

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

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Scholarship for Social Justice

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DEMANDING A RACE TO THE TOP: THE 2015 STRIKE AGAINST MFY LEGAL SERVICES IN CONTEXT

Jota Borgmann and Brian Sullivan†

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In the subzero temperatures of February 2015, the unionized employees of MFY Legal Services¹ (MFY) waged a three-and-a-half-week strike against their employer.² At issue in this labor dispute were securing pay equity for the organization’s lowest paid

† Brian J. Sullivan and Jota Borgmann are members of the National Organization of Legal Services Workers, UAW Local 2320, and were on the union bargaining team during the strike discussed in this article. Brian would like to thank his partner Erica Chutuape and his daughters Maya and Cece. Jota thanks Becky and James Borgmann for their support and the MFY shop for its hard work, enthusiasm, and determination throughout the 2015 contract campaign. Both authors offer a heartfelt thank you to Jessica Cepin, who served with us on the bargaining team and provided feedback on an early draft of the article, and to Anamaria Segura and David Ureña, who provided crucial leadership during the strike and assistance with this article.

¹ MFY provides free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. See *About MFY*, MFY, <http://www.mfy.org/about/about-mfy/> [<https://perma.cc/HYE2-HMWC>].

² See *MFY Legal Services Employees on Strike*, UAW LOCAL 2320 (Feb. 1, 2015), http://www.nolsw.org/index.cfm?zone=/unionactive/view_article.cfm&homeID=467929 [<https://perma.cc/KU2V-LCKF>] (discussing MFY’s unionized employees’ overwhelming 90% vote to go on strike following their rejection of management’s contract proposal).

employees, parental leave for all employees, and ensuring that the organization offered a benefits package that would retain a long-term, experienced, and diverse staff.³ Together, these demands would improve labor conditions at MFY and, consequently, would improve the quality of services delivered to the organization's clients.

Some observers wonder why legal services workers, especially lawyers, would require a union and why they would need to strike for better working conditions. Why wouldn't the interests of a nonprofit organization with a social justice mission be aligned with those of its workers? The answer lies in the devastating cuts to social services in New York City and the U.S. over the past several decades. These cuts have imperiled New York City's low-income population and undermined the economic position of working New Yorkers. While nonprofit organizations have stepped in to deliver services to compensate for an inadequate safety net, the competitive, market-like bidding for public and private grants has led to a "race to the bottom" style of administration in the nonprofit sector.

In this article, two members of the union's negotiation team will discuss the political and economic context of the 2015 strike and why this strike was and is important for the future not only of MFY's clients and workers, but for legal services generally. In Part I of this article, we will briefly describe New York City's turn towards neoliberalism⁴ and the effect this turn had on social services generally, and legal services in particular. We will analyze how New York City, New York State, and federal social service policy changed between the late 1960s through the present day, and how legal services in general, and MFY in particular, reacted to these changes. This analysis will help to explain why MFY's workers found themselves in a contentious contract negotiation with MFY's management at a time of unprecedented growth and prosperity for the organization. In Part II, we will describe the concrete details of

³ See *Why MFY Is on Strike*, UAW LOCAL 2320 (Feb. 5, 2015), http://www.nolsw.org/index.cfm?zone=/unionactive/view_article.cfm&homeID=468433 [<https://perma.cc/KL5G-NX9B>].

⁴ KIM MOODY, *FROM WELFARE STATE TO REAL ESTATE* 18 (2007) ("[Neoliberalism is a] restraint on social spending, privatization, deregulation, and, most importantly, the reassertion of class power by the nation's capitalist class."); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005) ("[Neoliberalism is a] theory of political economic practices that propose that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.").

the contract campaign and resulting strike, explaining how both were organized and executed. This section walks through the campaign chronologically, from the formulation of our demands, through negotiations at the bargaining table, to the strike itself. We conclude with some reflections on how the victories we won in our strike and recent changes in the legal services funding landscape will affect MFY workers and our clients going forward.

Between the 1930s and 1960s, New York City benefited from relatively healthy social democratic spending at the City, State, and federal levels.⁵ Towards the end of this period, MFY was both a leader in providing Civil Legal Services (CLS) and was also involved in ambitious political agitation, such as Frances Fox Piven's successful welfare reform campaign.⁶

Unfortunately, the 1970s saw a major rightward shift in City politics. Especially after the New York City fiscal crisis in 1975, social spending was sharply curtailed and the City's social democratic policy was cut back.⁷ We will trace this neoliberal shift through the 1980s, including President Reagan's attempt to defund legal services at the federal level through the elimination of the Legal Services Corporation.⁸ This trend continued in New York City under mayors Dinkins, Giuliani, and Bloomberg, during which time multiple non-union CLS providers were established,⁹ and competitive battles for funding drove working conditions down.¹⁰

Looking at the immediate lead-up to our strike, we will analyze changes in the CLS landscape, social spending in the Bloomberg years, and the massive infusion of state money that resulted from the advocacy of Chief Judge Jonathan Lippman of the Court of Appeals.¹¹ Of particular importance to our strike was the 2013

⁵ MOODY, *supra* note 4, at 16-17.

⁶ Tyler Kasperek Somes, *The Legal Services NYC Strike: Neoliberalism, Austerity and Resistance*, 71 NAT'L LAW. GUILD REV. 1, 12 (2014).

⁷ Kim Phillips-Fein, *The Legacy of the 1970s Fiscal Crisis*, NATION (Apr. 16, 2013), <http://www.thenation.com/article/legacy-1970s-fiscal-crisis/> [https://perma.cc/PZ78-3M3Q].

⁸ Stuart Taylor, Jr., *Legal Aid for the Poor: Reagan's Longest Brawl*, N.Y. TIMES (June 8, 1984), <http://www.nytimes.com/1984/06/08/us/legal-aid-for-the-poor-reagan-s-longest-brawl.html>.

⁹ For instance, the New York Legal Assistance Group was founded in 1990. See *About Us*, N.Y. LEGAL ASSISTANCE GRP., <http://nylag.org/about-us> [https://perma.cc/J3CK-KA2M].

¹⁰ MOODY, *supra* note 4, at 162 (discussing the Bloomberg administration's cuts to social service contracts in the early years).

¹¹ William Glaberson, *Judge's Budget Will Seek Big Expansion of Legal Aid to the Poor in Civil Cases*, N.Y. TIMES, Nov. 28, 2010, at A21.

strike at Legal Services of New York City (LSNYC), a labor struggle from which we learned many lessons.

It was in this larger context that we embarked on our contract campaign in the final months of 2014. Despite the significant cuts in social spending that have been a central component of neoliberal New York, MFY as an organization was fiscally healthy in 2014 (in part because of past concessions that the union had made). The unionized staff was also particularly well-organized and militant. Thus, both objective and subjective conditions made 2014 a good time to mount an ambitious contract campaign. We will describe how we organized ourselves, took inspiration from the history of labor resistance, and accomplished the strike itself. Ultimately, the strike was highly successful. Though we had to make some tough concessions, we achieved all of our central goals. Therefore, our strike must be viewed not only in light of the steady push towards austerity that has characterized social services policy for the past fifty years, but also in light of labor's tradition of resistance to neoliberalism.¹²

I. SOCIAL SERVICES AND THE RISE OF NEOLIBERAL NEW YORK

*Many persons seem to cringe at the thought of the federal government financing litigation against state and local governments—especially if the result is to raise the local tax bite to support the poor.*¹³

A. *The 1960s and the Early Days of Mobilization for Youth*

Mobilization For Youth, the precursor organization to the formation of MFY Legal Services in 1968, was founded in 1961 with federal grants offered by the Kennedy administration.¹⁴ Mobilization For Youth offered a broad range of social services, including welfare advocacy, legal services, services for low-income youth, and a host of other human services.¹⁵ At the time, civil legal services were only a small part of Mobilization For Youth's work. In addition to social services, Mobilization For Youth "conducted aggressive community organizing campaigns that included rent strikes against negligent slum owners, education boycotts against school

¹² See *infra* Part I(C).

¹³ STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 1, 191 (2d ed. 2004) (citing Fred P. Graham, *Lawyers for the Poor Take on City Hall*, N.Y. TIMES, Dec. 28, 1969, at 137).

¹⁴ DOLORES SCHAEFER, *MFY LEGAL SERVICES, INC.: MOBILIZING FOR JUSTICE SINCE 1963*, at 2 (2013), <http://www.mfy.org/wp-content/uploads/MFY-History-50th-Anniversary1.pdf> [<https://perma.cc/CW96-9QXC>]; *About MFY*, *supra* note 1.

¹⁵ SCHAEFER, *supra* note 14, at 3.

segregation, and demonstrations at construction sites demanding jobs for people of color.”¹⁶

Most famously, in the mid-1960s, Mobilization For Youth waged a pitched battle against New York City political and economic elites to secure welfare rights for the City’s poor and working class residents.¹⁷ This broad-based social struggle provided the groundwork for some of MFY’s most enduring legal achievements. MFY paralegal Una Perkins represented John Kelly when he was denied welfare benefits based on alleged fraud.¹⁸ At the time, welfare recipients were not afforded any due process rights prior to termination of their benefits.¹⁹ Acting on behalf of all New Yorkers denied benefits without due process, Mr. Kelly challenged the City’s summary denial of his benefits. The case was ultimately decided by the United States Supreme Court in the landmark decision *Goldberg v. Kelly*.²⁰

In its combined strategy of social organizing and legal advocacy, MFY embraced a robust practice of poverty law.²¹ However, MFY’s most ambitious years of social organizing were cut short when political winds began to shift in the mid to late 1960s. At the federal level, President Richard Nixon was inaugurated in 1969, and the coded racism of his national election strategy—which ultimately paved the way for Ronald Reagan’s attack on the welfare system and racialized references to the “welfare queen”²²—would

¹⁶ Somes, *supra* note 6, at 11-12.

¹⁷ Tamar W. Carroll, “To Help People Learn To Fight”: *New York City’s Mobilization for Youth and the Origins of the Community Action Programs of the War on Poverty*, GOTHAM BLOG (Oct. 8 2015), http://www.gothamcenter.org/blog/to-help-people-learn-to-fight-new-york-citys-mobilization-for-youth-and-the-origins-of-the-community-action-programs-of-the-war-on-poverty#_edn2 [https://perma.cc/3XX7-6263].

¹⁸ *Una Perkins: 40 Years at MFY and Going Strong*, MFY FYI (MFY Legal Servs., New York, N.Y.), Spring-Summer 2009, at 4, <http://www.mfy.org/wp-content/uploads/fyi/FYI-Spring-Summer-2009.pdf> [https://perma.cc/E6GA-GMVA].

¹⁹ Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1252 (1965).

²⁰ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that, under the Fourteenth Amendment, a recipient of certain government benefits must be granted an evidentiary hearing prior to termination of such benefits).

²¹ In a fundamental sense, poverty law refers to the new form of legal practice that emerged during the ‘War on Poverty’ of the 1960s, a form of practice that transcended the traditional legal-aid model of providing individual representation in unconnected and usually private-law matters, and instead sought to enlist the law in a systemic effort to achieve social and structural changes that might alleviate poverty itself.

Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1240-41 (2006).

²² See Kathryn J. Edin & H. Luke Shaefer, *Ronald Reagan’s “Welfare Queen” Myth: How the Gipper Kickstarted the War on the Working Poor*, SALON (Sept. 27, 2015), <http://>

significantly affect the public services landscape in New York City. The specter of the urban malingerer became a potent tool in a bipartisan effort to roll back the gains of the past decades.²³

Reflecting these changing political and economic conditions, in the mid-1960s, Mobilization For Youth found itself in a battle for its existence. Because of its involvement in the welfare rights movement, the organization came under the scrutiny of the New York City Police Department and City Council President Paul Scrvane, who withheld the organization's funding in 1964.²⁴ Mobilization For Youth was accused of inciting racial violence in Harlem and of being "a suspected Red honeycomb for leftists."²⁵ The organization ultimately survived this leftist witch-hunt, but in 1968, MFY Legal Services split apart from the broader organization to focus on litigation and individual representation.²⁶ While this move was a reaction to a hostile political environment, it did pave the way for the organization's staff to ultimately unionize into the Legal Services Staff Association (LSSA). This happened in 1972, when LSSA formed as a wall-to-wall union.²⁷ This organizational form would prove to be of crucial significance throughout LSSA's history, and particularly in MFY's 2015 strike.

www.salon.com/2015/09/27/ronald_reagans_welfare_queen_myth_how_the_gipper_kickstarted_the_war_on_the_working_poor/ [<https://perma.cc/94FC-K3DA>] ("Although negative racial stereotypes had plagued welfare throughout its existence, the emphasis on race was more widespread and virulent after Reagan turned his focus to the system. His welfare queen soon became deeply ingrained in American culture. She was black, decked out in furs, and driving her Cadillac to the welfare office to pick up her check. None of these stereotypes even came close to reflecting reality, particularly in regard to race."). See generally Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014); KE-ANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (2016) (analyzing how the neoliberal assault on welfare and social spending was particularly devastating to African Americans).

²³ See generally Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 247 (2014) (detailing the use of the welfare queen rhetoric by courts and politicians all the way up to 2012's presidential race where "Governor Romney was able to trigger the stereotypes underlying the welfare queen, through his welfare attack ads in order to seek an advantage among white voters").

²⁴ Homer Bigart, *City Hunts Reds in Youth Project on East Side*, N.Y. TIMES (Aug. 17, 1964), http://www.nytimes.com/1964/08/17/city-hunts-reds-in-youth-project-on-the-east-side.html?_r=0.

²⁵ *Id.*

²⁶ *Somes*, *supra* note 6, at 14.

²⁷ A "wall-to-wall" union is one in which all staff, not just professionals or certain workers, are joined together in a single union. See *Union History*, LSSA 2320, <http://lssa2320.org/members/union-history/> [<https://perma.cc/5SA5-854W>].

B. *The Fiscal Crisis and the Dawn of Neoliberal New York*

While the late 1960s and early 1970s were turbulent political times, the New York City fiscal crisis of 1975 ushered in a dramatic neoliberal reorganization of the City. As demonstrated by scholars such as Kim Moody and Robert Fitch, the 1970s saw New York City's political and economic elites embrace the neoliberal project.²⁸ As David Harvey has commented, New York City's case was "iconic," and the "management of the New York fiscal crisis pioneered the way for neoliberal practices both domestically under Reagan and internationally through the IMF (international monetary fund)"²⁹ Through management of the crisis, City elites "emphasized that the role of government was to create a good business climate rather than look to the needs and well-being of the population at large."³⁰

Thus, while government at both the local and federal level responded to the urban unrest of the 1960s with greater social spending and an expansion of welfare benefits, by the 1970s this response had been replaced by a program of harsh austerity. As Kim Moody explains in his history of New York City, *From Welfare State to Real Estate*, the worldwide recession of the mid-1970s hit New York City particularly hard. The global recession "affected America's other ailing cities . . . causing widespread fiscal distress, but given New York's central place in the world economy, [it] hit New York harder and at a sharper angle."³¹

This fiscal crisis gave the City's elites their long-awaited opportunity to significantly cut social spending. These cuts did not come to fruition until the Koch administration several years later, but, as one business executive commented in 1973, "If we don't take action now, we will see our own demise. We will evolve into another social democracy."³² Ultimately, cuts to social spending were a crucial component of New York City's shift to neoliberalism.³³ "Restraint on social spending, privatization, deregulation, and, most importantly, the reassertion of class power by the nation's capitalist class are at the center of the neoliberal project."³⁴

The administration of Mayor Ed Koch, spanning three terms

²⁸ See ROBERT FITCH, *THE ASSASSINATION OF NEW YORK* 145-84 (1993); MOODY, *supra* note 4, at 18.

²⁹ HARVEY, *supra* note 4, at 48.

³⁰ *Id.*

³¹ MOODY, *supra* note 4, at 16.

³² *Id.* at 18.

³³ *See id.*

³⁴ *Id.*

between 1978 and 1989, would cement many of the neoliberal changes being imposed on the City, and would set the mold for social services in the decades to come.³⁵ Koch employed a clever strategy in instituting austerity in social services: at the same time that he significantly cut social spending, he poured money into the nonprofit sector, making the professionals who ran nonprofit organizations “think twice about advocacy actions that might annoy the mayor.”³⁶ Thus, there was a paradoxical quality to Koch’s policy: he dedicated significant resources to the NGO sector but undermined grassroots political action and encouraged an overall deterioration of conditions for working class and poor New Yorkers.³⁷ His neoliberal social policy expressed itself in New York City’s surging homeless population, the introduction of tuition at formerly free CUNY campuses, subway fare hikes, layoffs of City workers, and hospital closures.³⁸

Federal policy would follow a similar course. In 1974, Congress passed legislation creating the Legal Services Corporation (LSC), a private nonprofit corporation that distributes funding for legal services for poor people.³⁹ While the LSC represented a large source of reliable funds for legal services, it also limited the terrain on which poverty law could be practiced. In the 1980s and 1990s, the federal government would place sharp restrictions on the law practices of those organizations that accepted LSC money.⁴⁰

During this period, New York City’s public sector unions, particularly District 1199, grew dramatically.⁴¹ Despite this numeric growth, most workers in the City saw a slow but steady decline in wages and working conditions. It was in this climate that LSSA went on strike in 1977 and 1979. While the 1977 strike was fast, lasting only one week, the strike in 1979 lasted eleven weeks, stretching out through the winter. In both actions the union fought off givebacks pertaining to control over staff working conditions, and

³⁵ See Samuel Zipp, *Burning Down the House: On Ed Koch*, NATION (Nov. 3, 2010), <http://www.thenation.com/article/burning-down-house-ed-koch/> [https://perma.cc/3VQW-LKE2].

³⁶ MOODY, *supra* note 4, at 65.

³⁷ See *id.* at 66-80.

³⁸ See *id.* at 39, 73-74, 80; see generally JONATHAN SOFFER, ED KOCH AND THE REBUILDING OF NEW YORK CITY (2011).

³⁹ Joshua D. Blank & Eric A. Zachs, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN ST. L. REV. 1, 4 (2005).

⁴⁰ See Michael Serrill, *Law: An Organization at War with Itself*, TIME, Oct. 3, 1983.

⁴¹ See Michelle Chen, *How Did New York Become the Most Unionized State in the Country?*, NATION (Sept. 3, 2014), <http://www.thenation.com/article/how-did-new-york-become-most-unionized-state-country/> [https://perma.cc/5TN8-8CL6].

won important victories such as wage increases and retirement benefits.⁴²

However, things did not improve for all legal services workers in the 1980s. Immediately after taking office, President Ronald Reagan sought to eliminate the LSC,⁴³ a move which, if successful, would have effectively destroyed legal services. Reagan's position was a piece of his larger strategy to slash welfare and other social services.⁴⁴ Having recently affiliated with the United Auto Workers (UAW), the unionized employees of LSSA fought these spending reductions tooth and nail, ultimately prevailing when Reagan's draconian cutbacks were rejected.⁴⁵

New York City, meanwhile, gave considerable tax breaks and other subsidies to large developers.⁴⁶ Mayor Koch continued the path he commenced at the beginning of his term, overseeing a glut in commercial and residential development and devoting fewer resources to improving the lives of working class and poor New Yorkers.

C. *Deepening Austerity and the New Social Services Landscape*

The 1990s saw local and national policy attacks against legal services that accompanied larger policy attacks against poor people. Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the so-called "welfare reform" legislation that created work requirements for recipients of public assistance⁴⁷ and a five-year lifetime limit on benefits.⁴⁸ Almost twenty years after its passage, the country saw a sharp increase in the number of families living in deep poverty, *i.e.*, at incomes below half of the poverty line.⁴⁹ In the same year, Congress passed new restrictions on LSC funding, prohibiting representation of undocumented immigrants and litigants participating in class action law-

⁴² See *Union History*, *supra* note 27.

⁴³ Taylor, *supra* note 8.

⁴⁴ *Somes*, *supra* note 6, at 14.

⁴⁵ See Stuart Taylor, Jr., *Plan Gains to Raise Funds to Pay for Legal Services for Poor*, N.Y. TIMES, Nov. 13, 1984, at 1; *Union History*, *supra* note 27.

⁴⁶ FITCH, *supra* note 28, at 146.

⁴⁷ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 824, 110 Stat. 2105 (1996).

⁴⁸ See *id.* § 408(a)(7).

⁴⁹ CTR. ON BUDGET AND POL'Y PRIORITIES, POLICY BASICS: AN INTRODUCTION TO TANF 6 (June 15, 2015), <http://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf> [<https://perma.cc/D8EA-SSSL>] ("[T]he number of families in deep poverty rose between 1996 and 2013, from 2.7 million to 3 million.").

suits.⁵⁰ State and federal budget cuts at this time also forced MFY to close its neighborhood storefront offices and consolidate to one location.⁵¹

In New York City, these cutbacks were paired with policy shifts favoring elites. Mayor David Dinkins bolstered the already-powerful real estate industry, continuing Koch's policies of privatization and subsidies for the super wealthy, accompanied by feeble attempts to expand the City's safety net.⁵² It was early in the Dinkins administration that LSSA would fight, and win, one of its most important strikes. For sixteen grueling weeks in 1991, LSSA waged a pitched battle against Legal Services of New York City (LSNYC). The victories of that strike, including "rationaliz[ing] wage scales on the basis of seniority, obtain[ing] unprecedented wage increases, eliminat[ing] discretionary raises, [winning] a strong policy against sexual harassment, [and winning] retroactive pension contributions for our long-time members,"⁵³ put in place the basic framework under which legal services workers labor today. The 1991 strike made legal services a viable long-term career option for attorneys, paralegals, and administrative staff.

In 1993, Dinkins was replaced as mayor by Rudolph Giuliani, whose racist policing tactics,⁵⁴ disregard for all but the wealthiest New Yorkers,⁵⁵ and dedication to austerity⁵⁶ no matter the human costs would make him a symbol of all that had gone wrong for the City's most vulnerable. For legal services workers, the Giuliani administration would prove to be a powerful adversary.⁵⁷ Mayor Giuliani attacked unionized legal services, threatening lawyers striking at Legal Aid Society with the loss of their jobs,⁵⁸ and forcing them to accept a contract without pay increases after the union and man-

⁵⁰ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §504(a)(7), (11), 110 Stat. 1321 (1996).

⁵¹ *Chinatown MFY Office Shuts*, TENANTNET, <http://www.tenant.net/tengroup/Metcounc/Mar96/mfy.html> [<https://perma.cc/Y83N-C6XK>]; Andrew Jacobs, *Neighborhood Report: Chinatown; Legal Lifeline for Asian Poor Gets Budget Ax*, N.Y. TIMES (Nov. 5, 1995), <http://www.nytimes.com/1995/11/05/nyregion/neighborhood-report-chinatown-legal-lifeline-for-asian-poor-gets-budget-ax.html>.

⁵² MOODY, *supra* note 4, at 119-21.

⁵³ *Union History*, *supra* note 27.

⁵⁴ TAYLOR, *supra* note 22, at 124.

⁵⁵ MOODY, *supra* note 4, at 133.

⁵⁶ Jonathan P. Hicks, *To Black Audience in Brooklyn, Mayor Promotes Austerity Plan*, N.Y. TIMES (Nov. 14, 1994), <http://www.nytimes.com/1994/11/14/nyregion/to-black-audience-in-brooklyn-mayor-promotes-austerity-plan.html>.

⁵⁷ See Alison Mitchell, *Mayor Moves to Cut Role of Legal Aid*, N.Y. TIMES (Oct. 6, 1994), <http://www.nytimes.com/1994/10/06/nyregion/mayor-moves-to-cut-role-of-legal-aid.html>.

⁵⁸ Alison Mitchell, *Giuliani and Striking Lawyers: Sending a Message*, N.Y. TIMES (Oct.

agement had reached a tentative agreement that included modest bonuses.⁵⁹ Giuliani immediately sought out alternative providers of indigent criminal defense to scale back funding for Legal Aid Society.⁶⁰ By 1998, the City had established contracts with several non-unionized organizations including Bronx Defenders and Brooklyn Defender Services.⁶¹ A report that year by the Indigent Oversight Panel of the Appellate Division, First Department, found that Legal Aid Society lawyers were overworked, handling an average of 650 cases each, and that the overall quality of indigent legal defense had declined.⁶²

In 2002, MFY dissociated itself from LSNYC (then LSNY), with the most experienced advocates remaining in LSNY's Manhattan office and the newer staff splitting off with MFY.⁶³ Right away, MFY's management issued a layoff notice to a member of the support staff, which the shop⁶⁴ successfully fought. In the first round of contract negotiations after the split, management demanded significant givebacks in health care, sick and vacation leave, and family medical leave.⁶⁵ In October 2003, the nineteen-member shop went on strike for nine weeks and successfully fought off many of management's demands.⁶⁶ As one of the MFY strikers described it, "[s]hop members came back from the strike unified and support-

5, 1994), <http://www.nytimes.com/1994/10/05/nyregion/giuliani-and-striking-lawyers-sending-a-message.html>.

⁵⁹ See Mitchell, *supra* note 57.

⁶⁰ *Id.*

⁶¹ David Rohde, *Decline Is Seen in Legal Help for City's Poor*, N.Y. TIMES (Aug. 26, 1998), <http://www.nytimes.com/1998/08/26/nyregion/decline-is-seen-in-legal-help-for-city-s-poor.html>.

⁶² *Id.*

⁶³ See *Union History*, *supra* note 27.

⁶⁴ "A 'union shop' is an establishment in which the employer by agreement is free to hire nonmembers as well as members of the union but retains nonmembers on the payroll only on condition of their becoming members of the union within a specified time." 41 CAL. JUR. 3d *Labor* § 236 (2016).

⁶⁵ See *Union History*, *supra* note 27 ("MFY began raiding other legal service programs' funding and did its best to drive a wedge between its employees and the rest of LSSA, while setting out at the same time to bust the union at MFY with disastrous giveback demands and complete intransigence in bargaining. In an oft-quoted exchange, the MFY project director gave staff five minutes to decide whether they would accept her offer, whereupon staff replied, 'We don't need five minutes.'").

⁶⁶ Lisa Belkin, *Paycheck Goes, and the Dominoes Fall*, N.Y. TIMES (Nov. 23, 2003), <http://www.nytimes.com/2003/11/23/jobs/life-s-work-paycheck-goes-and-the-dominoes-fall.html> ("The MFY office went on strike the week of Halloween. It is a small workplace, 19 people in all, including the lawyers and support staff."); *Union History*, *supra* note 27 ("It was actively supported by the rest of LSSA, garnered widespread support, and ultimately produced a contract much closer to the union's initial position than to management's.").

ive. We started having lunch together every day and we had each other's back."⁶⁷

One year before the 2003 strike, the New York City mayoralty passed to billionaire Michael Bloomberg. His administration continued social policies and a budget that emphasized tax abatements for the rich, development of luxury housing, and impairment of public education, all at the expense of remedial social policies for poor and working class New Yorkers.⁶⁸ Half way through the administration's five-year plan to reduce homelessness, the City saw the greatest rise in homelessness since 1982, when it first began counting the number of people in the City's shelters.⁶⁹ The financial crisis that began in 2008 dramatically increased evictions as funding for rent subsidies decreased.⁷⁰

As mayor, Bloomberg honed some of the tactics pioneered in the Koch years.

Ed Koch had skillfully used city contracts with nonprofit social agencies to buy, not so much loyalty, as acceptance and lack of resistance to his economic policies. Bloomberg also appeared to employ city contracts as a way of gaining widespread goodwill. In fact, the number of city contracts exploded from 6,849 valued at \$9.9 billion in [fiscal year] 2000 to 17,402 worth only \$7.5 billion in [fiscal year] 2006.⁷¹

It was within this context of nonprofits being pushed to do more with a shrinking budget that MFY management felt justified in rejecting LSSA's demands in order to stay "competitive" in bidding for City and other contracts, thus paving the way for the 2015 MFY strike.

In 2013, a decade after MFY's 2003 strike, LSSA again found itself on the picket line, this time battling savage cutbacks at LSNYC. Claiming impending fiscal catastrophe, LSNYC's management demanded a series of exceptional givebacks that would have "interrupted physical therapy and mental health treatments mid-stream" and would have "removed fertility procedures as an affordable treatment option; imposing a heteronormative condition on gay, lesbian, transgender and gender non-conforming couples

⁶⁷ Email from an LSSA member who participated in the 2003 strike (Oct. 2013) (on file with authors).

⁶⁸ MOODY, *supra* note 4, at 158.

⁶⁹ Leslie Kaufman, *City Vows to Improve Aid to Homeless Families*, N.Y. TIMES (Mar. 19, 2007), <http://www.nytimes.com/2007/03/19/nyregion/19homeless.html>.

⁷⁰ Alan Feuer, *Homeless Families, Cloaked in Normality*, N.Y. TIMES (Feb. 3, 2012), <http://www.nytimes.com/2012/02/05/nyregion/ordinary-families-cloaked-in-a-veil-of-homelessness.html>.

⁷¹ MOODY, *supra* note 4, at 162.

which had not existed previously.”⁷² In reality, while years of austerity had harmed LSNYC’s budget, the organization’s fiscal problems were not as severe as its management claimed. To the extent LSNYC had fiscal problems, they were sharply exacerbated by the organization’s top-heavy management structure.

LSSA mounted a courageous and successful counter-attack, striking for forty days in the summer of 2013.⁷³ Building rank-and-file power and involvement through a series of escalating actions, LSSA mobilized broad support both within and outside its membership. The union drew critical attention to the outsized role of LSNYC’s corporate board in setting the organization’s labor policy and broader strategy.⁷⁴ The union succeeded in both fighting off the most draconian givebacks and in articulating a rich vision for legal services, one in which low-income New Yorkers would receive ambitious services provided by experienced advocates.

Shortly after LSSA’s strike ended, CLS received an infusion of new funding it had not seen in decades.⁷⁵ Chief Judge Lippman of the New York State Court of Appeals had begun calling for significant increases in funding for legal services in the state budget and for a right to counsel for civil litigants, particularly those facing eviction.⁷⁶ At the same time, he promoted volunteerism amongst the bar in a relatively soft job market as it continued to recover from the 2008 financial crisis.⁷⁷ It was in this context, and drawing on the hard lessons learned by labor over the past several decades, that the unionized staff of MFY embarked on its 2015 contract campaign.

⁷² *Somes*, *supra* note 6, at 15.

