THE CRIMINALIZATION OF HOMELESSNESS

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READINGS, Parts I, II, III, IV, V, VI & VII

Part VI

HOUSING NOT HANDCUFFS

A Litigation Manual

NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

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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.

TABLE OF CONTENTS

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.

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).

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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.

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,

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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

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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-

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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

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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

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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

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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

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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.

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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-

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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

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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-

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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

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(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]

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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-

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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.

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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

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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.

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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.

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.

Lynn Adelman, The Supreme Court's Quiet Assault on Civil Rights, Dissent Magazine, Fall 2017

It is a little-known and disturbing fact that the Supreme Court is in the process of gutting what may be the most important civil rights statute Congress has ever passed. It is particularly distressing that the harm is being done by a largely unanimous court—and that, other than a few legal scholars, no one seems to be paying any attention.

The statute in question is Section 1983 of the United States Code, which was enacted in 1871 as part of Reconstruction. Section 1983 enables people to bring suits in federal court to enforce the rights created by the Fourteenth Amendment—which, among other things, prohibits state officials from depriving persons of due process and equal protection of the law. The law was designed to provide a federal remedy against officials who violated the rights of the newly freed slaves or who stood by while others, like the Ku Klux Klan, did so. Specifically, it authorizes individuals to sue in federal court "any person who under color of law" violates their constitutional rights. The purposes of the law are to compensate persons whose constitutional rights have been violated and to deter future violations. Actions brought under Section 1983 are known as constitutional tort suits.

After Congress enacted Section 1983, the law lay largely dormant for some ninety years. In 1961, however, in *Monroe v. Pape,* the Warren Court breathed life into the statute. The plaintiff in *Monroe* alleged that thirteen Chicago police officers broke into his home in the early morning without a warrant, made his family stand naked, and interrogated him under physical threat. The Supreme Court upheld the plaintiff's claim for damages under Section 1983 and interpreted the "under color of law" requirement to include actions by government officials taken under the badge of their authority even if the actions exceeded what they were permitted to do under state law. A police officer who used excessive force—as in the *Monroe* case—would be a prime example.

As the result of *Monroe*, Section 1983 became the primary vehicle for enforcing constitutional rights in the United States, and that remains true to this day. As Professor Lynda Dodd of the City University of New York (CUNY) has shown, although the statute has never received as much attention as some of the 1960s-era statutes such as the Civil Rights Act of 1964, Section 1983 has served as a central pillar of civil rights work for more than half a century. It is the means by which plaintiffs challenge the use of excessive force by police officers, race-based patterns of stop and frisk, unconstitutional conditions of confinement, wrongful convictions, and other kinds of official misconduct. While the Justice Department can only investigate a handful of police departments in a year—assuming that it is interested in the issue at all, which Attorney General Jeff Sessions has indicated it currently is not—private litigants file more than 15,000 Section 1983 actions every year and prisoners file more than 30,000. The families of several recent victims of high-profile police killings, including Michael Brown in Ferguson and Eric Garner in New York City, have been among those to bring actions under Section 1983.

Since *Monroe*, however, the Supreme Court has not been friendly to the statute, consistently narrowing it and making it harder for individuals whose constitutional rights have been violated to prevail in lawsuits. One way the Court has limited Section 1983 is that it has refused to apply the legal doctrine of *respondeat superior* to cases involving constitutional torts. The *respondeat superior* principle provides that an employer is liable for the damages caused by the wrongdoing of an employee committed in the course of employment. This doctrine is a general principle of law applicable in virtually all tort cases, including run-of-the-mill auto accidents and cases under federal

anti-discrimination statutes. Because the Supreme Court refuses to apply it to suits under Section 1983, however, if a police officer uses excessive force, the municipality that employs the officer cannot be held liable for the damages the officer caused.

The Court has also narrowed the statute by holding that a state is not a "person" and, therefore, cannot be sued under Section 1983. This unfortunate 5–4 Rehnquist Court decision, dating back to 1989, relied heavily on the notion that the word "person" should not be read to include a sovereign. The decision was a sharp setback for civil rights and a victory for the retrograde idea that state sovereignty can serve as a source of resistance to rights guaranteed by the federal Constitution.

A third way that the Court has narrowed Section 1983 is by rejecting the proposition that a supervisor can be liable for the constitutional tort of an employee under his or her supervision. In a 1976 case, citizens of Philadelphia sought to hold high-ranking city officials including the city's notorious mayor, Frank Rizzo, accountable for the city's failure to properly handle citizen complaints of police mistreatment. Writing for the Court, Justice Rehnquist said that the plaintiffs needed to show an affirmative link between the supervisors' conduct and the constitutional violations but provided no further guidance. The Court did not address the issue again until 2009 in a case in which a Pakistani prisoner, Javaid Iqbal, sued corrections officers and high-ranking officials including former Attorney General Ashcroft, who had designated him a person "of high interest." Iqbal alleged that the extremely harsh conditions of his confinement constituted discrimination based on race, religion (Iqbal was Muslim), and national origin. The Roberts Court squarely held that high-ranking officials could not be held liable for the conduct of subordinates.

