initiated by the Warren Court. Once attention was drawn to prison conditions, court action followed.

Political and Social Support. The second constraint on courts' ability to produce significant social reform is the need for political support. Prison reform issues are "essentially political" (Bronstein 1977, 27, 44), and prison reform is "highly dependent upon the political processes" (Resnick 1984, 348). When political leaders are willing to act, this constraint can be overcome. When they do nothing, or oppose court decisions, little change occurs. The reasons for this are relatively straightforward. First, unless prison officials are pushed by political leaders there is "little incentive" for them to "take the risks inherent in changing the current structure" (Note 1979, 1067). Without the support of political leaders, prison officials lack the resources to make many changes and risk their jobs in trying. Ameliorating conditions, improving services, hiring more guards, and building more prisons all cost money, and that money can come only from the legislature and the executive branch. Thus, overcoming the lack of political support was a trickier problem, and one that reformers have not been able to solve uniformly.

Political support for prison reform was based on several factors. In general, a prisoners' rights movement developed that was part of a larger rights movement that swept the U.S. in the 1960s. As one commentator put it, activists "linked the prisoners' cause to the plight of other powerless groups" in the "context of a 'fundamental democratization' which has transformed American society since World War II, and particularly since 1960" (Jacobs 1980, 432).[11] This "social acceptance of civil rights for a variety of 'unconventional' social groups" (Thomas, Keeler, and Harris 1986, 793) made prison reform an issue that politicians could deal with. There was a proliferation of prison support groups ranging from CURE, Citizens United for the Rehabilitation of Errants in Texas (Ekland-Olson and Martin 1988, 368–69), to nationwide, established organizations. In 1970 the American Bar Association created a Commission on Correctional Facilities and Services to advance reform which, with Ford Foundation funding, opened a full-time office in

11. As Jacobs (1980, 436) notes, by the late 1950s and early 1960s, blacks were a majority of prisoners in many Northern prisons and in some state prison systems.

Washington, D.C. (Jacobs 1980, 437–39). The National Institute of Corrections, a federal agency, "played an increasingly important role in the prisoners' rights movement" as did the American Correctional Association, the leading professional association of prison officials (Jacobs 1980, 448). Thus, prison reform moved more toward the political mainstream.

Another important factor in creating political and social support was prison violence. It is an unfortunate fact of American life that it often takes violence to bring an issue to political consciousness. The prison reform movement was unquestionably aided by a series of bloody prison riots and the coming to light of acts of prison violence (Toch 1985, 69). Those acts provided the "critical impetus" (Benton and Silberstein 1983, 122) for reform efforts. In particular, numerous writers point to the riot at New York's Attica prison in September 1971 as having a catalytic effect on the entire prisoners' rights movement.[12] In that riot, described by a state investigating commission as the "bloodiest encounter between Americans since the Civil War" (quoted in Kolbert 1989, 1), forty-three people were killed. And the crucial role of riots and violence in promoting reform has been noted in Mississippi (Hopper 1985, 56), New Mexico (Mays and Taggart 1985, 38, 47), Oklahoma (Giari 1979), and Georgia (Chilton 1989, 10), to cite just a few cases.

Political support for court-ordered prison reform varies enormously. In states like New York and New Mexico, perhaps because of riots and severe overcrowding, Governors Carey, Cuomo, and Anaya have been committed to prison reform and expansion (Jacobs 1984, 216–17 n.19; Mays and Taggart 1985, 48–49). While such political support by no means ensures that reform will occur, it removes the political obstacles found in states such as Oklahoma and Alabama (Giari 1979, 451; Yarbrough 1984). In Alabama, while Lieutenant Governor George McMillen and others supported compliance with court decisions, Attorney General Charles Graddick used opposition to court-ordered reform to bolster his political image (Yarbrough 1984, 287–88, 283). And George Wallace, seldom without a colorful slogan, accused Judge Johnson of creating a "hotel atmosphere" in the state prisons. Wallace's remedy for the problem was simple: "Vote for George Wallace and give a barbed wire enema to a federal judge" (quoted in Yarbrough 1984, 287). It takes no great insight to see that successful prison reform faced major obstacles in many states.

Lack of Implementation Power. The third constraint that must be overcome is the courts' lack of implementation powers. As Bronstein points out, implementation and enforcement of prison reform decrees rests "primarily in the hands of prison officials" (Bronstein 1977, 44) who, like other professionals, do not like having their professional competence challenged. When

12. See, for example, Bronstein (1977, 32); Finn (1984, 320–21); Mullen (1985, 32); Resnick (1984, 348).

courts issue orders requiring prison reform, many administrators see them as doing just that. The problem, of course, is not only that prison officials "often continue to fight for the status quo" (Bronstein 1977, 44), but also that courts lack the tools to insure implementation. Although this is not unusual, the less visible nature of prisons as compared to other governmental agencies which have been the targets of litigation makes implementation even more problematic. Since prison access is regulated for safety reasons, information on conditions and the progress of implementation is difficult to obtain. As Jacobs points out, "even under the best of circumstances," the court "must depend upon the institution's staff for information as to whether a decree is being followed" (Jacobs 1980, 452). The staff, of course, may be uncooperative. Indeed, when California corrections administrators were asked, in a survey, if they could "comply with court orders through changes which meet the letter of the court order, but not its spirit, and thereby frustrate the intent of the court," a whopping 87 percent said yes (Project 1973, 530). As one administrator put it in a follow-up interview, "we can usually get around anything" (Project 1973, 531). Administrators simply play an indispensable role in the success of prison reform. As the assistant attorney general in charge of corrections in Washington state put it, "the key to relief will be commitment by defendants to comply with the letter and the spirit of the order" (Collins 1984, 342). The necessity of support from prison administrators, and their ability to withhold that support, makes overcoming the implementation constraint particularly problematic.[13]

There is also a related issue of staff support below the top administrative level. Since it is the staff who will actually carry out any reform decree, their attitude is vitally important. Yet the staff, operating in a potentially dangerous environment, may have little interest or incentive in reforming their procedures, especially if the reforms are perceived as lessening their authority. A New York study found that the typical corrections officer "opposes prison reform as a threat to his physical security" (New York State 1974, 17). The California correctional administrators' survey just referred to, found "many administrators" stating that the "greatest administrative challenge regarding the effect of change on the staff was having to 'sell' the staff on every new policy" (Project 1973, 502). Indeed, the survey found that "*staff morale* is the operational factor which consistently shows the greatest negative effect" of court-ordered reform (Project 1973, 575).

It makes good sense that staff may feel uneasy about change. Aside from the potential dangers under which they constantly operate, they may also fear for their jobs. Active attempts at implementation may get them into trouble with recalcitrant administrators while active refusal to implement may create similar problems with the court. This attitude can make it doubly hard for

13. For a colorful illustration of this point involving the Texas prison system, see Ekland-Olson and Martin (1988).

courts to find out what prison problems exist, how they are improving and the reasons why. This difficulty in turn limits the courts' ability to mold effective decrees (Note 1979, 1079–80). And when administrators are fighting court-ordered reform, repeated violations of court orders may enhance rather than harm an employee's career.[14] On the other hand, when there is support for the decree on top, staff may be more willing to make a good faith effort.[15]

In sum, the "transformation of the patterns of interaction necessary for prison reform cannot be achieved by decree" (Note 1979, 1073). The active support of administrators and staff is required. And without the presence of factors external to the courts, that support will not be available.

Conditions Necessary for Change

Given the difficulties of implementation that I have laid out, one may wonder why or how reform ever occurs. Clearly, without political support, neither of the first two conditions will be present. It is also clear that there is no market solution. However, there is still room for the fourth condition: administrators willing to make changes who see court decisions as providing cover or a tool for leverage with the legislature and the executive branch. When this condition is present, and the constraints have been overcome, change can occur.

Administrators and staff sometimes believe that changes can be made that will improve life for *everyone* involved in prisons. While, in general, adjudication is "unlikely to be effective because the process remains separate from and foreign to those directly affected" (Note 1979, 1073–74), when administrators and staff are willingly involved in negotiation, change can occur. In the fourteen-year-old Georgia case, for example, as time went on, "key decision makers . . . were comparatively more accepting of the remedial decrees they had to live with, because these orders were the results of their efforts" (Chilton 1989, 14). A similar story can be told of New Mexico and Alabama (Mays and Taggart, 1985; Yarbrough 1984, 282). In Texas, on the other hand, where there was little negotiation, a study concluded that "to the extent that administrators and staff perceive that changes have been imposed, such changes will be resisted and morale among staff will be lowered" (Ekland-Olson and Martin 1988, 378). When prison officials are willing to reform, and take part in the remedial process, reform is more likely.

Much of the argument is highlighted by litigation involving the infamous Parchman Prison in Mississippi. Examining that litigation, one study suggested that "perhaps in no other state has litigation been as fundamentally involved in changing prison conditions." However, the study also identified factors essential to overcoming the constraints and pointed to the conditions

14. For an example from Texas, see Ekland-Olson and Martin (1988, 374).

15. For an argument that this is what happened in New Mexico, see Mays and Taggart (1985, 50).

necessary for change. Prison violence, the result of two inmate guards murdering another prisoner, led to a legislative investigation of prison conditions and the issuance of a report. A "floodtide of prisoners," identified as the "biggest factor operating in corrections in the state," kept the issue in the political spotlight. Within the prison system, much change had been made prior to the filing of the suit. The decline in the profitability of farming made it unattractive for the prison to continue it, and the cruel and exploitative regime that it had fostered was replaced. In the early and mid-1960s, whipping had been stopped and vocational education programs started. By the late 1960s additional education programs were added, including an alcohol and drug rehabilitation center, and a pre-release center staffed with counselors. "In short, Parchman had taken long strides in the changing treatment of inmates by the time the court interceded." Court intervention, then, did not institute change but rather "broadened the scope of the trend" (Hopper 1985, 54, 56–57, 61, 62).

Reform is also more likely where it is seen as involving either a minor issue or as entailing "good correctional policy."[16] This argument is nicely summed up by the Indiana attorney general's comparison of the state's reaction to two cases. In the first, "the federal judge issued a fairly narrow decree dealing with medical care and overcrowding. The state felt that he was right—they were going to comply with it as best they could." However, in the second case, dealing with a reformatory, the judge "issued a very detailed decree telling them how many medical technicians they had to hire, and so on and so forth. They were going to fight this one to the end because they didn't want to be told in detail how to do every single thing in their prison" (as recollected by Bronstein 1984b, 326).

In terms of using court orders as leverage, Herman found that "court orders reducing overcrowding are welcomed by many prison administrators" because such orders give them leverage in the budgetary process (Herman 1984, 308). In other words, the courtroom defendants may actually be secret plaintiffs. The assistant attorney general in charge of corrections for Washington state has noted this too: "sometimes the client wants to lose, since sometimes losing is the only way a correctional administrator can get the money he needs to run a proper program" (Collins 1984, 342). For administrators who wish to make changes but see little hope of obtaining the necessary resources from the legislature, judges may appear as "budgetary saviors" providing the "one possibility for budgetary growth" (Harriman and Straussman 1983, 348, 349).[17] In terms of using courts as cover, administrators can

16. See, for example, Ekland-Olson and Martin (1988, 378); Mays and Taggart (1985, 44, 51); Project (1973, 520, 551).

17. See also *Rhodes* v. *Chapman* (1981, 360) where Justice Brennan noted that "even prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform."

change rules and then claim that the changes were forced on them by the court. As Jacobs puts it, "rules and practices can be liberalized and then blamed on the courts, thereby blunting criticism from rank and file guards" (Jacobs 1980, 446). For the administrator who is not opposed to at least some changes, court orders can be used as a tool.

Conclusion

Justice Brennan, concurring in a 1981 case (*Rhodes* v. *Chapman*, 359), argued that courts can play a vital role in prison reform. The evidence, however, suggests that despite the good intentions of many prison litigators and judges, courts lack important tools necessary for the successful reform of the American prison system. Justice Powell, for example, has noted that the "problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree" (*Procunier* v. *Martinez* 1974, 404–5). Former Chief Justice Warren Burger agreed, writing in 1985 that "courts are not the primary forum for effective resolution of disputes over prison conditions" (Burger 1985, 9). Clearly, Justice Brennan and proponents of the Dynamic Court view have overstated their case.

On the other hand, courts have made a difference on some issues in some places. If the constraints can be overcome, and one of the conditions is present, litigation can make a difference. The Constrained Court view, then, is also not very helpful. This leaves the conditions. And, as the analysis has shown, they do explain both why change has been uneven and when it has occurred.

Defenders of the use of litigation to improve prison conditions, even if they admit that success is uneven, often argue that there is no other choice. As litigator Turner puts it, "litigation is the clumsiest, most frustrating, costliest way of doing anything, but it's the only game in town because of the default of the other branches of government" (Turner 1984a, 347).[18] Yet there is little evidence that prison reform litigators have put as much time, energy, and resources into political and social change as into litigation. Without that change, litigation will not be effective. Reliance on courts will not bring much change.[19] The political challenge must be faced directly.[20] Litigation, as the executive director of the ACLU's National Prison Project has come to understand, "is not, of course, the real answer" (Bronstein 1984b, 324).

18. See also Comment (1977, 369).

19. Turner's litigation strategy actually recognizes that the ultimate decision must be political. Believing, along with many prison reformers, that a major problem is the excessive use of prison terms in the legal system, he "explicitly" uses litigation to lessen the use of prison terms. Through prison litigation he aims to "improve the conditions of imprisonment and thereby to make it ruinously expensive for the state to continue to incarcerate as many people as they do" (Turner 1984b, 331, 331–32). Yet, as the number of citizens incarcerated has grown enormously, and at an increasing pace, this hardly seems like a sensible strategy.

20. There may be a greater chance of successful implementation when legislatures rather than courts are involved: "Correctional employees understand the legislative process; the Department of Corrections and employee groups are both represented by spokesmen before the legislature" (Project 1973, 554 n.429).

Conclusion: The Revolution That Wasn't

In the decisions that I have examined in this chapter, reformers attempted to dramatically change police and courtroom practices and prison conditions. They did so by litigating, focusing on rights and arguing that prison officials, the police, and the courts must inform criminal defendants of a wide array of rights and refrain from certain practices. And they won many cases.

The Court, however, was unable to achieve its stated goals because political support was often lacking and seldom were the conditions necessary for change present. What was overlooked was that organizations, be they prison systems, police departments, or lower courts, are often unwilling to change. Watching over 1,600 criminal court cases a decade and a half after the "revolution," Feeley found that "constitutional changes notwithstanding, the lower courts are reluctant to treat formally that which has traditionally been treated informally, and they refuse to consider solemnly that which has usually been taken lightly" (Feeley 1979, 8). For many officials, what the Supreme Court did simply "did not matter much" (Wasby 1976, 221). Of the more than 1,600 cases that Feeley saw, the "overwhelming majority ... took just a few seconds" and "the courtroom encounter was a ritual in which the judge ratified a decision made earlier" (Feeley 1979, 11). While some change has occurred, it depended more on the interests of non-Court actors, espe-cially politicians and administrators, than on the courts. The revolution failed.

Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263 (2010)

I. Introduction

[There is a] … crisis of confidence in constitutional litigation as a tool for social change. … Some have questioned the courts' institutional capacity to generate change, either because they cannot ensure that their rulings will be enforced or because they cannot change the beliefs of those whose views determine the course of policy. Others emphasize the ways in which litigation has de-radicalized social movements, since courts favor moderate, legally grounded arguments that may enforce the social status quo. Although they focus on the value of litigation as a tool for change, critics of change-oriented litigation also offer a powerful account of the relationship between social change and judicial decision-making. In this account, as we will see, law is argued to affect neither the concrete enforcement of rights nor popular opinion about the justice of a movement's arguments.

…[T]he basic premises of … [the] model shared by litigation's critics of how social change occurs [has three premises]. The first premise … addresses the relationship between law and social change. Litigation's critics reason that legal reforms almost inevitably mirror shifts in social mores and popular opinion. This is the reflectionist hypothesis: law reflects but does not reshape public attitudes and views. The second premise addresses how social change happens. This is the cause-acceptance hypothesis: social change occurs when a majority of the public accepts the legitimacy of the movement's complaint. A final premise concerns law's relevance to social movement campaigns. This is the clean-up hypothesis: court decisions matter only when they strike down already unusual and unpopular laws or implement remedial measures the public already supports.

… Contrary to what is suggested by the reflectionist hypothesis, decisions and change-oriented litigation may sometimes produce social change indirectly, by redefining a social practice … and thereby influencing citizens' attitudes. This model is one of "constitutional framing," whereby movements, countermovements, and officials in constitutional debates compete and collaborate in changing or reinforcing the meaning of social practices.

The changing definition of a movement's cause may have effects more complex than the outcomes and shifts in public attitudes …. When the prevailing meaning of a practice changes, a decision can alter the argumentative strategies adopted by opposing movements, the alliances each side can pursue, the policy opportunities available to competing groups, and the ways in which a movement can influence popular opinion. The framing effects of a decision may favor progressive social movements or conservative countermovements. In either case, constitutional framing demonstrates that social change occurs not only when members of the public accept the justness of a progressive or conservative movement's cause, but also when the public redefines that cause in a way that favors change.

Finally, contrary to what is suggested by the clean-up hypothesis, … movements may sometimes benefit from using litigation rather than ordinary protest tactics …. Because litigation can foster the expression of alternative arguments, the courts offer movements an opportunity to present a variety of possibly effective frames. When it does not yet have political influence, a movement may often have to rely on the media to publicize a frame. In such a case, movements have reason to silence dissent, for the media are likely to focus on internal divisions once they are discovered rather than on the movement's message. Consequently, social movement organizations may press members to speak with a single voice and to suppress alternative frames. By contrast, in applying rules governing pleading and the submission of amicus briefs, the courts may foster forms of dissent that would prove too costly for movements in the political arena. …

II. Litigation and Its Critics

In recent years, criticisms of change-oriented litigation have been varied and profound. …Part IA opens with an examination of leading criticisms of change-oriented litigation. While offering significantly different proposals, I argue that these scholars work from a shared model of the relationship between legal and social change. Part IB sketches this model and explores its major premises. If we examine and challenge the premises on which this model is built, we will be better able to understand alternative, indirect routes to social change.

A. The Problems With Litigation

Gerald Rosenberg's landmark studies were among the first to propose that "court decisions are neither necessary nor sufficient for producing significant social reform." Rosenberg's main contribution has been to cast doubt not only on the courts' willingness to create social change but also on their ability to implement their decisions. Because they possess few tools to ensure compliance with their decisions, it is argued that courts are not able to create social change unless "their decisions are supported by elected and administrative officials." Rosenberg further argues that support from the public or political elites is necessary to gain sufficient popular support to implement broad social change.

Rosenberg also examines an alternative, "extrajudicial" path of influence, by which court decisions "inspir[e] individuals to act or persuad[e] them to examine and change their opinions." In his analysis of Roe, for example, Rosenberg states a number of claims that could be made in favor of extrajudicial influence: an argument that the Roe Court "greatly influenced popular opinion in favor of abortion" or a claim that the courts "spurred women to form and join women's rights organizations and to raise large sums of money." Based on his analysis, Rosenberg finds no evidence in support of these claims.

Like Rosenberg, Michael Klarman challenges the courts' institutional capacity to generate social change. Klarman highlights the backlash the courts may produce in the rare instances in which their opinions do not track popular opinion. He explains that, "[b]y outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance." Moreover, Klarman reasons, there are few positive indirect effects of change-oriented litigation to offset costly backlashes. He acknowledges that judicial victories can have important symbolic value to a movement but questions whether decisions have any broader social impact. By raising the salience of an issue, the courts are argued to be able to "forc[e] many people to take a position [for the first time]." However, he contends, salience-raising fuels backlash and may thus harm rather than help the cause the courts endorsed. Moreover, he offers evidence that judicial decisions do not "influence the position" people take nor make them more "strongly committed to implementing the ruling."

Unlike Klarman, Tomiko Brown-Nagin focuses not on the courts' institutional incapacity, but instead on the adverse effects of change-oriented litigation on social movement efficacy and strategy. Brown-Nagin claims that social movements risk much by using constitutional law to define their campaigns. The courts will fail to deliver the change a movement demands because their decisions are often "moderate, elitist, and utilitarian," the product of negotiations among members of the elite and their effort "to find consensus amidst cultural conflict."

In her view, these outcomes illustrate how social movements are fundamentally in tension with constitutional law and litigation. Law demands that movements de-radicalize, play by institutional rules, and make only those demands that law would recognize. If movements define themselves

by litigation, she argues, they lose their ability to challenge existing policy compromises Only when public attitudes change noticeably can movements effectively pressure the government to recognize the legitimacy of their claims.

By comparison to Brown-Nagin, William Eskridge suggests that even definitional litigation campaigns can have both benefits and costs to social movements. He shows that movements and law have a dialectical relationship: movements propose doctrines and constitutional revolutions that the courts adopt, albeit often in modified form. In turn, constitutional law "influence[s] the rhetoric, strategies and norms of social movements." In Eskridge's view, law helps to define and even create identity-based social movements, first by enforcing discrimination against them and then by giving "concrete meaning to the 'minority group' itself." Later, law gives identity-based social movements a chance to demand social change and permits them to reemerge as mass political mobilizations.

In Eskridge's account, however, some litigation campaigns and judicial decisions have a negative impact both on social movements and on the larger society. As one key example of such a campaign, Eskridge points to Roe v. Wade. Eskridge asserts that Roe announced abortion rights in a "politically insensitive way" by acting before political consensus about abortion rights had been reached. For this reason, Roe "undermine [d]" abortion rights "by stimulating extra opposition to" them.

While often carefully exploring the benefits of some change-oriented campaigns, Eskridge's work suggests that those campaigns should be limited. He implies that "constitutional law can change if a longstanding political equilibrium is destabilized, and it must change if the public culture settles into a new political equilibrium." If these conditions are not in place, a favorable judicial decision may damage the movement whose cause has been embraced and generate "immediate and longstanding political turmoil."

In different ways, and for different reasons, litigation's critics argue that social movements should not invest limited resources in change-oriented litigation. For example, Rosenberg argues that change-oriented litigation "may not be the best use of scarce resources in important battles for significant social reform." If the courts follow popular opinion and are institutionally incapable of changing it, as Klarman's account suggests, social movements should focus on changing popular opinion by direct-action protest. He speaks for others in stating that litigation alone "cannot fundamentally transform a nation."

B. Modeling Change

Critics of litigation offer deeply different arguments about the effects of constitutional litigation on movement strategy and the shortcomings of litigation as a tool for change. However, Their arguments proceed from a shared account of the relationship between legal and social change. This model of change rests on a set of hypotheses about how law relates to social change, how social change occurs, and how law can serve change campaigns. If we understand these hypotheses, we can begin to develop an alternative model of social change.

1. The Reflectionist Hypothesis

As we have seen, litigation's critics question whether constitutional decisions can deliver the social changes a movement seeks. These claims all follow in part from the hypothesis that law reflects public mores, attitudes, and values. For example, Brown-Nagin writes: "It is only after such [public] attitudinal c[h]anges occur or are under way that lawyers might successfully seek changes in

law." Eskridge also reasons "constitutional law can change [only] if a longstanding political equilibrium is destabilized." This is the reflectionist hypothesis: a claim that law reflects popular values, opinions, and mores.

Constitutional framing challenges the hypothesis that law only reflects popular mores and opinions about a movement's cause. It proposes that, under some circumstances, constitutional decisions and litigation can also redefine a movement's cause and reshape debate about it. Much will depend, for example, on whether the public views abortion as an issue of women's rights or as a gender-neutral public health crisis. When a decision helps focus debate on a different set of policy questions in this way, it may change which questions are discussed, alter which arguments are used, reshape the coalitions addressing a movement's grievance, and determine which goals these coalitions are likely to achieve. In this way, constitutional framing can make change more possible.

2. The Cause-Acceptance Hypothesis

If law cannot create social change, how do litigation's critics believe social change occurs? The model underlying otherwise different criticisms of litigation suggests an answer. First, a group of people must recognize and articulate a shared grievance. That movement then develops a repertoire of effective protest tactics, such as marches, media events, advertisements, lobbying, or sit-ins. This effort is a political one that unfolds outside of court.

Social change ultimately happens when popular opinion recognizes the legitimacy of a movement's complaint. For example, Brown-Nagin explains that social change is possible only when "public attitudes . . . changed substantially and noticeably, so much so that the media recognize and confirm the shift in opinion" and public officials are pressured to act. Rosenberg suggests that legislative and judicial action on abortion became possible when "opinions on abortion . . . changed rapidly."…

However, we can better understand how popular opinion changes by looking at more than mere disapproval or approval of a practice. Instead, constitutional framing proposes that attitudes toward a practice will depend on which questions are central to a debate. An issue like … abortion will involve several, sometimes conflicting, policy considerations. A citizen's opinion will depend in part on which of those considerations is given the most weight. …When shifting the meaning of a movement's cause and the public debate about it in this way, constitutional litigation and decisions can help to create a political environment that favors change.

3. The Clean-Up Hypothesis

The final and arguably most important question addressed by litigation's critics involves the role that litigation and law can play in creating social change. Leading criticisms suggest that while litigation alone cannot deliver the social changes movements demand, the courts can strike down outliers, and produce and elaborate on remedies already supported by popular consensus. Rosenberg acknowledges that "litigation can remove minor but lingering obstacles," and he suggests that court-delivered remedies can be part of a "mopping-up operation." …

Constitutional framing demonstrates that constitutional law and litigation can sometimes play a broader and more complex role than the clean-up hypothesis suggests. Framing shows that judicial decisions not only strike down unpopular laws but also produce environments that favor political change. After a high profile decision, debate will turn in part on whether the Court reached the right conclusions on the issues it addressed. When the Court brings attention to new issues, its decision may refocus and reshape popular debate. When addressing a different question about

abortion …, movements and countermovements may be able to make different claims, win different kinds of members, build new alliances, and pursue different kinds of legislative reform. …

III. A New Model of Change

… Why are litigation's critics so adamant that law only reflects popular attitudes? The answer may lie in part in how these scholars measure social change. Litigation's critics first focus on measurable shifts in popular attitudes. … First, critics like Rosenberg have contended that the public is unaware of controversial decisions and their content. If people do not know what the court has said, a judicial decision is unlikely to produce change. Other critics argue that, although the public is aware of controversial opinions, judicial decisions still have no effect on public attitudes. ….

The second primary measurement used by litigation's critics involves the courts' ability to enforce the rights they announce. That the "[c]ourts . . . have neither the purse nor the sword," as Martin Shapiro writes, is well understood. Because courts are also argued to be incapable of altering popular acceptance of a practice, judicial decisions are thought not to encourage public compliance with or official enforcement of a decision.

These measurements offer useful insight into some aspects of our legal system. Recent empirical studies have shown that judicial decisions sometimes have no measurable impact on popular opinion, as was the case when the Court struck down a flag-burning ban in Texas v. Johnson. …

This account is inadequate partly because it considers only whether public approval or disapproval of a cause shifts, not how or why such shifts occur. In recent years, "sociolegal" scholars have suggested one way that law influences popular attitudes: by structuring the way citizens understand the world around them. This explanation draws on cross-disciplinary work about what Erving Goffman first labeled framing: "frameworks of understanding available in our society for making sense out of events." Framing an issue is a way of defining, labeling, and understanding it. …

A growing body of scholarship confirms that the framing of a group's cause is central to its ability to win recruits, to sustain protest, and to influence how other groups and bystanders view that event or cause. … Because so much is at stake in the framing of an issue, social movements often compete in dialogue with one another to frame an issue. …[F]raming campaigns may play a key role in determining what kinds of social change are possible. By convincing members of the public that one's definition of a cause is the right one, movements take an important step in creating support for that cause. … By publicizing a different definition of a group's cause, in turn, a judicial decision may create an environment that favors change.

Litigation's critics neglect this dimension of social change. If we follow some of litigation's critics in looking only at approval or disapproval of a practice, we will miss the beginnings of changes in public attitudes. As social movement scholar Joseph Gusfield explains, the framing of a cause can create "the recognition that some accepted pattern of social life is now in contention."

…[T]here is also reason to think that, in some cases, movements will benefit from using litigation rather than ordinary protest tactics in advancing a frame. The first and less controversial advantage of litigation involves the relative costs of dissent in court. If they lack the ability to influence a legislature, movements using direct action protest tactics to generate official support must often rely heavily on the media to publicize a frame or "mobiliz [e] popular support." … A movement may try to promote a frame directly, through working to attract media coverage of a group's protest activities, or indirectly, through obtaining a high-salience judicial decision that publicizes a frame.

Social movement scholarship points to strategic risks associated with using direct media coverage.

When there are intense struggles within movements regarding cause or identity, a movement may lose control of its message, as "this internal movement conflict can easily become the media's story" and focus. … Consequently, formally structured "social movement organizations" often suppress a rich variety of competing frames in order to present an image of unity and to exercise control over the frame that the media will cover. In mounting an effective political or media campaign, movements are pressured to speak with one voice. In the process, other important views within a movement may not be heard by the public.

By comparison, litigation may sometimes offer movements a better chance to promote diverse frames. As we have seen, an effective political or media strategy may require a movement to silence dissenting members, at least in public debate. By contrast, the Federal Rules of Civil and Appellate Procedure, like those in many states, foster a form of dissent. … Federal Rule of Civil Procedure 8(d) invites "hypothetical" and "inconsistent" claims. Liberal pleading rules of this kind may encourage litigants to present a richer variety of frames. Most state and federal courts also accept or invite the submission of amicus briefs. Thus, amici without the resources or organization to mount a test case will still often be able to present a frame to the court.

Second, the courts may lower the costs of broadcasting a frame to the public. … Although the [Supreme] Court receives substantially less coverage than do the other branches of government, the media pay significant attention to dramatic decisions on divisive issues. In particular, studies of press coverage of the Supreme Court show that the media publicize judicial work product, including the frame of an issue that the Court adopts.

Brown v. Board of Education… reshaped political debate about segregation. As Michael Klarman has documented, it was possible before *Brown* for racial moderates to support segregation without endorsing white supremacy. Politicians like Big Jim Folsom and Lyndon Johnson were able to combine race-equality rhetoric and gradual racial reform with clear support for school segregation. By equating support for segregation with rejection of racial equality, *Brown* helped to radicalize debate and to redefine segregation as a practice inextricably linked to white supremacy . . . .

By redefining an issue, a judicial decision may set back or advance a campaign for change. However, the normative point to be taken from constitutional framing is that litigation can still matter to a change campaign. In spite of the concerns raised by critics like Rosenberg and Klarman, it may still be worthwhile for movements to use their resources on litigation, even early in a struggle. In some cases, litigation may be able to reshape the meaning of a movement's cause in a way that ordinary politics cannot. …

IV. Redefining the Culture Wars

Critics of change-oriented litigation suggest that social movements go to court seeking to win acceptance for their cause. However, as we will see, there is more than one reason to go to court. Part A examines how the definition of the abortion-legalization cause evolved after Roe. We have come to associate pro-choice politics with debate about a woman's right to choose abortion. Before Roe, this frame was often less prominent than those involving physicians' rights and population control. Roe helped to marginalize claims about population growth, and the decision helped to focus new attention on claims about women's reproductive autonomy and equal citizenship. …

This history shows that judicial decisions like Roe … did not simply fail to educate the public or trigger backlashes. Instead, these decisions also drew public attention to a different set of questions. As public debate focused on a new subject, the meanings of each struggle changed as well.

A. The Meaning of Abortion

Today, Roe is arguably best known [among scholars of litigation and social change] for creating backlash. As we will see, however, the decision played an equally important role in redefining the abortion-legalization cause.

1. Lowering the Costs of Dissent

In important ways, the terms of the abortion debate before Roe did not resemble those likely to be familiar to most of us today, as pro-choice activists often avoided the rights- or choice-based frames that now are taken for granted. Instead, groups like the National Abortion Rights Action League (NARAL) were equally likely to adopt population-control frames of the abortion issue. . . .After NBC aired an episode of the popular television program Maude involving abortion, Wilma Scott Heide, then-President of NOW, commented at a NOW press conference: "The pressure of populations on world food supplies is coming home to America."

For the purpose of political organization and media strategy, leaders of groups like NOW and NARAL pressed members to suppress or downplay some claims about women's rights. For example, in 1969, when NARAL formed to coordinate national efforts to repeal abortion bans, there were already deep divisions between feminists and other pro-choice leaders about how the abortion-legalization cause should be described to the public. At the first meeting of the organization's national Board of Directors, Betty Friedan, a founding member of NARAL and a prominent women's rights advocate, moved that NARAL "should support political groups working toward the basic purpose of the right of a woman to decide when to have or not have children." The motion died for lack of a second. At the same meeting, Larry Lader moved that NARAL resolve that, "to prevent increasing overpopulation, American parents in general . . . should adopt the . . . principle of the 2-child family." The motion passed 26-18, as did another resolution intended to make clear that "men as well as women have the right to birth control.". . .

The courts offered the pro-choice movement a place to test frames that movement leaders had sometimes downplayed in the political arena. Of course, several pro-choice briefs in Roe, including the one submitted on behalf of the American College of Obstetricians and Gynecologists and the American Psychiatric Association, still defined the abortion-legalization cause in line with current debate: as gender-neutral, involving "[t]he rights of physicians to administer health care, and of patients to seek medical treatment." However, litigation allowed the feminist wing of the movement to promote a frame that the movement had not stressed in the political domain. Representing a number of women's liberation organizations, including NOW, attorney Norma Zarky entered into the Roe litigation in the hope that the Court would publicize and "reach the fundamental issue of a woman's rights." In another amicus brief on behalf of feminist organizations, Nancy Stearns of the Center for Constitutional Rights explained that Roe offered women the chance to "raise aspects of the constitutional issues before the Court not raised by the parties," especially the equality interests of women involved in abortion legalization. . . .

In drawing on these diverse frames, Roe forged a different definition of the abortion legalization cause. The decision did address the dominant definitions of the cause offered by physicians' groups and public health organizations. In early drafts and in its final version, Roe and its companion case, Doe v. Bolton, treated abortion legalization as an issue involving the mixed right of the woman and the physician, the right of "the physician, in consultation with his patient, . . . to determine, without regulation by the State, that, in his best medical judgment, the patient's pregnancy should be terminated." ."

However, the frame to emerge from Roe also incorporated the claims of feminist attorneys like Zarky and Stearns. As Zarky called for recognition of "a woman's fundamental right to decide for herself whether or not to have a child," the Roe Court emphasized that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In explaining why the abortion decision deserved constitutional protection, the Court also drew on Stearns' account of the unique burdens and anxieties facing women before and after childbirth. Significantly, population control was not made an issue in the Roe decision.

2. Changing Argumentative Strategies

Although a number of race-based and international scandals hurt the population control movement in the late 1970s, Roe played an important role in deemphasizing population control arguments. After the decision, NARAL operatives were given the following instruction for participating in debates about abortion:

> Allegation: That abortion should not be used as a means of population control. [Response]: Agreed. . . . In a democratic, nonsectarian society, women should be free to make their own decisions regarding childbearing and contraceptive use. The term 'population control' implies the use of coercive policies and programs to limit population growth. The United States has no such policy.

In the aftermath of Roe, pro-choice organizations began stressing rights-based instead of population control arguments. By 1974, NOW operatives were advised to compare "the Supreme Court['s] . . . recogni[tion] of the federal constitutional basis for a woman's right to limit childbearing" to the "freedom of religion or freedom of speech." Similarly, following a strategy meeting in 1973, Planned Parenthood activists were told, "an important thematic idea to be stressed is that abortion in a pluralistic society is to be considered as a matter for determination according to personal choice."

3. Changing Alliances

As Roe helped to change the arguments made in the abortion debate, the decision also changed the alliances available to the pro-choice movement. That African-Americans as a group at one point were more likely to oppose abortion than other groups is relatively well-known. It is less well-documented that, before Roe, prominent African-Americans suggested that the abortion cause was unjust primarily because abortion was defined as an issue of population control. For example, Marvin Davies, the Florida field secretary for the NAACP, stated that population control measures were not "in the best interests of the black people."

When Roe helped to redefine abortion as a choice- or rights-based issue, the pro-choice movement was more easily able to pursue alliances with African-Americans and civil rights leaders. Jesse Jackson, who had led a war against abortion, had described it as a threat to African-Americans. But in 1983, when Jackson declared his intention to run for the Democratic presidential nomination, he promised feminist leaders to defend a woman's right to choose abortion.

4. Changing Policy Possibilities

As Roe helped to reshape the alliances on either side of the abortion debate, it also helped to redefine the political opportunities available to each side. Between 1974 and 1980, as the fight over the scope of abortion funding bans became increasingly bitter, the pro-choice movement was able for the first time to rely on civil rights advocates in the Senate, like Ted Kennedy and Birch Bayh, to vote down the strict House proposals and to call for funding at the very least in cases of

rape, incest, or medical necessity. In 1975, for example, pro-choice leaders expected Kennedy to continue his long-standing, pre-Roe opposition to legalized abortion as a form of population control when the Senate voted on a Medicaid abortion restriction. Because the definitions of abortion had begun to change, Kennedy led the opposition to the restriction and ultimately helped to defeat it that year. After Roe, when debate focused on whether abortion was a constitutional or civil rights issue, leaders like Kennedy helped lead Senate opposition to strict Medicaid bans.

Over time, as the new definition of the pro-choice cause became entrenched, Roe may also have helped to reshape popular opinion. There is reason to think that before Roe a significant number of African-Americans viewed the abortion-legalization cause as a population control measure. A February 1971 poll taken by the Chicago Defender found that while only 26.4% of African-Americans generally opposed abortion reform, 63.7% of those polled professed a belief that government-funded abortions could lead to "mass genocide in the black community."

When Roe helped to redefine abortion as a choice- or rights-based issue, the pro-choice movement was more easily able to convince African-Americans and civil rights leaders to support legalized abortion. A published study on race and views on abortion confirms this view. Controlling for a variety of factors likely to determine a person's views on abortion, including family income, years of education, region of residence, frequency of church attendance, and religious denomination, the study found that, in the two years before Roe, being African-American was, in its own right, a statistically significant predictor that a person would be opposed to abortion reform. In the period three years after Roe, being African-American was no longer a statistically significant predictor of opposition to legalized abortion.

Roe helped fundamentally to reshape the abortion debate. By helping to redefine the abortion-legalization cause, Roe shifted the argumentative strategies used by either side, the coalitions competing movements could form, and the policy opportunities that each side could pursue. Partly because of Roe, what had been a debate about population growth and physicians' rights was becoming a discussion about women's rights. …

V. Reexamining the Value of Litigation

In studying the history of the … abortion struggles, we might be tempted to assume that the terms of discussion have remained relatively stable over time. Nonetheless, the case studies considered here suggest that this would be a mistake. Because litigation's critics ignore the ways in which judicial decisions redefine movement causes, their theories discount important advantages of going to court. As the history studied here suggests, litigation sometimes offers movements framing opportunities that might not be available through ordinary politics.

First, unlike public protest or political lobbying, litigation may sometimes allow movement members to offer a rich range of competing or complementary frames. Before Roe, as we have seen, pro-choice leaders like Lader and Nellis cited strategic reasons for deemphasizing women's-rights claims in the political arena. Through the use of amicus briefs, advocates like Stearns and Zarky effectively used the litigation of Roe to advance alternative women's-right frames that were not sometimes thought to be strategically wise in the political domain. Moreover, Sarah Weddington, counsel for Jane Roe, took advantage of liberal pleading rules to offer both physicians'-rights and feminist frames of the abortion issue. …

Second, by comparison to direct action protest, litigation may sometimes be a less strategically

risky way to publicize a movement's frame. A movement may pay a high price if it adopts alternative strategies for winning media attention, such as recruiting a charismatic leader or staging dramatic protests. Because the media cover controversial judicial opinions, especially those on social issues and civil rights, the courts may offer a less risky way of publicizing a movement's frame. By attracting controversy, a judicial decision will focus media attention on a court's work product. When the public turns its attention to a different set of issues, the court's decision may effectively change the definition of a movement's cause.

The history considered here also suggests that there is a good deal at stake when the definition of a grievance shifts. First, this history suggests that a judicial decision may help to shift the balance of arguments that defines a debate. We have seen that Roe deemphasized population control claims and helped to privilege contentions about women's abortion rights. The decision encouraged advocates to argue, as NARAL operatives were instructed, that "women should be free to make their own decisions regarding childbearing and contraceptive use." …

Moreover, as the terms of a debate change, different coalition-building opportunities may become available to each side as well. After Roe, as we have seen, the pro-choice movement was able for the first time to build an effective partnership with civil rights leaders like Jesse Jackson and Ted Kennedy. …

Thus, the history of the abortion … struggles suggests that there is much more at stake in the definition of a movement's cause than might be supposed by litigation's critics. First, as the social meaning of a movement's grievance changes, the policy opportunities available to that group may narrow or expand. For example, we have seen how the changing definition of abortion helped the pro-choice movement win allies in Congress who helped to fight against strict Medicaid abortion bans. Second, the history considered thus far implies that the evolving definition of a cause may reshape popular opinion…. [T]here is evidence that, as Roe deemphasized population control arguments, African-Americans became more likely to support legalized abortion.

Litigation's critics assume a model of the relationship between law and social change fundamentally different from the one described here. This model hypothesizes that law primarily reflects popular mores. Building on this premise, the model next assumes that social change occurs only when popular approval of a practice increases. Consequently, litigation's critics reason that litigation is valuable only when it suppresses outliers or cleans up after any major social change has already taken place.

However, the history considered here suggests that this model is oversimplified. And if the model of social change assumed by these scholars is incomplete, there may be reason to question their normative conclusions. Of course, the history studied here does not suggest that litigation will always be a wise strategic choice for a movement or countermovement with limited resources. But constitutional framing does suggest that it may still be worthwhile to seek change through litigation. Although we may be aware of reasons not to rely on judicial decisions, we should be equally careful not to blind ourselves to the opportunities still available in the courts. . . .

Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011)

We live in a culture that prioritizes winning. We declare winners and losers, and we deem it fair and reasonable to distribute benefits based on that distinction: To the victor go the spoils. Perhaps nowhere is the continued articulation of the winner-loser distinction more apparent than in law. Litigation, every day, produces winners and losers--often in very public ways. Some parties prevail, and some do not. To the prevailing parties go a host of remedies, including money, injunctions, and declarations of rights. The losers, of course, submit to the winners, paying damages or ceasing some action. …

Rosenberg's pessimistic account of courts would seem to have much to say to an attempt to theorize litigation loss: Judicial defeats--instances in which courts reject a social movement's claim--may highlight some of courts' key constraints. Moreover, analysis of social movement activity in the wake of litigation loss might offer a comparative account to supplement Rosenberg's empirical analysis and bolster his (somewhat veiled) normative commitments. Although framed most often as an empirical and descriptive account, the constrained-courts view derives from a normative position that prefers social change that emanates from nonjudicial institutions. When courts fail to grant the asked-for reform, advocates may turn to other lawmaking channels, such as legislative and administrative arenas, and Rosenberg's approach would value this tactical and institutional shift. …

…[L]egal mobilization and cause lawyering scholars often assume that a litigation loss has a demobilizing effect. That is, they concede the negative effects of failed litigation. This concession is generally implicit in work that focuses on whether litigation itself can produce positive social change. Other times, the concession is explicit, as scholars contrast the subject of their analysis--positive judicial decisions--with demobilizing events--negative judicial decisions. For instance, McCann notes that "eventual defeat in court can sap movement morale, undercut movement bargaining power, and exhaust movement resources." In this sense, litigation loss, rather than litigation victory, is the point at which sociolegal scholars find common ground with those more generally convinced of litigation's harmful effects. …

By failing to address litigation loss on its own terms, legal mobilization and cause lawyering scholarship furnishes a premature concession to those convinced of litigation's ineffectiveness. Crucially, this concession produces an incomplete picture of law and social change, missing the way in which litigation loss, in addition to litigation victory and process, contributes productively to the process of reform.

IV. The Productive Potential of Litigation Loss

In this Part, I specify the productive effects that judicial defeat may yield for social movements. I show that losing is a relatively routine feature of social movements that advocates have learned to manage and to cultivate for change. Moreover, I relate advocates' framing of litigation loss to the specific limitations of court-centered change.

First, I explore two internal movement effects of litigation loss: (1) Loss may help a specific organization stake out an identity in a competitive social movement by committing itself to a meaningful issue susceptible to judicial rejection; and (2) loss may contribute to mobilization and fundraising by inspiring outrage and signaling the need for continued activism in light of courts' failure to act. Next, I illustrate two external effects of litigation loss: (1) Loss may prompt advocates to shift more attention and resources to other law-making institutions, but it may do so in a way that allows advocates to carve out a specific need for action by other state actors; and (2) advocates

may use loss to appeal to the public by encouraging citizens to rein in an "activist," countermajoritarian judiciary. While many of these indirect effects resonate with those identified by legal mobilization and cause lawyering scholars, I show how these effects derive meaning from the unique attributes of litigation loss, rather than merely the act of litigation.

I use examples primarily from the LGBT-rights movement and the Christian Right movement. Taking cues from legal mobilization scholars' interpretive approach, which relies heavily on content analysis and case studies, I pay significant attention to the actions and statements of social movement lawyers themselves. Furthermore, instead of merely viewing social movements in relation to the state, I devote special attention to the importance of movement-countermovement relationships. My analysis of opposing-movement interactions shows that social movement advocates, who operate within a framework of multidimensional advocacy, do not view defeat in one venue as the end of the story; rather, they engage other venues and alter their messaging based on their loss. …

A. Internal Effects

1. Constructing Organizational Identity

The first aspect of litigation loss that I highlight has an organization-specific component and depends on the social movement organization's relationship to other organizations and constituents within the larger movement. Here I contend that litigation loss may be constitutive of organizational identity and may, counterintuitively, contribute to an organization's stature and longevity within a movement. … I take as my primary example the Thomas More Law Center ("TMLC"), a Christian public-interest law firm headquartered in Ann Arbor, Michigan. I focus on TMLC because it is a relatively new organization intervening in a competitive social movement environment populated by many established, better-resourced, and more connected firms.

a. Contextualizing Organizational Identity

First, focusing on important characteristics of the Christian Right movement facilitates an understanding of how TMLC in particular is well-suited to capitalize on losing. Many public-interest law firms in contemporary social movements pride themselves on their winning records, and together these firms provide a comprehensive, unified picture of their respective movement. …

Not all social movements are so carefully orchestrated or harmonious. Indeed, the main countermovement to the LGBT-rights movement--the Christian Right--is more diffuse and competitive. A concerted Christian Right litigation campaign emerged from the larger political and cultural movement in the 1990s. At least nine Christian Right legal organizations formed in that decade, including current movement leaders the American Center for Law & Justice ("ACLJ") in 1990 and the Alliance Defense Fund ("ADF") in 1994. As Christian Right legal organizations continue to proliferate and compete for constituents, a handful of organizations, including ACLJ and ADF, command the bulk of the financial resources, lead the most high-profile litigation, and pride themselves on their courtroom victories. ACLJ boasts that its chief counsel has successfully argued "[s]everal landmark cases . . . before the U.S. Supreme Court," and ADF points to thirty-three separate Supreme Court decisions in its "History of Success."

Many smaller legal organizations are still staking out their identities in this broader movement. TMLC, founded in 1999, is a prime example. TMLC finds itself somewhat of a theological and geographical outsider in the Christian Right movement. The organization was founded by a Catholic donor, Tom Monaghan, whereas most other prominent Christian Right legal organizations have been directed by evangelical Protestant groups. And with its base in Ann Arbor, Michigan,

TMLC finds itself removed geographically from traditional (coastal) centers of power and without the Washington, D.C., location that more prominent Christian Right legal organizations boast. But, rather than shy away from its non-mainstream markers, TMLC has attempted to stake out a unique identity geared to particular issue areas and strategies. TMLC's willingness to take on hot-button issues that go to the core of constituents' worldviews, and to do so despite relatively slim odds of success, has been key to forming its identity.

b. Loss in Court

TMLC loses at a higher rate than other significant Christian Right legal organizations and demonstrates a willingness to address and embrace litigation loss, rather than to sweep it under the rug and move on. …TMLC's overall success rate was 36%. After removing the cases in which TMLC acted only in an amicus capacity, TMLC had a success rate of 35%. Of the forty-three decisions in which there was a clear prevailing party, TMLC prevailed in fifteen of the decisions and lost in twenty-eight. These success rates contrast, in some cases rather dramatically, with the results of the three comparison organizations. TMLC's overall success rate was the lowest of the four firms; Becket Fund's overall success rate was 59%, compared to 44% for Liberty Counsel and 47% for ACLJ. TMLC's success rate in litigation in which it acted as counsel, rather than merely in an amicus capacity, was also the lowest; Becket Fund prevailed in 52% of decisions for its non-amicus cases, compared to 43% for both Liberty Counsel and ACLJ.

While TMLC certainly hopes and attempts to win, it has a tendency to take on relatively weak cases that other firms might decline. This has implications for both the substantive areas the firm engages and the constituents it represents. For instance, TMLC has staked out a specialization in school-programming litigation, in which the landscape can be summed up rather simply: Courts routinely reject parental-rights and free-exercise challenges to curriculum (usually secular and/or progressive programming), but they often accept Establishment Clause challenges to curriculum (usually science programming). In representing conservative Christian parents in the school-programming domain, TMLC most often challenges school districts that implement progressive programming relating to sex, sexuality, sexual orientation, gender identity, and non-Western religions. In representing school districts, TMLC often defends implementation of science programming that challenges the primacy of evolution. Given the relatively settled legal principles governing both sets of cases, it becomes clear that TMLC represents parties (whether parents or school districts) in disputes where those parties have a relatively minor chance of success. But with these cases, TMLC has staked out a specialty among Christian Right legal organizations, and it has done so on a hot-button issue--school programming--that strikes at the core of movement constituents' beliefs and concerns.

c. Litigation Loss and Organizational Identity

TMLC's dedication to litigation challenging the primacy of evolution and insisting instead on alternative, religiously informed science curriculum facilitates a close examination of TMLC's management of litigation loss in its preferred issue area of school programming. TMLC represented Pennsylvania's Dover County School District in a challenge to the district's instruction of intelligent design. TMLC deliberately decided to construct and litigate an intelligent-design test case. To that end, the firm searched for a school district willing to adopt an alternative curriculum, knowing it would lead to litigation. After the ACLU and Americans United for Separation of Church and State sued the school district on behalf of parents, TMLC defended the district.

Rather than work within the broader movement strategy, TMLC's intelligent-design litigation departed from the mainstream Christian Right's tactical calculations. Other Christian Right organizations neither joined nor endorsed TMLC's campaign. In fact, the actions of TMLC and the Dover School Board upset other groups within the larger movement. ….

Predictably, TMLC lost the case on Establishment Clause grounds. But the litigation gave TMLC a national platform and established the organization's identity as a group willing to put religious principles above legal rules. TMLC's head, Richard Thompson, touted the intelligent-design case because of its "national impact," and the case landed the firm in high-profile press outlets like the New York Times. Commentators described TMLC being "thrust into the limelight with the nationally watched [Dover] case." Consistent with other legal mobilization accounts, the litigation process produced important indirect effects for TMLC. The mere act of litigating brought public attention to the organization and allowed TMLC to claim the issue area as part of its primary work.

But the loss itself also produced important effects for TMLC. Its court defeat became part of a broader historical narrative, as TMLC leaders tapped into a tradition akin to what constitutional law scholar Jules Lobel has labeled "prophetic litigation." By expressing the community's call for change and by documenting the judiciary's rejection of that call, TMLC lawyers articulated "a vision of justice unachievable in the present" at the same time that they "record[ed] history by creating a narrative of oppression and resistance." But whereas Lobel's model of "prophetic litigation" situates losing litigation along a (progressive) historical trajectory, TMLC constructed a historical narrative to serve its immediate organizational needs. That is, TMLC's Thompson positioned his organization's litigation loss within a grand narrative of "oppression and resistance" to appeal directly to constituents for immediate organizational purposes.

Thompson's account relates TMLC's litigation failure to a key constraint of courts--their inability or unwillingness to bring about sweeping cultural reform. In seeking a return to what they see as the original values of the country, America as a "Christian nation," Thompson and his organization asked the court to do too much. TMLC's cultural vision is not cognizable within the contemporary language of rights or existing precedent and, moreover, is inconsistent with the liberal, secular ideology of the American judiciary. But TMLC advocates created a historical record of the courts' dismissive treatment of their competing vision, and they did so for the purpose of establishing, legitimizing, and funding their social movement organization.

In soliciting donations for his organization, Thompson situated TMLC's litigation efforts within broader cultural struggles. His fundraising pitch at the end of 2008 depicted Christians at war with "non-believers" (both secularists and Muslims). …

…[H]e paints continued litigation as necessary, even if it does not produce social change in the near future. Litigation responds to the enemies in the "culture war," meeting their suspect, secular tactics head-on. In the wake of defeat, the "Culture War" symbolism allows TMLC advocates to proclaim, heroically, "We are up against a powerful enemy!" In this sense, TMLC lawyers are central and necessary players. They give voice to their constituents' competing vision of the good even in the face of judicial resistance and rejection. In taking on school-curriculum challenges, and often losing, TMLC lawyers portray themselves as the lone defenders of religious parents--warriors committed to a long-term battle.

And battling a powerful enemy requires resources. While public-interest law firms often depend on recovering attorneys' fees in successful litigation to fund their work, such firms also rely heavily on private donors. In fact, while TMLC founder Monaghan initially funded the group with

$500,000, the firm claims that it is now funded exclusively by private individuals, including 50,000 individuals who make annual membership donations.

2. Mobilizing Constituents, Building Resolve, and Fundraising

… When a court validates a claim, the group's claim enjoys the legitimacy that comes with the state's approval. When a court rejects the group's claim, however, the demand that the legal claim embodies might be made more pressing and the deprivation more acute. That is, denial of the claim might serve to highlight more intensely the injustice suffered by the group. While victory might signal that continued or increased activism is no longer necessary, loss might incentivize more aggressive organization and advocacy.

In this way, loss creates a distinct threat and provides a sense of urgency for a movement.

This is the flip side of Rosenberg's critique of court-centered strategies as demobilizing. Whereas legal victory might lull movement members into a false sense of security, legal defeat might encourage new, more vibrant mobilization and direct action by bringing awareness to courts' ineffectiveness and explicitly demonstrating the failed promise of litigation. Scholars have shown how in the wake of Roe v. Wade, the abortion-rights movement's activism declined, while the activity of opponents increased dramatically. Losing movements might experience a new (or renewed) motivation, while winning movements might relax, believing judicial victory has secured the desired change. Movement advocates, therefore, have an interest in highlighting legal defeat. Indeed, they may even frame ambiguous outcomes as defeats in order to create a new threat against which to rally.

Thus, litigation loss may raise consciousness and mobilize constituents, but it may do so most effectively by inspiring outrage, strengthening resolve, and building a more fervent feeling of entitlement in ways that mere litigation process (and certainly litigation victory) cannot. …

In sum, movement leaders may use an official, published, and publicized instantiation of unfair treatment to raise consciousness and mobilize constituents. The loss (even if partial) sends a message that cannot be sent by litigation itself, and certainly not by litigation victory. Defeat announces that the fight must go on, that more resources are necessary, more citizens are required, and more time is needed. Advocates tap into a historical narrative of "prophetic litigation," but they do so for immediate social movement purposes.