⁷³ Erik Forman, *In a Blow Against Austerity, Legal Services Strikers Win Contract*, IN THESE TIMES (June 28, 2013, 10:40 AM), http://inthesetimes.com/working/entry/15200/strike_victory_at_legal_services_nyc_neoliberalism [<https://perma.cc/BLY3-ZZTM>]; *Legal Services NYC Strike Ends After 40 Days*, LSSA 2320, <http://lssa2320.org/legal-services-nyc-strike-ends-after-40-days-as-employees-ratify-contract-that-maintains-benefits-adds-job-security-assurances/> [<https://perma.cc/7XUA-WLE7>].

⁷⁴ *Striking Workers Confront LSNYC Board of Directors*, LSSA 2320, <http://lssa2320.org/striking-workers-confront-lsny-board-of-directors/> [<https://perma.cc/MZY2-XU4S>].

⁷⁵ Carey R. Dunne, *City Bar President Applauds Increase in Civil Legal Services Funding in Judiciary Budget*, N.Y.C. BAR: 44TH STREET BLOG (Nov. 30, 2012, 2:27 PM), <http://www.nycbar.org/44th-street-blog/2012/11/30/city-bar-president-on-judiciary-budget/> [<https://perma.cc/2RHL-T3MY>].

⁷⁶ Terry Carter, *Judges’ Efforts to Pursue Funding for Unmet Civil Legal Needs Garner Applause at LSC Conference*, ABA J. (Sept. 17, 2014), http://www.abajournal.com/mobile/article/lsc_40th_anniversary [<https://perma.cc/6XNX-36PF>].

⁷⁷ Joel Stashenko, *Lippman Proposes Student Pro Bono Program*, N.Y.L.J. (Feb. 13, 2014), <http://www.newyorklawjournal.com/id=1202642530145/Lippman-Proposes-Student-Pro-Bono-Program> [<https://perma.cc/6TKY-SGMJ>].

II. THE FIGHT FOR A FAIR CONTRACT AT MFY LEGAL SERVICES

We are unstoppable! A fair contract is possible.

—A popular chant by the MFY Shop
on the picket line in February 2015

Our campaign for a fair contract in 2015 started months before we sat down across the table from the MFY management negotiation team. We went into contract negotiations knowing that a negotiation team's power is not based on clever and articulate arguments, or on force of will, but on the strength and resolve of the members of the union. With this in mind, our shop had taken pains to build the contract campaign from the ground up. We involved as many people as possible in the process, made efforts to touch base with members individually, and did our best to ensure that all voices were heard in the planning and strategizing process. This openness not only ensured that rank-and-file members were invested in the process, but also developed trust in the union negotiation team.

MFY's unionized staff grew quickly and significantly during this time—by approximately 29% in the six months prior to the strike.⁷⁸ This presented a number of organizing challenges. New members would have to be brought up to speed quickly, incorporated into the union's culture, and convinced that it was worth making significant sacrifices for the future of an organization they had only just joined. This rapid growth also resulted in some bad working conditions, such as overcrowding and lack of adequate supervision.⁷⁹ It is a testament to both new and experienced staff that all of these goals were accomplished so quickly and that new members understood the stakes of the contract negotiation with such clarity.

A. *Formulating Our Demands*

MFY's shop turned out to be well prepared and organized to educate and bring brand new staff members into the bargaining process. The shop formed a committee to poll shop members about what they wanted out of our collective bargaining agreement (CBA). We then met on multiple occasions to discuss the results of the poll and refine our demands. We formed a pre-bargaining

⁷⁸ See Brian Sullivan, *Ready to Strike at MFY*, SOCIALISTWORKER.ORG (Jan. 27, 2015), <http://socialistworker.org/2015/01/27/ready-to-strike-at-mfy> [https://perma.cc/JRR9-WCWV].

⁷⁹ See *MFY Legal Services Employees on Strike*, *supra* note 2.

committee to take the lead in this work, and members of that committee took responsibility for various projects and tasks such as researching the Affordable Care Act, creating surveys and polls, and analyzing MFY's budget.

In formulating our bargaining demands and broader strategy, we took significant efforts to uncover how women and people of color were affected by working conditions at MFY and potential contract terms. As a result, for example, we placed particular significance on our demands for pay equity for administrative support staff.⁸⁰ For the past decade, the vast majority of the administrative staff at MFY has been women of color. They are also the lowest paid staff in the organization and endure the most challenging working conditions. A variety of factors affect support staff's treatment within the organization as a whole and, consequently, their engagement with the union. They include elitism, classism, racism, and, practically speaking, greater oversight by and contact with managers that make support staff vulnerable to discipline. Unfortunately, economic and social denigration are part of life for people of color in the neoliberal United States,⁸¹ and this reality is reflected in our organization. It is noteworthy that, for the past decade, no support staff member has been promoted to an advocate or paralegal position. We therefore demanded pay equity for these employees and a commitment to hire additional administrative staff to alleviate their untenable workloads. And it was critical that an administrative staff member sit on our negotiation team.

After significant organizing and discussion, we finalized a five-page bargaining demand in which we listed a series of concrete demands, each accompanied with a brief explanation of the principles underlying them. The demands were organized under three major goals: improve the quality of MFY's services, make MFY a family-friendly workplace, and ensure that MFY hired and retained a staff that reflects the communities we serve. Each category is explained in more detail below, but underlying all our demands was the principle of solidarity. We made sure that the lowest paid workers, the most vulnerable, and the most in need would receive significant gains in negotiations, that better working conditions for staff meant better services for our clients, and that the staff would not be divided by age, experience, or parental status.

Taking each major area of principle in turn, we first wanted to ensure that our clients would be served by an experienced, knowl-

⁸⁰ See Sullivan, *supra* note 78.

⁸¹ See TAYLOR, *supra* note 22.

edgeable, and truly diverse staff. The working conditions of MFY's staff have a direct impact on the services we provide and the work we are able to do.⁸² Even though there is sharp debate about whether the nonprofit sector can accomplish the sort of far-reaching reforms that poor and working class people need,⁸³ it is beyond serious dispute that, given the current economic climate, low-income people are in desperate need of the sort of services MFY provides. Although management often speaks as if staff demands pit us against our clients, the exact opposite is true. The better our working conditions, the more diverse we remain as a staff, the longer we practice, the more experience we gain, then the better we serve our clients. In light of this solidarity between our staff and our clients, we fought to ensure that staff receive a compensation package that would be competitive and appealing. Concretely, this meant an increase in retirement contributions, no health care givebacks, and fair raises. We also demanded greater transparency and accountability for decisions about our working conditions, more resources for training and professional development, and a commitment to a truly welcoming workplace by holding an annual anti-oppression training for all staff.

Second, we wanted to win pay equity for MFY's lowest paid staff. Administrative staff at MFY are not only paid less than any other classification of workers, but also receive smaller wage increases for each year of experience they gain. For example, while an attorney received a 3.6% raise upon her second anniversary of employment, and a 6.6% raise on her third, administrative staff only received 2.3% and 2.5%, respectively. The experience and dedication of administrative staff was literally less valued. Especially in light of the fact that the administrative staff is currently and has historically been made up of mostly women of color, this discrepancy was an unacceptable injustice in our CBA. We also had to address an oversight in the prior contract negotiation that resulted in the loss of funds that had been predominately used by our administrative staff to pay for college education and other training. Management had refused to contribute to these funds after the CBA provision sunset, so the benefit had to be won again.

⁸² See generally Ian MacDonald, *Beyond the Labour of Sisyphus: Unions and the City*, 50 SOCIALIST REG. 247 (2014) (arguing for meaningful engagement between the labor movement and the communities that workers serve).

⁸³ See THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 9-13 (INCITE! Women of Color Against Violence ed., 2009) (questioning whether the nonprofit sector can accomplish the sort of movement building and far-reaching reforms that the poor and working class need).

Finally, we wanted to win real parental leave for all employees. Prior to the strike, MFY offered only unpaid parental leave, a completely untenable option for the majority of employees. Instead of dedicated paid parental leave, new parents had to cobble together sick and vacation days. More than one shop member was threatened with loss of health benefits when they tried to extend their time with a new child by taking unpaid leave, a burden which fell particularly hard on female shop members. This retrograde policy left the organization far behind the curve, given that MFY was the only legal services organization of its size providing no paid parental leave.⁸⁴

Of course, underlying all of these areas and at issue in almost any labor campaign is respect for the workers. For our shop, management's lack of respect manifested itself in various ways. For example, we were excluded from decisions that affected our day-to-day working conditions, such as how to configure our limited workspace to ensure that we are productive. Management further engaged in infantilizing practices, such as demonstrating an unwillingness to allow staff to work from home despite a shortage of workspace. Most importantly, management's lack of respect was exemplified by their failure to hire the additional administrative staff necessary to adequately support our rapidly increasing case-handling staff.

B. Starting Negotiations

After several months of preparation, we delivered our demands to management in late October 2015 and proposed a schedule of negotiation sessions by topic, starting with items that would have the least economic impact.

We knew we were in for a fight when we received management's response to our demands. Their response, and overall strategy, reflected the language of neoliberal austerity. They refused to agree to discuss topics in any particular order. Claiming inade-

⁸⁴ *MFY Legal Services Staff Declare One-Day Strike in Protest*, LSSA2320, <http://lssa2320.org/mfy-legal-services-staff-declare-one-day-strike-protest/> [<https://perma.cc/AQ3V-NWLG>]; COLLECTIVE BARGAINING AGREEMENT BETWEEN THE LEGAL SERVICES STAFF ASSOCIATION NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS INTERNATIONAL UNION UAW, LOCAL 2320, AFL-CIO & LEGAL SERVICES NYC (July 1, 2012 – July 31, 2014), <http://lssa2320.org/wp-content/uploads/2013/10/CBA-with-New-Index-w-MOA-July-2012-July-2014.pdf> [<https://perma.cc/ZL9E-BJTM>]; ALAA CONTRACT 2013-2014: COLLECTIVE BARGAINING AGREEMENT BETWEEN THE ASSOCIATION OF LEGAL AID ATTORNEYS, UAW 2325 (AFL-CIO) & THE LEGAL AID SOCIETY (NYC) (Mar. 31, 2014), <https://alaa2325.files.wordpress.com/2014/08/final-2013-2014-alaa-contract.pdf> [<https://perma.cc/C3XX-AXNA>].

quate fiscal resources and uncertain times on the horizon, they demanded significant givebacks, including cuts to our health care, job security, and an effective pay cut.⁸⁵ Their opening offer included a considerably less generous economic package than the prior contract negotiations despite the fact that MFY's finances and general economic conditions were much better. Most shockingly, management demanded to limit the accrual of sick leave so that they would not have to pay for long-term care for employees who became terminally ill.⁸⁶ They also demanded limitations on health coverage for staff members' children and for unmarried same-sex domestic partners.

In addition to their false claims of MFY's fiscal insecurity—the organization had consistently seen annual budget surpluses, and its fiscal reserves had increased by about \$1.5 million (as adjusted for inflation) over the prior seven years—management offered a number of rationales for their draconian demands.⁸⁷ They pointed to contracts that Mayor de Blasio's administration had recently negotiated with a number of municipal unions, which contained low raises and significant givebacks.⁸⁸ They also claimed that MFY already offered a compensation package that was too rich and would not allow the organization to competitively bid against other nonprofits for public and private grants. We discuss this race-to-the-bottom mentality further below. The overall message was that workers at MFY would have to live with worse benefits, lower pay, and inferior working conditions. Implicit in this message, though never acknowledged by management, was that our clients would have to live with an inferior organization staffed by less experienced advocates. This message is not unique to MFY's management:

Despite knowing that our organizations are only as good as our staff, for too many years legal services organizations have sat still as our salaries became lower and lower in comparison to other legal positions. The cost of law school has soared over the past decades and the amount of debt that new lawyers have taken on

⁸⁵ *LSNYC & MFY Units Set Strike Deadline*, LSSA 2320, <http://lssa2320.org/lsnyc-mfy-units-set-strike-deadline/> [<https://perma.cc/X526-N7C5>].

⁸⁶ See *MFY Legal Services Staff Declare One-Day Strike in Protest*, *supra* note 84.

⁸⁷ See Sullivan, *supra* note 78 (“Changes in civil legal services funding at the state and city level have led to an influx in cash. This influx resulted in massive hiring at MFY—35 percent of the staff of the organization started in October 2014 or later.”).

⁸⁸ Will Bredderman, *De Blasio Cuts Contract Deal with NYCHA Teamsters Union for Raises, Cost Cuts*, *OBSERVER* (May 18, 2015, 5:00 PM), <http://observer.com/2015/05/de-blasio-cuts-contract-deal-with-nycha-teamsters-union-for-raises-cost-cuts/> [<https://perma.cc/X54L-LFCM>].

is staggering. This has caused chronic difficulties in recruiting and retaining the best staff. Yet our community gave minimal raises and pointed fingers at others. We were quick to look to law schools and government programs and funders and suggest that they needed to step in to help our low-paid, highly indebted attorneys but slow to look at our own role in underpaying staff and creating conditions that both hurt them and our programs.⁸⁹

At this point it became clear that we were going to do more than fend off management's bankrupt demands for givebacks—we were going to ask for more. We were not going to be happy to inch along, exchanging away our rights for a few paltry scraps. The staff of MFY works incredibly hard to ameliorate the harshest conditions that the neoliberalization of New York City has forced on our clients. We deserved better. More importantly, our clients deserved better. Improved pay and working conditions make legal services a more tenable and attractive long-term career, and we were going to win a contract that included them.

C. *“Don't get mad, get organized”: The Members Show Their Strength*

The old labor adage “the boss is the best organizer” proved true for us. After management delivered their unacceptable demand, our already organized and militant union got fired up and ready for a fight. The staff implemented a series of escalating actions to highlight our concerns, respond to the disrespect regularly communicated to us at the bargaining table, and make clear to management how serious we were about our demands. When particular staff members experienced mistreatment or retaliation, dozens of shop members would file into our executive director's office to present a letter outlining our concerns. After one negotiation session, staff members formed a “gauntlet” by lining both sides of the hallway and staring down management's negotiation team and then cheering us as we walked out.⁹⁰ We organized a picket and action at the December meeting of the organization's board of directors.⁹¹ The unionized staff of LSNYC came out in force to show their solidarity, and three shop members addressed the board directly about the ways in which the entire staff felt disrespected by management's demands.

Later that month, the staff boycotted the annual holiday party

⁸⁹ Kelly Carmody et al., *Creating the Legal Services Organizations Our Clients Deserve: Salaries and Beyond*, 45 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 329, 329 (2011).

⁹⁰ See Sullivan, *supra* note 78.

⁹¹ *Id.*

usually held every December, resulting in its cancellation for the first time in recent memory.⁹² Instead we held our own party off-site that only enhanced our solidarity. In December we also began lunchtime pickets, a great way to channel anger at the disrespect we faced in the workplace and to build solidarity. When management failed to acknowledge in negotiations the numerous contributions and personal sacrifices the staff makes to ensure MFY's and its clients' successes, we implemented a work-to rule, where staff members consistently worked exactly thirty-five hours per week, the weekly work hours set forth in our CBA.⁹³ We picketed outside the executive director's home and flyered her neighbors and local businesses. When there was still no meaningful movement by management to accept some of our demands or retract their more despicable ones, we held a one-day strike on January 12, 2015.⁹⁴

It would be wrong, however, to give all credit for these inspiring and brave actions to the boss. While management's unscrupulous approach to bargaining no doubt fueled the anger underlying our militant actions, actually organizing that anger and deploying it strategically took significant effort on behalf of the rank-and-file leaders in the union.

First, the negotiation team made it a point to communicate regularly and thoroughly with the entire shop through constant email updates and weekly (or sometimes more frequent) in-person meetings. Shop delegates facilitated communication between shop members and the negotiation team and identified shop member concerns before they became divisive. The consistent feedback given to the negotiation team and the team's regular and transparent communication back to the shop ensured that we were able to maintain trust and have honest discussions that were key to our shop's solidarity.

The seriousness with which the negotiation team approached regular meetings with members was mirrored in the high level of participation from the rank and file. The majority of shop members attended meetings, debated seriously options on the table, posed challenging questions to the team and to each other, and maintained discipline even when there were disagreements about

⁹² *Id.*

⁹³ COLLECTIVE BARGAINING AGREEMENT BETWEEN THE LEGAL SERVICES STAFF ASSOCIATION NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS INTERNATIONAL UNION UAW, LOCAL 2320, AFL-CIO & MFY LEGAL SERVICES, INC. 15 (Jan. 1, 2012 – Dec. 31, 2015), http://lssa2320.org/wp-content/uploads/2013/10/MFY_CBA_2012to2014-FINAL.pdf [<https://perma.cc/FH42-B9BT>].

⁹⁴ *MFY Legal Services Staff Declare One-Day Strike in Protest*, *supra* note 84.

particular actions. This resulted in wide and enthusiastic participation in each action, even by members who were hesitant to join some of the more radical actions. When we did strike, not a single member crossed the picket line.

The underlying point here is that while members placed great trust in the negotiation team, the contract campaign was ultimately propelled forward by the rank and file. While many examples illustrate this fact, here we will briefly discuss two.

First, at the very outset of bargaining, we told management that whatever offer was on the table on January 15, 2015 would be the offer we would vote on one week later. In years past, management had attempted to continue negotiating until the eleventh hour, delivering a final offer sometimes hours before the union is set to vote. This tactic denies staff an opportunity to seriously debate and consider an offer. Building a two-week buffer ensures that the union has time to carefully weigh the final offer. In this round of contract negotiations, MFY filed an Unfair Labor Practice complaint against LSSA for using this tactic.⁹⁵ Nervous about how this meritless claim might affect the bargaining process, the LSSA negotiation team considered scheduling extra negotiating sessions with management to appease them. At a special shop meeting called to discuss the matter, the negotiation team was told unequivocally not to take such action. Our spines suitably stiffened, we returned to the table, inspired by the shop's courage to stick to our original plan.

The second example involves an all-staff meeting we held in December 2014, approximately one month before the deadline. In that meeting we discussed what was on the table, what we wanted to be sure to get out of bargaining, and how we were going to get there. Members discussed and debated the merits of the union and management offers, and ultimately hammered out the plan of escalating actions described above. People brainstormed ideas, discussed logistics, and debated larger questions. The meeting ultimately resulted in a concrete plan that was ratified at a subsequent meeting. Without this rank-and-file-driven planning meeting, we would not have succeeded in our goals.

Arriving at this point meant debating some difficult questions. One question that staff asked throughout negotiations and the strike, a question that it was crucial to answer clearly, was why? Why

⁹⁵ Charge, MFY Legal Servs., Inc. v. Legal Servs. Staff Ass'n, NLRB Case No. 02-CB-144397 (filed Jan. 14, 2015) (on file with authors). The charge was later withdrawn when the parties reached a final agreement.

was MFY's management attacking our health care and sick leave? Why were they refusing to pay non-attorneys equitably, or to agree that in the twenty-first century, workers should be entitled to parental leave? MFY's management is made up mostly of life-long public servants, people who have dedicated their careers to serving low-income New Yorkers. So answering this question was key to understanding the basic dynamics of our dispute with management.

The answer to this question lies not in some moral failing on the part of MFY's management, but in the political and economic context of our negotiations and the structure of legal services organizations. MFY is funded by City, State, federal, and private contracts, and must bid for these contracts in a market where the organization competes against other legal services organizations. In this competition there are real pressures to offer services at cheaper rates. As we discussed above, this competitive market for funding has been effectively used by both the Koch and Bloomberg administration to quell radical politics.

This situation makes it easy for management to embrace a race-to-the-bottom mentality. The organization must constantly win new contracts to survive and must make competitive bids for those contracts. Management is ill-equipped to resist the downward pressure of this dynamic. Unionized staff, on the other hand, is well situated to resist this downward pressure. As front-line, case-handling staff, we directly observe how the deterioration of our working conditions leads to inferior client services. We also feel the pain of the race to the bottom in our pocketbooks. Finally, we are members of a union, one of the greatest vehicles for fighting working class oppression in world history.

To further complicate the matter, there is (at least potentially) a divide between the management of a modern legal services organization and that organization's board of directors.⁹⁶ In his book, *The Politics of Rights*, Stuart Scheingold discusses what he calls the "activist bar"—those lawyers who "are interested in serving the cause of change," including its prospects and its opposition.⁹⁷ He notes that lawyers of private law firms, while setting up *pro bono* programs to attract new graduates, cannot be dedicated to the ac-

⁹⁶ Jeanette Zelhof, Exec. Dir., MFY Legal Servs., Address at MFY 50th Anniversary Alumni Reunion, at 7:45-9:40 (2013), http://www.mfy.org/wp-content/uploads/MFY-50th_small.mp3 ("[H]ousing in this richest city in the nation is effectively unaffordable to those people who are our clients; workers are exploited as never before; and financial institutions are engaged in the greatest theft from the poor and working poor not seen in most of our lifetimes.").

⁹⁷ SCHEINGOLD, *supra* note 13, at 190.

tivist bar in the long term.⁹⁸ MFY's board, while requiring a certain number of clients or former clients in its membership, is overwhelmingly comprised of partners and associates from large corporate firms. Regardless of board members' political leanings, opposition to the activist bar "can be shaped and deflected by cautious and conventional action programs."⁹⁹ Thus, legal services programs are subjected to "pressures that can be effectively mounted against both law reform and movement building—in short, against the most promising signs of innovation."¹⁰⁰ This was evident in the board's concerns about framing gentrification as a negative force affecting MFY's clients in recent discussions of the organization's strategic plan. Some questioned whether MFY could attract new board members serving certain industries if MFY explicitly set a goal to combat gentrification.

D. Ready to Strike at MFY

After long months of negotiating, debating, and demonstrating our resolve, on January 30, 2015, the time finally came to vote on management's final offer. The week before, the negotiation team had informed the staff that we would not be recommending management's offer. Crucially, management refused to offer pay equity to non-attorneys, a benefits package that it acknowledged it could afford, or an adequate parental leave policy. The union met off-site at UAW offices in midtown Manhattan. After a brief discussion, we voted. With nearly 100% of the shop participating, 90% voted in favor of striking.¹⁰¹

Though we could not have known that MFY's management would ultimately make such an unacceptable offer, preparation for the strike had commenced weeks before the vote. Indeed, members would not have felt so confident to vote in favor of striking if we had not been preparing in advance. In the preceding weeks we had organized ourselves into several different committees, each handling a different aspect of the strike. One committee prepared press releases, contacted politicians, and drafted other external statements. Another committee (perhaps the most popular) organized food for all of our meetings. The benefits committee ensured that members were receiving strike benefits from the UAW or,

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 191.

¹⁰¹ See *MFY Legal Services Employees on Strike*, *supra* note 2 (discussing MFY's unionized employees' overwhelming 90% vote to go on strike following their rejection of management's contract proposal).

where possible, from City and State agencies. The hardship committee managed LSSA's strike fund, providing financial assistance to ensure that nobody would miss a rent payment or go hungry. Crucial to giving our picket lines a vibrant and energetic feel was the art committee, which wrote new slogans and emblazoned them on signs that members would wear or hold up.

The committees ensured that every member was cared for during the strike, that we were tightly organized, and that we had a clear line of communication with the press and politicians. By organizing ourselves into committees, we also ensured that the strike would be run in a bottom-up fashion. Each committee operated independently, making important decisions and fulfilling its function without extensive oversight from any central body. Simultaneously, the committees offered regular reports and updates to the bargaining team and the shop as a whole. This well-oiled operation allowed us to be flexible and created an environment in which the entire membership could have productive strategy discussions.

Prior to the strike, our shop focused on organizing internally and taking direct action targeting the board and management. After the strike began, our actions turned more outward to focus on reaching out to political allies and honing our message in the press. These actions were immensely successful. We received overwhelmingly positive media coverage, including in *The New York Law Journal* and on Democracy Now's newscast.¹⁰² Community based organizations and student groups also sent letters supporting the union's efforts, some of which were published in *The New York Law Journal*.¹⁰³

During the strike, LSSA members received indispensable support from the UAW. The international union provided members with a weekly stipend, or strike pay. Because MFY cut our health

¹⁰² See Letter of support from CUNY Law Labor Coal. for Workers Rights and Econ. Justice et al., *Prolonged Bargaining Hurts MFY Clients, Staff*, N.Y.L.J. (Feb. 19, 2015), <http://www.newyorklawjournal.com/id=1202718260649/Prolonged-Bargaining-Hurts-MFY-Clients-Staff?slreturn=20160124181638>; *Workers at NYC Legal Nonprofit Strike over Pay, Family Leave*, DEMOCRACY NOW! (Feb. 3, 2015), http://www.democracynow.org/2015/2/3/headlines/workers_at_nyc_legal_nonprofit_strike_over_pay_family_leave [<https://perma.cc/MN24-Q388>].

¹⁰³ See, e.g., Letter of support from CUNY Law Labor Coal., *supra* note 102; Letter from Deborah Glick, Assemblymember, New York Senate, Feb. 20, 2015, <http://lssa2320.org/wp-content/uploads/2015/02/New-York-State-Assemblymember-Deborah-Glick1.jpg> [<https://perma.cc/5MZA-CP4R>]; Letter from The Unionized Workers of Urban Justice Ctr. to Jeanette Zelhof, Exec. Dir., MFY Legal Servs. and Robert Harwood, Partner, Harwood Feffer, LLP (Feb. 3, 2013), <http://lssa2320.org/wp-content/uploads/2015/02/Union-members-of-Urban-Justice-Center1.jpg> [<https://perma.cc/R2W4-BRZK>].

insurance during the strike, the UAW insured all striking members. Region 9A also provided helpful press and political contacts.

The day-to-day of the strike was divided into three main activities: picketing, committee meetings and activities, and shop-wide meetings to strategize and discuss the latest developments at the bargaining table. In spite of the extreme cold, we picketed most days each week, sometimes dividing into smaller groups to hold rallies near a particular target's office or home. The frigid weather prevented us from holding all-day picket lines, but we managed to turn this potential disadvantage into a great strength. Shorter pickets meant more energetic pickets, and the enthusiasm of the shop's pickets was truly inspiring. Supporters who came out to pickets commented on how organized we were, down to every member knowing our chants. The democracy of the shop's operations was reflected in the chants themselves, which were led by a wide variety of members who constantly rotated and shared the role.

On top of our picketing schedule, we reported to union headquarters almost every weekday. At headquarters we would have committee meetings and shop-wide meetings, and would carry out other activities, such as contacting the press or other unions in order to raise our strike's visibility.

Key to the success of our picket lines was the support and solidarity we received. A wide range of groups, including ACT-UAW Local 7902, the Association of Legal Aid Attorneys Local 2325, Brandworkers International, CWA Local 1180, GSOC-UAW Local 2110, the IWW, National Writers Union-UAW Local 1981, the National Lawyers Guild NYC chapter, the NYC International Socialist Organization, NYSNA, the CUNY Professional Staff Congress, Central Labor Council, the Rude Mechanical Orchestra, State Senator Brad Hoylman, Assembly Member Dick Gottfried, Council Members Helen Rosenthal, Corey Johnson, and Stephen Levin, all came out to support us at various times. We punctuated our regular pickets with a few "all-out" pickets that lasted well into the freezing nights. These actions both energized the shop and demonstrated how our strike resonated across the city with workers who were tired of slowly deteriorating wages and working conditions.

Throughout the strike, we were also careful to maintain a clear and confident political message. Although it helped that we supported each of our bargaining demands with clear principles, it was nonetheless difficult at times. During negotiations, management's team suggested that our arguments regarding the racially problematic nature of their demands and strategy were inaccurate, divisive,

and made in bad faith. However, the management team ultimately advanced no substantive arguments that successfully rebutted our position. Therefore, despite pressure from our employer to soften our public arguments on this point, we carried forward. The seriousness of the racial problems at MFY required it.

In the first week of the strike, management's bargaining position did not change on any of the union's most important demands. After our sustained and effective efforts, however, we began to see progress. The crucial breakthrough came towards the end of the second week of the strike, when management finally agreed to our demands for pay equity for administrative staff. As with any contract negotiation, the union also made some hard concessions.

Finally, in a marathon session on February 23, 2015, management made an offer that satisfied LSSA's most important demands. The management and board were most resistant to increased retirement contributions because of the long-term financial commitment this demand represented. The irony that we were dedicating our careers to this work at a great financial sacrifice while the board held out on agreeing to a .5% increase in our retirement contributions was not lost on our shop.

Upon reaching a tentative deal at the bargaining table in the fourth week of the strike, the chair of MFY's board, Robert I. Harwood, told our negotiation team, "You guys did a good job for your people." A member of the union's negotiating team responded that she hoped the next time she saw him he would consider the staff "his people" as well. We can only assume that the board's general view of MFY's staff is summarized by Mr. Harwood's comment. His comment reflects the belief that the people who carry out MFY's mission, the people who serve the organization's clients on a daily basis, are separate and distinct from the organization's managers and board. It reflects the experience of our staff and explains why it was crucial that the staff demand respect, transparency, and accountability as part of its contract campaign.

E. Taking the Fight Forward

Our strike and fight for a fair contract was, in turns, exhilarating, exhausting, inspiring, and intense. It gave us an opportunity to work collaboratively and collectively with our co-workers, to witness their talents, bravery, and resolve, and to forge the kind of connections that can only be made in struggle for a just cause. Our strike also won benefits that will make MFY a leader in the legal services field, including forty days of paid parental leave, large pay in-

creases for non-attorneys, a benefits package that ensures our clients will be represented by experienced advocates, and measures that will ensure that MFY is a diverse, respectful workplace.

Aside from the contract provisions themselves, the success of this contract campaign and strike are readily apparent in our workplace. Our administrative staff is more engaged in our union, including support staff serving as shop delegates for the first time in many years. Several staff members have already taken advantage of paid parental leave without fighting for approval or worrying about gaps in health coverage. Some members of the union have taken the energy of the strike forward and formed an activism committee that connects our union to other struggles around the city. In order to more effectively fight the oppression and marginalization endemic to the neoliberal order, the unionized members of MFY and LSNYC have identified a set of political priorities, including the fight against racial injustice, gender and sexuality oppression, and gentrification, which we will continue to organize around in the future.

However, there are still goals of the contract campaign yet to be achieved. Although MFY has more than doubled in size, we have hired only one additional administrative support staff member in the past several years. Management's practices continue to reflect distrust of staff and a general style that is more about power and control than leadership that inspires and supports. Unfortunately, the disrespect and disregard for the four staff members providing administrative support to an organization of now nearly one-hundred people continues.