Of all the restrictions that the Court has imposed on the statute, however, the one that has rapidly become the most harmful to the enforcement of constitutional rights is the doctrine of qualified immunity. As presently formulated by the Court, this doctrine provides that a government official is immune from liability for violating an individual's constitutional rights unless the individual can show that the right in question was "clearly established." To make this showing, the civil rights plaintiff must produce a precedent with facts or circumstances very close to those in the plaintiff's case. If the plaintiff fails to do so, the case must be dismissed. And as I will discuss, this is precisely what happens in a large number of cases.

The text of Section 1983 says nothing about qualified immunity. Where, then, does the doctrine come from? As one scholar, William Baude of the University of Chicago Law School, has explained, the simple answer is that the Supreme Court made it up. Qualified immunity is a limitation on Section 1983 that the Court created in 1982 without support in the statute's text or legislative history. Supreme Court justices have offered three different legal reasons for creating the doctrine, none of which are persuasive. One is that it is derived from a "good faith" defense that was available to government officials at common law. A second, offered by Justice Scalia, is that it compensates for the "mistake" that the Warren Court made when it decided *Monroe v. Pape*. Scalia's argument, in essence, is that it is appropriate for the Court to invent a new doctrine to correct an earlier error. A third justification is that qualified immunity is a way of assuring that officials are given fair warning about what they are permitted to do. As Baude points out, however, for a variety of reasons none of these justifications hold up. To summarize, there was no good faith defense at common law, the Court's decision in *Monroe* was not a mistake, and the fair notice rule—a principle applicable in criminal, not civil, law—is irrelevant. Finally, even if these justifications had merit, the doctrine of qualified immunity would not be the best way of effectuating it. The fact is that there is no

persuasive legal basis for the doctrine.

Justices have also advanced several policy reasons in support of qualified immunity. These include a concern about subjecting officials to damage awards and litigation expenses and distracting them from their duties, as well as a concern about deterring people from seeking government jobs. Again, however, these concerns are unfounded. Virtually all officials against whom judgments are taken in Section 1983 cases are indemnified by their employer or their employer's insurance company. None are required to pay damages out of their own pocket. The same is true of litigation expenses. All officials are represented by counsel paid for by their employer. As for lawsuits being a distraction, I suppose it's possible, but that hardly seems a legitimate reason to provide an official with immunity for violating someone's constitutional rights. Finally, I know of no evidence that people are deterred from seeking government jobs because of possible liability for constitutional torts. Ultimately, the doctrine of qualified immunity seems to rest on nothing more than a feeling by Supreme Court justices that government officials should not be held responsible for violating an individual's constitutional rights except in extremely limited circumstances—that is, if the official did something really terrible.* This feeling, however, is entirely inconsistent with the language and the purpose of Section 1983.

From the standpoint of a litigant whose constitutional right has been violated, the biggest problem with the doctrine is demonstrating that the right in question was clearly established. The Supreme Court regularly reminds lower courts that "clearly established law" has to be understood concretely. It is not enough to say that the Fourth Amendment is clearly established, and therefore all Fourth Amendment violations are contrary to clearly established law. Nor is it enough to say, more specifically, that case law clearly establishes that the use of force in making an arrest is unconstitutional, and therefore all excessive force violations are clearly established law violations. The plaintiff must always show a precedent with facts much like those in his or her case. In an excessive force case, for example, the plaintiff must come up with a precedent in which the police used the same kind and amount of force that they used in the plaintiff's case.

The Court has been extremely aggressive on this issue. Of the nineteen opinions it has issued since 2001, in seventeen it found that government officials were entitled to qualified immunity because the plaintiff could not produce a precedent with facts close enough to those in the case at bar. The last time the Court ruled in favor of a Section 1983 plaintiff on the clearly established law issue, as Penn State legal scholar Kit Kinports points out, was in 2004. Also, more than one-third of these seventeen defendant-friendly rulings came in summary reversals, which are rare in the Supreme Court. The Court continually reminds us that its job is not error-correction but to decide broader questions. In these summary reversals, however, the only question was whether the clearly established law standard applied to a particular set of facts, a pure error-correcting issue. Ironically, in the one summary reversal that favored a Section 1983 plaintiff, Justices Alito and Scalia objected that the Court was engaging in error-correcting.

The Supreme Court's rulings make it very hard for lower courts to deny immunity. Lower courts are regularly reversed for erring on the side of liability but almost never for granting immunity. The Supreme Court's message to lower courts is clear: think twice before allowing a government official to be sued for violating an individual's constitutional rights. As a result, the lower federal courts are disposing of cases based on qualified immunity at an astonishing rate. A recent study analyzed 844 circuit court opinions encompassing 1,460 claims and found that qualified immunity was granted in 72 percent of them, the majority because the plaintiff had not shown that the law was clearly established.

Besides its rulings on the merits of the qualified immunity issue, the Supreme Court has also created procedural obstacles for civil-rights plaintiffs in connection with the issue. The Court regards qualified immunity not as a mere defense but as an actual immunity from suit such that government officials entitled to immunity should not have to undergo pre-trial discovery or trial. Thus, when a trial court denies an official's request for immunity, the official need not wait for a final judgment before appealing but may do so immediately and thereby bring a halt to all proceedings in the trial court. This makes it much more expensive and time-consuming for civil-rights plaintiffs to pursue their cases.