B. External Effects

1. Appealing to Other State Actors

a. Shifts Across Levels of Government

… Loss in the U.S. Supreme Court, or more generally in the federal courts, might prompt a reworked strategy that focuses on state-based venues. In this sense, litigation loss might lead to a critical rethinking of tactics that may ultimately yield a more robust and effective movement. More significantly, though, advocates may use the federal litigation loss to encourage players at the state level to act. The loss itself may specifically aid the appeal to the targets of the new tactics. Furthermore, consistent with theories of state constitutionalism and interactive federalism, state constitutional interpretations that contravene analogous federal interpretations may contribute to eventual shifts in federal jurisprudence. In this sense, a two-way street exists between the federal and state levels of government. The LGBT-rights movement again provides relevant examples. …

The decades-long fight against Florida's blanket ban on adoption by lesbians and gay men provides

a more recent illustration of the shift from federal to state venues and the use of federal litigation loss to advocate in these new venues. In the early 1990s, LGBT-rights advocates pursued state litigation aimed at invalidating the Florida law. While they experienced mixed results at the trial-court level, the Florida Supreme Court ultimately refused to overturn the ban. But after the larger movement's success in Lawrence, Florida advocates had new and compelling federal case law on which to build a federal challenge to the ban. To these advocates' dismay, the Eleventh Circuit Court of Appeals, in Lofton v. Secretary of the Department of Children & Family Services, rejected the challenge and held that the ban was rationally related to legitimate governmental interests. The U.S. Supreme Court denied certiorari. Advocates then faced the prospect of returning to state venues in an attempt to overturn the law. …

The loss in Lofton provided a particularly compelling case in the state legislative arena and in the domain of public opinion. The case portrayed loving, close-knit families and unselfish parents who provided a stable home life for children with pressing medical and emotional needs. While the litigation process facilitated this depiction, the litigation loss itself provided a powerful new dimension by threatening the destruction of these loving, stable families. By upholding the general ban, denying permanency to these families, and leaving them vulnerable to dissolution, the court helped to create an image of an unforgiving, unfair, and illogical law that, while seeking to help the state's most vulnerable children, actually undermined those children's well-being. The loss, rather than the mere act of litigation, highlighted the gravity of this injustice. The judicial decision threatened the physical break-up of the plaintiff families and put the state's coercive power behind the statute.

Post-Lofton, advocates were able to frame legislative demands based on emotional pleas for particular children's best interests. The Lofton court made the law concrete by enforcing it against specific children--special-needs children with loving, committed caretakers seeking to adopt them. …

While legislative work failed to achieve repeal of the adoption ban, activism in the state courts continued to work in conjunction with state legislative efforts. …LGBT-rights lawyers in Florida turned to state-court judges, urging them to use state-law grounds, some of which the Florida Supreme Court had not considered, to remedy the injustice perpetrated by Lofton.

In 2008, two trial-court judges invalidated the ban, and the Florida Court of Appeal recently affirmed one of those decisions. At the trial-court level, Judge Cindy Lederman relied on novel state-law grounds, finding that the law violated children's right to permanency as expressed in Florida's statutory regulations on adoption. Then, in accepting the equal-protection claim, Judge Lederman situated Lofton as out of date, given the volume of intervening studies on the effects of sexual orientation on parenting. …

In affirming Judge Lederman's ruling, the Florida District Court of Appeal relied exclusively on state equal-protection grounds. After explaining that the Florida Supreme Court left open the equal-protection issue in its 1995 decision, the court found no rational basis for the discriminatory treatment of lesbians and gay men in the adoption context. Florida Governor Charlie Crist responded to the appellate court ruling by announcing that the state would stop enforcing the discriminatory law, and the Florida Department of Children and Families made clear that it would not appeal the ruling. In response, Attorney General Bill McCollum, a supporter of the ban, announced that he would not ask the state supreme court to consider the case. While McCollum left open the possibility of future litigation by insisting that "a more suitable case will give the [Florida] Supreme Court the opportunity to uphold the constitutionality of this law," LGBT-rights advocates

hailed the end of the adoption ban.

b. Shifts Across Branches of Government

… By demonstrating the unwillingness of courts to bring about change, litigation loss highlights the importance of action by elected officials and thereby brings a new sense of urgency to what Rosenberg sees as more "political" efforts. But unlike Rosenberg, I do not suggest that strategies aimed at nonjudicial actors are preferable to litigation tactics. Instead, I argue that such strategies work in conjunction with litigation and often derive meaning from failed litigation….

The women's-rights movement, in which legal defeats have spurred legislative reform, provides a useful starting point. Elizabeth Schneider shows how after women's-rights advocates failed to convince the Supreme Court to treat pregnancy discrimination as a sex-equality issue, Congress passed the Pregnancy Discrimination Act, which adopted the exact legal arguments advocates had made in court. In her work on demosprudence, Guinier documents the pay-equity issue as a more recent example from the women's-rights movement. After Ledbetter v. Goodyear Tire & Rubber Co., in which the Supreme Court rejected an equal-pay claim under Title VII based on a constrained reading of filing deadlines, Congress and the President acted quickly to remedy the issue. Movement advocates successfully demonstrated that the Court's failure to recognize the employment-based injustice necessitated legislative and executive action. Justice Ginsburg's dissent, upon which advocates seized, articulated the discrimination experienced by women (and legitimized by the majority) and emphasized the need for a legislative response. While in both of these instances advocates would have preferred to prevail in court, they were able to positively use the litigation losses to achieve the movement's goals by other means. …

2. Appealing to the Public

Just as litigation victory may help a movement sell its cause to the public, litigation loss may ironically have a similar effect. This may depend on whether movement advocates are able to frame the judicial defeat as a contravention of majoritarian beliefs. If so, activists might mobilize popular support by constructing courts as countermajoritarian, elitist, and out of touch with mainstream society. Indeed, when courts fill an important role-- protecting minorities from unfavorable treatment by the majority-- they might also produce opportunities for mobilization by opposing movement forces. This effect is consistent with Rosenberg's analysis of backlash to court decisions. Rosenberg notes that "those judicial opinions that seem most effective in mobilizing citizens are those that anger and outrage segments of the population who mobilize to prevent their implementation and overturn them."

Yet rather than situate backlash to court decisions as unique--i.e., as an institutionally specific response that demonstrates the ineffectiveness of litigation in comparison to legislative advocacy and direct action--I situate backlash to judicial decisions as just one form of countermobilization that occurs in the wake of movement advances. Christian Right advocates have used the ballot-initiative process to turn back LGBT gains deriving from all branches of government. Indeed, LGBT-rights lawyers themselves understand backlash to judicial decisions as part of this broader movement-countermovement phenomenon. … A prime example emerges from Christian Right advocates' successful campaign to amend the California Constitution to prohibit marriage for same-sex couples. …

In May 2008, the California Supreme Court ruled the statutory prohibition on marriage for same-sex

couples unconstitutional. Proposition 8, which proposed to amend the California Constitution to prohibit marriage for same-sex couples, appeared on the November 2008 ballot. Yet the campaign to amend the state constitution actually started in 2003, long before the California Supreme Court decided the issue. Nonetheless, Christian Right advocates, fueled by the court loss, were able to frame Proposition 8 as a necessary and immediate response to a countermajoritarian judiciary. The litigation defeat raised the salience of the issue and lent the campaign a new sense of urgency and legitimacy, helping advocates raise more than $40 million to fund the Proposition 8 effort. …

First, advocates wasted no time in framing the court's decision as "judicial activism," with all of the negative connotations that term has come to carry. Jay Sekulow, the head of ACLJ, which participated in the litigation, announced that "the California marriage decision underscores the growing problem of an activist judiciary."… By striking down Proposition 22--an initiative approved by voters in 2000 that had provided an additional statutory basis for the state's marriage restriction--the justices in the majority became symbols of an elite, secular class ruling without regard for popular will.

…Furthermore, advocates painted the court and the LGBT-rights movement as undemocratic and therefore un-American--a move that relies on the idea, articulated by Rosenberg and Klarman, that countermajoritarian court decisions disrupt the natural and appropriate process of social change. For example, Bauer proclaimed that same-sex marriage advocates use "the most undemocratic methods possible"--relying "on political activists cloaked in black who answer to no one"--because they "cannot achieve [their] goals through the democratic process via the elected legislatures." …The litigation loss allowed proponents to make the measure as much about reining in the courts as about substantive objections to marriage for same-sex couples.

While the Proposition 8 campaign appealed to the "activist judiciary" trope, it focused more heavily on the claim that legalization of same-sex marriage would lead to public schools teaching about same-sex relationships. To make this claim, Christian Right advocates tied largely unrelated, out-of-state litigation defeats to California's fight over marriage. The litigation over free-exercise and parental-rights issues in Massachusetts became a centerpiece of the Proposition 8 campaign in a way that highlights the function of multiple (even low-level) litigation losses. …

Certainly, Christian Right advocates focused on the litigation loss at the California Supreme Court to shape public opinion in a way that supports Rosenberg's account of the courts' countermajoritarian limitation. Yet at the same time, the fact that advocates spent so much time and money on a school-programming message, which had a much more attenuated connection to the "activist court" trope, complicates Rosenberg's empirical claim linking backlash specifically to court decisions. Furthermore, Christian Right advocates have mobilized opposition to LGBT legislative gains by criticizing legislators as antimajoritarian and elitist. …

Ultimately, the Proposition 8 campaign demonstrates the way in which savvy advocates deploy and reconfigure litigation loss to speak to the public. A judicial defeat may allow advocates to paint the judiciary as dangerously countermajoritarian and may inspire voters to restore majoritarian policy. Christian Right lawyers hoped to prevail in court, but when they lost, they did not simply ignore the litigation. Rather, they reconfigured the judicial decision to aid their political campaign. In this sense, they extracted positive effects from what they viewed as an otherwise disappointing result. …

Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO J. LEGAL ETHICS 551 (2011)

INTRODUCTION: THE NEED FOR SOCIAL CHANGE LAWYERING

Jane, a transgender woman, wants to sue East Carolina for discriminatory identification policies. Jane has little knowledge of the legal system and turns to a lawyer, Pat, for advice and representation. In their initial meeting, Jane states that her goal is to require the state to reform the process by which gender designations are changed on state identification and recorded in publicly accessible databases. East Carolina's state identification process currently requires its citizens to provide a birth certificate to confirm gender. To change the gender notation on the identification, East Carolina requires a detailed medical history of the person's gender transition and a letter from a doctor from within five years of the identification application verifying the applicant's current gender. These documents then become available on the Department of Motor Vehicles ("DMV") website as part of public record, with the exception of the medical records, although the website notes that the DMV has such records on file. Jane informs Pat that her ultimate goal would be to see transgender people afforded the same rights as other citizens and treated as equals by the rest of society.

While Pat is the only attorney in conservative East Carolina sympathetic to Jane's goals, she is not an advocate for transgender rights. However, she knows there is an active national transgender movement. Because East Carolina is a small state with a small transgender population that prefers anonymity, the national transgender movement has not been active within East Carolina. Pat takes on Jane's case, but must now decide how to proceed.

> [D]isputes are not things: they are social constructs. Their shapes reflect whatever definition the observer gives to the concept .... Of all the agents of dispute transformation lawyers are probably the most important. This is, in part, the result of the lawyer's central role as gatekeeper to legal institutions .... There is evidence that lawyers often shape disputes to fit their own interests rather than those of their clients.

This Note analyzes the role of the lawyer as a gatekeeper of socially transformative courses of action and the duties imposed on lawyers by the American Bar Association's *Model Rules of Professional Conduct*. Disputes are moldable, influenced both by the claimant and her representative. There are multiple ways in which a lawyer, as an expert who exerts substantial power on the client, can and should exercise that authority.

Disputants who seek social change are arguably well represented by lawyers. Lawyers are especially well positioned to play a necessary role in working for the rights of all people because of their access to and knowledge of established forms of social change, namely the judicial system. "[T]hose 'lawyers whose work is directed at altering some aspect of the social, economic and/or political status quo,"' are referred to as social change or cause lawyers. There is a need for the work that social change lawyers do. Social change lawyers "furnish information about choices and consequences unknown to clients; offer a forum for testing the reality of the client's perspective; help clients identify, explore, organize, and negotiate their problems; and give emotional and social support to clients who are unsure of themselves or their objectives;" they also provide an invaluable service to clients and the population at large.

However, there is very little guidance in the *Model Rules* for this kind of lawyering because social

change litigation often focuses on the broader stakes of a social movement rather than on the individual client's needs. In fact, the *Model Rules* may even constrain social change lawyers by requiring them to focus on the client rather than the movement, and the traditional conception of lawyering may be problematic for some social change lawyers. However, the *Model Rules* should not and do not prevent social change lawyers from seeking their and their clients' goals.

The *Model Rules* exhort lawyers to "exercise independent professional judgment and render candid advice," relying not only on "law but [on] other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." But it is unclear what considerations a lawyer must make in advising a client whose situation is directly related to and likely inextricable from a current social movement. Specifically, it is unclear what role a "traditional" lawyer must play when representing a client with social change goals. While much has been written about the role of the cause lawyer and the ethical implications of cause lawyering, this Note will explore what the correct course of action should be for a traditional lawyer representing a client whose ultimate aim is social change and who may want to do so through the litigation of an individual claim. One possible solution would be a collaborative client-lawyer relationship, which could solve the problem social change lawyers face in dividing attention between individual client needs and broader social change goals. Additionally, while this Note will not specifically address these options, consensus-building and mediation may be an alternative to adversarial litigation and would emphasize a collaborative and cooperative approach to effectuating social change.

Moreover, while social change litigation has been recognized as a viable and often successful means of creating social change, this method is not without its critics. Social change litigation has been accused of being contrary to democratic ideals because it rests the decision of how to achieve social change in the hands of one client, rather than in the hands of the affected class. Social change lawyers face a tension in balancing an individual client's goals with a movement's; one possible solution is a move away from litigation toward building community alliances in furtherance of both the client's and the movement's goals.

Lawyers who are not dedicated social change lawyers may represent clients with social change goals and are therefore faced with similar concerns over the *Model Rules*, the lawyer-client relationship, and the implication of social change litigation on the community at large. This Note will address some of the ways the social change literature can inform the decisions of traditional attorneys representing social change clients.

Because lawyers are the gatekeepers to legal knowledge, those not in the practice of creating social change, traditional lawyers, should be informed and armed with possible strategies to effectively represent clients with social change goals. A traditional lawyer taking on a social change client should be ready and open to molding her style and approach to representation in order to best serve the client. ….

I. TRADITIONAL LAWYER: THE ZEALOUS ADVOCATE

> *A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.* [ABA Model Rule 1.3 cmt.1]

As the comment to Model Rule 1.3 regarding "diligence" asserts, a lawyer is expected to act as a

zealous advocate on behalf of her client. This section defines the role of a traditional lawyer and then analyzes the implications of a traditional lawyer zealously advocating for a client's individual legal claim without regard to the client's social change agenda or the larger social movement's goals, concluding that this is detrimental to the client's ultimate goals and therefore in conflict with the *Model Rules*.

A. DEFINING ZEALOUS ADVOCACY

Henry Lord Brougham offered an extreme explanation of the role of a lawyer as an advocate who "knows but one person in all the world, and that person is his client." Brougham insisted that "[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty." While this definition has long been criticized, it illustrates what lawyers are traditionally taught, and what they continue to believe: that their primary function is that of an advocate, "zealously represent[ing] their clients within the bounds of the law."

For a traditional lawyer pursuing the zealous advocacy model of lawyering, there is little chance of conflict between the lawyer's and the client's goals because a lawyer's goal is to advocate zealously for the client. In the social change context, a traditional lawyer will likely have no independent or personal connection to the change that a client wishes to achieve, and would thus not be troubled by the *Model Rules*' directive to advocate zealously for the client in the way that the client wishes. However, a client whose goal is social change may not desire that her lawyer advocate for her zealously in traditional ways, and may not be able to communicate this need or know that any possibilities exist outside of traditional methods of advocacy. Clients seeking social change are often the most disenfranchised members of society and may therefore be unaware of all the possibilities that exist in the pursuit of social change. While a social change client might prefer a course of action that prioritizes her social change agenda over her individual claim, unless a lawyer informs her of this possibility, the client may not be aware that this course of action exists. In that case, a traditional zealous advocate would need to adapt to these different needs or risk being inefficient and ineffectual in representing or achieving the client's social change needs.

Another part of the traditional conception of the lawyer as zealous advocate is that lawyers must retain "a rational distance from the client, whereby the lawyer is careful not to step outside the sphere of neutrality that embodies her role as a professional advocate." According to this principle, a lawyer must remain detached from the potential consequences of her advocacy on society, instead focusing on the client's needs. Because this norm of detachment is part of the traditional conception of a lawyer and zealous advocate, a traditional lawyer advocating for a client with social change needs would likely be neutral and detached toward the effects of such a representation on society at large. This neutrality can be positive in that it does not affect a lawyer's ability to represent a client whose agenda is not consistent with her own. However, in the social change context, it can prevent a lawyer from the zealous advocacy that effective social change work often requires.

B. LITIGATION: NOT THE PROBLEM

A potential pitfall of this zealous advocacy is that lawyers must often represent Justice Oliver Wendell Holmes' "'bad man,' one who cares only for his own good and the consequences that may be taken by public agencies" against him. Combining Holmes' characterization of a typical client with the role of a lawyer as a zealous advocate requires that attorneys not consider the consequences of their actions for the public interest and instead focus on the immediate goals of their individual clients. While in some sense this kind of partisan lawyering is good, necessary, and

particularly American, it may pose problems for clients whose ultimate goal is social change. Too much focus on an individual client's claim in litigation may lead to adverse consequences for the social movement as a whole and may impede the social change the client desires.

However, a focus on litigation is not at the root of the problem a zealous advocate may present for a client seeking social change. Many social change lawyers advocate for their clients through litigation, particularly constitutional litigation, because it is the method with which they are most comfortable and competent. While litigation does incur large costs, can take a long time, and might not be successful, it is a "valid form of political advocacy," and provides both legitimacy to the cause and "bargaining leverage." Therefore, because litigation as a method is widely accepted, it is often an excellent method to pursue, both for social change and traditional lawyers, when a movement is seeking to be recognized by the legal system. In addition to bringing legitimacy to a movement, a successful lawsuit can create a precedent to help further the social movement.

Moreover, constitutional litigation can also bring a movement or the problems faced by members of an oppressed class to the attention of legislators, thereby leading to legislative developments on behalf of the social movement or oppressed class. However, it is not always the case that this kind of litigation will lead to widespread and immediate change within society. Although constitutional protections may change the legal landscape, to diminish the inequities suffered by many on a daily basis, it is often necessary to change people's minds, attitudes, and prejudices through other methods.

Traditional lawyers would likewise be comfortable turning to litigation when representing a client seeking social change. Litigation is therefore a strong choice when a lawyer believes that there is a good chance of a positive outcome, although as a method for social change, it can potentially be problematic.

C. AN INCOMPATIBLE METHOD: ZEALOUS ADVOCACY AND SOCIAL CHANGE

While litigation is not problematic in and of itself, it can create obstacles for a client's efforts toward social change. A win in court may be good for an individual client's claim, but may not create the desired change within society or the resulting precedent might harm the cause of social change as a whole. Even if the result of the litigation is not detrimental to the cause per se, because the litigation affects a distinct community or social class, the community should have a more democratic say in the choice to litigate and the choices that are made within the course of litigation. Regardless of the kind of precedent established, litigation may "infringe upon the freedom of other community members to litigate their own individual cases (or to choose not to litigate)." Rather than creating more opportunities for members of an oppressed social class to exert their power and autonomy, litigation can usurp this power and place it in the hands of a lawyer or an individual client. The possibility that litigation impedes the rights of other members of the afflicted class is a concern that rings particularly true for a client whose goal is in part to better the situation of others.

In reality, traditional and cause lawyers do more than just litigate for their client; they rely on an arsenal of different tactics whether it be to save money, time, resources, or to be more effective. The zealous advocate does not have to be a cutthroat litigator. Rather, a lawyer can be a "creative, cooperative lawyer" and pursue negotiation and other tactics to advance all of the parties' interests. However, when "the interests of the client part from another's interests, the lawyer invariably" bargains for her client's interests above the rest. Zealous advocates, regardless of the course of action they pursue, strive to further the "interests of their clients, not the interests of justice nor the public interests." A client seeking social change will require her lawyer to be aware of public interests and do more than zealously advocate for her individual claim, regardless of what tools her lawyer uses.

While a lawyer acting as a zealous advocate can be effective on behalf of a client with social change goals, her narrowly tailored pursuit of a client's stated dispute and her personal detachment from the client's cause may impede her from effectuating the true change that the client desires. A client with a social change agenda would likely be better served by an attorney operating on a different paradigm.

D. PAT AS A TRADITIONAL LAWYER

Pat, as a zealous advocate representing Jane, would fervently pursue Jane's claim against East Carolina. This would entail filing a complaint in court, attempting negotiations with the state's counsel, pursuing the removal of Jane's personal information from the DMV website, and either negotiating a large monetary settlement for Jane or trying the case in court in the hopes of winning a large compensatory damages award for pain and suffering. Conservative East Carolina would not likely offer a large settlement or concede to Jane's wishes. Pat would likely have to take Jane's claim to court, thereby bringing her into the public sphere. This dispute would also call attention to other members of the transgender community in East Carolina who might wish to avoid the exposure litigation would incur. Additionally, East Carolina juries tend to be highly conservative, so Jane's chances of recovery are slim, even within the federal court system.

Even if Pat and Jane were to prevail at trial, a jury might only award an injunction, or only award nominal damages. The possibility that a trial might hot result in an injunction to the practices that Jane wants to change is high, and in fact might create bad precedent and thereby prevent or make more difficult a change in the future. A more problematic result from Jane's perspective, even though she might not have been able to voice this exactly to Pat, would be a lack of change or worsening of the public's view and treatment of transgender people regardless or even because of success in litigation. While Pat might effectively succeed as a zealous advocate in accomplishing one of Jane's goals, the chances of accomplishing her ultimate goal of social change would likely not be addressed.

II. CAUSE LAWYERS

A lawyer always has a duty to zealously advocate for her client; however, cause lawyers dedicate this energy and zeal not only to their individual clients, but also to the causes their clients represent. This is "[a] more robust vision of client loyalty [that] in this circumstance would ask the litigator to acknowledge the larger client--the community--and thus to consider the consequences of her tactics on the community's interests." Cause lawyers are not detached from their representation, but are passionate supporters of the cause they represent. A cause lawyer advocates the social movement through the individual client and makes choices that take into account the cause's needs.

Pursuing the goals of a social movement in addition to a client's individual goals is a logical choice for lawyers who strongly believe in and are members of the cause that they represent. The *Model Rules* offer very little guidance to cause lawyers whose focus is on doctrinal development on behalf of the cause. This Section divides social change or cause lawyers into two categories: the litigator and the advocate, and addresses each separately. The cause litigator's focus is on constitutional litigation in order to effect social change, while the social change advocate is a member and participant within a social movement and works toward social change using the methods traditionally ascribed to social movements.

A. CAUSE LAWYERING AND LITIGATION

There is no set definition for cause lawyers and what they should do. The definitions and criticisms of cause lawyers below illustrate the lack of consensus in what a cause lawyer is and should be,

and highlight the complexities involved in lawyering for social change. However, in a general sense, cause lawyers may be defined as those whose aim is to bring public advocacy to the forefront through a renewed commitment to morality and bettering society, thereby further legitimizing the legal profession.

Cause lawyers are those who pursue the betterment of society through the promotion of their own political and moral beliefs, and do so by advocating for a particular social movement, focusing on the effects of litigation on society rather than on the individual client. Cause lawyers can do so through a variety of strategies, but because litigation is highly effective, it is one of the main strategies pursued.

Because the *Model Rules* make no mention of representing causes, only individuals and organizations, the *Model Rules* may indicate to lawyers that the furtherance of the public good is a personal endeavor not to be intermingled with their clients' cases. This argument has merit in light of the *Model Rules*' call to lawyers to advocate zealously on behalf of their clients, and therefore not for their own benefits. However, support for cause lawyering lies within the *Model Rules*' exhortation to "protect the system that safeguards individual rights in order to preserve societal values." Additionally, cause lawyers are not solely dedicated to advocating on behalf of the cause without regard to the client. Cause lawyers generally strive for either "doctrinal development or ... direct client advocacy." The lawyer focused on doctrinal development would use an individual client's case in furtherance of "the evolution of a particular novel legal principle" in order to benefit the larger social movement. The direct client advocate would zealously litigate on behalf of an individual client's social change goals.

More than just being a zealous advocate and litigator, a cause lawyer pursuing litigation imbues the claim with personal passion toward the cause. This informs the way in which a cause lawyer advises her client. Model Rule 2.1 offers some guidance on how a cause lawyer should interact with her client: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Lawyers can and should rely on personal knowledge in order to advise their clients. Additionally, "it is entirely legitimate for a lawyer to engage in work for social change in order to ensure that the rights of all people are protected." The *Model Rules* therefore permit lawyers to advise their clients of the effects any action might have on the broader social movement.

Lawyers whose goal in litigation is doctrinal development are often referred to as impact lawyers. Impact lawyers only accept cases they believe would have the desired precedential effect, but once selected, they zealously advocate on their clients' behalf. This is in part because the impact lawyer selects clients with the same goals as herself, so that advocating for the client is tantamount to advocating for the desired impact. However, this alignment of goals does not always occur and can possibly be detrimental to the client if the impact lawyer remains fixated on the outcome she desires over the welfare of the client. For a cause lawyer with her own agenda, the ethical requirement to zealously represent a client's interests may constrain the way in which she brings about that change. A social change lawyer, according to the *Model Rules*, may not take action to further her own agenda without the client's express authorization. However, while a social change lawyer must "pursue the case in a way that furthers the client's best interests ... she does have control over how to conduct that representation and may be able to shape the client's case in important ways." The choice between an approach that would most benefit the individual client and one that would benefit the cause technically rests in the hands of the client because decisions about "the objectives of representation" are in the client's domain. However, because a client often defers to the lawyer to

make tactical decisions, it is possible that an impact lawyer can pursue a client's objective--the furtherance of the individual client's claim--while still pursuing her own broader social change agenda.

B. CRITIQUES OF LITIGATING FOR SOCIAL CHANGE

There are two major veins of criticisms of cause lawyering: first, the argument against the "anti-majoritarian nature of using the courts to reach goals that could not be attained through ordinary domestic means," and second, the idea of the negative impact on the lawyer-client relationship.

The anti-majoritarian critique sees courts as making law that the democratically elected legislature has declined to enact or consider. Critics have argued that this process is anti-democratic in that it allows one lawyer and a client, or in a class action, a representative plaintiff, to make the decisions for an entire community. Allowing one individual lawyer and client to make the choices within a lawsuit precludes others within the community from doing so as well, either through precedent or, in the case of class actions, preclusion. Moreover, an individual litigation or class action ignores or discards the possibility that members within the community do not in fact want to litigate the issue, would prefer to spend resources on another issue that affects their community, or would prefer a tactic other than litigation to address this issue.

The second vein of criticism, the negative impact of cause lawyering on the lawyer-client relationship, is closely related to a critique of cause lawyering as unrepresentative of the needs of community members. Cause lawyering is criticized as manipulative and likely to allow the lawyer to focus on her own goals rather than those of the individuals. Additionally, one of the most problematic aspects of cause and impact lawyering is that rather than empowering the client, it uses clients as "tools" to further the lawyer's own agenda. However, cause lawyers can attempt to avoid this problem of manipulation through close adherence to the client's stated goals; the method by which a cause lawyer would do so, client-centered practice, is discussed further below.

The problems that these critiques identify may be abated if cause lawyers take affirmative steps to ensure that the lawyer-client relationship meets the requirements of the *Model Rules*. American clients often conceive of themselves as "entitled to be the masters of their lawyers." While this is the case for some privileged clients, many clients in fact experience the inverse: lawyers exerting their power over their clients to the extent that they are making decisions for them. The clients of cause lawyers are particularly susceptible to this power dynamic, as they are often disempowered people. The "client-centered practice" is one method that may diminish the power lawyers exert over their clients. In an endeavor to empower her clients by enabling their right to make choices, a lawyer in a client-centered practice tailors conversations with clients to learn the "relevant facts [that will] help the client articulate his values" and make the choices throughout litigation. Here the lawyer acts less as an expert or guide and more as a careful listener in order to divine the client's will and ensure a less coercive or manipulative relationship. A cause lawyer could apply these methods in order to understand more fully her client's advocacy needs and to be able to construe and help develop, with the client's input, the best course of action in furtherance of both the personal and social change goals of her client.

However, the client-centered practice may be equally flawed because while it is not clearly coercive, this method is still "both psychologically potent and manipulative" of the client. No method is likely to dissipate entirely the power lawyers exert over their clients. This power relationship is inherent: the lawyer has expertise that the client does not, regardless of the tactics the lawyer uses to interact with the client. This difference in expertise, and sometimes level of education, can pressure clients to adopt the lawyer's recommendations, even when the lawyer's recommendations

conflict with the client's desires. Even when the client feels most at ease with the lawyer, the client will likely defer to the lawyer's expertise to make the major legal decisions. Despite the potential coercive effects, the client-centered approach is appealing because it offers a method by which lawyers may learn more about what the client desires, particularly with regard to the client's ultimate goal. With that knowledge, a lawyer will be able to better advise the client, despite of the possibly coercive nature of this advice, as to the best course of action.

Regardless of the criticisms of cause lawyering, cause lawyers advocate for the betterment of society, whether through the promotion of their own ideals, through their client's individual litigation, or through litigation that focuses on the needs of the cause more than the client.

C. CAUSE LAWYERING AND SOCIAL MOVEMENT ADVOCACY

Cause lawyers who are not focused on litigation but are social movement advocates are "integrated members" of the community that they represent, "practicing behavior that moves their cause forward ... using their legal skills on behalf of the cause." Cause lawyers who work along with social movements "make problematic the assumption that there are strict dichotomies between professional and grassroots tactics, or between institutional, nondisruptive practices (litigation) and extrainstitutional disruptive practices (protests, sitins)." A lawyer's duty to zealously advocate for her client extends to both the client's actual claim and to the client's overarching social change goals. As noted above, a cause lawyer focused on litigation can be effective at pursuing both a client's claim and the overarching social change goal, but this often comes at the cost of the client's empowerment. Social movement advocates, unlike cause lawyers whose efforts are directed at litigation, work from within social movements, participating in the traditional methods of social movement advocacy, in an effort to promote social change.

Creating lasting social change within disenfranchised communities requires individuals who seek to change their own and others' social conditions; unfortunately, as subordinated members of the community, they often do not have the knowledge or the resources to go about creating change. In order to fulfill the need for client empowerment, there is a growing shift from impact litigation and direct client advocacy to community building characterized by fostering "an ethic of connections--one of building alliances and creating alternative institutions" directed at social change. This kind of social movement advocacy empowers the client to begin more immediately working toward social change with the other members of her community or with members of the relevant social movement. A social movement advocate can serve this function by translating the client's grievance into the appropriate legal language in order to help give voice to the claim and so that the client may be able to communicate the grievance to other community members. Lawyers are often the most obvious and appropriate choice for these clients because as lawyers they possess extensive knowledge about the legal system necessary to bring about the social change the clients desire.

D. PAT AS A CAUSE LAWYER

Pat, as a cause lawyer representing Jane, would pay particular attention to Jane's overarching goal of social change. If Pat were acting as a direct-client advocate, she would identify Jane's goal to better the treatment of transgender people in East Carolina and pursue it zealously in addition to Jane's individual claim against East Carolina. In doing so, Pat would work toward both of Jane's goals.

However, if Pat were acting as a doctrinal or impact lawyer, she would either have first decided that her own goal was to better the treatment of transgender people and end East Carolina's dis-

criminatory identification process, or have decided that of the potential social change clients available, Jane's claim would be the most likely to create the desired precedent. Once Pat made this decision, she would then zealously pursue her goal to end East Carolina's discriminatory practice. This goal would supersede Jane's individual claim. For example, even if East Carolina offered to settle Jane's claim and remove her information from the DMV website, Pat would likely recommend that Jane continue to pursue litigation in an effort to receive an injunction and establish favorable precedent for future litigants.

If Pat were a social change advocate, she would likely work along with an existing social movement. Pat would introduce Jane to a transgender rights organization and facilitate her work with the transgender rights organization by informing and instructing Jane of the extralegal ways in which a social movement could further her goal of improving treatment of transgender people. Pat would also help Jane put into legal terms the problem with the identifications and the status of transgender rights in East Carolina so that she and the transgender community could assert their rights.

III. RECOMMENDATIONS FOR TRADITIONAL LAWYERS REPRESENTING SOCIAL CHANGE CLIENTS

Because clients will likely seek the services of both cause and traditional lawyers in order to pursue their goals, it is necessary to understand what traditional lawyers, unaccustomed to social change advocacy, should do in such circumstances. In representing a client with social change needs, a traditional lawyer should rely on lessons learned from cause lawyers as well as on the *Model Rules*. There are some critiques of cause and traditional lawyering that cannot be avoided by this course of action because they are inherent to litigation. However, the goal for lawyers representing clients with social change goals should not be to eliminate all problems related to social change lawyering, but rather to strike a balance between the traditional lawyer's focus on an individual client's claim to the detriment of the greater social change goal and the effects on third parties, and the cause lawyer's possible focus on the social change goal over the needs of the individual client.

A. LAWYERING ON BEHALF OF SOCIAL CHANGE CLIENTS

While cause lawyers are often fueled by an intense passion for the cause they represent, lawyers representing social change clients do not have to adopt a similar passion for their clients' goals. Traditional lawyers can instead achieve a similar level of dedication to the client's goals by a true commitment to the *Model Rules*' exhortation to zealous advocacy and by deferring to the client in regards to third-person effects.

The *Model Rules* exhort lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Because lawyers are the gatekeepers to knowledge about the judicial system and the courses of action available to social change clients, a lawyer should not only inform the client of what her legal remedies might be, but also of the extralegal opportunities available to accomplish her goal. The *Model Rules* conceive of lawyers in part as advisors, which allows lawyers to rely on more than just legal considerations in advising their clients. Therefore, a lawyer may advise her clients as to all the possibilities within the lawyer's range of knowledge. Additionally, a lawyer is not required to give unsolicited advice; however, the Rules also require communicating thoroughly with the client about possible means by which to accomplish the client's objectives. Because there are multiple methods by which a client can achieve social change, lawyers are permitted by the *Model Rules* to advise the client of the possibility of pursuing a resolution to her claim through community organizing or work with a social movement, as well as the potential benefits and disadvantages of litigation.

Advising a client about the potential extralegal solutions available does not constitute denying the client representation. A client could choose to pursue both legal and extralegal methods of furthering her claim. Should a client decide not to go forward with a traditional method of legal advocacy, a traditional lawyer can still act as an advisor, in part by informing the client about current social change movements relevant to the client's position and by encouraging and facilitating the client's participation in that movement as well as within the community the client represents. Traditional lawyers need not become involved with social movements themselves or participate in extralegal actions in furtherance of movements, but should consult with their clients to determine whether the clients' goals would best be served by extralegal actions in participation with a social movement. The choice not to pursue social change litigation and to focus solely on community organizing and other extralegal remedies is a gamble for both attorneys and clients, and should be made only when a client is fully informed of the available possibilities.

B. PAT AS A TRADITIONAL LAWYER REPRESENTING A SOCIAL CHANGE CLIENT

Pat, acting as a traditional lawyer representing a social change client, would work to meet Jane's goals by informing her of the various methods available to her and by advising her as to the most likely successful course of action. Pat would likely present Jane with three major options, barring Jane deciding not to go forward with her claim or deciding not to work with Pat at all. Pat would advise Jane that her options are to pursue litigation, pursue litigation and extralegal methods to achieve social change, or only pursue the extralegal methods. To the best of her abilities, Pat would fully inform Jane about the possibilities of success and costs of each course of action, and Jane would then be able to choose which to pursue as a thoroughly informed client. After advising Jane of the possibilities presented by litigation, Pat would advise her about the extralegal possibilities available, but would make sure to inform Jane that these options would require much more time, passion, and involvement on Jane's part than pursuing litigation would. Some of the extralegal options Pat would present to Jane include working with an existing transgender rights group and organizing her own meetings with the transgender community in East Carolina in which to discuss what action should be taken in regards to the discriminatory identification processes, in order to make a more democratic decision about the correct choice of action to pursue. Should Jane choose to continue to focus on her larger social change goal, Pat would continue to inform Jane of the effects her actions might have on the transgender community throughout her representation.

CONCLUSION

While traditional lawyers and cause lawyers take different approaches to litigating and representing social change clients, both approaches are fueled by an underlying dedication to the *Model Rules*' call to zealous advocacy. The choice these two approaches present is whether to advocate on behalf of the individual client's claim or for the broader social change goal, but these two options are not mutually exclusive. Because lawyers are the gatekeepers to knowledge about the judicial system, lawyers representing social change clients should act as advisors and inform clients of the myriad ways in which a social change goal can be met. By doing so, a lawyer would allow the client to make the choice whether to focus on the broader social change goal, the individual claim, or both.

Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. Rev. 1770 (2017)

The prominence of Black Lives Matter (BLM) in American society today signals the revitalization of alternative forms of participatory democracy-- from localized community organizing to widespread social movements--as political expression among racial minorities. … In proposing a new theory, one I term *rebellious social movement lawyering*, I argue that social movement lawyers should play an active role in social movements, so long as they are guided by two overarching principles at all times: first, that social movements are necessary to achieve structural social change; and second, that the participation and leadership of grassroots community members, more than professionals and formal social justice organizations, is necessary to sustain such movements. …

My theoretical insights on the role and strategies of rebellious social movement lawyers stem from my yearlong localized advocacy against traffic court debt in South Los Angeles. During my second year of law school, I externed with Theresa Zhen, then in her second year of a Skadden fellowship at A New Way of Life Reentry Project (ANWOL), to attack the excessive fines and fees generated from traffic tickets. In response to the structural dimension of traffic court debt, which entraps low-income minorities in cycles of indebtedness and involvement in the criminal justice system, our advocacy gradually evolved from purely direct representation to legislative advocacy, strategic litigation, and community organizing. Though our work was guided neither by principles of building social movements nor by enhancing grassroots democracy, our multifaceted approach to advocacy informs the dynamic role of lawyers under my theory ….

I. TRAFFIC COURT DEBT IN CALIFORNIA

Since the 2015 publication of the U.S. Department of Justice report on Ferguson, Missouri, national attention has increasingly turned to the explosion of traffic court debt in low-income communities of color as a mechanism of revenue generation for municipalities. Los Angeles County is not immune to this scheme, with an average of $26.8 million collected each year from 2010 to 2015 from civil assessment fees--$300 fines that are automatically added to the overall amount owed by individuals who fail to appear for their traffic court hearing or who miss a payment for a traffic citation--alone. …

The fines and fees tacked onto traffic citations have steadily increased over the last few decades. Today, an individual is automatically charged a total of $490 for a $100 ticket. … In addition to an increased financial hardship, individuals with an FTA have their licenses suspended by the Department of Motor Vehicles (DMV) and a misdemeanor conviction on their criminal record. …In summary, the true immediate costs of a traffic infraction include hidden fines and fees that are added on top of the base fine, license suspensions and misdemeanor convictions for FTA and FTP, and the choice between unemployment and incarceration for driving with a suspended license. Quantitative data reveals that this form of revenue generation is predicated on the backs of low-income communities of color. …

Traffic court debt expedites formal contact with the criminal justice system by criminalizing one's inability to pay or appear and one's need to drive with a suspended license. The criminalization of traffic violations by traffic courts must be understood in terms of two complementary dynamics. First, to generate revenue, traffic courts can seamlessly threaten and impose criminal punishment when one ignores financial punishment. Second, the power for traffic courts to do so mirrors a larger structural shift resulting in "the fading line between civil and criminal law," whereby civil

adjudicatory systems are increasingly relied upon to punish low-level, nonviolent violations. Traffic court judges preside over both traffic infractions and misdemeanor traffic tickets, thereby liberating criminal courts to adjudicate nontraffic offenses. Nonetheless, because misdemeanor traffic violations are formally classified as criminal, the collateral consequences of a criminal conviction … carry over to the traffic court context.

One effect of criminalizing traffic violations is that it empowers traffic courts to arrest and jail individuals to collect on unpaid debt. Unsurprisingly, communities of color are disproportionately targeted for arrest and jailing. … Spending time in jail has profound material, psychological, and emotional impacts on individuals and their families both in the short and long term. Short term incarceration can lead to job and housing loss. …In the long term, because a misdemeanor conviction creates a criminal record, one's eligibility for certain jobs, occupational licenses, and benefits may be permanently foreclosed. Entire families are affected materially and emotionally. A greater burden may be placed on a family member without a criminal record to provide for the family. Alternatively, the social stigma of being unemployed or having a criminal record may impel the individual to pursue illicit activities to provide for their family. …

…[A] police stop for an ordinary traffic violation initiates the cycle of traffic court debt. Interrogating the initial encounter with law enforcement reveals a pattern of policing in low-income communities of color based on racial profiling. In South Los Angeles, the effects of driver's license suspensions intersect with a "broken windows" policy of policing that has long aggressively targeted low-income communities of color. [In many cases] … "routine traffic stops" by the LAPD … are merely a pretext for vehicle searches to further race-based nontraffic criminal investigations, and citations are issued ex post facto to justify illegal searches when they yield neither contraband nor weapons….

II. A MULTIFACETED APPROACH TO CHALLENGING TRAFFIC COURT DEBT

A. Direct Representation

I began my externship at A New Way of Life in October 2015 assisting Zhen with the direct representation of indigent clients. We pursued this mode of advocacy both because of the sheer magnitude of need for pro bono representation and because our professional training as public defenders shaped our pragmatic goal of making a meaningful difference in a handful of lives of those who faced insurmountable traffic court debt and license suspensions. …

Without assistance of counsel, the vast majority of indigent defendants cycle in and out of traffic court ignorant of their rights, alone to face a byzantine system that deliberately reduces their humanity to inputs of revenue generation. …In contrast, Zhen and I discovered early on that representation by counsel can be determinative in dropping the charge against a defendant or in waiving the fines and fees at sentencing. Officers were likely to work out a deal with us prior to trial. …

Despite our success with individual cases, Zhen and I became increasingly frustrated by how much work each case demanded for only an individualized effect. Moreover, we were concerned that our individualized courtroom victories reified the predatory procedures of the court, decreasing the likelihood that *pro se* defendants would receive favorable outcomes. These concerns catalyzed a pragmatic shift from primarily engaging in direct representation to adopting a more ambitious vision of systemic reform.

At the same time, we recognized that direct representation opened the door to broader advocacy in two ways. First, the more time we invested in court, the greater the degree of precise knowledge

we possessed of the court's predatory procedures. We appreciated this dialectic, as it informed other strategies, such as impact litigation, to challenge the rampant due process violations we witnessed. Second, because of my community organizing background, we relished the opportunity of organizing with individuals who were directly impacted by traffic court debt. Without providing successful representation in traffic court, it is doubtful that we could have met and recruited community members who would assist us in launching the grassroots organizing off the ground.

This foregoing paragraph anticipates the fluidity in tactics that is the cornerstone in my theory of rebellious social movement lawyering. Rather than being guided by rebellious social movement lawyering principles, however, our decision to shift strategies was a response to the practical limitations of direct representation and our desire to effect systemic change along the lines of our preexisting training and skillsets as traditional legal professionals and, for me, a community organizer.

B. Policy Advocacy

…[D]irect representation was largely ineffective for clients whose licenses had already been suspended, regardless of jurisdiction. From county to county, judges resisted granting indigency hearings to clients whose suspensions resulted from an FTA or FTP absent the payment of "total bail." Thus, a consensus [within a group of concerned practitioners with traffic court experience] congealed around a legislative strategy to end license suspensions as a debt collection mechanism.

To generate political traction, the participants formally announced a coalition, known as Back on the Road California (the BOTR coalition). In April 2015, the BOTR coalition published a report entitled *Not Just a Ferguson Problem--How Traffic Courts Drive Inequality in California*. Through a meticulous breakdown of court fines and fees, interwoven with client narratives illustrating the devastating effect of traffic court debt, the report built a compelling case to end license suspensions altogether.

The report received wide coverage locally and nationally, prompting Governor Jerry Brown to sign a "one-time amnesty program for unpaid traffic ... tickets" on June 24, 2015. Becoming effective on October 1, 2015, with an end date of March 31, 2017, this temporary program provided material relief for some indigent applicants whose licenses were suspended. Theoretically, anyone "in good standing" with a license suspension from an unpaid traffic ticket qualified for license reinstatement, while a narrower subset of these individuals were eligible for an additional debt reduction of up to 80 percent.

On its face, however, the amnesty program was limited in scope and efficacy. First, because the program applied only retroactively to already-issued tickets, indigent individuals ticketed during the program and after its termination were provided no relief from the familiar cycles of license suspensions and criminal justice system involvement without recourse. Second, under the program, applicants who were ticketed after January 1, 2013, were categorically ineligible for debt reduction. Although these applicants would have benefited from license reinstatement, their financial obligations to the state remained excessive and, for most, impossible to meet. For these individuals, there is a high likelihood of wage garnishment, tax levies, and other debt collection methods due to a missed payment. …

The enactment of the amnesty program spurred a new round of direct representation. …Far from abandoning legislative advocacy, we appreciated the significant political ground gained by the initial report through the Governor's initiation of the amnesty program. On April 11, 2016, the BOTR coalition published a second report, titled *Stopped, Fined, Arrested: Racial Bias in Policing*

and Traffic Courts in California. … By assuming a race-conscious framework, we combined our grounded observations of the racial dynamics of traffic court with the broader social momentum against police violence and mass incarceration, by which we hoped to compel urgent legislative action to end the use of license suspensions.

C. Impact Litigation

Given the underwhelming relief that the amnesty program actually provided and the glacial pace at which legislative reform typically occurs, the BOTR coalition decided that litigation was also necessary to disrupt the judicial pathway to driver's license suspensions through notification to the DMV to suspend licenses upon an individual's FTA or FTP. …

On June 15, 2016, a team of coalition members and local advocates in Northern California filed a lawsuit against the Solano County Superior Court for declaratory and injunctive relief from the court's systematic "failure to provide a meaningful opportunity to be heard on the issue of ability to pay prior to referring a traffic defendant to the DMV for driver's license suspension" for an FTA or FTP. This, the complaint stated, violated statutory authority and the state and federal constitutional Due Process and Equal Protection clauses. On the heels of the Northern California litigation, we convened with a team of advocates in Southern California and filed an analogous lawsuit against the Los Angeles County Superior Court….

Two components of the Los Angeles County lawsuit are worth mentioning. First, we identified our plaintiffs from our continual engagement in direct representation. Had we fully transitioned from legal services to legislative advocacy, we would have been severely limited in our capacity to locate ideal complainants. Moreover, those of us who represented clients directly influenced the team's conception of the ideal plaintiff from a fictionalized caricature of a law-abiding, indigent, one-time minor traffic offender to an individual more truly representative of the residents of color at large in Los Angeles County--one with multiple traffic stops, tickets, and arrests pursuant to traffic warrants. Ultimately, our two plaintiffs, one Latina and one Black woman, honestly reflected the everyday experiences of low-income drivers of color with the law and the traffic court system ….

Second, our complaint differed from the Solano County lawsuit in one significant sense. Along with alleging statutory and constitutional violations, we alleged that the practice of license suspensions absent an indigency hearing was a violation of antidiscrimination law. A few of us were adamant about including a race-conscious remedy in the complaint. … Although the outcome of our litigation may not ultimately turn on the anti-discrimination claim, our race-conscious framing constituted a logical progression of the analysis we forged in the second report, and plays an important function in symbolically channeling the racial discontent on the streets to the formally colorblind culture of the judicial system. Moreover, as a matter of trial strategy, by including a race-based claim, we opened the door to the possibility of convincing a sympathetic judge concerned about the racial impact of license suspensions to rule in our favor.

D. Community Organizing

… When I pitched the idea of community organizing, Zhen was enthusiastically supportive. She connected me with one of her clients, E.C., whom she described as particularly vocal about his inability to escape cycles of traffic tickets and debt. What E.C. lacked in formal organizing experience, he made up for with unbridled excitement and eagerness to jump right in. Together, the three of us began hosting meetings twice a month, open to the public, in a conference room at Ascot Library in Watts, South Los Angeles.

Zhen and I shared an organizing philosophy premised on participatory democracy and collective decisionmaking. The overall purpose of these meetings was to empower community members affected by traffic court debt into grassroots organizers capable of leading a local campaign for traffic court reform. Our initial goal was to raise the community's baseline level of knowledge of the traffic court system. Instead of us formulating the problem to attendees, we deliberately assumed the role of facilitators, allowing attendees to create knowledge by sharing stories and listening to each other's experiences. Our assumption was that through repeated encounters with police and traffic court debt, attendees already possessed an acute awareness of the problem.

Far from merely ensuring participation among all attendees, though, we actively facilitated in two ways. First, we synthesized the commonalities among individual experiences to emphasize the collective effects of the system preying on low-income Black and Brown communities, and in turn, foster solidarity. Second, we broke down common experiences into the concrete steps of the larger traffic court system, much in the same way I characterize the system in Part I. We obtained a clearer picture of the concrete steps over time; as our semimonthly meetings progressed, the content of the community conversations blossomed from fines and fees to traffic stops, vehicle searches, and arrests and jail time subsequent to traffic violations. In turn, everyone in the meetings, Zhen and myself included, developed a deeper understanding of the multilayered systemic nature of traffic court debt. …

Aside from developing the collective consciousness of traffic court debt, our goal was to raise the capacity of attendees to lead a grassroots organizing campaign. We believed that transformation into organizers occurred through actual practice. After a few initial meetings, I invited the most dedicated attendees--E.C. and two Black women--to separate planning meetings, where I trained these emerging leaders to independently lead subsequent public meetings at Ascot Library. . . .

Notwithstanding Zhen's and my zealous and multifaceted approach to advocacy, at times in collaboration with dozens of professional advocates statewide, traffic court debt remains a systemic barrier entrapping tens of thousands of low-income Californians of color in cycles of debt and criminal justice system involvement. Absent creative new democratic, grassroots strategies, the structural behemoth of traffic court debt will likely remain a fixture. Indeed, our narrow gaze on license suspensions ignored the systemic problem of traffic court debt, which generates revenue for the state through a complex web of mechanisms.

At best, our professionally-driven campaign and strategies have accomplished limited, temporary gains. Even then, the gains are precarious. At the time of writing, both lawsuits remain pending. Although a promising legislative bill, SB-881, was proposed by Senator Robert Hertzberg in January 2016 to end the use of license suspensions as a debt collection mechanism, that component was completely excised from the final version passed in September. The provisional band-aid of the amnesty program finally peeled off on March 31, 2017. …[O]ur pursuit of legal and legislative modes of advocacy, conducted in a professional vacuum, have left us in a strikingly similar position to where we began--perhaps worse, given the new political landscape in Washington, D.C.. . .

III. REBELLIOUS LAWYERING: AN ACTIVIST THEORY OF LAWYERING

…Since the 1970s, two main progressive legal traditions have emerged to replace legal liberalism, the reigning philosophy from the Warren Court era that favored litigation as the primary mechanism for structural social change. Even the most optimistic account of Warren Court activism failed to withstand a longterm, contemporary analysis against the realities of resegregation, retrenchment of race conscious remedial plans, and the ascent of individual over collective rights

under a neoliberal regime of law and politics. Thus, the new traditions sought to subordinate law and the role of lawyers by instead emphasizing grassroots power as the primary mechanism for social change.

The first of these traditions, movement lawyering, … attempted a reinterpretation of Warren Court decisions through contextualizing landmark court victories against a backdrop of the massively disruptive pressures exerted by the Civil Rights Movement. In its contemporary iteration, movement lawyering describes a "model of practice in which *lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy*." Thus, unlike legal liberalism, lawyers are accountable to "mobilized clients" and deploy legal strategies as part of a broader "integrated advocacy" that recognizes the importance of mass mobilization in structural social change. Like legal liberalism, though, movement lawyering both contemplates the need for legal advocacy and mostly relegates the role of lawyers along their formal, professional identities in which lawyers litigate, while organizers organize. …

[The second tradition,] [r]ebellious lawyering, generated its theoretical currency from practitioners reflecting on their own attempts at creative community lawyering. Rebellious lawyers seek to achieve social change through direct collaboration with community members at the grassroots level. In other words, whereas movement lawyering characterizes lawyers as representing preexisting activist organizations, rebellious lawyers build such organizations from among their legal services clients. …

A. The Rebellious Approach to Advocacy

Rebellious lawyering conceptualizes social change as a dynamic process of collaborative problem solving between community members and lawyers. According to Gerald López, instead of distancing themselves from actively organizing in the manner of movement lawyers, rebellious lawyering involves "teaching self-help and lay lawyering"--that is, "helping people to see that they can identify, understand, and contribute to solving their own and others' problems." López's articulation of teaching, then, is not so much a process of the teacher depositing foreign knowledge into student, but rather a process where lawyers inspire confidence in community members by validating their existing lay methods of problem solving. López deliberately elevates these lay methods of problem solving--methods he calls *lay lawyering*--as possessing equal if not greater importance than professionalized lawyering because community intuitions and traditions have ensured survival, resistance, and progress for generations despite systematic subordination.

Insofar as lawyers specialize in legal knowledge, they should also promote legal literacy among community members. In this way, community members are equipped with a complete arsenal of both legal and nonlegal tactics they are empowered to strategically deploy in their advocacy. As much as rebellious lawyers teach the law, they learn from community members about lay lawyering. Thus, rebellious lawyering is a collaborative, rather than professionalized, approach to problem solving, whereby each member of the community is valuable precisely because they contribute their own sets of skills and knowledge to the grassroots organization. …

While collaboration has been its centerpiece, rebellious lawyering insists that such an approach be deployed to challenge "institutional and structural power" in order to "alter[] the material conditions in which clients live." In other words, rebellious lawyering is concerned with more than resisting the inherent domination within an attorney-client relationship or even immediate symptoms of structural problems. Instead, López calls for rebellious lawyers to "work with others in ... executing strategies

aimed at responding immediately to particular problems *and*, [underlying systemic causes of] social and political subordination." …

[However,] … while the theory contemplates broad structural change, case studies in rebellious lawyering fail to illustrate how rebellious lawyers wage collaborative battles for structural social change where the underlying structures lie at the state, federal, or international level. [C]ase studies reveal that rebellious lawyering is most effective in achieving structural change at a neighborhood or citywide level. In particular, case studies have failed to demonstrate how rebellious lawyering compels institutional actors at the statewide level or higher to concede to demands. …

IV. REBELLIOUS SOCIAL MOVEMENT LAWYERING

A. Principles of Rebellious Social Movement Lawyering

Two overarching principles guide rebellious social movement lawyers. First, drawing from the movement lawyering tradition, rebellious social movement lawyering conceives of broad-based social movements as the primary mechanism for sustainable structural change beyond the localized level. Absent a critical mass of individuals directly participating in a broad-based social movement transcending a finite geography--as opposed to a localized grassroots campaign--social change will be limited in scale, application, and duration. Embedded in this principle is the fundamental notion that legal mechanisms alone cannot achieve structural change because the law constitutes unequal power relations. Instead, structural change occurs when policymakers, as representatives of class interests hostile to low-income communities of color, are compelled to concede power by the disruptive pressures from the mass mobilization of a social movement.