After we settled our contract at the end of February 2015, the administration of Mayor Bill de Blasio dramatically increased funding for civil legal services. The long-term impact of this infusion of City money remains to be seen, and it is clearly a welcome development for those of us in the field. However, this increase in funding does not change the basic environment in which legal services advocates operate—one of continued austerity for working class and poor New Yorkers.¹⁰⁴ Furthermore, legal services organizations will continue to bid for grant money in a competitive, market-like setting, ensuring that the managements of legal services organizations will continue to adopt race-to-the-bottom negotiating tactics. In

¹⁰⁴ In 2014, one year before de Blasio announced the new funding for legal services, Ian MacDonald predicted that municipal governments would couple large handouts to developers with social services projects intended to secure the legitimacy of the government and consent of the governed. *See* MacDonald, *supra* note 82.

other words, the basic political economic context for the provision of legal services has not changed.

A discussion of the sort of social movements that it would take to change the neoliberal context in which we operate is beyond the scope of this article. LSSA's experience in its 2015 strike, however, gives us a glimpse of what such movements might look like. They would need to be based on solidarity, on the basic principle that an injury to one of us is an injury to all of us. They will need to have the courage to expand our political horizons, to ask more of the City, State, and federal governments.

Focusing more narrowly on legal services, to the extent that our contract campaign represents a broader movement in the field, it represents the rejection of the race to the bottom.¹⁰⁵ Anti-poverty advocates could be significantly more effective in pressing for expanded funding if MFY's board and management formed a united front with the union to advocate for increased resources to ensure the highest quality of legal services. Instead, by forgoing such a position, MFY's management and board have taken a stance that relegates legal services to less and supports a trend of reliance on volunteerism and unbundled legal services.¹⁰⁶ LSSA, however, plans to continue to fight to improve our working conditions and the lives of our clients.

The 2015 strike against MFY will, however, stand out as a moment of raised expectations in legal services. It was a moment in which we dared to reject austerity and fight for more—more for ourselves and more for our clients. The struggle continues.

¹⁰⁵ See Carmody et al., *supra* note 89, at 329.

¹⁰⁶ See Fern Fisher-Brandveen & Rachel Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 *FORDHAM URB. L.J.* 1107, 1107-14 (2002).

CAN REPRODUCTIVE TRANS BODIES EXIST?

Chase Strangio[†]

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“I assume you’re here about a hysterectomy”

Those were the first words my gynecologist ever spoke to me. Before she sat down, before she said hello, she looked at my chart and assumed I was in her office for a major surgery that would end my ability to carry a child at age twenty-seven. After months of delay, I had scheduled the appointment to address the severe pelvic pain that I had been dealing with for months. The dread of that feeling of walking into a gynecologist’s office and facing the inquisitive looks had caused me to ignore the near-constant pain. “What is he doing here?” “Is that really a woman?” “What a freak.” The whispers. The stares. The internalized self-hate.

“Umm . . . no. I am not here for a hysterectomy,” I replied. An inauspicious beginning for an already fraught relationship—and this was the “trans-friendly” gynecologist recommended by the LGBT health center.

My medical records clearly indicated to my gynecologist that I was transgender (some identifying medical procedures and medical interventions), and her assumption was that I therefore wanted a hysterectomy. That might have been a completely fair assumption from a medical perspective—that a trans man coming in for a visit with a gynecologist would ask about a hysterectomy. The problem is not that she asked; it was that without knowing anything about me she assumed that the only possible reason for my visit was to remove my reproductive organs. This type of engagement with a trans patient sends at least two concerning

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messages: the first is that trans people do not need access to preventive care and only visit the doctor when discussing health care related to transition; and the second is that trans people are assumed not to desire the capability to biologically make children. Both messages have strong eugenic undertones contributing to the negative health outcomes for the trans community and the coerced sterilization of trans people.¹

For me, this experience—an incredibly common one for transmasculine people—was also a stark reminder of how precarious trans bodies are in our public imagination. We simply do not exist in so many spaces. We are the men who become pregnant, need gynecological care, want abortions; the women who need prostate care, produce sperm, can get their partners pregnant; the men, women, and non-binary people who may need care that defies every expectation of how bodies look, perform, and have sex.

The cost of not existing is felt very differently across axes of race, immigration status, disability, poverty, and gender presentation. For me—a white trans man; a lawyer; a person with access to wealth and resources—it means that I may choose not to become pregnant or that I worry about the embarrassment of being scrutinized at the gynecologist. For my trans sisters of color, it means devastating rates of murder, forced sterilization, incarceration.² For all of us, we are told that our bodies are not meant to reproduce and that we cannot and should not parent the kids we make and the kids we raise. These messages are the result, in part, of legal systems that compel narratives of identity and embodiment that fail to account for the complexity and beauty of people's bodies and capabilities.

It is easy to attempt to explain the tenuousness of trans bodies in our medical and legal discourse by focusing on the way and extent to which reproductive rights advocacy fails to account for reproductive trans bodies. It is true that a reproductive rights and health discourse that presumes that only women can become

¹ See NAT'L LATINA INST. FOR REPROD. HEALTH, AT THE MARGINS OF CARE: THE NEED FOR INCLUSIVE HEALTH CARE FOR TRANSGENDER & GENDER NON-CONFORMING LATINAS 1 (2013), <http://latinainstitute.org/sites/default/files/NLIRH-FactSheet-GenderedCare-EngR3new.pdf> [<https://perma.cc/7A5H-HZKD>].

² Zach Stafford, *Transgender Homicide Rate Hits Historic High in US, Says New Report*, GUARDIAN (Nov. 13, 2015), <http://www.theguardian.com/us-news/2015/nov/13/transgender-homicide-victims-us-has-hit-historic-high> [<https://perma.cc/WB7P-6LBL>] (“The Human Rights Campaign report documented 21 transgender homicide victims so far in 2015, almost all of them transgender women of color . . .”).

pregnant or that all women share certain reproductive capacities is trans exclusionary at best, and anti-trans at worst. However, the negative outcomes for trans people that flow from the current state of reproductive rights advocacy are not unique to that context.³ In fact, the very same consequences flow from the advocacy strategies pursued by the transgender rights movement.

As advocates for trans people, we have similarly failed to name and protect reproductive trans bodies. Over the course of the past several years, as the transgender “movement” has gained visibility in connection to and independently from a broader gay and lesbian movement, narratives of transgender experience have proliferated. These narratives have employed different devices to make politically coherent the experiences of trans and gender non-conforming people. Often we hear stories of people “born in the wrong body” or “never quite fitting in” until medical intervention brought their internal senses of self into congruence with their bodies.⁴ Individual trans people and advocacy movements have utilized those narratives but have, at the same time, critiqued the ways transgender identity and experience have been medicalized⁵ and how the processes for accessing health care force us as trans patients and advocates to reproduce the very pathologizing

³ Cheryl Chastine, *Cisgender Women Aren't the Only People Who Seek Abortions, and Activists' Language Should Reflect That*, RH REALITY CHECK (Mar. 18, 2015, 12:09 PM), <http://rhrealitycheck.org/article/2015/03/18/cisgender-women-arent-people-seek-abortion-activists-language-reflect/> [<https://perma.cc/V3E8-WXF6>].

⁴ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 205 (D.D.C. 2006) (“At birth, plaintiff was classified as male and christened ‘David John Schroer.’ From a young age, she was socialized to wear traditionally masculine attire and to think of herself as a boy. However, this designation did not match her gender identity”) (internal citations omitted); see also Petition at 3, *O’Donnabhain v. Comm’r of Internal Revenue*, 134 T.C. 34 (T.C. 2010) (No. 6402-06), <https://www.glad.org/uploads/docs/cases/in-re-rhiannon-odonnabhain/odonnabhain-tax-court-petition.pdf> [<https://perma.cc/K9R4-AVYY>] (“Since childhood, Ms. O’Donnabhain had experienced extreme discomfort with her anatomical sex and felt a deep sense of inappropriateness in the gender role of that sex. She had feelings that something was not right in her body from as early as six or seven years old, but wasn’t able to put a label on the feelings.”); JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSSEXUALITY* 68 (Columbia Univ. Press 1998) (“Transsexual subjects frequently articulate their bodily alienation as a discomfort with their skin or bodily encasing: being trapped in the wrong body is figured as being in the wrong, or an extra, or a second skin, and transsexuality is expressed as the desire to shed or step out of this skin.”).

⁵ In this context, medicalization refers to the process by which narratives of selfhood are given meaning and coherence through psychiatric and medical discourses with their concurrent pathologizing impulse. We become defined through our illness and cured through medical intervention. See generally MICHEL FOUCAULT, *HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (1978).

discourses of trans experience that we critique.⁶

While embodiment is a central part of trans experience and the desire for re-embodiment or changed embodiment is important for the self-actualization of many trans-identified people, as advocates for transgender people we have failed to account for and embrace the many ways we inhabit our bodies.⁷ Even as we critique the medical model and its pathologizing impulse, when we seek surgeries to modify our bodies and tell stories of gendered actualization we necessarily rely on some idea of sexed embodiment as being natural or “right” in an internal sense. For example, when I tell my therapist that I want a mastectomy because it fits my gender, I am reifying maleness. My identity takes on meaning through a digression from expected female sexed embodiment, and masculinity conflates with male chest reconstruction. Even as I denounce the narrative I am forced to tell of always having felt like “a boy,”⁸ there is something about the maleness of a flat chest that I seek—something not only about its flatness, but also about its maleness. As this narrative is collectivized through our desire for the recognition of the legitimacy of our transness as something real and politically cognizable and our “need” for affirming care as something legitimate, we reinforce ideas about how sexed bodies look and operate within a binary.

By examining both reproductive and trans rights discourse, this article poses the question of whether reproductive trans bodies can exist in the law. The purpose is not to answer the question one way or the other but rather to expose how all our movements are susceptible to critique and ultimately, our advocacy strategies will never wholly capture the multitude of people’s experiences. Rather than focus on the ways in which our legal and political strategies fall short, I propose an emphasis on collaborative engagement. The goal at this stage is not necessarily to change the legal

⁶ See Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 23-24 (2003) (“The medical model, ultimately, was what I had to contend with in order to achieve the embodiment I was seeking. I learned quickly that to achieve that embodiment, I needed to perform a desire for gender normativity, to convince the doctors that I suffered from GID and wanted to ‘be’ a ‘man’ in a narrow sense of both words.”).

⁷ *Id.*; see also PROSSER, *supra* note 4, at 33 (responding to Judith Butler, Prosser explains, “In its representation of sex as a figurative effect of straight gender’s constative performance, *Gender Trouble* cannot account for a transsexual desire for sexed embodiment as *telos*.”).

⁸ See Spade, *supra* note 6, at 23-24 (discussing his own experience deploying this narrative).

paradigm, but rather to speak publicly and boldly about all bodies and to honor sexed embodiment outside of the gender binary. Once we name and embrace who we are beyond the legal and political narratives we may be forced to tell, we might shift the conditions for trans people and in time shift our advocacy narratives.

I. WHAT TO MAKE OF THAT UTERUS? – REPRODUCTIVE TRANS BODIES IN REPRODUCTIVE RIGHTS AND TRANS RIGHTS DISCOURSE

For my gynecologist, the existence of my uterus was presumed to be my problem. If I wanted to be a man, in her mind, then certainly I wouldn't want to keep that organ that signified womanhood. She assumed that I desired a coherently sexed body. Underneath that assumption is a strand of political discourse that seeks to expel from the categories of "womanhood" and "manhood" those bodies that possess reproductive capacities different from those traditionally associated with the "opposite gender." The anxiety is that if we accept that a body without breasts and with a uterus, for example, could desire to carry a child, we might destabilize the advocacy projects of both the reproductive rights and the transgender rights movements. This section explores how both reproductive rights and trans rights advocacy are wary of fully embracing transgender bodies.

A. *Transgender People and Sex*

Despite the difficulty of developing meaningful definitions to capture the range of transgender experiences, it is still useful and important to identify some general contours for these categories and terms to ground a discussion of trans experience. For the past number of years at least, the commonly used definition of the term "transgender" has been something to the effect of "an umbrella term referring to individuals with a gender identity or expression that differs from the gender identity or expression associated with the person's assigned sex at birth."⁹ Concerned that this definition creates a problematic and completely artificial distinction between "gender identity" and "sex," I prefer to understand "transgender" as a term referring to individuals with a gender that differs from the gender assigned to them at birth, including individuals with a

⁹ See, e.g., *GLAAD Media Reference Guide – Transgender Issues: Transgender Specific Terminology*, GLAAD, <http://www.glaad.org/reference/transgender> [https://perma.cc/Z78G-U7CS].

gender other than male or female.¹⁰ Though a transgender person may also be “gender non-conforming,” the two terms are not coextensive for every person. I use the term “gender non-conforming” to encompass a broader range of persons who express their gender in a manner that is not traditionally associated with their assigned gender, whether or not they identify as transgender.

When discussing health care for transgender people, both advocates and medical providers rely on the terms gender identity, gender, and sex. Gender identity often refers to one’s subjective sense of belonging to a particular gender (usually assumed to be male or female).¹¹ The most common way of distinguishing gender from sex in medical and legal discourse has been to define gender as a culturally and socially constructed set of behaviors associated with sex, whereas sex is “assigned at birth based upon sexual characteristics of the external genitalia.”¹² However, once interrogated, this distinction becomes tenuous and the idea of sexual difference is exposed as a construct itself in which binary sexual difference is produced through our discourses of gender.¹³ For example, while we may locate bodily differences among different people, those differences are ascribed meaning through social process. Properly understood, what we had thought of in the past as biological sex in the sense of a noun, might be better understood as a verb—one is sexed through a process of attaching significance to different body parts.

B. *Trans Bodies in Reproductive Rights*

The movements to expand access to abortion and reproduc-

¹⁰ See, e.g., Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 751 (2008) (“[Administrative policies concerning gender changes] emerged from a growing awareness of the existence of a group of people, currently called ‘transgender’ people, who live their lives identifying as and expressing a different gender than the one assigned to them at birth.”).

¹¹ *Id.*

¹² Robert Garofalo et al., *Overlooked, Misunderstood and At-Risk: Exploring the Lives and HIV Risk of Ethnic Minority Male-to-Female Transgender Youth*, 38 J. ADOLESCENT HEALTH 230, 230 (2006).

¹³ See P.-L. Chau & Jonathan Herring, *Defining, Assigning and Designing Sex*, 16 INT’L J. L. POL’Y & FAM. 327, 328 (2002) (“‘[T]he hierarchical division of humanity into two transforms an anatomical difference (which is itself devoid of social implications) into a relevant distinction for social practice.’ In other words the ‘biological fact’ of sex is only a ‘fact’ of any interest because of the cultural importance attached to it.”); see generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 12 (1990) (“[T]here is no recourse to a body that has not always already been interpreted by cultural meanings; hence, sex could not qualify as a prediscursive anatomical facticity. Indeed, sex, by definition, will be shown to have been gender all along.”).

tive health have long and complicated histories in the law. The purpose of this section is not to explore the various doctrinal strategies for challenging restrictions on health access and discrimination against those who are or may become pregnant. Rather it is to highlight some of the background legal realities that have compelled an emphasis on equality principles within the reproductive rights landscape and to situate the trans rights critique within that larger framework.

In a 2015 piece for *The Nation*, Katha Pollitt urged the reproductive rights movement to resist a push from, according to Pollitt, trans advocates to abandon a focus on “women” in favor of gender-neutral terminology.¹⁴ “Who has abortions?” Pollitt began. “For most of human history, the answer was obvious: women have abortions. Girls have abortions. Not any more. People have abortions. Patients have abortions. *Men* have abortions.”¹⁵ The piece went on to position the demands of “young people” in opposition to the needs of “half of humanity and 99.999 percent of those who get pregnant.”¹⁶ The question, for Pollitt and many others, is how can something as tenuous as reproductive health care for (non-transgender) women abandon its core constituency. In another piece, Pollitt wrote: “It has taken humanity thousands of years to acknowledge womanhood as something to identify with proudly, to see women as bearers of rights. I wouldn’t be so quick to throw that away.”¹⁷

The idea that somehow the needs of the transgender community result in the “throwing away” of womanhood has come to frame the question of how trans bodies interact with reproductive rights advocacy. In a more hostile piece for *The New York Times*, journalist Elinor Burkett, wrote incredulously of the idea that “self-described transgender persons” would claim that “[a]bortion rights and reproductive justice is not a women’s issue”¹⁸ In her formulation, transgender advocates think about abortion not as a “women’s issue” but as a “uterus owner’s issue.” This is, of course, factually true but Burkett’s description of the advocacy by trans

¹⁴ Katha Pollitt, *Who Has Abortions?*, NATION (Mar. 13, 2015), <http://www.thenation.com/article/who-has-abortions/> [https://perma.cc/UJ75-THK6].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Katha Pollitt et al., *Does Talking About ‘Women’ Exclude Transgender People from the Fight for Abortion Rights?*, NATION (Apr. 22, 2015), <http://www.thenation.com/article/letters-505/> [https://perma.cc/6YTJ-DHZU].

¹⁸ Elinor Burkett, *What Makes a Woman?*, N.Y. TIMES (June 6, 2015), <http://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html>.

people is quite reductive, and according to Burkett, it is this re-framing that “undermin[es] women’s identities, and silenc[es], eras[es] or renam[es women’s] experiences”¹⁹ For Burkett, what is clear is that the existence of trans people has the potential to “erase” non-transgender people—non-transgender (or cisgender) women, in particular.²⁰ Trans people don’t even have to claim space within reproductive rights or women’s rights advocacy to threaten it with their very existence.

Both Pollitt and Burkett craft (or invent) narratives of trans identity and advocacy that are aimed at or would have the effect of undermining the interests of cisgender women, but neither accounts for the actual experiences or goals of transgender people. The reality is that “womanhood” as a lived reality and a political concept should not be subject to a scarcity notion—there is enough womanhood to go around, and one person’s experience of and claim to womanhood does nothing to undermine or take away another woman’s experience of the same. The idea that a trans-woman’s claim to womanhood harms or erases non-transgender women is just as logically incoherent as the claim that marriages between same-sex couples would undermine the completely unrelated marriages of different-sex couples.²¹ It is not a zero sum game. And while it is tempting to devote an entire article to the distortions and inaccuracies that Burkett and Pollitt put forth, I do not think engaging on this terrain is useful. Further, as offensive as their framing is for trans people (myself included), the concerns both authors cite about undermining the already precarious access to reproductive health care are real and important. Though there may be some ill-intentioned people at the margins,²² for most reproductive rights and women’s rights activists, the resistance to a trans-inclusive reproductive rights discourse is grounded in a fear of losing access to reproductive health care for everyone and not in a goal of singling out transgender people for exclusion.

The idea of shifting from talking about “pregnant women” to

¹⁹ *Id.*

²⁰ *Id.*

²¹ Brief for Texas Eagle Forum & Steven F. Hotze, M.D., as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

²² There are varying degrees of insidious rhetoric when it comes to excluding transgender people from women’s and reproductive rights discourse and advocacy. On the extreme end are trans exclusionary radical feminists (TERFs) like Cathy Brennan and Janice Raymond who do not believe that transgender people exist at all and make public efforts to denounce transgender people, using the wrong names and pronouns and opposing access to health care for transgender people. *See, e.g.*, JANICE RAYMOND, *THE TRANSEXUAL EMPIRE* (Beacon Press 1979).

“pregnant people” can evoke traumatic memories of the Supreme Court’s refusal to protect pregnant people from discrimination under a sex discrimination theory forty years ago. In *Geduldig v. Aiello*, the Supreme Court considered whether discrimination on the basis of pregnancy constituted sex discrimination for purposes of equal protection.²³ The case involved a challenge to California’s disability insurance program that excluded from coverage work loss related to pregnancy.²⁴ The Court rejected the argument that pregnancy discrimination constituted sex discrimination, reasoning in a now infamous footnote:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in [*Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973)]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.²⁵

Though the decision was essentially overruled by Congress when it passed the Pregnancy Discrimination Act in 1978, the legal holding that pregnancy discrimination is not sex discrimination still stands.²⁶ Relying on *Geduldig*, the Court has since held that restrictions on abortion access likewise do not constitute sex discrimination.²⁷

²³ *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

²⁴ *Id.* at 492.

²⁵ *Id.* at 496 n.20.

²⁶ *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983).

²⁷ *See, e.g., Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271 (1993) (“Respondents’ case comes down, then, to the proposition . . . that since voluntary abortion is an activity engaged in only by women, to disfavor it is *ispro facto* to discrimi-

The Court's refusal to recognize discrimination based on pregnancy and restrictions on access to abortion as sex discrimination is particularly concerning for those who may become pregnant because the substantive due process line of cases have failed to adequately protect the rights of those who are or may become pregnant. In the immediate aftermath of the Court's decision in *Roe v. Wade*, Congress and the states acted swiftly to restrict abortion access.²⁸ Restrictions continued, and in 1992, the Court was again confronted with the question of whether and to what extent the decision to terminate a pregnancy was protected by the Constitution. That year, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed the central holding of *Roe* that the decision to end a pregnancy before the viability of a fetus is protected by due process and that any restriction amounting to an undue burden on this liberty interest is unconstitutional.²⁹ But abortion restrictions continued to proliferate and the legal test set up in *Casey* and its progeny has been ineffective at halting—and has actively contributed to—the continued assault on the availability of safe and legal abortions. This term, the Court will again consider the contours of the “undue burden” test in *Whole Woman's Health v. Hellerstedt*, a case challenging Texas laws that would, according to petitioners, “cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health.”³⁰ If the Court upholds the targeted regulation of abortion providers (“TRAP”) laws in Texas, the impact will be felt most severely by low-income people across the country whose access to safe and legal abortion will all but disappear.³¹

nate invidiously against women as a class. Our cases do not support that proposition.”).

²⁸ Before the close of 1973, Congress passed a law that exempted any individual or entity receiving federal funds from any requirement to perform an abortion where such performance would be contrary to the individual's or the institution's religious beliefs. Public Health Service Act, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95-96 (1973) (codified as amended at 42 U.S.C. § 300a-7 (2012)). More restrictions followed, such that now at least forty-four states permit health care institutions to refuse to provide abortion services, and forty-four states permit individual health care providers to refuse. GUTTMACHER INST., STATE POLICIES IN BRIEF AS OF OCTOBER 1, 2014: REFUSING TO PROVIDE HEALTH SERVICES (2014), https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_RPHS.pdf [<http://perma.cc/66QB-FAVN>].

²⁹ *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 876-77 (1992).

³⁰ Brief for Petitioners, *Whole Woman's Health v. Cole*, No. 15-274 (S. Ct. *petition for cert. filed* Sept. 2, 2015), <http://www.scotusblog.com/wp-content/uploads/2016/01/15-274-ts-reprint.pdf> [<https://perma.cc/XX5B-D23Q>].

³¹ See, e.g., Miriam Zoila Pérez, *Everything You Need to Know About the Biggest Abortion Case In Our Lifetime*, COLOR LINES (Jan. 22, 2016), <http://www.colorlines.com/articles/everything-you-need-know-about-biggest-abortion-case-our-lifetime> [<https://>

The decision to center cisgender women in the conversations about pregnancy and abortion access has been compelled by the Court's holdings in *Geduldig*, *Roe*, and *Casey* in which the Court has gone out of its way to obscure the concrete and measurable harms to those forced to carry an unwanted or unsafe pregnancy to term. The shift to an equality discourse that foregrounds the experiences of women in reproductive rights and health advocacy is a logical one. The alternative would have been to risk ceding the conversation to the abstract principles of liberty and the balancing of burdens, which have completely failed to protect all people who may become pregnant from restrictive and dangerous laws restricting abortion access. As Justice Ginsburg notes in her dissent in *Gonzales v. Carhart*, "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."³²

Given this history, it is understandable why the women's rights movement would be wary of decentering "women" from such campaigns as "Stand With Women" or "Stop the War on Women" because the framing does not include the experiences of trans people. There is an urgent need to halt the harms flowing to cisgender women from abortion restrictions and pregnancy discrimination,³³ and it is strategic and important for the reproductive rights and women's rights movements to highlight the harms of these restrictions on their constituencies. That is why Pollitt writes, "Once you start talking about 'people,' not 'women,' you lose what abortion means historically, symbolically and socially. It becomes hard to understand why it isn't simply about the right to life of the 'unborn.'"³⁴ It does make sense within the political landscape and

perma.cc/DAR6-UGNB]; Brief for Planned Parenthood Federation of America et al. as Amici Curiae Supporting Petitioners, *Whole Women's Health v. Cole*, No. 15-274, (S. Ct. Jan. 4, 2016), <http://www.scotusblog.com/wp-content/uploads/2016/01/Planned-Parenthood-Federation-of-America.pdf> [<https://perma.cc/D8TN-G97Y>].

³² *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

³³ Each year brings new proposals to restrict abortion access in the states, with the cost born disproportionately by people living in rural places, people living in poverty, and people of color. See, e.g., CTR. FOR REPROD. RIGHTS, 2015 STATE OF THE STATES: FIGHTING BACK BY PUSHING FORWARD, <http://www.reproductiverights.org/sites/ctr.civicaactions.net/files/documents/USPS-Year-End-Report-Vs-6.pdf> [<https://perma.cc/MWY8-Q8M4>] (discussing the 400 bills and forty-seven newly enacted restrictions on access to reproductive health care in 2015); see also *Crisis in the South*, CTR. FOR REPROD. RIGHTS, <http://www.reproductiverights.org/feature/crisis-in-the-south> [<https://perma.cc/YZ45-V325>] (discussing the impact of abortion restrictions on women who are marginalized).

³⁴ Pollitt, *supra* note 14.

given the constraints under which we are operating that we talk about “women” when we talk about pregnancy and abortion. The problem and the challenge is that an emphasis on cisgender women and the experiences of cisgender women can quickly and uncritically translate into a set of narratives that fail to account for the existence of transgender people at all.

This erasure of reproductive trans bodies has shown up uncritically in much of the legal scholarship engaging with questions of reproductive autonomy, pregnancy discrimination, and reproductive health.³⁵ The standard post-*Geduldig* formulary becomes: “Given the indisputable facts that only women become pregnant, that generally only women who have recently been pregnant and given birth lactate, that only women who are lactating are able to breastfeed, and that only women who are breastfeeding need to pump or manually express milk from their breasts, the chain of causation from sex to pregnancy to lactation to breastfeeding to expressing milk would appear to be fairly clear.”³⁶ Even in a symposium entitled “Pregnant Man?”³⁷ scholars essentially disavowed trans existence. The language in the scholarship seemed to gratuitously exclude the trans experience: “simply because biology prevents a man from being pregnant (Thomas Beatie apart);”³⁸ “Breast-feeding is a function only women can perform;”³⁹ “It also is interesting that pregnancy, that one thing that only women (defined biologically) can do, is the source of such angst.”⁴⁰

Scholarship also erases the existence of women who are transgender and unable to become pregnant by conflating the definition of womanhood with an ability to be or become pregnant. As one author wrote of *Geduldig*:

It contains an obvious fallacy. While it is true that not all women are pregnant at any one time, all women, as a class, are susceptible to pregnancy (and bear in the United States an average of two children apiece). But even if pregnancy were a risk for only a small subclass of women, the sex discrimination issue would

³⁵ See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (“Criticizing *Geduldig* has since become a cottage industry. Over two dozen law review articles have condemned both the Court’s approach and the result.”).

³⁶ L. Camille Hébert, *The Causal Relationship of Sex, Pregnancy, Lactation, and Breastfeeding and the Meaning of “Because of . . . Sex” Under Title VII*, 12 GEO. J. GENDER & L. 119, 119 (2011).

³⁷ Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 277 (2010).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 232.

still be a live one.⁴¹

None of these formulations are true, and more insidiously, all of these formulations make it more difficult for transgender people to stake our own claims to bodily autonomy and reproductive health. What becomes of the transgender woman who cannot become pregnant or the transgender man who is pregnant? They are quite literally written out of existence.

The legal history of pregnancy and abortion restrictions is helpful for understanding why and how trans people are marginally situated in reproductive rights advocacy and discourse. The law constrains the narrative that advocates can deploy to resist and destabilize the harms set up through legal restrictions and discrimination. By neutralizing possible discrimination arguments in *Roe*, *Geduldig*, and *Casey*, the Court framed the terms of the debate over reproductive health access in abstract principles rather than real world consequences. The reality for trans people in reproductive rights discourse is that our bodies complicate the coherence of a narrative that is already fragile because of the fraught and unsettled nature of the legal protection at stake. This is true of all legal work, and some bodies and some people are always excluded or made more vulnerable. So what do we do? The answer is not simple, but we might better understand the problem if we look at how the trans advocacy movement has similarly contributed to the erasure of reproductive trans bodies.

C. *Reproductive Trans Bodies in Trans Rights Advocacy*

In some of the same ways that reproductive rights advocacy has refused to account for and accommodate the realities of trans bodies, so too have advocates for transgender rights. If the trans movement is to critique the ways in which we have been excluded from reproductive rights discourse, we must do so with a full recognition of our own complicity in the same exclusionary practices. Just as reproductive rights advocates have been forced to make certain linguistic and strategic choices in advocacy because of the restrictions in place, trans advocates have made similar choices with attendant costs and benefits in response to legal restrictions and social pressures. This section explores the ways in which trans advocacy challenges to restrictions on insurance coverage for transgender health care and access to accurate identification for

⁴¹ Diane L. Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 448 (1975) (emphasis omitted).

transgender people have contributed to the erasure of reproductive trans bodies.

Though the past few years have witnessed tremendous advances for transgender people, restrictions on health and identification access continue to threaten the health and well being of the trans community. Despite a medical consensus that “gender-affirming” health care—like hormone therapy and surgery—is medically necessary and safe, many public and private insurance programs exclude such care from coverage.⁴² While that care is excluded, many government record-keeping bodies continue to require proof of surgical transition in order to update the record of a person’s gender.⁴³ What this means is that a transgender woman in Alabama, for example, may have a medical need for genital surgery, but unless she can pay the \$50,000 to cover the cost of the care out of pocket, she will not be able to receive the care.⁴⁴ At the same time, in order to update the gender listed on her Alabama driver’s license to reflect her female gender, she will have to prove that she has had the surgical procedure that she cannot have because of the exclusions in place.⁴⁵ This person will then have poor health outcomes because she is wrongly identified as male on her identification and unable to obtain needed care to treat her medical condition. She will also be vulnerable to violence because every time she uses her driver’s license she will be outed as transgender in a climate where transgender people—particularly transgender women—face harassment and physical abuse for simply existing.⁴⁶

Given the consequences for trans people that flow from insurance coverage restrictions and onerous policies for updating iden-

⁴² See Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL’Y 7, 7 (2007).