The Supreme Court also changed the sequence in which trial courts must address the issues in cases involving qualified immunity, and this decision has had a very harmful effect on the development of constitutional law. Previously, trial judges had to determine whether a government official violated the constitutional right at issue before deciding whether the right was clearly established. This was important because it meant that lower courts could not avoid deciding constitutional issues. Recently, however, the Court eliminated this requirement and authorized lower courts to proceed directly to whether the right in question was clearly established. So now, most courts just avoid the constitutional issue. As a result, constitutional issues don't get resolved and constitutional rights don't get established, clearly or otherwise.

A number of scholars have been very critical of the Court's handling of the qualified immunity issue. Professor Baude argues that the Court has acted unlawfully and contrary to conventional norms of statutory interpretation. Professor Kinports contends that the Court's qualified immunity jurisprudence represents a tacit assault on constitutional tort suits. And Dean Erwin Chemerinsky of the University of California Law School at Berkeley has described how the effect of the Court's approach is to protect bad cops.

The obvious question is what, if anything, can be done. From a substantive standpoint, it would be relatively easy to fix Section 1983. Many of the problems would go away if the law were changed so that the *respondeat superior* doctrine applied to constitutional torts. If civil-rights plaintiffs could recover from employers, whether an employee was entitled to qualified immunity wouldn't matter. For a number of reasons, however, it is extremely unlikely that the Supreme Court will change the law anytime soon.…

Progressives and other civil rights advocates need to speak out about this issue. They also should probably begin to think about a strategy to persuade a future Congress to strengthen Section 1983. Congressional action to strengthen civil rights is not as rare as one might suppose. In 1978, Congress passed the Pregnancy Discrimination Act to overrule a Supreme Court decision that pregnancy discrimination was not sex discrimination under Title VII, and in 1988 Congress passed the Civil Rights Restoration Act for the purpose of correcting a Supreme Court decision regarding federal financial assistance to schools. Title VII has also been the subject of legislative overrides, as in the Civil Rights Act of 1991 and the Lily Ledbetter Act of 2009.…

Both the Supreme Court and Congress could easily fix the problems that the Court has created involving Section 1983. Neither, however, will do so unless a broad base of public support emerges.… In the meantime, however, the issue is in the hands of the judiciary and it is essential that lawyers, judges, and progressive legal organizations continue to argue strenuously against the course that the Supreme Court has recently taken.

Lynn Adelman is a judge in the United States District Court, Eastern District of Wisconsin.

Karen Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm. & Mary Bill Rts. J. 913 (2015)

There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs.

Plaintiffs who bring claims under Section 1983 can name as defendants the individual actors who are alleged to have engaged in unconstitutional conduct, whether as "line" officers or as supervisors, as well as local government entities whose customs or policies are alleged to have caused the injury. In each instance, barriers erected by the Supreme Court will hinder a plaintiff's ability to seek redress for harms caused by even acknowledged violations of constitutional rights.

The primary focus of this Article is on the befuddled jurisprudence surrounding the defense of qualified immunity. I begin, however, with some brief observations about both municipal and supervisory liability, just to underscore the difficulty of making out those kinds of claims, and thus, assuming the Court's continued dogged adherence to the doctrine of no respondeat superior liability, the importance of providing plaintiffs with a viable damages remedy against non-supervisory officials.

I. The Maze: Claims Against Government Entities

While individual officers sued in their individual capacities for damages are afforded the qualified immunity defense to protect from harassment and liability for engaging in conduct that was not clearly unconstitutional, local governments may be held liable for constitutional harm that can be shown to result from official policy or custom, even if the right was not clearly established at the time of the challenged conduct. But, the Court has remained steadfast in its rejection of respondeat superior liability under Section 1983, so plaintiffs have to show that the entity itself has caused the constitutional violation, not simply that the entity employs a constitutional tortfeasor. The Court has recognized basically four different ways a plaintiff might establish local government liability:

1. Plaintiff may establish that her harm was caused by an application of an officially adopted unconstitutional policy.
2. Plaintiff may establish that her harm was caused by an unconstitutional custom, usage, or practice.
3. Plaintiff may attribute a single unconstitutional decision or act of a final policymaker to the entity, taking caution to distinguish a final policymaker from a final policy-implementing official or even a final decision maker.
4. Plaintiff may establish that a failure to train, supervise, discipline, or adequately screen, while not itself unconstitutional, is deliberately indifferent to and the cause of a constitutional violation by a non-policymaker.

Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, and even more challenging to ultimately prove after the Court's decision in Connick v. Thompson. In Connick, by a five-to-four decision, the Court overturned a fourteen million dollar verdict for John Thompson who had brought an official capacity or Monell

claim against the Orleans Parish District Attorney in Louisiana, based on a failure to train prosecutors as to Brady obligations.

John Thompson had spent eighteen years in prison, including fourteen years on death row, when a private investigator discovered undisclosed blood-test evidence that exonerated Thompson of an attempted armed robbery for which he had been convicted. Because of the possibility of impeachment from the robbery conviction, Thompson chose not to testify at his trial for an unrelated murder, which trial also resulted in conviction. When the robbery conviction was vacated and the murder case was retried, a jury returned a verdict of not guilty. As a result, Thompson brought a wrongful conviction suit against the Office of the District Attorney, claiming that the failure to train assistant district attorneys as to their obligation to turn over exculpatory or impeachment evidence caused the Brady violation that injured him. Even though ten exhibits were disclosed at the retrial that had not been disclosed at the initial murder trial, and even though, over a twenty-year period, no fewer than five different prosecutors had known about and failed to turn over the exculpatory blood-test evidence, the majority viewed this egregious conduct as a "single incident" and held that "[f]ailure to train prosecutors in their Brady obligations does not fall within the narrow range of Canton's hypothesized single-incident liability." The majority underscored that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train," and observed that none of the four convictions that had been overturned due to Brady violations in the 10-year period prior to Thompson's robbery trial had "involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind," and thus, none could have put Connick on notice as to the need for specific training to avoid the constitutional violation in Thompson's case.