While a social movement orientation provides an overarching framework of structural social change, standing alone, this principle fails to conceive of how to first build, and then sustain, a social movement, or how to interact with an existing social movement in a meaningful way that will endure beyond formal victories. Here, rebellious lawyering's emphasis on community empowerment provides a useful point of departure for building and maintaining a vibrant social movement.

Thus, the second principle underlying rebellious social movement lawyering is grassroots democracy. When community members directly affected by injustice are empowered to take ownership of their own struggle, they will initiate a campaign that is directly responsive to community needs. In other words, rebellious social movement lawyers will constantly engage in what Mari Matsuda terms "looking to the bottom," for both a material understanding of systemic injustices and a solution through organizing by affected individuals.

In order to take ownership, clients must independently arrive at a conviction in the necessity of community organizing. Thus, rebellious social movement lawyers consciously assume a dialogical approach to consciousness raising. Instead of defining a problem and dictating the necessity of organizing to clients, lawyers facilitate a space where clients come together and collectively discuss their problems. Through the practice of listening to others articulate similar problems to oneself, the individualized nature of legal problems--specifically, the self-blame, shame, and internalized victimization--withers away and in its place, a new baseline understanding of the systemic nature of their problems begins to develop. By visualizing others in the community who are similarly harmed by the problem, clients begin to imagine the possibilities of attacking the problem through collaboration and organizing.

Because organizing campaigns are created by clients responsive to their particularized lived reality,

campaigns will undoubtedly entail a symptomatic character at the local level. So long as they are not substituted for the end goal of structural reform, localized, symptomatic struggles are not in themselves problematic. Localized, symptomatic campaigns increase confidence among new organizers through smaller-scale individualized victories, sharpen participatory democracy and collaboration as ways of life, train strategic thinking and organizing skills, and develop leaders from the grassroots. Rebellious social movement lawyers, however, have an additional responsibility to educate and encourage clients-turned-organizers to develop social movement consciousness.

Where rebellious social movement lawyering departs from rebellious lawyering, then, is in the expanded role of lawyers to train grassroots organizers in acquiring (1) a critical analysis of the distinction between formal and substantive change, and (2) the necessity of a broad-based social movement to challenge the systemic nature of immediate problems. Concretely, to facilitate this analytical mindset, lawyers might develop an accessible curriculum of readings on the history of social movements and movement organizations that highlight the tension between symptomatic change and structural reform, the importance of intersectionality and class solidarity across identity-based lines, and the need to forge broader coalitions in building an inclusive social movement. As lawyers and organizers collectively discuss such readings, lessons of the past are digested, thereby sharpening the group's analysis, resiliency, and ability to manage seemingly new but historically similar situations.

Once such an analytical mindset is developed, lawyers and organizers, collaborating as equal members of the grassroots organizing group, will make strategic determinations based on how a proposed tactic or campaign enhances grassroots democracy, social movement building, or both. There is no specific formula for how these strategic determinations will be made. Instead, members must weigh the merits of either continuing a localized, symptomatic campaign or pursuing a broader movement for systemic change. Relevant factors might include the current size of the grassroots organizing group, the readiness and confidence level of existing members to jump into a more ambitious campaign, the material well-being of members, the vulnerability of a target, and the existence of an independent vibrant social movement. …

… [I]nstead of collaborating with "mobilized clients," rebellious social movement lawyers should directly build power among legal services clients and community members in a grassroots organizing group, and thus contribute as equal participants in that context, the question of deference, strategies, and evaluation is directly resolved through democratic decisionmaking at the level of the grassroots organizing group. In other words, rebellious social movement lawyering contemplates that just as clients are transformed into organizers, lawyers are similarly transformed into organizers who jointly participate in the organizing group. Where the organizing group participates as a member organization of a larger coalition or social movement, a strategy will first be democratically decided within the group, and then proposed for adoption at the coalition level. Similarly, where no movement exists, lawyers should build a grassroots organizing group, which, over the course of waging a localized, symptomatic campaign, transitions into conscious movement building activity.

For rebellious social movement lawyers, then, grassroots democracy is the nonnegotiable linchpin of a social movement's viability. Lawyers must play an active role in creating a culture of participatory democracy at the grassroots level before organizing within an existing social movement. Throughout history, many social movements eventually waned or splintered because of the lack of democratic mechanisms to disseminate leadership and decisionmaking among movement participants. Movement organizations--"mobilized clients"--of the past generally assumed a top-heavy hierarchical structure, which not only disempowered, but in many cases led to, the departure

of their members. Because my theory of rebellious social movement lawyering begins with localized, symptomatic campaigns that instill the value of grassroots democracy, seasoned grassroots organizers of these struggles who later join an existing movement or initiate a new movement will inject and insist on a participatory-democratic culture at the movement level. With greater democratic participation and decisionmaking among movement participants, broad-based social movements will be able to adapt to shifting adversities, attract new leaders from the grassroots, and survive beyond formal change.

B. Processes of Rebellious Social Movement Lawyering

… First, lawyers must *act with deliberation* toward enhancing grassroots democracy and building a social movement. Deliberation entails constant reflection on how their actions advance these goals. Lawyers must take heed of the overall campaign direction. Because localized, symptomatic campaigns can be in tension with larger movement building, in that symptomatic demands might reflect individualized grievances rather than structural change, lawyers must reflect like dialecticians. It is not enough to assess the merits of a chosen strategy based on immediate outcomes; one must also consider how a strategy might reinforce complacency among organizers or invite reactionary backlash by the state. Thus, in reflecting dialectically, lawyers might identify opportunities to demystify the structural nature causing the immediate harm sought to be remedied by the localized, symptomatic campaign. This might simply entail reframing symptomatic demands along structural lines, incorporating additional demands that relate to the underlying structure, or partnering with similarly-situated localized organizing campaigns to forge a broader movement against the system producing the harm. In order to avoid reproducing a hierarchy where lawyers become the sole tactical dialectician, however, lawyers must disseminate dialectical thinking skills among the grassroots organizers. In so doing, the symptomatic-structural and localized-movement assessments over demands and scale will occur collaboratively, rather than unilaterally.

Thus, the second approach lawyers assume is the *democratization of skills and knowledge* within the group. The goal is to create a horizontal group where each member contributes their talents, ideas, and leadership equally. At the outset, because skills and knowledge are unequally distributed, education should be prioritized. This education must go both ways. That is, lawyers must simultaneously "[l]earn and [t]each." Lawyers must learn preexisting strategies of "lay lawyering" and understand the intricacies of an unjust system through the eyes of grassroots organizers. In turn, lawyers teach their skills and knowledge, including raising movement consciousness. Moreover, lawyers should disseminate legal knowledge insofar as it explicates existing rights under the law and enables the group to make strategic decisions involving legal advocacy. By knowing the law, the group might decide to structure a campaign expressly drawing from the notion of legal rights. Because rights discourse inherently cabins the vision of freedom and tends to reify unequal power relations, however, the group must think dialectically in making a cost-benefit determination of pursuing such a narrowly defined campaign, such that legal recourse does not in itself become the end. Ultimately, legal knowledge will allow the group to fully weigh a legal strategy alongside other tactical options. While the familiar concerns exist with pursuing litigation as the sole means for change, when understood as just one instrument in the toolkit, litigation can enhance the goal of movement building.

Naturally then, the third approach is reframing *lawyering as one tool in a multipronged strategy* to structural change. If the group decides to litigate, the role litigation is to play in relation to the symptomatic campaign and the overall strategy of movement building must be deliberated and

clearly established. Litigation solely to address a symptom should be used sparingly as it is extremely costly, produces dependency on lawyers, and discourages grassroots collective action that might otherwise achieve similar individualized victories. In contrast to smaller claims, major impact litigation might serve as a bridge between the localized campaign and a broader social movement. Viewed this way, because major litigation tends to receive increased publicity relative to localized grassroots organizing, it might connect the group with other similarly situated communities beyond their immediate network, thus becoming a rallying cry that leads to greater participation across geographical space. Lawyers, however, should not approach major litigation as the exclusive movement strategy, and instead encourage complementary pressure tactics and structural demands that operate outside the law. Far from rejecting the greater access and privilege afforded to them by their profession, rebellious social movement lawyers should seek to contribute their legal training synergistically with the tactics and skills of the organizing group.

Fourth, lawyers must be *flexible* with their strategies by adapting to constantly changing conditions. Every move invites a countermove. Often, the stagnant and predictable strategy proves to be fatal. If it makes no sense to continue a chosen tactic, the group should abandon it. Changing strategies deepens the creative and analytical capacity of grassroots organizers, while exerting new pressures against the system. Constant group reflection is key for assessing the current efficacy and continued potential of chosen strategies.

Finally, lawyers must *defer to group democracy*. A lawyer is merely one member of a collaborative organizing group. Though lawyers should actively contribute their insights, they must ultimately respect democratic decisions, even if it goes against their wisdom. The value of democracy is paramount both in breaking the lawyer's propensity for authority and in developing the leadership of others. Localized, symptomatic campaigns are training grounds for organizers. To the extent that strategies result in missteps, lawyers must understand the greater value in organizers developing ownership, mutual trust, and ability to learn through collectively reflecting on their ineffective strategies and subsequently developing alternatives. …[O]rganizers who experience and believe in grassroots democracy at a localized level will inject that principle at the movement level, thereby enhancing the longevity and vibrancy of the social movement on the whole.

V. RECONCEIVING ADVOCACY AGAINST TRAFFIC COURT DEBT IN CALIFORNIA: A REBELLIOUS SOCIAL MOVEMENT LAWYERING APPROACH

A. Building a Grassroots Organizing Group

Understanding a social movement infused with grassroots democracy to be a necessary predicate for reforming the system of traffic court debt, rebellious social movement lawyers will prioritize the development of the grassroots organizing group above all other tasks. Rebellious social movement lawyers will engage in direct legal services insofar as doing so introduces them to a wide base of potential organizers among their clients. Every courtroom outing should double as an opportunity to converse with the hundreds of unrepresented defendants awaiting arraignment or trial about their situation and to invite them to share their stories at community meetings open to the public.

In building a grassroots organizing group, two types of meetings will be necessary. First, regular public meetings serve as a mechanism to establish community roots and to raise systemic consciousness within the community at large. Lawyers will facilitate community meetings dialogically. Knowledge will be gained from individual participants sharing their stories, listening to others, and reflecting on the shared harms caused by the common underlying system of traffic court debt. In developing a systemic analysis, lawyers might carefully tie together the common threads

of individual stories with an explanation of structural causation. … In the end, though, in order to promote the voices of community members, active moderation of discussion at these public meetings must be approached sparingly.

Second, regular internal organizing meetings allow the most interested and committed clients and public meeting participants to train as grassroots organizers and leaders. A combination of practical organizing and critical thinking skills will be developed through skills-based trainings, group discussions of social movement tailored readings, and participation in localized collective action. As members of these internal meetings grow in skills, confidence, and numbers, the authority of lawyers will diminish as power becomes equalized. Thereafter, meetings will constitute the basis of the grassroots organizing group, in which goals and strategies will be decided based on a collective symptomatic-structural, localized-movement assessment.

In building a localized campaign, the goals will shift along a spectrum of smaller-scale, immediately achievable demands that develop confidence and longer-term, structural demands that are aspirational. On the one hand, specific campaign demands should be reflexive reactions to the material realities of community members. Reflexive demands should neither be limited to procedural defects nor bound by the narrow confines of a cognizable legal claim.

Responsiveness to immediate needs is merely one consideration in demand formulation. On the other hand, lawyers should encourage demands that are not limited to immediate needs or harms, but also express positive visions of transformative and structural change. …Moreover, structural demands increase the possibility of coalescing a social movement with other organizing groups identifying with some aspect of the campaign.

Because decisions over strategy will be made and executed collaboratively, professional strategies might be creatively reconceived such that grassroots organizers can implement these professional strategies themselves. Consider a localized campaign that reimagines direct representation. The traffic court system's smooth functioning is predicated on the rapid mechanization of arraignments among defendants ignorant of their right to trial. In my observation, unrepresented traffic court defendants' arraignments lasted an average of less than a minute. If each defendant were represented, first at arraignment and then at trial, the resulting slowdown would quite literally "crash the system." Should a systemic crash occur, the disruption in itself might compel policymakers to act, or, at the minimum, incite public scrutiny and call for structural change. While a legion of defense attorneys could accomplish this task, an alternative strategy undertaken by a grassroots organizing group is to empower unrepresented defendants to assert their own rights *pro se*. Organizers and lawyers together would mobilize in and around traffic courts in the county to raise awareness of the right to trial among the thousands of defendants lining up for arraignment. If a substantial number of *pro se* defendants collectively asserted their right to a trial, courtroom efficiency would be disrupted, causing the system to crash.

Moreover, grassroots organizers might directly participate in authoring policy reports. Lawyers should welcome this idea, as it upsets the hierarchy reinforced by a separation between professional and unprofessional tasks. Doing so might change the tenor of the reports. For example, instead of professionals framing traffic court debt as an issue of poverty, a grassroots-driven policy report might, from the outset, frame it as an issue of race and poverty. …

Driven by the principles of democracy and movement building, lawyers should rarely use professional strategies that take the center stage in a campaign. One such rarity might occur if the group decides that the benefits of filing a complaint to remedy an immediate harm outweigh the costs of

material resources and minimal grassroots participation. Given that section 40508 of the California Vehicle Code already provides a statutory hook to require courts to conduct a willfulness determination hearing before notifying the DMV for a license suspension, the benefits of injunctive relief might outweigh the costs of minimal legal research and filing. Beyond providing a tangible material benefit to a narrow class of defendants, such a victory might also allow organizers to move beyond the symptom of license suspensions and build a movement that directly focuses on the statewide system of traffic court debt.

Regardless of other strategies deployed in a localized campaign, the central strategy undertaken by the grassroots organizing group will be collective action. Through collective action, community members develop a real understanding of camaraderie, confidence in their own power, and conviction in organizing for change. Moreover, during moments of spontaneity or excitement, many often discover previously suppressed skills and capabilities, such as public speaking, leading chants, and acts of civil disobedience. The form of action will constantly shift, responding to contextual developments that occur in real-time. Tactics should escalate in disruptiveness when the target continues its noncompliance.

Where tactics are minimally disruptive, lawyers should actively participate as organizers. This includes the day-to-day collective outreach activities of canvassing neighborhoods and conversing with defendants around the courthouse pursuant to a "crash the system" strategy. Where tactics are deliberately disruptive, lawyers might best function as legal observers. In the capacity of a professional, lawyers should further provide direct representation as necessary when organizers are arrested.

The foregoing discussion on goals and strategies is focused on the role of lawyers in developing grassroots democracy through localized campaigns. Given the statewide nature of traffic court debt, a localized campaign will be insufficient to compel legislative reform of the system. Yet, as emphasized in Part IV, lawyers must not substitute the top-down construction of structural demands for the process of building successful localized, symptomatic campaigns, which impart the values of democracy and collective action. The key is to supplement the campaign with concrete education, through a movement-oriented curriculum, which raises the group's consciousness both (1) from localized advocacy to social movement building, and (2) from limited, small-scale reforms to durable, structural change.

B. Advancing the Struggle from Local to Movement

Just as strategies and campaign demands are fluid, the leap from localized to movement-level advocacy need not occur in one formalized moment. … Because traffic court debt is a statewide system of harm, simply refocusing the demands of a localized campaign to address structural dimensions will be insufficient to produce change. Mass mobilization beyond the level of Los Angeles County is necessary.

Where no independent social movement exists, coalition building with organizations of similar politics, methodologies, and demographic makeup is crucial to increase the scale of advocacy necessary to compel the state to take notice. As such, organizers might reconceive their day-to-day outreach expansively, viewing community members not just as isolated individuals, but as connected to broader networks including other organizing groups. Where a community member has existing ties to another organizing group, organizers might contemplate outreach in terms of recruiting that other group to a movement against traffic court debt. Even if other organizations are structured hierarchically, veteran organizers from the localized, symptomatic campaign will insist that the coalition be grounded in democracy and meaningful participation among the community

constituents who comprise the other organizations. Unlike a coalition of professionals convening together for litigation, a movement-oriented coalition is formed with the express purpose of generating structural change through mass mobilization.

While the grassroots organizing group possesses greater control in timing their transition to movement-level advocacy where no independent movement exists, the prominence of BLM as a vibrant social movement complicates the movement building role of lawyers in new ways. As a movement, BLM is both a symbolic rallying cry and a physical entity comprised of a coalition of movement organizations. This duality poses a unique opportunity for a localized campaign to, from the outset, embody structural dimensions and thereby increase the potential of mass mobilization against traffic court debt beyond immediate geographic locality.

Against a colorblind ideology that has driven American jurisprudence since the 1970s, BLM has opened a space in mainstream discourse where race has once again become salient. Because of BLM's symbolic power as an overarching beacon against racial injustice, a localized campaign framed in race-conscious terms might be inseparable in the public eye from the larger movement. Instead of distancing themselves from BLM, organizers should be prepared to articulate these connections on both a personal and conceptual level. On a personal level, Black and Brown organizers should freely express their feelings of being simultaneously subjected to multiple forms of racialized violence. Conceptually, symptomatic issues might need to be framed as structural to show how multiple systems interact to produce racial inequality. …[T]raffic court debt, … like other systems identified by BLM, disproportionately enacts its violence on Black and Brown communities. Simply put, challenging traffic court debt simultaneously with police violence is imperative because in spite of both systems, "Black lives matter." By expressly drawing connections to BLM, the demand to end traffic court debt might very well ignite support and mobilization among movement participants.

…BLM is constituted by the Movement for Black Lives (M4BL), a coalition comprised of over fifty Black-led organizations. Because collective action has largely been decentralized, the coalition's primary work instead has been the construction of a platform of movement demands, known as the "Vision 4 Black Lives." The grassroots organizing group might propose the incorporation of a demand to end traffic court debt, which would enhance the current platform demand to end money bail. The group, however, should approach incorporation into M4BL's platform as yet another means for outreach, and not in itself a strategy to effect change. That is, due to the decentralized nature of BLM actions, neither incorporation of a demand nor participation as a member organization within the M4BL alone will generate the mass mobilization needed to compel an end to traffic court debt. …

Unlike the spontaneous BLM actions, which, thus far, have erupted nationwide in reaction to police violence, a successful challenge against traffic court debt will require a much more coordinated, mass mobilization effort in California. While invoking BLM's symbolic power might expedite the transition to structural demands and increase the possibilities of movement building with other BLM supporters or M4BL organizations, the task of movement building will still largely remain in the hands of the grassroots organizing group. Ultimately, the role of rebellious social movement lawyers remains vital, first in building a capable grassroots democratic organization, and second, in advancing the struggle from the local to a movement.

1.3 Factors for Strategic Consideration

Updated 2013 by Jeffrey S. Gutman (http://federalpracticemanual.org/acknowledgements#gutman)

As your office considers the possibility of litigation, it will need to consider who the client is, the client's goals, the capacities of the organization, available resources and time considerations, as well as who can provide the relief that the client seeks.

1.3.A. Who Is Your Client?

Part of the lawyer's job is deciding who will be the client. A person who walks into your office with a grievance will not necessarily become your client in a lawsuit. In individual matters, questions may arise as to who the client is: The parent or the child? The leaseholder or the family member barred from the property? The guardian or the ward? These issues and potential conflicts must be addressed at the outset through careful legal, factual, and, occasionally, ethics research.

Lawyers generally, and legal aid lawyers in particular, need to think carefully about not only which issues are suitable for litigation, but also which clients will best present those issues as parties to litigation. The lawyer has some flexibility in deciding who the client will be. The lawyer may seek clients and not simply wait for individuals to ask for help. For example, when the lawyer knows that a wrong is about to occur or has been occurring, the lawyer may seek out people who want to challenge it.[1] This may take the form of public education about the issue or may involve more actively contacting potential clients through networking with organizations and client groups.[2]

Before accepting someone as a client in potential litigation, issues of standing, ripeness and mootness, discussed in Chapter 3 (http://federalpracticemanual.org/node/18) of this MANUAL, must be considered. Minimizing standing and mootness problems may justify retaining multiple plaintiffs. Yet, representing more than one person may create conflicts, both ethical and practical. Depending on the nature of these issues, such hurdles may counsel in favor of a non-litigation approach.

In many situations, the client may be a community organization. Working with a community organization, especially in the context of tackling systemic issues, has many advantages. The community group may have its own resources to contribute to the advocacy strategy. The group may lend financial and volunteer support, credibility, networking, and potential plaintiffs in any litigation. Most importantly, the group may understand the importance of the issues at hand and the social forces that have created the problem and can lead to its solution. The involvement of a community group can also ensure that attorneys advance the litigation in accordance with community needs.

Working with organizational clients involves special considerations.[3] Most important, the attorney and the group must agree on who speaks for the group. Counsel should also understand whether the group speaks for the community or constituency at large or only for its particular members or leadership. The attorney must have open communications with the group and its leadership so that there is an understanding and agreement on the respective roles of attorney and client. The institutional interests of the organization may diverge from the desires of individual members of the group. The retainer agreement must incorporate all elements of the attorney-client relationship, and should spell out the mechanism by which the decisions of the group will be made and conveyed. While the retainer may specify the name of an individual member of the group, the retainer should state who speaks for the group in case the named individual leaves the group. The attorney and group must agree on the advocacy approach and on determining whether the objectives have been achieved, whether through litigation, settlement, or other means.

The retainer agreement is the blueprint for the relationship with the client. In addition to including any language mandated by the state bar or legal services program, the retainer should anticipate the potential attorney-client relationship problems that can arise during litigation. The respective responsibilities of the attorney and client should be discussed. The grounds for termination of the attorney-client relationship and how such termination will be handled, costs and fees, including attorney's fees, and settlement offers should be addressed. A retainer should also warn a client that he or she will need to report any monetary awards received as a result of litigation and any attorneys' fees awards as income for federal tax purposes. Some attorneys include language explaining the typical time frame for litigation.

In bringing a class action, retainer agreements and conversations with the class spokespersons must make clear that the lawyers' responsibilities are to all class members, not just the named plaintiffs. For example, in challenging mass evictions and proposed demolition of housing, be clear about the extent to which counsel is representing people who want to stay, people who left but will not return, and people who are in need of the housing and do not want the property demolished. If potential conflicts are foreseen, or if those conflicts already exist, the attorney may choose to represent one of the subgroups and recruit private or other nonprofit counsel to represent other subgroups. A conflict of interest with the local legal services office is often one of the criteria that the local office uses for placing a case with *pro bono* counsel.

The lawyer should not simply use the office's standard retainer agreement without ensuring it meets the needs in the contemplated case. While such agreements can serve as a model, they may need modification. These agreements must be explained carefully to the client(s) and a memorandum of that conversation should be drafted and kept in the case file.

1.3.B. What Are Your Client's Goals?

The answer to this question will shape the course of your advocacy strategy as certain approaches will be better than others in achieving clearly identified objectives. In many cases, a client will need to define these objectives in terms of solving the immediate or individual problem, or in terms of solving deeper systemic problems that have manifested themselves in what has happened to the particular client. Effective interviewing and counseling is necessary in order to define problems and objectives. The lawyer must neither defer reflexively to the client's definition nor unilaterally impose her own. Failure to accurately and collaboratively define client needs and objectives can result in misdirected advocacy strategies, ethical headaches and client dissatisfaction. For these reasons, initial client meetings must be carefully planned and considered.

The advocate and the client need to think initially not in legal terms but, instead, consider in a broader way the range of possible solutions and strategies for the problem the client has presented and the implications of each approach. This avoids prematurely selecting litigation as the strategy and inappropriately allowing formulaic ways of requesting relief to limit unnecessarily the goals of the advocacy. Focus first on the desirable outcome and not merely what is believed is attainable. Litigation may not achieve all that is desirable. Other approaches may achieve much of what is sought more quickly and less expensively, potentially with less risk to the client or others in similar situations, or with less risk of creating a negative precedent or provoking negative legislative or administrative responses that could undermine the client's goals. If such alternatives are not feasible or successful, then more narrowly focus on what is legally attainable after completing the legal research and fact investigation.

In some cases a client will have a clear view of what strategy to employ, and in those situations the lawyer's job is to do the technical, professional analysis and work necessary to competently pursue the matter in accordance with the client's wishes. In other situations, the client has limited expectations or understanding of the possibilities and the lawyer's job is to counsel the client regarding options, implications and risks. Part of the advocate's job is to make sure that the client has a full picture of the kinds and extent of relief available as well as the potential approaches and obstacles in achieving them. Do not begin any legal work on behalf of a client until you have a clearly defined understanding of the client's concerns and objectives, a full discussion of the range of potential solutions and their pros and cons, and a written agreement on how to proceed.

What a client wants must be assessed with a measure of sympathetic skepticism. The advocacy strategy and its potential for achieving the client's goals will turn on the client's situation and whether the client's desires are, or may reasonably be, supported in existing law or policy or rational and logical extensions of such law and policy. Thus, as the advocate begins work with a client, it is wise to develop a provisional legal or policy theory (discussed below), which will help define the bounds of the possible and influence your advocacy strategy. It is also important to consider whether particular approaches may have unintended consequences for the client. For example, depending on the circumstances, a client who must rely, or anticipates needing to rely, on needs-based public benefits for subsistence, may ultimately be harmed by a financial recovery. In some cases, program beneficiaries may get along fine if they are ineligible for benefits for a short time, but the loss of some types of benefits may mean a long-term loss that could jeopardize the client's well-being or stability. Individuals receiving needs-based public benefits generally have an obligation to timely report pending litigation and any recovery to the administrator of the benefit program, and, in some cases, may need to assign some or all of their interests in a financial recovery. In addition, advise your client on the impact of a potential financial or attorneys' fees award. Because the Supreme Court has ruled that settlement awards constitute income to the client, attorneys' fees are also considered income and may be taxable to the client.[4] In these cases, the client must be notified that income and any fees generated are taxable income for federal income tax purposes and must be reported. Every situation has to be individually evaluated and the client made aware of potential consequences and strategies to mitigate loss of needed assistance so that the client can make a fully informed decision on how to proceed. This may counsel against litigation, or it may inform the remedies sought in the case.

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT
PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts

within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "'should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing

to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in the state of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of authority between client and lawyer

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 4-1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 4-1.14.

Independence from client's views or activities

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token representing a client does not constitute approval of the client's views or activities. ...

father and older brother. As the Supreme Court has acknowledged, there is "abundant evidence that [people with intellectual disabilities] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." Atkins, 536 U.S. at 318, 122 S.Ct. 2242. In context, such a diagnosis would have been particularly powerful mitigation evidence.

By failing to identify and present a well-documented scientific phenomenon that had well made its way into the legal landscape of capital defense, and by neglecting to locate and present that vital evidence, Postelle's trial counsel presented a mitigation case that erroneously depicted him as more capable, more cunning, and more culpable than he was. Ignorant of the Flynn Effect and presented with artificially high IQ scores, the jury sentenced Postelle to death. This profound failure by Postelle's counsel erroneously deprived Postelle of his constitutional right to counsel in violation of Strickland.

FORT LAUDERDALE FOOD NOT BOMBS, Nathan Pim, Jillian Pim, Haylee Becker, William Toole, Plaintiffs-Appellants,

v.

CITY OF FORT LAUDERDALE, Defendant-Appellee.

No. 16-16808

United States Court of Appeals, Eleventh Circuit.

(August 22, 2018)

Background: Nonprofit organization filed § 1983 action against city, claiming ordinance and related park rule violated organization's First Amendment rights of free speech and free association and were unconstitutionally vague in restricting organization's weekly events sharing vegetarian or vegan food at no cost with passersby, including homeless persons, who gathered to join in meal at public park, as act not of charity but of political solidarity meant to convey organization's message that society could end hunger and poverty if collective resources were redirected from military and war and that food was human right, not privilege, which society had responsibility to provide for all. The United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ, William J. Zloch, J., 2016 WL 5942528, granted city summary judgment. Organization appealed.

Holding: The Court of Appeals, Jordan, Circuit Judge, held that organization's outdoor food sharing was expressive conduct protected by First Amendment.

Reversed and remanded.

1. Federal Courts ⚿3604(4)

Court of Appeals reviews the district court's grant of summary judgment de novo.

2. Federal Courts ⚿3573

Court of Appeals applies the plenary standard of de novo review to questions of constitutional law.

3. Federal Courts ⚿3675

In reviewing the parties' cross-motions for summary judgment, Court of Appeals draws all inferences and reviews all evidence in the light most favorable to the non-moving party.

4. Federal Courts ⚿3621

There is an additional twist to the de novo standards of review in the First Amendment context; because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, Court of Appeals must thus decide for

itself whether a given course of conduct falls on the near or far side of the line of constitutional protection. U.S. Const. Amend. 1.

5. Constitutional Law ⚿1490

Constitutional protection for freedom of speech does not end at the spoken or written word. U.S. Const. Amend. 1.

6. Constitutional Law ⚿1490, 1497

The First Amendment guarantees all people the right to engage not only in pure speech, but expressive conduct as well. U.S. Const. Amend. 1.

7. Constitutional Law ⚿1497, 1655

Under the First Amendment, a sharp line between words and expressive acts cannot be justified; constitutional protection is afforded to speech, and acts that qualify as signs with expressive meaning qualify as "speech" within the meaning of the Constitution. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law ⚿1497

In determining whether conduct is expressive, such that First Amendment protections apply, Court of Appeals asks whether the reasonable person would interpret the conduct as some sort of message, not whether an observer would necessarily infer a specific message. U.S. Const. Amend. 1.

9. Constitutional Law ⚿1497

In answering the question whether a reasonable person would interpret conduct as some sort of message, as required to qualify as expressive conduct protected by the First Amendment, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. U.S. Const. Amend. 1.

10. Constitutional Law ⚿1497

The circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive to warrant First Amendment protection, and similar activity that is not. U.S. Const. Amend. 1.

11. Constitutional Law ⚿1762, 1850

Context separates the physical activity of walking from the First Amendment protected expressive conduct associated with a picket line or a parade. U.S. Const. Amend. 1.

12. Constitutional Law ⚿2183, 2201

Context divides simply being in a state of nudity, which is not an inherently expressive condition, from the type of nude dancing that is to some degree constitutionally protected expressive conduct under the First Amendment. U.S. Const. Amend. 1.

13. Constitutional Law ⚿1761

Municipal Corporations ⚿721(1)

Nonprofit organization's outdoor food sharing was "expressive conduct" protected by First Amendment, as surrounding circumstances would lead reasonable observer to view organization's weekly food-sharing in traditional forum of public park at no cost with passersby, including homeless persons, not as mere picnic in park, but as conveying some sort of message, where organization set up tables and banners and distributed literature at events open to all to share meal at same time, treatment of city's homeless population was issue of community concern, and organization used events to convey message that society could end hunger and poverty if collective resources were redirected from military and war and that food was human right, not privilege, which society

had obligation to provide for all. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

14. Constitutional Law ⚿1497

Although the choice of location alone is not dispositive of whether conduct is sufficiently expressive to qualify for First Amendment protection, location is nevertheless an important factor in the factual context and environment that must be considered. U.S. Const. Amend. 1.

15. Constitutional Law ⚿1497

The history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it, as required to constitute expressive conduct protected by the First Amendment. U.S. Const. Amend. 1.

16. Constitutional Law ⚿1497

Although the fact that explanatory speech is necessary is strong evidence that the challenged conduct is not so inherently expressive that it warrants protection under the First Amendment, the critical question is whether the explanatory speech is necessary for the reasonable observer to perceive a message from the conduct. U.S. Const. Amend. 1.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ

Kirsten Noelle Anderson, Jodi Siegel, Southern Legal Counsel, Inc., 1229 NW 12th Ave., Gainesville, FL 32601-4113, Andrea Hope Costello, Florida Legal Services, 14260 W Newberry Rd. #412, Newberry, FL 32669, Mara Shlackman, Law Offices of Mara Shlackman, PL, 757 SE 17th St. PMB 309, Ft. Lauderdale, FL 33316-2960 for Plaintiffs-Appellants.

Alain E. Boileau, Alain E. Boileau, PA 100 N Andrews Ave., Fort Lauderdale, FL 33301, for Defendant-Appellee.

Tracy Tatnall Segal, Akerman, LLP, 777 S Flagler Dr. Ste. 1100W, West Palm Beach, FL 33401-6147, for Amicus Curiae West Palm Beach Food Not Bombs.

Victoria Mesa-Estrada, Florida Legal Services, 14260 W Newberry Rd. #412, Newberry, FL 32669, for Amicus Curiae Marc-Tizoc Gonzalea, Florida Legal Services, Inc., Latina and Latino Critical Legal Theory, Inc., Society Of American Law Teachers, Inc.

Before TJOFLAT and JORDAN, Circuit Judges, and STEELE,* District Judge.

JORDAN, Circuit Judge:

In understanding what is going on around us, context matters. Food shared with company differs greatly from a meal eaten alone. Unlike a solitary supper, a feast requires the host to entertain and the guests to interact. Lady Macbeth knew this, and chided her husband for "not giv[ing] the cheer" at the banquet depicted in Shakespeare's play. As she explained: "To feed were best at home; From thence, the sauce to meat is ceremony. Meeting bare without it." William Shakespeare, The Tragedy of Macbeth, Act III, scene 4 (1606).

Fort Lauderdale Food Not Bombs, a non-profit organization, hosts weekly events at a public park in Fort Lauderdale, sharing food at no cost with those who gather to join in the meal. FLFNB's members set up a table and banner with

* Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

the organization's name and emblem in the park and invite passersby to join them in sitting down and enjoying vegetarian or vegan food. When the City of Fort Lauderdale enacted an ordinance in 2014 that restricted this food sharing, FLFNB and some of its members (whom we refer to collectively as FLFNB) filed suit under 42 U.S.C. § 1983. They alleged that the ordinance and a related park rule violated their First Amendment rights of free speech and free association and were unconstitutionally vague.

The district court granted summary judgment in favor of the City. It held that FLFNB's outdoor food sharing was not expressive conduct protected by the First Amendment and that the ordinance and park rule were not vague. *See Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 2016 WL 5942528 (S.D. Fla. Oct. 3, 2016) (final judgment). FLFNB appeals those rulings.

Resolving the issue left undecided in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc), we hold that on this record FLFNB's outdoor food sharing is expressive conduct protected by the First Amendment. We therefore reverse the district court's grant of summary judgment in favor of the City. On remand, the district court will need to determine whether the ordinance and park rule violate the First Amendment and whether they are unconstitutionally vague.

I

FLFNB, which is affiliated with the international organization Food Not Bombs, engages in peaceful political direct action. It conducts weekly food sharing events at Stranahan Park, located in downtown Fort Lauderdale. Stranahan Park, an undisputed public forum, is known in the community as a location where the homeless tend to congregate and, according to FLFNB, "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness." D.E. 41 at 8.

At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message.

FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members (or, as the City describes them, volunteers) eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. *See* D.E. 40-23. FLFNB's set-up includes a banner with the name "Food Not Bombs" and the organization's logo—a fist holding a carrot—and individuals associated with the organization pass out literature during the event. *See id.*

On October 22, 2014, the City enacted Ordinance C-14-42, which amended the City's existing Uniform Land Development Regulations. Under the Ordinance, "social services" are

> [a]ny service[s] provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment of assistance; and day shelter or any combination of same.

D.E. 38-1, § 1.B.6. The Ordinance regulates "social service facilities," which include an "outdoor food distribution center." D.E. 38-1, § 1.B.8. An "outdoor food distribution center" is defined as

> [a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein. A food distribution center shall not be considered a restaurant.

D.E. 38-1, § 1.B.4.

The Ordinance imposes restrictions on hours of operation and contains requirements regarding food handling and safety. Depending on the specific zoning district, a social service facility may be permitted, not permitted, or require a conditional use permit. *See* D.E. 38-1 at 9. Social service facilities operating in a permitted use zone are still subject to review by the City's development review committee. *See id.*

Stranahan Park is zoned as a "Regional Activity Center—City Center," D.E. 38-34, and requires a conditional use permit. *See* D.E. 38-1 at 9. To receive a conditional use permit, applicants must demonstrate that their social service facilities will meet a list of requirements set out in § 1.E of the Ordinance.

The City's "Parks and Recreation Rules and Regulations" also regulate social services. Under Park Rule 2.2,

> [p]arks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

D.E. 38-35.

The City has voluntarily not enforced Ordinance C-14-42 and Park Rule 2.2 since February of 2015.

II

FLFNB contends that the Ordinance and Park Rule 2.2 violate its rights to free speech and free association guaranteed by the First Amendment, which is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. *See* D.E. 1 at 21; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). It also argues that the ordinance and regulation are unconstitutionally vague, both facially and as applied. *See* D.E. 1 at 27.

The City defends the district court's summary judgment ruling. It asserts that the food sharing events at Stranahan Park are not expressive conduct because the act of feeding is not inherently communicative of FLFNB's "intended, unique, and particularized message." *See* City's Br. at 35. Understanding the events, according to the City, depends on explanatory speech, such as the signs and banners, indicating that FLFNB's conduct is not inherently expressive.

[1–3] We review the district court's grant of summary judgment *de novo*. *See Rodriguez v. City of Doral*, 863 F.3d 1343, 1349 (11th Cir. 2017). The same plenary standard applies to questions of constitutional law. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017) (en banc). In reviewing the parties' cross-motions for summary judgment, we "draw all inferences and review all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316,

1318 (11th Cir. 2012) (quotation marks omitted and alteration adopted).

[4] There is an additional twist to these standards of review in the First Amendment context. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace ... we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). *See also Flanigan's Enters., Inc. v. Fulton Cnty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (applying First Amendment independent review standard in a summary judgment posture).

III

[5–7] Constitutional protection for freedom of speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The First Amendment guarantees "all people [ ] the right to engage not only in 'pure speech,' but 'expressive conduct' as well." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). As one First Amendment scholar has explained, "[a] sharp line between 'words' and 'expressive acts' cannot ... be justified in Madisonian terms. The constitutional protection is afforded to 'speech,' and acts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution." Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993).

[8] Several decades ago, the Supreme Court formulated a two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment: (1) whether "[a]n intent to convey a particularized message was present;" and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since then, however, the Court has clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection" because "if confined to expressions conveying a 'particularized message' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (citing *Spence*, 418 U.S. at 411, 94 S.Ct. 2727). So, "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis in original) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*") (explaining that, to merit First Amendment protection, conduct must be "inherently expressive").

A

On this record, we have no doubt that FLFNB intended to convey a certain message. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. Neither the district court nor the City suggest otherwise. *See* D.E. 49 at 1, 2; D.E. 78 at 24. As noted, the message is "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Food sharing in a visible public space, according to FLFNB, is "meant to convey that all persons are equal, regardless of socio-economic status,

and that everyone should have access to food as a human right." *Id.* at 2.

[9] "Whether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge[.]" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). The critical question, then, is "whether the reasonable person would interpret [FLFNB's conduct] as *some* sort of message." *Holloman*, 370 F.3d at 1270. In answering this question, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation. *See* James E. Leahy, *Flamboyant Protest, the First Amendment, and the Boston Tea Party*, 36 Brook. L. Rev. 185, 210 (1970). *Cf.* Rodney A. Smolla, Free Speech in an Open Society 26 (1992) (maintaining that mass demonstrations "are perhaps the single *most* vital forms of expression in human experience"); Thomas I. Emerson, The System of Freedom of Expression 293 (1970) ("The presence of people in the street or other open public place for the purpose of expression, even in large numbers, would also be deemed part of the 'expression.' ").

[10–12] It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not. Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade. *See United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."); *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 ("[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."). Context also differentiates the act of sitting down—ordinarily not expressive—from the sit-in by African Americans at a Louisiana library which was understood as a protest against segregation. *See Brown v. Louisiana*, 383 U.S. 131, 141–42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). And context divides simply "[b]eing in a state of nudity," which is "not an inherently expressive condition," from the type of nude dancing that is to some degree constitutionally protected. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quotation omitted). *Compare also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing is expressive conduct, although "only marginally so"), *with City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (noting that "recreational dancing" by clothed dance hall patrons is not sufficiently expressive).[1]

The district court concluded that "outdoor food sharing does not convey [FLFNB's] particularized message unless it is combined with other speech, such as that involved in [FLFNB's] demonstrations." D.E. 78 at 24. This focus on

1. *See also Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1501, 1505 (11th Cir. 1990) (holding that a school employee's "quiet and non-disruptive" early departure from a mandatory meeting communicated an objection to the superintendent's position).

FLFNB's particularized message was mistaken. As *Holloman* teaches, the inquiry is whether the reasonable person would interpret FLFNB's food sharing events as "*some* sort of message." 370 F.3d at 1270.

B

[13] The district court also failed to consider the context of FLFNB's food sharing events and instead relied on the notion that the conduct must be "combined with other speech" to provide meaning. *See* D.E. 78 at 24. As we explain, the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message. That puts FLFNB's food sharing events on the expressive side of the ledger.

First, FLFNB sets up tables and banners (including one with its logo) and distributes literature at its events. This distinguishes its sharing of food with the public from relatives or friends simply eating together in the park. *Cf. Hurley*, 515 U.S. at 570, 115 S.Ct. 2338 (holding that participation in a parade was expressive in part because group members "distributed a fact sheet describing the members' intentions" and held banners while they marched).

Second, the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time. That, in and of itself, has social implications. *See* Mary Douglas, "Deciphering a Meal," in Implicit Meanings: Selected Essays in Anthropology 231 (1975) ("Like sex, the taking of food has a social component, as well as a biological one.").

[14] Third, FLFNB holds its food sharing in Stranahan Park, a public park near city government buildings. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. The parties agree that Stranahan Park is a traditional public forum. *See* D.E. 39 at ¶ 9; D.E. 49 at ¶ 9. That agreement is not surprising, for, public parks have, "time out of mind, [ ] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). They are places "historically associated with the exercise of First Amendment rights." *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). And they are places that "commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). Although the choice of location alone is not dispositive, it is nevertheless an important factor in the "factual context and environment" that we must consider. *See Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. *Cf. Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (concluding that a flag burning demonstration at Dallas City Hall conveyed an anti-government/lack of patriotism message).

Fourth, the record demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community. The City itself admits that its elected officials held a public workshop "on the Homeless Issue" in January of 2014, and placed the agenda and minutes of that meeting in the summary judgment record. *See* City's Br. at 12; D.E. 38 at ¶ 16; D.E. 38-19. That workshop included several "homeless issues, including public feedings in the C[ity's] parks and public areas." D.E. 38 at ¶ 16. It is also undisputed that the status of the City's homeless population attracted local news coverage beginning years before that 2014 workshop. We think that the local discussion regarding the City's treatment of the

homeless is significant because it provides background for FLFNB's events, particularly in light of the undisputed fact that many of the participants are homeless. This background adds to the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message. *See Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (noting that flag burning "coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President"); *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (noting that the exhibition of a peace symbol taped on a flag "was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy"); *Tinker*, 393 U.S. at 505, 89 S.Ct. 733 (noting that a black armband was worn during the Vietnam War).

[15] Fifth, it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it. *See Monroe v. State Court of Fulton Cnty.*, 739 F.2d 568, 571 n.3 (11th Cir. 1984) (explaining that, to be sufficiently expressive, "the actor must have reason to expect that his audience will recognize his conduct as communication") (citation omitted). In *Johnson*, for example, the Supreme Court explained the historical importance of our national flag, noting that it is "the one visible manifestation of two hundred years of nationhood" and that "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner." 491 U.S. at 405, 109 S.Ct. 2533 (quotations and citations omitted). Given this history, the American flag was recognized as a symbol for the United States, and its burning constituted expressive conduct. *See id.* at 405–06, 109 S.Ct. 2533. *See also Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015) (affirming the district court's determination on summary judgment that tattooing is protected activity, and relying in part on a historical analysis).

Like the flag, the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes. *See Mark* 2:13–17; *Luke* 5:29–32. In 1621, Pilgrims and Native Americans celebrated the harvest by sharing the First Thanksgiving in Plymouth. President Abraham Lincoln established Thanksgiving as a national holiday in 1863, proclaiming it as a day of "Thanksgiving and Praise to our beneficent Father" in recognition of blessings such as "fruitful fields and healthful skies." John G. Nicolay & John Hay, 2 Abraham Lincoln: Complete Works 417–418 (1894). Americans have celebrated this holiday ever since, commonly joining with family and friends for traditional fare like turkey and pumpkin pie.

On this record, FLFNB's food sharing events are more than a picnic in the park. FLFNB has established an intent to "express[ ] an idea through activity," *Spence*, 418 U.S. at 411, 94 S.Ct. 2727, and the reasonable observer would interpret its food sharing events as conveying *some* sort of message. *See Holloman*, 370 F.3d at 1270.

C

[16] The City, echoing the district court's analysis, relies on *FAIR*, in which the Supreme Court explained that "[t]he fact that [ ] explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*." 547 U.S. at 66, 126 S.Ct. 1297. This language from *FAIR*, however, does not mean that conduct loses its expressive nature just because it is also accompanied by

other speech. If it did, the fact that the paraders in *Hurley* were "carrying flags and banners with all sorts of messages" would have placed their conduct outside the realm of First Amendment protection. *See Hurley*, 515 U.S. at 569, 115 S.Ct. 2338. *See also Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam) (considering the denial of a stay of an injunction in a case where members of the National Socialist Party of America sought to parade in uniforms displaying a swastika). The critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct.

In *FAIR*, a number of law schools claimed that the Solomon Amendment—which denies federal funding to an institution that prohibits the military from gaining access to its campus and students " 'for purposes of military recruiting in a manner that is at least equal in quality and scope to access to campuses and to students that is provided to any other employer' "—violated their rights under the First Amendment. *See* 547 U.S. at 55, 126 S.Ct. 1297 (quoting 10 U.S.C. § 938(b)). Among other things, the schools asserted that their restriction of military recruiters' access to law students due to a disagreement with the government's then-existing policy excluding homosexuals from the military (such as, for example, requiring them to interview students on the undergraduate campus) was protected expressive conduct. *See id.* at 51, 126 S.Ct. 1297.

The Supreme Court held that it was not. *See id.* at 66, 126 S.Ct. 1297. It noted that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 66, 126 S.Ct. 1297. Such speech was necessary to provide explanation because "the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.' An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* (citation omitted). Thus, the "explanatory speech" in *FAIR* was speech that was necessary to explain the law school's conduct. Without it, the conduct alone (requiring military recruiters to see students off-site) was not sufficiently expressive and the reasonable observer would not be likely to infer some message.

Explanatory speech is not necessary in this case. Although such speech cannot create expressive conduct, *see id.* at 66, 126 S.Ct. 1297, context still matters. Here, the presence of banners, a table, and a gathering of people sharing food with all those present in a public park is sufficiently expressive. The reasonable observer at FLFNB's events would infer some sort of message, e.g., one of community and care for all citizens. Any "explanatory speech"—the text and logo contained on the banners—is not needed to convey that message. Whether those banners said "Food Not Bombs" or "We Eat With the Homeless" adds nothing of legal significance to the First Amendment analysis. The words "Food Not Bombs" on those banners might be required for onlookers to infer FLFNB's *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying "some sort of message." *See Holloman*, 370 F.3d at 1270 (holding that a "generalized message of

disagreement or protest directed toward [a teacher], the school, or the country in general" is sufficient under the *Spence* test, as modified by *Hurley*) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338).

We decline the City's invitation, *see* City's Br. at 21, to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (a "narrow, succinctly articulable message is not a condition of constitutional protection"), and it is not appropriate for us to bring it back to life.

The district court expressed some concern that *FAIR* does not align with the understanding in "*Holloman*[ ] and perhaps also *Hurley*[ ] . . . of a particularized message." D.E. 78 at 21. We do not believe that *FAIR* undermines *Hurley* or that it abrogates *Holloman*. *FAIR* does not discuss the need for a particularized message at all. Nor does it cite to how *Spence* phrased that requirement. *FAIR* did, however, discuss *Hurley*. The Supreme Court explained that "the law schools' effort to cast themselves as just like . . . the parade organizers in *Hurley* . . . plainly overstates the expressive nature of their activity," and was therefore unavailing. *FAIR*, 547 U.S. at 70, 126 S.Ct. 1297. In our view, FLFNB's conduct here is more like that of the paraders in *Hurley* than that of the law schools in *FAIR*. The reasonable observer of the law schools' conduct in *FAIR* was not likely to infer *any* message beyond that the interview rooms were full or that the military preferred to interview elsewhere. *See id.* at 66, 126 S.Ct. 1297. FLFNB's food sharing events are markedly different. Due to the context surrounding them, the reasonable observer would infer some sort of message.

IV

"[T]he nature of [FLFNB's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [FLFNB] engaged in a form of protected expression." *Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. We therefore reverse the district court's grant of summary judgment in favor of the City.

We decline to address whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague. These issues are best left for the district court to take up on remand.[2]

REVERSED AND REMANDED.

Maurice WALKER, on behalf of himself and others similarly situated, Plaintiff-Appellee,

v.

CITY OF CALHOUN, GA, Defendant-Appellant.

No. 17-13139

United States Court of Appeals, Eleventh Circuit.

(August 22, 2018)

Background: Indigent arrestee brought putative class action against city, alleging

2. The district court stated that its rejection of FLFNB's vagueness challenges was affected, although "to a lesser extent," by its ruling that FLFNB's conduct was not protected by the First Amendment. *See* D.E. 78 at 27. Given our ruling that FLFNB's food sharing events constitute expressive conduct, we think that the district court is in the best position to reassess its ruling on the vagueness issues in the first instance.

11 F.4th 1266
United States Court of Appeals, Eleventh Circuit.

FORT LAUDERDALE FOOD NOT BOMBS, Nathan Pim, Jillian Pim, Haylee Becker, William Toole, Plaintiffs - Appellants,
v.
CITY OF FORT LAUDERDALE, Defendant - Appellee.

No. 19-13604
|
(August 31, 2021)

Synopsis

Background: Nonprofit organization and organization members filed § 1983 action against city, seeking declaratory and injunctive relief and damages, claiming ordinance and related park rule, restricting organization's weekly events sharing vegetarian or vegan food at no cost with passersby, was an unconstitutional restriction of expressive conduct. The United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ, William J. Zloch, Sr., J., 2016 WL 5942528, granted summary judgment to city. Organization appealed. The Court of Appeals, 901 F.3d 1235, reversed and remanded. On remand, the District Court, 2019 WL 10060265, granted summary judgment to city. Organization appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

individual members sustained injury in fact sufficient to confer Article III standing;

organization sustained injury in fact sufficient to confer Article III standing;

intermediate, rather than strict, scrutiny applied to park rule; and

park rule was not narrowly tailored and thus was unconstitutional restriction on expressive conduct as applied.

Reversed and remanded.

Hull, Circuit Judge, filed concurring opinion in which Lagoa, Circuit Judge, joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***1271** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ

Attorneys and Law Firms

Jodi Siegel, Southern Legal Counsel, Inc., Gainesville, FL, Andrea Hope Costello, Florida Legal Services, Newberry, FL, Mara Shlackman, Law Offices of Mara Shlackman, PL, Fort Lauderdale, FL, for Plaintiffs-Appellants.

Michael Thomas Burke, Johnson Anselmo Murdoch Burke Piper & Hochman, PA, Alain E. Boileau, Alain E. Boileau, PA, Fort Lauderdale, FL, for Defendant-Appellee.

Before LAGOA, HULL, and MARCUS, Circuit Judges.

Opinion

MARCUS, Circuit Judge:

This case presents the second appellate skirmish in Fort Lauderdale Food Not Bombs's ("FLFNB") challenge to Fort Lauderdale's efforts to shut down the practice of sharing food with the homeless in downtown Stranahan Park. FLFNB hosts food-sharing events in order to communicate the group's message that scarce social resources are unjustly skewed towards military projects and away from feeding the hungry. In Round One, a panel of this Court held FLFNB's food sharing to be expressive conduct protected by the First Amendment and remanded the case to the district court to address whether the City's regulations actually violated the First Amendment. Now, in Round Two, we must decide whether Fort Lauderdale Park Rule 2.2, which requires City permission for social service food-sharing events ***1272** in all Fort Lauderdale parks, can withstand First Amendment scrutiny as applied to FLFNB's demonstrations.

It cannot. The Park Rule commits the regulation of FLFNB's protected expression to the standardless discretion of the City's permitting officials. The Park Rule bans social service food sharing in Stranahan Park unless authorized pursuant to a written agreement with Fort Lauderdale (the "City"). That's all the rule says. It provides no guidance and in no way explains when, how, or why the City will agree in writing. As applied to FLFNB's protected expression, it violates the First Amendment. It is neither narrowly drawn to further a substantial government interest that is unrelated to the suppression of free expression, nor, as applied, does it amount to a reasonable time, place, and manner regulation on expression in a public forum. Accordingly, we reverse the district court's order granting summary judgment in favor of the City and remand for further proceedings consistent with this opinion.

I.

A.

Fort Lauderdale Food Not Bombs is a nonprofit unincorporated association affiliated with the international advocacy organization Food Not Bombs. FLFNB advocates the message "that food is a human right, not a privilege, which society has a responsibility to provide for all." Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1238 (11th Cir. 2018) ("FLFNB I").

At the center of FLFNB's efforts are its weekly food sharing events in Fort Lauderdale's downtown Stranahan Park. Stranahan Park "is known in the community as a location where the homeless tend to congregate and, according to FLFNB, 'has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness.' " Id. "At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message 'that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war ....' Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message." Id.

"FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members ... eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. FLFNB's set-up includes a banner with the name 'Food Not Bombs' and the organization's logo -- a fist holding a carrot -- and individuals associated with the organization pass out literature during the event." Id. This includes flyers to convey FLFNB's social-justice message that all who are hungry deserve food.

B.

Sometime before 2000, the City of Fort Lauderdale promulgated Park Rule 2.2:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

Some years ago, Arnold Abbott, who led a program to feed the homeless on a public Fort Lauderdale beach, obtained a state-court injunction against the Park Rule on ***1273** the ground that it violated Florida's Religious Freedom Restoration Act, Fla. Stat. § 761.03. (Abbott is not affiliated with FLFNB.) The injunction required the City to either stop enforcing the Park Rule, designate an area in which Abbott could lawfully distribute food, or specify objective criteria for permitted food-sharing locations. See Abbott v. City of Fort Lauderdale, 783 So. 2d 1213, 1215 (Fla. 4th DCA 2001).

The City stopped enforcing the Park Rule until October 22, 2014, when it enacted Ordinance C-14-42 to amend

the Fort Lauderdale Uniform Land Development Regulations ("ULDR"). The City enacted this ordinance at least in part as an effort to bring itself into compliance with the state-court injunction so that it could resume enforcement of the Park Rule. In the years leading up to the enactment of Ordinance C-14-42, some citizens had complained about a series of problems they believed to be associated with feeding the homeless in public spaces, including safety risks, a lack of proper water and restroom facilities, and the negative impact this conduct may have on surrounding communities. In January 2014, the City Commission held a workshop on the "the homeless population in the City of Fort Lauderdale," where stakeholders debated public food distribution and related issues.