⁴³ See generally *ID Documents Center*, NAT’L CTR. FOR TRANSGENDER EQUAL., <http://www.transequality.org/documents> [https://perma.cc/ZV8T-ZRZJ] (compiling policies in various jurisdictions).

⁴⁴ JODY L. HERMAN, THE WILLIAMS INSTITUTE, COSTS AND BENEFITS OF PROVIDING TRANSITION-RELATED HEALTH CARE COVERAGE IN EMPLOYEE HEALTH BENEFITS PLANS 5 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf> [https://perma.cc/7K9N-PX4X] (estimating cost per claimant for trans health care at around \$50,000).

⁴⁵ See *ID Documents Center: Alabama*, NAT’L CTR. FOR TRANSGENDER EQUAL., <http://www.transequality.org/documents/state/Alabama> [https://perma.cc/S6RH-7HRV] (“[D]ocumentation signed by a surgeon verifying that the applicant has completed gender reassignment surgery [is required].”).

⁴⁶ See generally JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011) (finding pervasive discrimination in areas including education, economic security, housing, treatment by police, and health care).

tification documents, it is no surprise that the trans movement has focused on increasing access to both health care coverage and identification documents. The problem is that when we advocate with the insurance industry and the government to broaden access to gender-affirming surgeries we often become trapped in a “medical necessity” discourse that reinforces binary sexual difference. We also bump up against our strategies for removing surgical standards for updating identification documents to accurately reflect our genders with government record keepers. While in the former context we argue that gender-affirming health care is necessary to make our bodies coherent, in the latter we contend that internal self-identification as male or female regardless of medical intervention is “sufficient” to make our gender identities “real.” These two strategies reflect the ambivalent and confused relationship that trans advocacy has with the body, and the tension between them can have the effect of placing trans bodies (and all bodies) in precarious and impossible positions.

One example of the hazards of strategies for removing trans exclusions from health insurance coverage can be found in the successful challenges to the New York State Medicaid program’s exclusions on coverage for gender-affirming health care. In the first case challenging this exclusion, *Casillas v. Daines*, the plaintiff argued that to deny her access to sex reassignment procedures contravened state Medicaid law requiring coverage for “medically necessary procedures.”⁴⁷ To make out this claim, the plaintiff had to establish, among other things, that she had a medical diagnosis of gender identity disorder (“GID”),⁴⁸ what is now known as gender dysphoria, for which surgical intervention was medically necessary. The complaint explains how this necessity for female sexed embodiment came about: first, “Ms. C was a biological male at birth, but has identified as a woman since 1974;” then, she was diagnosed with GID and she began to live “as a woman” including bringing her physical body into conformity with her internal sense of her womanness; ultimately, Ms. C “needs gender reassignment surgery in order to *achieve the capacity* to live a life without terrible suffer-

⁴⁷ Complaint ¶ 39, *Casillas v. Daines*, 580 F. Supp. 2d 235 (S.D.N.Y. 2008) (No. 07 Civ. 04082).

⁴⁸ Gender Identity Disorder is a condition defined by the American Psychiatric Association as “a condition characterized by a strong and persistent cross gender identification and discomfort about one’s assigned sex, unrelated to either a perceived cultural advantage of being the other sex or a concurrent physical intersex condition, which results in clinically significant distress or impairment in social, occupation or important areas of functioning.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. 1994).

ing.”⁴⁹ Though advocates were careful not to fully flesh out the more problematic narrative (“I am a woman inside, therefore I need this surgery to become a woman on the outside”), that subtext is clear in the story the plaintiff is compelled to tell. When seeking recognition from the insurance excluder—whether that be the government or a private company—the medical necessity standard constrains us to a narrative about sexed embodiment wherein to be a woman, one must attain womanly embodiment with all of its attending physicality and meaning.⁵⁰

Our trans advocacy strategies reproduce norms of sexed embodiment that make it harder to embrace and celebrate the range of bodies our communities inhabit. For example, in *O’Donnabhain v. Commissioner of Internal Revenue*, a transgender woman sued the Internal Revenue Service for excluding from her deductions medical expenses related to her gender transition.⁵¹ Under IRS rules, a medical expense can be deducted from one’s taxable income so long as it is not “experimental” or “cosmetic.” The IRS had determined that Ms. O’Donnabhain’s expenses related to her gender transition were cosmetic and therefore not deductible, and she sued in Tax Court.⁵² To establish her medical need for the procedures for which she sought deductions, Ms. O’Donnabhain’s complaint, like Ms. Casillas’, explains how she “grew up with a medical condition in which her self-identification as female did not align with her male anatomical sex.”⁵³ Her surgeries, the complaint explains, were directed to “cure” her GID (a “disease” within the

⁴⁹ Complaint, *Casillas v. Daines*, *supra* note 47, ¶ 56 (emphasis added).

⁵⁰ This narrative can be found in almost every case challenging exclusions on health care coverage for transgender people. *See, e.g.*, Amended Complaint ¶ 38, *Norworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015) (No. 3:14-cv-00695-JST), <http://transgenderlawcenter.org/wp-content/uploads/2014/12/First-Amended-Complaint.pdf> [<https://perma.cc/K6U7-9WMD>] (“Plaintiff is a ‘biological female’ based upon her hormone levels and chemical castration, yet is being forced to live every minute of every day in a body with male genitalia that does not match her biology or deeply rooted identity.”); Amended Complaint ¶ 108, *Manning v. Carter*, No. 1:14-cv-1609-CKK (D.D.C. May 5, 2015), https://www.aclu.org/sites/default/files/field_document/041_amended_complaint_2015.10.05.pdf [<https://perma.cc/S9YG-QV8Q>] (“She is forced to cut her hair in a masculine manner undermining her ability to be affirmed in her female gender.”); Verified Complaint ¶ 5, *Diamond v. Owens*, No. 5:15-cv-00050 (MTT), 2015 WL 5341015 (M.D. Ga. Feb. 19, 2015), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/complaint_2.pdf [<https://perma.cc/944T-JCJA>] (“As a result of her continued denial of care, Ms. Diamond’s body has been violently transformed, she has been forced to transition back from a man to a woman, and she has experienced physical symptoms of withdrawal.”).

⁵¹ *O’Donnabhain v. Comm’r of Internal Revenue*, 134 T.C. 34 (2010).

⁵² *See* Petition, *O’Donnabhain v. Comm’r of Internal Revenue*, *supra* note 4.

⁵³ *Id.* at 3.

meaning of the Tax Code)—whereby her body could align with her self-identified female gender.⁵⁴ The narrative sets up a binary of male and female, which is anatomically defined, and presumed to pre-exist its articulation.⁵⁵ To be the “woman” that she feels she is, Ms. O’Donnabhain’s body must be transformed. Our citation of this norm produces and re-produces womanhood: the story is not simply descriptive of what the complainant feels but also productive of what a woman *is*. But what happens to the woman who has a penis or has no breasts—can she be a woman within this framework? Can her medical care be justified? Does this not leave out the members of the trans community whose body and identity is not as coherently sexed within that framework?

Not only do we produce binary sexed embodiment through our advocacy discourse, but we also then afford the Court the opportunity to codify sexed norms of how bodies look and operate. In *O’Donnabhain*, the Court ultimately concludes that because Ms. O’Donnabhain has gender identity disorder, most of her gender reassignment procedures were medically necessary within the meaning of the Tax Code and therefore are deductible. But the Court excepts from that determination Ms. O’Donnabhain’s breast augmentation, which it determines was cosmetic.⁵⁶ Because her surgeon noted that an “examination of [Ms. O’Donnabhain’s] breasts reveal [sic] approximately B cup breasts with a very nice shape,”⁵⁷ the Court concludes “[the breast augmentation] surgery was not necessary to the treatment of GID in petitioner’s case because petitioner already had *normal* breasts before her surgery.”⁵⁸ It should be terrifying to think of our genders being subjected to judicial fact-finding whereby our medical and survival needs might turn on whether a fact finder believes our breasts or other sexed body parts are “normal.” When we pursue relief through the law, we necessarily participate in a process whereby bodies are sexed in accordance with a norm. Not only do we participate in the production of that norm, but we create opportunities for the state to fur-

⁵⁴ *Id.* at 7.

⁵⁵ See BUTLER, *supra* note 13, at 33 (challenging our understanding of sex as the natural state upon which the cultural/constructed gender norms were inscribed) (“No longer believable as an interior ‘truth’ of dispositions and identity, sex will be shown to be a performatively enacted signification (and hence not ‘to be’), one that, released from its naturalized interiority and surface, can occasion the parodic proliferation and subversive play of gendered meanings.”).

⁵⁶ *O’Donnabhain*, 134 T.C. 34 at 73.

⁵⁷ *Id.* at 72.

⁵⁸ *Id.* (emphasis added).

ther entrench the bounds of what constitutes “normal” sexed embodiment.

While the trans community has voiced concern over the way in which medicalization demeans our bodies and experiences, we must consider our own role in creating these discourses through the repeated citation of these narratives in our advocacy. Diagnostic criteria and standards of “authentic” trans experience displace processes of self-identification and place power in the hands of medical providers as gatekeepers. In his reflection on seeking a double mastectomy (or “top surgery”), Dean Spade expresses concern over the power of diagnostic criteria to reify “the transsexual” as a category: “By instructing the doctor/parent/teacher to focus on the transgressive behavior, the diagnostic criteria for GID establishes surveillance and regulation effective for keeping both non-transsexuals and transsexuals in adherence to their roles.”⁵⁹ Citing Bernice Hausman, Spade goes on to explain how “transsexuals must seek and obtain medical treatment in order to be recognized as ‘transsexuals.’ Their subject position depends upon a necessary relation to the medical establishment and its discourses.”⁶⁰ This is true and part of the problem, but as advocates we then fail to account for how we, through the collectivization of our medicalized identities to seek recognition from the government and access to care, re-entrench binary norms of sexual difference. To explain our identities in the medicalized language available to us and in ways that the government will understand and recognize, we partake in a project of (re-)producing what it means to have a sexed body.

On an ideological level this complicity in binary sexing is concerning, but even more so our articulations of selfhood invoke standards of sexed embodiment that are self-eliminating. We seek to access insurance coverage for our “medically necessary” procedures, and in so doing reinforce, for example, womanness as inextricably tied to the state of not having a penis—the thing that must be removed for a woman’s identity to be actualized. At the same time, our community includes women with penises who are then unable to access other—also needed—medical care such as prostate exams, testicular exams, and reproductive health support. We further take away from those women the legal recognition of their medical need for care like breast augmentation or facial feminization surgery. Those procedures are either viewed as cosmetic, or

⁵⁹ Spade, *supra* note 6, at 25.

⁶⁰ *Id.* at 19.

the patient is viewed as undeserving of care because they, for example, might not want or need genital surgery and, therefore, are not “really” women within the framework we have set up.

II. WHAT DOES THIS MEAN AND WHAT CAN WE DO?

Whether in the reproductive rights or the trans rights space, the cost to trans people of advocacy strategies that lose sight of our bodies and bodily capabilities reinforce presumptions that all bodies are coherently sexed and that trans bodies, in particular, are not able to reproduce or desiring of reproduction. The presumption that a body is coherently sexed is, in turn, literally killing trans people through a variety of mechanisms.⁶¹

Even as exclusions on health care coverage for transition-related health care like hormone therapy and surgery are struck down and repealed, the government and insurance industries continue to regulate medical procedures in accordance with sex. For example, in the same regulation that had precluded coverage for gender-affirming care under New York State’s Medicaid program, New York continues to regulate access to hysterectomies on sexed terms.⁶² Hysterectomies are not covered where the sole purpose of the procedure is to prevent further pregnancies but are available and reimbursable under certain conditions where “the *woman* was sterile before the hysterectomy was performed.”⁶³ The language does not explicitly preclude coverage for a person not classified as “a woman.” However, in practice, the coding of a recipient’s sex as male will preclude access to coverage for procedures associated with femaleness.⁶⁴ This includes hysterectomies, gynecological exams, obstetric exams, and mammograms. Where a person with a

⁶¹ I use the term “coherently sexed” to refer to the presumption that once someone is identified as a particular gender (male or female) they will both have and desire one set of body parts associated with that sex. For a man who is transgender, this means that he is assumed to neither have nor desire any reproductive organs associated with women.

⁶² See N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(h)(2)(ii)(a) (2015) (presuming the person in need of a hysterectomy is “a woman”).

⁶³ *Id.* (emphasis added).

⁶⁴ This observation is based on my own experiences as an advocate for low-income transgender Medicaid recipients in New York, as well as on conversations with other advocates who have noticed similar patterns of coverage denial. See also Dorothy Cornwell, *Proposed Rule on ACA Nondiscrimination: Coverage for Transgender Individuals*, 57 NO. 12 DRI FOR DEF. 49, 54 (2015) (“Many commenters responding to the HHS request for information noted that transgender individuals are routinely denied coverage for medically appropriate sex-specific health services due to their gender identity or because they are enrolled in their health plans as one sex because the health services are generally associated with another sex.”).

uterus and breasts has a double mastectomy and is classified as male for purposes of Medicaid, that person may not be able to access gynecological care under the state's Medicaid scheme.⁶⁵ Similar problems arise for people classified as female but who need prostate care, testicular care, and other care that is limited to those coded as male.⁶⁶

This mismatch between how a person's gender is classified and what the insurer believes to be a gender-limited procedure has long-term negative health consequences for people whose bodies do not conform to a coherent model of binary sexual difference.

In addition to mismatched coding preventing needed care, there are emotional and physical consequences for some people for entering physician's offices that are widely viewed as sex-specific.⁶⁷ Like my own experiences described above, when a person who is read and perceived as male but who happens to have a uterus goes to the gynecologist, the experience can invite traumatic gazes from other patients and physicians. For this reason, many people avoid or delay going to the doctor.⁶⁸ As the National Latina Institute for Reproductive Health observed:

Because reproductive health screenings are heavily gendered, simple procedures such as pap smears and prostate exams are difficult to obtain without fear of humiliation and discrimination. Patients cannot trust that most providers will have any expertise in health issues that affect them, and there are documented cases of physicians refusing to treat transgender patients with reproductive cancers.⁶⁹

Failure to receive regular cervical, uterine, and ovarian exams will ultimately increase the likelihood of people with these organs developing malignancies.

The data that exists confirms that transgender people experience extreme discrimination in health care settings causing them to delay or avoid receiving care. The National Center for Transgender Equality reports that "[o]ne in three transgender people, and 48% of transgender men, have delayed or avoided preventive health care such as pelvic exams or STI screening out of fear of

⁶⁵ See Lisa Gillespie, *Despite Obamacare Promise, Transgender People Have Trouble Getting Some Care*, KAISER HEALTH NEWS (July 22, 2015), <http://khn.org/news/despite-obamacare-promise-transgender-people-have-trouble-getting-some-care/> [<https://perma.cc/W2R5-YVBU>] (discussing the barriers to health care faced by transgender people due to the coding of services along the gender binary).

⁶⁶ See *id.*

⁶⁷ NAT'L LATINA INST., *supra* note 1.

⁶⁸ *Id.*

⁶⁹ *Id.*

discrimination or disrespect.”⁷⁰ Additionally, transgender young people, including those who are at risk of unintended pregnancy, are hesitant to go to family planning clinics, increasing the likelihood of complications and poor health outcomes.⁷¹ Most transgender boys and men, as high as 93.8%, who have sex with cisgender men report a lack of adequate medical information about their sexual health needs.⁷² This means that in sexual relationships that could result in pregnancy, for example, people are not receiving the information or health care that they need. This lack of information makes the trans community particularly vulnerable to negative reproductive health outcomes.

In addition to the administrative incoherence and discrimination that makes health care access more difficult for transgender people, the reiteration of norms that do not account for our varied bodies also contributes to the climate where trans bodies are policed and killed. If we establish in law and social discourse that bodies must be coherently sexed to be legitimate, we make spaces for the harassment and violence levied upon those whose bodies transgress those expectations. These expectations are connected to why we see upticks in violence, and particularly deadly violence, in the transgender community, particularly among transgender women of color.⁷³ For strangers, transgender bodies can be understood to be deceptive in nature, causing people to lash out against a transgender partner. This is the narrative that, for example, Lance Corporal Joseph Scott Pemberton told of killing Jennifer Laude, a transgender woman, while he was on duty in the Philippines.⁷⁴ The two had met in a nightclub and went back to Pemberton’s hotel room where, he recounted at trial, he discovered that she had a penis, became enraged, and killed her.⁷⁵ This same dynamic can play out in intimate partnerships as well, where “abuse is in large part about controlling and enforcing gender norms within rela-

⁷⁰ NAT’L CTR. FOR TRANSGENDER EQUAL., *TRANSGENDER SEXUAL AND REPRODUCTIVE HEALTH: UNMET NEEDS AND BARRIERS TO CARE* (2012), http://www.transequality.org/sites/default/files/docs/resources/Factsheet_TransSexualandReproHealth_April2012.pdf [<https://perma.cc/8K6N-KCJN>].

⁷¹ *Id.*

⁷² *Id.*

⁷³ Katy Steinmetz, *Why Transgender People Are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), <http://time.com/3999348/transgender-murders-2015/> [<https://perma.cc/63FG-4WTL>].

⁷⁴ See Floyd Whaley, *U.S. Marine Guilty in Killing of Transgender Woman in Philippines*, N.Y. TIMES, Dec. 2, 2015, at A6, <http://www.nytimes.com/2015/12/02/world/asia/us-marine-joseph-pemberton-guilty-in-killing-of-transgender-woman-in-philippines.html> [<https://perma.cc/CJC7-TKN9>].

⁷⁵ *Id.*

tionships [and] transgender people, by virtue of their failure to conform to such norms, are particularly vulnerable to [such] abuse.”⁷⁶ We make space for such violence by creating legal norms that reinforce the notion that a woman cannot have a penis or that a body that does not cohere to our ideas of proper sexed embodiment is deviant and undesirable.

What this all means, I think, is that even if the entire reproductive rights movement stopped centering cisgender women in its advocacy, I am not convinced that we would see a change in the material conditions for transgender people. It would be symbolically important and more inclusive, sure, but it would not necessarily change my experience at the gynecologist, and it certainly would not end the violence and discrimination faced by transgender people of color. Instead of focusing on those changes in language—important as they are—I propose that we start by more robustly centering trans bodies in LGBT and trans rights work in ways that may have a greater impact on the life chances of transgender people.

This means talking about the fact that, for example, a transgender person who is a woman might have and embrace both breasts and a penis. Or that a transgender man may desire to become pregnant and that such desire and the act of being pregnant makes him no less of a man. These principles are central to our movement, but in our advocacy for health care access or restroom access or accurate identification we are often afraid that naming and embracing our bodies will jeopardize our work. But in reality, the reverse is true. We are jeopardizing our work and constraining our successes by not engaging with our bodies. If we do not normalize the way we inhabit our bodies, the ways that we have sex, and the ways that our bodies are targeted, we will not be successful in making space for our full communities to thrive.

III. CONCLUSION

Our work as advocates and particularly as legal advocates will inevitably spread costs and benefits across our many constituencies and communities. The nature of legal work, as a mentor once reminded me, is that you will always have blood on your hands. When you interface with a violent and flawed system, your interventions will be violent and flawed. So to advocate for trans people to receive life saving health care will likely entrench binaries that ex-

⁷⁶ Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 55 (2013).

clude health care for members of our communities. That does not mean we do nothing, but it should caution us in our critiques and we should look to model collaboration before centering critique and frustration. Is the reproductive rights movement flawed? Yes. Is our own movement equally flawed? Definitely.

The impulse to question the connection between trans and reproductive justice is a critical one, but I worry we are focusing on the wrong aspects of intersection. We can and must destabilize the meaning of sex and the sexing of our bodies. To do this, we have to recognize and engage with our bodies in all of our work. Our bodies are not simply vehicles crossing from one side of a coherently sexed gender binary to the other. We must name our existence in its child-bearing, sperm-producing, and menstruating capacities. The cost of not doing so is more than theoretical. Reiteration of the presumptive norm of sexed embodiment as male and female, and their respective bodily formations, makes our lives and bodies as trans people impossible. If we are to survive, we must exist.

**FROM MICHIGAN’S STRAWBERRY FIELDS TO
SOUTH TEXAS’S RIO GRANDE VALLEY:
THE SAGA OF A LEGAL CAREER AND
THE TEXAS CIVIL RIGHTS PROJECT**

James C. Harrington[†]

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I. INTRODUCTION, OVERVIEW, AND DEDICATION

Having authored more than a few law review articles over the years, it is a pleasure and an honor to write one of a different genre, namely, about my good fortune to have done community civil rights work in south Texas and then eventually found and direct the Texas Civil Rights Project, which celebrated its twenty-fifth anniversary on September 23, 2015.

My intent is not to present a biographical piece, though biographical it must be in some measure, but to recount a history of trying to do civil rights work, rooted in the community and people's aspirations and goals, in Texas, a state often inimical to the progress of human rights. This history recounts victories and losses, funny moments and sad times, and the stories of courageous people who stepped forward to be part of litigation as a way of improving their lives and the lives of others, now and in the future. In the process, the article will obviously assess some trends in Texas civil rights work throughout my forty-three years as a lawyer, which has become more painstaking, owing to ever more conservative state and federal judiciaries.

The article also will review how the Texas Civil Rights Project (TCRP) came into being as a result of philosophical differences in direction with the American Civil Liberties Union (ACLU). The strategic split from the ACLU and formation of the Project had everything to do with the profound issue of the extent to which

civil rights lawyers take direction and guidance from the community or whether we litigate in our own vacuum with our own priorities. Michelle Alexander recently raised this problematic afresh in *The New Jim Crow*.¹

My deeper desire, though, is that some law student or newly-minted attorney might read this and find inspiration to follow her or his heart into this awesome work with the assurance that, with dedicated labor and almost blind faith, ¡*Sí, se puede!* (“Yes, it can be done!”), as the farm worker movement expresses it so well. That, too, was TCRP’s motto. To that end, I am grateful to the editors for this opportunity.

One note should be made from the outset. Given that many events and cases overlap, the chronology is not always perfectly sequential so that the narrative might read better. I relay only my personal memory and perspective of events, but I must acknowledge and thank all those with whom I had the privilege of working—brave clients, dedicated staff, committed community activists, *pro bono* attorneys, and family—without whom nothing I relate could have happened. To them all, I dedicate this recollection of a history in which I was fortunate to be but a player.

II. THE START: WORKING WITH MIGRANT LABORERS IN MICHIGAN

My legal career began on a lark as a high school sophomore in 1961. I was in the seminary at the time, and the curriculum required students to start a five-year language track that year. Our options were German or Spanish. Of the two, I preferred German. But a group of us upstarts thought, if we petitioned for French, the authorities would respect our request. Rather naïve thinking for seminarians at the Pontifical College Josephinum, where I spent high school and college.² The authorities reacted by arbitrarily assigning us French-seekers to either German or Spanish. I drew the latter, and it changed the course of my life.

Our professor, Fr. Paul “Pablo” Sicilia, pushed us hard to learn the language and immersed us in various Spanish-speaking cul-

¹ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 225 (2012) (“With all deliberate speed, civil rights organizations became ‘professionalized’ and increasingly disconnected from the communities they claimed to represent.”).

² See generally *Our History*, PONTIFICAL COLL. JOSEPHINUM, <http://www.pcj.edu/about-josephinum/our-history>, [<https://perma.cc/QW6D-U5MM>] (“Until 1970, the Pontifical College Josephinum comprised a minor and major seminary, with the minor seminary consisting of four years of high school and two years of college, and the major seminary comprising two years of philosophy and four years for theology.”).

tures. He was particularly fond of Mexico where he studied and did summer missionary work in the indigenous mountain communities. So, in college, when a summer job opened up with the Diocese of Lansing among migrant workers in southwestern Michigan, I jumped at it. I could both do ministry and use my Spanish, which needed all the practice I could give it. I ended up working there for seven summers. At the time, some 70,000 farm workers would migrate to Michigan during the summer, mostly from south Texas's Rio Grande Valley, to harvest strawberries, blueberries, raspberries, and other hand-picked crops. From there, they went north to pick tree fruit.³

The migrant camps were appalling, dirty (muddy when it rained), and cramped. Families lived in converted barns and single-room shacks, sometimes as many as twenty cabins on a farm. Wages from bending over all day in the fields were barely life-sustaining. Young children picked crops, too, and earned even less.⁴ Harvesting began in the chilly pre-dawn dew and continued into the hot sun-baking afternoon.

Activists, do-gooders, and sympathetic government officials abounded, however. I worked for five years with the church and then two years with United Migrants for Opportunity, Inc. (UMOI), a "Great Society" poverty program that rankled local political and business leaders for its "meddling."⁵ We all joined together to fashion summer programs for young migrant children, provide Saturday evening entertainment for teens, arrange college scholarships for young adults, enforce minimum wage laws, set up health clinics, help distribute food commodities and vouchers, and attend to people's spiritual needs.

Young UMOI lawyers took on minimum wage issues and freedom of access to the migrant camps which farmers were increasingly blocking to keep out "troublemakers." One of the nuns in our program was a plaintiff in a federal suit against grower Joe Hassle, who did not want her distributing health clinic flyers in his camps. (Hassle settled mid-trial when he found out that the judge went to Mass every day at noon.)

³ See REFUGIO I. ROCHIN ET AL., JULIAN SAMORA RESEARCH INST., MIGRANT AND SEASONAL WORKERS IN MICHIGAN'S AGRICULTURE: A STUDY OF THEIR CONTRIBUTION, CHARACTERISTICS, NEEDS, AND SERVICES 3-11 (1989) (providing yearly estimates for migrant workers in Michigan ranging from 40,000 to 80,000 between 1965 and 1989).

⁴ *Id.* at 14 ("[During the 1970s and 1980s] [a]pproximately 20,000 children of migrant farm workers come to Michigan annually . . .").

⁵ CULTURE WARS: AN ENCYCLOPEDIA OF ISSUES, VIEWPOINTS, AND VOICES 278 (Roger Chapman & James Ciment eds., 2015).

It was the era of César Chávez's vigorous national grape boycott activity for the United Farm Workers (UFW), and the spirit of La Causa began to blow through Michigan's sympathetic communities. We even marched on the capitol in Lansing, taking over the rotunda and raucously demanding higher wages and stricter enforcement of field and labor camp health regulations. Governor William Milliken was caught trying to sneak out of the building through a side stairwell and had then to address the demonstrators and promise reform, which ultimately was weak and slow in coming.

I left the seminary after college and began graduate studies in philosophy. Church structures and hierarchy were not conducive to the kind of social justice life toward which I was moving. I wrapped up a master's degree in Spanish Existentialism at the University of Detroit and enlisted in the University of New Mexico's PhD program. By then, I had decided I would go work in the Valley with the farm laborers. I wanted to be part of the UFW movement, but all the activists were going to California. So, I decided to move to south Texas as a professor, another ultimately naïve idea.

One early Saturday morning, I still vividly remember, I suddenly sat up in bed and decided to go to law school. Probably by then, my subconscious had put two and two together that being a lawyer made much more sense than pursuing philosophy. Besides, the sole philosophy professorship in the Valley was already occupied. So, I stayed in Motown another three years, studying law at the University of Detroit, and married. During the next two summers, I joined UMOI since the new bishop did not approve of the activist direction in which I was moving the church's migrant program.

I visited labor camps as a UMOI paralegal, rather than wearing the church hat, although they conveniently overlapped in the workers' minds. As a student with a third-year bar card, I handled a case for a family that traveled to Michigan after being promised employment by a farmer when they arrived 1,500 miles and three days later to find that he had hired someone else. The local judge poured us out, siding with the grower, one of the biggest in the county.

III. MOVING TO SOUTH TEXAS

Once law school was over in May 1973, I headed to Texas to take the bar, along with my now former wife, Rebecca Flores, who was from San Antonio and had secured her MSW from the Univer-

sity of Michigan. Appropriately enough, we had met at the UFW boycott office in Detroit while students. She eventually became an indefatigable UFW organizer and leader.

I was lucky to find a job with the South Texas Project (STP) ahead of time, when one of its two lawyers left. He had just done so when my letter arrived, forwarded by the local UFW, asking if the union had any job openings. The union did not; but STP, which shared space in the union building, did; another quirk of fate.

The South Texas Project was a creation of the ACLU, designed to fight the geographic exclusion of Valley *colonias* from local water districts and to support UFW organizing in the Valley.⁶ Like many southwestern states, Texas has water districts; they are municipalities with elected local governance that allocates potable water within the district.

Colonias are extremely poor rural Hispanic communities, unregulated “subdivisions.” In 1973, most lacked infrastructure like paved roads, street lighting, school bus routes, trash pickup, mail service, and so on.⁷ There were about 200 of them throughout the Valley, mostly comprised of farm laborer families, recent immigrants, and other low-income folks. They were places of grueling poverty and prone to flooding. Being excluded from water districts and potable water meant that misery and disease abounded—diseases not found in other areas of the state. It was Texas’s version of the “third world.”

The Anglo growers governed the districts through trickery, such as burying English-only election and meeting notices on the courthouse bulletin board. Legal posting in those days was typically by thumbtacking paper announcements on a corkboard.

Under the adroit leadership of David Hall, the South Texas Project was helping shepherd four monumental pieces of federal litigation.⁸ Two, co-counseled by the Mexican American Legal Defense and Education Fund, involved *colonia* exclusion from water districts.⁹ The third dealt with the Texas Rangers’ brutal suppres-

⁶ See generally AM. CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION RECORDS: SUBGROUP 2, ORGANIZATIONAL MATTERS SERIES, <http://findings.aclu.org/collections/MC001.02.01> [https://perma.cc/46MY-XG5G].

⁷ FED. RESERVE BANK OF DALLAS, TEXAS COLONIAS: A THUMBNAIL SKETCH OF THE CONDITIONS, ISSUES, CHALLENGES AND OPPORTUNITIES 3 (1996), <https://www.dallasfed.org/assets/documents/cd/pubs/colonias.pdf> [https://perma.cc/LU9R-SAA8].

⁸ Until 1976, three-judge district court panels heard suits involving the constitutionality of federal or state laws, with direct appeal therefrom to the U.S. Supreme Court.