Many trees have been destroyed by scholars, myself included, trying to parse and explain the various theories for holding municipalities liable under Section 1983, always cautious about crossing the line the Supreme Court has drawn between vicarious and direct liability. Justice Breyer's call for a reexamination of "the legal soundness of that basic distinction itself," has gained little traction since he first made the suggestion. The area of municipal or entity liability has become, in the words of Justice Breyer, a "highly complex body of interpretive law," indeed, a maze that judges and litigants must navigate with careful attention to all the twists and turns.

Professor Joanna Schwartz has done an empirical study involving forty-four of the largest police departments and law enforcement agencies in the country, as well as thirty-seven small and mid-sized agencies, and concludes that her findings "support the presumption that officers across the country, in departments large and small, are virtually always indemnified." Based on her findings, one may question both the need for qualified immunity to protect individual officers and the rejection of respondeat superior liability for government entities. But as Professor Schwartz points out, given the seemingly widespread indemnification practices, one can also argue that there is no great need to replace theories of municipal liability with respondeat superior liability. It's happening anyway and there may be some value to playing the Monell game in terms of "settlement, leverage, fault-fixing, and information gathering." Whatever its merits and however questionable the foundation on which it has been built, it appears that the direct/vicarious line drawn in Monell is here to stay for the foreseeable future. The net result of adherence to the no-respondeat-superior rule is that plaintiffs will have to work through the maze of complex and stringent criteria for making out

municipal liability claims and courts will be more concerned about strengthening the immunity defenses available to individual actors.

II. The Mud: Claims Against Supervisors

Supervisory liability is a form of individual liability and presents no special problems when the supervisor is an active participant in the underlying constitutional violation. It is when the supervisory liability claim is based on a "failure to ____"-for example, failure to supervise, discipline, train or adequately screen-that matters have become muddied. The doctrinal change that the Supreme Court announced in Iqbal, with respect to the standard for holding supervisors liable under Section 1983, has left a sea of uncertainty, confusion, and disagreement among the lower courts as to when, if ever, supervisory liability may attach for claims based on inaction, rather than affirmative acts. Post-Iqbal, the majority of Circuits have engaged in avoidance of the issue whenever possible. The most recent excursion into the "muddied waters" of supervisory liability has been by the Third Circuit Court of Appeals. In Barkes v. First Correctional Medical, Inc., the court noted that Iqbal "expressly tied the level of intent necessary for superintendent liability to the underlying constitutional tort," and further observed that "[t]his aspect of Iqbal has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability." Rejecting the view that Iqbal has "abolished supervisory liability in its entirety," the Third Circuit joined ranks "with those courts that have held that, under Iqbal, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged." Thus, in the case before the court, where the claim was based on an Eighth Amendment denial of medical care, the state of mind required was subjective deliberate indifference. The court left "for another day the question whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid." I, as well as a number of my dear colleagues, have examined the question of the liability of supervisors post-Iqbal. Despite the amount of ink invested, the area remains a mess. I stick to my position on this and recommend a uniform standard for "failure to" claims against supervisors based on inaction. "Supervisory inaction that is subjectively and deliberately indifferent to continued or future constitutional wrongdoing by subordinates should be treated as conduct that is itself violative of substantive due process, regardless of the underlying constitutional violation." Thus, whether the underlying constitutional violation is based on an Eighth Amendment excessive force claim, requiring a malicious and sadistic state of mind, or based on a Fourth Amendment excessive force claim, requiring only objective unreasonableness, a supervisor who has subjective knowledge of the wrongful conduct and who condones or acquiesces in such conduct, should be found to have committed an independent Fourteenth Amendment substantive due process violation.

Post-Connick and post-Iqbal plaintiffs will struggle to get past summary judgment on municipal and supervisory liability claims. Even pleading these claims has become more onerous. The inability to pursue such claims might be tempered if plaintiffs were assured a remedy against the "street level" tortfeasors, with the assurance of indemnification in most cases, but to prevail on claims against non-supervisory state actors who engage in unconstitutional conduct, plaintiffs must first vault the immunities hurdles….

Conclusion: Take Two Aspirin

… It is time to revisit Monell and the Court's mistaken rejection of respondeat superior liability. Adopting respondeat superior liability would not eliminate the need for

plaintiffs to plead and prove an underlying constitutional violation. The challenges of Iqbal and the need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success in these suits. But, adopting respondeat superior would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense, as well as the hours that presently go into establishing or defeating Monell claims. Thirty-seven years after first criticizing the Court's interpretation of the statute, I have come full circle to say it again. While, as Professor Levinson notes, the change could be made legislatively by simply amending the language of Section 1983 to make clear that respondeat superior liability is authorized, we all know the likelihood of Congress taking such action is virtually nil. In Monell, the Court engaged in self-correction, and likewise, it should not shy away from this much-needed and long overdue reexamination of the soundness of the decision rendered in that case. As David Rudovsky so succinctly puts it, "in one elegant move," the Court could do much to eviscerate what I have characterized as the maze, the mud, and the madness of Section 1983 jurisprudence. From his lips to the Court's ears.