Ordinance C-14-42, as relevant here, (1) defines an Outdoor Food Distribution Center as "[a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service"; (2) defines "social service[ ]" as "[a]ny service provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment or assistance; and day shelter or any combination of same"; and (3) requires a conditional use zoning permit for the operation of an Outdoor Food Distribution Center in Stranahan Park.[1] The other city parks in Fort Lauderdale (of which there are more than 90, City of Fort Lauderdale, City Parks, https://www.fortlauderdale.gov/departments/parks-recreation/city-parks (last visited June 29, 2021)) are zoned so that public food-sharing events are not allowed at all, even by permit. Thus, the Ordinance prohibits social service food distribution in most parks and does not provide for food sharing as of right in any park.

[1] Ordinance C-14-42 implemented these regulations of outdoor food distribution by adding new provisions -- ULDR §§ 47-1B.31(B)(4), (C)(2)(c) -- and by making additions to ULDR §§ 47-6.12; 47-6.13; 47-7.10; 47-8.10; 47-8.11; 47-8.12; 47-8.13; and 47-13.10. We refer to these specific components of Ordinance C-14-42 -- those that regulate outdoor food distribution -- as the "Ordinance." Other provisions of Ordinance C-14-42 regulate other social services not relevant to this case, such as providing addiction treatment centers. The constitutionality of the other provisions of Ordinance C-14-42 is not before this Court.

To obtain a conditional use permit, an individual or group must wind through a lengthy process for receiving a zoning variance. This involves an initial application to the Development Review Committee (which meets twice a month); upon approval, a subsequent submission and presentation to the Planning and Zoning Board (which meets once a month); and then a subsequent review by the City Commission. The City Commission has 30 days to decide whether to conduct its own review of the application; if the City Commission does not, the application is considered approved and returns to the Development Review Committee for a check to make sure the final permit is the same as the plan the Zoning Board approved. There is no deadline for a permit to issue, and the ***1274** City's zoning administrator could not provide an average time for resolving applications. Applicants must pay a fee for City staff time spent reviewing an application; the fee can rise as high as $6,000, which the City may reduce in its unguided discretion.

Permitting requirements for outdoor food distribution include that the proposed activities must not impose a nuisance or cause a change to the character of the area, that the use be 500 feet away from similar uses and residential property, that food be timely served and stored at safe temperatures, that a certified food service manager attend the event, and that the site provide handwashing, wastewater disposal, and restroom facilities.

Soon after the Ordinance passed, the City began enforcing it along with the Park Rule. Police officers interrupted and stopped an FLFNB demonstration in Stranahan Park on November 7, 2014. On that day, the city arrested and cited FLFNB members and other demonstrators for violating both the Ordinance and the Park Rule. The City also issued citations to participants in FLFNB demonstrations on November 14 and November 21. FLFNB members Nathan Pim, Jillian Pim, Haylee Becker, and William Toole were not personally arrested or cited, but were present at each of these events and witnessed their co-demonstrators being arrested and cited on November 7 and November 14. They did not directly witness any arrests or citations at the November 21 event; police later delivered a citation to the home of a participant in that demonstration.

The City also enforced the Ordinance and the Park Rule against Abbott, who moved the state court for an order to enforce its 2000 injunction and halt enforcement. See Mot. to Enforce Inj., Abbott v. City of Fort Lauderdale, No. 99-03583 (05), Dkt. No. 37 (Fla. Cir. Ct. Nov. 12, 2014). The Seventeenth Judicial Circuit Court in Broward County issued a temporary stay on December 2, 2014, and the City stopped enforcing the Ordinance along with the Park Rule. Even though the state-court stay expired on January 1, 2015, the City voluntarily continued its non-enforcement, and has not enforced the Ordinance or the Park Rule since. FLFNB continues to hold weekly food-sharing demonstrations in Stranahan Park.

C.

Soon after the state-court stay expired, on January 29, 2015, FLFNB and members Nathan Pim, Jillian Pim, Haylee Becker, and William Toole (the "Individual Plaintiffs," and, together with FLFNB, the "Plaintiffs") sued the City in the United States District Court for the Southern District of Florida pursuant to 42 U.S.C. § 1983. They alleged that the Ordinance and the Park Rule violated their First Amendment rights to free expression and expressive association, and that these regulations were unconstitutionally vague, both facially and as applied. The Plaintiffs sought declaratory and injunctive relief as well as compensatory damages.

After discovery, the parties cross-moved for summary judgment. The district court granted the City's motion on all claims, holding that FLFNB's food-sharing was not expressive conduct entitled to First Amendment protection. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, No. 15-60185-CIV, 2016 WL 11700270, at *9 (S.D. Fla. Sept. 30, 2016). In an analysis heavily influenced by its initial holding that FLFNB was not engaged in expressive conduct, the district court concluded that the Ordinance and the Park Rule did not infringe on the Plaintiffs' rights to expressive association. Id. Finally, the district court held that the Ordinance and the Park Rule were not ***1275** unconstitutionally vague. The court acknowledged that this holding was also influenced by its conclusion that FLFNB was not engaged in expressive conduct. Id. at *10.

The Plaintiffs appealed the trial court's judgment to this Court. On November 7, 2017, while the appeal was pending, the City repealed the Ordinance insofar as it regulated outdoor food distribution. However, Fort Lauderdale did not repeal the Park Rule, which remains on the books.

In Round One, a panel of this Court reversed the district court's summary judgment order. FLFNB I, 901 F.3d at 1245. We applied the two-part inquiry drawn from Spence v. Washington, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), and held that FLFNB's demonstrations were expressive conduct protected by the First Amendment. FLFNB I, 901 F.3d at 1240–43. First, the panel had little difficulty concluding that FLFNB "inten[ded] to convey a particularized message" with its food sharing events. Id. at 1240 (quoting Spence, 418 U.S. at 410–411, 94 S.Ct. 2727). FLFNB shared food in order "to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." Id. at 1240–41.

Next, the panel closely examined the circumstances surrounding FLFNB's food sharing in order to apply the second part of the Spence inquiry -- whether a "reasonable person would interpret FLFNB's food sharing events 'as some sort of message.' " Id. at 1242 (quoting Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004)). We held that five circumstances surrounding FLFNB's events would lead a reasonable observer to discern a message. First, FLFNB wasn't just a group of acquaintances eating together in a park -- it adorned its events with tables and banners and distributed literature explaining its political message. Second, the events had "social implications" because they were open to all comers. Id. Third, FLFNB held its food sharings "in Stranahan Park, a public park near city government buildings." Id. Public parks, the panel noted, are "historically associated with the exercise of First Amendment rights." Id. (citation omitted). Fourth, treatment of the homeless was an issue of substantial public concern and discussion in the Fort Lauderdale community. Indeed, the City had held a public workshop on the issue, and local media had covered "the status of the City's homeless population" for years. Id. Fifth, the sharing of food with others in order to communicate a message was a tradition that "date[d] back millennia." Id. at 1243. All of these circumstances combined to "put[ ] FLFNB's food sharing events on the expressive side of the ledger." Id. at 1242.

Since each of the district court's merits holdings had

turned in substantial part on its erroneous conclusion about expressive conduct, the panel remanded the case for the district court to reconsider these issues as well as to address in the first instance whether the Ordinance and the Park Rule violated the First Amendment. Id. at 1245 & n.2.

On remand, the district court took supplemental briefing, including on the effect of the repeal of the Ordinance. For a second time, the district court entered summary judgment in favor of the City. The court held that the Plaintiffs had standing based on the City's disruption of their events, and that FLFNB was a "person" with a cause of action under 42 U.S.C. § 1983. The court noted that while the repeal of the Ordinance mooted the Plaintiffs' claims for declaratory and injunctive relief against the Ordinance, the court still had to rule on its constitutionality because the Plaintiffs also sought compensatory ***1276** damages. Next, the district court held that even accepting FLFNB I's binding holding that the Ordinance and the Park Rule interfered with the Plaintiffs' expressive conduct, both regulations passed First Amendment muster as lawful, content-neutral time, place, and manner regulations.

As for the Plaintiffs' claims that the Ordinance and the Park Rule's permitting requirements acted as a prior restraint by giving City officials unguided discretion to block their expression, the district court observed that the regime was "somewhat suspect." After all, Fort Lauderdale's officials could charge as much as $6,000 for the permitting process but could reduce that amount in any way if they "fe[lt]" it appropriate. Meanwhile, the Park Rule did not provide any standards to guide the exercise of discretion in determining whether to provide City permission to share food in the park. Even so, the district court concluded that the permitting schemes were not subject to either as-applied or facial challenges, because the Plaintiffs never applied for a permit and because the regulations were "laws ... of general application" that did not directly regulate protected expression. The district court also rejected the Plaintiffs' expressive association arguments, reasoning that the regulations "impose a content-neutral restriction on a kind of expressive conduct that is only incidentally associative." Finally, the trial court held that the terms found in the Ordinance and in the Park Rule, such as "social service," were not unconstitutionally vague.

Again, the Plaintiffs timely appealed to this Court.

II.

Before we can consider the merits of the Plaintiffs' claims, we are required to address three threshold matters. As for the first one, we conclude that FLFNB is a "person" and therefore a proper plaintiff under § 1983 of Title 42. Second, as for the City's Ordinance, the Plaintiffs' claims for injunctive and declaratory relief are moot; however, their monetary damages claims arising out of the enforcement of the Ordinance are not. Finally, all of the Plaintiffs have standing to bring their remaining claims. Our review on each of these issues is de novo. See Hoever v. Marks, 993 F.3d 1353, 1357 (11th Cir. 2021); Taylor v. Polhill, 964 F.3d 975, 980 (11th Cir. 2020); Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1328 (11th Cir. 2004).

A.

First, the City argues that FLFNB, as an unincorporated association, is not a "person" that may bring suit under § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added). There is some historical support for the City's reading, but this view stands in tension with the text's ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City's invitation ***1277** to bar all unincorporated associations (other than unions) from being able to sue under § 1983.

"As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.' " United States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) (citation omitted). When examining the phrase "any citizen of the United States or other person," "person" must refer to something beyond individuals who are United States citizens; otherwise, the term would be redundant. See, e.g., Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (noting that "one of the most basic interpretive canons" is "that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant' ") (citation omitted and alteration accepted). At the very least, the phrase extends a § 1983 cause of action to non-citizen individuals. Congress enacted Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), the original version of what is now § 1983, in order to enforce the Fourteenth Amendment. See, e.g., Ngiraingas v. Sanchez, 495 U.S. 182, 187, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990). The word "person" in the Fourteenth Amendment includes not only citizens but also non-citizens within the United States. E.g., Graham v. Richardson, 403 U.S. 365, 371, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); see also Hague v. Comm. for Indus. Org., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Stone, J.) ("It will be observed that the cause of action, given by [Section 1 of the 1871 Civil Rights Act], extends broadly to ... those rights secured to persons, whether citizens of the United States or not, to whom the [Fourteenth] Amendment in terms extends the benefit of the due process and equal protection clauses."). We also know that the word "person" in § 1983 extends to corporations, both municipal and otherwise. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Indeed, in Monell, the Supreme Court observed that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." Id. at 687, 98 S.Ct. 2018.

However, the Supreme Court has also ruled that Native American Tribes seeking to vindicate sovereign rights, States, State officers acting in their official capacities, Territories, and Territory officers acting in their official capacities are not "persons." Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 712, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003) (reasoning that § 1983 "was designed to secure private rights against government encroachment" to reach this conclusion in the case of a Tribe suing to vindicate its right to sovereign immunity from state process); Ngiraingas, 495 U.S. at 187–92, 110 S.Ct. 1737 (examining historical sources and the context surrounding amendments to § 1983 to reach this conclusion with respect to Territories and their officers); Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (relying on federalism concerns, the Eleventh Amendment, and the "often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it' " to reach this conclusion regarding States and their officials) (alterations accepted and citation omitted). Monell, Ngiraingas, and Will each interpreted the first use of the word "person" in § 1983, which relates to which entities may be proper § 1983 defendants -- "[e]very person" who under color of law causes a deprivation of federal rights shall be liable to the party ***1278** injured. By contrast, today we interpret § 1983's second use of the word "person" -- "any citizen or other person" -- a phrase that delineates which entities may be proper § 1983 plaintiffs. But these cases are nonetheless instructive, because we "generally presume that 'identical words used in different parts of the same act are intended to have the same meaning.' " United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (citation omitted).

In order to decide whether FLFNB has a cause of action in this case, we must determine whether "other persons," in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations. The words "other person," by themselves, do not definitively answer the question. Cf. Ngiraingas, 495 U.S. at 187, 110 S.Ct. 1737 ("[Section 1983] itself obviously affords no clue as to whether its word 'person' includes a Territory."). Unlike sovereign entities, there is no presumption that unincorporated associations are not persons. To the contrary, the ordinary meaning of "person" in legal contexts includes unincorporated associations. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 273

(2012) ("Traditionally the word person ... denotes not only natural persons (human beings) but also artificial persons such as corporations, partnerships, associations, and both public and private organizations.") (second emphasis added). Thus, the most natural reading of § 1983 extends a cause of action to unincorporated associations.

On the other hand, we "normally interpret[ ] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton Cnty., —— U.S. ——, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). And in 1871, unincorporated associations were not legal persons with the capacity to sue or be sued absent some express authorization. United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 385, 42 S.Ct. 570, 66 L.Ed. 975 (1922) ("Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."); Wesley A. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383, 383 (1924) (citing authorities dating as far back as 1884 to observe that "[t]he cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name").

Moreover, reading the word "person" to exclude unincorporated associations is fully consonant with the 1871 version of the Dictionary Act, which expressly limited "person" to "bodies politic and corporate." See, e.g., Will, 491 U.S. at 69 n.8, 109 S.Ct. 2304. The Dictionary Act -- a statute that provides general definitions for common terms used across the United States Code, see 1 U.S.C. § 1 -- did not expand to include "associations" until 1948. See Act of June 25, 1948, Pub. L. No. 80-772, § 6, 62 Stat. 683, 859 (1948); Lippoldt v. Cole, 468 F.3d 1204, 1214 (10th Cir. 2006). The 1871 Dictionary Act definition matches the definition of "person" found in the first edition of Black's Law Dictionary, published in 1891, which confirms that an entity needed some express authorization in positive law to achieve legal personhood. Person, Black's Law Dictionary (1891) ("Persons are divided by law into natural and artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws, for the purposes of society and government, which are called 'corporations' or 'bodies politic.' ").

***1279** What's more, the legislative history surrounding the adoption of the 1871 Civil Rights Act does not suggest any departure from the established legal meaning of "person" as it related to the capacity to sue in 1871. See Monell, 436 U.S. at 690, 98 S.Ct. 2018 (analyzing the legislative history of Section 1 to interpret § 1983). The drafters of Section 1 of the 1871 Civil Rights Act likely did not contemplate that unincorporated associations were "persons" under the Act. The Republican sponsors of the Civil Rights Act were aghast at reports of widespread vigilante violence against federal officials, northern transplants, Blacks, and Republicans in the post-war South. These attacks, they believed, were the work of recalcitrant Confederates, including individuals organized as the Ku Klux Klan, who faced only weak opposition from ineffectual state officials. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 320 (1871) (hereinafter "Globe") (Rep. Stoughton) ("There exists at this time in the southern States a treasonable conspiracy against the lives, persons, and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion."); id. at 820 (Sen. Sherman) (observing that the bill was based on the fact that "an organized conspiracy, spreading terror and violence, murdering and scourging both white and black, both women and men, and pervading large communities of this country, now exists unchecked by punishment, independent of law, uncontrolled by magistrates" and that "of all the multitude of injuries not in a single case has redress ever been meted out to one of the multitude who has been injured").

Section 1 itself "was the subject of only limited debate and was passed without amendment." Monell, 436 U.S. at 665, 98 S.Ct. 2018. At most, read together with statements about the 1871 Act generally, floor discussions of Section 1 suggest that both proponents and opponents of the 1871 Act believed that the typical plaintiff would be an individual who suffered a violation of constitutional rights, especially the denial of the equal protection of the laws at the hands of state officials. Thus, for example, proponent Senator Dawes spoke of "citizen[s]" who suffered violations of their rights -- phrasing that implies a concern for the individual plaintiff. Globe at 477 ("I conclude ... [that] Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done ... [b]y giving him a civil remedy in the United States courts for any damage sustained in that

regard."). For their part, Democrats who opposed the passage of Section 1 generally claimed that it was too broad, but notably did not argue that the word "person" did anything to expand the range of entities that could traditionally sue. They, too, seemed to envision individual plaintiffs. E.g., id. at 337 (Rep. Whithorne) (complaining that "any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution" would be able to sue and conjuring the hypothetical example of a drunk suing a police officer who had confiscated his pistol).

All told, historical context suggests that the word "person" as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of the United States Code as it exists today, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of "person" that may have informed Congress's decision to perpetuate ***1280** that term across amended versions of § 1983. Indeed, the Supreme Court in Ngiraingas looked not only to the history of the 1871 Civil Rights Act but also to "the successive enactments of [§ 1983], in context" -- and to changes to the definition of "person" in the Dictionary Act -- in order to interpret the word "person." 495 U.S. at 189, 191 n.10, 110 S.Ct. 1737.

Congress amended the text of § 1983 twice after the 1948 amendment to the Dictionary Act -- which made clear that "person" in "any Act of Congress" includes "associations" and "societies" in addition to "corporations," "companies," "firms," "partnerships," "joint stock companies," and "individuals." See 62 Stat. at 859; 1 U.S.C. § 1. A congressional amendment in 1979 extended § 1983's coverage to injuries inflicted by those acting under the color of District of Columbia law; a 1996 amendment limited the availability of injunctive relief against judicial defendants. See Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (1979); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996). In neither re-enacted version of § 1983 did Congress narrow the definition of "person" in light of the intervening clarification in the Dictionary Act that associations are "persons" as that term is used in federal statutes. Cf. United States v. Bryant, 996 F.3d 1243, 1258 (11th Cir. 2021) ("[W]hen interpreting statutes, what Congress chose not to change can be as important as what it chose to change.").

Similarly, Congress enacted both of these amendments after the 1937 promulgation of Federal Rule of Civil Procedure 17(b), which provided "that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States." Parties, 1937 Rep. Advisory Comm. on Civ. Rules 47 (1937); see also Fed. R. Civ. P. 17(b)(3) (the Rule's current text remains nearly identical to that of the original version); Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 954 F. Supp. 2d 127, 137 (E.D.N.Y. 2013) (relying on Rule 17(b)(3) to conclude that "an unincorporated association[ ] ha[d] legal capacity to bring [a § 1983] suit because all of its claims allege[d] violations of the United States Constitution"), aff'd, 868 F.3d 104 (2d Cir. 2017), and aff'd, 705 F. App'x 10 (2d Cir. 2017); Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R., 698 F. Supp. 401, 413–14 (D.P.R. 1988) (similar analysis regarding the unincorporated Puerto Rico Cable Television association), aff'd as modified on other grounds, 906 F.2d 25 (1st Cir. 1990).

And perhaps most significantly, the Supreme Court held in 1974 that an unincorporated union could "sue under 42 U.S.C. § 1983 as [a] person[ ] deprived of [its] rights secured by the Constitution and laws." Allee v. Medrano, 416 U.S. 802, 819 n.13, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). Thus, by the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were "persons" that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term "person" when it re-enacted amended versions of § 1983. See Pollitzer v. Gebhardt, 860 F.3d 1334, 1340 (11th Cir. 2017) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (emphasis added) (quoting Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Where words are employed in a statute which had at the ***1281** time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.") (emphasis added) (quoting Lorillard, 434 U.S. at 583, 98 S.Ct. 866); Scalia

& Garner, supra, at 322 ("The clearest application of the prior-construction canon occurs with reenactments: If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction ... a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). Whatever "person" meant in 1871, its meaning included unincorporated associations by the time Congress "perpetuated" the word "person" in new versions of § 1983 in 1979 and 1996. See Scalia & Garner, supra, at 322.

Even setting these textual and historical considerations aside, Allee suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a "person" for § 1983 purposes. In Allee, individual organizers and a union brought a § 1983 action against Texas officials on behalf of a class of union members, alleging that law enforcement had threatened and harassed them for engaging in union organizing activities, including by bringing criminal charges in bad faith. 416 U.S. at 804–09, 94 S.Ct. 2191. A question arose as to whether there were pending state prosecutions against any of the plaintiffs -- if not, the plaintiffs' request for injunctive relief would be partially moot. Id. at 818, 94 S.Ct. 2191. The Supreme Court instructed that on remand, if there were indeed pending prosecutions against the unnamed class members, the district court "must find that the class was properly represented" by the named plaintiffs in part because the named-plaintiff union was a "person[ ]" that could sue under § 1983 and that had standing to complain of the unlawful intimidation of its members. Id. at 819, 94 S.Ct. 2191 n.13; see also id. at 831, 94 S.Ct. 2191 (Burger, C.J., concurring in the result in part and dissenting in part) (acknowledging that the union plaintiff was unincorporated).

In holding that "[u]nions may sue under 42 U.S.C. § 1983 as persons," the Court in Allee did not rest on any distinctive features of unions or suggest that unions should be treated differently than any other kinds of unincorporated associations. Id. at 819, 94 S.Ct. 2191 n.13. The Court might have relied on, but did not so much as mention, characteristics surrounding unions that other types of unincorporated associations may not share, such as their affirmative recognition and privileges in federal and state law. See Coronado Coal Co., 259 U.S. at 385–90, 42 S.Ct. 570. Instead, the Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 "persons." The understanding of the meaning of the term "person" at the time the Civil Rights Act was passed in 1871 presented no obstacle to the result the Supreme Court reached in Allee. A union was neither an individual nor a corporation, yet the Supreme Court held that it still fell within the ambit of the term "other person."

In keeping with a broad reading of Allee, most federal courts to have confronted the question of whether a non-union unincorporated association is a "person" under § 1983 have answered in the affirmative. In Barrett v. United States, the Second Circuit reasoned that an estate administratrix could bring a § 1983 suit on behalf of the estate beneficiaries because they were a group of individuals "associated for a special purpose." 689 F.2d 324, 333 (2d Cir. 1982) ("Unions and unincorporated associations have also been found to possess standing to assert a § 1983 claim."). The Second Circuit weighed in again in Jund v. Town of Hempstead, this time to hold that unincorporated local Republican committees were proper § 1983 defendants. ***1282** 941 F.2d 1271, 1279–80 (2d Cir. 1991). And at least two district courts have adopted this reading. In Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., a court in the Southern District of Florida held that an "unincorporated, voluntary association of students" at a Florida high school was a § 1983 "person." 477 F. Supp. 2d 1246, 1248, 1249–51 (S.D. Fla. 2007). A court in the Northern District of Illinois similarly held that an unincorporated organization representing the interests of a public housing development could bring a § 1983 suit and noted that "[u]nincorporated organizations have been found to be 'persons' entitled to bring suit under § 1983." Cabrini-Green Loc. Advisory Council v. Chi. Hous. Auth., No. 04 C 3792, 2005 WL 61467, at *3 (N.D. Ill. Jan. 10, 2005).

Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. See, e.g., First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 758 (11th Cir. 2011) (en banc) (Orlando Food Not Bombs); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1031 (9th Cir. 2006) (Santa Monica Food Not Bombs); Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1034 (9th Cir. 1999) (Students for Legal government, an unincorporated

association of University of Oregon students); Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255, 256–57 (6th Cir. 1993) (Citizens Against Tax Waste, an "unincorporated association of property owners in the Westerville City School District"); Marcavage v. City of New York, 918 F. Supp. 2d 266, 267 (S.D.N.Y. 2013) (Repent America, an unincorporated association dedicated to Christian evangelism); Occupy Fresno v. Cnty. of Fresno, 835 F. Supp. 2d 849, 853 (E.D. Cal. 2011) (Occupy Fresno, an unincorporated association of individuals who wished to assemble in a park); Good News Emp. Ass'n v. Hicks, No. C-03-3542 VRW, 2005 WL 351743, at *1 (N.D. Cal. Feb. 14, 2005), aff'd, 223 F. App'x 734 (9th Cir. 2007) (unincorporated association organized to promote a faith-based concept of "Natural Family and Marriage"); Nat'l Ass'n of Alzheimer's Victims & Friends v. Pa. Dep't of Pub. Welfare, No. CIV.A. 88-2426, 1988 WL 29338, at *1 (E.D. Pa. Mar. 23, 1988) (National Association of Alzheimer's Victims & Friends, an "unincorporated association founded for the purpose of providing a mutual care and support group for persons suffering from Alzheimer's disease and their families and concerned friends"); Republican Coll. Council of Pa. v. Winner, 357 F. Supp. 739, 740 (E.D. Pa. 1973) (Republican College Council of Pennsylvania). The same is true of a historically significant set of § 1983 plaintiffs, the unincorporated local chapters of the NAACP. See N.A.A.C.P. v. Brackett, 130 F. App'x 648 (4th Cir. 2005).

This body of practice is not a body of holdings and, of course, cannot alter the meaning of the word "person" as used in the statute. But when combined with the ordinary meaning of the text, Allee, persuasive interpretations from other courts, and the body of law informing Congress's amendments to § 1983 -- all of which indicate that unincorporated associations are "persons" -- it at least underscores the need for compelling evidence before we adopt the City's contrary interpretation. See Nasrallah v. Barr, —— U.S. ——, 140 S. Ct. 1683, 1697–98, 207 L.Ed.2d 111, (2020) (Thomas, J., dissenting) (protesting ***1283** that when "presented with two competing statutory interpretations[,] one of which ma[de] sense of" the statute "without upending settled practice, and one of which significantly undermine[d the statute] by removing a vast swath of claims from its reach," the Supreme Court majority should have "justif[ied]" its choice of the latter interpretation and "candidly confront[ed] its implications"); Fowler v. U.S. Parole Comm'n, 94 F.3d 835, 840 (3d Cir. 1996) (While "a practice bottomed upon an erroneous interpretation of the law is not legitimized merely by repetition," "general acceptance of a practice must be considered in any reasoned [statutory interpretation] analysis.").

The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as "persons." See Lippoldt, 468 F.3d at 1216 (holding that Operation Save America, an unincorporated association devoted to anti-abortion advocacy, was not a "person" within the meaning of § 1983); see also Tate v. Univ. Med. Ctr. of So. Nev., No. 2:09-CV-01748-LDG (NJK), 2013 WL 1249590, at *11 (D. Nev. Mar. 26, 2013) (stating, in a single sentence devoid of analysis, that an unincorporated association was not a "person" subject to suit under § 1983), rev'd on other grounds, 617 F. App'x 724 (9th Cir. 2015). The Tenth Circuit's otherwise thorough discussion of the legislative history of the 1871 Civil Rights Act, the background law in 1871, and the 1871 Dictionary Act did not account for the fact that Congress re-enacted the word "person" in § 1983 twice after intervening developments in federal law clarified that unincorporated associations were "persons."

At bottom, in enacting § 1983, Congress "intended to give a broad remedy for violations of federally protected civil rights." Monell, 436 U.S. at 685, 98 S.Ct. 2018. And the Supreme Court has instructed us that "Congress intended § [1983] to be broadly construed." Id. at 686, 98 S.Ct. 2018. "[A]ny plan to restrict the scope of § 1983 comes with a heavy burden of justification -- a burden that is both constitutional and historical." Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 28 (1985). Absent some indication from the Supreme Court that unincorporated associations are not "persons," we decline the City's invitation to upset longstanding practice recognizing that unincorporated associations are "persons" that may sue under § 1983. See id. at 3 (warning "that any restriction of what has become a major symbol of federal protection of basic rights [should] not be made in irresponsible haste" and that absent strong historical evidence, the scope and "underlying principles of § 1983 liability should be secure"). We hold that FLFNB is a person that may bring suit under § 1983.

B.

The second threshold question, also prefatory to an analysis of the merits, concerns the principle of mootness. The Plaintiffs seek declaratory, injunctive, and damages relief as to both the Ordinance and the Park Rule. But well after the commencement of this litigation, the City repealed the challenged Ordinance. The Park Rule remains in effect, so the Ordinance's repeal does not affect the Plaintiffs' claims for declaratory, injunctive, and damages relief concerning the Park Rule. Likewise, the Plaintiffs' claims for monetary damages arising out of the application of the Ordinance while it was still on the books remain viable notwithstanding its subsequent repeal. See, e.g., Checker Cab Operators, Inc. v. Miami-Dade Cnty., 899 F.3d 908, 916 (11th Cir. 2018) ("Although a ***1284** case will normally become moot when a subsequent [law] brings the existing controversy to an end, when the plaintiff has requested damages, those claims are not moot.") (alteration in original) (citation omitted). However, the repeal mooted the Plaintiffs' claims for declaratory and injunctive relief against the Ordinance.

"Plainly, if a suit is moot, it cannot present an Article III case or controversy and the federal courts lack subject matter jurisdiction to entertain it." Coral Springs, 371 F.3d at 1328. "Generally, a challenge to the constitutionality of a statute is mooted by repeal of the statute," but an exception "applies if there is a substantial likelihood that the challenged statutory language will be reenacted." Id. at 1329. The Plaintiffs have failed to meet their burden of proving that this exception applies. See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1256 (11th Cir. 2017) (en banc) ("[O]nce the repeal of an ordinance has caused our jurisdiction to be questioned, [the plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot.") (alteration in original) (citation omitted).

"The key inquiry... is whether the evidence leads us to a reasonable expectation that the City will reverse course and reenact the allegedly offensive portion of its Code should this Court" conclude the case is moot. Id.; Coral Springs, 371 F.3d at 1331 ("Whether the repeal of a law will lead to a finding that the challenge to the law is moot depends most significantly on whether the court is sufficiently convinced that the repealed law will not be brought back."). The Plaintiffs must present "concrete evidence," rather than "mere speculation," that the City will return to its old ways. Nat'l Advert. Co. v. City of Miami, 402 F.3d 1329, 1334 (11th Cir. 2005).

"[T]hree broad factors" guide our inquiry: (1) "whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction"; (2) "whether the government's decision to terminate the challenged conduct was unambiguous," including "whether the actions that have been taken to allegedly moot the case reflect a rejection of the challenged conduct that is both permanent and complete"; and (3) "whether the government has consistently maintained its commitment to the new policy or legislative scheme." Flanigan's Enters., 868 F.3d at 1257. These factors are neither exclusive nor dispositive; rather, the question is whether "the totality of [the] circumstances persuades the court that there is no reasonable expectation that the government entity will reenact the challenged legislation." Id.

The first factor does not help the Plaintiffs. The City repealed the ordinance through its normal legislative process, rather than in "secrecy" or "behind closed doors." Id. at 1260. The Commission considered the repeal at a public meeting, and the Plaintiffs do not provide any reason to believe that "the procedures used by the City to repeal the Ordinance [do not] reflect the same level of deliberation we would expect for any other change in policy." Id. Moreover, the timing of the repeal does not provide reason to "doubt the City's sincerity." Coral Springs, 371 F.3d at 1320. Notably, the City repealed the Ordinance after the district court had granted final judgment in its favor in this case and before this Court had reversed that judgment in FLFNB I. This factor weighs heavily against a conclusion that the City will re-enact the Ordinance.

So does the second factor. The City enforced the Ordinance only for a brief period (about one month) after its October 22, 2014 enactment; the City did not enforce the Ordinance between December 2, 2014 and its repeal on November 7, 2017. ***1285** To be sure, this cessation of enforcement was not the result of an independent change of heart; rather, on December 2, a state court stayed enforcement in connection with a separate lawsuit challenging the Ordinance under Florida's Religious Freedom Restoration Act. And the City has not unequivocally assured that it will not re-enact the Ordinance. See Flanigan's, 868 F.3d at 1262 (city council had passed a resolution disavowing any intent to re-enact the challenged ordinance or anything similar). Still, all the Plaintiffs can offer on the second factor are inferences drawn from the timing of the City's enforcement decisions in relation to litigation developments. And these

inferences are hardly ironclad: the City voluntarily continued its policy of non-enforcement even after the expiration of the state-court stay on January 1, 2015.

At first blush, the Plaintiffs do better on the third factor, for the Park Rule still remains in effect and implicates the gravamen of Plaintiffs' complaint by preventing them from carrying out their expressive food sharing in a public park. When "a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot." Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515, 1520 (11th Cir. 1992); cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (The enactment of a new statute similar to the one repealed saves a case from mootness so long as the new statute implicates "the gravamen of [the original] complaint," even if the new statute "differs in certain respects from the old one" or "disadvantage[s] [the plaintiffs] to a lesser degree than the old one."). Even so, the City stopped enforcing the Park Rule against FLFNB's demonstrations at the same time it stopped enforcing the Ordinance (on December 2, 2014). In practice, the City's commitment to its repeal of the Ordinance and retreat from the policies behind it has not wavered.

To sum it all up, notwithstanding the City's failure to repeal the Park Rule or to unequivocally "disavow[ ] any intent to reenact" the Ordinance, Flanigan's, 868 F.3d at 1263, the Ordinance's regulation of outdoor food distribution is a thing of the past. The Plaintiffs have not offered "concrete evidence" that the City might re-enact the Ordinance. Nat'l Advert. Co., 402 F.3d at 1334. Their case depends almost entirely on conjecture based on the timing of the City's actions and its commitment to a related rule. But the timing at best provides a weak reed to establish an intent to re-enact and at worst undermines the Plaintiffs' case: the City repealed the Ordinance after the district court initially upheld it. This sequence does not betray a strategic repeal to avoid adverse litigation developments. We lack jurisdiction to address the difficult constitutional questions that attend the Plaintiffs' requests for declaratory and injunctive relief against the Ordinance. These claims are moot.

C.

The third, and last, of the threshold issues concerns Article III standing. The City argues that all of the Plaintiffs lack standing to assert damages claims based on the Ordinance and the Park Rule because these regulations, by the City's account, were not enforced against any of the Plaintiffs. According to the City, the Plaintiffs cannot prove a concrete injury connected to the Ordinance or the Park Rule. Like the district court before us, we remain unpersuaded. Both the Individual Plaintiffs and FLFNB have standing to bring damages claims against the City based on its enforcement of the Ordinance and the Park Rule. They also have standing to bring claims for declaratory and injunctive relief against the Park Rule.

***1286** It is by now almost axiomatic that in order to establish constitutional standing, a party plaintiff must show three things:

> First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations and quotation marks omitted and alterations accepted); see also Bischoff v. Osceola Cnty., 222 F.3d 874, 883 (11th Cir. 2000). Standing for injunctive relief requires proof of a threat of future injury. Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1329 (11th Cir. 2013). If there is a genuine issue of material fact as to whether the Plaintiffs have standing, summary judgment against them on

standing grounds is inappropriate. See Bischoff, 222 F.3d at 884.

1. Individual Plaintiffs. The City applied the Ordinance and the Park Rule to the Individual Plaintiffs insofar as they each participated in a November 7, 2014 FLFNB food-sharing event in Stranahan Park that the police broke up under their authority drawn from the Ordinance and the Park Rule. Plaintiff Nathan Pim, testifying on behalf of FLFNB, explained that the police "stopped" the event "short." **[DE 49-1 at 41]** We have already concluded that the Individual Plaintiffs were engaging in constitutionally protected expression, and the City forced them to stop and disperse. Undeniably, the Ordinance and the Park Rule injured them by directly interfering with and barring their protected expression. "[E]very violation [of a right] imports damage." Uzuegbunam v. Preczewski, —— U.S. ——, 141 S. Ct. 792, 796–97, 799, 209 L.Ed.2d 94 (2021) (citation omitted) (considering it beyond dispute that a college student suffered an injury in fact when he complied with a college official's order to stop speaking and handing out religious literature on campus); cf. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. ——, 141 S. Ct. 63, 67–68, 208 L.Ed.2d 206 (2020) (per curiam order granting application for injunctive relief) (those who wished to attend religious services, an exercise of their First Amendment freedoms, would suffer irreparable injury if barred from attending by state executive order); Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

In this way, the Individual Plaintiffs sustained an injury in fact sufficient to confer standing that does not depend on the arrests of their FLFNB colleagues at the same demonstrations. What's more, those arrests provide an additional basis for standing, even though the Individual Plaintiffs were not personally arrested or cited. "[S]tanding exists at the summary judgment stage when the plaintiff has submitted evidence indicating 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.' " Bischoff, 222 F.3d at 884 (quoting Wilson v. State Bar of Ga., 132 F.3d 1422, 1428 (11th Cir. 1998)); see also Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

***1287** Each Individual Plaintiff has declared under penalty of perjury that he or she will continue to participate in FLFNB's protected food-sharing demonstrations in Stranahan Park, and there is no dispute that this conduct is arguably proscribed by the Park Rule (and was proscribed by the Ordinance when it was in effect). Of course, the threat of prosecution must be "genuine," not "imaginary" or "speculative," Leverett v. City of Pinellas Park, 775 F.2d 1536, 1538 (11th Cir. 1985), but the Individual Plaintiffs easily meet this requirement. Each directly witnessed the police arrest and/or cite their co-demonstrators or others under the Ordinance and the Park Rule. Citations issued to the Individual Plaintiffs' fellow demonstrators referenced both the Ordinance and the Park Rule. These arrests and citations of the Individual Plaintiffs' "companion[s]" render the threat of enforcement "non-chimerical." Susan B. Anthony List, 573 U.S. at 159, 134 S.Ct. 2334 (describing Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)); cf. Bischoff, 222 F.3d at 884–85 (plaintiffs who were threatened with arrest and whose co-demonstrators were actually arrested suffered injury in fact).

2. FLFNB. FLFNB does not claim that it has associational standing to sue on behalf of its members; rather it claims "standing in its own right." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). An advocacy organization like FLFNB suffers injury in fact when the defendant's conduct "perceptibly impair[s] [the organization's] ability" to carry out its mission, including by causing "drain on the organization's resources." Id. at 379, 102 S.Ct. 1114; see also Fla. State Conf. of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1165 (11th Cir. 2008) ("[A] n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.").

It is undeniable, as the district court found, that the City's enforcement of the Ordinance and the Park Rule "impair[ed]" FLFNB's "ability to engage in its projects" -- food-sharing demonstrations to criticize society's allocation of resources between food and war -- in a number of ways. Most directly, the police shut down an FLFNB food-sharing demonstration on November 7, 2014. This blocked FLFNB from holding its traditional post-meal organizational meeting in Stranahan Park and cut short an exercise of its chief means of advocacy. See Havens, 455 U.S. at 379, 102 S.Ct. 1114 (plaintiff organization suffered injury where challenged practices impaired its ability "to provide counseling and referral

services for low-and-moderate-income homeseekers"). Moreover, the challenged regulations caused FLFNB to expend resources in the form of volunteer time, including efforts to collect bail money and organize legal representation for its members who were arrested under the Ordinance and the Park Rule. The threat of arrest also has practically hindered would-be volunteers from participating in FLFNB demonstrations. Thus, for example, FLFNB had to stop accepting high school volunteers because it did not want to risk subjecting them to criminal liability. These injuries will continue, because FLFNB continues to hold demonstrations under the threat of Park Rule enforcement.

FLFNB volunteers who would have normally worked on preparing for food-sharing demonstrations had to divert their energies to advocacy activities such as attending City meetings and organizing protests against the Ordinance, as well as arranging for transportation and supplies for these events. FLFNB's Rule 30(b)(6) representative unambiguously testified ***1288** that this "drew away time and resources from free time we would be spending on preparing for ... feedings." See Fla. State Conf. of N.A.A.C.P., 522 F.3d at 1165–66 (organization suffered injury in fact from anticipated diversion of "personnel and time to educating volunteers and voters on compliance with" a challenged law). In the face of these injuries, the fact that FLFNB has continued to hold food sharings in Stranahan Park since the enactment of the Ordinance does not deprive it of standing.

Nor, as the City suggests, does the fact that FLFNB is an informal organization with no formative documents, formal leadership offices, or written proof of membership. The City has not offered any authority to suggest that an unincorporated association's informal structure somehow renders it incapable of sustaining actual and concrete injury. To the contrary, unincorporated associations by their nature lack a charter and often lack formal organizational structures. See S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 931 (9th Cir. 2014) ("[A]n 'unincorporated association' is a 'voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common objective.' ") (citation omitted). This does not block them from seeking redress for injuries they may sustain. See Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1571 (11th Cir. 1991) ("Empire is an unincorporated association. As such, it has standing to allege ... injuries suffered directly by the organization."). On this record as a whole, FLFNB's relaxed organizational style does not denude it of standing.

III.

A.

To take stock so far, the Plaintiffs have standing to bring the following justiciable claims: for declaratory and injunctive relief against the Park Rule, and for compensatory damages with respect to both the Ordinance and the Park Rule. Our next step would normally be to examine the merits of the Plaintiffs' arguments that the Ordinance and the Park Rule are unconstitutional. But there is a twist here. As we see it, we need not, and therefore do not, pass upon the validity of the Ordinance. The Ordinance was repealed on November 7, 2017. And the validity, vel non, of the Ordinance has no bearing on the Plaintiffs' claims for past damages. This is because the Plaintiffs' damages claims with respect to the Ordinance -- the only Ordinance claims left -- are coextensive with their damages claims arising out of the enforcement of the Park Rule. The City enforced the Ordinance and the Park Rule as one, so reviewing the constitutionality of the Park Rule is all we must do in order to determine whether the Plaintiffs may be entitled to damages based on the City's enforcement actions. Because, as we will explain, the Park Rule violates the First Amendment as applied to the Plaintiffs, a ruling on the Ordinance provides no further benefit to the Plaintiffs. Deciding the constitutionality of the repealed Ordinance would therefore be an unnecessary exercise of our authority to interpret the Constitution. "Generally, we don't answer constitutional questions that don't need to be answered." Burns v. Town of Palm Beach, 999 F.3d 1317, 1348 (11th Cir. 2021); see Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

To explain, the core of the Plaintiffs' theory of damages is that they were forced to exercise their First Amendment rights under the fear of City sanction. The Ordinance and the Park Rule operated together ***1289** to inflict this fear, so reserving judgment on the Ordinance will not affect the

Plaintiffs' pursuit of compensatory damages. The Plaintiffs explain that they "fear future harassment, arrest and prosecution for continuing to engage in their weekly demonstrations at Stranahan Park." They also complain of associated "impairment of reputation, emotional distress, and loss of protected constitutional freedoms." Thus, for example, plaintiff William Toole declared that "[i]f the City resumes enforcement of the Ordinance and Park Rule, as I anticipate it will, I and other members of [FLFNB] will continue to face the possibility of receiving criminal citations for engaging in political expression, citations carrying a potential penalty of a $500.00 fine, 60 days in jail, or a combination of the two." As an organization, plaintiff FLFNB suffered similar damages because "people who want to associate with [FLFNB] for purposes of engaging in [its] weekly political demonstrations do so by assuming a risk of citation or arrest."

A violation of the Ordinance and a violation of the Park Rule each carry the same penalty. The City could impose the specific penalties Toole and the other plaintiffs fear -- a $500.00 fine and 60 days in jail -- either for a violation of the Ordinance (when it was in effect) or for a violation of the Park Rule. Those convicted of violating the Ordinance "shall ... be punished as provided in Section 1-6 ... of the Code." § 47-34.2(C). Section 1-6 of the Code provides for a $500 fine or 60-day imprisonment punishment. City Code § 1-6(c).

Meanwhile, Park Rule 2.2 prohibits social services in City parks without the City's permission. Section 11.0 of the Park Rules deals with enforcement. Specifically, § 11.3, entitled "Trespass," says that "[a]ny person or group found in violation of [any Park Rule] shall be ordered to leave all [City parks] for a minimum 24-hour period. Any person who fails to leave all City [parks] at the time requested may be arrested and prosecuted for trespassing or prosecuted under other existing ordinances." This directs us to the "Trespassing" section of the City Code, which incorporates the punishment found in City Code § 1-6, the same penalty section incorporated into the Ordinance: "[v]iolators of this section shall be deemed trespassers and subject to punishment as provided in section 1-6 of this Code." City Code § 16-26 (Trespassing). Just as it does for violations of the outdoor food distribution Ordinance, Section 1-6 provides for a fine up to $500 or up to 60 days in jail for Park Rule violations. City Code § 1-6(c). This identity in the available sanction makes sense, because the City enacted the Ordinance at least in part in an effort to bring itself into compliance with the 2000 state-court injunction against the Park Rule, "thereby permitting the resumption of enforcement of the Park Rule."

To support their fears of enforcement, the Plaintiffs identify five instances when the City arrested or cited fellow demonstrators in the Plaintiffs' presence. The arrest documents for four of these demonstrators cite both the Ordinance and the Park Rule. Thus, the Park Rule was an important element in most of the arrests that give rise to the Plaintiffs' claimed damages, namely their fear of arrest and prosecution for engaging in protected expression. Indeed, on November 7, 2014, the same day as the initial arrests, the City's Public Information Officer announced that the City would not allow food sharing in Stranahan Park even pursuant to the conditions of the Ordinance "because social services activities are not allowed to be conducted in our parks per Rule 2.2 of the Parks and Recreation Rules and Regulations." The City's policy of policing food sharing in Stranahan Park -- the source of the Plaintiffs' fear-based damages -- did not depend on the Ordinance. ***1290** In the City's own words, it arose alternatively, and independently, from the Park Rule.

It is true that the record does not indicate that the City ever brought any formal prosecutions under the Park Rule. But the City ultimately dropped all but one of the prosecutions it brought under the Ordinance (one individual pleaded no contest and served ten hours of community service), so the absence of filed Park Rule prosecutions does not drive a meaningful wedge between any damages the Plaintiffs sustained from the enforcement of the Park Rule and any monetary damages arising from the enforcement of the Ordinance.

The Ordinance and the Park Rule operated in tandem and were enforced together against FLFNB's demonstrations. The Plaintiffs acknowledge as much in their complaint: "[v]iolation of the Park Rule is a violation of the [O]rdinance because both require written permission from the City to share food in a City park." The Plaintiffs' alleged damages all stem from a single root: the City's enforcement of the Park Rule.[2] Succeeding in their constitutional claim against the Park Rule would allow the Plaintiffs to proceed in their quest for damages based on this enforcement. Succeeding in their constitutional claim against the Ordinance would not entitle them to anything more because their Ordinance-based damages theories invoke the same set of harms. Cf. Patterson v. Balsamico, 440 F.3d 104, 113–14 (2d Cir. 2006) (nominal damages

award was "contingent on the injuries suffered by [the plaintiff] rather than the number of statutes under which [the defendant was] liable").

[2] Some of the Plaintiffs' filings also might be read to claim damages that do not relate to fears of arrest, but rather to costs incurred in protesting the enactment of the Ordinance. Even these alleged damages stem from the enforcement of the Park Rule. The materials for one of the City meetings FLFNB attended in protest explained that the City wished to pass the Ordinance so that it could resume enforcement of the Park Rule. So FLFNB allegedly expended resources to fight the Park Rule just as much as it did to fight the Ordinance. Of course, nothing in this opinion should be taken to suggest that the Plaintiffs will ultimately be able to prove compensatory damages or even the required causation. We observe only that the damages, as alleged, stem as much from the Park Rule as they do from the Ordinance.

And as we shall see, it is not especially difficult to conclude that the Park Rule cannot pass First Amendment muster as applied to these Plaintiffs.[3] The Ordinance, however, presents a closer and more difficult question. On the one hand, it presents serious constitutional issues arising out of its arduous permitting process and a fee that can rise as high as $6,000 subject to City officials' unfettered discretion. And, at least arguably, the Ordinance effectively bans the Plaintiffs' expression in all City parks; the City did not take advantage of narrower potential alternatives such as allowing demonstrations in particular parks or permitting organizations to hold a limited number of annual food-sharing events as of right. See First Vagabonds Church of God, 638 F.3d at 758 (upholding similar ***1291** Orlando ordinance with these features). On the other hand, the City has a substantial interest in managing its park property, see id. at 761, and the Ordinance (unlike the Park Rule) provides clear and objective standards to guide the City's permitting decisions, such as the requirement that each food sharing use must be at least 500 feet away from any other.

[3] The Plaintiffs also purport to bring a facial challenge to the Park Rule. But they have not shown that the Park Rule prohibits a substantial amount of protected conduct, especially since most of the social service park uses the Park Rule regulates will have no expressive component at all. See Doe v. Valencia Coll., 903 F.3d 1220, 1232 (11th Cir. 2018). Therefore, we follow FLFNB I and treat the Plaintiffs' challenge only as an as-applied one. See 901 F.3d at 1241 ("Whether food distribution or sharing can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge.") (citation omitted and alterations accepted).

The resolution of these issues does not matter here. The Ordinance has been repealed, and its validity does not bear on the Plaintiffs' quest for damages. Since the repeal of the Ordinance renders its validity a wholly academic question, in keeping with the judicial restraint principals of constitutional avoidance, we do not answer it.[4] See Lyng, 485 U.S. at 446, 108 S.Ct. 1319 (lower courts should have answered a constitutional question only if "a decision on that question could have entitled [the plaintiffs] to relief beyond that to which they were entitled on their statutory claims"); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"); Boss Cap., Inc. v. City of Casselberry, 187 F.3d 1251, 1254 (11th Cir. 1999) ("[I]t is our custom not to decide difficult constitutional questions unless we must."), abrogated on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004).

[4] For similar reasons, we do not reach the Plaintiffs' alternative theories for why the Park Rule is unconstitutional, namely their expressive association, vagueness, and prior restraint theories.

B.

Finally, we come to the merits of the Plaintiffs' as-applied challenge to the Park Rule. Our review of the district court's summary judgment holding that the Park Rule was constitutional is de novo. FLFNB I, 901 F.3d at 1239. We

draw all reasonable inferences in the light most favorable to the Plaintiffs, the non-moving parties. Id.

But first, we pause to clarify what is not up for debate in this appeal. In FLFNB I, a panel of this Court held that FLFNB's food-sharing demonstrations in Stranahan Park are expressive conduct protected by the First Amendment. Id. at 1245. This holding binds us under both the law of the case doctrine, see Rath v. Marcoski, 898 F.3d 1306, 1312 (11th Cir. 2018), and our Court's prior precedent rule, Andrews v. Biggers, 996 F.3d 1235, 1236 (11th Cir. 2021). The sole remaining question for us, then, is whether the Park Rule's regulation of this protected conduct passes First Amendment scrutiny.

To answer this question, we must first decide whether the Park Rule is content neutral or content based, for a content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny. See Texas v. Johnson, 491 U.S. 397, 403–04, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); Burk v. Augusta-Richmond Cnty., 365 F.3d 1247, 1255 (11th Cir. 2004). As we explain, the Park Rule is content neutral. So, we only apply intermediate scrutiny. Specifically, we apply the United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), test for content-neutral regulations of expressive conduct and ask whether the Park Rule "is narrowly drawn to further a substantial governmental interest ... unrelated to the suppression of free speech." ***1292** Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing O'Brien, 391 U.S. at 377, 88 S.Ct. 1673).

Alternatively, we evaluate the Park Rule as a time, place, and manner restriction on expressive conduct. This sort of law also must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. These standards substantially overlap and yield the same result in this case. Either way, the Park Rule violates the First Amendment as applied to the Plaintiffs' food-sharing events.

1. Content Neutrality. Johnson instructs us that a regulation of expressive conduct is content neutral if the justification for the regulation is unrelated to the suppression of free expression. 491 U.S. at 403, 109 S.Ct. 2533. Even a content-neutral purpose, however, cannot save a regulation that " 'on its face' draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

The Park Rule does not draw content-based distinctions on its face:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

The Rule applies not just to food sharing events but also to a host of other social services, including the provision of clothing, shelter, and medical care. These services usually do not involve expressive conduct. Even most social-service food sharing events will not be expressive. See FLFNB I, 901 F.3d at 1242 (holding that FLFNB's food sharing was protected expressive conduct only after a close examination of the specific context surrounding the events). That the Park Rule regulates a range of activity, most of which has no expressive content at all, suggests its application does not vary based on any message conveyed. The Rule does not single out messages which relate to food or the importance of sharing food with the homeless.

Instead, the Park Rule's application to food sharing (and other services) turns on whether the services are provided "in order to meet [the recipients'] physical needs." This distinction does not depend on the content of the message associated with any food sharing that happens to be expressive. The Park Rule (at least in the City's view) applies to FLFNB's sharing of low-cost food with the homeless in order to communicate a message about the societal allocation of resources between food and the military, but it would also apply to an organization that shared low-cost food with the homeless in order to

communicate that the City's homeless shelters serve food that lacks vital nutrients. It would likewise apply to an organization that shared low-cost food with struggling veterans in order to emphasize the debt our society owes for their sacrifice, and so on. Indeed, it would apply to organizations that share food with those in need to communicate any number of messages. Simply put, the Rule does not "draw[ ] distinctions based on [any] message" food-sharers convey. Reed, 576 U.S. at 163, 135 S.Ct. 2218.

The Plaintiffs rely on Reed's allusion to the possibility that some facial distinctions might be content based because they define "regulated speech by its function or purpose" to argue that the Park Rule's social-service-purpose distinction is content based. Id. at 163–64, 135 S.Ct. 2218. But we have characterized this language in Reed as "dicta." ***1293** Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1319 (11th Cir. 2020). In any event, as just described, the purpose on which the regulatory definition turns -- sharing food to provide for physical welfare -- is not one that draws a distinction based on the content of any expression. See Recycle for Change v. City of Oakland, 856 F.3d 666, 671 (9th Cir. 2017) (holding, after Reed, that a regulation that applied to unattended donation boxes that collected personal items "for the purpose of distributing, reusing, or recycling those items" did not turn on "communicative content"); Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905, 915 (8th Cir. 2017) (regulation that applied to photography for commercial purposes, but not non-commercial purposes, was not content based under Reed). To be sure, it seems likely that most expressive food sharings subject to the Park Rule's regulation will involve some sort of message related to the importance of sharing food with those in need. "But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen v. Coakley, 573 U.S. 464, 480, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

Likewise, the City's justifications for the Park Rule do not relate to content. "A regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The City enacted the Park Rule, and the Ordinance designed to facilitate its enforcement, in order to address a series of problems associated with large group food events in public parks, including loitering and crowds, trash build-up, noise, and food safety issues, as well as to ensure that similar uses of public property did not concentrate in one area. Citizens had complained about some of these problems in connection with food-sharing events. In January 2014, the City Commission held a workshop on homelessness in the community where stakeholders debated public food distribution and related topics. More generally, the Ordinance states that its purpose is "to regulate social service facilities in order to promote the health, safety, morals and general welfare of the residents of the City of Fort Lauderdale." (This statement illuminates the Park Rule's purpose as well, since the City enacted the Ordinance so that it could resume enforcement of the Park Rule.)

These concerns, which boil down to an interest in maintaining public parks and other property in a pleasant, accessible condition, are not related to the suppression of the Plaintiffs' (or any other party's) expression, so they are content neutral. See First Vagabonds Church of God, 638 F.3d at 762 ("[T]he interest of the City in managing parks and spreading large group feedings to a larger number of [locations] is unrelated to the suppression of speech."); see also McCullen, 573 U.S. at 480–81, 134 S.Ct. 2518 (public safety, the need to protect security, and regulation of congestion are content-neutral concerns); Ward, 491 U.S. at 797, 109 S.Ct. 2746 ("The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.").