⁹ See *Fonseca v. Hidalgo Cty. Water Improvement Dist. No. 2*, 496 F.2d 109

sion of the 1966-1967 UFW labor strikes in Starr County;¹⁰ and the fourth, the gross underrepresentation of Hispanics on Hidalgo County grand juries (virtually all-Anglo in a county that was 80% Mexican American).¹¹ Eventually, the water district cases were lost, thanks to an intervening U.S. Supreme Court decision, addressing similar issues in a California water district case.¹² Then-Chief Justice William Rehnquist authored the opinion finding no violation of the Fourteenth Amendment.¹³

The Texas Rangers¹⁴ and the grand jury discrimination¹⁵ cases, however, both succeeded in the Supreme Court, and were enormous victories for justice in south Texas. As a result of the *Medrano* decision, the Texas legislature, led by their Mexican American colleagues and the traditional liberal bloc, reined in the Rangers and put them under the thumb of the Department of Public Safety, the state police. They became professionalized and lost their tough “one riot, one Ranger” motif, which they had aptly earned over the years by terrorizing the Mexican American community at whim.¹⁶

Even the water district cases were not a total wash. It was losing the battle, but winning the war because in 1975, Congresswoman Barbara Jordan of Houston helped bring Texas under the Voting Rights Act (VRA). The VRA banned municipalities from excluding geographic areas from their jurisdiction if doing so would diminish their minority representation.¹⁷ The law also required bilingual access, such as providing ballots and election notices in Spanish.¹⁸

Less than two years after my arrival in “El Valle de Lágrimas”

(1974); *Jiménez v. Hidalgo Cty. Water Improvement Dist. No. 2*, 496 F.2d 113 (1974); see also Wendy Jepson, *Claiming Space, Claiming Water: Contested Legal Geographies of Water in South Texas*, 102 ANNALS ASS'N AM. GEOGRAPHERS 614, 614-31 (2012).

¹⁰ See generally *Allee v. Medrano*, 416 U.S. 802 (1974).

¹¹ *Castañeda v. Partida*, 430 U.S. 482, 486 (1977).

¹² See generally *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

¹³ *Id.* at 725.

¹⁴ *Allee*, 416 U.S. at 802.

¹⁵ *Partida*, 430 U.S. at 482.

¹⁶ See *The Texas Rangers Killed Hundreds Of Hispanic Americans During The Mexican Revolution*, TEX. STANDARD (Jan. 22, 2016), <http://www.texasstandard.org/stories/texas-exhibit-refuses-to-forget-one-of-the-worst-periods-of-state-sanctioned-violence/> [<https://perma.cc/QB29-69W3>]; John Morán González et al., *The Project, REFUSING TO FORGET*, <https://refusingtoforget.org/the-project/> [<https://perma.cc/464U-4QMG>]; *Texas Rangers*, TEX. STATE HISTORICAL ASS'N, <https://tshaonline.org/handbook/online/articles/met04> [<https://perma.cc/Y6GH-K57V>].

¹⁷ 52 U.S.C. § 10101 *et seq.*

¹⁸ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (amending the 1965 Act to address the voting rights of language access minorities).

(the “Valley of Tears,” as people there often called it), David Hall became Executive Director of the federally-funded Texas Rural Legal Aid (now known as Texas RioGrande Legal Aid, with the same TRLA acronym as before).

Prior to his departure, I had been handling STP “service” cases, such as minimum wage litigation, for the National Farm Workers Service Center, Inc., the UFW’s nonprofit alter ego at the time, and taking on criminal appointments. Here, I learned more about the rules of evidence than even my clinical days in law school had prepared me for. It also helped supplement my salary since we were beginning to have a family and STP only paid \$6,667/year (the three of us on staff divided the \$20,000 allocated for salaries). The United Methodist Church covered our health care, fortunately.

A. *Making Local Grand Juries More Representative of the Community*

By the time David won *Castañeda v. Partida*, the habeas corpus appeal challenging the underrepresentation of Hispanics on grand juries, he was at the TRLA helm. The task of retrying the case, which was burglary with intent to commit rape, fell to me. Oscar McInnis, the District Attorney at the time with a strong racist streak (and years later indicted for soliciting the murder of his girlfriend’s ex-husband—McInnis was also married at the time¹⁹), boasted that a grand jury’s composition had no bearing on a person’s guilt, vowed that Rodrigo Partida would be convicted again, and re-indicted him. The pressure was on, and all eyes were watching.

We won a not guilty verdict in short order; and David sent over a bottle of fancy champagne, which did not take long to consume, given the pressure of the trial. The *Partida* case set me on the tack of mounting grand jury challenges in federal court as 42 U.S.C. § 1983 civil actions. I was making similar challenges in the criminal cases to which I was appointed until the judges wised up and removed me from the appointed counsel list; they wanted pleas, not fair trials, and were blunt about it.²⁰

For the federal challenges, I represented community groups,

¹⁹ Robert Draper, *The Sheriff Who Went to Pot*, TEX. MONTHLY (Dec. 1994), <http://www.texasmonthly.com/articles/the-sheriff-who-went-to-pot/> [<https://perma.cc/GFC4-X64X>].

²⁰ I also used criminal appointments for other challenges to the system, such as protecting privacy rights of probationers. See generally *Basaldúa v. Texas*, 558 S.W.2d 2 (Tex. Crim. App. 1977) (en banc).

which argued their members were denied the right to be considered and chosen for service. I expanded the challenge beyond Mexican Americans generally, to include women, Mexican-American women (the “double whammy” effect), young people (those younger than twenty-seven years old), and poor people (who comprised more than 50% of the Valley). We also took on Willacy County besides Hidalgo County. The district judge dismissed our cases for lack of justiciability, but we prevailed in the United States Court of Appeals for the Fifth Circuit in 1980 with a rather strong opinion.²¹

The Texas method of selecting grand jurors, the “key man system,” was inherently fraught with the potential of discrimination. As the statute worked, the judge would select five people as grand jury commissioners, who, in turn, compiled a list of twenty potential grand jurors, from which list the judge would select twelve grand jurors. That meant grand juries often reflected the judge’s own social class and typically were predominantly Anglo businessmen or, sometimes, their wives.

Not surprising, the grand juries tended to be preoccupied with property crimes, and not as much interested in crimes of personal violence, especially against women. After the Fifth Circuit decision and grand juries became more representative of the community, there was a remarkable turnaround, with more attention paid to personal violence.

The legislature eventually changed the statute because of the litigation, allowing judges to select grand jurors randomly from the general jury wheel. Even though it is a safer mechanism for preventing a grand jury challenge that might overturn a conviction or drawing federal litigation, judges still use the old method, often accompanied by instructions about the need for community cross-section representation. A “buddy system” was built into the old method: a judge “honors” five friends as grand jury commissioners, takes them to lunch when they come to the courthouse to do their job, etc. Good politics for an elected judge.

B. Transitioning from a Special Project into a Community Civil Rights Organization

This was the beginning of re-purposing the South Texas Project (STP) toward general civil rights litigation, while still supporting UFW organizing. We won support from the bishop of the

²¹ See generally *Ciudadanos Unidos de San Juan v. Hidalgo Cty. Grand Jury Comm’rs*, 622 F.2d 807 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981).

Brownsville diocese, John J. Fitzpatrick. He wanted to help fund us, but he could not support us through the ACLU because of its stand on reproductive issues.

So, we formed a nonprofit, *Oficina Legal del Pueblo Unido, Inc. (OLPU)*, that could receive the money.²² Bishop Fitzpatrick was instrumental in our receiving funding from the Catholic Campaign for Human Development's national Thanksgiving collection for three years that we stretched into four. We were able to raise salaries and expand staff a bit so that we were two attorneys and a support person. Setting up OLPU as a local Texas operation opened the door for attracting funding from other sources and foundations that preferred to support grassroots organizations rather than the national ACLU. It also provided the vehicle for recruiting activist-type law interns from universities around the country. Northeastern University School of Law was particularly receptive.

Supporting community organizing efforts became a STP priority, a philosophy I carried for the rest of my career and into the TCRP. It was important because legal support gave those organizations greater clout. It also helped assure that whatever change was won would continue since those groups would not allow any regression and would build on the progress made.

I learned early on that, if someone wants to do community work, you have to be part of the community. You have to make friends, go to quinceañeras and weddings, celebrate birthdays, do house visits, attend funerals, be on the picket line and be present at demonstrations, and even help clean the union hall. Poor people, because of their bad experiences with attorneys, generally distrust them; respect has to be won. Being a part of the community not only creates trust and builds solidarity, but it is how an attorney learns the issues of importance to people.

One example of working with the community was the agreements we negotiated with Valley television and radio stations to include more Spanish-language programming and greater publicity for community groups. In those days, when their licenses came up for renewal every three years, radio and television outlets had to prove to the Federal Communications Commission (FCC) that they were serving the community. This gave us a certain amount of power because we could actually tie up the license renewal with denial petitions. That kind of leverage is no longer possible unfor-

²² *Our History*, TEX. CIVIL RIGHTS PROJECT, <http://www.texascivilrightsproject.org/81/our-history/> [<https://perma.cc/F5H9-C8KC>].

tunately because of FCC regulatory changes, but we did make strides in those days with such agreements.

C. Farm Worker Organizing: Dealing with Strikes Everywhere

In May 1975, the UFW began an organizing campaign in Starr County again, focusing on the melon harvest. Toward the end of the month, on May 26, a wildcat strike erupted at the international bridge in Hidalgo where many farm workers crossed each day from Mexico to work in the fields.²³ Some strikers fanned out to nearby fields, whereupon a grower, C.L. Miller, shot at them and wounded ten of the laborers.²⁴

All hell broke loose. My wife Rebecca was up in Starr County with the UFW organizers when I got a call in the early morning about the chaos at the bridge. I had to grab our son Elías, a baby at the time, and go pacify the situation. I recall that the next day, the *McAllen Monitor* ran a front page photo of me holding him while trying to calm the workers and focus the organizing in a concrete direction.²⁵

Wildcat strikes exploded across the Valley. Othal Brand, who had huge fields everywhere, was a natural target. Like other growers, he responded by filing lawsuits left and right. At one point, Brand became so irate at the union pickets that he drove from his office to a strike site and pulled a gun on them, an event broadcast on CBS news.²⁶

The local judges, in a political dance trying to resolve the growers' suits and the union's countersuits, called a secret evening meeting at the courthouse for the attorneys. I, of course, alerted the press. The end result was dismissal of all suits, each side promising to obey the law.²⁷

²³ See James C. Harrington, *From La Casita to Lupe*, TEX. OBSERVER, Dec. 3, 2004, at 42.

²⁴ *Farmer 'Opens Season' on Union Sympathizers*, SPARTANBURG HERALD (May 27, 1975), <https://news.google.com/newspapers?nid=1876&dat=19750527&id=fZQeAAAAIBAJ&sjid=HcwEAAAAIBAJ&pg=4785,4946279&hl=en> [<https://perma.cc/MU3C-RVGJ>].

²⁵ See UFW Texas Records, Part 1, Box 9, Folders 3-17 (Texas strike, 1975), Archives of Labor and Urban Affairs, Wayne State University, <https://reuther.wayne.edu/files/LR002511.pdf> [<https://perma.cc/5KCT-57LE>].

²⁶ See generally *Texan Takes Law into Own Hands*, BAKERSFIELD CALIFORNIAN, May 30, 1975, at 28; Susan Duffy, *The Last Patron: McAllen's Mayor Is Used to Getting His Own Way*, TEX. MONTHLY, July 1981, at 84, 86.

²⁷ The lawsuits always named me as a defendant, apparently to create a conflict so I couldn't represent the union. It never worked. I was able to have a judge dismiss me or get a waiver from the other defendants, for ethical purposes.

Responding to the strikes and the workers' anger at the shootings was something else, though. I spent a good deal of time trying to calm and redirect the situation by helping organize targeted protests and a ten-mile march from the Hidalgo bridge to McAllen's plaza for a rally.

As the summer wore on, the UFW²⁸ moved its organizing efforts to the Big Bend area, where Brand also had fields. He filed suit, claiming the union was violating the state's right-to-work law.²⁹ While generally a regressive statute, a couple provisions favor workers. One is that a judge could order an election to determine if the workers actually belonged to the union. We petitioned for an election. The local judge recused himself, and a retired judge was assigned to the case. To Brand's horror, the judge ordered an election, whereupon he immediately dismissed the suit rather than risk the outcome. (The judges in south Texas, where Brand lived and was politically strong, never would honor an election request.)

The other right-to-work provision we used for the workers' benefit was its anti-retaliation section: no employment reprisals for non-membership or membership in a union. We represented María Vásquez, who lost her job with a local packing shed for being an UFW member. We won a jury trial, and the Texas Supreme Court unanimously upheld the verdict and ordered her re-hired.³⁰ It was great fun using the right-to-work law to vindicate a union member, hardly the purpose for which the statute was designed. Delicious irony, as they say.

After the summer strikes ended, a disaffected group split off from the UFW and formed its union. It was a difficult situation since I had worked closely with the folks who went off on their own. The UFW responded by sending us Fred Ross, whom Saul Alinsky schooled and was largely responsible for helping César Chávez get the farm worker movement off the ground.

Ross trained UFW members in the art of house meetings and organizing UFW *colonia* committees. The committees held annual Valley-wide conventions, beginning in 1976, which I had a hand in coordinating. They adopted legislative and organizing priorities and turned themselves into a political force such that the governor,

²⁸ STP's files, legal and non-legal, for 1973-1983 and other years are archived at the Walter P. Reuther Library at Wayne State University as part of the United Farm Workers collection. *See generally* UFW Texas Records, United Farm Workers Collection, Walter P. Reuther Library, Box 54, <https://reuther.wayne.edu/node/3042>.

²⁹ TEX. REV. CIV. STAT. ANN. art. 5154g (recodified as TEX. LAB. CODE §§ 101.051-.053).

³⁰ *Vásquez v. Bannworths, Inc.*, 707 S.W.2d 886 (Tex. 1986).

lieutenant governor, and all stripes of politicians attended at times. César would come for the conventions.

The 1981 convention led to a week-long march for higher wages. Hundreds of people walked from both ends of the Valley, from Brownsville and Rio Grande City, culminating midway at the Virgen de San Juan Shrine. César marched as well, alternating between groups. Part of planning the event fell on my shoulders, a blend of community lawyering and organizing.³¹

The major joint organizing and litigation efforts—a highlight of my career—that went on from 1978 to 1988 involved three pivotal lawsuit victories (removing the exclusion of farm laborers from the laws regarding worker compensation,³² securing unemployment benefits,³³ and safeguarding the right to know about the use of dangerous workplace chemicals³⁴) and securing a health department regulation requiring toilets and hand-washing facilities in the fields. The last piece that fell into place was legislation banning the use of the backbreaking short-handled hoe (“el cortito”),³⁵ a remnant from the era of slave labor.

This ten-year struggle alone would be worthy of a lengthier article. Suffice it to say that, besides the litigation, it involved intense community and political organizing, spearheaded by Rebecca, a great expense of personal time and work by activists and farm workers, and some courageous and adept maneuvering by political leaders and a Travis County judge.

We brought the lawsuits under the Texas Equal Rights Amendment (ERA), arguing that the statutory exclusions of farm workers as a group discriminated against an ethnically-identifiable group. Judge Harley Clark, who presided over all three lawsuits, accepted

³¹ I ended up working eighteen years with César Chávez, representing the UFW in Texas and even César, himself, at times. He was a brilliant strategist on using law and litigation hand-in-hand with organizing.

³² See *Delgado v. Texas*, No. 356,714 (203d Dist. Ct. Travis Cty. 1984); *Puga v. Donna Fruit Co.*, 634 S.W.2d 677 (Tex. 1982). The legislature amended the statute in 1984 to include farm and ranch laborers.

³³ See *Camarena v. Tex. Emp. Comm’n*, 754 S.W.2d 149 (Tex. 1988). The legislature amended the statute in 1985 to include agricultural laborers.

³⁴ *López v. Tex. Dep’t of Health*, No. 408,281 (199th Dist. Ct. Travis Cty. 1987). The legislature passed a statute in 1986 to create a specific right-to-know law for agricultural laborers.

³⁵ Joshua Barnes, “*Voices of the UFW in Texas*”: *A Documentary on the United Farm Worker Movement in Texas*, SAMPSONIA WAY (Apr. 3, 2014), <http://www.sampsoniaway.org/interviews/2014/04/03/%E2%80%9Cvoices-of-the-ufw-in-texas%E2%80%9D-a-documentary-on-the-united-farm-worker-movement-in-texas/> [https://perma.cc/5S25-G63H].

the argument and made extensive findings of fact and conclusions of law in that regard.

The innovative use of the state ERA was essential because federal courts had held that such worker compensation exclusions did not violate Fourteenth Amendment equal protection. The Texas ERA, adopted in 1972, was an astonishing addition to the state Bill of Rights, prohibiting discrimination on the basis of race, ethnicity, sex, religion, and national origin.³⁶

Agricultural laborers had been excluded from workers' compensation in Texas since 1914 and from unemployment benefits since 1936. Not only did bringing farm laborers under workers' compensation help cover the costs of medical attention, but it also lessened the drain on public health entities. Likewise, extending employment benefits to agricultural workers added about \$17 million a year to the south Texas economy when the law first became effective.

Then-Governor Mark White rose to the occasion.³⁷ When the Speaker of the House blocked last minute passage of a workers' compensation law to address our litigation at the end of the 1982 session, Governor White called a special session the next day, the result of which was the creation of the Governor, Lieutenant Governor, and Speaker's Joint Committee on Farm Worker Insurance, on which I served.³⁸ We held hearings around the state, and agricultural laborers came under the law in the 1984 session. Governor White signed the law in front of farm workers at the Shrine in San Juan where the march for higher wages had culminated three years earlier.³⁹

D. *McAllen's Infamous Mayor*

Othal Brand became Mayor of McAllen in 1977⁴⁰ and proved himself a nemesis in that position as well. He tried to sell the city hospital to the Hospital Corporation of America. Along with TRLA, we filed suit, convincing the judge that the city charter prohibited such a sale. Brand then tried to amend the charter. Dr. Ramiro

³⁶ TEX. CONST. art. I, § 3a.

³⁷ See Dave Denison, *A Victory for Farmworkers*, TEX. OBSERVER, May 17, 1985, at 6; Geoffrey Ripps, *The Battle for Farmworker Compensation*, TEX. OBSERVER, Jan. 13, 1984, at 7.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *City of McAllen History of Election of Mayors & City Officials*, CITY OF McALLEN, <https://www.mcallen.net/docs/default-source/city-secretary/reports/history-of-mcallen-mayors-city-commissioners.pdf?sfvrsn=10> [https://perma.cc/597H-K8WU].

Casso, a well-respected community physician and long-time activist, headed the opposition and Brand's effort bit the dust in a Saturday referendum.

The Sunday edition of the *McAllen Monitor*, the local newspaper so friendly to the mayor that it was dubbed "Brandspeak," reported falsely that some of us had essentially stormed City Hall after the election victory the night before, jumping on furniture and behaving badly. We filed a libel suit Monday morning, and the *Monitor* eventually settled for \$10,000 for the five people it wrongly accused.

At one city council meeting, Brand became so angry at residents from Colonia Balboa complaining about the lack of city services that he rammed through an ordinance that they could no longer speak at a council meeting without permission. We filed suit and set the ordinance aside.

While mayor, Brand had a group of UFW protesters, mostly women, arrested for trespassing on his property. He fenced them in at the entranceway to his field so they could not leave. I followed them to the county jail and complained vociferously when I found out the jailors had strip-searched them. Someone then swore out a warrant for me.

A few days later, after I left the courtroom on another farm worker case, I was arrested and taken down a side stairwell. The arrest did not go unnoticed. A group of people, instigated by Rebecca who was there, followed the deputies, chanting "Free Jimmy Chuck," a nickname one of my brothers had given me. The deputies had to drive around the county to three different justices of the peace before they found one willing to arraign me. District Attorney McInnis dropped the charges, after I offered not to sue. It was great theater.

A justice of the peace jury in Mission eventually acquitted the protesters of trespassing. We failed in our effort afterward to have Brand criminally charged with false imprisonment. This was one of a number of jury trials for UFW picketers. We always won; they were fun.

E. The McAllen Police and the C-Shift Animals

Another major litigation effort involved the McAllen police, who had a habit of brutalizing young men, typically at the police station. We ended up trying seven suits over a five-year period, one

of which was a class action.⁴¹ We won the individual cases, and then proceeded with the class action. After opening statements to the jury, the defendants settled the class action for \$125,000 and institution of a citizen review board.

The most astounding aspect of the litigation was learning during one of the trials, on a throwaway question to a police sergeant witness, that he had collected videotapes of beatings at the station—seventy-six altogether. Not only that, but the sergeant would check them out to officers to show at parties. He testified that Mayor Brand knew about the tapes and had ordered them destroyed. The sergeant had refused to comply because of a federal court evidentiary order.⁴²

Most of the beatings occurred during the night “C” shift, and the officers dubbed themselves the “C-Shift Animals” and printed t-shirts with that moniker.⁴³ The videotapes rocked the community. Some were quite graphic and were broadcast around the country, Mexico, and Europe.⁴⁴ They also became an issue in the mayoral election.

As the McAllen police cases wound down, Brand, who had been mayor during the litigation, announced for re-election in 1981. Dr. Casso threw his hat into the ring. It was a bitter campaign. Brand, as he was wont to do, sued *The Nation* over an unflattering article about him and the election.⁴⁵ Brand was reelected and sued Casso for accusing him during the campaign of having presided over the police brutality and ruling McAllen with an iron fist like an “ayatollah.”⁴⁶ I represented *The Nation* and had the case summarily dismissed on free press grounds. David Casso, who had interned with TCRP as a law clerk, represented his father all the

⁴¹ *Cano v. Colbath*, No. CA 76-B-52 (S.D. Tex. 1976). By chance, I had secured the order preserving the tapes in the first case I filed because the two brothers I was representing said that, while the police were beating them, one officer had shouted to another to turn off the video system. The defense lawyers lied throughout the years of litigation, claiming that the system did not record but only monitored the room. When the sergeant told the truth, they feigned ignorance.

⁴² *Robles v. City of McAllen*, No. CA B-81-58 (S.D. Tex. Brownsville Div. 1981).

⁴³ See Dan Balz, *Brutality Charges, Bitterness Haunt McAllen, Tex.*, WASH. POST (June 2, 1981), <https://www.washingtonpost.com/archive/politics/1981/06/02/brutality-charges-bitterness-haunt-mcallen-tex/ddf97d23-83c9-4ca8-a6fa-296caadff557/> [<https://perma.cc/K565-ZVDC>].

⁴⁴ Guadalupe Cano—one of the plaintiffs who was beaten—and I appeared on *The Phil Donahue Show* to talk about the McAllen police brutality, along with some of the videotapes. (Being on *Donahue* finally legitimized what my mother thought was the hopelessly quixotic life path of her eldest son.)

⁴⁵ See generally *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989).

⁴⁶ *Id.*

way to the Texas Supreme Court and won a precedent-setting victory.⁴⁷

Quite unbelievably, then-Governor Bill Clements nominated Brand in 1981 to head up the Texas prison system. That created a political uproar, with adverse editorials and lampooning cartoons across the state. The senate eventually killed the nomination. I testified, showing videos of beatings that occurred during Brand's tenure as mayor.

IV. RELOCATING TO AUSTIN IN 1983 AS LEGAL DIRECTOR FOR THE TEXAS CIVIL LIBERTIES UNION

When we moved to the Valley, I had every intention of living there permanently; but, toward the decade mark, the thought of relocating would whirl around in my mind from time to time. Part of the reason was expanding the work I was doing on a larger scale. Another part was wanting a better education for my three kids than the Valley offered. The teachers were all great, but education resources were scarce thanks to Texas's grossly disparate school funding scheme.

There was also the fact that, because I had such a high media profile, I could not go anywhere without people discussing their legal problems, most of which, while pressing, were outside the gamut (and expertise) of my work. I vividly remember one late night in particular: I was buying groceries on the way home, and a man talked to me for a half-hour about his family troubles. It was frustrating because I could do nothing to alleviate his worries.

The store episode happened about the time the Legal Director position for the Texas Civil Liberties Union (TCLU), the state ACLU affiliate, opened up. I had turned it down a couple of years earlier when approached, but it was vacant again. After some reflection and family discussion, I accepted the position, at \$28,000/year; and it was off to Austin.

A. *Spotlighting Some Litigation Successes*

Although I did the traditional ACLU-type cases, such as vindicating the right of access to courts (law library and/or legal assistants) for McLennan County jail prisoners,⁴⁸ one of the litigation directions on which I tried to focus at TCLU was expanding litigation under the Texas Bill of Rights, rather than using federal

⁴⁷ *Id.*

⁴⁸ *See generally* *Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985).

courts. At the time, the Texas courts were beginning to show an interest in the concept that the state constitution might offer greater protection of civil rights and liberty than the federal constitution. This was also a developing national movement of sorts.

1. Privacy: A Fundamental State Constitutional Right

One especially sweet victory was convincing the Texas Supreme Court that privacy was a fundamental right under the state Bill of Rights, even though it is not under the federal Constitution. The high court, on a 9-0 vote, banned the mandatory polygraph testing of state employees under the precept that it violated the right to privacy, protected as a penumbra fundamental right under the Texas Constitution.⁴⁹ I count this case as one of best legal victories for which a lawyer could ever wish.

I ended up speaking and writing extensively on state constitutional law⁵⁰ and began a twenty-seven-year career as an adjunct professor at the University of Texas Law School, teaching on this topic (although, as Texas courts became more conservative and less receptive to staking out rights under the state constitution,⁵¹ it eventually turned into a general civil rights litigation course). I also taught at St. Mary's University School of Law for nine years. I always tried to keep the TCLU litigation as community-based as possible, representing the state employees union in the polygraph case, for example.⁵²

⁴⁹ *Tex. State Emps.' Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987); James C. Harrington, *Privacy and the Texas Constitution*, 13 VT. L. REV. 155 (1988). The subtext of the TSEU polygraph case had a lot to do with employees suspected of union organizing in state mental disability facilities. We also limited pre-employment polygraphing of Houston police, firefighters, and airport security and secured a class action injunction and back pay for the individual plaintiffs in another case, *Woodland v. City of Houston*, 918 F. Supp. 1047 (S.D. Tex. 1996).

⁵⁰ See, e.g., JAMES C. HARRINGTON, *THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL* (Butterworth Legal Pub., 1987) (2d ed., 1993); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399 (1993); James C. Harrington, *Free Speech, Press, and Assembly Liberties Under the Texas Bill of Rights*, 68 TEX. L. REV. 1435 (1990).

⁵¹ One way the courts undermined this effort was to hold that there were no damages available under the Texas Bill of Rights because the legislature had not enacted any "enabling" statute like 42 U.S.C. § 1983, completely misreading (or ignoring) the logic of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). See, e.g., *City of Beaumont v. Bouillon*, 896 S.W.2d 143 (Tex. 1995); *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836 (Tex. App. Austin 1993) (denying writ).

⁵² See *Woodland v. City of Houston*, 918 F. Supp. 1047 (S.D. Tex. 1996).

2. Free Assembly: The State Constitution and Private Property

A similar effort under the state Bill of Rights extended state constitutional free speech and free assembly rights to an expansive private Austin shopping mall for a local organizing peace group, even though there was no such First Amendment protection.⁵³

3. Expanding Voting Rights under the Texas ERA

Another community-oriented case was on behalf of African Americans and Mexican Americans in the Del Valle school district near Austin. Along with the Mexican American Legal Defense and Education Fund (MALDEF), in 1989, we filed a voting redistricting case under the Texas Equal Rights Amendment.⁵⁴ Similar to the farm worker statutory exclusion cases, this case was another rather creative and unique use of the ERA. We won and created single-member districts that made the school board as diverse as the community.⁵⁵

Two years later at TCRP, we joined with MALDEF in similar Texas ERA efforts with regard to congressional and state redistricting litigation after the 1990 census, with favorable results.⁵⁶

4. Disability Rights: A Life Lost—Wrongly Confined for Fifty-One Years

A case of great importance to the mental health community involved Opal Petty, whom the state wrongly confined for fifty-one years (thirty-four years in the Austin state hospital for mentally ill persons, and then seventeen years in San Angelo state school for

⁵³ *Nuclear Freeze Campaign v. Barton Creek Shopping Mall*, No. 349,268 (126th Dist. Ct. Travis Cty. July 13, 1983) (granting injunction). *But see* *Oficina Legal Del Pueblo Unido, Inc. v. Simon Prop. Grp. TX, L.P.*, No. 03-00-00288-CV, 2001 WL 838370 (Tex. App. Austin July 26, 2001) (dodging the issue in a suit I brought after being arrested for holding a press conference with three plaintiffs in front of one of the mall stores we sued for discrimination).

⁵⁴ *See generally* *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507 (Tex. App. Austin 1993) (denying writ).

⁵⁵ *Id.*

⁵⁶ *See generally* *Richards v. Quiróz*, 848 S.W.2d 819 (1993) (denying writ); *Terrazas v. Ramírez*, 829 S.W.2d 712 (Tex. 1991); *Mena v. Richards*, No. C-454-91-F (332d Dist. Ct. Hidalgo Cty. 1991); *Quiróz v. Richards*, No. C-4395-91-F (332d Dist. Ct. Hidalgo Cty. 1991). *See Texas Redistricting*, TEX. LEGISLATIVE COUNCIL, http://www.tlc.state.tx.us/redist/history/chron_1990s.html [<https://perma.cc/D9AC-GDJC>]; *see also* James C. Harrington & Judith Sanders-Castro, *Legislative Redistricting in 1991-1992: The Texas Bill of Rights v. the Voting Rights Act*, 26 ST. MARY'S L.J. 33 (1994).

individuals with developmental disabilities). Her stay in the hospital was amid appalling conditions of the time.

Her father, a fundamentalist church deacon in rural Texas, had committed Opal in 1934 at age sixteen for acting out as a teenager, when praying over her had failed. The hospital never conducted a periodic evaluation concerning the need for her continued confinement or contacted her family. After nearly four decades, the hospital, realizing she was not mentally ill, transferred her to San Angelo.

By a surprising intersection of coincidence, her grandniece by marriage, also living in San Angelo, learned of Opal and began to search for her, only to find her literally in the neighborhood, and secured her release. Opal went to live with the family and prospered after being freed but never overcame the effects of a half-century of institutionalization.