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.

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 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).

History

Amended Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 24, 1998, eff. Dec. 1, 1998; March 27, 2003, eff. Dec. 1, 2003; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009; April 26, 2018, eff. Dec. 1, 2018.

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.

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.
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> . . . . .
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> "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)

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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….

No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Table of Contents

ARGUMENT

I. *Robinson*'s prohibition against status crimes squarely applies to laws like petitioner's that punish people for the status of homelessness.

The Ninth Circuit properly applied the constitutional prohibition against status crimes in *Robinson* to strike down sleeping/camping ordinances that punished people for being homeless in violation of the Eighth Amendment. *See Robinson*, 370 U.S. at 666 (holding that criminalizing status of addiction violates the Eighth Amendment because "in the light of contemporary knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment"); *see also Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) (reaffirming *Robinson*'s holding that under the Eighth Amendment, "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus"). The Ninth Circuit properly restrained the City of Boise from enforcing its sleeping/camping ordinances against homeless individuals who did not have access to shelter because doing so would punish them for the status of homelessness in violation of the Eighth Amendment. *Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 674 (2019). The Ninth Circuit reiterated this principle in *Johnson v. City of Grants Pass* when it affirmed the district court's ruling that petitioner's sleeping/camping ordinances[2] violate the

2. The sleeping/camping ordinances before the Court are Grants Pass Municipal Code §§ 5.61.010, 5.61.030, and 6.46.090. Pet. App. 15a–17a, 24a, 221a–224a.

Eighth Amendment by prohibiting homeless individuals from sleeping outside with blankets or other bedding, even when there is nowhere else in the city for them to sleep. Pet. App. 57a. These decisions were correct applications of *Robinson*.

Petitioner's assertion (Br. 37) that its ordinances prohibit the "specific act[]" of "'occupy[ing] a campsite' on public property" obfuscates their function and disregards the basic science of sleep. First, the ordinances do not implicate a constitutional "right to camp." *Contra* Pet. Br. 42. Whatever petitioner may label them, in reality the ordinances ban merely sleeping beneath a blanket on the ground. Pet. App. 46a–47a. In other words, the ordinances implicate the right for a human being to simply exist. *Cf. Bailey v. Alabama*, 219 U.S. 219, 238, 244 (1911) (holding that an Alabama law framed "in terms . . . to punish fraud" in fact established unconstitutional involuntary servitude, and admonishing that "[w]hat the state may not do directly it may not do indirectly").

Second, sleeping—with or without rudimentary bedding—is no actus reus. Humans only exist either in a state of sleep or wakefulness; sleeping, like waking, is being, not doing. Furthermore, sleep is as inherently innocent, life-sustaining, and innate as breathing. No government has an interest in prohibiting sleep, any more than it could forbid people to breathe.

As discussed in more detail below, petitioner's sleeping/camping ordinances do not target criminal conduct but—like illegitimate vagrancy laws before them—target poverty. *See Crime*, Black's Law Dictionary (11th ed. 2019) (defining "status crime" as "a crime of

which a person is guilty by being in a certain condition or of a specific character"). Like the statute struck down in *Robinson* that made narcotics addiction a continuous crime, petitioner's ordinances make people experiencing homelessness "continuously guilty" every day that they are forced to sleep outside. *See Robinson*, 370 U.S. at 666. It is impossible for homeless and involuntarily unsheltered individuals to conform their sleeping "conduct" to the law by choosing not to sleep. *Cf. Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) ("Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human."), *vacated per settlement*, 505 F.3d 1006 (9th Cir. 2007). For them, the ordinances effectively criminalize living within city bounds. *See* Resp. Br. 29–30 (a person who remains in Grants Pass after being issued an exclusion order for "unlawful camping" faces unlimited trespass arrests). Compliance is only possible for people who have access to indoor shelter. The Ninth Circuit correctly held that petitioner's sleeping/camping ordinances create an impermissible status crime.

II. Courts have the capacity to apply *Robinson* and administer workable legal standards to ensure that the government does not unlawfully punish people for the status of homelessness.

Petitioner is incorrect (Br. 5) that "the Ninth Circuit's . . . test has already proved unworkable in both theory and practice." Courts and governments in the Eleventh Circuit have proved just the opposite: courts, in three cases discussed below that were examined by the Ninth Circuit in *Martin* and *Johnson*, have successfully applied *Robinson* in similar contexts. These cases demonstrate

that, contrary to petitioner's claims (Br. 43–45), the "involuntariness" and shelter availability standards are workable in practice. Furthermore, petitioner's claim (*id.* at 14) that *Johnson* "calls into doubt many other criminal prohibitions" contradicts decades of decisions illustrating that this narrow application of *Robinson* does not disturb substantive criminal law and will not create mayhem in the lower courts.