One could phrase the City's motives in terms that are perhaps less flattering. The district court said the City was concerned "that food sharing as a social service attracts people who act in ways inimical to" keeping parks safe, clean and enjoyable; the Plaintiffs put a finer point on it and accuse the city of "deter[ring] homeless and hungry people from parks because of how they might act." Fort Lauderdale's ***1294** elected officials seem to have decided that sharing food with large groups of homeless people in public parks causes problems that make those parks less useful to the broader public. But even accepting these descriptions does not alter the First Amendment analysis, which at this stage asks only whether the City's desire to prevent groups of homeless people from gathering in public parks is a goal related to the content of the Plaintiffs' or any other party's expression. The First Amendment does not permit us to go further and comment upon whether this objective is virtuous public policy. We hold simply that the Park Rule is not related to

expressive conduct; it has nothing to do with the Plaintiffs' critique of society's allocation of scarce resources between welfare and defense spending.

The Plaintiffs are wrong to say that the City's concern with the behavior of the crowds that gather at FLFNB expressive food-sharing events is a justification related to "[l]isteners' reaction to speech," which they correctly point out would not be "a content-neutral basis for regulation." Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Forsyth and related cases stand for the principle that a city may not regulate speech because it "cause[s] offense or ma[kes] listeners uncomfortable," McCullen, 573 U.S. at 481, 134 S.Ct. 2518, or because it might elicit a violent reaction or difficult-to-manage counterprotests, Forsyth Cnty., 505 U.S. at 134, 112 S.Ct. 2395. The City is concerned not that FLFNB's expression will offend or cause violence, but that it will cause the gathering of crowds -- participants in the meals, rather than a bystander audience -- and associated logistical problems such as the accumulation of trash. Addressing the practical problems crowds pose is a content-neutral concern. See McCullen, 573 U.S. at 481, 134 S.Ct. 2518 ("Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks."); cf. Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1317–18 (11th Cir. 2000) (a regulation that distinguished between events based on whether they would require municipal services to "accommodate ... large public gatherings" was "justified without reference to the content of the regulated speech") (emphasis omitted).

2. Intermediate Scrutiny. Since the Park Rule is a content-neutral regulation of expressive conduct, it is subject only to intermediate scrutiny, not the more demanding requirements of strict scrutiny. Specifically, under United States v. O'Brien, the Park Rule may regulate the Plaintiffs' expressive food sharing only so long as food sharing "itself may constitutionally be regulated" (no one has suggested it may not) and the Park Rule "is narrowly drawn to further a substantial governmental interest" that is "is unrelated to the suppression of free speech." Clark, 468 U.S. at 294, 104 S.Ct. 3065 (1984) (citing O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

The City does have a "substantial interest in ensuring the ability of [its] citizens to enjoy whatever benefits the city parks have to offer." Ward, 491 U.S. at 797, 109 S.Ct. 2746. More specifically, the Park Rule seeks to further the City's "substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area." First Vagabonds Church of God, 638 F.3d at 762. As we have explained, the regulations are concerned with avoiding concentration of similar park uses and with sanitation and other logistical problems that crowded food distribution events cause -- substantial ***1295** government interests that are unrelated to the suppression of free speech.

However, the Park Rule is not narrowly tailored to the City's interest in park maintenance. Under intermediate scrutiny, the regulation " 'need not be the least restrictive or least inclusive means' of serving the government's interests." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citation omitted). Rather, "the requirement of narrow tailoring is satisfied 'so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,' " and "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 799–800, 109 S.Ct. 2746 (citation omitted and alterations accepted).

Fatally, the Park Rule imposes a permitting requirement without implementing any standards to guide City officials' discretion over whether to grant a permit. The Rule bans social-service food sharings in City Parks "unless authorized pursuant to a written agreement with City." That's it. Under the terms of the Rule, a City official may deny a request for permission to hold an expressive food sharing event in the Park because he disagrees with the demonstration's message, because he doesn't feel like completing the necessary paperwork, because he has a practice of rejecting all applications submitted on Tuesdays, or for no reason at all. In a word, the complete lack of any standards allows for arbitrary enforcement and even for discrimination based on viewpoint.

Generally, subjecting protected expression to an official's "unbridled discretion" presents "too great" a "danger of censorship and of abridgment of our precious First Amendment freedoms." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). "[D]istaste for [such] censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Id. It comes as no surprise, then, that "a long line" of

Supreme Court decisions makes it abundantly clear that a regulation which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (quoting Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

The facts of Shuttlesworth illustrate the point. A Birmingham, Alabama ordinance empowered the city commission to deny parade permits whenever they thought it necessary for "public welfare," "decency," "morals," or "convenience." Id. at 148–50, 89 S.Ct. 935. In 1963, city officials used this ordinance to arrest and prosecute participants in a peaceful civil rights march held without a license, including Rev. Fred Shuttlesworth. Id. But the Supreme Court invalidated Shuttlesworth's conviction. Id. at 159, 89 S.Ct. 935. The risk that the ambiguity in the licensing regime would permit officials to target individuals, like Shuttlesworth, on the basis of their disfavored expression was too great for the First Amendment to bear.

The reasoning of these prior restraint cases controls the as-applied narrow tailoring inquiry we conduct in this case: "[e]xcessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." Burk, 365 F.3d at 1256. The Park rule does not even supply malleable standards like those found in Shuttlesworth; it doesn't provide any standards at all. As applied to the Plaintiffs' protected ***1296** expression, the Park Rule fails First Amendment scrutiny.

Moreover, the Park Rule's sweeping grant of discretion to City permitting officials is not necessary to further the City's interests in crowd control and park conservation. The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citations omitted). Of course, the mere availability of less restrictive alternatives will not cause a regulation to fail narrow tailoring scrutiny, and we may not "replace the City as the manager of its parks." First Vagabonds Church of God, 638 F.3d at 762 (citation omitted and alterations accepted). But an abundance of targeted alternatives may indicate that a regulation is broader than necessary. See McCullen, 573 U.S. at 490–94, 134 S.Ct. 2518 (relying in part on available alternatives to conclude that a regulation of speech near abortion clinics burdened more speech than necessary).

The Park Rule amounts to an outright ban on public food sharing in all of Fort Lauderdale's parks; any exception is subject only to the standardless whims of City permitting officials. For a model of a narrower regulation targeting more or less the same interests, the City need only have looked 218 miles to the northwest. In First Vagabonds Church of God, we upheld an Orlando regulation that permitted public food distribution without a license in sixty-six parks. 638 F.3d at 761. For the group of forty-two parks in the central downtown district near City Hall, each organization was entitled to two licenses per year. Id. And the Orlando ordinance applied only to events likely to attract twenty-five or more people. Id. at 759.

Fort Lauderdale offers no reason it could not have similarly narrowed the Park Rule's permission requirement or tailored it in some other way. Thus, for example, in addition to adding "narrowly drawn, reasonable and definite standards" to guide officials' permitting discretion, Forsyth Cnty., 505 U.S. at 133, 112 S.Ct. 2395 (citation omitted), the City could have required permission only for events likely to attract groups exceeding a certain size. Or it could have required City permission only for certain parks. Central to the City's conclusion that public food distribution causes problems in parks is a collection of seven citizen and organizational complaints about food-sharing events. Six of these are specific to the downtown Fort Lauderdale area. The City could have required permission only in downtown parks or designated limited areas within parks for sharing food. See McCullen, 573 U.S. at 493, 134 S.Ct. 2518 (evidence of disruptive demonstrations at a single Boston clinic did not justify a statewide regulation of demonstrations at abortion clinics); see Clark, 468 U.S. at 295, 104 S.Ct. 3065 (rejecting challenge to a limited ban on camping in Washington, D.C.'s Lafayette Park as applied to an anti-homelessness demonstration; the Park Service allowed camping in designated areas in other parks); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956–57 (11th Cir. 1999) (upholding ban on begging that applied only to a five-mile "designated, limited beach area" and did not ban begging in "many other public fora"). The City also might have allowed groups like FLFNB a limited annual number of food distribution events in Stranahan Park as of right. Again, we do not presume to

tell the City exactly how it should manage its parks; all this is only to say that the Park Rule's utterly standardless permission requirement is "substantially broader than necessary to achieve" the City's interest in maintaining its parks. Ward, 491 U.S. at 782–83, 109 S.Ct. 2746. The Park Rule therefore cannot qualify as a valid regulation of the Plaintiffs' expressive conduct.

***1297** Alternatively, we evaluate the Park Rule under Clark's standard for time place, and manner restrictions. A content-neutral law regulating the time, place, and manner of expression in a public forum must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. Stranahan Park is "an undisputed public forum." FLFNB I, 901 F.3d at 1238. We underscore that parks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." McCullen, 573 U.S. at 476, 134 S.Ct. 2518 (quotation omitted); United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (Public parks are "historically associated with the free exercise of expressive activities."); Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). "[T]he government's ability to permissibly restrict expressive conduct" in Stranahan Park is therefore "very limited." Grace, 461 U.S. at 177, 103 S.Ct. 1702. But the government nevertheless "may enforce reasonable time, place, and manner regulations" on expression in the park. See id.

As a practical matter, there is little difference between this standard and the O'Brien test we have just discussed, and, in any event, they yield the same result in this case. Clark, 468 U.S. at 298, 104 S.Ct. 3065 (observing that the O'Brien standard "is little, if any, different from the standard applied to time, place, or manner restrictions"); see First Vagabonds Church of God, 638 F.3d at 761–62 (analyzing a similar ordinance under both standards). Both require that the regulation be narrowly tailored to serve a significant government interest. Clark, 468 U.S. at 293, 298, 104 S.Ct. 3065. Just as it does under O'Brien, the Park Rule's grant of standardless discretion to the City's permitting officials causes it to fail time, place, and manner scrutiny: "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' " Forsyth Cnty., 505 U.S. at 130–31, 112 S.Ct. 2395 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)); Burk, 365 F.3d at 1256 ("[T]ime, place, and manner regulations must contain narrowly drawn, reasonable and definite standards, to guide the official's decision and render it subject to effective judicial review.") (internal quotation marks and citations omitted). Since the Park Rule fails because it is not narrowly tailored, we need not address whether it leaves open ample alternative channels for the communication of the Plaintiffs' message.

The long and short of it is that the Park Rule as applied to the Plaintiffs' expressive food sharing activities violates the First Amendment. Accordingly, we **REVERSE** the district court's summary judgment order and **REMAND** for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HULL, Circuit Judge, with whom LAGOA, Circuit Judge, joins, concurring:

I concur in full in the panel opinion. I write separately to emphasize that this is ***1298** the second appeal in this case and that our panel is bound by this Court's holding as to whether the plaintiff FLFNB's food-sharing conduct is sufficiently expressive to warrant First Amendment protection. See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

In that prior appeal, this Court held that, "on this record," the nature of the plaintiff FLFNB's weekly food-sharing activity in a public park, "combined with the factual context and environment in which it was undertaken," led to the conclusion that FLFNB's food sharing conduct "express[es] an idea through [that] activity," conveys "some sort of message" to a reasonable observer, and constitutes "a form of protected expression" under the First Amendment. Id. at 1240–45 (quotation marks omitted). This holding relied on a well-developed factual record about the plaintiff FLFNB's many years of

food-sharing events (1) that are held in the City's Stranahan Park, a public forum where the homeless congregate, and (2) that are accompanied by FLFNB's banners and distribution of literature. Id. As the panel opinion points out, "most social-service food sharing events will not be expressive." Maj. Op. at 1292. Here, however, we are bound by the holding in the prior appeal that was based on a particular and extensive list of factual circumstances.

All Citations

11 F.4th 1266, 29 Fla. L. Weekly Fed. C 286

End of Document

Georgetown Journal on Poverty Law and Policy
Volume XXIII, Number 2, Winter 2016

NOTES

Food-Sharing Restrictions: A New Method of Criminalizing Homelessness in American Cities

Jordan Bailey*

INTRODUCTION

Chico and Debbie Jimenez, founders of Spreading the Word Without Saying a Word Ministry, have fed homeless residents of Daytona Beach once a week for more than year.[1] Joan Cheever, operator of a non-profit food truck, has been serving homeless residents of San Antonio for ten years.[2] Arnold Abbot, a ninety-year-old veteran, has been feeding the homeless people of Ft. Lauderdale for decades.[3] In addition to feeding the homeless population, these individuals have something else in common: each has faced penalties, including jail time, in the past year for their charitable work.[4] These penalties are a result of ordinances prohibiting food-sharing which cities have adopted at an increasing rate in recent years. Part of a larger trend towards criminalizing activities of individuals experiencing homelessness, at least sixteen cities have adopted these ordinances since 2013 alone.

The adoption of these ordinances has been widely controversial. Cities often claim that these restrictions are implemented to ensure that the food that the homeless population receives is healthy and properly distributed.[5] Others believe the food-sharing restrictions will encourage homeless people to seek food in

---

* J.D. Candidate, Georgetown University Law Center, 2016; B.A. University of Alabama at Birmingham, 2012; Executive Editor, Vol. 23, Georgetown Journal on Poverty Law & Policy. The author thanks his parents, David and Carolyn, his family, and his friends for their constant love and support. The author also thanks Professor Peter Edelman, Kristina Scott, and Dr. Robert Corley for their inspiration and mentorship.

1. Bill Briggs, *Florida Couple Fined, Threatened with Jail for Feeding Homeless*, NBC NEWS (May 12, 2014, 4:35 PM), http://www.nbcnews.com/news/us-news/florida-couple-fined-threatened-jail-feeding-homeless-n103786.

2. Gilbert Garcia, *Chef ticketed, facing $2,000 fine for feeding homeless in San Antonio*, SAN ANTONIO EXPRESS-NEWS (Apr. 14, 2015, 4:35 PM), http://www.mysanantonio.com/news/local/article/Chef-ticketed-facing-2-000-fine-for-feeding-6198766.php.

3. Eliza Barclay, *Florida Activist Arrested for Serving Food to Homeless*, NPR (Nov. 6, 2014, 4:35 PM), http://www.npr.org/blogs/thesalt/2014/11/06/362019133/florida-activists-arrested-for-serving-food-to-homeless.

4. *See supra* notes 1–3.

5. *See infra* Part IV.A.

locations where they can be provided with comprehensive services.[6] Homeless advocates and charities, however, argue that these ordinances are an attempt to hide or remove the homeless population from downtown and tourist areas that cities are wishing to revitalize.[7]

Part I of this Note will provide a brief overview of homelessness and hunger in the United States. Part II will discuss the history of ordinances criminalizing homeless activity, including their origin in vague vagrancy and loitering laws, the adoption of contemporary homeless ordinances, and the recent explosion of their use in cities across the country. Part III will introduce the various forms of food-sharing prohibitions that cities have adopted. Part IV will consider the stated public policy goals behind these prohibitions, consider their effectiveness at attaining these goals, and propose possible alternatives to criminalization. Finally, having concluded that these ordinances should be repealed, this Note will propose in Part V a possible campaign to void current prohibitions and prevent future implementation through the adoption of city or state homeless bills of rights.

I. AN OVERVIEW OF HOMELESSNESS AND HUNGER

In 2014, it was estimated that almost 580,000 people experienced homelessness in the United States on a given night.[8] Sixty-nine percent of these individuals suffering homelessness were living in emergency shelters or transitional housing, while 31% were living in various unsheltered locations.[9] 99,434 people were considered chronically homeless,[10] defined as being homeless for a year or more or experiencing at least four episodes of homelessness in the last three years.[11] Nearly 85% of those considered chronically homeless were experiencing homelessness as individuals rather than families.[12] There were almost 50,000 veterans experiencing homelessness in 2014, and an estimated 45,205 children and youth experiencing homelessness, 50% of whom were unsheltered.[13] Half of the U.S. homeless population is located in just five states—California, New York, Florida, Texas, and Massachusetts—with 20% located in California alone.[14]

---

6. *See infra* notes 101–04.

7. *See* Arthur Delaney, *How A Traveling Consultant Helps America Hide The Homeless*, HUFFINGTON POST (Mar. 9, 2015, 9:12 PM), http://www.huffingtonpost.com/2015/03/09/robert-marbut_n_6738948.html.

8. U.S. DEP'T OF HOUS. & URBAN DEV., THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2014), https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf.

9. *Id.*

10. *Id.*

11. *Id.* at 2.

12. *Id.* at 1.

13. *Id.*

14. *Id.* at 8.

Homeless families and individuals experience high levels of food insecurity due to their low income and housing instability,[15] requiring them to rely heavily on emergency food assistance.[16] In a 2014 survey of hunger and homelessness in twenty-five U.S. cities, 75% of cities had an increased need of emergency food assistance.[17] Across these twenty-five cities, it is estimated that 27% of the emergency food assistance need went unmet.[18] At the same time that need increased, 82% of cities had to reduce the quantity of food persons could receive during each pantry visit, or food offered per meal at emergency kitchens.[19] Others were forced to reduce the number of times that a person or family could visit a food pantry each month.[20]

II. A HISTORY OF CRIMINALIZATION

American cities have a long and troubling history of using the criminal justice system as a policy tool to punish and remove individuals experiencing homelessness. Such practices have become widely referred to in the housing advocacy community as "criminalizing homelessness."[21] While criminalization has been used for decades, the marked growth in its contemporary use and the range of activity to which criminal violations now apply makes this issue more concerning than ever.[22] This Part will present various methods used to criminalize the behavior of individuals experiencing homelessness, including both vague vagrancy and loitering laws and new contemporary ordinances. It will then discuss the recent explosion of criminalization efforts around the country.

A. Vagrancy and Loitering Laws

The history of criminalizing homelessness likely began with now-defunct vague vagrancy and loitering laws.[23] These laws punished status rather than conduct.[24] Being homeless and unemployed was all that was needed to constitute

15. INST. FOR CHILDREN, POVERTY, AND HOMELESSNESS, THE AMERICAN ALMANAC OF FAMILY HOMELESSNESS 44 (2013), http://www.icphusa.org/pdf/americanalmanac/almanac_issue_foodinsecurity.pdf.

16. *Id.*

17. U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 1–2 (2014), http://www.usmayors.org/pressreleases/uploads/2014/1211-report-hh.pdf.

18. *Id.*

19. *Id.*

20. *Id.*

21. Jonathan Sheffield, *A Homeless Bill of Rights: Step by Step From State to State*, 19 PUB. INT. L. REP. 8, 9 (2013); *see also* NAT'L LAW CTR. FOR HOMELESSNESS AND POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 14–16 (2011), http://www.nlchp.org/Criminalizing_Crisis (describing the recent rise in penalizing homeless activities).

22. *See infra* text accompanying notes 58–64.

23. *See* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 635–645 (1992).

24. *See* Handler v. Denver, 77 P.2d 132, 135 (Colo. 1938).

arrest; illegal activity was not required.[25] While the use of vagrancy and loitering laws—a practice started in Great Britain in the fourteenth century—has been an American tradition since colonial times, a wave of vagrancy legislation began in 1881 in response to the increasingly static population of individuals experiencing homelessness.[26] These laws also played a critical role in the Jim Crow South. As part of the "Black Codes"—laws passed by Southern state legislatures to limit the freedom of former slaves—vagrancy and loitering statutes allowed white Southerners to intimidate African Americans, arrest them, and often force them back into labor.[27]

State and Federal courts largely upheld vagrancy laws until the 1960s and 1970s.[28] During that time, courts invalidated these statutes on various grounds, including: that they invidiously discriminated against the poor, that they amounted to cruel and unusual punishment, that they restricted the right to travel, and that they were too vague and indefinite to provide adequate notice of prohibited conduct.[29]

As vagrancy laws were invalidated, police began relying heavily on loitering laws to achieve comparable results.[30] This practice was largely upheld until the United States Supreme Court's 1983 decision in *Kolender v. Lawson*,[31] which invalidated a California loitering statute requiring street wanderers to present valid identification when stopped by the police, on the grounds that the statute was too vague to satisfy due process.[32] This decision was followed by *Chicago v. Morales*,[33] which invalidated a Chicago ordinance preventing loitering by gang members on due process grounds.[34]

B. The Introduction of Contemporary Criminalization Ordinances

With many vague vagrancy and loitering laws no longer enforceable, municipalities in the last three decades instituted new ordinances aimed at punishing individuals experiencing homelessness. These ordinances targeted a broad range of homeless activity in public, including panhandling, camping, sleeping in vehicles, sanitation practices, and the storage and transportation of belongings.

---

25. *See* Simon, *supra* note 23, at 640.

26. JAMES ADAM WASSERMAN & JEFFREY MICHAEL CHAIR, AT HOME ON THE STREET 9 (2010).

27. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008).

28. Simon, *supra* note 23, at 642.

29. *Id.*

30. *Id.* at 644 (stating that after the decision of *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), police officers continued to arrest "suspicious" individuals under the guise of loitering laws).

31. Kolender v. Lawson, 461 U.S. 352 (1983).

32. *Id.*

33. Chicago v. Morales, 527 U.S. 41 (1999).

34. *Id.*

1. Panhandling

Many cities have enacted ordinances against begging and panhandling. The District of Columbia's ordinance, enacted in 1993, prohibits a person from asking, begging, or soliciting alms, including money and other things of value, in a public transportation vehicle; at a bus, train, or subway stop; and within ten feet of an ATM.[35] It also prohibits "aggressive" begging or solicitation in any place open to the general public.[36] This and similar ordinances substantially limiting the time, method, and location of panhandling have been widely upheld by courts.[37] Only outright prohibitions on all panhandling in public have been invalidated as unconstitutional.[38]

2. Sleeping In Vehicles

For many people who can no longer afford traditional housing, living in a motor vehicle is often their last resort short of sleeping in the streets.[39] In the absence of adequate services and alternatives, "[c]ars are the new homeless shelters," according to People Assisting the Homeless CEO Joel John Roberts.[40]

While one would think that cities would prefer this housing arrangement over living in the street, many cities and states have passed laws prohibiting the human habitation of vehicles parked on public streets or in public parking facilities.[41] In Minneapolis, one of the most progressive cities in the country,[42] an ordinance was adopted stating that

> No camp car, house trailer, automobile, tent or other temporary structure may be parked or placed upon any public street or on any public or private premises or street in the city and used as a

35. D.C. CODE § 22-2302 (2015).

36. *Id.*

37. *See* Gresham v. Peterson, 225 F.3d 899, 901 (7th Cir. 2000) (upholding a panhandling ordinance that prohibited solicitation of cash at night near a public transportation vehicle or facility, parked or stopped vehicle, sidewalk café, or bank); Smith v. City of Ft. Lauderdale, 177 F.3d 954, 955 (11th Cir. 1999) (upholding an ordinance that prohibits panhandling on a five-mile stretch of beach); McFarlin v. District of Columbia, 681 A.2d 440, 447–50 (D.C. 1996) (upholding an ordinance that prohibited begging at subway stations and stops). *See generally* Tracy A. Bateman, Annotation, *Laws regulating begging, panhandling, or similar activity by poor homeless persons*, 7 A.L.R. 5th 455 (1992).

38. *See* Speet v. Schuette, 889, F. Supp. 2d 969, 972 (W.D. Mich. 2012) (invalidating a statue that criminalized begging in a public place); C.C.B v. State, 458 So.2d 47, 48 (Fla. Dist. Ct. App. 1984) (invalidating an ordinance that prohibited all forms of begging or soliciting of alms).

39. Kevin O'Leary, *Last Refuge of the Homeless: Living in the Car*, TIME (Feb. 12, 2010), http://content.time.com/time/nation/article/0,8599,1963454,00.html.

40. *Id.*

41. *See, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES, § 9-4-11 (2016); MINNEAPOLIS, MINN., CODE OF ORDINANCES, ch. 244.60 (2015).

42. *See* K.N.C & L.P., *Urban Ideologies*, ECONOMIST (Aug. 4, 2014, 2:53 PM), http://www.economist.com/blogs/graphicdetail/2014/08/daily-chart-0.

> shelter or enclosure of persons and their effects for the purpose of living therein.[43]

These ordinances severely impact the 10,000 people estimated to live in their automobiles throughout the country.[44]

3. Camping in Public

Unfortunately for those individuals experiencing homelessness who do not have a vehicle, camping or sleeping in public is often a basic tool of survival.[45] Yet many localities have passed ordinances making it a crime to engage in these or similar acts.[46] Tucson, for example, passed an ordinance in 1996 prohibiting camping and sleeping on city property at night.[47] It is also illegal to lie or sit on public sidewalks in the downtown commercial area during the day.[48] These ordinances—similar to those found in cities across the country[49]—substantially limit the space in which individuals experiencing homelessness may legally live and sleep. As a result, a nationwide survey of individuals experiencing homelessness revealed that more than 70% are unaware of a single place that is safe and legal for them to sleep outside.[50]

4. Sanitation Practices

Many U.S. cities have also prohibited basic sanitation practices that result from not having access to housing. Cities like Manteca, California, have passed ordinances criminalizing urination and defecation in public.[51] At the same time, many cities have restricted the ability of homeless individuals to access the already-limited supply of public restrooms by closing them at night or removing them all together.[52] This makes legally performing life-sustaining functions

---

43. MINNEAPOLIS, MINN., CODE OF ORDINANCES, ch. 244.60 (2015).

44. Dina Demetrius, *Mobile homes: Many 'hidden homeless' Americans living in vehicles*, AL JAZEERA (Oct. 10, 2014), http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/10/10/mobile-homes-manyhiddenhomelessamericanslivinginvehicles.html.

45. *See* Scott Keyes, *City Makes It Illegal To Sleep In Public In Effort To Crack Down On the Homeless*, THINK PROGRESS (Sept. 22, 2014, 8:40 AM), http://thinkprogress.org/economy/2014/09/22/3570021/florida-city-criminalizes-homelessness/.

46. *See* NAT'L LAW CTR. FOR HOMELESSNESS AND POVERTY, NO SAFE PLACE 18–20 (2014) [hereinafter NO SAFE PLACE].

47. TUCSON, ARIZ. CODE, ch. 21 § 3(4) (2015).

48. TUCSON, ARIZ. CODE, ch. 11 § 36 (2015).

49. *See* NO SAFE PLACE, *supra* note 46.

50. WESTERN REG'L ADVOCACY PROJECT, NATIONAL CIVIL RIGHTS OUTREACH FACT SHEET 2 (2014), http://wraphome.org/images/stories/hbr/NationalCivilRightsFactSheetDecember2014.pdf.

51. MANTECA, CAL. MUNICIPAL CODE, tit. 9, ch. 13.020 (2015).

52. *See* Bryce Covert, *California City Bans Homeless From Sleeping Outside: If They Leave, 'Then That's Their Choice'*, THINK PROGRESS (Nov. 10, 2014, 8:47 AM), http://thinkprogress.org/economy/2014/11/10/3590672/manteca-homeless/; Mike Brassfield, *Clearwater neighborhood longs for park toilets, closed to discourage homeless*, TAMPA BAY TIMES (Nov. 28, 2012), http://www.tampabay.com/news/localgovernment/clearwater-neighborhood-longs-for-park-toilets-closed-to-discourage/1263706.

difficult. A number of cities also ban bathing in public fountains, presenting yet another sanitation hurdle for people experiencing homelessness, as their access to showers is usually inadequate.[53]

5. Storage and Transportation of Belongings

Other cities have taken aim at the ability of individuals experiencing homelessness to transport and store their belongings. For example, Honolulu enacted an ordinance in 2010 that bans the use or storage of shopping carts—often used by individuals experiencing homelessness to store their property—in the city's public parks.[54] Similarly, Ft. Lauderdale has prohibited storage of any item of personal property on public property.[55] With few cities providing individuals experiencing homelessness with access to storage,[56] these ordinances place a serious burden on homeless people's ability to secure their valuable possessions, medications, and important documents like birth certificates and Social Security cards.[57]

C. The Recent Explosion of Criminalization Efforts

The number of cities passing ordinances that criminalize homelessness has increased rapidly since 2009.[58] A report by the National Law Center for Homelessness and Poverty (NLCHP) entitled "No Safe Place" demonstrates this increase in its survey of laws from 187 U.S. cities.[59] According to the NLCHP report, while city-wide bans on sleeping in public have not changed between 2011 and 2014, city-wide bans on camping in public have increased by 63%.[60] Similarly, city-wide bans on sitting or lying down in particular public places have increased by 43%.[61] Ordinances prohibiting sleeping in automobiles saw the most dramatic increase—119%—between 2011 and 2014.[62] In fact, more than 40% of cities now institute some form of ban on living or sleeping in automobiles.[63] Ordinances prohibiting panhandling have also increased. More than 140 cities

53. *See, e.g.*, SANTA MONICA, CAL. MUNICIPAL CODE, art. 5, ch. 08.600; *see also* Allison Arieff, *Showers on Wheels*, N.Y. TIMES (Jan. 15, 2015), http://www.nytimes.com/2015/01/17/opinion/showers-on-wheels.html?_r=0.

54. HONOLULU, HAW. REVISED ORDINANCES, § 10-1.2(a)(15) (2015).

55. FT. LAUDERDALE, FLA. CODE OF ORDINANCES, § 16-83(b) (2014).

56. *See* Eleanor Goldberg, *Providing Free Storage Could Be Key To Ending Homelessness*, HUFFINGTON POST (Aug. 29, 2014, 6:14 PM), http://www.huffingtonpost.com/2014/08/27/storage-ending-homelessness_n_5724610.html.

57. *See* Renee Lewis, *Homeless dragged down by belongings, as cities view keepsakes 'trash'*, AL JAZEERA (Nov. 7, 2014, 6:44 PM), http://america.aljazeera.com/articles/2014/11/7/homelessamericansdraggeddownbyneedtocarrybelongings.html.

58. Lauren Spurr, *Criminalization of homelessness on the rise in U.S. cities*, MSNBC (Jul. 18, 2014, 1:39 PM), http://www.msnbc.com/hardball/criminalization-homelessness-the-rise-us-cities.

59. NO SAFE PLACE, *supra* note 46, at 7–11.

60. *Id.* at 18.

61. *Id.* at 22.

62. *Id.* at 9.

63. *Id.*

have instituted an ordinance preventing the practice in particular places, a 20% increase since 2011.[64]

Unfortunately, this increase in the prevalence of ordinances that criminalize homeless activity is occurring at the same time as a dramatic decrease in affordable housing stock in cities across the country. In fact, the share of apartment stock in New York City labeled affordable declined from 58% to 44% between 2008 and 2011.[65] Similarly, only thirty-seven affordable units per 100 needed are available in the Los Angeles rental market.[66] Low-income housing programs—providing funds for struggling Americans to secure homes—are also drying up.[67]

III. FOOD-SHARING ORDINANCES

Over the past year, much attention has been given to a new, rapidly-expanding trend of criminalization: the adoption of strict regulations that essentially prohibit groups and individuals from feeding people experiencing homelessness. These ordinances are unique because, unlike the camping, sanitation, and panhandling ordinances directed at individuals experiencing homelessness, these ordinances are directed at service providers, groups, and individuals attempting to help those in need.

Much of the attention surrounding these ordinances resulted from the November 2014 arrest of Arnold Abbot by Ft. Lauderdale police after he fed individuals on a public beach.[68] Abbot, a ninety-year-old homeless advocate and founder of Love Thy Neighbor,[69] has been providing meals to over 1,400 individuals in Ft. Lauderdale who are experiencing homelessness every week since 1991.[70] His arrest was the result of the city's new ordinance strictly regulating the provision of food services in outdoor areas.[71] Although its

64. *Id.* at 21.

65. N.Y. OFFICE OF THE STATE COMPTROLLER, THE CONTINUED DECLINE IN AFFORDABLE HOUSING IN NEW YORK CITY 2 (2013), https://www.osc.state.ny.us/osdc/affordable_housing_3-2014.pdf.

66. Raphael Bostic & Tony Salazar, *L.A.'s real housing problem*, L.A. TIMES (Feb. 4, 2013), http://articles.latimes.com/2013/feb/04/opinion/la-oe-bostic-rental-housing-crisis-20130204.

67. *See* DOUGLAS RICE, CTR. FOR BUDGET AND POLICY PRIORITIES, SEQUESTRATION COULD DENY RENTAL ASSISTANCE TO 140,000 LOW-INCOME FAMILIES (2013), http://www.cbpp.org/sites/default/files/atoms/files/4-2-13hous.pdf.

68. Geetika Rudra, *Crackdown on Feeding Homeless Gets More People Arrested*, ABC NEWS (Nov. 9, 2014 6:03 PM), http://abcnews.go.com/US/crackdown-feeding-homeless-people-arrested/story?id=26793092. Although Abbot was not actually taken into custody, he was served with notices to appear in court and charged with a criminal offense. *See* Amy Sherman, *Jack Seiler says Arnold Abbott, 90-year-old, wasn't taken into custody for feeding homeless*, POLITIFACT FLA. (Nov. 17, 2014, 2:58 PM), http://www.politifact.com/florida/statements/2014/nov/17/jack-seiler/jack-seiler-says-arnold-abbott-90-year-old-wasnt-t/.

69. Love Thy Neighbor is an all-volunteer, interfaith organization committed to helping the homeless. *See About Us*, LOVE THY NEIGHBOR, http://lovethyneighbor.org/about-us/ (last visited Feb. 7, 2016).

70. *Id.*

71. FT. LAUDERDALE, FLA. ORDINANCE NO. C-14-42 (2014), https://fortlauderdale.legistar.com/LegislationDetail.aspx?ID=1944463&GUID=27834143-2A86-4467-9261-225B846FF1BB&Options=&Search (amending FT. LAUDERDALE, FLA. CODE OF ORDINANCES, § 47-18.31 (2014)).

ordinance has become well recognized due to strict enforcement, Ft. Lauderdale is just one of many cities that have instituted or proposed food-sharing prohibitions since 2007.[72]

According to a report from the National Coalition for the Homeless, at least twenty-one cities adopted food-sharing restrictions in 2013-2014.[73] Ten other cities introduced similar legislation during that same time period,[74] a 47% increase in such activity from 2010.[75] While there are various methods that cities employ to restrict or prohibit food-sharing, they can generally be divided into three categories: (a) restricting the use of public property, (b) instituting strict food-safety regulations, and (c) relocating food-sharing events.[76]

A. Restricting the Use of Public Property

The most popular form of restrictions on food-sharing are those instituted through limitations on use of public property.[77] One such restriction is requiring that groups or individuals receive a permit before distributing food in parks and other public areas. For example, Myrtle Beach, South Carolina, requires that an individual or group performing a "large group feeding" in a park or public facility apply for a permit.[78] Although the permit process likely does not present an insurmountable hurdle, the ordinance places an annual permit limit of one per individual or four per legally-recognized entity.[79] This greatly limits the opportunities of individuals or organizations looking to develop regularly-scheduled or widespread food-sharing programs.

Some cities impose substantial fees on those seeking food-sharing permits. Only 150 miles from Myrtle Beach, the city of Columbia, South Carolina, requires individuals and organizations to pay a weekly fee of up to $120 per hour when feeding twenty-five or more people in a public park.[80] Sacramento has proposed a similar ordinance that would require individuals or groups to pay

---

72. *See generally* THE NAT'L COAL. FOR THE HOMELESS, FOOD-SHARING REPORT: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED (2014) [hereinafter FOOD-SHARING REPORT], http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf; THE NAT'L COAL. FOR THE HOMELESS & THE NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS (2010) [hereinafter A PLACE AT THE TABLE], http://nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf.

73. FOOD-SHARING REPORT, *supra* note 72, at 4.

74. *Id.*

75. Eliza Barclay, *More Cities Make It Illegal To Hand Out Food To the Homeless*, NPR (Oct. 22, 2014, 2:05 PM), http://www.npr.org/blogs/thesalt/2014/10/22/357846415/more-cities-are-making-it-illegal-to-hand-out-food-to-the-homeless?utm_medium=RSS&utm_campaign=news.

76. FOOD-SHARING REPORT, *supra* note 72, at 8–19.

77. *Id.* at 4 (stating that twelve out of twenty-one cities had employed this method).

78. MYRTLE BEACH, S.C. CODE OF ORDINANCES, § 14-316(f) (2015).

79. § 14-316(f)(3).

80. COLUMBIA, S.C. CODE OF ORDINANCES, § 15-2-5 (2015); *see also* Scott Keyes, *'Exile The Homeless' City Now Require Permits and Large Fees To Feed The Homeless*, THINK PROGRESS (Feb. 13, 2014, 11:21 AM), http://thinkprogress.org/economy/2014/02/13/3288211/columbia-feeding-homeless-ban/.

between $100 and $1,250 depending on the number of people served.[81] These fees can be cost-prohibitive to many individuals or organizations that have limited budgets and simply distribute donated food.[82]

B. Strict Food Safety Regulations

Another common way of targeting those that feed individuals experiencing homelessness is to subject them to strict food safety regulations that typically apply to restaurants, food trucks, and other vendors selling food. This can be accomplished—as San Antonio has done—by simply not offering charities that feed individuals experiencing homelessness an exclusion from the health code.[83] By limiting health code and food permit requirements to those *selling* food rather than distributing it for free, cities can ensure food safety without creating hardships for those feeding individuals experiencing homelessness.[84]

For those attempting to share food, being subjected to food safety regulations is often an impossible obstacle. First, annual health permits can cost hundreds, if not thousands, of dollars.[85] Additionally, unlike restaurants, charity or home kitchens used to prepare meals often do not meet the necessary regulations in order to prepare hot food.[86] These regulations can often include physical requirements, like powered exhaust vents and mop sinks,[87] and personnel requirements, like having at least one person who is a certified food safety manager.[88] Once food is prepared, regulations greatly burden its transportation and distribution to homeless populations. Some regulations require that food distribution areas have access to hot and cold water, hand-washing stations, and portable bathrooms.[89]

Another method cities can use to subject charities to strict food regulations, is to institute outright bans on donated food on the grounds that the nutrition of the contents cannot be accurately verified. For example, the Bloomberg administration in New York City partially banned food donations from charities to shelters in 2012 because the city claimed that it was unable to monitor the salt, fat, and fiber in meals served to individuals experiencing homelessness.[90]

---

81. *See* FOOD-SHARING REPORT, *supra* note 72, at 8.

82. *See Frequently Asked Questions*, FOOD NOT BOMBS, http://www.foodnotbombs.net/faq.html (last visited Feb. 7, 2016) (describing Food Not Bombs' method for collecting and distributing food).

83. *Compare* SAN ANTONIO, TEX. CODE OF ORDINANCES, § 13.3 (2015) (defining food establishment); *with* NEV. REV. STAT. § 446.020 (2015) (defining food establishment).

84. *See* NEV. REV. STAT. § 446.020 (2015) (emphasis added).

85. *See* SAN ANTONIO, TEX. CODE OF ORDINANCES, § 13-27(a) (2015).

86. FOOD-SHARING REPORT, *supra* note 72, at 14.

87. SAN ANTONIO, TEX. CODE OF ORDINANCES, § 13-41 (2015).

88. DALLAS, TEX. CODE OF ORDINANCES, § 17-2.2(c)(1) (2015).

89. *See, e.g.*, FT. LAUDERDALE, FLA. ORDINANCE, C-14-42 (2014).

90. *Bloomberg Strikes Again: NYC Bans Food Donations To The Homeless*, CBS NEW YORK (Mar. 19, 2012, 8:33 PM), http://newyork.cbslocal.com/2012/03/19/bloomberg-strikes-again-nyc-bans-food-donations-to-the-homeless/.

C. Relocate Food-sharing Events

Finally, cities are attempting to limit food-sharing by relocating food-sharing events and sites.[91] Unfortunately, other cities outright prohibit, or have attempted to prohibit, food-sharing in some public locations, often those most convenient for engaging with the city's homeless population. In 2012, the City of Philadelphia issued regulations prohibiting all outdoor feeding in the city's parks and requiring that all programs move to indoor locations.[92] Advocates argued that the indoor feeding resources were insufficient to meet the needs of the city's homeless population and that individuals experiencing homelessness were reluctant to leave their belongings and spots in the park to travel to an indoor facility.[93] Similarly, Wilmington, North Carolina prohibits the distribution of food on city streets and sidewalks;[94] the Parks Department in Manchester, New Hampshire has attempted to prohibit food-sharing in a downtown park;[95] and Cincinnati park officials have attempted to prohibit food-sharing in a park across from the city's largest homeless shelter.[96]

IV. PUBLIC POLICY

Despite the arrests, fines, and effects of restricting food sharing, punishing individuals experiencing homelessness or those that attempt to help them is not the stated reason for instituting and enforcing these laws. This Part will attempt to (a) identify the stated public policy rationale behind the enactment of these restrictions, (b) analyze whether the goals of this policy can be accomplished through these various restrictions, and (c) propose alternatives to food-sharing criminalization.

A. Stated Rationale Behind Food-Sharing Restrictions

Advocacy groups have argued that these food-sharing prohibitions are merely efforts to hide a city's homeless population from residents and tourists.[97] These groups believe that business interests and sentiments of "NIMBYism" (Not in My Back Yard) are the real forces driving officials to adopt these

---

91. *See, e.g.*, *infra* notes 92–96 and accompanying text.

92. Chosen 300 Ministries v. Philadelphia, No. 12-3159, 2012 WL 3235317, at *2 (E.D. Pa. Aug. 9, 2012) (in findings of fact).

93. *Id.*

94. WILMINGTON, N.C. CODE OF ORDINANCES ch. 11, art. III, § 11-47 (2005).

95. FOOD-SHARING REPORT, *supra* note 72, at 10; *see also Homeless advocates, city dispute weekend meals*, WMUR (May 17, 2013, 11:46 PM), http://www.wmur.com/news/nh-news/homeless-advocates-city-dispute-weekend-meals/20200016.

96. A PLACE AT THE TABLE, *supra* note 72, at 10.

97. Arthur Delaney, *How A Traveling Consultant Helps America Hide The Homeless*, HUFFINGTON POST (Mar. 9, 2015, 9:12 PM), http://www.huffingtonpost.com/2015/03/09/robert-marbut_n_6738948.html.

measures.[98] Mayors and city officials have repeatedly cited public safety, health, and dignity as the rationales behind food-sharing restrictions, despite the oppressive appearance of the ordinances. During the adoption of Philadelphia's prohibition on food-sharing in 2012, Mayor Michael Nutter stated that "[p]roviding to those who are hungry must not be about opening the car trunk, handing out a bunch of sandwiches, and then driving off into the dark and rainy night."[99] Similarly, Ft. Lauderdale Mayor Jack Seiler stated that food-sharing restriction "allow[] the homeless to be fed in a more safer [sic], secure, sanitary setting."[100]

In addition to claims that these ordinances promote health, safety, and dignity, many cities argue that prohibiting food-sharing is part of a larger comprehensive strategy to tackle homelessness. This is premised on the belief that giving food to homeless people is actually counterproductive. According to Dr. Robert Marbut,[101] a homelessness consultant who has assisted cities like Fresno and Sarasota:[102]

> External activities such as "street feeding" must be redirected to support the transformation process. In most cases, these activities are well-intended efforts by good folks, however these activities are very enabling and often do little to engage homeless individuals. Street feeding programs without comprehensive services actually increase and promote homelessness. Street feeding groups should be encouraged to co-locate with existing comprehensive service programs.[103]

These efforts to restrict food-sharing are merely an outgrowth of Marbut's principles. If individuals cannot get food on the street, the argument goes, they will be incentivized to seek out food from locations established by the city, such as shelters, where they can get both a warm meal and wrap-around services.[104]

B. Efficacy of Restrictions

Improving public safety and furthering the health and dignity of individuals experiencing homelessness—as well as getting people out of homelessness

---

98. *See* FOOD-SHARING REPORT, *supra* note 72, at 15.

99. *City To Ban Street-Corner Feedings of Homeless*, CBS PHILLY (Mar. 14, 2012, 11:30 PM), http://philadelphia.cbslocal.com/2012/03/14/nutter-announces-ban-on-outdoor-feeding-of-homeless/.

100. *Interview with John Seiler, Mayor of Fort Lauderdale, FL*, CNN NEW DAY (Nov. 11, 2014), https://vimeo.com/111549126.

101. *See Dr. Robert Marbut Jr.*, MARBUT CONSULTING (2015), http://www.marbutconsulting.com/Dr.html.

102. *See Projects*, MARBUT CONSULTING (2015), http://www.marbutconsulting.com/Projects.html.

103. *Seven Guiding Principles*, MARBUT CONSULTING (2015), http://www.marbutconsulting.com/Seven_Guiding_Principles_FQ.html (quoting from "External Activities Must be Redirected or Stopped").

104. *See Projects, supra* note 102.

altogether—are admirable goals for any city. But are the varied policies of criminalizing food-sharing an effective means for securing these goals? Probably not.[105]

Concerning a city's desire to increase safety, there appears to be little evidence that individuals experiencing homelessness are a threat to the public.[106] According to a study of Baltimore's homeless population, although homeless individuals are more likely to engage in non-violent and non-destructive crimes than non-homeless individuals, non-homeless persons are more likely than homeless persons to engage in crimes against persons or property.[107]

In fact, there is a growing trend of violence by non-homeless individuals *against* the homeless population.[108] In 2013 alone, it was reported that there were 109 violent attacks against individuals experiencing homelessness, eighteen of which resulted in death.[109] That number of violent attacks represents an astounding 24% increase in attacks from 2012.[110]

Similar to public safety, health and food safety are legitimate concerns for a city, and the regulation of the storage, preparation, and delivery of food is a critical consumer protection function. Again, however, the application of health permits and food safety regulations to charitable organizations and others attempting to feed the homeless appears to be a solution in search of a problem. Some cities enforcing these food safety regulations have never actually received any reports of homeless individuals getting sick from shared food.[111] Additionally, these regulations do not extend to personal, family, or potluck meals prepared in a private home or church,[112] likely because these groups lack any incentive to cut corners regarding the safety of their friends or family. Food prepared for a community or family event is analogous to individuals feeding the homeless, since they are only doing so to benefit those receiving the food; no incentive exists for them to cut corners on food safety. While isolated incidents of cruelty through unsanitary feeding have occurred,[113] food safety regulations—although likely to diminish charitable activity[114]—are unlikely to stop these bad actors from targeting individuals experiencing homelessness for mistreatment.

---

105. *See infra* Part IV.B.

106. *See* Meredith Bolster, *Myths about the homeless, Part Two,* BANGOR DAILY NEWS (Apr. 9, 2011, 5:04 PM), http://bangordailynews.com/2011/04/08/health/myths-about-the-homeless-part-2/.

107. *Id.*

108. NAT'L COAL. FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST THE HOMELESS IN 2013 at 6 (2014), http://nationalhomeless.org/wp-content/uploads/2014/06/Hate-Crimes-2013-1.pdf.

109. *Id.* at 6.

110. *Id.*

111. FOOD-SHARING REPORT, *supra* note 72, at 15.

112. *See, e.g.*, NEV. REV. STAT. § 446.020 (2015) (stating that the definition of a "food establishment" excludes private home and religious organizations).

113. Mark Horvath, *Why You Should Support Regulating the Public Feeding of Homeless People*, HUFFINGTON POST (Aug. 8, 2012, 9:08 AM), http://www.huffingtonpost.com/mark-horvath/public-feeding-homeless-regulating_b_1804687.html (describing college students putting feces on sandwiches and giving them to the homeless).

114. *See supra* Part III.B.

A number of cities have also cited dignity as a reason for food-sharing ordinances. According to these cities, getting fed indoors with access to shelter and other services is more dignified than getting fed in a park or other public place.[115] While this might be true in theory, the practice can be quite different. For example, after St. Petersburg criminalized some homeless activities, the city opened a wrap-around service shelter as part of Robert Marbut's consulting model.[116] Unfortunately, that shelter, located twenty miles from downtown, is an old prison facility next to the current county jail.[117] The shelter is operated by the county sheriff's department with the help of private security guards, and rule breakers are required to sleep outside in an exposed courtyard, even when it rains.[118] According to a former resident, those running the shelter see the residents as inmates rather than homeless.[119] This hardly sounds more dignified than any alternative arrangement.

It is also questionable whether using these food-sharing prohibitions will incentivize individuals to participate in programs with comprehensive services that can get them on a pathway out of homelessness. Outdoor food-sharing programs in public places may be the only way some individuals experiencing homelessness are able to access food.[120] There are a number of reasons that individuals experiencing homelessness might not be able to make it to an indoor food-sharing program with services, including work conflicts, illness, disability, and a lack of transportation.[121] Additionally, some cities pass ordinances to incentivize individuals experiencing homelessness to use resources that have not yet been established because they lack the indoor feeding capacity to adequately meet the hunger needs of the homeless population.[122] When cities deprive individuals experiencing homelessness of food, they are forced to expend all of their energy on obtaining food rather than improving other aspects of their lives.[123]

Although it is questionable whether food-sharing prohibitions will accomplish the cities' stated goals, it is likely that these ordinances—combined with criminalization measures that target camping, panhandling, and other activity—*will* accomplish the cynical goal suspected by the homeless advocacy community: making the homeless population less visible in downtown and tourist

115. *See, e.g.*, Matt Pearce, *Homeless feeding bans: Well-meaning policy or war on the poor?*, L.A. TIMES (Jun. 11, 2012), http://articles.latimes.com/2012/jun/11/nation/la-na-nn-homeless-feeding-bans-20120611 (highlighting the statement of Mark McDonald, spokesman for Philadelphia Mayor Michael Nutter).

116. Delaney, *supra* note 97; *See generally* Robert G. Marbut, Presentation of Findings and Action Plan Recommendations to the City of St. Petersburg (2014), http://www.stpete.org/socialservices/docs/FollowupReviewOfHomelessnessReportInStPeteFINAL_June_8__2014.pdf.

117. Delaney, *supra* note 97.

118. *Id.*

119. *Id.*

120. A PLACE AT THE TABLE, *supra* note 72, at 9.

121. *Id.*

122. FOOD-SHARING REPORT, *supra* note 72, at 6–7.

123. FOOD-SHARING REPORT, *supra* note 72, at 7.

areas.[124] When individuals experiencing homelessness cannot engage in any life-sustaining activities across entire sections of a city, they are naturally pressured to go elsewhere. Unfortunately, hiding individuals experiencing homelessness, however convenient for businesses, tourists and other city residents, neither helps those in need nor tackles the root causes of homelessness.

C. Alternative Policies

If the food-sharing policies being implemented by cities are not going to be successful at achieving their stated goals, what alternative policies should be introduced? First, cities should collaborate with food-sharing programs on issues of hunger and homelessness[125] rather than forcing them to adapt or abandon their work under the weight of these food-sharing prohibitions.[126] One example of successful collaboration is Dining with Dignity,[127] a St. Augustine food-sharing program led by various churches, restaurants, and charities that provides meals to the city's homeless population every day of the year.[128] While the program initially provided food in an area that caused concern among businesses and city leaders, the city manager and program leaders collaborated to find a new downtown food-sharing site that was convenient and helpful to all parties: individuals experiencing homelessness, the program, and downtown businesses.[129] Although this recommendation is seemingly simple and somewhat obvious, soliciting the input of those who work with individuals experiencing homelessness every day would secure much-needed expertise and save cities money, time, and public scorn.[130]

Another alternative to criminalizing food-sharing would be to improve the access of individuals experiencing homelessness to the Supplemental Nutrition Assistance Program (SNAP), the national food help program for low-income

---

124. Teresa Wiltz, *Do New Laws Help or Hurt the Homeless?*, PEW CHARITABLE TRUSTS (Nov. 17, 2014), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/11/17/do-new-laws-help-or-hurt-the-homeless.

125. A PLACE AT THE TABLE, *supra* note 72, at 4.

126. *See supra* Part III.

127. *See Dining with Dignity*, ST. FRANCIS EPISCOPAL CHURCH, http://www.saintfrancisepiscopalchurch.org/ministries-outreach/local-and-domestic-outreach/dining-with-dignity/ (last visited Feb 7, 2016).

128. *Dining with Dignity serves homeless*, ST. AUGUSTINE RECORD (Sept. 16, 2011, 12:06 AM), http://staugustine.com/living/religion/2011-09-16/dining-dignity-serves-homeless#.VUjo0CFVikp.

129. FOOD-SHARING REPORT, *supra* note 72, at 21.

130. Many of these cities have faced lawsuits regarding these food-sharing ordinances. *See, e.g.*, Bod Norman, *Lawsuit filed against city of Fort Lauderdale over homeless feeding ordinance*, WPLG MIAMI (Nov. 20, 2014), http://www.local10.com/news/lawsuit-filed-against-city-of-fort-lauderdale-over-homeless-feeding-ordinance/29842890; Kate Shellnut, *Homeless ministry says Dallas food ordinance restricts their religious freedom*, HOUSTON CHRONICLE (Nov. 10, 2011), http://blog.chron.com/believeitornot/2011/11/homeless-ministry-says-dallas-food-ordinance-restricts-their-religious-freedom/. Additionally, many cities, like Ft. Lauderdale, have faced heavy criticism from the media, faith communities, and poverty advocates. *See, e.g.*, *Interview with John Seiler, Mayor of Fort Lauderdale, FL*, CNN NEW DAY (Nov. 11, 2014), https://vimeo.com/111549126.

individuals and families.[131] Although most individuals experiencing homelessness are likely eligible for SNAP, an estimated 63% are not receiving benefits.[132] This low enrollment rate is likely due to the numerous information and eligibility barriers that individuals experiencing homelessness face. These individuals have often been misinformed about SNAP benefit requirements, believing, for example, that they must have a permanent address to qualify.[133] Similarly, they often face traditional barriers—such as lack of access to transportation—that can impact their ability to apply and use SNAP benefits.

If their states participate in the program, cities should also implement the SNAP Restaurant Meals Program (SNAP RMP).[134] Even if an individual experiencing homelessness secures SNAP benefits, the program's restrictions can greatly limit their effectiveness. For example, benefits cannot be used to buy hot food at a grocery store or market.[135] Since individuals experiencing homelessness often do not have access to means of food preparation, storage, or refrigeration, purchasing many perishable foods is often not an option.[136] SNAP RMP allows individuals experiencing homelessness to pay for fresh, hot meals at participating USDA-approved restaurants with their SNAP benefits.[137] SNAP RMP could be very helpful in reducing both food insecurity among the homeless population and the need for food-sharing programs, since a new alternative for hot meals will be available. California, one of three states currently participating in the program, already has more than 477 restaurants participating in Los Angeles County alone.[138]

If, as argued by many cities, the goal of food-sharing restrictions is about solving the condition of being homeless altogether, then those cities should consider implementing a "housing first" approach rather than criminalizing efforts to feed people. Housing first is among the best ways to help those who are chronically homeless get off the streets and onto a sustainable path to permanent housing.[139] As the name suggests, this approach provides permanent, affordable housing to individuals experiencing homelessness as quickly as possible,[140] without regard to income, sobriety, or participation in treatment programs.[141]

---

131. *Supplemental Nutrition Assistance Program (SNAP)*, FOOD AND NUTRITION SERVICE, USDA (Nov. 20, 2014), http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap.

132. UNITED STATES GEN. ACCOUNTING OFFICE, HOMELESSNESS: BARRIERS TO USING MAINSTREAM PROGRAMS 20 (2000) [hereinafter BARRIERS], http://www.gao.gov/new.items/rc00184.pdf.