Co-counseling with Advocacy, Inc. (a federally-funded disability rights organization), we divided the state court lawsuit into two: a damages action jury trial and a class action for injunctive relief under federal and state law.⁵⁷

We won the jury trial and sustained it on appeal, although the damages under state law were shockingly parsimonious, given that the state had taken Opal's life away from her.⁵⁸ She did have a loving family for her remaining days. Her grandniece, for example, took Opal on a train ride to Disneyland after the jury verdict.

The class action settled with the state instituting annual reviews of everyone committed to the state hospital, including a review of people in situations like Opal's.⁵⁹ There were a few hundred of them still alive; many had died. A good number of those still alive were so institutionalized and without family that they could not or did not want to leave the facilities to which they had been assigned. So bittersweet was the litigation, even while successful.

When Opal died on March 10, 2005, a *New York Times* obituary memorialized her passing.⁶⁰

⁵⁷ Texas Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680 (Tex. 1992). We won on a 4-1-4 vote, although subsequent Supreme Court decisions rejected our theory of recovery under the Texas Tort Claims Act. We probably picked up the fifth vote because the facts were so appalling.

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ Christopher Lehmann-Haupt, *Opal Petty, 86, Patient Held 51 Years Involuntarily in Texas, Dies*, N.Y. TIMES (Mar. 17, 2005), <http://www.nytimes.com/2005/03/17/us/opal-petty-86-patient-held-51-years-involuntarily-in-texas-dies.html>.

V. SEVERING TIES WITH THE ACLU AND FOUNDING THE TEXAS
CIVIL RIGHTS PROJECT

The first five years as Legal Director with the TCLU flowed along quite placidly. There were four of us altogether: the Executive Director, his assistant, myself, and my assistant. However, the Executive Directors changed and made a series of poor financial decisions that depleted funds and moved TCLU to the red side of the ledger.

Philosophical differences were beginning to simmer as well. Although my litigation track record was quite good, some TCLU board members seemed displeased with my emphasis on drawing lawsuits from the community, rather than “pure” ACLU-type cases. They did not point to anything in particular, but the undercurrent was tangible.

It all came to a head in early 1990, when the Board fired the Executive Director and his assistant, leaving my assistant Fara Sloan and me to run the shop. I did an emergency mail appeal and raised close to \$45,000—one of TCLU’s most successful appeals.

That did not placate the board, though; and, rather than raise badly needed funds, board members began to come to the office and watch us for time-management purposes. Fara and I decided it was time to form a union, and we enlisted the Communication Workers of America as our representative.

The board went apoplectic, even though some of the members themselves belonged to teachers’ unions. Fara went off to have a baby, and the board fired me. To make matters more bizarre, the board announced to the media that, although my legal work was excellent, it was discharging me for forming a union—something quite against the law.

We ended up in late Saturday-night mediation. At that point, even though holding the cards, I decided it best to go my own way and shake the dust from my sandals. The idea was to set up a community-based civil rights project under the auspices of OLPU, the non-profit I helped found in 1978. I set up shop the next morning on September 23, 1990. It was an auspicious day, indeed—Fara’s baby arrived the same Sunday.

Part of the settlement with the ACLU, which had come to the rescue of the TCLU, involved my getting the law books and some office furniture, keeping the cases on which I was working, receiving some start-up funds, and taking over the South Texas Project. Through my then-wife’s help, we were fortunate to find rent-free office space in the Peace Building, a small two-story iconic struc-

ture in downtown Austin that once served as a small hotel and train stop.

When Fara returned to TCLU, she worked there alone, essentially transferring legal case files to me, since TCLU had barred me from the office, despite the mediation agreement. After two weeks, while by herself in the office, Fara received a fax from the board, firing her—showing a shocking lack of civility toward a dedicated employee who had worked there for years.

Fara came to work with me, living on unemployment benefits; and I supported my family with part-time teaching at University of Texas School of Law. We survived that way until January 1991, when the Texas Equal Access to Justice Foundation (TEAJF) threw us a lifeline.

TEAJF managed the state Supreme Court's IOLTA program, and added us to the list of nonprofit recipients of funding. We started off with an \$80,000 grant. As I learned a hundred times over, it was much easier to raise local funds for a Texas-based organization than for an ACLU affiliate.

I supplemented our budget with part-time work at Advocacy, Inc. for a couple of years, helping develop its regional legal program and creating community-based litigation campaigns under the Americans with Disabilities Act (ADA). Then, for three years, I served as part-time Director of the Americans with Disabilities National Backup Center, traveling around the country (twenty-two states and three territories), training lawyers on how to do ADA campaigns.

This dovetailed nicely with TCRP's work as we began to use the ADA for civil rights cases where we could, instead of the traditional 42 U.S.C. § 1983.⁶¹ Because of the way it was written, the ADA often held out more promising relief for cases involving prisoner suicides, police misconduct toward people with mental disabilities, and bad medical care for prisoners.⁶² The creative possibilities were myriad, and ADA litigation became a TCRP priority.

⁶¹ See generally James C. Harrington, *The ADA and Section 1983: Walking Hand-in-hand, Using the Americans with Disabilities Act to Re-Open the Civil Rights Door*, 19 REV. LITIG. 435 (2000).

⁶² Over a period of time, I personally handled four county jail suicide cases in west Texas, three in Tom Green County alone—sad cases, all involving depressed young men. The first was under § 1983, when it was still a good tool, and settled. We barely settled the second, however, because, by then, the Fifth Circuit case law had made suicide cases more problematic. The last two cases, occurring after passage of the ADA, settled more quickly and with better results.

TCRP helped set the national trend, albeit it rocky in the beginning, toward making voting more accessible to blind citizens⁶³ and reconfiguring theaters with wheelchair seating in the middle of the theater, rather than on the floor in front of the screen. We also adapted the parole system to be more accommodating for people with mental disabilities, cutting the recidivism rate by two-thirds, and compelled the state lottery only to use retail outlets that were ADA-compliant.

Altogether, in twenty-five years, collaborating closely with ADAPT of Texas, VOLAR of El Paso, and other disability rights community groups, we handled more than 550 ADA cases and conducted more than fifty ADA-enforcement campaigns. We were no respecter of defendants, whether judges, large corporations, agencies, or hospitals.⁶⁴ Many cases resulted in major architectural and programmatic changes.

We stayed in the Peace Building until it was sold and then purchased a small house in east Austin, the African-American side of town. We eventually outgrew that location and found an old lube shop in the Mexican-American community that, thanks to an attorney donor, local folks had converted into an office building. We moved there in time for our fifteenth anniversary.⁶⁵ This was a great fundraising opportunity overall, and we had a donors' space at the entrance with a tile for each donor, sized according to the amount of donation. The attorney donor, Wayne Reaud, donated the building in honor of the legendary Michael Tigar, who had long been a strong TCRP supporter. Molly Ivins spoke at the dedication.

We went through a midnight fire in 2013 and spent seven months in exile, working out of the Austin TRLA office while ours was being rebuilt. We were fortunate to have purchased good insurance. Both the fire and the rebuilding offered excellent fun-

⁶³ See generally *Lightbourn v. Cty. of El Paso*, 118 F.3d 421 (5th Cir. 1997); James C. Harrington, *Pencils Within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Disabilities*, 4 TEX. F. ON C.L. & C.R. 87 (1999).

⁶⁴ See, e.g., *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997). This was one fun case, which impressed a federal judge, where we successfully sued the "national beer of Texas," the Shiner brewery for excluding blind tourists with guide dogs. Part of our argument involved proving that guide dogs were actually cleaner than humans.

⁶⁵ Barbara Belejack, *Keeping the Tradition Alive: The Texas Civil Rights Project Turns 15. An interview with TCRP Director James Harrington*, TEX. OBSERVER (Oct. 7, 2005), <http://www.texasobserver.org/2052-keeping-the-tradition-alive-the-texas-civil-rights-project-turns-15-an-interview-with-tcrp-director-james-harrington/> [<https://perma.cc/Y7M2-FNYC>].

draising opportunities. We did the donor tiles again, the new ones surrounding the original tiles charred by the fire. Fate struck again, though. Exactly two years later to the day of the fire, the building flooded during a torrential storm; we extracted 350 gallons of water.

Over the years, we were able to find capital funds from foundations to purchase and build out our offices in El Paso and south Texas. So, we owned three of our offices. The Houston NAACP let us use a small house it owned next to its office, rent-free. Not only was that a financial blessing, but it helped give us roots in the community.

VI. THE WORK OF THE TEXAS CIVIL RIGHTS PROJECT

A. *Quarter Century Overview*

On our twenty-fifth anniversary, we put together an information sheet for the public that summarizes the quarter-century of our work. It is included here as a good synopsis of TCRP's history, although some of the cases will be described in greater detail further on:

25 Years Seeking Justice . . .

For twenty-five years, the Texas Civil Rights Project has been a tireless advocate for racial, social and economic justice in Texas, through our education and litigation programs in our six offices across the state: Austin, El Paso, South Texas, Houston, Odessa, and North Texas.

Some of the achievements we are most proud of:

- *Handling more than 2600 cases for poor and low-income Texans, some of which included comprehensive settlements and important appellate victories*
- *Creating an extensive pro bono network with private attorneys to expand our civil rights work in Texas*
- *Developing a vigorous VAWA (Violence Against Women Act) program in our Austin, El Paso, and South Texas offices for abused immigrant women in rural Texas that includes our unique "Circuit Rider" component, as well as counseling and support services and a promotora program provided by a MSW staff supervisor and social work interns*
- *Publishing eighteen Human Rights reports on issues such as hate crimes, prison conditions, solitary confinement, and school funding equity*
- *Compiling five "self-help" legal manuals, on matters like Title IX, disability law, and veterans' rights*
- *Conducting community and lawyer trainings for more than 40,000 persons*

- *Working to establish special veterans courts in West Texas through our Odessa office*
- *Publishing more than 350 opinion editorials in Texas newspapers*
- *Giving more than 400 speeches and talks on civil rights to diverse groups (such as school conferences, police and law enforcement trainings, senior citizens' organizations, veterans groups, and attorney education programs)*
- *Being a vigorous and consistent advocate of human rights and civil liberty in the media*
- *Having an amazing, hard-working, and dedicated staff in our offices across the state*

We have sued over every kind of misconduct in every part of Texas: city police, sheriff deputies, Department of Public Safety officers, and Border Patrol agents. Because of our work, jails in Hidalgo, El Paso, Henderson, Tom Green, Williamson, Travis, Bexar, Dallas, and Brown Counties do much more now in preventing inmate suicide, providing interpreters for deaf prisoners, protecting vulnerable inmates from sexual assault, administering HIV medications, and making them accessible for inmates with disabilities.

And our prison conditions work, which we do as a special project, addresses medical care, violence by guards, suicide, solitary confinement, and over-heated facilities. The Harris County Jail, one of the largest jails in the country with a large population of mentally ill inmates, is in our sights.

TCRP set the national model in ballot accessibility for blind voters and has led more than 50 regional compliance campaigns in Texas under the Americans with Disabilities Act (ADA). Thanks to the efforts of our staff, facilities, churches, and courthouses in Texas are much more accessible to elderly folks and people with disabilities. We are the state's preeminent litigator on behalf of the disability community.

Our Title IX educational and litigation programs on sexual harassment and equal sports opportunities helped make rural middle schools and high schools more hospitable for young women, and respectful of them, and opened up the prospect of athletic scholarships to college for them. Our volunteer Safe Schools education program works with community groups on anti-bullying programs for students.

Our "Equality under the Law" campaign addressed "benign" discrimination against African Americans and Hispanic Americans in banks, restaurants, motels, and other places of public accommodation in Central Texas. And we ended GLBT discrimination in El Paso restaurants and other locations in the state.

Our efforts to help South Asian, Muslim, and Arab citizens, permanent residents, and students who fell victim to post September 11 discrimination included a successful suit against a major airline and

enlisting Texas attorneys to represent, pro bono, individuals questioned by the FBI.

We worked with the Mexican American Legal Defense and Education Fund (MALDEF) to help create single-member school board districts in Del Valle ISD and assisted in redistricting the Texas Legislature and Congressional districts in the 1990s so as to protect the representational rights of minority citizens.

We assisted the NAACP in persuading the U.S. Department of Justice to audit the Austin Police Department and make more than 160 changes, including its use of force practices in the city's minority communities.

We joined with the American Jewish Congress in one of the first court cases in the country to challenge the constitutionality of government funding of a religiously-orientated job training program that used the Bible as a text and proselytized its trainees. And we continue our efforts to keep religion and state separate, challenging, for example, Williamson County's use of a religious test to hire an interim constable.

Our economic justice program in our South Texas and El Paso offices helps low-income workers organize against wage theft and other forms of exploitation.

So, too, we are an intrepid advocate of traditional civil liberties, such as free speech and assembly, privacy, due process, and equal protection under the United States and Texas Constitutions.

We ended the practice of the state health department surreptitiously collecting and storing blood samples of all newborn babies in the state without parental consent and then selling them to pharmaceutical companies and sending them to a military hospital. The nearly seven million samples collected were destroyed, and a new consent process was instituted by the legislature.

TCRP won an appeal and settlement on behalf of an east Texas lesbian high school student, outed to her mother by the school's coach, to prevent this from happening again to other students.

We have partnered with Texas RioGrande Legal Aid (TRLA) to challenge the state health department's recent regime of making it difficult, if not impossible, for undocumented parents to obtain the birth certificates of their children born in Texas, which keeps kids from school and exposes them to deportation risks.

Our Austin office is a stopping point for visitor teams from foreign countries, sponsored by the State Department, wanting to learn about nonprofit civil rights work in the United States.

And we survived an office fire, continuing our work unabated in temporary quarters at TRLA during rebuilding.

We have been able to expand our work exponentially through the many volunteer law school interns who join us in the summers and throughout the year and the many other volunteers who contribute their

time on other facets of our program. We are grateful to them and to our many pro bono attorney partners.

We owe great thanks and appreciation to our Board of Directors and all those people and organizations that have supported us over the years, confident that we would be good stewards of their financial support in helping make Texas a better society for all the people of the state.

On to the next 25 years . . .

B. Highlighting Some TCRP Litigation

1. Free Speech and Assembly and Community Demonstrations

In May 2003, a group of activists, dubbed the “Crawford 5,” was arrested for failing to obtain a parade permit when caravaning through Crawford en route to demonstrate against the Iraq war outside the ranch of then-President George W. Bush.⁶⁶ They were held overnight in jail. A local Crawford jury gave them the largest fine allowable under law;⁶⁷ but, on appeal, a county judge ruled that their arrests violated the First Amendment and overturned the convictions. In May 2005, the group settled a federal class action against the City of Crawford, McLennan County, and the Department of Public Safety.⁶⁸ The successful resolution of the “Crawford 5” cases paved the way for anti-war activist Cindy Sheehan’s camp-in protest outside Bush’s ranch in August of that year.

In January 2005, TCRP teamed up with TRLA on behalf of five students and a teacher to sue the El Paso police and the Socorro school district for injuries during a “police riot” by more than 100 officers against some 1,000 Montwood High School students who had walked out of class to protest curriculum reorganization.⁶⁹ After lengthy discovery, the case went to mediation and settled, paying damages and attorneys’ fees and setting up a police training program and policies and procedures regarding the proper use of

⁶⁶ *Anti-war Protestors Convicted for Demonstrating Near Bush’s Ranch*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Feb. 18, 2004), <http://www.rcfp.org/browse-media-law-resources/news/anti-war-protestors-convicted-demonstrating-near-bushs-ranch> [<https://perma.cc/8B3V-7ZGW>]. Following the incident, we informally dubbed the group the “Crawford 5.”

⁶⁷ The trial took place in the town’s auditorium because the regular courtroom was too small. The defendant protestors and supporters marched, chanting, from the Crawford “peace house” they had rented to the auditorium, where they had to pass through temporary metal detectors.

⁶⁸ *Jack v. Tex. Dep’t of Public Safety*, No. W-03-CA-190 (W.D. Tex. 2005).

⁶⁹ *López III v. City of El Paso*, No. EP-05-CA-009-FM (W.D. Tex. 2005).

force and police conduct at free speech and assembly activities.⁷⁰ TCRP's involvement in this high-profile case led El Paso community people to request that the Project establish an office there, which eventually happened.

In March 2006, more than 200 students in Round Rock, Texas walked out of class, joining a nationwide student protest against the Bush Administration's immigration policy. The City and District then began to prosecute the students for disrupting class or violating curfew, depending on their age. After defending students in a series of misdemeanor prosecutions that threatened to go on for years, we filed a federal class action on behalf of seventy students to block the prosecutions.⁷¹ The defendants invoked *Younger* abstention.⁷² However, after the federal judge indicated he might overrule abstention, City and school officials struck a settlement that included \$90,000 for the students' nominal damages and attorneys' fees, a fund to cover expunging the students' records, and dismissal of all criminal charges.⁷³

Another case, which we co-counseled with a private law firm, involved members of the Occupy Wall Street Movement camping out in the plaza in front of Austin city hall in late 2011. The City tried to limit the activity by preemptively issuing oral and written criminal trespass notices, which were essentially administrative bans from city property, to individual protestors. We won, but the federal judge denied attorneys' fees. The Fifth Circuit later reversed on the issue of attorneys' fees.⁷⁴

2. Police Misconduct: A Never-Ending Social Problem

As part of TCRP's efforts to tie its litigation to community organized efforts, we worked closely with the NAACP of Austin, a highly energetic advocacy group, which directed much effort to po-

⁷⁰ A study, initiated by Socorro Independent School District to examine the January 29, 2003 events, concluded that students, teachers, and police (many in riot gear) were to blame for the peaceful protest turning violent. The study also found that, while most police officers acted professionally, some lacked training on how to handle public demonstrations. See *Montwood Report Finds Everybody a Little at Fault*, W. TEX. CITY. COURIER (Mar. 6, 2003), http://www.wtxcc.com/flats_pdf/2003/03-06-03.pdf [<https://perma.cc/96KU-2R6Q>].

⁷¹ *Tellez v. City of Round Rock*, No. A-06-CA-1000-LY (W.D. Tex. 2006). TCRP had organized a cadre of *pro bono* criminal defense attorneys for the students, but the City was not capable of prosecuting more than one case at a time. There was also the issue of time to be consumed on appeals.

⁷² See *Younger v. Harris*, 401 U.S. 37 (1971).

⁷³ *Tellez*, No. A-06-CA-1000-LY.

⁷⁴ *Sánchez v. City of Austin*, 774 F.3d 873 (5th Cir. 2014).

lice profiling and the excessive force that had resulted in a number of police-related deaths in the city's minority communities.⁷⁵

On June 19, 2004 (Juneteenth), representing the NAACP, we filed an innovative Title VI administrative complaint with the U.S. Department of Justice (DOJ), which was supplemented at various junctures, asking that the government withhold federal funds from the City because of broad police misconduct.⁷⁶ The complaint pointed out that, between 1999 and 2003, eleven people died from encounters with the Austin Police Department (APD). Ten of the eleven people were either Hispanic or African American.

In response, DOJ undertook an investigation into the APD, which coincided with the arrival of a new police chief, who was committed to improving the situation. In December 2008, DOJ sent APD a fifty-page technical letter with 165 recommendations for improving APD policies.⁷⁷ They focused on use-of-force policy, complaint investigation processes, training, and procedures. APD concurred with 161 of the recommendations and crafted policies that complied with them.⁷⁸

While overall police performance improved and the level of misconduct subsided, complaints to the City's police monitor continued to come disproportionately from minority persons. And an-

⁷⁵ We also teamed up with the NAACP to challenge the state-sanctioned use of paperless ballots, namely direct recording electronic machines (DREs), because of their high potential for undetected error and manipulation. Although we won a plea to jurisdiction in the lower courts, the Texas Supreme Court ruled against us since plaintiffs could not show injury—an ironic holding since our argument was that DREs inherently concealed injury. See *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011).

⁷⁶ Complaint, *NAACP v. Austin Police Dep't* (Dep't of Justice Civil Rights Div. June 27, 2012), http://texascivilrightsproject.org/docs/12/tcrp_titleVIcompt120625.pdf [<https://perma.cc/8YBR-NU24>] (filed pursuant to the 1994 Violent Crime Control and Law Enforcement Act (42 U.S.C. § 14141), Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d), the 1968 Omnibus Crime Control and Safe Streets Act (42 U.S.C. § 3789d), and the Fourth and Fourteenth Amendments). For an analysis of TCRP's approach, see Alexandra Holmes, *Bridging the Information Gap: The Department of Justice's "Pattern or Practice" Suits and Community*, 92 TEX. L. REV. 1241 (2014).

⁷⁷ Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep't of Justice Civil Rights Div., to Marc A. Ott, City Manager, City of Austin, Texas, and Arturo Acevedo, Chief, Austin Police Dep't (Dec. 23, 2008), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/AustinPD_taleter_12-23-08.pdf [<https://perma.cc/8SRX-2Z5H>].

⁷⁸ Patrick George, *Justice Department Closes Investigation of Austin Police Department*, AUSTIN AM.-STATESMAN (May 29, 2011), <http://www.statesman.com/news/news/local/justice-department-closes-investigation-of-austi-1/nRbSH/> [<https://perma.cc/3SAA-8E4B>]; Jordan Smith, *DOJ Closes Police Inquiry: APD Needs to Close 'Gaps in Use-of-Force Reports'*, AUSTIN CHRON. (June 3, 2011), <http://www.austinchronicle.com/news/2011-06-03/doj-closes-police-inquiry/> [<https://perma.cc/9RLX-PP7X>].

other questionable police killing occurred. We asked DOJ in 2012 to reopen its APD file, but it declined. In the meanwhile, though, police halted the practice of requesting consent searches during vehicular stops, a source of strong complaints from the African-American community and NAACP because of the abuse to which the practice had led.

3. Access to Justice for Low-Income Texans: Suing the Texas Supreme Court

Despite its oil wealth reputation, Texas has a high level of individuals, families, and children living at or below the poverty line (about 18% of the population generally and 25% of children).⁷⁹ That, in turn, means a great need for legal services and a severe shortage of attorneys, whether of legal aid or *pro bono* vintage. Some studies suggest that 75% to 90% of poor or low-income Texans have a least one unmet legal problem each year.⁸⁰

Because of that reality and the fact the State Bar was doing virtually nothing to ameliorate the crisis, we filed suit against the bar in 1991, representing three poor persons unable to secure legal assistance, demanding that it require all 67,000 Texas attorneys at the time to do a set amount of *pro bono* hours each year. The idea of mandatory *pro bono* generated the most hate mail for any case I have done, which is saying a lot. Attorneys screamed that mandatory *pro bono* violated the anti-slavery Thirteenth Amendment, a particularly offensive argument, given America's brutal history of slavery.

The trial judge held he had no jurisdiction since regulating the practice of law was exclusively a constitutional prerogative of the State Supreme Court. We won on the first appeal, only to have the high court reverse the case (5-4) on the exclusivity issue.⁸¹ The court did write it would place the case on its "administrative docket" and consider the matter at a later date.⁸²

After a year, I started writing the court about every December, asking whether it would address the issue. Never a response. Then, in 1999, I called the court; and the clerk said no administrative

⁷⁹ CTR. FOR PUB. POL'Y PRIORITIES, KEY FACTS ABOUT POVERTY AND INCOME IN TEXAS, http://forabettertexas.org/images/EO_2014_ACSPovertyIncome_Charts.pdf [<https://perma.cc/4W5S-5HHQ>].

⁸⁰ See *Texas Commission to Expand Civil Legal Services*, TEX. COURT SYS., <http://www.txcourts.gov/organizations/policy-funding/texas-commission-to-expand-civil-legal-services.aspx> [<https://perma.cc/F86T-VLG8>].

⁸¹ See generally *State Bar of Tex. v. Gomez*, 891 S.W.2d 243 (Tex. 1994).

⁸² *Id.* at 274.

docket existed. At that point, I filed a federal suit against the court in the Brownsville division where the plaintiffs lived, arguing denial of due process.⁸³

It did not take long for the federal judge in south Texas to transfer the case to Austin, whereupon a judge, *sua sponte*, dismissed the case for lack of justiciability.⁸⁴ But the suit and publicity grabbed the court's attention, and, to their credit, the justices scheduled a hearing.

The hearing in December 2008 was quite amazing. All kinds of legal aid providers showed up to discuss insufficient legal services for poor and low-income people. Instead of testifying, myself, I invited one of our VAWA staff persons to come to Austin and testify. She had been a former client under our Violence Against Women Act program. It was her first airplane ride. Her testimony was powerful, riveting, and moving. One could hear a pin drop as she described her former life in an abusive relationship and how she was now helping other women escape domestic violence against them and their children.

The ultimate result was the court creating the Texas Access to Justice Commission in 2010, charged with developing and implementing initiatives to expand access to, and enhance the quality of, justice in civil legal matters for low-income Texans. The Commission has risen to the task quite admirably.

The Texas Supreme Court has become a nationally-recognized leader in this arena, even persuading the state legislature to regularly appropriate legal services funds as part of the court's budget. The Texas Access to Justice Foundation (formerly, TEAJF), which allocates funding for the court and indefatigably identifies other income sources, also enjoys national prominence.

⁸³ *Gómez v. Phillips*, No. B-199-B (S.D. Tex. 1999).

⁸⁴ *Gómez v. Phillips*, No. 1:00-cv-00007-SS (W.D. Tex. Jan. 20, 2000). In addition to the *pro bono* cases, I also sued the Texas State Supreme Court in 1995, representing three attorneys with disabilities, for lack of ADA compliance when the court building was refurbished. The case quickly settled after a front-page Sunday newspaper article in which the judge in charge of remodeling admitted they had not considered the ADA in the plans. The building was nicely retrofitted. Governor Greg Abbott himself, who uses a wheel chair, then beginning a stint as a Supreme Court justice, benefitted from the ADA, although later, as Attorney General, he was its fierce opponent. See Jonathan Tilove, *Job Put Me at Odds with Disabilities Law, Abbott Says*, AUSTIN AM.-STATESMAN (July 20, 2013), <http://www.mystatesman.com/news/news/state-regional-govt-politics/abbott-says-he-supports-disabilities-law-but-advoc/nYx7M/> [https://perma.cc/ESJ5-TJMT]. Abbott, when on the Supreme Court, called me about an inaccessible Houston hotel where he attended a reception. I contacted the hotel about retrofitting; but Abbott would not go public, even though it would have benefitted the disability community.

4. Privacy: Secretly Taking and Storing Baby Blood Spots

Thanks to a tip from a newspaper reporter, we learned that, for seven years, the state health department had been surreptitiously collecting the blood spots of all babies born since 2002 and secretly storing them indefinitely at Texas A&M University, apparently for unspecified research purposes. There were 4.5-5.0 million samples as of that point. That led to a class action suit in which my four-month-old grandson was lead plaintiff, represented by his mother.⁸⁵

Andrea Beleno did not object to the initial screening, required by state law, for medical disorders. What she found problematic was the indefinite retention of her son's genetic material and the unknown and undisclosed uses of his blood samples. She worried about future misuse of her son's genetic information, perhaps with employment ramifications. In fact, with proper disclosure and safeguards, she might have consented to limited scientific use. The secrecy of it all greatly disturbed her and heightened distrust of government activity.

After the federal judge refused to dismiss the case, the department settled in late 2009 and destroyed all 5.3 million samples at the time.⁸⁶ The legislature, in an alliance of conservatives and liberals, responded by passing laws that required affirmative consent to keep samples past the need for newborn screening and for purposes other than screening, with proper disclosure of intended use and privacy protections in place.⁸⁷

Despite the settlement and new legislation, the battle continued. In 2010, we learned that between 2003 and 2007, approximately 800 newborn baby blood spots were sent to the U.S. military to create a "national mitochondrial DNA database" and others had been sold to pharmaceutical companies. The military database was never disclosed during the *Beleno* lawsuit. In fact, the department assured us that the blood samples were used only for medical research and not law enforcement purposes.

⁸⁵ Trial Pleading, *Beleno v. Texas Dept. of State Health Servs.*, No. SA-09-CA-0188-FB (W.D. Tex., San Antonio Div. Sept. 29, 2009), 2009 WL 5072239.

⁸⁶ For a detailed description of the litigation and issues involved, see Allison M. Whelan, *That's My Baby: Why the State's Interest in Promoting Public Health Does Not Justify Residual Newborn Blood Spot Research Without Parental Consent*, 98 MINN. L. REV. 419 (2013); see also *Higgins v. Tex. Dep't of Health Servs.*, 801 F. Supp. 2d 541 (W.D. Tex. 2011); Dana Barnes, *Texas DNA Showdown*, MAYBORN (Mar. 3, 2016), <http://www.themayborn.com/article/texas-dna-showdown> [<https://perma.cc/8347-WYHZ>].

⁸⁷ See TEX. HEALTH & SAFETY CODE §§ 33.0111-12 (2016).

We filed a new class action lawsuit, claiming that health department deceptively and unlawfully sold, traded, bartered, and distributed blood spots to private research companies, government agencies, and other third parties, including the Armed Forces Institute of Pathology.⁸⁸ The case was ultimately dismissed for lack of standing after the department filed an affidavit that it had destroyed the blood spots of the two plaintiffs' children.⁸⁹

5. Immigrants: Denial of Birth Certificates to Citizen Children

In early 2015, we began to learn that the state health department had tightened regulations for parents seeking to obtain birth certificates for their American-born children. The rules were clearly aimed at making it nearly impossible for undocumented parents of Texas-born children to obtain their birth certificates. This affected the ability of the children to enter school, travel, obtain Medicaid, be baptized, and subjected them to deportation, in which case they would essentially become stateless.⁹⁰

This apparently happened as a political response to the Obama administration's proposed Deferred Action for Parents of Americans program, shielding from deportation and giving work permits to as many as 5 million undocumented immigrants, who had citizen children.

We partnered with TRLA and filed suit in May 2015, which attracted extensive nationwide and international attention. We were unsuccessful in obtaining a preliminary injunction,⁹¹ even though the judge indicated he was rather troubled with the state's position.⁹² The case is set for trial in December 2016. We will be seeking interim relief on the theory that the state cannot deny birth certificates to the children and must devise some method to obtain them.

C. *Dancing on the Changing Legal Landscape*

The forty-two-year span during which I have practiced law has

⁸⁸ *Higgins*, 801 F. Supp. 2d at 544.

⁸⁹ *Id.*

⁹⁰ Melissa del Bosque, *Children of Immigrants Denied Citizenship*, TEX. OBSERVER (July 13, 2015), <https://www.texasobserver.org/children-of-immigrants-denied-citizenship/> [<https://perma.cc/N43T-6P9Q>] (containing a copy of the federal complaint).