A. *Pottinger v. City of Miami*

In 1988, Michael Pottinger, Peter Carter, Berry Young, and other similarly situated persons experiencing homelessness sued the City of Miami, Florida, alleging constitutional violations relating to arrests for harmless, involuntary, and life-sustaining acts such as sleeping. *Pottinger v. City of Miami* (*Pottinger I*), 810 F. Supp. 1551, 1553–54 (S.D. Fla. 1992). The court certified a class. *Pottinger v. City of Miami*, 720 F. Supp. 955, 960 (S.D. Fla. 1989); *see also* Pet. App. 36a n.20. After a bench trial, U.S. District Court Judge Atkins entered an order holding that "the City's practice of arresting homeless individuals for performing inoffensive conduct in public when they have no place to go is cruel and unusual in violation of the eighth amendment." *Pottinger I*, 810 F. Supp. at 1583.

The court's well-reasoned opinion applied *Robinson* to the facts adduced at trial. Miami's "laudable attempts" to address homelessness, the court observed, had been hindered by "an escalating number of homeless people." *Id.* at 1558. To explain the causes of homelessness, the court relied on the testimony of expert witnesses, concluding that "homelessness is due to various economic, physical or psychological factors that are beyond the homeless

individual's control." *Id.* at 1563 ("[P]eople rarely choose to be homeless.").

Applying *Robinson* to these facts, the court held:

> Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless . . . . As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct.

Id. at 1564–65. The court directed the creation of two or more arrest-free zones where the city would be enjoined from arresting individuals experiencing homelessness for such involuntary, innocent conduct. *Id.* at 1584. *Pottinger*, rendered 25 years before *Martin*, has been followed by localities in Florida that conformed their ordinances and police practices with this basic rule of law.[3] Indeed, *Martin* cited *Pottinger I* approvingly, observing "[w]e are not alone in reaching this conclusion" that "as long

3. For instance, a former law enforcement official reported conforming police policies in Broward County, Florida, with *Pottinger I* to ensure that homelessness is not a crime. Decl. of Robert R. Pusins ¶¶ 1–6, *McArdle v. City of Ocala*, 519 F. Supp. 3d 1045 (M.D. Fla. 2021) (No. 5:19-cv-00461), ECF No. 108-18.

as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." 920 F.3d at 617.

In 1998, following two appeals and court-ordered mediation, *Pottinger v. City of Miami*, 40 F.3d 1155 (11th Cir. 1994) & 76 F.3d 1154 (11th Cir. 1996), the parties entered into a landmark settlement agreement that protected the rights of people experiencing homelessness, Settlement Agreement, *Pottinger I*, *supra* (No. 1:88-cv-02406), ECF No. 382. The agreement created, among other reforms, a law enforcement protocol that prohibited police from arresting individuals experiencing homelessness for specified "life sustaining" misdemeanors if shelter was unavailable; if shelter was available and accepted upon offer, the police agreed to transport and not arrest the person. *Id*. at 8–11.

By 2019, the district court, as affirmed by the Eleventh Circuit, found that the consent decree's core purpose of stopping the criminalization of homelessness had been achieved. *See Pottinger v. City of Miami* (*Pottinger II*), 359 F. Supp. 3d 1177, 1195 (S.D. Fla. 2019), *aff'd sub nom. Peery v. City of Miami*, 977 F.3d 1061 (11th Cir. 2020). Over the objection of class counsel, the court dissolved the decree, finding evidence that Miami had reformed police procedures and "no longer arrest[ed] . . . the homeless for being homeless." *Peery*, 977 F.3d at 1076 (citation omitted). The court also found that Miami had directed resources, including dedicated tax revenue, to programs that "provide shelter, medical care, and other services" for people experiencing homelessness. *Id*. "Because the City has a strong system in place to address homelessness,"

the court reasoned, "it is unlikely to revert to arresting or mistreating the homeless." *Id.*

Petitioner complains that *Martin* and *Johnson* have tied their hands; however, the City of Miami demonstrated that substantial progress can be made on homelessness without criminalizing people who have no choice but to sleep outside. Far from creating a ballooning crisis of homelessness, the court found that the *Pottinger I* consent decree, and the related increase in access to services, reduced homelessness by 90% while also decreasing arrests. *Pottinger II*, 359 F. Supp. 3d at 1180, 1182–83. Further, as the court observed, "both sides agree that arresting the homeless is never a solution because, apart from the constitutional impediments, it is expensive, not rehabilitating, inhumane, and not the way to deal with the 'chronic' homeless, who suffer from mental illnesses and substance abuse addiction." *Id.* at 1180–81.

B. *Joel v. City of Orlando*

James Joel, a person experiencing homelessness, was arrested by the City of Orlando, Florida, for violating an ordinance prohibiting "'camping' on public property," defined to include "sleeping out-of-doors." *Joel v. City of Orlando*, 232 F.3d 1353, 1355 (11th Cir. 2000), *cert. denied*, 532 U.S. 978 (2001). Police enforcement protocol required "some indication of actual camping," beyond sleeping, to make an arrest, though that could be as little as someone sleeping "atop and/or covered by materials" or "when awakened volunteer[ing] that he has no other place to live." *Id.* at 1356. Significantly, the protocol directed officers to advise homeless individuals of alternative shelter, and the undisputed evidence showed that shelter

was in fact available: the local shelter had "never reached its maximum capacity" or turned anyone away for lack of space or inability to pay. *Id.* at 1356–57.