133. *Id.*

134. A PLACE AT THE TABLE, *supra* note 72, at 4.

135. *Supplemental Nutrition Assistance Program (SNAP): Eligible Food Items*, FOOD AND NUTRITION SERVICE, USDA (Jul. 18, 2014), http://www.fns.usda.gov/snap/eligible-food-items.

136. BARRIERS, *supra* note 132, at 20.

137. *See CHC's Position on the SNAP Restaurant Meals Program*, CONGRESSIONAL HUNGER CTR. (Sept. 16, 2011), http://www.hungercenter.org/news/chc%E2%80%99s-position-on-the-snap-restaurant-meals-program/; *see also* 7 C.F.R. § 271.2 (2015) (defining eligible foods).

138. A PLACE AT THE TABLE, *supra* note 72, at 4.

139. Gary A. Benjamin, *Homelessness: A Moral Dilemma and an Economic Drain*, 13 J. L. SOC'Y 391, 402 (2012).

140. *Housing First*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (2013), https://www.usich.gov/solutions/housing/housing-first.

141. *Id.* (discussing past requirements for getting housing assistance).

Once housed, individuals are provided with the social services and support needed to achieve stability and pursue personal goals.[142] Salt Lake City has seen extraordinary success from providing housing first.[143] Since Utah adopted the program in 2005 as part of its ten-year plan to end chronic homelessness, the state has seen a 72% decrease in the number of chronically homeless individuals.[144]

Although this list is not exhaustive, implementing one or more of these alternatives to food-sharing criminalization could have a positive impact on how homelessness and hunger are being addressed.

V. REPEALING CURRENT FOOD-SHARING RESTRICTIONS AND PREVENTING FUTURE IMPLEMENTATION

This Note has identified the various forms of food-sharing restrictions, questioned the public policy behind those restrictions, and proposed a number of alternatives to accomplishing cities' stated goals. With the understanding that these restrictions place a burden on charitable organizations and individuals, and that they do not result in better outcomes for those experiencing homelessness, only one question remains: how do individuals challenge current restrictions and prevent future ones from being implemented by cities under pressure from businesses, tourists, and the like? This Part will (a) describe the varied results of litigation and (b) argue that implementing a "homeless bill of rights" in states and cities would be an effective way to counter and prevent these restrictions.

A. Varied Results of Litigation

Challenging city ordinances that require food-sharing restrictions in state and federal court has proved successful in some cases. In 2007, the U.S. District Court for Nevada invalidated a Las Vegas ordinance that prohibited the feeding of the indigent in city parks as unconstitutionally void for vagueness.[145] Similarly, in 2012, the U.S. District Court for Eastern Pennsylvania held that a Philadelphia ordinance prohibiting the feeding of individuals experiencing homelessness in Fairmount Park—a collection of sixty-three parks that is the

142. *Id.*

143. Kara Dansky, *This City Came Up With a Simple Solution to Homelessness: Housing*, NATION (Oct. 23, 2014), http://www.thenation.com/article/184017/city-came-simple-solution-homelessness-housing.

144. Scott Carrier, *Room for Improvement*, MOTHER JONES (Mar. 2015), http://www.motherjones.com/politics/2015/02/housing-first-solution-to-homelessness-utah. Utah's housing first approach includes access to food and other services. *See* Candi Helseth, *Compassionate Collaboration Reduces Homelessness in Utah,* RURAL MONITOR (Nov. 18, 2014), https://www.ruralhealthinfo.org/rural-monitor/housing-first-utah/ ("In addition to case management, housing and outreach services partners offer transportation, child care, employment training and support, substance abuse treatment, counseling, and medical, legal, food and essential services.").

145. Sacco v. Las Vegas, Nos. 2:06-CV-0714-RCJ-LRL, 2:06-CV-0941-RCJ-LRL, 2007 WL 2429151, at 3 (D. Nev. 2007).

largest municipally-operated park system in the United States[146]—was an unconstitutional violation of religious charities' right of free exercise.[147]

The results of litigation challenging regulatory restrictions—rather than across-the-board prohibitions—have been less promising. In 2011, Orlando's food-sharing permit ordinance, which required organizations engaged in group feedings in public parks to obtain a permit, and limited an organization to two park-specific permits per year, was upheld by the Eleventh Circuit.[148] Petitioners challenged the ordinance on the grounds that it violated the First Amendment guarantees of free speech and free exercise.[149] The Court found that the ordinance violated neither the Free Exercise Clause, since the ordinance was rational and of neutral applicability,[150] nor the Free Speech Clause, since the ordinance was a reasonable time, place, and manner restriction.[151] In 2006, the Ninth Circuit rejected a facial challenge to a Santa Monica ordinance requiring food distribution in the city's parks or city hall lawn to comply with state health and safety standards, holding that the conduct was not integral to, or commonly associated with, expression.[152]

These cases demonstrate the limited success of litigation to defeat food-sharing ordinances. The litigation approach is further complicated by the variety of methods cities employ to restrict food sharing. A city determined to keep charities from feeding individuals experiencing homelessness will always be able to find permitted alternatives if a preferred method is defeated in litigation.

B. Homeless Bills of Rights

One alternative to costly, unpredictable litigation as a strategy to defeat these restrictions and prevent their future implementation is for cities and states to adopt "homeless bill of rights" legislation. In 2012, Rhode Island became the first state to pass such legislation.[153] The bill protected individuals experiencing homelessness from being discriminated against with respect to freedom of movement, access to municipal services, employment, emergency medical care, voting, confidentiality of personal records, and privacy rights in personal property.[154] In 2013, similar laws were adopted in Connecticut and Illinois in an effort to protect those states' homeless populations.[155]

---

146. Chosen 300 Ministries v. Philadelphia, No. 12-3159, 2012 WL 3235317, at *1 (E.D. Penn. Aug. 9, 2012).

147. *Id.* at 27.

148. *See* First Vagabonds Church of God v. Orlando, 638 F.3d 756 (11th Cir. 2011).

149. *Id.* at 759.

150. *Id.* at 763, *aff'g in part* First Vagabonds Church of God v. Orlando, 610 F.3d 1274 (11th Cir. 2010).

151. *Id.* at 762.

152. Santa Monica Food Not Bombs v. Santa Monica, 450 F.3d 1022, 1032 (11th Cir. 2006).

153. Michael F. Drywa, Jr., *Rhode Island's Homeless Bill of Rights: How Can the New Law Provide Shelter from Employment Discrimination?*, 19 ROGER WILLIAMS U. L. REV. 716, 717 (2014).

154. *Id.*

155. Jonathan Sheffield, *A Homeless Bill of Rights: Step by Step From State to State*, 19 PUB. INT. L. REP. 8, 10 (2013).

If correctly written, these homeless bills of rights could be very effective at rendering void current food-sharing laws and preventing their future implementation in cities around the country. Although charities and advocates have not yet challenged food-sharing restrictions in the states where these homeless bills of rights exist, advocates have expressed concern that, absent specific language protecting the right to receive food, these laws may not be adequate to defeat ordinances targeting those that feed individuals experiencing homelessness.[156]

Homeless bill of rights legislation introduced in California in 2015 attempts to remedy this issue by providing additional language to protect food-sharing.[157] This draft legislation states that every person in the state has the basic human and civil right to "eat, share, accept, or give food in any public space in which having food is not otherwise generally prohibited."[158] Advocates should use this language as a model when campaigning for states and cities to implement similar legislation so that food-sharing restrictions can be defeated and prevented.

The passage of homeless bill of rights legislation, however, is unlikely to be a panacea for the issues facing those without shelter. While the legislation would be effective at voiding municipal ordinances criminalizing homeless activity or activity meant to assist the homeless population, accomplishing the actual goals of a homeless bill of rights might be more challenging because of the practical constraints of judicial enforcement and administrative implementation.[159] For example, an individual experiencing homelessness denied a right guaranteed under this proposed legislation would have to seek recourse in the court.[160] This would require people who are homeless to not only be aware of their rights, but also to have the resources to seek appropriate relief for an alleged violation. Fortunately, this scenario is less applicable to food-sharing restrictions since ordinances often prohibit activity by institutional bodies, such as non-profit and religious organizations, which are likely better-versed in the law. Additionally, the primary barriers to sharing food—criminal penalties, land-use restrictions, and permitting processes[161]—will be easily addressed by the passage of a homeless bill of rights.

---

156. Jake Grovum, *Activist Aim to Bolster Rhode Island's Homeless Bill of Rights*, PEW CHARITABLE TRUSTS (Nov. 12, 2012), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/11/12/activists-aim-to-bolster-rhode-islands-homeless-bill-of-rights.

157. S.B. 608, 2015 Leg., 2015–2016 Reg. Sess. (Cal. 2015), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0601-0650/sb_608_bill_20150227_introduced.html.

158. *Id.* at 53.81.b(3).

159. Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 421–23 (2015) (discussing the practical challenges associated with the implementation of a homeless bill of rights).

160. Rhode Island's Homeless Bill of Rights provides that a civil action may be brought alleging violation of the Homeless Bill of Rights. 34 R.I. GEN. LAWS § 34-37.1–4 (2015). The court may award appropriate injunctive or declaratory relief, actual damages, and reasonable attorneys' fees and costs to a prevailing plaintiff. *Id.*

161. *See supra* Parts II and III.

CONCLUSION

Cities across the country will likely continue to consider ordinances that criminalize laudable charitable efforts to feed individuals experiencing homelessness. This particularly virulent form of homelessness criminalization, which fails to achieve its oft-stated goal of improving the health and dignity of the homeless population, is only beneficial to those wishing to hide or remove that population from business districts or tourism sites.

These ordinances—which may be doing real harm to the nutritional needs of those without a home—should be repealed and prevented, and the numerous alternatives to accomplishing cities' stated goals should be implemented. One option is for cities and states to adopt of homeless bills of rights that are food-sharing-inclusive. Though a homeless bill of rights will likely not get people off the street and into affordable housing, it will at a minimum ensure that individuals experiencing homelessness can receive a hot meal from a person willing to provide it.

Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?

Marc-Tizoc González*

* Professor of Law, St. Thomas University School of Law, mtgonzalez@stu.edu, @marctizoc, http://www.foodsharinglaw.net [https://perma.cc/MT34-9LWF]. This Article is the second in a series that critically analyzes the criminalization of people who publicly share food with those who hunger. I again thank all the scholars, lawyers, and activists who supported my first Article in the series, Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 231 (2015) (lead article). For helpful comments on this Article, I also thank Gordon Butler, Amy J. Cohen, Brendan Conley, Richard Delgado, Teague González, Angela P. Harris, Ernesto Hernández-López, John Kang, Christine Klein, Thomas Kleven, Beth Kregor, Tamara Lawson, Stephen Lee, Beth Lyon, Audrey McFarlane, Osha Neumann, Adam P. Romero, Amy Ronner, Sarah Schindler, Francisco Valdes, Patricia E. Wall, Jeff Weinberger, and Brenda Williams. Finally, I thank the outstanding research assistants who have supported this multiyear project: Jessica Biedron, Gracy Crumpton, Marina G. González, Cynthia Lane, Patricia J. Peña, Jesse S. Peterson, and Gwendolyn Richards.

I dedicate this Article to D, an African American elder whom I met in December 2006 while helping to establish the Oakland, California, office of the Alameda County Homeless Action Center. As a staff attorney therein, I represented D in his successful claim for federal disability benefits, defended his liberty against several charges of "quality of life" criminal infractions, and generally counseled him as he contended with the socio-legal conditions of extreme poverty and racism. When we last saw each other, in June 2011, I tried to thank him for all that he had taught me. He replied with a grin, "We're just getting started!"

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

– Anatole France (April 16, 1844, to October 12, 1924)[1]

> On the morning of Saturday, August, 24 [2013], Love Wins [Ministries] showed up at Moore Square [in Raleigh, North Carolina] at 9:00 a.m., just like we have done virtually every Saturday and Sunday for the last six years. We provide, without cost or obligation, hot coffee and a breakfast sandwich to anyone who wants one. We keep this promise to our community in cooperation with five different, large suburban churches that help us with manpower and funding.
>
> On that morning three officers from Raleigh Police Department prevented us from doing our work, for the first time ever. An officer said, quite bluntly, that if we attempted to distribute food, we would be arrested. . . .
>
> When I asked the officer why, he said that he was not going to debate me. "I am just telling you what is. Now you pass out that food, you will go to jail."[2]

---

1. Justice Frankfurter preferred this English translation. *See* Griffin v. Ill., 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (citation omitted); *see also* ANATOLE FRANCE, LE LYS ROUGE 117 (4th ed. 1894) [hereinafter FRANCE, LE LYS ROUGE], https://fr.wikisource.org/wiki/Le_Lys_rouge/VII [https://perma.cc/29ST-ZTAW] (In the original French: "Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain."); ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed., Winifred Stephens trans., 6th ed. 1921) [hereinafter FRANCE, THE RED LILY], https://books.google.com/books?id=2-YLAAAAIAAJ [https://perma.cc/R2CT-3NZK] ("At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."); FRANCE, THE RED LILY, *supra*, at ch. VII (Project Gutenberg trans.), http://www.gutenberg.org/files/3922/3922-h/3922-h.htm#link2HCH0007 [https://perma.cc/WL8L-RY77] ("The poor must work for this, in presence of the majestic equality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread."). I thank activist, artist, and attorney Osha Neumann for introducing me to this quote in 2007 while mentoring me in the legal defense of an elderly Black man whom police arrested for begging in Oakland, California, under former CAL. PENAL CODE section 647(b)(6), which prohibited "[w]illfully disturbing others on or in any system facility or vehicle by engaging in boisterous or unruly behavior."

2. Hugh Hollowell, *Feeding Homeless Apparently Illegal in Raleigh, NC*, LOVE WINS MINISTRIES (Aug. 24, 2013), http://lovewins.info/2013/08/feeding-homeless-apparently-illegal-in-raleigh-nc/ [https://perma.cc/LSP3-GA4L].

INTRODUCTION

Food is necessary for human survival and fundamental to human flourishing.[3] In the United States, however, over forty-eight million people (more than fifteen percent of the populace) suffered "food insecurity" in 2014.[4] Despite these human realities and socio-legal conditions, over the past decade the National Coalition for the Homeless and the National Law Center on Homelessness and Poverty have documented fifty-seven U.S. cities across twenty-five states that have proscribed or otherwise regulated the unauthorized provision of food to hungry people in public.[5]

To criminalize people for publicly sharing food with those who hunger may seem absurd, cruel, or unusual,[6] and indeed, numerous people have challenged these

3. *Accord* Dylan Clark, *The Raw and the Rotten: Punk Cuisine*, 43 ETHNOLOGY 19, 19 (2004) ("Levi-Strauss (1964) saw the process of cooking food as the quintessential means through which humans differentiate themselves from animals, through which we manufacture culture and 'civilization.'"); Michael Gurven & Adrian V. Jaeggi, *Food Sharing*, *in* EMERGING TRENDS IN THE SOC. AND BEHAV. SCI. 1, 4 (Robert Scott & Stephen Kosslyn eds., 2015) ("Among humans, the necessity for sharing [food] in order to provision infants, juveniles, and adolescents—and abundant inter-household sharing among adults—has led to a relatively high intrinsic propensity to share with others, and a high degree of sensitivity to cues of recipient need.") (citation omitted).

4. ALISHA COLEMAN-JENSEN, MATTHEW P. RABBITT, CHRISTIAN A. GREGORY & ANITA SINGH, ECON. RES. SERV., U.S. DEP'T OF AGRIC., ERR-194, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2014, at 6, 10 (2015) [hereinafter HOUSEHOLD FOOD SECURITY IN THE UNITED STATES].

5. NAT'L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 4–5, 25 (2014) [hereinafter SHARE NO MORE], http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf [https://perma.cc/WCJ7-V496] (reporting that twenty-one cities established restrictions on sharing food publicly from January 2013 to October 2014 and that ten other cities were considering such legislation, and also depicting a map of fifty-seven cities, across twenty-five states, that have attempted to ban, relocate, or otherwise restrict such activity); *see also* NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS 10–14 (2010) [hereinafter A PLACE AT THE TABLE], http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf [https://perma.cc/QPH5-VAZ3] (discussing municipal laws in twelve U.S. cities that "at some point limited the use of public parks for sharing food with homeless people"); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8, 24–25 (2014) [hereinafter NO SAFE PLACE], http://nlchp.org/documents/No_Safe_Place [https://perma.cc/P5VJ-Z2MQ] (discussing restrictions on food sharing in seventeen cities); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, FEEDING INTOLERANCE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS vi, 2–3, 7–8, 10–18, 20 (2007) [hereinafter FEEDING INTOLERANCE], http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf [https://perma.cc/B47S-XQ8A] (listing and summarizing food-sharing restrictions in twenty-two U.S. cities). *See generally infra* App. 2 U.S. Cities with Anti-Food-Sharing Laws (grouping the cities by state).

6. *Cf.* Statement of Interest of the United States at 3–4, Bell v. City of Boise, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015), https://www.justice.gov/crt/file/761211/download [https://perma.cc/GWS5-28KF] (arguing that if insufficient shelter space makes it impossible for some homeless individuals to comply with city ordinances that prohibit camping, lodging, or sleeping in public, then enforcement of such ordinances would amount to the criminalization of homelessness in violation of the Eighth Amendment).

laws.[7] Adapting the usage preferred by some of the people who publicly share food with those who hunger, I use the phrase, "the food-sharing cases" to describe when people challenge their criminalization under "anti-food-sharing laws,"[8] and I use the phrase "those who hunger" to evoke the Biblical Beatitudes of the Sermon on the Mount: (viz., "Blessed are they who hunger and thirst for righteousness, for they will be satisfied").[9] Since 1993, legal challenges to these laws have predominantly sounded in federal courts, which have produced over a dozen published and unpublished judicial opinions, including several from the U.S. Courts of Appeals for the Ninth and Eleventh Circuits.[10] Only a few challenges have sounded in state courts,[11] and several recent food-sharing cases have resolved entirely in the court of public opinion.[12]

---

7. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: ADVOCACY MANUAL 132–41 (2011), [hereinafter CRIMINALIZING CRISIS], https://www.nlchp.org/documents/Criminalizing_Crisis_Advocacy_Manual [https://perma.cc/P37C-PSW4] (summarizing twelve published federal judicial opinions regarding such laws); *see also infra* App. 1. The Litigated Food-Sharing Cases (listing the cases chronologically).

8. *Accord* KEITH MCHENRY, HUNGRY FOR PEACE: HOW YOU CAN HELP END POVERTY AND WAR WITH FOOD NOT BOMBS 11, 14, 19–20, 153 (2015), https://www.foodnotbombs.net/hungry_for_peace_book.pdf [https://perma.cc/AF6C-ENKY] (discussing how one of the eight co-founders of the international Food Not Bombs movement understands the ethics of sharing food); SHARE NO MORE, *supra* note 5, at 2, 4 (discussing restrictions on food sharing); Nathan Pim, *Food Sharings Shut Down 11.2.2014, Hunger Strike Declared*, RESIST FT. LAUDERDALE HOMELESS HATE LAWS (Nov. 2, 2014), http://homelesshatelaws.blogspot.com/2014/11/food-sharings-shut-down-1122014-hunger.html [https://perma.cc/QN8K-5YWH] (discussing the initial enforcement of a 2014 City of Fort Lauderdale law against people who publicly share food on the sidewalk by a city park); *see* González, *supra* note *, at 233.

9. *Matthew* 5:6.

10. *See* CRIMINALIZING CRISIS, *supra* note 7, at 132–42 (summarizing twelve published federal judicial opinions regarding food-sharing laws from 1993 until 2011); *see also infra* App. 1. The Litigated Food-Sharing Cases (listing the cases chronologically).

11. *See, e.g.*, Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs., 712 P.2d 914, 921 (Ariz. 1985) (affirming the trial court's preliminary injunction against a church program that provided one free meal a day to indigent persons and holding that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort, or convenience constitutes a public nuisance, notwithstanding no violation of criminal or zoning laws); Abbott v. City of Fort Lauderdale (*Abbott II*), 783 So. 2d 1213, 1214 (Fla. Dist. Ct. App. 2001) (affirming the trial court's final judgment that Fort Lauderdale's anti-food-sharing law violated the plaintiffs' rights under the Florida Religious Freedom Restoration Act of 1998, FLA. STAT. ANN. § 761.03 *et seq.* (West 2016)); Wilkinson v. Lafranz, 574 So. 2d 400 (La. Ct. App. 1991) (dismissing plaintiffs' appeal of the denial of its motion for a preliminary injunction against a church's soup kitchen as untimely filed, but finding that plaintiffs' claim for a permanent injunction remained pending).

12. *See, e.g.*, Colin Campbell, *Emails: Legal Advice Sought to "Clean Up" Moore Square*, NEWS & OBSERVER (Sept. 13, 2013), http://www.newsobserver.com/news/local/community/midtown-raleigh-news/article10279163.html [https://perma.cc/MQB6-VBUX] (reporting that the City Council of Raleigh, North Carolina, ordered police to temporarily stop enforcing rules prohibiting food sharing after social media and traditional media uncovered city employees' emails regarding "how to push out charities and suspected criminals to 'clean up' Moore Square").

While the human practice of sharing food is literally prehistoric,[13] and myriad relevant historical antecedents exist,[14] the first wave of modern anti-food-sharing laws in the United States emerged in the 1980s and spread throughout the 1990s. In this period, some cities used their police power to proscribe food sharing on publicly and *privately* owned properties as a regulation of health, parks, nuisance, or zoning.[15] Since the 2000s, however, the second wave of modern anti-food-sharing laws has featured a surge of laws that typically threaten a misdemeanor crime against people who share food with those who hunger while on public (city-owned) properties—such as parks, sidewalks, and streets—without first obtaining the

13. Gurven & Jaeggi, *supra* note 3, at 1 ("Among hunter-gatherers, whose lifeways most closely resemble those of ancestral humans, the direct transfer of food items among individuals (hereafter 'food sharing') is an important and ubiquitous form of cooperative behavior.").

14. *See, e.g.*, Shamhart v. Morrison Cafeteria Co., 32 So. 2d 727, 728 (Fla. 1947) (enjoining the appellee cafeteria owner from creating a public nuisance when his customers' queue on the sidewalk routinely blocked the entrance to appellant's drug store, where the appellee used the entire space of his premises for cooking food and seating customers); HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 123–72 (1965) (discussing First Amendment jurisprudence that the Court created as the National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP LDF) defended students and others who protested racial segregation through protest marches and lunch counter sit-ins); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 1–3, 64–70 (2010) (interpreting the civil rights lunch counter sit-in protests of the 1960s under the theory of property outlaws and altlaws); THE DR. HUEY P. NEWTON FOUND., THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS 30–39 (David Hilliard ed., 2008) (discussing the Free Breakfast for Schoolchildren Program and Free Food Program); William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2334–40 (2002) (discussing how civil rights litigation spurred the Court to evolve First Amendment jurisprudence to protect expressive association and expressive conduct); González, *supra* note *, at 235 n.4 (referencing gendered and racialized socio-legal conflicts concerning the preparing and providing of food to striking California cotton pickers in 1933) (I thank John Kang for encouraging me to read Kalven's classic book and Thomas Kleven for encouraging me to consider relevant public nuisance cases, which led me to *Shamhart*.).

15. *See, e.g.*, McHenry v. Agnos (*McHenry I*), 983 F.2d 1076 (9th Cir. 1993) (unpublished table decision) (affirming the district court's summary judgment in favor of municipal defendants, where the plaintiff sued under 42 U.S.C. § 1983 (2012), alleging that a San Francisco superior court injunction against his distribution of food violated his civil rights); W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C. (*W. Presbyterian Church II*), 862 F. Supp. 538, 547 (D.D.C. 1994) (granting summary judgment for plaintiff church, which argued that its "program to feed the homeless . . . constitutes religious activity protected by the First Amendment of the constitution and the Religious Freedom Restoration Act of 1993 and that application of the District of Columbia's zoning regulations to the feeding program impermissibly infringes upon plaintiffs' right to free exercise of their religion" and enjoining the District of Columbia from interfering with the plaintiffs' program, "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance."); *Armory Park Neighborhood Ass'n*, 712 P.2d at 921 (affirming the trial court's preliminary injunction against a church program that provided one free meal a day to indigent persons and holding that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort, or convenience constitutes a public nuisance, notwithstanding no violation of criminal or zoning laws); *Wilkinson*, 574 So. 2d 403 (dismissing plaintiffs' appeal of the denial of its motion for a preliminary injunction against a church's soup kitchen as untimely filed but finding that plaintiffs' claim for a permanent injunction remained pending).

proper permit.[16] Some municipal legislatures promulgated these criminalization efforts in the years preceding the Great Recession of December 2007 to June 2009;[17] others enacted such laws during the Great Recession,[18] and despite the uneven economic recovery,[19] this trend has yet to stop.[20]

The food-sharing cases implicate a number of constitutional doctrines and statutory rights and thus merit scholarly attention on the basis of their legal complexity alone. For example, in 2011, the Eleventh Circuit of the U.S. Court of Appeals created an inter-circuit split in authority when it upheld the City of Orlando's anti-food-sharing law.[21] Where the Eleventh Circuit affirmed Orlando's law "as a reasonable time, place, or manner restriction and as a reasonable regulation of expressive conduct,"[22] in 2006 the Ninth Circuit found that a community events ordinance that regulated diverse uses of public property, including food sharing,

16. *Accord* SHARE NO MORE, *supra* note 5, at 20–21; A PLACE AT THE TABLE, *supra* note 5; CRIMINALIZING CRISIS, *supra* note 7, at 132–41; NO SAFE PLACE, *supra* note 5, at 26; FEEDING INTOLERANCE, *supra* note 5, at 7; *see, e.g.*, First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God IV*), 610 F.3d 1274, 1280 n.4 (11th Cir. 2010), *vacated & rev'd en banc*, 616 F.3d 1229, 1230 (11th Cir. 2010) ("Violations of the Ordinance are punishable by a fine of up to $500 or 60 days of imprisonment."); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1029 (9th Cir. 2006) (quoting SANTA MONICA, CA., MUNICIPAL CODE § 5.06.020 (2017), adopted October 22, 2002, which provides, "Any person violating this Section shall be guilty of a misdemeanor which shall be punishable by a fine not exceeding One Thousand Dollars per violation, or by imprisonment in the County Jail for a period not exceeding six months, or by both such fine and imprisonment.").

17. *See* CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, CURRENT POPULATION REPORTS P60-252, at 21 (2015) (discussing the recession concept and showing that the eighteen-month Great Recession was the longest of the eleven recessions on record since 1948); FEEDING INTOLERANCE, *supra* note 5, at 2 ("In the past few years, many cities have adopted a new tactic—one that targets not only homeless persons but also individual citizens and groups who attempt to share food with them.").

18. *See* A PLACE AT THE TABLE, *supra* note 5, at 2–3, 10–17 (discussing anti-food sharing laws in twenty-one cities).

19. *See* Emmanuel Saez, *U.S. Top One Percent of Income Earners Hit New High in 2015 Amid Strong Economic Growth*, WASH. CTR. FOR EQUITABLE GROWTH (July 1, 2016), http://equitablegrowth.org/research-analysis/u-s-top-one-percent-of-income-earners-hit-new-high-in-2015-amid-strong-economic-growth/ [https://perma.cc/N39E-DRFS] (reporting that U.S. families in the bottom ninety-nine percent of income earners have recovered only about sixty percent of their income losses due to the Great Recession).

20. *See* SHARE NO MORE, *supra* note 5, at 4–5 (stating that seven cities were still in the process of trying to pass anti-food-sharing laws at the time of the report).

21. González, *supra* note *, at 233–34, 260–77 (discussing the split in authority between the Ninth and Eleventh Circuits of the U.S. Courts of Appeals regarding the food-sharing cases).

22. First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God V*), 638 F.3d 756, 758–59 (11th Cir. 2011) (en banc), *rev'g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008) (upholding an anti-food-sharing law "as a reasonable time, place, or manner restriction and as a reasonable regulation of expressive conduct," which required a permit to conduct a "large group feeding," within public parks located in a two-mile radius of city hall, with no more than two permits available per year to a permittee for any particular park, and where "large group feeding" was defined as, "an event intended to attract, attracting, or likely to attract twenty-five (25) or more people . . . for the delivery or service of food.") (citation omitted).

was unconstitutional for not being narrowly tailored under the First Amendment.[23] In district courts, other food-sharing cases have featured diverse arguments over the free exercise of religion, peaceable assembly, expressive association, and equal protection.[24] Also, some food-sharing cases have implicated federal or state Religious Freedom Restoration Acts,[25] and one has featured the Religious Land Use and Institutionalized Persons Act of 2000.[26] Finally, several of the earliest food-sharing cases featured nuisance law.[27]

Beyond legal doctrines, the food-sharing cases merit scholarly attention because socio-legal conflicts over sharing food in public implicate numerous important jurisprudential principles and socio-legal theories. For example, anti-food-sharing laws might be cognized as one of the new set of laws, regulations, policies, and practices that cities have recently deployed to effect the banishment, exclusion, or exile of socially marginal classes of people (e.g., people who "aggressively beg" or "the homeless").[28] Alternatively, the food-sharing cases might

23. *Santa Monica Food Not Bombs*, 450 F.3d at 1040, 1043 ("[A] narrowly tailored permit requirement must maintain a close relationship between the size of the event and its likelihood of implicating government interests," and finding that a city department's instruction undermined an ordinance's narrow tailoring where it mandated, "that 'any activity or event which the applicant intends to advertise in advance via radio, television, and/or widely-distributed print media shall be deemed to be an activity or event of 150 or more persons.'") (citation omitted).

24. *See* González, *supra* note *, at 233–34, 260–77.

25. *See, e.g.*, Chosen 300 Ministries, Inc. v. City of Phila., No. 12-3159, 2012 WL 3235317, at *26–27 (E.D. Penn. Aug. 9, 2012) (applying the Pennsylvania Religious Freedom Protection Act (PRFPA), 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401 *et seq.* (West 2012), and issuing a preliminary injunction against the defendant city); Big Hart Ministries Ass'n, Inc. v. City of Dall., No. 3:07-CV-0216-P, 2011 WL 5346109, at *5 (N.D. Tex. Nov. 4, 2011) (deciding that the plaintiffs had presented enough evidence to withstand summary judgment on their claim under the Texas Religious Freedom Restoration Act (TRFRA), TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2017)); First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God II*), 2008 WL 2646603 (M.D. Fla. June 26, 2008) (finding no violation of the Florida Religious Freedom Restoration Act (FRFRA), FLA. STAT. ANN. § 761.01 *et seq.* (West 2016)), *rev'd on other grounds* 638 F.3d 756, 758–59 (11th Cir. 2011) (en banc); Stuart Circle Par. v. Bd. of Zoning Appeals of Richmond, 946 F. Supp. 1225 (E.D. Va. 1996) (applying the least restrictive means test of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* (2012), and issuing a temporary restraining order against the defendant); Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (finding no violation of RFRA); *W. Presbyterian Church II*, 862 F. Supp. at 547 (granting summary judgment for plaintiff church, which claimed that defendants' enforcement of zoning laws violated the RFRA); *Abbott II*, 783 So. 2d 1213 (enjoining the defendant from enforcing its park rule because it violated FRFRA).

26. Pac. Beach United Methodist Church v. City of San Diego, No. 07-CV-2305-LAB-PCL, 2008 WL 7257244 (S.D. Cal. Apr. 18, 2008) (Order of Dismissal).

27. *See, e.g.*, *W. Presbyterian Church II*, 862 F. Supp. at 547; *Armory Park Neighborhood Ass'n*, 712 P.2d at 921; *Wilkinson*, 574 So. 2d 403; Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981 (N.Y. 1989).

28. *See, e.g.*, KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 10 (2010) ("[T]he new legal tools we analyze here entail banishment: the legal compulsion to leave specified geographic areas for extended periods of time."); Randall Amster, *Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness*, 30 SOC. JUST. 195, 195 (2003) ("[P]atterns of spatial exclusion and marginalization of the impoverished that have existed throughout modern history have reemerged."); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996);

be understood to resurface old yet ongoing debates, and socio-legal struggles, over homelessness and liberty.[29] Similarly, evaluating the food-sharing cases might help to nuance new theories of "pedestrianism," "property outlaws," the "right to the city," and the "urban commons."[30] Alternatively, they might recapitulate past and present contests over the definitions and limits of police power, private and public property, and public space.[31] Further, some anti-food-sharing laws seem to have responded to recent mass urban protests and social movements like Occupy Wall

---

Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.–C.L. L. REV. 1 (1997); Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TULANE L. REV. 631 (1994).

29. *See, e.g.*, Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 5–6 (1996); Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. POVERTY L. & POL'Y 145 (1999); Nate Vogel, *The Fundraisers, the Beggars, and the Hungry: The First Amendment Rights to Solicit Donations, to Beg for Money, and to Share Food*, 15 U. PA. J.L. & SOC. CHANGE 537 (2012); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991); David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487 (1994).

30. *See, e.g.*, NICHOLAS BLOMLEY, RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW (2011); DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION (2012); ANASTASIA LOUKAITOU-SIDERIS & RENIA EHRENFEUCHT, SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE (2009); DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003); PEÑALVER & KATYAL, *supra* note 14, at 12–18 (theorizing acquisitive and expressive disobedience to property laws under a theory of "property outlaws and altlaws," social actors who play an important role in the evolution and transfer of property entitlements between owners and nonowners); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011); David Harvey, *The Right to the City*, 53 NEW LEFT REV. 23 (2008); Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435 (2006).

31. *See, e.g.*, STEPHEN CARR, MARK FRANCIS, LEANNE G. RIVLIN & ANDREW M. STONE, PUBLIC SPACE (1992); MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE OF LOS ANGELES (1990); MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE 3 (2004) ("[T]he privatization of public space undermines the opportunities for free speech . . . the dependence of free speech upon spatial practices is not always clear."); MITCHELL, *supra* note 30; THE POLITICS OF PUBLIC SPACE (Setha Low & Neil Smith eds., 2006); Ellickson, *supra* note 28; Ernesto Hernández-López, *LA's Taco Truck War: How Law Cooks Food Culture Contests*, 43 U. MIAMI INTER-AM. L. REV. 233, 237–39 (2011) (arguing that debates over the legality and illegality of food truck vendors in Los Angeles "reflect larger cultural contests about local and neighborhood identity, local economics, and public space . . . . These arguments focus on how neighborhoods view themselves and the image they project, whether it's in perceived property values, excluding businesses or outside customers, or prejudices concerning the working class and immigrants.") (citations omitted); *see also* Hernández-López, *supra*, at pt. III.c, 262–66 ("Food Trucks Raise Old Questions about Public Space"); Audrey G. McFarlane, *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 1 (2003); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Lawrence J. Vale, *Securing Public Space*, 17 PLACES 38, 38 (2005), http://escholarship.org/uc/item/7203x7dk [https://perma.cc/DR99-7WCK] (theorizing "the securescape—the uneasy confluence of security, landscape, and escape from public contact").

Street,[32] and they bear resemblance to the "ugly laws" of an earlier era.[33] Finally, the food-sharing cases implicate the international human right to food and related notions of food justice, food oppression, and food sovereignty.[34] Engaging with such theories promises great enjoyment and illumination.[35] This Article, however, focuses on existing First Amendment jurisprudence, in particular the Free Exercise Clause and related statutes, to explore what limits might (and should) exist on the power of local government to prohibit, permit, or otherwise regulate people's diverse uses of publicly and privately owned properties that are generally accessible to the public.

The Article proceeds in two major Parts. Guided by anthropological concepts of the "emic" and the "etic,"[36] Part I describes how two different classes of people describe their practices of sharing food in public as well as how cities cognize such activities when they set out to criminalize, or otherwise regulate, them. I distinguish between people who publicly share food for religious, versus political (in the social,

32. *See, e.g.*, Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339 (2012); Sarah Kunstler, *The Right to Occupy: Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989 (2012); Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155 (2012); *see also About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ [https://perma.cc/573C-CJJ4] (last updated 2017).

33. *See* SUSAN SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC (2009); Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.–C.–L. L. REV. AMICUS *1 (2011).

34. *See, e.g.*, CULTIVATING FOOD JUSTICE (Alison Hope Alkon & Julian Agyeman eds., 2011); ROBERT GOTTLIEB & ANUPAMA JOSHI, FOOD JUSTICE (2010); ERIC HOLT-GIMÉNEZ & RAJ PATEL, FOOD REBELLIONS!: CRISIS AND THE HUNGER FOR JUSTICE (2009); KIM KESSLER & EMILY CHEN, FOOD EQUITY, SOCIAL JUSTICE, AND THE ROLE OF LAW SCHOOLS: A CALL TO ACTION (2015), https://law.ucla.edu/centers/social-policy/resnick-program-for-food-law-and-policy/publications/food-equity-social-justice-and-the-role-of-law-schools/ [https://perma.cc/4EXL-PTLT]; Ahmed Aoued, *The Right to Food: The Significance of the United Nations Special Rapporteur*, *in* INTERNATIONAL POVERTY LAW: AN EMERGING DISCOURSE, at 87 (Lucy A. Williams ed., 2006); Christopher J. Curran & Marc-Tizoc González, *Food Justice as Interracial Justice: Urban Farmers, Community Organizations and the Role of Government in Oakland, California*, 43 U. MIAMI INTER–AM. L. REV. 207 (2011); Andrea Freeman, *Fast Food: Oppression through Poor Nutrition*, 95 CAL. L. REV. 2221 (2007); Carmen G. Gonzalez, *The Global Politics of Food: Introduction to the Theoretical Perspectives Cluster*, 43 U. MIAMI INTER–AM. L. REV. 75 (2011).

35. Constrained in numerous ways (e.g., time, ongoing analysis, the law review format), this Article does not delve deeply into how socio-legal theories illuminate the food-sharing cases. Rather, this Article focuses on applying First Amendment Free Exercise of Religion jurisprudence to the food-sharing cases. I plan to elaborate the historical, jurisprudential, and theoretical importance of the food-sharing cases in a book on the subject, tentatively titled: *The Food Sharing Cases: Criminalizing Charity and Deterring Organic Solidarity in the United States.*

36. My understanding of these terms derives from graduate study under visual anthropologist Peter Biella, in particular his lecture of May 10, 2000 at San Francisco State University. In the discipline of anthropology, the "emic" concept may be understood to regard people's "native" usage of language and other cultural practices. In contrast, the "etic" concept regards the outsider specialist's interpretation of such practices. The concepts derive from the linguistic conceptualization of the phonemic and phonetic aspects of language. *See, e.g.*, Alan Dundes, *From Etic to Emic Units in the Structural Study of Folktales*, 75 J. AMER. FOLKLORE 95, 96, 101–03 (1962) (adapting the emic and etic concepts, innovated by KENNETH L. PIKE, LANGUAGE IN RELATION TO A UNIFIED THEORY OF THE STRUCTURE OF HUMAN BEHAVIOR (1954), to the study of folklore).

not electoral, sense) reasons, and elucidate the distinctive meanings that they impute to the public sharing of food. Drawing on published judicial opinions, as well as popular media reportage of select food-sharing cases, Part I also presents a partial history of food sharing in the United States from the late 1980s, after which the Ninth Circuit issued an unpublished opinion regarding a food-sharing case in San Francisco, California, through the most recent food-sharing controversy to be litigated in federal court, which emerged at the end of 2014 in Fort Lauderdale, Florida.[37] I detail salient features of food-sharing practices and anti-food-sharing laws to provide readers with a strong foundation to understand the contemporary practice of sharing food with hungry people in public and how different U.S. cities have proscribed this activity over the past several decades. In turn, this basis should enable readers to better evaluate how courts should apply First Amendment jurisprudence to the food-sharing cases.

Part II then explores how various courts have adjudicated the food-sharing cases under the Free Exercise Clause and related statutes. In other work,[38] I have discussed the split in authority between the Ninth Circuit and Eleventh Circuit of the U.S. Courts of Appeals regarding how to apply several free speech doctrines, including the regulation of expressive conduct and putatively content neutral time, place, and manner restrictions, to the food-sharing cases.[39] Differences regarding how courts have applied free speech doctrines are critically important for pending and future food-sharing cases, but many courts have resolved food-sharing cases under the Free Exercise Clause and related statutes like the federal Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[40] Also, state Religious Freedom Restoration Acts (state RFRAs) have provided the most consistent way by which courts have disposed of anti-food-sharing laws.[41] Therefore, Part II discusses how courts have adjudicated various food-sharing cases under the Free Exercise Clause, RFRA, state RFRAs, and RLUIPA. I then conclude the Article by arguing for U.S. cities to stop criminalizing the charitable sharing of food in public.

---

37. *See McHenry I*, 983 F.2d 1076 (unpublished table decision); Complaint for Declaratory and Injunctive Relief and Damages: Preliminary Statement, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (*Fort Lauderdale Food Not Bombs I*), No. 0:15-CV-60185 (S.D. Fla. Jan. 29, 2015) [hereinafter Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*]. On the concept of "partial history," see ROBERT F. BERKHOFER, BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE 38–39 (1995) (theorizing how the paradigm of normal history understands partial histories as contextualized within a "Great Story" about the past).

38. *See* González, *supra* note *, at 233–34, 260–77 (discussing the inter-circuit split).

39. *Compare First Vagabonds Church of God V*, 638 F.3d at 758–59 (en banc), *rev'g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008), *with Santa Monica Food Not Bombs*, 450 F.3d 1022.

40. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), *codified at* 42 U.S.C. § 2000cc *et seq.*; Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), *codified at* 42 U.S.C. § 2000bb *et seq.*

41. *See, e.g.*, *W. Presbyterian Church II*, 862 F. Supp. 538; *Stuart Circle Par.*, 946 F. Supp. 1225. *But see Daytona Rescue Mission*, 885 F. Supp. 1554 (applying RFRA but finding that the city code did not substantially burden the petitioners' free exercise of religion).

I. CONTESTED (EMIC AND ETIC) MEANINGS OF SHARING FOOD IN PUBLIC

Before discussing how courts have applied First Amendment jurisprudence to food-sharing cases, it is important to establish a baseline understanding of the practice of publicly sharing food with hungry people. Therefore, here I discuss how people who share food publicly explain what they do. For example, religious food-sharing activists (i.e., people who publicly share food with those who hunger because of their religious beliefs) often discuss their conduct in terms of "charity" and "ministry."[42] In contrast, political food-sharing activists (i.e., people who share food because of their political beliefs) often expressly disavow the label of charity and instead describe their conduct in terms of "solidarity" and "mutual aid."[43] Theories and practices of charity, mutual aid, and solidarity have long and distinctive histories that are beyond the scope of this Article. Nevertheless, the emic meanings ascribed by people who publicly share food with those who hunger merit serious consideration, especially by municipal legislators who consider promulgating an anti-food-sharing law and judges who consider the validity of such a law. Indeed, as discussed below in Part II, the food-sharing cases almost always feature a conflict not only about the conduct of publicly sharing food with those who hunger, but also about the meaning of that conduct. Therefore, in addition to discussing how religious and political food-sharing activists explain themselves, this Part also details how various cities cognize food sharing in terms of "food distribution," "homeless feeding," "large group feeding," "outdoor public serving of food," and/or as a "social service, social service facility, or outdoor food distribution center."[44]

Understanding the emic meanings of food sharing is important in at least three ways. First, from a legal perspective, the self-understandings of people who publicly share food may clarify how courts that consider food-sharing cases should apply First Amendment jurisprudence. Understanding the reasons proffered by religious and political food-sharing activists for what they do is essential to a meaningful adjudication of the constitutionality of any particular anti-food-sharing law, especially under First Amendment free speech doctrines like content discrimination, expressive conduct, and viewpoint discrimination, but also including the free exercise of religion and whether a law constitutes a "substantial burden" on the exercise of religion. Second, from a practical perspective, not understanding the emic meanings ascribed by people who practice religious charity or political solidarity around the public sharing of food makes it more likely than not that anti-food-sharing laws will fail to deter public food sharing because food-sharing

42. *See infra* Section I.A.

43. *See infra* Section I.B.

44. *See, e.g.*, *First Vagabonds Church of God V*, 638 F.3d at 759 (large group feeding); *Santa Monica Food Not Bombs*, 450 F.3d at 1030 (food distribution); *Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at *1 (outdoor public serving of food); Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37 (social service, social service facility, and outdoor food distribution center); Findings of Fact and Conclusions of Law at 32, *Big Hart Ministries Ass'n*, No. 3:07-CV-0216-P (N.D. Tex. Mar. 25, 2013) [hereinafter Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*] (homeless feeding).

activists' underlying motivations will remain. Thus, understanding the terms under which different food-sharing activists understand their actions would benefit legislators considering the amendment, enactment, or repeal of an anti-food-sharing law. Finally, from a theoretical perspective, critically apprehending food-sharing activists' emic understandings provides insights into their "legal consciousness" and practices of "popular constitutionalism."[45]

A. Religious Charity or Ministry

Selecting from several of the food-sharing cases that featured religiously motivated activists, this Section represents how they typically discussed their activity under terms of charity and ministry.[46] In one of the first food-sharing cases litigated in federal court, *Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia*, the plaintiffs argued that their program of providing food on church premises for people who were homeless was "an integral part of their religious beliefs."[47] Collaborating with the then-new nonprofit corporation, Miriam's Kitchen, Inc., the church began its program to feed homeless people in 1984, "in response to the dramatic upsurge in homelessness experienced by [the people of Washington, D.C.] in the early 1980s."[48] Originally, the program provided bag lunches; later it served breakfast in the church basement.[49] Five years later, the church decided to relocate from 1906 H Street, N.W. to 2401 Virginia Avenue, N.W. in the Foggy Bottom neighborhood, and in December 1990 the church applied for city permission to build its new building.[50]

The District of Columbia Zoning Administrator issued the building permit, but the permit application "made no specific reference to the operation of a feeding program at the site."[51] Construction on the new church began in June 1992, but in

45. *See, e.g.*, Austin Sarat, *"... The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 343–44 (1990) ("I suggest that the legal consciousness of the welfare poor is a consciousness of power and domination, in which the keynote is enclosure and dependency, and a consciousness of resistance, in which welfare recipients assert themselves and demand recognition of their personal identities and their human needs."); Kendall Thomas, Rouge et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2609 (1992) ("The perspective of popular historical method permits us to see the extent to which the history of constitutionalism in America, viewed from its underside, can be plotted as a story of a body of law born of sustained struggle, the outcome of painful, passionate political and ideological contests between subordinate groups and dominant institutions.") (citation omitted).

46. *E.g.*, *Big Hart Ministries Ass'n*, 2011 WL 5346109, at *3-4; *Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at *19; *First Vagabonds Church of God V*, 638 F.3d at 758, *rev'd en banc, rev'g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008); *Daytona Rescue Mission*, 885 F. Supp. at 1556; *W. Presbyterian Church II*, 862 F. Supp. at 540; *Stuart Circle Par.*, 946 F. Supp. at 1228.

47. W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C. (*W. Presbyterian Church I*), 849 F. Supp. 77, 79 (D.D.C. 1994) (granting the plaintiffs' motion for preliminary injunction).

48. *W. Presbyterian Church II*, 862 F. Supp. at 540 (granting the plaintiffs' motion for summary judgment).

49. *Id.*

50. *Id.*

51. *Id.*

August 1993 the zoning administrator received complaints from a local neighborhood commission and association regarding the church's "plans to provide food for the needy,"[52] and in September 1993, the zoning administrator notified the church in writing "that its feeding program was not a use permitted as a matter of right in a residential zone and was a prohibited use in the special purpose zone."[53] The following month, the plaintiffs appealed to the Board of Zoning Adjustment, but after holding two public hearings, the board voted in March 1994 to uphold the zoning administrator's decision.[54] The plaintiffs thus litigated the matter, filing suit in April 1994 and obtaining a preliminary injunction later that month.[55]

Five months later, in analyzing the plaintiffs' motion for summary judgment, District Judge Stanley Sporkin noted, "The plaintiffs maintain that ministering to the needy is a religious function rooted in the Bible, the constitution of the Presbyterian Church (USA) and the Church's bylaws."[56] Judge Sporkin's opinion also quoted several Biblical passages, which supported "the view that the Church's ministry is not merely a matter of personal choice but is a requirement for spiritual redemption."[57] For example, "For I was an hungred [sic], and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in."[58] Similarly, "If a person is righteous and does what is lawful and right . . . and gives his bread to the hungry and covers the naked with a garment . . . he is righteous, he shall surely live, says the Lord God."[59] Finally:

> What does it profit, my brethren, if a man says he has faith, but has not works? Can his faith save him? If a brother or sister is ill-clad and in lack of daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what does it profit? So faith by itself, if it has no works, is dead.[60]

Judge Sporkin's opinion also referenced Islam, Hinduism, and Judaism as similarly promoting "the concept of acts of charity as an essential part of religious worship."[61] Reserving discussion of the legal issues at play in the case for Part II.B.1, *infra*, here it should suffice to say that Judge Sporkin concluded that:

> The plaintiffs here seek protection for a form of worship their religion mandates. It is a form of worship akin to prayer. . . . The Church may use its building for prayer and other religious services as a matter of right and

52. *Id.*
53. *Id.* (citation omitted).
54. *Id.* at 541–42.
55. *Id.* at 540; *see also W. Presbyterian Church I*, 849 F. Supp. at 79 (granting the plaintiffs' motion for preliminary injunction).
56. *W. Presbyterian Church II*, 862 F. Supp. at 544.
57. *Id.* at 544 n.3.
58. *Id.* at 544 n.3 (quoting *Matthew* 25:35).
59. *Id.* (quoting *Ezekiel* 18:5–9).
60. *Id.* (quoting *James* 2:14–17).
61. *Id.* at 544.

> should be able, as a matter of right, to use the building to minister to the needy.[62]

Using terms of religious charity, ministry, spiritual redemption, works of faith, and worship, one of the first modern food-sharing cases, *Western Presbyterian Church*, thus represented the emic meanings ascribed by the plaintiffs to their provision of food to hungry people. As we shall see, religious food-sharing activists have often used such terms to describe what they believe they are doing when they publicly share food.

A hundred miles away, another of the early food-sharing cases featuring religious activists raised similar socio-legal issues and surfaced similar emic meanings. In *Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia*, the plaintiffs were "a partnership comprised of six churches of different denominations located within about five blocks of each other in the Stuart Circle area of the City of Richmond."[63] Some fifteen years prior to the litigation, the Stuart Circle Parish started "a Meal Ministry, which offers worship, hospitality, pastoral care, and a healthful meal to the urban poor of Richmond on Sunday afternoons."[64] First located in the Pace Memorial Methodist Church, the Meal Ministry eventually outgrew that location and came to attract about "one hundred people, some homeless, some not, but nonetheless needy."[65] Therefore, the plaintiffs shifted the Meal Ministry about half a mile west to the First English Evangelical Lutheran Church.[66] Shortly thereafter, the City of Richmond Zoning Administrator received complaints "about unruly behavior, public urination and noise in the area" and, in a pattern that is typical of the first wave of modern food-sharing cases, the administrator quickly determined that the Meal Ministry violated the city zoning ordinance.[67] In early November 1996, the Board of Zoning Appeals upheld the administrator's determination, and the plaintiffs quickly sued for injunctive relief.[68]

Later that month, when analyzing the plaintiffs' motion for a temporary restraining order, District Judge Robert E. Payne noted, "Plaintiffs view the Meal Ministry as the physical embodiment of a central tenet of the Christian faith, ministering to the poor, the hungry and the homeless in the community."[69] Referencing witness testimony, Judge Payne noted "that the feeding of the urban poor in Richmond is an extension of their morning worship . . . . Indeed, caring for the poor has been central to the Methodist faith, and was a formal teaching of John

62. *Id.* at 547.

63. *Stuart Circle Par.*, 946 F. Supp. at 1228.

64. *Id.*

65. *Id.*

66. *Id.* According to Google Maps, the Pace Memorial Methodist Church is located at 700 West Franklin Street, Richmond, Virginia 23320, and the First English Evangelical Lutheran Church is at 1603 Monument Avenue, Richmond, Virginia 23220. The distance between them is 0.6 miles.

67. *Id.*

68. *Id.*

69. *Id.* at 1228–29.

Wesley, the founder of Methodism."[70] He referenced another witness who "testified that one of the most important facets of her [Catholic] religion is sharing in the Eucharist, which is the equivalent of sharing in a meal with God and the congregation."[71] He continued, "Sharing a meal with the homeless is a natural extension of this practice."[72] Finally, Judge Payne referenced an expert witness in Christian theology, who "pointed to passages in the Bible in both the Old and New Testament, including the Sermon on the Mount and the sharing of the loaves and fishes."[73] Judge Payne thus concluded "that, for the plaintiffs, the feeding of those less fortunate constitutes methods of obtaining a blessing and the means to redemption."[74] He explicated:

> [T]he plaintiffs showed that it was central to their faith to invite the homeless into the church in order to establish a climate of worship. . . . Moreover . . . it is the gathering together as a community to share in the meal that constitutes the essence of their faith.[75]

In the context of the food-sharing cases, therefore, *Stuart Circle Parish* adds to and extends the emic meanings expressed by the plaintiffs in *Western Presbyterian Church*. For the *Stuart Circle Parish* plaintiffs, ministry to "the poor, the hungry, and the homeless in the community" within the largest of the Stuart Circle Parish churches was not merely about fulfilling the alimentary needs of people who were hungry but was also a religious way to "obtaining a blessing and the means to redemption."[76] Indeed, it was "the gathering together as a community to share in the meal that constitute[d] the essence of their faith."[77] *Stuart Circle Parish* thus surfaces an important, yet often underappreciated, insight that I herein elaborate: too often commentators reduce the people who benefit from public food sharing to "the homeless."[78] As noted in *Stuart Circle Parish* and *Western Presbyterian Church*, however, the religious food-sharing activists believed that they benefited greatly from sharing food with hungry people. Obtaining a blessing or redemption may not amount to pecuniary consideration, but it is a profound benefit to those who profess their religion as they share food in communion.

---

70. *Id.* at 1236.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* Judge Payne then quoted *Matthew* 25:35, 40–43, 46, which begins, "I was hungered and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger and ye took me in."

75. *Id.* at 1239.

76. *Cf. id.* at 1228–29; *id.* at 1236.

77. *Id.* at 1239.

78. *See, e.g.*, Adam Nagourney, *As Homeless Line Up for Food, Los Angeles Weighs Restrictions*, N.Y. TIMES (Nov. 25, 2013), http://www.nytimes.com/2013/11/26/us/as-homeless-line-up-for-food-los-angeles-weighs-restrictions.html [https://web.archive.org/web/20170323135126/http://www.nytimes.com/2013/11/26/us/as-homeless-line-up-for-food-los-angeles-weighs-restrictions.html] (focusing on homeless people while reporting on an emerging controversy around food sharing in Los Angeles, California).