⁹¹ *Serna v. Tex. Dep't of State Health Servs*, No. 1:15-CV-00446 (W.D. Tex. 2015).

⁹² Andrea Grimes, *State: Birth Certificate Lawsuit a Ruse to Validate Foreign ID's*, TEX. OBSERVER (Oct. 2, 2015), <http://www.texasobserver.org/undocumented-texans-take-birth-certificate-suit-to-court/> [<https://perma.cc/ELM2-7MD8>].

seen the courts, and often juries, become ever more conservative. This is especially true of the Texas appellate courts and the U.S. Fifth Circuit, which once was a civil rights paragon.

This reality has led us to more creative legal strategies. One tactic, as already mentioned is moving from 42 U.S.C. § 1983 to ADA cases to accomplish the same goals, particularly on issues of prisoner medical care and suicide and police conduct toward people with disabilities.

Another approach has been to rely on mediation as much as possible; and, indeed, we have had great success at this, much more than I would have expected.

The third strategy has been to partner with *pro bono* attorneys from law firms. As one Texas Supreme Court justice candidly acknowledged to me, when judges see a law firm investing resources in a civil rights case, they pay attention. The subtext is something like, "If this firm has taken on the case, there must be something there or else the firm would not be doing it." It is now a TCRP litigation priority to engage law firms, especially for appeal. I have witnessed the good results of this approach time and again. It also frees up resources for other litigation and increases capacity.

Despite their differences with civil rights litigation, it has been heartening to observe the respect that judges have for us, even at times appointing us to a case or calling and asking that we pick up a case for a *pro se* litigant because there appears to be merit in it.

VII. SOME OF THE PRACTICALITIES IN KEEPING TCRP HUMMING

A. *TCRP Governance Structure: Trying to Keep a Community Balance*

Structuring TCRP governance so as to maintain community input but also to draw people who could bring their professional skills and help attract funding was always a challenge. We tried to accomplish this by each regional office having a Council of Advisors, which, in turn, would select a member to the State Board. The other five State Board members are elected at large. State Board members always have lunch with the staff before their meetings. We also established a state and regional Boards of Councilors, comprised of attorneys from firms, who would help us recruit *pro bono* lawyers and solicit contributions from firms. TCRP's Legal Director helps organize and work with the State Board of Councilors.

B. *Public Education: Creating a Culture of Civil Rights*

Public education about civil rights issues was always important

to TCRP. There were issues we could not litigate either because there was no cause of action or because of their complexity and our lack of resources.

We made great use of press conferences, speaking invitations, and op-ed pieces. We also drew on our volunteers to prepare human rights reports. We tried to issue one every year or so. The reports dealt with issues such as the level of hate crimes, intra-district school funding equalization, Title IX, and ADA access in the courts, for example.⁹³

Apart from the traditional website to convey information, we also developed use of social media and constructed an email-blast list of 10,000 persons to whom we send weekly or twice weekly copies of op-ed pieces or TCRP-related information.

C. *Expanding Capacity Through Volunteers*

Harnessing the energy and talent of volunteers has always been key to increasing TCRP's capacity exponentially. That involves *pro bono* attorneys, law student interns, high school and college students, MSW interns for our VAWA program, and paralegal interns. We average about fifteen to twenty law students at our offices each year. We also plugged into court-sponsored Community Service and Restitution programs. We recruited volunteers first from the Jesuit Volunteer Corps and then from the Lutheran Border Servant Corps for our El Paso office.

D. *Fundraising: Expanding and One Funding Source at a Time*

As discussed earlier, the Texas Access to Justice Foundation is a consistent funder, providing about 60% of TCRP's budget. The balance comes from an ever-changing kaleidoscope of the annual Bill of Rights dinner, two written fundraising letters annually (which follow a week after our newsletter), other foundations, court-awarded attorneys' fees, e-mail pitches, and big-donor solicitations.

We draw upon targeted funding sources for special programs (VAWA, economic justice along the border, prisoner rights, veterans, police and mental health encounters, and capital expansion). We also used events, such as the fire that struck our Austin office in October 2013 and acquiring our south Texas and west Texas buildings, as successful fundraising opportunities.

⁹³ *TCRP Human Rights Reports*, TEX. CIVIL RIGHTS PROJECT, <http://www.texascivilrightsproject.org/tcrp-human-rights-reports/> [<https://perma.cc/SWGU-MAMW>] (providing links to the eighteen reports).

We produced TCRP t-shirts and other SWAG to raise funds and as incentives for donors.

VIII. OTHER HUMAN RIGHTS WORK AND TEACHING

My view always has been that public education is an essential component of a civil rights attorney's work, even though it typically requires extra evening and weekend hours and adept balancing of private and family life.

To that end, it was important to write regular op-ed pieces for Texas newspapers and accept as many speaking engagements and CLE presentations as practical. For seven years, the late night oil burned on Sundays while I pounded out a bi-monthly column for the *Texas Lawyer*. Altogether, I wrote close to twenty law review articles (and co-authored a couple), a slew of "popular" pieces, and created a litigation manual on the Texas Bill of Rights,⁹⁴ which the courts turned into a historical treatise as they became more conservative.

In addition to law school teaching, I tagged on an evening civil liberties course at the University of Texas, and sometimes one on historic landmark trials, for thirteen years. Writing and teaching kept me up-to-date on the law and generated creative ideas for litigation. Teaching was also a vehicle to recruit interns and volunteers for TCRP; and it provided income, which let me keep my salary modest and help the TCRP budget. Teaching often provided health insurance, which saved TCRP that cost, which increased with my age.

My passion for human rights law led me to serve on delegations to Honduras and Nicaragua, Chile, Israel and the Palestinian Territories, and Guatemala. As a result of an interfaith trip to Turkey, I ended up writing a book on the political trials of Fethullah Gülen, a moderate Islamic leader of the Sufi tradition.⁹⁵ And then there were speeches about the book around Europe, Canada, Mexico, and the United States. That latter writing and speaking experience was fodder for co-authoring a book about a fictional meeting in medieval Venice of three premier Islamic, Christian, and Jewish mystics.⁹⁶

⁹⁴ HARRINGTON, *supra* note 50.

⁹⁵ JAMES C. HARRINGTON, *WRESTLING WITH FREE SPEECH, RELIGIOUS FREEDOM, AND DEMOCRACY IN TURKEY: THE POLITICAL TRIALS AND TIMES OF FETHULLAH GÜLEN* (2011).

⁹⁶ JAMES C. HARRINGTON & SIDNEY G. HALL III, *THREE MYSTICS WALK INTO A TAVERN: A ONCE AND FUTURE MEETING OF RUMI, MEISTER ECKHART, AND MOSES DE LEÓN IN MEDIEVAL VENICE* (2015).

IX. FINAL THOUGHTS: WRAPPING IT UP

As I have reflected on how TCRP has changed over a quarter century, several thoughts come to mind. There is clearly a tension between remaining a community-based organization and evolving into an agency-like operation. I suspect a natural inevitability to this phenomenon. Being part of the community and its pains and aspirations is quite different than just helping people. It is the difference between solidarity and service, working *with* or working *for*.

Our staff spans nearly three generations; and there are marked generational differences, reflecting changing staff priorities—community organizing versus a “meaningful” job, but with limits on involving personal time. The cost of this dynamism may mean less agility in responding to community needs. Immediate exigencies may give way to planning long-term goals and increased structure.

As my own work became consumed with managing six offices and nearly forty staff, I realized the time was near to step back into the community and help with grassroots organizing. I am told, and believe, there is a “founder’s syndrome,” a reluctance to let go of one’s creation. But further reflection reminds me of something César Chávez frequently said, that, if the union did not survive him, he did not do a good job. I take César’s insight to heart. TCRP will be just fine.

The Project is on good footing, and the timing seems fortuitous. The staff is seasoned; operating systems have been honed; and we enjoy the respect of the community. The Project has grown from a staff of two in a small cramped second-floor office. We now own three buildings, mortgage free, and only have to pay utilities on our Houston facility provided by the NAACP.

My legal career has spanned nearly forty-three years, and age seventy is on the near horizon.

I feel drawn to work again more directly and personally with community people. Human rights are in my blood; and I will continue teaching, writing, doing public speaking, and organizing. I may even take on a case or two. This also will give me more time with my eight grandchildren.

As I have said far and wide, I am not riding off into the sunset, just changing horses.

Every day, I reflect on the good fortune that has smiled on my life. I am proud of my three children (whom, when younger, I readily conscripted, in trade for pizza, to fold fundraising mail outs and lick envelopes in TCRP’s beginning years).

Every day, I have the hope that perhaps I have helped make people's lives better, at least to some extent. They have certainly enhanced mine.

To be sure, there were painful, unsuccessful cases. One loss I still feel was the family of María Contreras, who left behind six children. She died, nine months pregnant, at the Nuevo Progreso bridge, while immigration officers forcefully grilled her as she returned from buying food across the border in Mexico. Another tragic loss involved Arturo Martínez, a high school student, killed by an Austin police officer. He and friends were drinking beer around a fire in a drainage ditch. The police surprised them, and he was shot in the back as he ran. The jurors said the boys should not have been out after curfew. Or Sofia King, killed by another Austin officer while she was experiencing a psychotic episode. She had a young daughter and son. Or unsuccessfully seeking to stop Gary Graham's execution after years in court.

These agonizing losses, and others, always cause me to reflect on the saying "every struggle for justice is lost, and lost, and lost, until it is finally won."

We even went through a devastating fire at our Austin office, but the community rallied around us and helped us rebuild. The local legal aid office took us in during our seven-month sojourn. I will always remember our building contractor who helped his paraplegic son, against the odds, travel to Norway and become a world champion weightlifter. So many inspiring people.

As one might expect, myriad humorous anecdotes arise when working closely with people, especially as part of community organizing, stories to be related over a beer or two, with a flavor of Irish embellishment, and sometimes melancholy.

I never saw my social justice work as a job. It is just what I did, and always wanted to do. Every morning I got up and felt very fortunate I was able to do what my heart led me to. Many people do not have that opportunity or good fortune. I have been grateful every day of my career for the honor of meeting and representing so many good and decent—and sometimes heroic—fellow travelers on the long, rocky road to a more just society, "angels," Tracy Chapman called them. It is a journey worth making, just as those who went before us opened up horizons to us and pushed history along, at even greater personal cost than what we face. We owe it to them.

In tribute to those with whom and for whom I have had the honor of working I conclude this article, as I did in many of my

talks, with a quote from Robert Kennedy's moving speech to university students in Capetown, South Africa, during the era of apartheid:

Few men are willing to brave the disapproval of their fellows, the censure of their colleagues, the wrath of their society. Moral courage is a rarer commodity than bravery in battle or great intelligence. Yet it is the one essential, vital quality for those who seek to change the world which yields most painfully to change [T]hose with the courage to enter the conflict will find themselves with companions in every corner of the world.⁹⁷

My thanks to those many moral companions with whom I was fortunate to find myself.

⁹⁷ Robert F. Kennedy, Day of Affirmation Address at the University of Capetown (June 6, 1966), <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/RFK-Speeches/Day-of-Affirmation-Address-as-delivered.aspx> [<https://perma.cc/2T99-XFEC>].

PUERTO RICO'S ODIIOUS DEBT: THE ECONOMIC CRISIS OF COLONIALISM

Natasha Lycia Ora Bannan†

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I. INTRODUCTION

The Caribbean island of Puerto Rico is facing one of the greatest financial crises of our time, where the island is beyond the point of bankruptcy after accumulating \$72 billion in debt, more than its Gross National Product (GNP). The island is home to 3.5 million residents and the homeland of roughly 5 million Puerto Ricans in the diaspora who are watching intently as the island tries to prevent its nation’s collapse. The debt is not only unpayable, as Governor Alejandro García Padilla declared in 2015;¹ it is also arguably the result of unscrupulous business practices largely on the part of hedge funds who bought junk-rated municipal bonds at extremely low prices and then charged excessively high interest rates.² Efforts to renegotiate the debt, restructure the debt, or allow for a bankruptcy option for Puerto Rico have all proven unsuc-

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¹ Michael Corkery & Mary Williams Walsh, *Puerto Rico’s Governor Says Island’s Debts Are ‘Not Payable’*, N.Y. TIMES (June 28, 2015), <http://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html>.

² Ed Morales, *How Hedge and Vulture Funds Have Exploited Puerto Rico’s Debt Crisis*, NATION (July 21, 2015), <http://www.thenation.com/article/how-hedge-and-vulture-funds-have-exploited-puerto-ricos-debt-crisis/> [<https://perma.cc/RL6J-PN2T>].

cessful thus far, and creditors have shown no interest in engaging in debt talks. To the contrary, when Puerto Rico attempted to pass a domestic version of bankruptcy protection in 2014,³ many hedge fund creditors sued immediately to prevent enactment of the law. The matter is currently pending before the U.S. Supreme Court.⁴

Much debate has been generated about the legitimacy of the debt and the brutal and devastating impact it is having on the people of Puerto Rico, who are being forced to repay it in the form of drastically reduced public services, benefits and employment, as well as increased taxes. The debt is odious in effect and impact, and possibly in origin. It is important to note, however, that while the traditional context of odious debt looks at the odious nature of the debt itself,⁵ this article discusses the odious nature of the lending by creditors to a democratically elected government within the unique political context of colonialism.

The doctrine of odious debt argues that debt accumulated by an odious regime that burdens, rather than benefits, the people of that nation should not be repaid.⁶ An emerging trend in the doctrine of odious debt is derived from the realm of transitional justice, where one sovereign (usually in the form of a dictator or repressive ruler) has transferred power to another (signaling a political shift in governance and ideology), and debt repudiation would promote the goals of that transition.⁷ That context, which has been the subject of much discussion and debate, will not be resurrected here. Rather, I argue that the nuanced context of Puerto Rico's political status is relevant to an analysis of whether equi-

³ Ley para el Cumplimiento con las Deudas y para la Recuperación de las Corporaciones Públicas de Puerto Rico [Puerto Rico Public Corporations Debt Enforcement and Recovery Act], 2014 P.R. Laws Act No. 71. See also *The Facts About Puerto Rico's Public Corporations Debt Enforcement and Recovery Act*, GOV'T DEV. BANK FOR P.R., <http://www.bgfpr.com/documents/FactsAboutDebtEnforcementAndRecoveryAct.pdf> [https://perma.cc/7HE9-PELM].

⁴ The two main cases involving dozens of hedge funds, *Puerto Rico v. Franklin California Tax-Free Trust* and *Acosta-Febo v. Franklin California Tax-Free Trust*, have been consolidated before the U.S. Supreme Court. *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577 (D.P.R. 2015) (holding that Puerto Rico was preempted from enacting its own domestic bankruptcy code that would allow it to restructure municipal and agency debt despite its explicit exclusion from federal bankruptcy law under Chapter 9), *aff'd*, 805 F.3d 322 (1st Cir. 2015), *cert. granted sub nom* *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 582 (2015).

⁵ G. Mitu Gulati et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1203 (2007).

⁶ Sabine Michalowski & Juan Pablo Bohoslavsky, *Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts*, 48 COLUM. J. TRANSNAT'L L. 59, 92-93 (2009).

⁷ *Id.* at 92.

table principles allow Puerto Rico to argue the odiousness of its debt as a defense to repayment under general principles of odious debt as part of debt relief. While most nations whose debt has been declared, or argued to be, odious generated such debt through state-to-state⁸ borrowing, Puerto Rico's debt is exclusively generated by the selling of municipal bonds on the bond market, namely to private creditors, such as hedge fund investors. Conflicts arising from contractual disputes, including the selling of state bonds to a private creditor/investor, are usually governed by domestic law, which may include equitable considerations or limitations on the payment of debt. However, such laws rarely, if ever, take into consideration the larger context in which the debt accrued. The doctrine of odious debt begs us to consider the circumstances, such as whether those on whose behalf the debt was incurred ultimately benefitted from such accrual. In this sense, international law and principles provide a broader framework from which to approach debt and debt relief at the nation level.⁹ It is in this context that Puerto Rico's unique political situation as a colony for over 500 years becomes relevant.

A. *Overview of Odious Debt*

The doctrine of odious debt is one based in principles of equity, not law. It is an equitable remedy, one that considers factors of fairness and justness as critical elements that help make up the "general principles of law of civilized nations."¹⁰ Similar to other equitable remedies, it is a defense to a binding obligation to repay money borrowed.¹¹ As such, it acts as a limitation to the general obligation to pay back debts accrued by one state when borrowing from other states. As governments transition from old to new, abu-

⁸ In the international context, "state" is synonymous with "nation," not a unit of a nation such as the states of the United States. While Puerto Rico's territorial status means it remains a colony of the United States, subject to the jurisdiction and laws of the United States, I use "state" at times to refer to Puerto Rico as a separate nation with its own obligations and rights.

⁹ See generally Alice de Jonge, *What Are the Principles of International Law Applicable to the Resolution of Sovereign Debt Crises?*, 32 POLISH Y.B. INT'L L. 129 (2012).

¹⁰ Robert Howse, *The Concept of Odious Debt in Public International Law*, Discussion Paper 185, U.N. CONF. ON TRADE & DEV., UNCTAD/OSG/DP/2007/4, 6 (July 2007), http://unctad.org/en/Docs/osgdp20074_en.pdf [https://perma.cc/SC5D-63VC]. The principle of equity embedded in odious debt constitutes "one of the fundamental sources of international law stipulated in the Statute of the International Court of Justice." *Id.* at 21.

¹¹ *Id.* ("The international law obligation to repay debt has never been accepted as absolute, and has frequently been limited or qualified by a range of equitable considerations, some of which may be regrouped under the concept of 'odiousness.'").

sive to democratic, or governing in war-time to post-conflict societies, they seek to undo the choke hold of debt accumulated unfairly or unconscionably, which burdens nations seeking progress or economic stability.¹²

The principles of odious debt provide a moral foundation for severing, in whole or in part, the continuity of legal obligations where the debt in question was contracted and used in ways that were not beneficial, or were actually harmful, to the interests of the population. Thus the debt is either adjusted or severed (often in the context of political transitions) based in part on the notion that the debt incurred did not benefit, or was even used to repress, the people of that nation. Interestingly, odious debt first appeared in practice when the United States refused to assume the debts acquired by Spain when it was ceded sovereignty over Cuba, Puerto Rico, the Philippines, and other territories in the late nineteenth century after the Spanish-American War.¹³ The United States claimed that the debt Spain was attempting to pass on after trading colonial rule was not contracted for the benefit of the Cuban people, and in fact was hostile to their interests.¹⁴ As a result, the United States bore no obligation to honor it. Although Spain maintained the position that the sovereign who gains the benefits of ruling also bears the burdens of assuming its debts, the United States eventually prevailed.¹⁵

Debt repudiation is not a new concept, although it has gained traction lately as the international community becomes more attuned to the crushing weight of debt and debt repayment on poorer nations whose debt only benefits creditor nations and perpetuates vicious cycles of economic violence on their citizens.¹⁶ The concept of odious debt was originally articulated after World

¹² See generally Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG. 605, 621–33 (2007) (examining the historical origins of the doctrine of odious debt).

¹³ Howse, *supra* note 10, at 10–11.

¹⁴ *Id.* The American Commissioners who refused to pay Spain's debt incurred in Cuba reasoned that "the loans were hostile to the people required to pay them." *Id.*

¹⁵ Paul B. Stephan, *The Institutional Implications of an Odious Debt Doctrine*, 70 L. & CONTEMP. PROBS. 213, 219–20 (2007).

¹⁶ See Chris Jochnick, *The Legal Case for Debt Repudiation*, in SOVEREIGN DEBT AT THE CROSSROADS: CHALLENGES AND PROPOSALS FOR RESOLVING THE THIRD WORLD DEBT CRISIS 132 (Chris Jochnick & Fraser A. Preston eds., 2006); see also Michalowski & Bohoslavsky, *supra* note 6, at 89–90 ("The contemporary legal discussion of odious debts to some extent reflects the view of campaigners that a doctrine of odious debts should address broader political and moral concerns. It demonstrates a widely shared conviction that legal remedies are necessary in order to deal with cases in which debt repayment is regarded as morally repugnant.").

War I by Alexander Nahum Sack, who divided odious debts into several categories, including war debts, subjugated or imposed debts, and regime debts.¹⁷ An odious debt described any debt contracted for purposes that do not conform or comply with customary international law and, in particular, the principles of international law embodied in the Charter of the United Nations.¹⁸

Various principles in international law contribute to the formation of the notion of odious debt, all of which are applicable in the context of Puerto Rico. Strict interpretation and compliance with traditional contract law and creditor/debtor lending principles shifts to more equitable considerations under the doctrine of odious debt. Such considerations include promoting equitable and fair dealing, protecting human rights, establishing and supporting democracy and democratic movements, and creating processes for true civic participation.¹⁹ The prominence of consideration of human rights in debt accumulation and repayment is particularly salient in the context of Puerto Rico, where the economic crisis has resulted in a foreclosure and housing crisis, increased crime and violence, forced migration, and extraordinarily high levels of poverty and unemployment. As a result of the debt owed, millions have been impacted by austerity measures and cuts to public services.²⁰

Since the end of the 1898 Spanish-American War, there has been little opportunity to adjudicate claims of odious debt in the domestic context. Odious debt has not developed much in domes-

¹⁷ ALEXANDER NAHUM SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* [THE EFFECTS OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] (1927); see also Howse, *supra* note 10, at 2.

¹⁸ Mohammed Bedjaoui (Special Rapporteur of the Int'l Law Comm'n), *Ninth Rep. on the Succession of States in Respect of Matters Other than Treaties*, ¶ 129, U.N. Doc. A/CN.4/301 and Add.1 (Apr. 13 and 20, 1977).

¹⁹ Howse, *supra* note 10, at 4 ("Formal concepts of sovereignty and statehood have been influential and so have notions of political justice and accountability, as well as ideas of fair dealing and equity in contractual relations. In recent and contemporary treatments of odious debt, human rights elements have attained importance . . .").

²⁰ Letter from Annette Martínez Orabona, Caribbean Inst. Human Rights, and Eva Prados Rodríguez, Gen. Coordinator, Cumbre Social, to Emilio Álvarez Icaza, Exec. Sec'y, Inter-American Comm'n on Human Rights (Jan. 20, 2016) (request for a thematic hearing before the IACHR regarding public debt, fiscal policy, and poverty in Puerto Rico) (on file with author) [hereinafter Request for Thematic Hearing]; see also Brief for LatinoJustice PRLDEF et al. as Amici Curiae Supporting Petitioners at 3–20, *Commonwealth of Puerto Rico v. Franklin Cal. Tax-Free Tr.*, No. 15-233 (Jan. 26, 2016), http://latinojustice.org/civil_rights/commonwealth_v_franklin.pdf [<https://perma.cc/72R6-CVXZ>]; see also Ed Morales, *The Roots of Puerto Rico's Debt Crisis—and Why Austerity Will Not Solve It*, NATION (July 8, 2015), <http://www.thenation.com/article/the-roots-of-puerto-ricos-debt-crisis-and-why-austerity-will-not-solve-it/> [<https://perma.cc/QAH5-QR3Z>].

tic practice because it is not often asserted as a defense to contract enforcement.²¹ However, contract law is grounded in common law, and as such evolves with the facts, law, and equitable principles presented in each case; therefore, odious debt and other equitable remedy doctrines develop over time.²² Inconsistent or even inadequate state practice is neither a reason to disregard the doctrine or discourage its assertion, nor should obligations deemed odious continue to be enforced in domestic fora.²³ Normative considerations and state practice recognize that debt in a wide variety of legal and political contexts has led to determinations of odiousness.²⁴ As such, strict conditions, terms, or scenarios are not necessary to argue for the non-enforcement of debt obligations.

B. Economic Crisis and Human Rights Violations in Puerto Rico

Puerto Rico is spending more on debt service than on education, health, or security.²⁵ The weight of its crushing \$72 billion debt has resulted in closing over 150 schools,²⁶ increasing taxes,²⁷

²¹ Cf. Stephan, *supra* note 15, at 213 (“The United States originated the concept of odious debt over a century ago, but since World War II, it has regularly upheld the position of creditors in negotiations with defaulting sovereign debtors. At present no treaty or legislation specifically provides for this defense, and no domestic court in any country or any modern arbitral tribunal has embraced it.”).

²² In the international human rights context, a similar notion is that of customary international law, which is a body of law made by the accumulation of decisions, norms, and principles in domestic, regional, and international fora. It includes the general and consistent practices of states and a sense of legal obligation that binds them to such decisions and practices. Admittedly, it is still debated whether odious debt is considered part of customary international law, in part because it is a remedy at equity, not at law, and because there is not a consistent state practice of successor states assuming the debt of previous regimes. However, that does not necessarily make debt less odious. See, e.g., Michalowski & Bohoslavsky, *supra* note 6, at 65; Emily F. Mancina, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT’L L. REV. 1239, 1247–53 (2004).

²³ See Howse, *supra* note 10, at 8 (“It would be mistaken to invoke cases where the debt was arguably odious but the outcome was adjustment not elimination of obligations to show that state practice does not support the existence of an odious debt concept as customary international law.”).

²⁴ The United States has historically recognized debt repudiation by various states outside the traditional scope of despotic dictatorships. See Sara Ludington et al., *Applied Legal History: Demystifying the Doctrine of Odious Debt*, 11 THEORETICAL INQUIRIES L. 247, 248–49 (2010).

²⁵ Jennifer Wolff, *The Human Cost of Puerto Rico’s Limbo*, OPEN SOC’Y FOUND.: VOICES (Jan. 26, 2016), <https://www.opensocietyfoundations.org/voices/human-cost-puerto-rico-s-limbo> [https://perma.cc/GEN6-WNKE].

²⁶ Danica Coto, *Puerto Rico Struggling to Maintain Its Schools Amid Cutbacks, Exodus*, ASSOCIATED PRESS (May 17, 2015), <https://www.bostonglobe.com/news/nation/2015/05/16/puerto-rico-closes-dozens-schools-economic-woes-deepen/443kazM17Vr8EdvpN2NGYN/story.html> [https://perma.cc/X84P-LNF2].

²⁷ Danica Coto, *Misery Deepens for Those in Puerto Rico Who Can’t Leave*, ASSOCIATED

laying off public sector workers,²⁸ proposing to reduce the minimum wage,²⁹ a growing shortage of medical specialists due to emigration of 3,000 doctors in a five-year period,³⁰ forcing migration to the United States,³¹ increasing unemployment and underemployment,³² separating families,³³ and increasing food insecurity.³⁴ Lack of any vehicle to renegotiate the debt will limit the prospects of altering Puerto Rico's bleak economic future and will further the mass exodus of residents from the island.³⁵

In a hearing before the United States Senate Committee on the Judiciary, the Governor of Puerto Rico admitted the extent of

PRESS (Aug. 3, 2015), <http://bigstory.ap.org/article/a4622a3466db460aa33b203830882756/misery-deepens-those-puerto-rico-who-cant-leave> [https://perma.cc/C37P-K5GA].

²⁸ Greg Allen, *As Puerto Rican Economy Lags, Some Question Cuts*, NAT'L PUB. RADIO (Sept. 26, 2011), <http://www.npr.org/2011/09/26/140802828/as-puerto-rican-economy-lags-some-question-cuts> [https://perma.cc/2C83-3A54].

²⁹ ANNE O. KRUEGER ET AL., PUERTO RICO—A WAY FORWARD, GOV'T DEV. BANK FOR P.R. (June 29, 2015), <http://www.bgfpr.com/documents/puertoricowayforward.pdf> [https://perma.cc/VEM3-88K6].

³⁰ Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/health-providers-brace-for-more-cuts-to-medicare-in-puerto-rico.html>.

³¹ See, e.g., Jaison R. Abel & Richard Deitz, *Population Lost: Puerto Rico's Troubling Out-Migration*, FED. RESERVE BANK OF N.Y.: LIBERTY ST. ECON. BLOG (Apr. 13, 2015), <http://libertystreeteconomics.newyorkfed.org/2015/04/population-lost-puerto-ricos-troubling-out-migration.html> [https://perma.cc/EY43-FSLS]; Jaison R. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico's Declining Population*, 20 CURRENT ISSUES ECON. & FINANCE, no. 4, 2014, at 1–8, https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci20-4.pdf [https://perma.cc/53UJ-YY2Z].

³² See DEPARTAMENTO DEL TRABAJO Y RECURSOS HUMANOS NEGOCIADO DE ESTADÍSTICAS DEL TRABAJO, EMPLEO Y DESEMPLEO EN PUERTO RICO: PROMEDIO AÑO NATURAL 2014 [EMPLOYMENT AND UNEMPLOYMENT IN PUERTO RICO] 6–7, <http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=UNPbf00R8Y4%3D&tabid=186> [https://perma.cc/4R28-GUQA]; see also Ed Morales, *Puerto Rico in Crisis: Weighed Down by \$73bn Debt as Unemployment Hits 14%*, GUARDIAN (June 28, 2015), <http://www.theguardian.com/world/2015/jun/28/puerto-rico-debt-unemployment> [https://perma.cc/B5KE-EM5S].

³³ See Brief for LatinoJustice PRLDEF et al., *supra* note 20, at 3–20; Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RESEARCH CTR. (Oct. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s/> [https://perma.cc/JT98-N5AQ].

³⁴ See Senate of Puerto Rico, *Final Report: Senate Resolution No. 237*, Committee on Civil Rights, Citizen Participation and Social Economy, 17th Legislative Assembly - 5th Regular Session (Apr. 9, 2015) (on file with author); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 17 (2013), <http://www.gao.gov/assets/660/653046.pdf> [https://perma.cc/A8SG-AVKM]; see also *Expuesto Puerto Rico a Una Crisis Alimentaria*, EL NUEVO DIA (Feb. 21, 2014), <http://www.elnuevodia.com/negocios/consumo/nota/expuestopuertoricoaunacrisisalimentaria-1717099/> [https://perma.cc/RGH7-B2JJ].