Applying *Robinson* to the undisputed facts on summary judgment, the court rejected Joel's argument that Orlando's camping ordinance punished him for the status of being homeless. The court distinguished *Pottinger I* on the facts: there, the court had "explicitly relied on the lack of sufficient homeless shelter space" to find that "sleeping in public [was] involuntary conduct for those who could not get in a shelter." *Id.* at 1362. *Joel* held that the Orlando ordinance, by contrast, permissibly reached only voluntary conduct because of "the availability of shelter space," which gave Joel "an opportunity to comply with the ordinance." *Id.*

Robinson, as applied in *Joel*, was workable: the court considered whether shelter was available and found that it always was. Joel was therefore not punished for his status, but for the conduct of camping outside when he had available alternatives. The availability of alternatives to Joel was pivotal to the Eighth Amendment analysis by the Eleventh Circuit and determinative of the outcome. *See* Pet. App. 110a–111a; *see also Martin*, 920 F.3d at 617 n.9.

C. *McArdle v. City of Ocala*

In 2019, Patrick McArdle, Courtney Ramsey, and Anthony Cummings, sued the City of Ocala, Florida, challenging the constitutionality of its "open lodging" ordinance. *See McArdle*, 519 F. Supp. 3d at 1048. The ordinance made "rest while awake or sleep" a crime when, like in *Joel*, at least one indicator of lodging was present,

including simply being homeless or sleeping with bedding. *Id.* at 1048–49. The court found that all of the following unambiguously fit under the definition of lodging: "using bags of belongings as a pillow, sleeping on a park bench with belongings, sleeping in a covered alcove, sleeping using clothing as a pillow, sleeping with blankets and sleeping bags, sleeping wrapped in blankets, sleeping with a backpack as a pillow, and sleeping on top of a pair of jeans." *Id*. at 1053.

In total, the plaintiffs had been arrested and convicted for violating the ordinance 18 times. *Id.* at 1049 ("On some of those occasions, Plaintiffs were arrested for sleeping outdoors and, upon being awoken, advised that they were homeless."). An Assistant Professor of Medicine at the University of Miami School of Medicine who had treated hundreds of homeless patients explained the medical requirement of sleep for all human beings. Decl. of Dr. Armen Henderson ¶ 2, *McArdle*, *supra* (No. 5:19-cv-00461), ECF No. 108-10 ("Sleep is a non-voluntary, physiologic requirement necessary for normal neurocognitive and metabolic functioning."). Dr. Henderson further explained that blankets are necessary for thermoregulation of the human body: "In cooler conditions (50F and below while awake and higher when asleep), blankets are necessary to keep core temperature above 96F. Hypothermia is possible even in moderate temperatures without adequate body coverings. Blankets trap heat and are the most efficient means for maintaining body temperature." *Id*. ¶ 4.

Like in Grants Pass, the undisputed facts established that the lodging ordinance applied at all times on all public property in the city. Pls.' Mot. Summ. J. & Permanent Inj. at 8 ¶¶ 20–21, *McArdle*, *supra* (No. 5:19-cv-00461), ECF

No. 108. Over five years, the city convicted 264 unique homeless individuals of the crime of open lodging 406 times. These individuals spent 5,393 days in jail and were assessed $301,067.00 in fees and fines. *Id.* at Ex. 6, at 1, ECF No. 108-6. The evidence demonstrated that shelter was not available or was otherwise inaccessible. *McArdle*, 519 F. Supp. 3d at 1049. Unlike in *Joel*, the police did not inquire into shelter availability before making an arrest. *Id.* at 1052.

Applying *Robinson*, U.S. District Court Judge Moody held that the city's open lodging ordinance unlawfully punished the plaintiffs for their status of homelessness. In doing so, the court reconciled *Martin* and *Joel*, finding that their holdings turned on the availability of shelter space:

> The Court notes that if the ordinance is only enforced after making an inquiry of the availability of shelter space, then it only punishes the individual's conduct for failing to comply with the ordinance. If no such inquiry is made and the individual is arrested for merely sleeping outside and identifying themselves as homeless, then the ordinance unlawfully punishes the individual based on their homeless status.

Id. at 1052; *see also* Pet. App. 110a–111a; *Martin*, 920 F.3d at 617 n.9. The court entered an injunction, prohibiting the city from enforcing its open lodging ordinance against someone who is homeless "prior to inquiring about the availability of shelter space." *McArdle*, 519 F. Supp. 3d at 1056. *Johnson* referenced *McArdle* as providing an example of the practicality of determining

"involuntariness" at the time of enforcement. Pet. App. 40a n.23, 52a n.31.

D. *Robinson* has not prevented governments in Florida or any other state from addressing homelessness.

The reasons offered by petitioner (Br. 5–6, 45–47) and some of its *amici* for overturning *Johnson* and *Martin* are primarily grounded in concerns about large encampments. *See, e.g.*, Brentwood Cmty. Council Amicus Br. 6 (warning that "[w]ithout regulation of encampments" a public health crisis results); Venice Community Stakeholders Ass'n Amicus Br. 7–9 (decrying "large encampments on world famous Venice Beach"); City of Chico Amicus Cert. Br. 3 (asserting the "proliferation of homeless encampments" threatens public health). But sleeping/camping ordinances like petitioner's that apply to as few as one person and to protection as minimal as a blanket are not about large encampments. As the district court in *Johnson* reiterated, this is simply not a case about the time, place, or manner in which camps are allowed. Pet. App. 57a (court's decision, like *Martin*, was narrowly limited to principle that it is unconstitutional to punish someone for sleeping somewhere in public when they have nowhere to go). Although issues related to encampments are unquestionably important, none of those issues is properly addressed here.