Additionally, as Judge Payne noted, the *Stuart Circle Parish* plaintiffs shared food with approximately "one hundred people, some homeless, some not, but nonetheless needy."[79] Naming the multiple classes of people who benefited from the Meals Ministry is important because the people who ate a weekly Sunday afternoon meal in the First English Evangelical Lutheran Church were not exclusively homeless. As I have elsewhere argued, the number of people who are homeless in the United States is a very small proportion of the massive numbers of people who are poor and/or hungry.[80] Depending on the estimate, homeless people number from "3.5% to 7.5% of the population of poor people in the United States."[81] I highlight this fact not to argue that homeless people are less important because of smaller numbers but rather to underscore that food sharing implicates a substantially larger number of people—namely the approximately fifteen percent of the U.S. population that is food insecure.[82]

Religious food-sharing activists feature in several other food-sharing cases,[83] but brevity militates against representing here all of the religious food-sharing cases. Instead, I discuss other religious food-sharing cases *infra* at Part II, detailing how courts have applied First Amendment free exercise of religion, and related statutory, jurisprudence. In the next section, I discuss the food-sharing cases that feature politically motivated activists. The case law often features a particular group, Food Not Bombs, but other politically motivated food-sharing activist groups exist.[84]

---

79. *Stuart Circle Par.*, 946 F. Supp. at 1228.

80. González, *supra* note *, at 239 (arguing that poverty should not be conflated with homelessness and noting that the U.S. Census counted almost 46.5 million poor people in 2012 in comparison to the 649,917 people whom the U.S. Interagency Council on Homelessness estimated in 2012 as "without a place to call home on any given night and more than 1.59 million [people who] spent at least one night in emergency shelter or transitional housing over the past year") (citation omitted). As noted earlier, in 2014 over forty-eight million people in the United States were food insecure. *See* COLEMAN-JENSEN ET AL., *supra* note 4, at 6, 10, and accompanying text.

81. González, *supra* note *, at 239–40 (citations omitted). In 2014, the population of poor people was 14.8%. DENAVAS-WALT & PROCTOR, *supra* note 17, at 12. Multiplying that percentage by the 3.5% and 7.5% estimates shows that homeless people constitute from one-half a percent to a little over one percent of the U.S. population, which was 319,849,022 on Dec. 31, 2014. *U.S. and World Population Clock*, U.S. CENSUS, http://www.census.gov/popclock/ [https://perma.cc/JU98-6JYS] (last updated Oct. 28, 2017).

82. *See* COLEMAN-JENSEN ET AL., *supra* note 4, at 6, 10 (regarding food insecurity in the United States); *see also* MCHENRY, *supra* note 8, at 15 ("People that had been living average middle class suburban lives were showing up to eat, having moved in with their families or friends after foreclosing on their homes. Some people reported that they were camping at the state park or told us they ate at Food Not Bombs so they would have enough money to pay their mortgage.").

83. *E.g.*, *Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at 1–2; *First Vagabonds Church of God V*, 638 F.3d at 758; Layman Lessons, Inc. v. City of Millersville, 636 F. Supp. 2d 620, 626 (M.D. Tenn. 2008); *Abbott II*, 783 So. 2d 1213; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 2.

84. *See, e.g.*, Nagourney, *supra* note 78 (reporting on the introduction of a Los Angeles city council resolution to move "food lines" indoors, in response to complaints organized by the Melrose Action Neighborhood Watch, against the West Hollywood Food Coalition, which was established twenty-seven years earlier and provides free nightly meals to up to 200 people from a large truck). For commentary on the legal and cultural contests over earlier restrictions on commercial food trucks (i.e., trucks which people use to sell meals) in Los Angeles, see Hernández-López, *supra* note 31, *passim*,

It bears highlighting that the categories of "religious" and "political" food-sharing activists are themselves etic (i.e., those of an outsider specialist): they find purchase in the configuration of the First Amendment, which U.S. courts have interpreted to provide substantially different protection for claims cognized under the free exercise of religion versus the freedom of speech or the right of the people peaceably to assemble. While I believe the distinction between religious and political food-sharing activists is useful, I understand people who publicly share food as momentarily occupying changing positions in society (e.g., shaped by, *inter alia*, ability, age, education, gender, health, income, poverty, profession, race, wealth, etc.), and I believe that they likely have mixed motives that change during the time in which they share food in public.

B. Political Solidarity or Mutual Aid

The 1993 unpublished Ninth Circuit memorandum opinion, *McHenry v. Agnos*, is an example of how politically motivated activists challenged the first modern wave of anti-food-sharing laws.[85] The plaintiff-appellant, Keith McHenry, was a "co-founder and member of Food Not Bombs (FNB), an organization which distributes free food to San Francisco citizens and advocates increased public assistance for the homeless and hungry of that city."[86] In the 1996 unpublished Ninth Circuit memorandum opinion, *McHenry v. Jordan*, the court noted, in understated tones, "Since he organized FNB in San Francisco in 1987, McHenry has had a rather acrimonious relationship with San Francisco City authorities."[87] For people familiar with the international Food Not Bombs movement, or with the history of San Francisco, California, in the 1980s and 1990s, these case citations speak volumes. Since its 1980 origin, the Food Not Bombs movement has grown rhizomatically, across and beyond the United States, so that its banner, showing a fist holding a carrot, has become a familiar sight near the foldout tables where Food Not Bombs volunteers serve vegan or vegetarian meals at public protests and public food sharings, which take place in over a thousand cities worldwide.[88] In the same

---

and Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the Loncheros*, 2 U.C. IRVINE L. REV. 91 *passim* (2012).

85. *McHenry I*, 983 F.2d 1076 (unpublished table decision). The panel consisted of Circuit Judges Proctor Hug, Jr., Harry Pregerson, and Charles E. Wiggins. *Id.*

86. *Id.* at *1; *see also* MCHENRY, *supra* note 8, at 14, 17, 20–21, 28, 33, 99–114, 150–51, 153, 155–60 (describing the history of the Food Not Bombs organization from its 1980 origin in organizing legal defense for an activist arrested following a direct action protest against the construction of the Seabrook Nuclear Power Generating Station, to its 1981 first meals in and around Boston, Massachusetts, to the 1988 founding of the San Francisco chapter, and through the ensuing decades as the Food Not Bombs movement grew across and beyond the United States).

87. McHenry v. Jordan (*McHenry II*), 81 F.3d 169 (9th Cir. 1996) (unpublished table decision). The panel consisted of Circuit Judges Herber Y. C. Choy (senior), Robert R. Beezer, and Michael Daly Hawkins. *Id.*

88. *See* MCHENRY, *supra* note 8, at 116 ("Food Not Bombs is active in over 1,000 cities around the world and often the most visible project accessible to the mainstream."); *see also id.* at 99–114, 155–60 (describing the history and growth of Food Not Bombs). On the notion of rhizomatic growth, see Kristin Lindgren, Amanda Cachia, & Kelly C. George, *Growing Rhizomatically: Disabilities, the Art*

period, San Francisco featured events ranging from the development of its high-rise financial district and the growth of homelessness under the mayoralty of Dianne Feinstein (1978 to 1988), to the catastrophic Loma Prieto earthquake of 1989 during the mayoralty of Art Agnos (1988 to 1992), to the expressly antihomeless "Matrix Quality of Life Program" of the mayoralty of Frank Jordan (1992 to 1996), to the dot-com boom during the mayoralty of former Speaker of the California Assembly, Willie Brown, the first African American mayor of San Francisco (1996 to 2004).[89] The Food Not Bombs movement grew in the same decades when the "City by the Bay" concentrated the wealth generated by myriad technology companies.

For readers who are unfamiliar with Food Not Bombs, *Hungry for Peace*, written by Keith McHenry, is one of the best textual sources to express the emic meanings that some politically motivated people ascribe to food sharing.[90] Other useful textual sources for these meanings are the pleadings and judicial opinions regarding the food-sharing cases in which Food Not Bombs volunteers were plaintiffs.[91] As shown below, the terms under which Food Not Bombs volunteers typically express their emic understandings of publicly sharing food include solidarity and mutual aid. To elaborate the social history of Food Not Bombs and the intellectual history of solidarity and mutual aid is beyond the scope of this Article, but quoting McHenry at length is merited to represent the emic terms under which Food Not Bombs groups publicly share food.

Under a section titled, "Solidarity, Not Charity," McHenry names the three principles of Food Not Bombs:

> 1. The food is always vegan or vegetarian and free to everyone, without restriction, rich or poor, stoned or sober.

Gallery, and the Consortium, 34 DISABILITY STUD. Q. (2014), http://dsq-sds.org/article/view/4250/3590 [https://perma.cc/CCR7-3KHU] ("What does it mean to develop rhizomatically? Botanically speaking, a rhizome is an underground plant stem that grows horizontally, producing roots and shoots from its nodes. Ginger, bamboo, and irises are rhizomes. Deleuze and Guattari contrast rhizomatic growth with arborescent growth: a model based on roots, trees, branches, linear and vertical development. Their philosophical concept of the rhizome, both distinct from and linked to the biological one, has itself traveled in non-linear ways, finding alliance with varied disciplines, modes of thought, and artistic practices."). *See generally* GILLES DELEUZE & FÉLIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA *passim* (Brian Massumi trans., 1987) (theorizing the rhizome).

89. *See* MCHENRY, *supra* note 8, at 14, 19–22, 33, 41, 53–54, 58–59, 63, 65, 88, 91–95, 103–09, 115, 153, 155–60 (discussing the history of Food Not Bombs in San Francisco, including the Matrix program); Foscarinis, *supra* note 29, at 37–38, 55–56, 60 (discussing the Matrix program and its litigation, Joyce v. City of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994)).

90. *See* MCHENRY, *supra* note 8, at 153 ("The eight founders of Food Not Bombs are Mira Brown, C. T. Lawrence Butler, Jessie Constable, Susan Eaton, Brian Feigenbaum, Keith McHenry, Amy Rothstien, and Jo Swanson.").

91. *E.g.*, *First Vagabonds Church of God V*, 638 F.3d at 758–59; *Santa Monica Food Not Bombs*, 450 F.3d at 1030; *Jordan*, 81 F.3d 169 (unpublished table decision); *Agnos*, 983 F.2d 1076 (unpublished table decision); Sacco v. City of Las Vegas, Nos. 2:06-CV-0714-RCJ-LRL, 2:06-CV-0941-RCJ-LRL, 2007 WL 2429151, at 3 (D. Nev. Aug. 20, 2007) (enjoining permanently the defendants from enforcing a law that barred the feeding of the indigent in city parks); Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37.

2. Food Not Bombs has no formal leaders or headquarters, and every group is autonomous and makes decisions using the consensus process.

3. Food Not Bombs is dedicated to nonviolent direct action and works for nonviolent social change.[92]

According to McHenry, these principles "were first formally suggested and adopted at the 1992 Food Not Bombs International Gathering in San Francisco."[93] For McHenry, "It cannot be stressed enough that Food Not Bombs is not a charity and is working to inspire a dramatic change in society. Sharing food for free without restriction is a revolutionary act in a culture devoted to profit."[94] As he explains:

> [W]e invite people who receive the food to become involved in participating in the collection, cooking or sharing of the food. Food Not Bombs volunteers work in solidarity with many members of their community and encourage everyone's participation in all aspects of our local chapters, including help with decision making. People eating with Food Not Bombs should never feel that they are in any way inferior to those who are sharing the food. We are all equal. This isn't charity. This provides an opportunity for people to regain their power and recognize their ability to contribute and make a change. This could be one of the most important ways Food Not Bombs contributes to social change.[95]

He continues:

> We build solidarity by sharing food and literature at events and actions organized by other groups. We also distribute literature at our meals that is provided by the organizations we support, promoting solidarity and the building of coalitions. Offering food and logistical support is a great way to create lasting relationships with activists working on issues related to the goals of Food Not Bombs. We are working against the perception of scarcity, which causes many people to fear cooperation among groups.[96]

McHenry also discusses Food Not Bombs in terms of mutual aid. For example, he notes:

> The founders of Food Not Bombs thought that there might be a way to encourage the public to seek an end to war and poverty, with a living theater and mutual aid on the streets. No lengthy theories and long winded speeches to bore the public. We also made sure there would never be any charismatic leaders for the authorities to discredit or leadership for them to replace. Food Not Bombs is about action, reliability, respect, trust and relationships in the community. We are about making sure everyone is free to express their best self and has the food, clothing, healthcare and housing they deserve. In short, we were searching for a way to reach a public

92. MCHENRY, *supra* note 8, at 19.
93. *Id.* at 21.
94. *Id.* at 20.
95. *Id.*
96. *Id.* at 32.

> unfamiliar with alternative ways of organizing society and of relating to our fellow animal and human beings.[97]

McHenry's representations of solidarity and mutual aid resonate throughout four twenty-first century food-sharing cases in which Food Not Bombs volunteers were plaintiffs.[98] Courts, however, do not often adopt these emic meanings but instead impose their etic understandings. Consider, for example, *Santa Monica Food Not Bombs v. City of Santa Monica*, in which the plaintiffs' opening brief to the Ninth Circuit, appealing the lower court's grant of the defendants' motion for summary judgment, explained:

> Plaintiff Santa Monica Food Not Bombs . . . is an unincorporated association devoted to drawing attention to the connection between the lack of food for the poor and the war preparation activities of the federal government . . . . Some of its members are homeless residents of the City [of Santa Monica], who not only help provide meals but also join their fellow homeless in eating the meals.[99]

In the panel's opinion, Ninth Circuit Judge Marsha S. Berzon recognized this plaintiff's self-identification (viz., "Plaintiff Santa Monica Food Not Bombs is an unincorporated association that seeks to highlight a 'connection between the lack of food for the poor and war-preparation activities of the United States government'").[100]

In contrast, consider the difference between the plaintiffs' amended complaint in *First Vagabonds Church of God v. City of Orlando*, and how various courts represented these plaintiffs. The complaint explained that:

> Plaintiff Orlando Food Not Bombs is an unincorporated association affiliated with the grassroots international Food Not Bombs movement, which is organized according to principles of egalitarianism, consensus, cooperation, autonomy, and decentralization. The group shares food with homeless and hungry people in Orlando to call attention to society's failure to provide food and housing to each of its members and to reclaim public space. The name Food Not Bombs states the group's most fundamental principle: society needs to promote life, not death.[101]

Reviewing the various judicial opinions in *First Vagabonds Church of God* suggests the existence of a struggle over emic versus etic meanings. For example,

---

97. *Id.* at 15.

98. *First Vagabonds Church of God V*, 638 F.3d at 758–59 (en banc); *Santa Monica Food Not Bombs*, 450 F.3d at 1030; *Sacco*, 2007 WL 2429151 (permanently enjoining the defendants from enforcing a law that barred the feeding of the indigent in Las Vegas parks); Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37.

99. Plaintiff's Opening Brief on Appeal from the Order Granting Defendants' Motion for Summary Judgment at 15, *Santa Monica Food Not Bombs*, 450 F.3d 1022 (9th Cir. 2006) (No. 03-56623), 2004 WL 443395, at *15.

100. *Santa Monica Food Not Bombs*, 450 F.3d at 1030.

101. Amended Complaint for Declaratory and Injunctive Relief and Damages at 4, First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God III*), 578 F. Supp. 2d 1353 (M.D. Fla. 2008), 2006 WL 3916070 (M.D. Fla. Dec. 29, 2006).

District Court Judge Gregory A. Presnell initially accepted Orlando Food Not Bombs' self-description.[102] After a bench trial and post-trial submissions, however, Judge Presnell characterized Orlando Food Not Bombs (OFNB) as:

> [A] loosely structured organization of political activists, including anarchists, communists, vegans, and those generally opposed to war and violence. Notwithstanding their diffuse views, all OFNB members share in OFNB's core belief: that food is a right which society has a responsibility to provide to all of its members.[103]

By the time the case reached the Eleventh Circuit Court of Appeals, however, Circuit Judge James Larry Edmondson significantly truncated the plaintiff's self-description (viz., "Plaintiff Orlando Food Not Bombs is a loosely structured organization of political activists who share the view that society has a responsibility to provide food to all of its members").[104] In contrast, dissenting Circuit Judge Rosemary Barkett cognized OFNB in the terms preferred by its members.[105] Finally, in the en banc opinion, Circuit Judge William H. Pryor, reduced the plaintiff's self-identification into, "a group of political activists dedicated to the idea that food is a fundamental human right."[106]

While some readers may find the different descriptions of the various Food Not Bombs plaintiffs unimportant, I find the changing descriptors of the OFNB plaintiffs in *First Vagabonds Church of God* significant and perhaps even predictive: they suggest a critical contest over the terms by which a court comes to understand public food sharing. The results of such contests seem to be that when a court adopts the emic terms of a plaintiff, as in the first two religious food-sharing cases discussed above in Part I.A., then the plaintiff prevails. In contrast, when courts disregard the emic terms of a plaintiff, as the majority opinions of the Eleventh Circuit Court of Appeals arguably did in *First Vagabonds Church of God*, then the court rules against the plaintiff. This hypothesis is certainly not novel. Socio-legal scholars have critiqued deconstruction, binary metaphors, and framing for

102. First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God I*), No. 6:06-CV-1583-Orl-31KRS, 2008 WL 899029, at *1 (M.D. Fla. Mar. 31, 2008) (granting in part and denying in part the defendants' motion for summary judgment) ("Plaintiff Orlando Food Not Bombs ('OFNB') is an unincorporated association with the international Food Not Bombs movement. This group shares food with homeless and hungry people at Lake Eola Park to draw attention to 'society's failure to provide food and housing to each of its members and to reclaim public space.'") (citation omitted).

103. *First Vagabonds Church of God III*, 578 F. Supp. 2d at 1356 (permanently enjoining defendants from enforcing their Large Group Feeding Ordinance), *rev'd*, 638 F.3d at 758–59 (en banc).

104. *First Vagabonds Church of God IV*, 610 F.3d at 1280 (affirming in part, reversing in part, and vacating the district court's permanent injunction), *rev'g*, 578 F. Supp. 2d 1353 (M.D. Fla. 2008), *vacated by* 616 F.3d 1230 (11th Cir. 2010), *reinstated in part en banc*, 638 F.3d 756 (11th Cir. 2011).

105. *Id.* at 1293 n.1 ("Orlando Food Not Bombs is an association of political activists affiliated with the international Food Not Bombs movement. It is undisputed that its members are opposed to war and violence and share the core belief that food is a right which society has a responsibility to provide to all.").

106. *First Vagabonds Church of God V*, 638 F.3d at 758.

decades.[107] Because the food-sharing cases often sound in the First Amendment, however, how courts cognize public food sharing and whether they extend constitutional protection to its practitioners seem to depend on whether judges accept, or at least not reject as incomprehensible, the plaintiffs' emic explanations for sharing food in public. Perhaps the judges even come to identify with the plaintiffs' reasons for seeking protection under the First Amendment?

Possibly accounting for this phenomenon, in the latest food-sharing case to be litigated in federal court, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*,[108] it appears that the plaintiffs seek to make themselves cognizable to the court by mixing emic terms of solidarity with etic terms of First Amendment jurisprudence:

> Plaintiffs share food during their Friday demonstrations at Stranahan Park as symbolic expression of the group's political beliefs that food is a human right and to communicate a message of social unity and solidarity with people who are hungry, which is a human condition shared by all.[109]

Time will tell how Southern District of Florida District Judge William J. Zloch comes to understand the plaintiffs, as well as the municipal defendant, which has its own distinctive view on sharing food in public.[110]

---

107. *See, e.g.*, J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 753 (1987) ("But we can read Derrida's work as challenging this commonsense conception. When we hold an idea in our minds, we hold both the idea and its opposite; we think not of speech but of 'speech as opposed to writing,' or speech with the traces of the idea of writing, from which speech differs and upon which it depends. The history of ideas, then, is not the history of individual conceptions, but of favored conceptions held in opposition to disfavored conceptions . . . . Our understanding of legal ideas may indeed involve, as Derrida says of speech and writing, the simultaneous privileging of ideas over their opposites.") (citations omitted); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 607 n.123 (1990) (comparing Balkin's interpretation of Derrida, with George Lakoff and Mark Johnson's theorization of the concepts that underlie binary spatial metaphors, and Audre Lorde's critique of simplistic binary oppositions as applied to human differences); Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 867 (2007) ("As humans we understand things by framing them via what George Lakoff calls 'idealized cognitive models.' Much of ethical and legal reasoning is a matter of framing situations and problems relative to various cognitive models, and image schemas, radial categories, and metaphors play a central role in defining our models.") (citation omitted); *see also* Martha F. Davis, *Law, Issue Frames and Social Movements: Three Case Studies*, 14 U. PA. J.L. & SOC. CHANGE 363, 364–65 (2011) ("While there are many definitions of framing and specific types of frames, there is general agreement that frames are 'schema of interpretation' that 'give meaning to key features of some topic or problem.'") (citation omitted).

108. Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37.

109. *Id.* at 10; *see also id.* at 4 ("Plaintiff Fort Lauderdale Food Not Bombs is an unincorporated association affiliated with the grassroots international Food Not Bombs movement that engages in peaceful political direct action to communicate its message that our society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide to all. Food Not Bombs shares food with anyone, without restriction, to communicate this message and organize for positive social change. The group does not serve food as a charity, but instead as an expression of and to further their political message. Food Not Bombs serves vegan or vegetarian food to reflect its political dedication to nonviolence against all, including animals.").

110. During the editing of this Article, Judge Zloch issued an order granting the City of Fort Lauderdale motion for summary judgment and denying the Plaintiffs' similar motion. Order, *Fort*

C. Municipal Terms

Cities that promulgate anti-food-sharing laws claim markedly different concerns than those expressed by religious and political food-sharing activists. In Part II *infra*, I discuss a few of the governmental interests that cities claim as compelling, important, or substantial justifications for their anti-food-sharing laws (e.g., competing uses, park aesthetics, public health, public safety, or zoning). Here, I overview four cities' labeling of public food sharing in terms of "food distribution" (Santa Monica, California) "homeless feeding" (Dallas, Texas), "large group feeding" (Orlando, Florida), and "social service facility" (Fort Lauderdale, Florida).[111] To provide readers with a sense of how these laws have recently evolved, I discuss these cities' different anti-food-sharing laws in the chronological order in which the cities promulgated them. I end the Part by briefly contrasting these labels with the emic meanings expressed by religious and political food-sharing activists.

1. Food Distribution

On October 22, 2002, the city council of Santa Monica, California, enacted an ordinance with two provisions to regulate the distribution of food in public parks, streets, and sidewalks.[112] In a new chapter of the Santa Monica Municipal Code (SMMC), entitled "Food Distribution on Public Property," Section 5.06.010 regulated food distribution in city parks and on the city hall lawn, and SMMC Section 5.06.020 regulated food distribution on public streets and sidewalks.[113] Section 5.06.010 required any person who would serve or distribute "food to the public" to comply with state health and safety standards, display a valid permit from the county Department of Health, obtain city approval as to location, and otherwise comply with Santa Monica's community events law, which the city had enacted the prior year.[114] Section 5.06.020 banned food distribution without city authorization

---

Lauderdale Food Not Bombs I, No. 15-60185-CIV (S.D. Fla. Sept. 30, 2016), 2016 WL 5942528. Critiquing Judge Zloch's reasoning is not feasible here, but the Plaintiffs have appealed to the Eleventh Circuit. *See* Appellants' Initial Brief, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (*Fort Lauderdale Food Not Bombs II*), No. 16-16808, (11th Cir. Jan. 18, 2017), 2017 WL 1076817; *see also* Oral Argument, *Fort Lauderdale Food Not Bombs II*, No. 16-16806 (11th Cir. Aug. 24, 2017), http://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/16-16808.mp3?download=1 [https://perma.cc/BKR7-2ULT] (linking to the digital recording of the oral arguments).

111. *See, e.g.*, *First Vagabonds Church of God V*, 638 F.3d at 759 (en banc) (large group feeding); *Santa Monica Food Not Bombs*, 450 F.3d at 1030 (food distribution); *Chosen 300 Ministries, Inc.*, 2012 WL 3235317 (outdoor public serving of food; Complaint for Declaratory and Injunctive Relief and Damages, Ordinance C-14-42 at 1–7, *Fort Lauderdale Food Not Bombs I*, *supra* note 37 (social service, social service facility, and outdoor food distribution center); Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44 (homeless feeding).

112. *Santa Monica Food Not Bombs*, 450 F.3d at 1029 (discussing SANTA MONICA, CAL. MUNICIPAL ORDINANCE No. 2055 (adopted Oct. 22, 2002), codified at SANTA MONICA, CAL. MUN. CODE § 5.06 (amended Feb. 24, 2004)).

113. *Id.* at 1029.

114. *Compare id.* at 1026 (dating the enactment of the community events ordinance as May 8, 2001, and noting its subsequent amendments), *with id.* at 1029 (discussing the food distribution ordinance).

under threat of a misdemeanor punishable by a fine not to exceed $1000, imprisonment in the county jail not to exceed six months, or both.[115]

On January 3, 2003, the plaintiffs filed their complaint in federal court seeking declaratory and injunctive relief from several Santa Monica ordinances, which regulated community events, food distribution, and street banners. On August 11, 2003, District Court Judge Manuel L. Real granted the city defendants' motion for summary judgment.[116] The plaintiffs appealed, and during its pendency, on February 24, 2004, the city amended its food distribution ordinance.[117] As to Section 5.06.010, Santa Monica clarified that city approval as to location would be controlled by state guidelines as administered by the County of Los Angeles, that the city would adopt new guidelines to administer the ordinance, and that compliance with the city's park maintenance code would be necessary.[118] As to Section 5.06.020, the amendment clarified four kinds of city authorization (vending permit, use permit, outdoor dining license, or community event permit) and, in an important concession to the plaintiffs, provided that "no permit or license shall be required for a noncommercial food distribution that does not interfere with the free use of the sidewalk or street by pedestrian or vehicular traffic."[119]

Santa Monica Food Not Bombs thus established the first terms under which some cities in the second modern wave of anti-food-sharing laws have cognized people who share food in public. The City of Santa Monica paired its "food distribution on public property" ordinance with a community events ordinance that further regulated the use of city properties. When challenged in court, Santa Monica prevailed at the district court, and predominantly prevailed at the Ninth Circuit, but the city nevertheless amended the part of its food distribution ordinance that regulated the use of streets and sidewalks so not to require a permit or license for "noncommercial food distribution that does not interfere with the free use of the sidewalk or street."[120] This clear exception for noncommercial food distribution is in marked contrast to other cities' approaches to regulating public food sharing. Moreover, after its amendment and litigation, Section 5.06.010 only required a permit for public food sharing in groups of 150 or more persons.[121]

115. *See id.* at 1029 (quoting SANTA MONICA, CAL. MUN. CODE § 5.06.020 (adopted Oct. 22, 2002)).

116. *Id.* at 1031.

117. *See id.* at 1029 (dating the amendment as Feb. 24, 2004); *see also* Plaintiff's Opening Brief, *Santa Monica Food Not Bombs*, 450 F.3d 1022 (No. CV-03-0032), 2004 WL 443395.

118. *Santa Monica Food Not Bombs*, 450 F.3d at 1029 (citing SANTA MONICA, CAL. MUN. CODE § 5.06.010 (adopted Oct. 22, 2002)).

119. *Id.* at 1030 (citing SANTA MONICA, CAL. MUN. CODE § 5.06.020 (adopted Oct. 22, 2004)) (emphasis removed).

120. SANTA MONICA, CAL. MUN. CODE § 5.06.020 (amended Feb. 24, 2004).

121. *See* González, *supra* note *, at 270–74 (discussing *Santa Monica Food Not Bombs*, 450 F.3d at 1025, 1035–45, which determined that a mandatory administrative instruction, requiring a community events permit for groups below 150 persons, failed the narrow tailoring requirement of First Amendment free speech strict scrutiny because it detached the ordinance from the city's asserted governmental interest in allocating the use of public open space by large groups).

2. Homeless or Large Group Feeding

On June 8, 2005, Dallas enacted its "Food Establishment Ordinance," which amended the city code to regulate "food establishments, including organizations that feed the homeless."[122] As noted by the court, District Judge Jorge A. Solis, "The stated purpose of the Ordinance [was] 'to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented.'"[123] At first glance, the ordinance might seem to apply only to commercial food establishments, but it expressly applied to organizations that feed the homeless when it articulated a nine-element "Homeless Feeder Defense."[124] While including the Homeless Feeder Defense in the ordinance might suggest that Dallas intended to provide a reasonable exception to its food establishment ordinance, after six years of litigation, on March 28, 2013, Judge Solis permanently enjoined the City of Dallas from enforcing the ordinance against the two organizational plaintiffs and one individual plaintiff.[125]

Orlando, Florida, evidenced a third approach to regulating food sharing in public. On July 24, 2006, its city council enacted an ordinance to amend Chapter 18A (Parks and Outdoor Public Assemblies) of its city code by adding and defining the terms "large group feeding" and "Greater Orlando Park District (GDPD)" and by creating a new section to regulate large group feeding in parks and park facilities owned or controlled by the city and within the GDPD.[126] As I have discussed the

122. Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 11 (citing and quoting DALL. CITY CODE § 17-1.1; TEX. ADMIN. CODE § 229.161 *et seq.*; *Minutes of the Dallas City Council Wed., Jun. 8, 2005*, DALL. CITY HALL (approved June 22, 2005), http://citysecretary.dallascityhall.com/pdf/CC2005/cc060805.pdf [https://perma.cc/ZM47-YCF2]).

123. Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 11.

124. *Id.* at 11–12 (citing DALL. CITY CODE § 17-1.6 (5), "known as the 'Homeless Feeder Defense,' [which] provides that an organization serving food to the homeless need not comply with the Ordinance if it meets other criteria, such as: (1) obtaining location approval from the City; (2) providing restroom facilities; (3) having equipment and procedures for disposing of waste and wastewater; (4) making available handwashing equipment and facilities, including a five-gallon container with a spigot and a catch[,] bucket, soap, and individual paper towels; (5) registering with the City; (6) obtaining written approval from the property owner; (7) having a person present at all times who has completed the City's food safety training course; (8) complying with food storage and transport[ation] requirements; and (9) ensuring the feeding site is left in a clean, waste-free condition").

125. Final Judgment at 1, *Big Hart Ministries Ass'n*, No. 3:07-CV-0216-P (N.D. Tex. Mar. 28, 2013). Judge Solis ultimately found that the Homeless Feeder Defense substantially burdened the plaintiffs' rights to freely exercise their religion without the compelling justification required by the Texas Religious Freedom Restoration Act of 1999 (TRFRA). Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 39 (citation omitted). TRFRA provides that, "a government agency may not substantially burden a person's free exercise of religion" unless the agency, "demonstrates that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2017).

126. ORLANDO CITY COUNCIL, CITY OF ORLANDO COUNCIL MINUTES, at 18–19 (Fla. July 24, 2006); *see also First Vagabonds Church of God IV*, 610 F.3d at 1292–93 (reproducing relevant parts of the ordinance); González, *supra* note *, at 267–68 (discussing the ordinance).

political history of the ordinance's enactment at length elsewhere,[127] here I make five brief points. First, Orlando defined a "large group feeding" as:

> [A]n event intended to attract, attracting, or likely to attract twenty-five (25) or more people, including distributors and servers, in a park or park facility owned or controlled by the City, including adjacent sidewalks and rights-of-way in the GDPD, for the delivery or service of food. Excluded from this definition are activities of City licensed or contracted concessionaires, lessees, or licensees.[128]

Second, Orlando defined its new GDPD "as an area within the limits of the City of Orlando, Florida, extending out a two (2) mile radius in all directions from City Hall and including all of the parks and park facilities owned or controlled by the City touched by that radius, in their entirety."[129] Third, within the GDPD, which included "approximately forty-two public parks,"[130] the ordinance made it "unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park or park facility . . . without a Large Group Feeding Permit."[131] Fourth, the ordinance provided that "[n]ot more than two (2) Large Group Feeding Permits shall be issued to the same person, group, or organization . . . for the same park in the GDPD in a twelve (12) consecutive month period."[132] Finally, violation of the ordinance was punishable by "a fine not to exceed $500.00" or "a definite term of imprisonment not to exceed sixty (60) days, or by both such fine and imprisonment."[133]

Thus, in 2006 the city of Orlando defined a large group feeding as amounting to twenty-five people, including "distributors and servers," and it created a two-mile radius downtown park district, centered on city hall, within which any person or organization seeking to share food in public must obtain a permit, with such person or organization unable to obtain more than two such permits in any twelve consecutive months for any particular park.[134] From Santa Monica, California, in 2002, to Dallas, Texas, in 2005, to Orlando, Florida, in 2006, we thus see how cities cognized public food sharing in terms of food distribution, food establishment and homeless feeding, and large group feeding, respectively. Such terms are far from the emic meanings expressed by food-sharing activists motivated by religious belief (charity, ministry, and works of faith) or political principle (solidarity and mutual aid), and the municipal terms are striking for their facial neutrality. (Only Dallas's ordinance expressly regulated homeless people in an affirmative defense to its food

127. González, *supra* note *, at 263–70.

128. ORLANDO, FLA. CODE OF ORDINANCES tit. II, § 18A.01(24) (2016), https://www.municode.com/library/fl/orlando/codes/code_of_ordinances?nodeId=TITIICICO_CH18APAOUPUAS_S18A.01DE [https://perma.cc/6TH4-6RMX].

129. *Id.* § 18A.01(25).

130. *First Vagabonds Church of God I*, 2008 WL 899029, at *1.

131. ORLANDO, FLA., CODE OF ORDINANCES tit. II § 18A.09-2(a) (1999).

132. *Id.* § 18A.09-2(c).

133. *Id.* §§ 1.08(3), 18A.24(4) ("Any person violating the provisions of any section of this chapter shall be subject to arrest and punishment as provided in Section 1.08 of this Code.").

134. *Id.* §§ 18A.01(24)–(25), 18A.09-2(c).

establishment ordinance.)[135] Beyond the advice of counsel, however, the municipal terms also evidence how particular city councils understood the socio-legal activity that they sought to regulate. Indeed, reflecting on the municipal terms raises questions regarding the implicit meanings of "distributing" (or serving) food,[136] versus "feeding" people who are homeless or otherwise hungry.

As above explained, I have adopted the phrase food sharing and believe that it accurately labels the various emic meanings that food-sharing activists ascribe to themselves. Cities that enacted anti-food-sharing laws, however, seem relatively unconcerned with activists' emic meanings and instead focus on governmental interests that are facially neutral and perhaps putatively objective. Distributing, feeding, sharing, and serving are different, yet related, ways to describe the patterned phenomena that I call public food sharing. These labels matter because they tend to play out differently under different First Amendment doctrines (e.g., protected expression versus unprotected conduct, content based discrimination versus content neutral regulation, exercise of religion or not, and substantial burden versus mere inconvenience).[137] Before turning to Part II, however, I briefly discuss the municipal term "social services facility," which is at issue in the latest anti-food-sharing law to be litigated in federal court.

3. Social Service Facilities and Outdoor Food Distribution Centers

On October 22, 2014, the City of Fort Lauderdale enacted an ordinance to regulate "social service facilities."[138] Ordinance No. C-14-42 substantially amended "Section 47-18.31, Social service facility (SSF), of the Unified Land Development Regulations (hereinafter referred to as 'ULDR')."[139] From being a single brief paragraph, the ordinance expanded section 47-18.31 to fifteen pages of new purpose, definitions, development standards, table of allowable uses by zoning district, level of review, and lists of permitted and conditional uses.[140] The ordinance redefined "social services" to mean "[a]ny service provided to the public to address

135. DALL., TEX. CODE OF ORDINANCES vol. 1, § 17-1.6 (2015).

136. *Cf. Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at *27 n.11 (discussing Philadelphia's anti-food-sharing law, which provided, "No person, group, or organization shall engage in Outdoor Public Serving of Food . . . [which] means the distribution of food free of charge to members of the public, in groups of three or more people, on any public highway, on any public sidewalk, or in any outdoor public place.").

137. *See infra* Part II.B.2 (discussing exercise of religion and substantial burden versus mere inconvenience).

138. FORT LAUDERDALE, FLA., ORDINANCE AMENDING THE UNIFIED LAND DEVELOPMENT REGULATIONS, No. C-14-42, at 1, 15 (adopted Oct. 22, 2014), http://www.fortlauderdale.gov/home/showdocument?id=6404 [https://perma.cc/P2LC-CRHN]; *see also* Larry Barszewski, *Fort Lauderdale Commissioners Pull All-Nighter and Approve Homeless Feeding Restrictions*, SUNSENTINEL (Oct. 22, 2014), http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-lauderdale-homeless-feeding-sites-20141021-story.html [https://perma.cc/FXX4-5D6H].

139. FORT LAUDERDALE, FLA, ORDINANCE No. C-14-42, at 2.

140. *Id.* at *passim.*

public welfare and health such as, but not limited to, the provision of food."[141] The ordinance defined what it termed "Outdoor Food Distribution Centers" as:

> Any location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein . . . and is generally providing food distribution services exterior to a building or structure without permanent facilities on a property.[142]

The ordinance mandated thirteen specific development standards for Outdoor Food Distribution Centers, which included, *inter alia*, meeting all state, county, and city requirements for food service establishments; not being closer than 500 feet from another food distribution center or any residential property; providing restroom facilities and equipment for hand washing and the lawful disposal of waste and wastewater; having written consent from the owner of the property on which the outdoor food distribution occurs; ensuring that one onsite person has received state food manager certification; requiring adequate food storage at prescribed temperatures and clean food transportation; mandating food service within four hours of its preparation; etc.[143] Further, the ordinance categorized Outdoor Food Distribution Centers as a "permitted use" in only one kind of zoning district, Heavy Commercial/Light Industrial.[144] In Community Facility (including House of Worship) and Regional Activity Center zoning districts, Outdoor Food Distribution Centers became a "conditional use," which therefore required "site plan level III approval" with newly created review criteria that included "compatibility with the character of the area."[145] In Park, Residential, and myriad other zoning districts, Outdoor Food Distribution Centers became a "prohibited use."[146] Additionally, the Fort Lauderdale Parks and Recreation rules and regulations expressly prohibited using parks for "business or social service purposes unless authorized pursuant to a written agreement with [the] City."[147]

In other words, Fort Lauderdale's 2014 ordinance deployed the police power delegated to it by the State of Florida to define the practice of publicly sharing food as a "social service," and to require this ostensible social service to comport with

---

141. *Id.* at 3 (amending Fort Lauderdale, Fla., Unified Land Dev. Code § 47-18.31(B)(6)).

142. *Id.* (amending Fort Lauderdale, Fla. Unified Land Dev. Code § 47-18.31(B)(4)).

143. *Id.* at 6–7 (amending Fort Lauderdale, Fla. Unified Land Dev. Code § 47-18.31(C)(2)(c)).

144. *Id.* at 7–9, 11 (amending Fort Lauderdale, Fla. Unified Land Dev. Code §§ 47-6.13, 47-18.31(D)).

145. *Id.* at 8–14 (amending Fort Lauderdale, Fla. Unified Land Dev. Code §§ 47-8.10–47-8.13, 47-13.10, 47-18.31(D)). Site plan level III approval requires approval from the Planning and Zoning Board after an opportunity for public participation, City of Fort Lauderdale, Fla., *Development Review Committee*, FORTLAUDERDALE.GOV, http://www.fortlauderdale.gov/departments/sustainable-development/urban-design-and-planning/development-applications-boards-and-committees/development-review-committee [https://perma.cc/B3FN-YEXQ] (last visited July 15, 2016).

146. FORT LAUDERDALE, FLA, ORDINANCE No. C-14-42, at 8–9 (amending Fort Lauderdale, Fla. Unified Land Dev. Code § 47-18.31(D)).

147. City of Fort Lauderdale, Fla., *Parks and Recreation—Rules and Regulations* (Rule 2.2. Social Services), FORTLAUDERDALE.GOV [hereinafter *Fort Lauderdale Parks and Recreation—Rules and Regulations*], http://www.fortlauderdale.gov/home/showdocument?id=2908 [https://perma.cc/QJV5-47PF] (last visited Sept. 12, 2016).

the city's zoning laws and park rules. Under the former, an "Outdoor Food Distribution Center" was a permitted use only in Heavy Commercial/Light Industrial districts located no closer than 500 feet from any other food distribution center or residential property; a conditional use (requiring approval from the planning and zoning board) in community facility, house of worship, and regional activity center districts; and a prohibited use in city parks. Consequently, under the terms of its new ordinance, public food sharing or an "Outdoor Food Distribution Center" would henceforth be relegated to a small number of locations within the city of Fort Lauderdale, not including any city parks and only possibly including a house of worship if it obtained permission for such a conditional use.

Instantiating Mark Twain's aphorism that "[t]ruth is stranger than fiction,"[148] one of the first four people whom Fort Lauderdale police arrested under the ordinance was a ninety-year-old World War II veteran.[149] Arnold Abbot had just served the fourth plate of food when police ordered him to "Drop that plate right now," and then cited and released him and three other food-sharing volunteers.[150] Abbott had been publicly sharing food in Fort Lauderdale, often at its beachside parks, since 1991 through the nonprofit Love Thy Neighbor Fund, Inc., which he established to commemorate his deceased wife.[151] A few days later, police again arrested, cited, and released Abbott, along with several other food-sharing volunteers.[152] Adding to the strangeness, Abbott was arrested thirteen years after he successfully sued the City of Fort Lauderdale for violating his rights under the

148. MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 155 (Olivia L. Clemens ed., Harper & Bros. Publishers 1899) ("Truth is stranger than fiction, but it is because Fiction is obliged to stick to possibilities; Truth isn't.").

149. Mike Clary, *Police Shut Down Stranahan Park Homeless Feeding Site, Cite Activists for Breaking New Law*, SUNSENTINEL (Nov. 2, 2014, 4:50 PM), http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-homeless-feeding-citations-20141102-story.html [https://web.archive.org/web/20171026185759/http://www.sun-sentinel.com/g00/local/broward/fort-lauderdale/fl-homeless-feeding-citations-20141102-story.html]; Jeff Weinberger, *Video: A 90-Year-Old and Two Clergymen Cited, Face Possible Jail Time, for Feeding the Homeless in Fort Lauderdale*, NEW TIMES BROWARD-PALM BEACH (Nov. 3, 2014, 9:30 AM), http://www.browardpalmbeach.com/news/video-a-90-year-old-and-two-clergymen-cited-face-possible-jail-time-for-feeding-the-homeless-in-fort-lauderdale-updated-6471412 [https://perma.cc/QUJ9-Z4B5].

150. Weinberger, *supra* note 149.

151. Stefan Kamph, *At the Beach with Arnold Abbott, Fort Lauderdale's Homeless-Feeding Advocate*, NEW TIMES BROWARD-PALM BEACH (Sept. 22, 2011, 9:05 AM), http://www.browardpalmbeach.com/news/at-the-beach-with-arnold-abbott-fort-lauderdales-homeless-feeding-advocate-6472058 [https://perma.cc/HB3Q-GUFA]; *see also* LOVE THY NEIGHBOR, http://lovethyneighbor.org [https://perma.cc/WSF7-58PP] (last visited July 15, 2016) ("Love Thy Neighbor is an all volunteer organization embracing the vision and passion of one woman, Maureen Abbott, who devoted her life to caring for as many poor, hungry, and homeless as she could reach.").

152. Mike Clary, *Activist, 90, Cited Again for Feeding Fort Lauderdale Homeless*, SUNSENTINEL (Nov. 6, 2014, 5:12 AM), http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-homeless-feeding-citations-folo-20141105-story.html [https://web.archive.org/save/http://www.sun-sentinel.com/g00/local/broward/fort-lauderdale/fl-homeless-feeding-citations-folo-20141105-story.html].

Florida Religious Freedom Restoration Act.[153] His state court lawsuit, upheld on appeal, won an injunction against enforcement of the city park rules unless the city provided a suitable alternative site, which it repeatedly failed to do.[154] In a final absurdity, which Kafka might have appreciated, when asked about the new ordinance, Fort Lauderdale City Manager Lee Feldman was quoted as saying, "the new rules will 'bring the city into full compliance' with a 2000 court order in a case brought by Abbott."[155]

II. PUBLICLY SHARING FOOD AS A FREE EXERCISE OF RELIGION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[156]

Courts have adjudicated most of the food-sharing cases under the First Amendment. Therefore, this Part discusses how different courts have applied the Free Exercise Clause and related statutes, including the federal Religious Freedom Restoration Act of 1993 (RFRA),[157] various state religious freedom restoration acts ("state RFRAs"),[158] and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[159] While a detailed history of the Supreme Court jurisprudence that led Congress to enact RFRA and RLUIPA is beyond the scope of this Article, such history is relevant to the food-sharing cases because several of the earliest food-sharing cases were litigated after Congress enacted RFRA but

153. *Abbott II*, 783 So. 2d at 1214–15 (affirming the trial court's injunction and remanding for its determination of whether the city's proposed alternate location complied with the trial court's order and the plaintiff's rights under the Florida Religious Freedom Restoration Act, FLA. STAT. ANN. § 761.03 (West 2016)).

154. *Abbott II*, 783 So. 2d at 1215; Order on Plaintiff's Renewed Motion for Contempt and/or to Enforce Injunction, Abbott v. City of Fort Lauderdale (*Abbott I*), No. CACE 99-003583(05) (Fla. Cir. Ct. June 14, 2000), *rev'd & remanded*, *Abbott II*, 783 So. 2d 1213 (finding the city's proposed alternate location not minimally suitable and including the trial court's June 14, 2000 Final Judgment and Order).

155. Larry Barszewski, *Feed the Poor—Only Where Permitted, Fort Lauderdale Says*, SUNSENTINEL (Oct. 6, 2014, 3:55 PM), http://www.sun-sentinel.com/local/broward/fl-lauderdale-homeless-feeding-rules-20141006-story.html [https://web.archive.org/save/http://www.sun-sentinel.com/g00/local/broward/fl-lauderdale-homeless-feeding-rules-20141006-story.html]; *accord* CITY OF FORT LAUDERDALE, FLA., CITY COMM'N, REGULAR MEETING AGENDA MEMO, #14-0889, at 1 (2014) ("The revisions also bring the City into full compliance with the Court's Final Judgment of June 14th, 2000 in the case of Abbott v. City of Fort Lauderdale, 783 So. 2d 1213 (Fla. Dist. Ct. App. 2001), and thereby permitting the resumption of the enforcement of Park Rule 2.2.") (footnote omitted).

156. U.S. CONST. amend. I.

157. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), *codified at* 42 U.S.C. § 2000bb *et seq.*

158. *E.g.*, Pennsylvania Religious Freedom Protection Act, 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401 *et seq.* (West 2012); Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2017); Florida Religious Freedom Restoration Act, FLA. STAT. ANN. § 761.01 *et seq.* (West 2016).

159. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), *codified at* 42 U.S.C. § 2000cc *et seq.*

before the Court held that it could not constitutionally apply to state and local governments.[160] Also, in the wake of *City of Boerne*, numerous states adopted their own religious freedom restoration acts, and these state RFRAs have featured in several recent religious food-sharing cases.[161] Finally, RLUIPA, which by its terms applies to the states,[162] and which the Court has upheld against an establishment clause challenge,[163] has featured in at least one food-sharing case.[164] The religious food-sharing cases thus provide a window into the Court's changing constitutional and statutory jurisprudence on the free exercise of religion. Below I briefly trace that doctrinal history and discuss its application in several of the food sharing cases.

A. The Free Exercise Clause

In 1940, the Supreme Court first applied the Free Exercise Clause of the First Amendment to state and local governments through the Due Process Clause of the Fourteenth Amendment.[165] From 1963 to 1990, the Court's protection of the free exercise of religion nominally followed the strict scrutiny test that was established in *Sherbert v. Verner*.[166] Under that view, government laws that substantially burdened a person's free exercise of religion required a compelling state interest and narrow tailoring to advance that interest.[167] In 1990, however, in *Employment Division v. Smith*, the Court held "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[168] Thereafter, neutral laws of general applicability that only incidentally infringed on a person's religion were merely subject to rational basis review.[169] In contrast, strict scrutiny would apply if the objective of a law was to infringe upon or restrict a religious practice (i.e., if it was not a neutral law of general applicability).[170]

160. City of Boerne v. Flores, 521 U.S. 507 (1997).

161. *See infra* Part II.B.

162. *See* 42 U.S.C. § 2000cc–5(4)(A) (defining "government" broadly).

163. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).

164. *See infra* Part II.C.

165. Cantwell v. Conn., 310 U.S. 296 (1940), *discussed in* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1248, 1319–20 (5th ed. 2015).

166. Sherbert v. Verner, 374 U.S. 398, 399, 403 (1963) (applying strict scrutiny to reverse the denial of unemployment benefits to a Seventh-day Adventist who quit her job rather than work on her Saturday Sabbath); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying free exercise strict scrutiny to exempt fourteen- and fifteen-year-old students of Amish parents from a state compulsory education law). Erwin Chemerinsky notes that although *Sherbert* established strict scrutiny, in this period the Court only applied strict scrutiny to cases involving denials of unemployment benefits and compulsory education laws. CHEMERINSKY, *supra* note 165, at 1321–26.

167. *Sherbert*, 374 U.S. at 406.

168. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (citations omitted).

169. CHEMERINSKY, *supra* note 165, at 1328.

170. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (citation omitted).

Daytona Rescue Mission, Inc. v. City of Daytona Beach is an early food-sharing case that featured analysis of the Free Exercise Clause.[171] The defendant city denied the plaintiffs' application for a permit to operate a food bank and homeless shelter, and the plaintiffs sought declaratory and injunctive relief from the city's zoning code, alleging that it violated their constitutional free exercise and statutory RFRA rights.[172] In April 1992, the plaintiff pastor contacted city officials to discuss his intent to establish a rescue mission, and over the course of a year he pursued numerous possible sites and made offers on two of them.[173] In May 1993, however, the city adopted a Land Development Code, which permitted churches in the relevant zoning district but "provided that homeless shelters and food bank programs are not accessory uses."[174] In June 1993, the plaintiff pastor obtained a contract for sale for one site and immediately applied for a "semi-public use" permit for his intended "Church-Mission."[175] His application specified his intent to use the "site as a facility for worship services, daily housing of a limited number of homeless men, and daily feeding of homeless men, including those who would not be sheltered at the facility."[176] The City Planning Board heard the request the following month and denied it in August 1993, and in October 1993, the City Commission voted unanimously to deny the permit.[177] In such a posture, the plaintiffs sued in federal court, and the court, District Judge G. Kendall Sharp, granted the municipal defendants' motion for summary judgment in May 1995.[178]

Curiously, although the court noted that RFRA had been held to be retroactive, its analysis did not stop with the statutory interpretation and application but also reached the constitutional question.[179] It then applied two analyses of the Free Exercise Clause—"both the Supreme Court analysis and the *Grosz* three-part tests in [the Eleventh Circuit's] opinion in *First Assembly*."[180] Focusing on the Supreme Court analysis, Judge Sharp found "that the City code is neutral and of general applicability."[181] Although he acknowledged that the city's land development code changed the definition of a church or religious institution after the plaintiff had applied for the permit, Judge Sharp concluded that the law was neutral and of general applicability because competent evidence showed that the definitional change reduced an established policy into writing, and because the

171. 885 F. Supp. 1554 (M.D. Fla. 1994).
172. *Id.* at 1554–55.
173. *Id.* at 1556.
174. *Id.*
175. *Id.*
176. *Id.*
177. *See id.*
178. *Id.* at 1555.
179. *Id.* at 1558 (citing Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994)).
180. *Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1557–58 (citing First Assembly of God of Naples, Fla., Inc. v. Collier Cty., Fla. (*First Assembly of God of Naples I*), 20 F.3d 419 (11th Cir. 1994), *opinion modified on denial of reh'g*, 27 F.3d 526 (11th Cir. 1994); Grosz v. City of Miami Beach, Fla., 721 F.2d 729 (11th Cir. 1983)).
181. *Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1558.

initial city official with whom the plaintiff met in 1992 said that the homeless shelter and food bank would be treated as a special use.[182] Therefore, the court found no violation of the Free Exercise Clause.[183] (I discuss the court's application of RFRA in Part II.B, *infra*.)

Daytona Rescue Mission thus shows one approach to claims brought under the Free Exercise Clause and is relevant for states without a state RFRA in situations where RLUIPA does not apply. Unless a plaintiff in such a situation can persuade the court that the law is not neutral and of general applicability but instead has the objective to infringe upon or restrict a religious practice, the court will apply rational basis review, and given the government's significant interest in regulating zoning, it is likely that no constitutional violation will be found.[184]

B. The Religious Freedom Restoration Act (RFRA)

In contrast, under the Religious Freedom Restoration Action of 1993, even neutral laws of general applicability are subject to strict scrutiny so long as they substantially burden the free exercise of religion.[185] Before the Court held in 1997 that RFRA was not a proper exercise of Congress's Fourteenth Amendment, Section Five enforcement power over the states,[186] several courts applied RFRA to state laws. Thereafter, RFRA was applicable only to the federal government, but several states quickly adopted their own RFRAs, and they have featured in several recent food-sharing cases. Below, I discuss both sorts of cases.

1. Federal RFRA

Reviewing how courts have applied RFRA to religious food-sharing cases is warranted for at least two reasons. First, courts adjudicated several of the early religious food-sharing cases before the Court held that RFRA could not constitutionally apply to state and local law.[187] Second, one of those cases arose in the Federal District of Columbia,[188] and RFRA remains applicable to federal law.[189] Thus, elucidating courts' past applications of RFRA in several past food-sharing cases can still inform strategies for future litigation.

---

182. *Id.*

183. *Id.* at 1561.

184. *See, e.g., id.* at 1558 (citing First Assembly of God of Naples, Fla. v. Collier Cty., Fla. (*First Assembly of God of Naples II*), 775 F. Supp. at 386 (M.D. Fla. 1991)).

185. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb *et seq.* (2012)).

186. *Boerne*, 521 U.S. 507.

187. *Compare Boerne*, 521 U.S. 507, *with Stuart Circle Par.*, 946 F. Supp. 1225; *Daytona Rescue Mission, Inc.*, 885 F. Supp. 1554 (applying RFRA but finding that the city zoning laws did not substantially burden the petitioners' free exercise of religion); *W. Presbyterian Church II*, 862 F. Supp. 538 (D.D.C. 1994).

188. *W. Presbyterian Church II*, 862 F. Supp. 538.

189. Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

In Part I.A., *supra*, I discussed the first religious food-sharing case, *Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia.* In that case, District Judge Sporkin granted the plaintiffs' motion for summary judgment and permanently enjoined the District of Columbia from preventing the plaintiffs from ministering to the needy by charitably providing food to homeless people at the site of their new church, "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance."[190] As he concluded, "The Church may use its building for prayer and other religious services as a matter of right and should be able, as a matter of right, to use the building to minister to the needy."[191] He explained, "To regulate religious conduct through zoning laws, as done in this case, is a substantial burden on the free exercise of religion . . . in violation of the First Amendment and the Religious Freedom Restoration Act of 1993."[192]

According to RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" if the government "demonstrates that application of the burden to the person" furthers "a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest."[193] In *Western Presbyterian Church*, the defendants conceded that they had no compelling governmental interest in prohibiting the plaintiffs from conducting their "feeding program . . . 'so long as appropriate controls are in place'"[194] Therefore, the defendants disputed whether the District of Columbia zoning regulations, as applied, substantially burdened the plaintiffs' free exercise of religion.[195] As discussed in Part I.A., *supra*, the court took seriously the emic views ascribed by the plaintiffs to their practice of providing food to hungry people.[196] The plaintiffs justified their practice in terms of religious charity, ministry, spiritual redemption, and works of faith, and Judge Sporkin found ample textual support in the Bible, the constitution of the Presbyterian Church (USA), and the church's bylaws.[197] He therefore found that "the Church's feeding program in every respect is a religious activity and a form of worship."[198] He noted, "It also happens to provide, at no cost to the city, a sorely needed social service."[199] As Judge Sporkin explained, "The secular benefits inure to the needy persons who partake of the free breakfasts; the members of the Church benefit spiritually by providing the service."[200] Consequently, he found that the defendants' application of the District of Columbia

190. *W. Presbyterian Church II*, 862 F. Supp. at 547.
191. *Id.*
192. *Id.*
193. 42 U.S.C. § 2000bb-1, *discussed in W. Presbyterian Church II*, 862 F. Supp. at 545–46.
194. *W. Presbyterian Church II*, 862 F. Supp. at 545 (citation omitted).
195. *Id.*
196. *See supra* notes 47–62 and accompanying text.
197. *W. Presbyterian Church II*, 862 F. Supp. at 544.
198. *Id.* at 546.
199. *Id.*
200. *Id.*

zoning laws substantially burdened the plaintiffs' free exercise of religion in violation of RFRA.[201]

The court in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, District Judge G. Kendall Sharp, took the opposite view.[202] As discussed in Part II.A., *supra*, Judge Sharp analyzed the case under the Free Exercise Clause and RFRA. As to the former, he found that the city zoning law was neutral and of general applicability.[203] As to the latter, he found that it did not substantially burden the plaintiffs' free exercise of religion.[204] Judge Sharp acknowledged the contrary finding in *Western Presbyterian Church*, but he found that the *Daytona Rescue Mission* plaintiffs had failed to show that the City code prevented them from running a homeless shelter and food program "anywhere in Daytona Beach."[205] Although he acknowledged that the defendants' denial of the plaintiffs' application for "semi-public use" prevented them "from engaging in such conduct," Judge Sharp credited the defendants for presenting evidence that other homeless shelters existed in the city and faulted the plaintiffs for "pursu[ing] only two sites and applying for semi-public use at only one site."[206] Moreover, perhaps to reduce the risk of an appellate court reversal, he found that if the defendants had substantially burdened the plaintiffs' free exercise of religion, then the defendants' "interest in regulating homeless shelters and food banks is a compelling interest and that the code furthers that interest in the least restrictive means."[207]

On one view, *Daytona Rescue Mission* simply stands in contrast to *Western Presbyterian Church*. Different district courts found different facts and concluded differently on the law. In my view, however, Judge Sharp was wrong to rule at summary judgment that Daytona Beach's zoning laws did not substantially burden the plaintiffs' free exercise of religion. Because in that pre-1997 era courts understood that RFRA applied to state and local law, strict scrutiny applied.[208] That the zoning laws were "generally applicable" was irrelevant. While the plaintiffs bore the evidentiary burden to show that the zoning laws substantially burdened their free exercise of religion,[209] I believe that they clearly met their burden.

Judge Sharp obtained the standard for "substantial burden" from a recent Ninth Circuit case.[210] Under that standard, plaintiffs had to show that the governmental action pressured them either "to commit an act forbidden by the

201. *Id.* at 547.

202. *See Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1560.

203. *Id.* at 1558.

204. *Id.* at 1560.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1559 ("As stated in the statute, the purpose of RFRA is to restore the compelling interest test, as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . in cases where the free exercise of religion is substantially burdened.") (citations omitted).

209. *See Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1559.

210. *Id.* at 1560 (citing Vernon v. City of Los Angeles, 27 F.3d 1385, 1393 (9th Cir. 1994) (citations omitted)).

religion or" prevented them "from engaging in conduct or having a religious experience which the faith mandates."[211] Further, "[t]his interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine."[212] Under the facts of the case, Daytona Beach's zoning laws prevented the plaintiffs from "engaging in conduct or having a religious experience which the faith mandates," and this interference was more than an inconvenience but rather went to tenets or beliefs that were central to their religious doctrine. Consider first that Judge Sharp noted that the pastor plaintiff diligently "looked at numerous sites" before making offers to purchase on two of them.[213] One of the offers was refused but the pastor timely applied for the "semi-public use" of "Church-Mission" for the property that he ultimately purchased, which was "zoned M-1 (Local Industry)," a zoning district in which churches were permitted uses.[214] Also, consider that the plaintiff who pursued this endeavor had been "the pastor of the Milwaukee Rescue Mission from 1978 to 1992."[215] Upon moving to the city of Daytona Beach, he immediately consulted with the City Director of Planning and Redevelopment (in April 1992) and then spent over a year looking at numerous potential sites for the rescue mission before ultimately obtaining a purchase agreement in June 1993.[216] He then timely applied for a permit for "semi-public use," but during the process encountered city officials who "were concerned about the issue of safety and security."[217]

Comparing Judge Sharp's opinion in *Daytona Rescue Mission* with Judge Sporkin's opinion in *Western Presbyterian Church*, the judges' different treatment of the emic meanings ascribed to the ministry of providing food (and shelter) looms large. Where Judge Sporkin accepted the plaintiffs' explanations of providing food to hungry people in terms of religious charity, ministry, spiritual redemption, and works of faith, which their foundational religious texts amply supported, Judge Sharp glossed over the *Daytona Rescue Mission* plaintiffs' substantial efforts to purchase and permit a place for their rescue mission. Had the plaintiffs purchased without attempting to comply with the zoning laws, and then challenged those laws as violating their free exercise of religion rights, then it would have been proper to disregard their claim for want of a substantial burden because a mere inconvenience (i.e., not wanting to apply for a zoning permit). Here, however, the plaintiffs conducted their due diligence and complied with the zoning laws.[218] Their attempt to create a rescue mission was frustrated when local officials denied their application, citing "safety and security" concerns, but such concerns are only relevant to whether the law furthered a compelling governmental interest, not to

211. *Id.* at 1559–60 (citing *Vernon*, 27 F.3d at 1393 (citations omitted)).
212. *Id.*
213. *Id.* at 1556.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 1556, 1559.
218. *Id.* at 1556.

whether the law substantially burdened the plaintiffs' free exercise of religion. Similarly, to require the plaintiffs to apply for a permit for "semi-public use" prior to owning an interest in the subject property seems unreasonable and itself a substantial burden on the free exercise of religion. While a sophisticated purchaser could make the purchase agreement contingent on obtaining city approval of the "semi-public use," such a contingency would likely make the buyer less attractive because of the additional time and uncertainty that the contingency would insert into the transaction. Moreover, the religious use sought for the particular location was permissible under the zoning laws of the zoning districts at issue. City officials, however, had recently amended those laws to redefine churches and religious institutions as "buildings used for the sole purpose of worship and customarily related activities" and expressly excluded homeless shelters and food banks from being "customarily related activities."[219]

Notwithstanding those facts, Judge Sharp found the application of the zoning laws not to impose a substantial burden and thus neatly disposed of the plaintiffs' claim, leaving them the owners of real property that they were entitled to use as a church "for the sole purpose of worship and customarily related activities" so long as those activities did not include the food and shelter ministries that were essential to the rescue mission. Perhaps the problem was evidentiary? If the plaintiffs had made a stronger showing of the centrality of food and shelter ministries to their religion, perhaps the court would have denied the defendants' motion for summary judgment and allowed the case to proceed to a trial? Other courts in this era, when RFRA applied to state and local law, had found that, "Plaintiffs have made a strong showing that feeding the poor constitutes a central tenet of [their] religion."[220] In the alternative, perhaps the Ninth Circuit standard that Judge Sharp adopted was too narrow? The standard for "substantial burden" in this era was in dispute: some circuits of the U.S. Courts of Appeals defined it narrowly, as requiring state compulsion to do religiously forbidden activity or state coercion to refrain from religiously mandated activity, and other circuits defined it more broadly to include state laws that compel, constrain, or inhibit religious conduct or expression.[221] Ultimately, however, even under a narrow interpretation of "substantial burden," I believe that Judge Sharp misunderstood, or rejected, the emic meanings that the plaintiffs ascribed to their particular exercise of religion. Under his ruling, the City of Daytona Beach's decision to redefine the food and shelter ministries that

219. *Id.*

220. *Stuart Circle Par.*, 946 F. Supp. at 1236.

221. *Id.* at 1237–38 (discussing, *inter alia*, Mack v. O'Leary, 80 F.3d 1175, 1178–79 (7th Cir. 1996) (discussing the inter-circuit split and interpreting the term broadly); Goodall by Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996) (defining the term more narrowly)); *see also* Jonathan Knapp, *Making Snow in the Desert: Defining Substantial Burden under RFRA*, 36 ECOLOGY L.Q. 259, 281–82, 285–87 (2009) (distinguishing between two tests of substantial burden, "coercion" and "substantial impact," and discussing the inter-circuit split over the meaning of substantial burden).

constituted the essential purpose of the plaintiffs' rescue mission was constitutional and survived strict scrutiny.

In my view, *Daytona Rescue Mission* was wrongly decided, and it contrasts markedly with its contemporaries, *Western Presbyterian Church* and *Stuart Circle Parish*. Nevertheless, it remains instructive for how a court could find no violation of RFRA, or a state RFRA, in a claim brought by people who publicly share food as an exercise of their religion.

2. State RFRAs

In the second modern wave of the food-sharing cases, state RFRAs have provided the most consistent way by which courts have disposed of anti-food-sharing laws.[222] Despite the differences between particular state RFRAs, where a food-sharing case features such a law, only one court has not found a violation of state statutory rights to the free exercise of religion.[223] This Section thus reviews two food-sharing cases that featured state RFRA claims, drawing out the differences in treatment between cases arising from Fort Lauderdale and Orlando, Florida.[224]

a. Florida RFRA

Florida enacted its Religious Freedom Restoration Act in 1998 (Florida RFRA).[225] It mandates that:

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest.[226]

Also, the Florida RFRA defines "exercise of religion" as "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[227]

As earlier discussed,[228] in 2001, Arnold Abbott, and his nonprofit Love Thy Neighbor Fund, successfully sued the City of Fort Lauderdale for violating their

222. *See, e.g.*, *Abbott II*, 783 So. 2d 1213; *Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

223. *See First Vagabonds Church of God I*, 2008 WL 899029.

224. For the sake of brevity, I forego discussing two recent food-sharing cases that featured state RFRAs in Pennsylvania and Texas. *See Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

225. FLA. STAT. ANN. § 761.03 *et seq.* (West 2016).

226. *Id.* § 761.03(1).

227. *Id.* § 761.02(3).

228. *See supra* notes 151–55 and accompanying text.

rights under Florida RFRA.[229] His state court lawsuit, upheld on appeal by Florida District Court of Appeal Judge W. Matthew Stevenson, won an injunction against enforcement of city park rules unless the city provided a suitable alternative site, which it repeatedly failed to do.[230] According to the trial court, Circuit Judge Estella May Moriarty noted that Abbott founded Love Thy Neighbor in 1991 as "a memorial to his late wife and to provide a vehicle to follow his religious conviction that God is served by feeding the poor and homeless."[231] From then until November 1997, Abbott and the other Love Thy Neighbor volunteers conducted their public food sharing without censure at several locations within the city, including public parks and beaches during a period in which Fort Lauderdale experimented with several "safe zones" for homeless people in the wake of *Pottinger v. City of Miami*.[232] In 1996, however, Fort Lauderdale enacted Park Rule 2.2, which declared that:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.[233]

The following year, in November 1997, the city manager, police commander, and head of the local "Hotel-Motel Association" met with Abbott to discuss their concerns regarding the food sharing that he conducted at the beach and their perceptions of its effect on tourism.[234] Shortly thereafter, in January 1998, "a notice was posted that social services were prohibited at the beach but were approved at the downtown 'safe zone.'"[235] Although the city had no procedure for requesting a permit, the city told Abbott that he had to apply for a permit to continue sharing food at the beach.[236] He filed an "Outdoor Event Application" in March 1998, but the city did not respond until February 1999. In its response, the city manager

229. *See Abbott II*, 783 So. 2d at 1214–15 (affirming the trial court's injunction and remanding for its determination of whether the city's proposed alternate location complied with the trial court's order and the plaintiff's rights under FLA. STAT. ANN. § 761.03 (West 2016)).

230. *See id.* at 1215; *see also* Order on Plaintiff's Renewed Motion for Contempt and/or to Enforce Injunction at 15, *Abbott I*, No. 99-003583(05) (Fla. Cir. Ct. June 14, 2000) (finding the city's proposed alternate location not minimally suitable and including the trial court's June 14, 2000 Final Judgment and Order) (on file with author).

231. Final Judgment at 8, *Abbott I*, No. 99-003583(05) (June 14, 2000) [hereinafter Final Judgment, *Abbott I*]; *accord* Kamph, *supra* note 151; LOVE THY NEIGHBOR, *supra* note 151.

232. *See id.*; *see also* Pottinger v. City of Miami, 720 F. Supp. 955 (S.D. Fla. 1992), *aff'd*, 40 F.3d 1155 (11th Cir. 1994) (establishing "safe zones" where the city's police could not arrest homeless people performing harmless life sustaining acts).

233. Final Judgment, *Abbott I*, *supra* note 231, at 8; *accord* Complaint For Declaratory and Injunctive Relief and Damages at 9–10, *Fort Lauderdale Food Not Bombs I*, 2016 WL 5942528 (citing *Fort Lauderdale Parks and Recreation—Rules and Regulations*, *supra* note 147, at Rule 2.2. Social Services.

234. Final Judgment, *Abbott I*, *supra* note 231, at 8.

235. *Id.*

236. *Id.* at 2–3.

denied the request, writing that the application had been deferred because of an emergency lack of shelter beds, which the city had just remedied by opening a new shelter, and that "the Zoning code permitted the regular provision of feeding only in a building and only as a conditional use in designated zoning districts."[237] The city manager's notice concluded that city staff would start enforcing violations the following month. Abbott and the other plaintiffs subsequently filed suit.[238]

While the *Abbott* plaintiffs argued that Park Rule 2.2 violated Florida RFRA, the Civil Rights Act of 1964, and the First and Fifth Amendments of the U.S. Constitution, the trial court only found a violation of Florida RFRA.[239] Judge Moriarty found, and the appellate court affirmed, that the plaintiffs were "substantially motivated by a religious belief" and that "the zoning code prevents the plaintiffs from engaging in feeding operations anywhere in the city except as a conditional use granted after as many as five public hearings."[240] In other words, the court found the park rule was a substantial burden on the exercise of religion. The court concluded, however, that "the Rule serves a significant government interest in providing recreation and promoting tourism."[241] It then considered whether the city had complied with the "least restrictive means" requirement of Florida RFRA.[242]

Judge Moriarty noted that the city had closed the "safe zone" that it once provided for such services, that many code sections permitted restaurants but disapproved "feeding of the homeless except as a conditional use," and that churches "also must apply for a conditional use permit to operate a feeding program."[243] Thus, the plaintiffs had no place where "they could practice their faith as a matter of right."[244] Citing *Western Presbyterian Church* and *Stuart Circle Parish* (but not *Daytona Rescue Mission*), Judge Moriarty concluded that the defendant city had failed to use the least restrictive means to further its governmental interest in "providing recreation and promoting tourism," and she enjoined the city from enforcing its park rule.[245] In her order, she enjoined the city of Fort Lauderdale from prohibiting:

> Plaintiffs' feeding of the homeless at the picnic area of the public beach until such time as the city either designates an alternative site on public property or amends its zoning code to provide locations where Plaintiffs [sic] activities are permitted as of right rather than as a conditional use, or

237. *Id.* at 3.
238. *Id.*
239. *Id.* at 1, 4–5.
240. *Id.* at 5.
241. *Id.* at 4 (citations omitted).
242. *Id.* (citation omitted).
243. *Id.*
244. *Id.*
245. *Id.* at 4–5.

specifies with particularity the objective criteria that must be met to allow a conditional use.[246]

Abbott v. City of Fort Lauderdale is thus the first of the food-sharing cases in which a court adjudicated the plaintiffs' claim under a state RFRA, and in this first case, the plaintiffs prevailed. A decade later, different plaintiffs would achieve similar success in Pennsylvania and Texas,[247] but curiously a subsequent case in Florida would dispose of the Florida RFRA claim and resolve the constitutional matters in the municipal defendant's favor.[248] Before turning to the second Florida RFRA case, however, I highlight that *Abbott* cuts against my argument regarding the importance of emic and etic meanings: where cases like *Western Presbyterian Church* and *Stuart Circle Parish* seem to show a positive correlation between courts that adopt plaintiffs' emic terms and favorable plaintiff results, and cases like the *McHenry* cases, *Daytona Rescue Mission*, and *First Vagabonds Church of God* seem to show a positive correlation between courts that disregard or reject plaintiffs' emic terms and results that favor the defendants, *Abbott* provides a counterpoint.

In *Abbott*, neither trial judge Moriarty nor appellate judge Stevenson adopted the plaintiffs' emic religious terms. Instead, they uniformly utilized etic phrases like "feeding the poor and homeless," "feeding of the homeless," "feeding operations," and "feeding program." To me, these terms seem far from those evoked by the name of Abbott's nonprofit, Love Thy Neighbor, which derives from the New Testament of the Bible.[249] Nevertheless, the *Abbott* courts resolved the case in the plaintiffs' favor. Whether commentators should regard this as an exception that proves the rule, evidence that disproves the emic/etic null hypothesis, evidence that suggests multivariate causality, or something else, I leave to future discourse on the matter, in particular after I study the attitudinal model of judging and its critiques.[250]

Returning to the Florida RFRA narrative, seven years after Florida courts decided *Abbott*, the Middle District of Florida, District Judge Gregory A. Presnell, found that religious food-sharing plaintiffs in Orlando failed to prove that the defendant city's Large Group Feeding Ordinance violated Florida RFRA.[251] After the bench trial in *First Vagabonds Church of God v. City of Orlando*, during which the defendant orally moved for a judgment on partial findings, Judge Presnell concluded that, "Clearly the ordinance places a *significant* burden on FVCG's

246. *Id.* at 5–6.

247. *Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

248. *First Vagabonds Church of God II*, 2008 WL 2646603.

249. *See, e.g.*, *Mark* 12:31 (New Am.) ("The second [greatest commandment] is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these.").

250. *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 963–68 (2011) (discussing the literature regarding strategic decision making, the attitudinal model, and agency costs as to state courts). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). I thank Francisco Valdes for encouraging me to consider the attitudinal model.

251. *First Vagabonds Church of God II*, 2008 WL 2646603, at *2.

services. However, it does not rise to the level of a *substantial* burden as defined by FRFRA."[252] What explains this odd distinction between a "significant" and "substantial" burden? Between *Abbott* and Judge Presnell's ruling and order in *First Vagabonds Church of God*, the Supreme Court of Florida, Justice Peggy A. Quince, determined *Warner v. City of Boca Raton*, a case that considered squarely the requirements of Florida RFRA, including its definition of "substantial burden."[253]

In *Warner*, the Eleventh Circuit certified two questions to the Florida Supreme Court. Answering the first one, Justice Quince explained the following about the Florida RFRA:

> [T]he RFRA expands the scope of religious protection beyond the conduct considered protected by cases from the United States Supreme Court. We also hold under the Act, any law, even a neutral law of general applicability, is subject to the strict scrutiny standard where the law substantially burdens the free exercise of religion.[254]

As to the meaning of Florida RFRA's "substantial burden" phrase, Justice Quince specifically considered and rejected "the middle and broad definitions of 'substantial burden'" adopted by the Sixth (middle), and Eighth and Tenth (broad), Circuits of the U.S. Courts of Appeals.[255] Instead, she explained:

> Accordingly, we conclude that the narrow definition of substantial burden adopted by the Fourth, Ninth, and Eleventh Circuits is most consistent with the language and intent of the FRFRA. Thus, we hold that a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.[256]

Addressing the second question certified to it, the court rephrased it into, "Whether the City of Boca Raton Ordinance at issue in this case violates the Florida [RFRA]?"[257] The court answered in the negative and agreed with the underlying federal district court's finding that the city's "regulation did not substantially burden appellants' free exercise of religion."[258] The municipal law in question was a 1982 "regulation prohibiting vertical grave markers, memorials, monuments, and structures on cemetery plots" in the city-owned cemetery.[259] The regulation instead allowed for stone or bronze markers that were level with the ground.[260] Despite the regulation, however, people, including the appellants, continued to decorate their familial graves with vertical decorations, and the city did not attempt enforce the regulation until 1991, when it sent notices to plot owners that noncomplying

252. *Id.* (emphasis added).
253. Warner v. City of Boca Raton, 887 So. 2d 1023, 1031–33 (Fla. 2004).
254. *Id.* at 1035–36.
255. *Id.* at 1033.
256. *Id.* (citation omitted).
257. *Id.* at 1034.
258. *Id.* at 1035 (citation omitted).
259. *Id.* at 1025.
260. *Id.*

structures would be removed, followed by a second notice in 1992.[261] When some plot owners continued to defy the regulation, the city agreed to postpone removal pending further study.[262] It then amended the regulations in 1996 to permit vertical grave decorations for up to sixty days from the date of burial and on certain holidays.[263] The following year, after its survey determined that most plot owners approved of the amended regulations, the city council announced that it would begin enforcing them in January 1998, and litigation ensued.[264]

This was the context in which the Florida Supreme Court agreed with the district court finding that the regulation did not substantially burden the plaintiffs' exercise of religion. As the district court explained, the regulations did "not prohibit the plaintiffs from marking graves and decorating them with religious symbols. Rather, the regulations permit only horizontal grave markers."[265] Further, the amended regulations permitted vertical grave decorations for limited times.[266] Thus, the district court found that the amended regulations "merely inconvenience the plaintiffs' practice of marking graves and decorating them with religious symbols."[267] As a mere inconvenience, the regulations were not a substantial burden on the plaintiffs' exercise of religion.

Warner narrowly defined the Florida RFRA's definition of substantial burden. In my view, however, *Warner* does not warrant Judge Presnell's conclusion in *First Vagabonds Church of God.* Rather, I believe that he wrongly concluded that the "significant burden," which he found Orlando's "Large Group Feeding" ordinance had imposed on the plaintiffs' exercise of religion, did "not rise to the level of a substantial burden as defined by FRFRA."[268] Judge Presnell's conclusion was wrong for at least three reasons. First, he impermissibly created the notion of a "significant burden," which has no place in Florida RFRA's statutory scheme.[269] Under Florida RFRA, Judge Presnell could either find a substantial burden (using *Warner*'s narrow definition), or he could find no substantial burden (and possibly characterize it as a mere inconvenience). Instead, he found a significant burden, which by its terms is

261. *Id.*
262. *Id.*
263. *Id.* at 1035.
264. *Id.*
265. *Id.* (citation and internal quotation marks omitted).
266. *See id.*
267. *Id.* (citation omitted and internal quotation marks omitted).
268. *First Vagabonds Church of God II*, 2008 WL 2646603, at *2 (emphasis added). Judge Presnell's conclusion is particularly perplexing because earlier in the litigation, he had denied the defendant's motion for summary judgment and specifically noted that the religious plaintiffs had argued that the ordinance would preclude them from conducting their religious services and that their evidence had shown, "that, given the limited means of communication and transportation available to them, there is at least a possibility that these limitations would prevent a substantial portion of the FVCG congregation from learning of and traveling to these services, making the ordinance more than a mere inconvenience." *First Vagabonds Church of God I*, 2008 WL 899029 at *3 (granting in part and denying in part defendant's motion for summary judgment). Nevertheless, Judge Presnell ultimately concluded that these were not substantial burdens. *First Vagabonds Church of God II*, 2008 WL 2646603, at *2.
269. FLA. STAT. ANN. § 761.01 *et seq.* (West 2016).

more burdensome than a mere inconvenience or other *de minimis* infringement, but declared, without a persuasive explanation, that it did not amount to a substantial burden.[270] Second, beyond Judge Presnell's self-contradictory terms, I believe that he misapplied *Warner* because Justice Quince's opinion specifically approved the Florida District Court of Appeal's opinion in *Abbott v. City of Fort Lauderdale* and specifically disapproved the approach of a different Florida appellate court.[271]

Third, and perhaps most importantly, I believe that the facts of *Warner* are distinguishable from the facts of *First Vagabonds Church of God.* As earlier discussed,[272] Orlando's Large Group Feeding ordinance created a two mile radius around city hall in which any person who sought to share food in a public park, including those who did so to exercise religion, was required to obtain a permit and was limited to obtaining only two such permits in any consecutive twelve months for any particular park. In *Warner*, the regulation, as amended, allowed cemetery plot owners to memorialize the interred with horizontal grave markers and to use vertical grave decorations for two months after burial and during specified holidays. No evidence reached the Supreme Court of Florida that any plot owner had installed a permanent vertical grave marker prior to the city cemetery regulations; thus, both the district court's and the Florida Supreme Court's conclusions that the regulations' burden on the plaintiffs' exercise of religion amounted to a mere inconvenience seem warranted. In contrast, for reasons explained at length in Part I.A, *supra*, the public sharing of food for religious reasons is an active practice of charity, ministry, and worship. This was true for the plaintiffs in *Abbott* and no less so for the religious plaintiffs in *First Vagabonds Church of God.*[273]

Circuit Judge Moriarty found that Fort Lauderdale's park rule imposed a substantial burden on the *Abbott* plaintiffs, in part because it prevented them "from engaging in feeding operations anywhere in the city except as a conditional use

270. After finding no substantial burden on the religious plaintiffs' exercise of religion, which was necessary for their claim under Florida RFRA, in a subsequent opinion, Judge Presnell reached the First Amendment Free Exercise Clause claim and found the ordinance violated the plaintiffs' constitutional rights because it lacked a rational basis. *See First Vagabonds Church of God III*, 578 F. Supp. 2d at 1361–62. This too seems a clearly reversible error, for how could a law pass the strict scrutiny required by Florida RFRA yet fail the rational basis review required of a neutral law of general applicability under the Free Exercise Clause after *Smith*?

271. *Warner*, 887 So. 2d at 1036 n.11 (approving *Abbott II*, 783 So. 3d 1213, and disapproving First Baptist Church of Perrine v. Miami-Dade Cty., 768 So. 2d 1114 (Fla. Dist. Ct. App. 2000)).

272. *Cf. supra* notes 126–34 (discussing *First Vagabonds Church of God IV*, 610 F.3d 756, and the Greater Orlando Park District (GDPD)).

273. *Compare supra* notes 228–49 and accompanying text (discussing the Final Judgment and Order in *Abbott I*, No. 99-003583(05)), *with First Vagabonds Church of God II*, 2008 WL 2646603, at *1 ("Pastor Brian Nichols . . . was ordained as a Christian minister in 2004 . . . . In 2005 he formed his congregation, the First Vagabonds Church of God . . . in Orlando. Nichols, having been homeless himself for a time, sought to minister to homeless Christians in downtown Orlando . . . . Currently, his congregation has approximately forty members and holds services every Sunday . . . in Langford Park, which is located within the GDPD. The services consist of songs, prayer, Bible readings and food sharing. The breaking of bread amongst the members of his congregation is a Christian tradition and an integral part of Nichols' ministry.")

granted after as many as five public hearings."[274] Similarly, Orlando's Large Group Feeding ordinance required the religious plaintiffs in *First Vagabonds Church of God* to limit their religious food sharing to no more than twice within a consecutive twelve month period at the park where they had practiced their ministry prior to the city's enactment of its anti-food-sharing law. To exercise their religion under the anti-food-sharing law, the religious plaintiffs would have to shift from park to park within the GDPD, using any particular park, after obtaining a permit, no more than twice within twelve consecutive months, or they would have to relocate outside of the GDPD. In other words, Orlando's Large Group Feeding ordinance promised to make the First Vagabonds Church of God, and the other religious plaintiffs, vagabond from park to park within the GDPD, or to exercise their religion away from the city center, wherein their impoverished and homeless congregants tended to be.[275] Even under the narrow interpretation of Florida RFRA's definition of substantial burden, Judge Presnell should have found a substantial burden on the plaintiffs' exercise of religion because the ordinance forbid them from engaging in conduct that their religion required. Under Florida RFRA, he should have determined whether the city defendant had a compelling governmental interest and whether the Large Group Feeding ordinance was the least restrictive means of furthering it.

Reflecting on these applications of Florida RFRA to two different food-sharing cases provides insights into the threshold question of when a state or local law may constitute a substantial burden on the exercise of religion. I believe that the courts correctly decided *Abbott* but incorrectly found no substantial, but only a significant, burden on religion in *First Vagabonds Church of God.* Since *First Vagabonds Church of God*, two other courts have found violations of two different state RFRAs.[276] In the interests of brevity, however, I now turn to discuss another statute that has proven important in protecting people who publicly share food in the exercise of their religion.

C. The Religious Land Use and Institutionalized Persons Act (RLUIPA)

In 1997, the Court held that RFRA could not constitutionally apply to state and local governments.[277] In 2000, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA).[278] Grounded in

274. Final Judgment and Order at 5, *Abbott I*, No. 99-003583(05) (June 14, 2000).

275. *See First Vagabonds Church of God III*, 578 F. Supp. 2d at 1358; *First Vagabonds Church of God II*, 2008 WL 2646603, at *1–2.

276. *Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

277. *Boerne*, 521 U.S. 507.

278. Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), *codified at* 42 U.S.C. § 2000cc *et seq*; *see also* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) (discussing the origins of RLUIPA). I thank Audrey McFarlane and Sarah Schindler for encouraging me to discuss the impact of RLUIPA on the food sharing cases.

Congressional authority derived from the Spending and Commerce clauses,[279] the Court upheld RLUIPA as constitutional against an Establishment Clause challenge in 2005.[280] As its title indicates, RLUIPA provides rights in "two areas of government activity. Section 2 governs land-use regulation,"[281] and is the relevant section for the food-sharing cases. In language that substantially follows RFRA, Section 2 provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[282]

In other words, RLUIPA requires strict scrutiny of any land use regulation, such as a zoning law, and it expansively defines "land use regulation" to include "formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved."[283] Also, RLUIPA changed RFRA's definition of "exercise of religion."[284] Where RFRA's original definition of the exercise of religion expressly referred to "the exercise of religion under the First Amendment," RLUIPA redefined it to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[285]

At a glance, it would seem that RLUIPA offers a powerful protection to people who would publicly share food as an exercise of their religion, provided that they sought to do so at a real property in which they owned an interest. To date, however, the food-sharing cases have not seen much action under RLUIPA. While the National Law Center on Homelessness and Poverty counts three food-sharing cases that feature RLUIPA,[286] a close reading of them shows that only one pertains to food sharing.[287] The other two cases instead feature socio-legal conflict over churches that sought to provide "a homeless ministry (including a shelter) in its

279. *Holt*, 135 S. Ct. at 860 (citing 42 U.S.C. § 2000cc–1(b)).

280. *Cutter*, 544 U.S. at 719–20 ("In accord with the majority of Courts of Appeals that have ruled on the question . . . we hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

281. *Holt*, 135 S. Ct. at 860 (citing 42 U.S.C. § 2000cc).

282. 42 U.S.C. § 2000cc(a)(1).

283. *Id.* § 2000cc(a)(2)(C).

284. *Burwell*, 134 S. Ct. at 2761–62 (citing 42 U.S.C. §§ 2000bb–2(4), 2000cc–5(7)(A)).

285. *Id.* (citing 42 U.S.C. § 2000cc–5(7)(A)) (internal quotations omitted); *accord Holt*, 135 S. Ct. at 860.

286. *See* CRIMINALIZING CRISIS, *supra* note 5, at 134, 136–38 (discussing Family Life Church v. City of Elgin, 561 F. Supp. 2d 978 (N.D. Ill. 2008); *Layman Lessons*, 636 F. Supp. 2d; Order of Dismissal, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (on file with author)).

287. Order of Dismissal, *Pac. Beach United Methodist Church*, 2008 WL 7257244.

church building,"[288] or "a storage and distribution center for donated clothing and personal items pending distribution to the needy as well as a retail store selling donated items."[289]

As to the one case that did feature RLUIPA and food sharing, *Pacific Beach United Methodist Church v. City of San Diego*, the parties jointly filed a motion to dismiss, "captioned Stipulation of Settlement and Dismissal."[290] Because the order contains no substantive discussion of RLUIPA, we only have the parties' arguments, which offer one important insight: in the Defendants' Joint Opposition to Plaintiffs' Motion for Preliminary Injunction, they argue that the plaintiffs failed to show that the City of San Diego had imposed a substantial burden when the city inspected the plaintiffs' church without prior notice, and a city official later repeatedly stated that a written notice of violation regarding several municipal zoning codes was being prepared.[291] As with the RFRA cases discussed above, if plaintiffs fail to show a substantial burden on their exercise of religion, RLUIPA provides no protection.[292] In the food-sharing cases, this is a familiar point from *First Vagabonds Church of God* and *Daytona Rescue Mission*; in that context, *Pacific Beach United Methodist Church* makes clear that in litigation featuring RFRA or RLUIPA, cities will almost certainly attack the sufficiency of the plaintiffs' showing of a substantial burden on their exercise of religion. The *Pacific Beach United Methodist Church* parties settled and thereby enabled the plaintiffs to maintain their religious practice of "sharing a meal and [other] religious services with the poor, the hungry and the homeless, and others, on Wednesday nights."[293] To learn how RLUIPA will feature in a more fully litigated food-sharing case, we shall have to wait.

CONCLUSION

I conclude by recapitulating the Article and arguing for U.S. cities to stop criminalizing people who share food in public. In Part I, I urged readers to attend carefully to the emic and etic meanings ascribed to the practices that constitute

288. *Family Life Church*, 561 F. Supp. 2d at 982.

289. *Layman Lessons*, 636 F. Supp. 2d at 626. The *Layman Lessons* plaintiff was a nonprofit religious institution that sought "to provide food, clothing, shelter, transportation and Christian training to those in need." *Id.* The property subject to the litigated dispute however, was not intended to house and feed the homeless although the city codes administrator "had initially been confused about the type of business activity that Layman Lessons planned to conduct . . . specifically, she thought Layman Lessons intended to house and feed the homeless there." *Id.* at 627. The plaintiff clarified this point, however, so neither food, nor shelter further featured in the litigation. *See id.* at 627–28.

290. Order of Dismissal at 1, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (S.D. Cal. Feb. 11, 2008).

291. Trial Motion, Memorandum and Affidavit at 11–13, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (S.D. Cal. Feb. 11, 2008).

292. *Accord Holt*, 135 S. Ct. at 862–63.

293. Complaint for Declaratory and Injunctive Relief and Damages at 1, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (on file with author); *see also* Ronald W. Powell, *City to Allow Food-for-Needy Program*, SAN DIEGO UNION TRIB. (Apr. 22, 2008), http://legacy.sandiegouniontribune.com/news/metro/20080422-9999-1m22nohome.html [https://perma.cc/K7QC-WJAB] (reporting on the settlement).

public food sharing. Drawing on these concepts from the discipline of anthropology, I elucidated how religiously and politically motivated people who share food in public describe their practice and explained how the former prefer terms of charity, ministry, works of faith, or worship, while the latter tend to prefer solidarity and mutual aid. In highlighting these emic terms, I presented a partial history of public food sharing in the United States during the first and second modern waves of anti-food-sharing laws. I then turned to the terms preferred by the cities that criminalize, or otherwise regulate, people who share food in public. Discussing ordinances that use terms like food distribution, homeless feeding, large group feeding, social services, social service facilities, and outdoor food distribution centers, I argued that the relative distance between emic and etic terms correlates with how courts adjudicate food-sharing cases, showing that in most cases, where a court adopts the plaintiffs' emic terms, the resolution is in their favor. In contrast, where a court disregards or rejects the plaintiffs' emic terms and instead prefers the etic terms of a municipality or of First Amendment jurisprudence, the adjudication often favors the defendants. Finally, I argued that attending carefully to the emic and etic meanings is important not only for legal adjudication but also to legislate public food sharing in pragmatic ways that obtain cities' legitimate governmental interests while accounting for the powerful motivations of people who share food in public.

In Part II, I discussed critically how courts have applied First Amendment jurisprudence, in particular the Free Exercise Clause, and related statutes, and argued when I believe that judges applied that jurisprudence incorrectly. Elaborating my partial history of the food-sharing cases, I showed how federal courts applied RFRA in the early years before the Supreme Court repudiated its application to state and local governments and apparently disproved my "null hypothesis" (i.e., that the emic meanings ascribed to public food sharing by the religious activists who do it as an expression of charity, ministry, works of faith, and/or worship do not matter to the resolution of such cases) and proved my alternate hypothesis (i.e., that the emic meanings do matter to the judicial resolution of food-sharing cases). The food-sharing cases that implicated RFRA also showed the importance of the jurisprudential notion of a substantial burden on the free exercise of religion. Courts that adopt the emic meanings ascribed to public food sharing always ruled in the plaintiffs' favor, and courts that disregarded or rejected those terms almost always ruled in the defendants' favor. I further supported this argument by attending to different approaches that courts took to the state RFRA of Florida, arguing why the latter case's finding of a significant, but not substantial, burden on the plaintiffs' exercise of religion was wrong for being internally self-contradictory, a misapplication of the narrow definition of Florida RFRA, and distinguishable from the case in which the Florida Supreme Court interpreted Florida RFRA's narrow definition of substantial burden. I then discussed RLUIPA and the food-sharing cases briefly and concluded that food-sharing litigation involving RLUIPA will

similarly predictably feature contests over the threshold issue of what constitutes a substantial burden on the exercise of religion.

I now argue for U.S. cities to stop criminalizing people who share food in public and to instead cultivate charitable practices like public food sharing and similar efforts at "collective action in the urban commons."[294] Cultivating public food sharing with city laws will not only respect, rather than substantially burden, people who publicly share food as an exercise of religion, but it will also promote class relations of "organic solidarity." The eminent sociologist Émile Durkheim theorized organic solidarity by analogy with the human body, with each organ highly specialized to provide a specific function while working as part of a whole that was intertwined for common yet distinct goals.[295] Durkheim's theorization of organic solidarity is particularly resonant for public food sharing because early commentators noted that, "Durkheim conceives of the growth of organic solidarity as a process of liberation of the individual from the social repression of mechanical solidarity."[296] In addition to facilitating people's liberation from social repression, cities that cultivate public food sharing will more likely than not reduce the material deprivation amongst the homeless, hungry, and otherwise impoverished people who often congregate downtown. In contrast, to criminalize public food sharing exacerbates these people's material deprivation while failing to address the underlying conditions that make homelessness, and other forms of being visibly poor, objectionable to some city legislators.[297]

294. *Cf.* Foster, *supra* note 30, at 58 (defining the urban commons as "local tangible and intangible resources in which [urban residents] have a common stake," ranging from "local streets and parks to public spaces to a variety of shared neighborhood amenities").

295. *See* ÉMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 181 (1893, George Simpson trans., 1933); *see also* Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 803, 817 (2003) ("Class-based solidarity, in contrast, creates a basis for identity that may diminish white working class attachment to race privilege or at least create openings for change . . . . In concepts of class interest that are based on group relations of economic power, antiracist solidarity is an actual or potential interest of white workers, and class awareness and activism are vital to the transformation of white attachment to privilege."); Martha R. Mahoney, *What's Left of Solidarity: Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1516–17 (2009) ("The term 'class' includes more than identification of the position in society of an individual or group. Class involves the work people do; the understandings they form about themselves, their lives, and the people with whom they live and work; economic and social relations between groups; and the actions they take to pursue their interests.") (citation omitted).

296. Julius Stone, Book Review, *On the Division of Labour in Society*, 47 HARV. L. REV. 1448, 1450 (1934) ("Durkheim conceives of the growth of organic solidarity as a process of liberation of the individual from the social repression of mechanical solidarity.") (citation omitted).

297. On being "visibly poor," see Rankin, *supra* note 28, at 6 ("[T]he term 'visibly poor' and related iterations encompass individuals currently experiencing homelessness, but also include individuals experiencing poverty in combination with housing instability, mental illness, or other psychological or socioeconomic challenges that deprive them of reasonable alternatives to spending all or the majority of their time in public.") (citation omitted).

In the wake of the longest recession on record since 1948,[298] almost forty-seven million people in the United States live below the poverty threshold,[299] and over forty-eight million people suffer "food insecurity" (i.e., hunger).[300] Faced with this situation, city leaders should eschew the revanchist criminalization of people who are homeless, hungry, or otherwise impoverished, as well as the criminalization of the religiously or politically motivated social activists who seek to publicly share food with them.[301] City leaders should instead incentivize urban residents to act collectively across their social classes in order to improve all residents' health and nutrition. Indeed, in the current era of austerity,[302] and in light of the national endemic of obesity and overweight,[303] U.S. cities have much to gain by cultivating cross-class relations of organic solidarity: persevering through a historical period

298. DENAVAS-WALT & PROCTOR, *supra* note 17, at 21.

299. *Id.* at 12 ("In 2014, the official poverty rate was 14.8 percent. There were 46.7 million people in poverty.").

300. COLEMAN-JENSEN ET AL., *supra* note 4, at i, v, 6, 10.

301. On revanchism, or the politics of revenge, see NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY, at 44–47, 211–18 (1996) (theorizing the revanchist city from the historic revanchists of late nineteenth century France and applying the concept to explain the gentrification process in New York City at the end of the twentieth century); González, *supra* note *, at 234–36, 257–59, 279–81 (evaluating Smith's discussion of historical French revanchism and his theorization of the emergence of the revanchist city in the late twentieth century United States and explaining the emergence of anti-food-sharing laws under Smith's theory of the revanchist city).

302. *See* THOMAS BYRNE EDSALL, THE AGE OF AUSTERITY: HOW SCARCITY WILL REMAKE AMERICAN POLITICS (2012); Zachary A. Goldfarb, *Have We Been Living in an Age of Austerity?*, WASH. POST (Feb. 21, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/02/21/have-we-been-living-in-an-age-of-austerity/ [https://perma.cc/56ZR-VFPJ].

303. *See* Ashleigh L. May et al., *Obesity—United States, 1999–2010*, *in* CENTERS FOR DISEASE CONTROL AND PREVENTION [CDC], CDC HEALTH DISPARITIES AND INEQUALITIES REPORT—UNITED STATES, 2013, MMWR 120, 120 (Nov. 22, 2013) [hereinafter May et al., CDC], http://www.cdc.gov/mmwr/pdf/other/su6203.pdf [https://perma.cc/5FQ4-YCJW] ("Since 1960, the prevalence of adult obesity in the United States has nearly tripled, from 13% in 1960–1962 to 36% during 2009–2010 . . . . Although the prevalence of obesity is high among all U.S. population groups, substantial disparities exist among racial/ethnic minorities and vary on the basis of age, sex, and socioeconomic status.") (citations omitted); Manel Kappagoda, Samantha Graff & Shale Wong, *Public Health Crisis: Medical-Legal Approaches to Obesity Prevention*, *in* POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP 601 (Elizabeth Tobin Tyler, Ellen Lawton, Kathleen Conroy, Megan Sandel & Barry Zuckerman, eds., 2012) ("Skyrocketing obesity rates in the United States over the past three decades have prompted call to action . . . . Currently two-thirds of adults and one third of children are overweight or obese . . . . As of 2008, 33.8 percent of adults and 16.9 percent of children ages 2–19 in the United States were considered obese."); *see also* Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 756 (2007) (arguing that poverty, hunger, and obesity are better understood as "endemic," facts of ordinary life for various vulnerable populations in the United States and other societies, rather than as exceptional or "epidemic"). For Berlant, "slow death" refers to "the physical wearing out of a targeted population" in a scene, episode, or other temporal environment that is "nearly a defining condition of their everyday experience and historical existence." *Id.* at 754. Under this approach, while the disproportionate poverty, hunger, and obesity of children, the elderly, immigrants, racialized ethnic minorities, and women may provoke feelings of outrage (that might be channeled into activism), these upsetting scenes serve vested interests with a long genealogy, namely, capitalism, or the historically particular class relations of the United States' political economy. *See id.* at 766.

marked by substantial assaults on governance and the public fisc may well require the kind of compassionate cooperation that food sharing exemplifies.

Finally, cities should stop promulgating, or repeal, anti-food-sharing ordinances and other municipal laws that criminalize people who are homeless, hungry, or otherwise impoverished, marginalized, and vulnerable because such laws are socially corrosive. Anti-food-sharing laws extend criminalization beyond their ostensible targets—impoverished, homeless, or otherwise hungry people. While homeless, hungry, or otherwise impoverished people may be subject to arrest and prosecution under an anti-food-sharing law, the typical activity criminalized by such laws is providing food to, or sharing food with, hungry people while on city-owned, ostensibly public, property. In other words, anti-food-sharing laws criminalize the religious and social activists who publicly assemble in order to provide food to hungry people. Not surprisingly, such laws sometimes deter the charity and ministry, or solidarity and mutual aid, that people practice and experience when they act together to satisfy the human need to eat. That these laws threaten organic solidarity in an historical moment when rates of impoverishment and hunger have increased significantly (i.e., before, during, and after the Great Recession) is particularly striking.[304] In my view, anti-food-sharing laws ultimately evidence the spread of a socially corrosive politics, which the late critical geographer Neil Smith, termed "the revanchist city," an ideology that competes with the ebullience of gentrification and which scapegoats disfavored and marginalized social groups in order to consolidate politically reactionary power.[305]

Criminalizing this sort of charity feels particularly disturbing because it appears unprecedented in U.S. history to generally make a crime out of providing food to hungry people.[306] While the color of law sometimes justified police action against sharing food, in U.S. history this typically only occurred during intense moments of social conflict, such as a labor strike, or in an historical moment where entire classes of people were denied fundamental constitutional rights and the equal protection of the law, such as under Jim Crow regimes, the Black Codes, or the peculiar institution of slavery.[307] In contrast, today, in an era that some commentators have dubbed the New Gilded Age,[308] increasing numbers of U.S. cities are promulgating anti-food-sharing laws in apparent disregard of superior statutory rights, constitutional rights, and international human rights.

Indeed, contextualizing the food-sharing cases in Anglo-American legal history raises other provocative comparisons, reaching beyond the poor house of the nineteenth century to the colonial outdoor relief of the eighteenth century, and

304. *Accord* González, *supra* note *, at 232–33 (noting the increase in poverty and food insecurity from 2006 to 2012).

305. *Id.* at 234–36, 257–59, 279–81 (evaluating Smith's discussion of historical French revanchism and his theorization of the emergence of the revanchist city in the late twentieth century United States).

306. *Id.* at 235–36.

307. *See id.* at 235.

308. *See id.* at 236–57 (discussing the notion of a New Gilded Age in the United States).

even further, to the English Poor Laws of the fourteenth century, which expressly forbade charity to the able-bodied poor so that they be compelled to labor in order to live.[309] In this light, the revanchist city of the twenty-first century seems particularly dystopian because the city governments that promulgate anti-food-sharing laws typically act at the behest of a handful of individuals, sometimes affiliated with a local chamber of commerce, often downtown area merchants or new residents to a city center.[310] In other words, U.S. cities are criminalizing charity and deterring organic solidarity at the behest of a relatively small number of citizens who are effectively claiming the right to exclude visibly homeless, impoverished, or otherwise hungry people from their midst, as well as those individuals of ostensibly nonpoor (middle) classes who organize themselves to help hungry people not starve. This brave new reality is redolent of medieval banishment or exile and should have no place in twenty-first century law and society.[311]

309. *See id.* at 236 (discussing the English Statute of Laborers (1349)) (citing to JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 10 (1995); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 102–03 (1998)); *see also* Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 188–89 (1955).

310. *See, e.g.*, González, *supra* note *, at 269 (discussing Orlando Mayor Buddy Dyer's reference to the Orlando Chamber of Commerce in the process that enacted the city's Large Group Feeding Ordinance); *see also supra* note 234 and accompanying text (discussing how the city manager, police commander, and head of the local Hotel-Motel Association met with Arnold Abbott to discuss their concerns regarding the food sharing that he conducted at the beach and their perceptions of its effect on tourism).

311. *See generally* BECKETT & HERBERT, *supra* note 28; Amster, *supra* note 28; Rankin, *supra* note 28; Riesenfeld, *supra* note 309, at 189; Simon, *supra* note 28.

Appendix 1: The Litigated Food-Sharing Cases (listed chronologically).[312]

	Case Name	Date of Opinion	Jurisdiction	Citation
1.	Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.	Aug. 29, 1985	Ariz.	712 P.2d 914 (Ariz. 1985)
2.	Wilkinson v. Lafranz	Jan. 11, 1991	La.	574 So. 2d 403 (La. Ct. App. 4 Cir. 1991)
3.	McHenry v. Agnos (*McHenry I*)	Jan. 19, 1993	9th Cir.	983 F.2d 1076 (unpublished table decision)
	McHenry v. Jordan (*McHenry II*)	May 30, 1996	9th Cir.	81 F.3d 169 (unpublished table decision)
4.	W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C. (*W. Presbyterian Church I*)	Apr. 15, 1994	D.D.C.	849 F. Supp. 77
	W. Presbyterian Church II	Sept. 8, 1994	D.D.C.	862 F. Supp. 538
5.	Daytona Rescue Mission, Inc. v. City of Daytona Beach	May 12, 1995	M.D. Fla.	885 F. Supp. 1554
6.	Stuart Circle Par. v. Bd. of Zoning Appeals of Richmond	Nov. 26, 1996	E.D. Va.	946 F. Supp. 1225
7.	Abbott v. City of Fort Lauderdale (*Abbott I*)	June 14, 2000	Fla.	No. CACE99-003583(05) (Fla. Cir. Ct. June 14, 2000)
	Abbott II	May 2, 2001	Fla.	783 So. 2d 1213 (Fla. Dist. Ct. App. 2001)

312. App. 1. The Litigated Food-Sharing Cases (listed chronologically) derives from CRIMINALIZING CRISIS, *supra* note 5, at 62–63, 132–42 (listing twelve federal court cases, including four appellate opinions, and one state (Florida) court case), plus additional research conducted by the author and his research team that identified further proceedings in those cases, additional published and unpublished cases, and emerging controversies that had yet to be litigated. The author plans to update this table online at http://foodsharinglaw.net [https://perma.cc/E6BC-YAA5].

8.	Santa Monica Food Not Bombs v. City of Santa Monica	June 16, 2006	9th Cir.	450 F.3d 1022
9.	Sacco v. City of Las Vegas	Aug. 20, 2007	D. Nev.	2007 WL 2429151
10.	Pac. Beach United Methodist Church v. City of San Diego	Apr. 18, 2008	S.D. Cal.	07-CV-2305-LAB-PCL Order of Dismissal
11.	First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God I*)	Mar. 31, 2008	M.D. Fla.	2008 WL 899029
	First Vagabonds Church of God II	June 26, 2008	M.D. Fla.	2008 WL 2646603
	First Vagabonds Church of God III	Sept. 26, 2008	M.D. Fla.	578 F. Supp. 2d 1353
	First Vagabonds Church of God IV	July 6, 2010	11th Cir.	610 F.3d 1274
	First Vagabonds Church of God V	Apr. 12, 2011	11th Cir.	638 F.3d 756
12.	Big Hart Ministries Ass'n, Inc. v. City of Dall. (*Big Hart Ministries Ass'n*)	Nov. 4, 2011	N.D. Tex.	2011 WL 5346109
	Big Hart Ministries Ass'n	Mar. 25, 2013	N.D. Tex.	3:07-CV-0216-P Findings of Fact and Conclusions of Law
	Big Hart Ministries Ass'n	Mar. 28, 2013	N.D. Tex.	3:07-CV-0216-P Final Judgment
13.	Chosen 300 Ministries, Inc. v. City of Phila.	Aug. 9, 2012	E.D. Pa.	2012 WL 3235317 Findings of Fact and Conclusions of Law
14.	Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (*Fort Lauderdale Food Not Bombs I*)	Sept. 30, 2016	S.D. Fla.	15-60185-CIV-ZLOCH Order on Motions for Summary Judgment
	(*Fort Lauderdale Food Not Bombs II*)	Jan. 18, 2017	11th Cir.	2017 WL 1076817

Appendix 2: U.S. Cities with Anti-Food-Sharing Laws (by state).[313]

Alabama	**Arizona**	**California (10)**	**Colorado**	**Connecticut**
Birmingham	Phoenix	Chico Costa Mesa Hayward Los Angeles Malibu Ocean Beach Pasadena Santa Monica Sacramento Ventura	Denver	Middletown
Florida (11)	**Georgia**	**Indiana**	**Iowa**	**Kentucky**
Daytona Beach Fort Lauderdale Gainesville Jacksonville Lake Worth Melbourne Miami Orlando Palm Bay St. Petersburg Tampa	Atlanta	Indianapolis Lafayette	Cedar Rapids Davenport	Covington
Maryland	**Missouri**	**North Carolina**	**New Hampshire**	**New Mexico**
Baltimore	Kansas City St. Louis Springfield	Charlotte Raleigh Springfield	Manchester	Albuquerque
Nevada	**Ohio**	**Oklahoma**	**Oregon**	**Pennsylvania**
Las Vegas	Dayton	Oklahoma City Shawnee	Medford	Harrisburg Philadelphia
South Carolina	**Tennessee**	**Texas**	**Utah**	**Washington**
Columbia Myrtle Beach	Nashville	Corpus Christi Dallas Houston	Salt Lake City	Olympia Seattle Sultan

313. App. 2. U.S. Cities with Anti-Food-Sharing Laws derives from SHARE MO MORE, *supra* note 5, at 5, which maps the fifty-seven cities across twenty-five states that the National Coalition for the Homeless reports as "U.S. cities that have attempted to restrict, ban, or relocate food-sharing." The author plans to update this table online at http://foodsharinglaw.net [https://perma.cc/E6BC-YAA5].

The 2021 Florida Statutes

CHAPTER 761
RELIGIOUS FREEDOM

761.01 Short title.—This act may be cited as the "Religious Freedom Restoration Act of 1998."
History.—s. 1, ch. 98-412.

761.02 Definitions.—As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.
History.—s. 2, ch. 98-412.

761.03 Free exercise of religion protected.—

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.
History.—s. 3, ch. 98-412.

761.04 Attorney's fees and costs.—The prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.
History.—s. 4, ch. 98-412.

761.05 Applicability; construction.—

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

(7) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution and the First Amendment to the Constitution of the United States respecting the establishment of religion. This act shall not be construed to permit any practice prohibited by those provisions.

History.—s. 5, ch. 98-412.

761.061 Rights of certain churches or religious organizations or individuals.—

(1) The following individuals or entities may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if such an action would cause the individual or entity to violate a sincerely held religious belief of the individual or entity:

(a) A church;

(b) A religious organization;

(c) A religious corporation or association;

(d) A religious fraternal benefit society;

(e) A religious school or educational institution;

(f) An integrated auxiliary of a church;

(g) An individual employed by a church or religious organization while acting in the scope of that employment;

(h) A clergy member; or

(i) A minister.

(2) A refusal to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges under subsection (1) may not serve as the basis for:

(a) A civil cause of action against any entity or individual protected under subsection (1); or

(b) A civil cause of action, criminal cause of action, or any other action by this state or a political subdivision to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, or licenses, from any entity or individual protected under subsection (1).

History.—s. 1, ch. 2016-50.