Petitioner (Br. 47) and some of its *amici* blame *Robinson*'s prohibition against status crimes, and the limited application of that doctrine to sleeping/camping laws, for supposedly increased crime and disease on the streets of this country. *See, e.g.*, Brentwood Cmty. Council

Amicus Br. 13–14 (implying that without the ability to arrest people who have nowhere to sleep but outside, local governments are "confus[ed]" about their ability to enact public health and safety regulations); Venice Cmty. Stakeholders Ass'n Amicus Br. 17; L.A. Chamber of Com. Amicus Br. 16. But the courts are not to blame for policy failures that created the housing and homelessness conditions in our country today. As the Florida examples of *Pottinger*, *Joel*, and *McArdle* show, Eighth Amendment doctrine does not constrain petitioner's and its *amici*'s policy choices to address homelessness. Nor does it restrain them from enforcing common-sense health and safety regulations or arresting people for the litany of crimes that are already prohibited by law.

The impact of such rhetoric is to scare the public by classifying an entire group of people based on unfounded accusations of their inherent criminality—rhetoric that was also once used to justify vagrancy laws and has since been soundly rejected. *See Papachristou*, 405 U.S. at 171 ("The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment.").

E. *Robinson* has not created mayhem in lower courts.

Petitioner complains (Br. 43–44) that *Robinson*, as applied to the status of homelessness, is unworkable and will create confusion in the lower courts. Petitioner is wrong. There is no crisis caused by the application of *Robinson* to people who are involuntarily sleeping outside, nor will it disrupt criminal law at large.

First, this Court should reject arguments raised by petitioner and some of its *amici* that the shelter availability test is unworkable because governments can neither shelter everybody nor determine who is "choosing" to sleep outside. *See* Pet. Br. 43 ("Courts also have no discernible standards by which to judge involuntariness."); *see, e.g.*, City of Chico Amicus Br. 18–20 (discussing difficulties of counting homeless individuals and available beds and deciding whether individuals are "voluntarily" homeless).[4] But these protests ring hollow. Objections to "workability" ultimately reveal a deeper motivation: governments defend sleeping laws because, like vagrancy laws before them, they are expedient. Affirming the Ninth Circuit's finding that these sleeping/camping ordinances are unlawful status offenses will only reinforce the rule of law, not undermine it as petitioner and its *amici* claim.

Second, this Court should reject petitioner's argument (Br. 47–49) that affirming the Ninth Circuit's decision would allow people to evade criminal responsibility for all manner of crimes. The Ninth Circuit's logic, it argues, will lead to the decriminalization of armed robbery, drug trafficking, sexual assault, and possession of child pornography if a person is diagnosed with a drug or sexual addiction. *Id.* Their slippery slope arguments should not replace legal and factual analysis. "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." Robert Bork, *The Tempting of*

4. If *amicus* City of Chico cannot even navigate its own shelter system, it is hard to imagine a person experiencing homelessness doing so. Regardless, the solution is not for the City of Chico to enlist the courts to punish people for being unable to navigate an inadequate shelter system.

America: The Political Seduction of the Law 169 (1990). As Judge O'Scannlain explained twenty years ago, "[i]n our system of government, courts base decisions not on dramatic Hollywood fantasies . . . but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004) (en banc). The case before the Court should be decided based on facts in the record, not fear of hypothetical future cases.

Regardless, drug trafficking, armed robbery, sexual assault, and child pornography are far afield from sleeping. In rejecting arguments to extend *Robinson* to drug possession or sexual abuse, courts have concluded that "while addiction may be a 'compelling propensity to use narcotics,' it is not necessarily an irresistible urge to have them." *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973); *see also United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (defendant's possession of child pornography was not "involuntary or uncontrollable"). By contrast, sleeping in public if shelter is unavailable is unavoidable. Even if the law prohibits sleeping, a person cannot comply. *See Pottinger I*, 810 F. Supp. at 1565 (it is "impossible" to resist the need to sleep). Because sleeping is a harmless biological imperative, it is distinguishable from the slippery slope of unchecked criminality that petitioner conjures in its brief.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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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, 331–32). 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.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by

which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

When used in these rules, the terms “fraud” or “fraudulent” refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed consent

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person;

nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, these persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules state that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for

the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake these procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); amended March 23, 2006, effective May 22, 2006 (933 So.2d 417); amended May 21, 2015, corrected June 25, 2015, effective October 1, 2015 (164 So.3d 1217), amended November 9, 2017, effective February 1, 2018 (234 So.3d 577).

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 must abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, must reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client that is impliedly authorized to carry out the representation. A lawyer must abide by a client's decision whether to settle a matter. In a criminal case, the lawyer must 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, except that a lawyer giving advice in a short-term limited legal services program under Rule 4-6.6 is not required to obtain the consent in writing. If the lawyer and client agree to limit the scope of the representation, the lawyer must advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer must 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 on 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 these decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer must consult with the client as required by rule 4-1.4(a)(2) and may take 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 these 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)(2). 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 the advance authorization. The client may, however, revoke this 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.