³⁵ Wolff, *supra* note 25.

the austerity measures his administration has taken in order to appease creditors:

In the three years of my Administration alone we have, inter alia, reformed our largest pension fund from a defined benefit plan to a defined contribution plan, including for current employees; froze[n] collective bargaining agreements, revenues measures that impacted the sales tax, the petroleum products tax and water rates; reduced government employment as a share of the population to an average lower than in the states though [sic] attrition and hiring freezes; and reduced expenses by twenty percent, the lowest spending level in a decade. The people of Puerto Rico have been the sole bearers of these burdens.³⁶

The human impact is both visible (*e.g.*, professionals and students leaving the island to seek employment in the United States)³⁷ and invisible (*e.g.*, the elderly and ill lying in cots in hospital hallways for days at a time, waiting for a room to become free).³⁸ There are many potential sources of blame for Puerto Rico's current debt crisis: hedge funds engaged in risky, and perhaps negligent, financial ventures;³⁹ the government mismanaged funds⁴⁰ and has

³⁶ *Puerto Rico's Fiscal Problems: Examining the Source and Exploring the Solution: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2015) (statement of Hon. Alejandro J. García, Governor of Puerto Rico), <http://www.judiciary.senate.gov/imo/media/doc/Garcia-Padilla%20Testimony.pdf> [<https://perma.cc/TQ98-CSXQ>].

³⁷ D'Vera Cohn, Eileen Patten & Mark Hugo Lopez, *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW HISPANIC CTR. (Aug. 11, 2014), <http://www.pewhispanic.org/2014/08/11/puerto-rican-population-declines-on-island-grows-on-u-s-mainland/> [<https://perma.cc/79M6-6KS6>]; *see also* Press Release, Instituto de Estadísticas de Puerto Rico, *La Emigración Neta Alcanza Su Punto Más Alto en la Última Década* [Net Emigration Reaches Its Highest Point in the Last Decade] (Sept. 17, 2015), <http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=KMY2LP3VLPw%3D&tabid=39&mid=590> [<https://perma.cc/45LK-54YS>] (P.R.); ALBERTO L. VELÁZQUEZ-ESTRADA, INSTITUTO DE ESTADÍSTICAS DE PUERTO RICO, *PERFIL DEL MIGRANTE 2013* [2013 MIGRANT PROFILE] (Feb. 8, 2015), http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=U_goumCYemA%3D&tabid=165 [<https://perma.cc/2HHQ-D5VA>] (P.R.).

³⁸ Alvarez & Goodnough, *supra* note 30; Kate Kilpatrick, *Patients, Doctors Say Puerto Rico's Health System in Critical Condition*, AL JAZEERA AM. (Sept. 4, 2015), <http://america.aljazeera.com/articles/2015/9/4/puerto-ricos-health-system-in-critical-condition.html> [<https://perma.cc/8ABU-W79R>].

³⁹ Jonathan Mahler & Nicholas Confessore, *Inside the Billion-Dollar Battle for Puerto Rico's Future*, N.Y. TIMES (Dec. 19, 2015), <http://www.nytimes.com/2015/12/20/us/politics/puerto-rico-money-debt.html>.

⁴⁰ D. ANDREW AUSTIN, CONG. RESEARCH SERV., *PUERTO RICO'S CURRENT FISCAL CHALLENGES 1-4* (Sept. 25, 2015), <https://www.fas.org/sgp/crs/row/R44095.pdf> [<https://perma.cc/7KP4-FUDT>] (discussing role of Puerto Rican public utility agencies in incurring the majority of the debt).

avoided disclosing its financial capacity to repay its debt;⁴¹ and antiquated federal maritime laws restrict maritime transport of cargo between the United States and Puerto Rico to U.S.-flagged ships.⁴²

Yet equally prevalent are proposed solutions to handle the crisis in the face of repetitive deadlines where the government is consistently expected to fail to meet its repayment obligations.⁴³ Coalitions have formed to demand congressional action, advocating for modifications to the federal Bankruptcy Code in order to allow Puerto Rico to declare Chapter 9 bankruptcy,⁴⁴ which would permit the island's municipalities and public agencies to restructure its debt. Prominent progressive leaders and institutions in the United States have voiced public calls to hedge funds to reduce the debt, as well as to the Treasury Department to pressure reluctant creditors to engage in debt renegotiations.⁴⁵

Additional proposals that primarily involve federal action include modifying the Jones Act, the 1920 law that includes the Cabotage Law,⁴⁶ which is applied in its entirety to Puerto Rico (and not other affected states or jurisdictions), resulting in extremely high shipping costs to the island; eliminating disparities in healthcare

⁴¹ COMMONWEALTH OF PUERTO RICO, FINANCIAL INFORMATION AND OPERATING DATA REPORT 15–16 (2014), <http://www.gdb-pur.com/documents/CommonwealthReport-October302014.pdf> [<https://perma.cc/EP8K-SK8V>].

⁴² Senate of Puerto Rico, *supra* note 34 (discussing Senate resolution to fund a study examining the impact of the Cabotage and maritime laws on the Puerto Rican economy). *Cf.* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34.

⁴³ Governor Alejandro García Padilla has put forward a five-year debt restructuring and economic recovery plan. WORKING GRP. FOR THE FISCAL & ECON. RECOVERY OF PUERTO RICO PURSUANT TO EXEC. ORDER 2015-022, PUERTO RICO FISCAL AND ECONOMIC GROWTH PLAN (Sept. 9, 2015), <https://assets.documentcloud.org/documents/2388398/puerto-ricos-debt-plan.pdf> [<https://perma.cc/943D-GEXV>].

⁴⁴ Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015). For more on coalition advocacy efforts, see HISPANIC FED'N, NATIONAL DAY OF ACTION FOR PUERTO RICO TOOLKIT (2015) <http://www.hispanicfederation.org/images/pdf/prtoolkit2015.pdf> [<https://perma.cc/3QGD-4PTX>]; HECTOR CORDERO-GUZMAN ET AL., HISPANIC FED'N, PUERTO RICO'S ECONOMIC CRISIS: OVERVIEW AND RECOMMENDATIONS FOR ACTION (Oct. 2015), <http://www.hispanicfederation.org/images/pdf/hfprpolicy2015.pdf> [<https://perma.cc/G2BC-N359>].

⁴⁵ See Martin Z. Braun, *NYC Pension Urges Hedge Funds to Ease Puerto Rico Crisis*, BLOOMBERG NEWS (Nov. 13, 2015), <http://www.bloomberg.com/news/articles/2015-11-13/nyc-pension-urges-hedge-funds-to-ease-puerto-rico-debt-crisis> [<https://perma.cc/2X93-7F46>]; *Senator Elizabeth Warren: Treasury Should Step Up to Help Families in Puerto Rico*, WARREN.SENATE.GOV (Oct. 22, 2015), <http://www.warren.senate.gov/?p=video&id=994> [<https://perma.cc/3K2R-4HAU>].

⁴⁶ Merchant Marine (Jones) Act of 1920, Pub. L. No. 66-261, 41 Stat. 988 (codified as amended at 46 U.S.C. § 55102). See Rory Carroll, *U.S. Shippers Push Back in Battle over Puerto Rico Import Costs*, REUTERS (July 9, 2015), <http://www.reuters.com/article/us-usa-puertorico-shipping-idUSKCN0PJ2TF20150709> [<https://perma.cc/L4A4-JK24>].

funding and reimbursements to the island under Medicaid and Medicare;⁴⁷ and extending federal tax credits for working families and parents to Puerto Rico.⁴⁸ Investors and those in the financial industry have simply advocated for increased austerity measures⁴⁹ like the ones already adopted, which are crippling the island.

However, none of the options listed would necessarily relieve the unbearable economic and social burden on the people of Puerto Rico. The only way to lift this burden is if the government was not required to repay decades of accumulated debt and instead could focus on addressing its underlying economic crisis, which is a product of its political status as a colony.⁵⁰ The debt must not only be declared unpayable,⁵¹ but also immoral and perhaps illegal as well. This should be done to prevent a continuous injustice upon the people who were forced to bear exorbitantly-priced goods and diminished public services while their nation became indebted and who are now asked to assume the burden of that debt in the form of austerity.

II. UNPACKING THE ACCUMULATION OF DEBT FOR THE “BENEFIT OF THE PEOPLE”

The benefits incurred by debt accumulation, if any, are a primary consideration of whether debt relief should be granted.⁵² Debt repayment can become illegitimate when it prevents a state

⁴⁷ Maria Levis, *The Price of Inequality for Puerto Rico*, HEALTH AFFAIRS BLOG (Dec. 29, 2015), <http://healthaffairs.org/blog/2015/12/29/the-price-of-inequality-for-puerto-rico> [<https://perma.cc/KML7-HCLH>]; ANNIE L. MACH, CONG. RESEARCH SERV., R44275, PUERTO RICO AND HEALTH CARE FINANCE: FREQUENTLY ASKED QUESTIONS (Feb. 3, 2016), <https://www.fas.org/sgp/crs/row/R44275.pdf> [<https://perma.cc/U4R3-G96M>]; Danica Coto, *NY Governor, NYC Mayor Join Puerto Rico Health Care Rally*, ASSOCIATED PRESS (Nov. 5, 2015), <http://bigstory.ap.org/article/3e6dfaa60b884292a11bea80374728af/ny-governor-nyc-mayor-join-puerto-rico-health-care> [<https://perma.cc/AC8W-49PS>].

⁴⁸ Earned Income Tax Credit Equity Puerto Rico Act of 2015, H.R. 3553, 114th Cong. (2015).

⁴⁹ KRUEGER ET AL., *supra* note 29.

⁵⁰ See RAFAEL BERNABE, PUERTO RICO: CRISIS Y ALTERNATIVAS (2014) for a discussion of the economic, social, political, and environmental consequences arising from Puerto Rico's political status.

⁵¹ Governor Padilla has already characterized the debt as unpayable. Corkery & Williams Walsh, *supra* note 1.

⁵² Gulati et al., *supra* note 5, at 1203, 1212–13. For a preview of the argument that debt is unenforceable under agency law, see Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, 70 L. & CONTEMP. PROBS. 83, 92 (2007) (“If the citizens of a country are viewed as the principal, the leaders as the agent, and creditors as the third party,” then “[d]ebts incurred without consent by or benefit to a country's citizens, . . . and to a creditor who is aware of these facts, should be deemed unenforceable.”).

from fulfilling its human rights obligations.⁵³

Equitable defenses beyond odious debt, such as laches and “unclean hands” (a doctrine very similar to odious debt) have long been applied in contract law. International forums and tribunals have also cited such defenses to determine the limitations and fair reach of debt that has been acquired under questionable circumstances.⁵⁴ As Robert Howse points out, it is not only the evolution of domestic jurisprudence and interpretation of contract principles that apply to interpretation of a state’s obligations, but international law as well. In particular, the Vienna Convention on the Law of Treaties “requires that the obligations in any one agreement be read in light of other binding agreements”⁵⁵ State responsibility to abide by international law includes human rights obligations both explicitly assumed by the signing and ratification of bilateral or multilateral treaties,⁵⁶ or less explicitly assumed yet still binding, such as customary international law.

The United States, and Puerto Rico as a political entity of the United States, is obligated to affirmatively ensure that the rights enshrined in the contracts and treaties it has signed are not jeopardized, compromised, or superseded by any contracts signed subsequently.⁵⁷ In fact, contractual obligations cannot supersede a state’s human rights responsibilities. Similarly, the government may not interfere with, undermine, or violate any of the protected

⁵³ Cephias Lumina (Special Rapporteur on the Effects of Foreign Debt and Other Related Int’l Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights), *Rep. on Guiding Principles on Foreign Debt and Human Rights*, U.N. Doc. A/HRC/20/23, ¶¶ 3–4, 6–7 (Apr. 10, 2012) (“States’ human rights obligations are clearly relevant in the context of their external debt arrangements.”).

⁵⁴ Howse, *supra* note 10, at 6 (“Equitable limits to contractual obligations . . . have included illegality, fraud, fundamentally changed circumstances, knowledge that an agent is not properly acting on behalf of the contracting principal and duress.”).

⁵⁵ *Id.*

⁵⁶ The United States is a party to several human rights treaties, which have the same weight as federal law under Article VI of the Constitution. U.S. CONST. art. VI. *See* International Covenant on Civil and Political Rights arts. 2(1), 6(1), 17, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). In addition, the United States has signed, but not ratified, other prominent human rights treaties. *See* Convention on the Elimination of All Forms of Discrimination Against Women arts. 1, 10, 12, Dec. 18, 1979, 1249 U.N.T.S. 13; G.A. Res. 2200A (XXI); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁵⁷ U.S. CONST. art. VI; Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

rights.⁵⁸

Puerto Rico's debt has been accumulating over the last several decades, while the nation has been in a recession for at least the past ten years⁵⁹ and public services have been cut steadily for the past six years.⁶⁰ There is a constant threat of continued cuts to public services and a government shutdown if the island is forced to pay in full every time payment becomes due.⁶¹ Meanwhile, local businesses are suffering the brutal impact of lost revenue, talent, and clientele.⁶² Austerity measures like the ones proposed and implemented in Puerto Rico⁶³ are not only disastrous for the people of Puerto Rico, but they seriously undermine and even violate the economic and social rights contemplated by the United Nations Charter and enshrined in international human rights law.⁶⁴ Austerity measures imposed under the pretext of fiscal stability actually create harmful long-term fiscal policy and ultimately burden those affected more, creating no benefits for the citizenry in either the accumulation of debt or its repayment.

As a result of the crushing weight of debt repayment, human rights violations are occurring on the island.⁶⁵ The government is not using increased tax revenue to fund necessary services and programs, but rather to pay back creditors.⁶⁶ The traditional context of odious debt recognizes the immorality of a debt that was accrued to suppress, repress, or oppress a people, and which often

⁵⁸ The Nature of States Parties' Obligations, Comm. on Econ., Soc. and Cultural Rights, Fifth Sess., U.N. Doc. E/1991/23 (1990); see Jernej Letnar Cernic, *State Obligations Concerning Socio-Economic Rights in Times of the European Financial Crisis*, 11 B.Y.U. INT'L L. & MGMT. REV. 125, 128, 131–36 (2015).

⁵⁹ Allen, *supra* note 28.

⁶⁰ *Id.*; Coto, *supra* note 26; Alvarez & Goodnough, *supra* note 30.

⁶¹ Edward Krudy, *Puerto Rico Officials Warn Government Shutdown Imminent*, REUTERS (Apr. 23, 2015), <http://www.reuters.com/article/us-usa-puertorico-idUSKBN0ND2P620150423> [<https://perma.cc/PDY7-LXZB>].

⁶² Coto, *supra* note 27.

⁶³ See Lauren Carasik, *Gutting Schools Won't Solve Puerto Rico's Debt Crisis*, AL JAZEERA AM. (Aug. 11, 2015), <http://america.aljazeera.com/opinions/2015/8/gutting-schools-wont-solve-puerto-ricos-debt-crisis.html> [<https://perma.cc/SD7R-9ADG>].

⁶⁴ Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ICESCR, *supra* note 56; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁶⁵ See Request for Thematic Hearing, *supra* note 20; see also *Public Affairs Secretary Testifies on Puerto Rico Crisis*, CARIBBEAN BUS. (Apr. 4, 2016), <http://cb.pr/puerto-rico-testify-on-fiscal-crisis-before-human-rights-forum/> [<https://perma.cc/JP6N-4U7W>].

⁶⁶ Suzanne Gamboa, *Puerto Rico Makes Debt Payment; Governor Issues 'Distress Call'*, NBC NEWS (Dec. 1, 2015), <http://www.nbcnews.com/news/latino/puerto-rico-makes-debt-payment-governor-issues-distress-call-n472126> [<https://perma.cc/5DZA-7DJZ>].

results in atrocious human rights abuses.⁶⁷ Those civil and political rights abuses that occurred because of the loan's procurement are recognized as odious.⁶⁸ The economic and social rights abuses that occur as a result of loan repayment should be seen as equally odious. Whether borrowed money is being used to commit human rights violations, or whether repaying borrowed money is causing the same, both contribute to the full panorama of human rights and debt.

III. KNOWINGLY ENGAGED IN RISK

The concept of odious debt forgiveness also takes into account whether or not the creditor knew or should have known of any risky circumstances at the time the debt was contracted.⁶⁹ The United States was able to repudiate the debt Cuba had accumulated as a Spanish colony by showing that the original "creditors knew that the pledge of Cuban revenues to secure the loans had been given in the context of efforts to suppress a struggle for freedom from the Spanish rule. Therefore the creditors 'took their [sic] obvious chances of their investment on so precarious a security.'"⁷⁰

In the context of Puerto Rico's borrowing of billions of dollars, the considerations are less about whether the creditor knew of the state's purported intention for the use of such funds—in this case keeping their government afloat—and more about the ethical and responsible nature of lending under the new concept of "odious lending," a proposed expansion of odious debt doctrine.⁷¹ Guidelines have long established ethical and socially responsible

⁶⁷ Christiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARV. INT'L L.J. 109, 146–47 (2008).

⁶⁸ David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 L. & CONTEMP. PROBS. 137, 140 (2007).

⁶⁹ Howse, *supra* note 10, at 17 ("Short of actual subjective knowledge, the notion that the lender ought to have known the intent of the debtor raises the issue of the nature and extent of the burden imposed on creditors to take positive steps to inform themselves of the purposes of the loan, and to assess the credibility of assertions of borrower state officials in that respect . . . [including] whether an agent (the debtor State) is exceeding its authority."); Bolton & Skeel, *supra* note 52, at 92–93 ("[T]he domestic-litigation strategy might be limited still more by the need to show that the lender knew or should have known the debt was wrongfully incurred.").

⁷⁰ Howse, *supra* note 10, at 10–11.

⁷¹ See Ochoa, *supra* note 67, at 158; STEPHEN MANDEL, NEW ECON. FOUND., ODIIOUS LENDING DEBT RELIEF AS IF MORALS MATTERED 5, <http://www.dette2000.org/data/File/Odiouslendingfinal.pdf> [<https://perma.cc/59RY-BLE6>] [hereinafter ODIIOUS LENDING].

investments and lending practices by financial institutions.⁷² These guidelines perform a range of functions, such as ensuring the use of fair interest rates and penalties; providing transparency in transactions (such as fees and charges); recognizing instances where a dramatic change in circumstances may prohibit a borrower from being able to repay the loan (in part or in its entirety); ensuring that loan contraction procedures and repayment plans protect human rights; ensuring that loans comply with social, labor, and environmental standards (both in borrowing and the terms of repayment); and promoting orderly debt restructuring or repayment processes that provide incentives for responsible lending and fair burden-sharing.⁷³

Many creditors—particularly hedge funds known as “vulture funds,” who buy distressed debt at extraordinarily high rates—knowingly engaged in precarious financial investments in Puerto Rico, even during the economic recession and after Puerto Rico’s credit rating was downgraded.⁷⁴ In fact, they charged higher interest rates because of that risk in order to protect themselves from a default.⁷⁵ A report by staff for a congressional committee pointed out that hedge funds knowingly engaged in high-risk transactions and sought to profit from it at exorbitant and unethical rates. As the report explains, the hedge funds:

had no excuse for not knowing the risks of buying Puerto Rico municipal bonds. Rather than absorbing the occasional investment losses that are expected as a matter of course when assessments are wrong, even by the most successful investing firms, these hedge funds are now working to pad their profits by cutting off relief options for families in the territory.⁷⁶

⁷² ODIUS LENDING, *supra* note 71, at 21–24; *see also* PRINCIPLES FOR RESPONSIBLE INVESTMENT INITIATIVE, RESPONSIBLE INVESTMENT AND HEDGE FUNDS: A DISCUSSION PAPER (2012), <http://www.unpri.org/wp-content/uploads/2012.11RIandHF.pdf> [<https://perma.cc/PTU7-MHVD>].

⁷³ PRIVILEGE HAANGÁNDU, JUBILEE USA NETWORK, THE RESPONSIBLE LENDING AND BORROWING IMPERATIVE: ADDRESSING THE ROOT CAUSES OF POVERTY 8 (Mar. 2012), http://www.jubileeusa.org/fileadmin/user_upload/Resources/2012_Jubilee_USA_Files/RLB_New_Formatting_FINAL.pdf [<https://perma.cc/86G4-RLND>].

⁷⁴ *See, e.g.*, Joel Cintrón Arbasetti, *Vulture Funds Have Puerto Rico Cornered*, CENTRO DE PERIODISMO INVESTIGATIVO (Apr. 9, 2015), <http://periodismoinvestigativo.com/2015/04/vulture-funds-have-puerto-rico-cornered/> [<https://perma.cc/KB4N-T4SB>]; Morales, *supra* note 2.

⁷⁵ Mahler & Confessore, *supra* note 39; David Dayen, *Don’t Reward the Greedy Vulture Funds Who Recklessly Invested in Puerto Rico*, NEW REPUBLIC (July 1, 2015), <https://newrepublic.com/article/122218/dont-reward-vulture-funds-who-recklessly-invested-puerto-rico> [<https://perma.cc/PZB2-83Z9>].

⁷⁶ RAUL M. GRIJALVA, PROFIT AT ANY COST: HOW SOME HEDGE FUNDS WIN BY MAKING SURE PUERTO RICO LOSES 1 (2015), <http://democrats-naturalresources>.

Puerto Rico's government and people are now forced to shoulder the disastrous impact of the public debt, but the problem is rooted in the perilous behavior of creditors and other private entities.⁷⁷ Those creditors, along with other hedge funds, have largely refused to engage in discussions regarding debt restructuring, much less debt relief.⁷⁸ In fact, days before Puerto Rico enacted its *quiebra criolla* law on June 28, 2014, which allowed its municipalities and agencies to access a debt restructuring regime identical to Chapter 9 of the federal Bankruptcy Code, a hedge fund filed suit challenging the constitutionality of the law and Puerto Rico's ability to implement its own domestic version of bankruptcy protections.⁷⁹ Dozens of other hedge funds later joined the suit against Puerto Rico.⁸⁰

The notion of "unsustainable debt" as an emerging concept of odious debt doctrine (under the larger construct of illegitimate debt⁸¹) is instructive here. Unsustainable debt maintains that a debt whose repayment (as opposed to accrual) causes governments

house.gov/imo/media/doc/Profit%20at%20Any%20Cost%20Hedge%20Fund%20Report.pdf [https://perma.cc/MLF5-WVLF] ("The risks of these investments were well known in advance of their sale – indeed, in publicly available documents, clear warnings were offered to investors that profit was not guaranteed and that the bonds carried significant potential for investor losses.").

⁷⁷ *Id.* The questionable and unethical behavior of the hedge funds, the primary creditors, has been detailed at length, including their efforts to take advantage of Puerto Rico's precarious financial position. In essence, hedge funds have:

pushed Puerto Rico to take on more debt at extremely generous terms for creditors. In April 2015, they proposed backstopping the island's proposed \$3 billion debt issuance, but only if it was made "bulletproof" in a way that protected creditor interests. They requested "acceleration rights," for instance, which would mean that the entire amount would be due if the government defaulted. They also proposed requiring the government to hold proceeds from the debt in escrow in case proposed tax reform was not enacted in advance of the issuance—essentially using their participation in the debt deal as leverage for securing austerity measures.

Id. at 3 (quoting *Hedge Fund Vultures in Puerto Rico*, HEDGE CLIPPERS (July 10, 2015), <http://hedgeclippers.org/hedgepapers-no-17-hedge-fund-billionaires-in-puerto-rico/> [https://perma.cc/J92V-RNBV]); see also Sam Thielman, *Puerto Rico Poised to Miss Another Debt Deadline as Financial Crisis Rages On*, GUARDIAN (Dec. 1, 2015), <http://www.theguardian.com/world/2015/dec/01/puerto-rico-debt-repayment-default-financial-crisis> [https://perma.cc/WU3K-WGE5] (discussing how one creditor, UBS, has engaged in financially risky, and perhaps reckless, lending).

⁷⁸ Editorial Board, *Congress Needs to Throw Puerto Rico a Lifeline*, N.Y. TIMES (Mar. 12, 2016), <http://www.nytimes.com/2016/03/13/opinion/sunday/congress-needs-to-throw-puerto-rico-a-lifeline.html>.

⁷⁹ *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577 (D.P.R. 2015).

⁸⁰ *Id.* at 584–85, nn.1–2.

⁸¹ A. Mechele Dickerson, *Insolvency Principles and the Odious Debt Doctrine: The Missing Link in the Debate*, 70 L. & CONTEMP. PROBS. 53, 61 (2007).

to deprive people of basic needs in order to service the debt should be declared unpayable and cancelled.⁸²

Where a debt may be legal and used for the benefit of the people and in isolation its terms are not overly onerous, it may nevertheless be unpayable because of the overall level of indebtedness of the country relative to its debt-servicing capacity. The concept of debt sustainability is at present defined very narrowly by the creditors and has focused almost entirely on a country's ability to pay in terms of its export earnings. National governments, however, have an obligation towards their citizens to provide their basic needs for clean water, health and education and at least not to frustrate their citizens' attempts to meet their needs for food, clothing and shelter. The freedom of the population to pursue the meeting of these needs is a fundamental human right. If a government can only meet its debt servicing by failing to provide basic health and education services and by taxing its citizens so that they cannot pay for enough food or shelter, this violates these human rights. It is therefore essential that any concept of debt sustainability includes an assessment of a) what level of taxation is reasonable, and b) what minimum expenditure is required to enable a government to meet its obligations to its citizens. Only after this obligation is met can funds be set aside for debt servicing. Debts incompatible with human rights should be cancelled.⁸³

Creditors argue that the government of Puerto Rico actually benefitted from the debt by purportedly using the funds to continue to provide ongoing government services, and thus repudiation of the debt would constitute unjust enrichment. However, the other equitable considerations that underlie the concept of odiousness and make it particularly applicable in the colonial context of Puerto Rico present a rich defense against such an assertion. To find unjust enrichment, one party must have been enriched at the expense of the other.⁸⁴ There has been no enrichment of colonial Puerto Rico. There is no credible way to argue that Puerto Rico has

⁸² For a discussion on the expansion of the odious debt doctrine to include questioning the legitimacy of current lending practices and the disproportionate and consequential impact on the developing world as an extension of neoliberal economic policies, see Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems, and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 70 L. & CONTEMP. PROBS. 1, 19 (2007).

⁸³ ODIIOUS LENDING, *supra* note 71, at 7; see also STEPHEN MANDEL, NEW ECON. FOUND., DEBT RELIEF AS IF JUSTICE MATTERED: A FRAMEWORK FOR A COMPREHENSIVE APPROACH TO DEBT RELIEF THAT WORKS 2 (2008), http://www.i-r-e.org/docs/a008_a-comprehensive-approach-to-debt-relief.pdf [<https://perma.cc/5JZZ-6AEM>] [hereinafter DEBT RELIEF AS IF JUSTICE MATTERED].

⁸⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2011).

been “enriched” by continuing to indebt itself to the point of owing more than it is capable of producing and paying. The parties actually enriched by Puerto Rico’s debt remain its creditors, who by the same principles of equity may not profit off of their actions, which both helped place Puerto Rico in debt and now continue to keep it there.⁸⁵ Ultimately, “in the case of state contracts with private creditors, . . . there is no evidence of general international law establishing the sanctity of such contracts.”⁸⁶ In fact, repudiation of debt, even in violation of domestic law, must be based “on notions of justice and equity, and therefore would imply the relevance of considerations such as the odiousness of the debt.”⁸⁷

Declaration of debt as odious may not always have the effect of repudiating it or imposing a moratorium on debt payments; instead, it could constitute grounds for renegotiating or restructuring the debt. For example, in some instances, a “debtor State [may] invoke concerns of odious debt in negotiations with its creditors in order to reach compromise that promotes financial stability and future access to credit.”⁸⁸

IV. DEBT MADE MORE ODIIOUS BY COLONIALISM

It is a basic tenet of odious debt doctrine that analysis of debt repudiation or renegotiation between a state and a private creditor must consider the overall political context in which the debt initiates.⁸⁹ If we extend that analysis to include the geopolitical and macroeconomic factors that give rise to indebted nations, we real-

⁸⁵ *Id.* (internal citations omitted). The Restatement makes clear that the tangible *unjustified* enrichment of the debtor is key in ascertaining whether the principle applies.

Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient’s wealth . . . Restitution may strip a wrongdoer of all profits gained in a transaction with the claimant, but principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off, apart from costs of litigation, than if the transaction with the claimant had never taken place.

Id.

⁸⁶ Howse, *supra* note 10, at 6.

⁸⁷ *Id.*

⁸⁸ *Id.* at 8.

⁸⁹ Robert K. Rasmussen, *Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief*, 70 L. & CONTEMP. PROBS. 249, 252 (2007) (“One does not have to look hard to see that political concerns often loom large when a country is seeking relief from its external debt.”). Because debt is only considered odious when stemming from abuses by a political regime, or, in this case, in part from the political relationship between Puerto Rico and the United States, the nature of the debt cannot be divorced from the context in which it was contracted.

ize that they are inherently “a product of the structural and historical convergence of private economic power and political strategies.”⁹⁰ Debt repayment must consider the way that financing, debt, and investment shape domestic and foreign policy.⁹¹ For example, debts accumulated to undermine decolonization efforts or thwart self-determination and human rights of a nation are recognized as wrongful under international law.⁹² Such debts typically fall under the category of subjugated debts, or debts incurred by an oppressor or colonizer over an oppressed people unable to assert sovereignty.

Following the United States’ refusal to assume Spain’s debt in Cuba, purportedly to benefit the Cuban economy, scholars began to draw a “distinction between debts according to their purpose, ruling out the transfer of debts in connexion [sic] with subjugation and accepting the transferability only of those that had contributed to a territory’s development.”⁹³ Despite the clear delineation of debts accrued by a *colonizing* nation on behalf of the colonized, there is far less clarity about the legitimacy of debts accrued by the *colonized* nation. Whereas debts accumulated by a colonizing nation on “behalf” of the colonized are inherently suspicious, debts accumulated by a colony (which remains unable to exercise self-determination and is subject to the laws and policies of the colonizing nation) are presumed to be legitimate and lawful.

The colonial status of Puerto Rico both contributes directly to the economic crisis as well as inhibits comprehensive solutions that would address short-term concerns and long-term economic policy changes. The United Nations Special Committee on Decolonization issued its annual resolution on the colonial status of Puerto Rico in early 2015, noting that the island needs to be able to make decisions in a sovereign manner to address its urgent economic and social needs, including its twelve percent unemployment rate,

⁹⁰ Louis A. Pérez, Jr. & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C. J. INT’L L. & COM. REG. 699, 701 (2007).

⁹¹ *Id.*

⁹² Bedjaoui, *supra* note 18, at 69. In the context of war debts, “[t]he question of ‘odious debts’ in a case of State succession arises . . . in connexion [sic] on the one hand with human rights and the right of peoples to self-determination and, on the other hand, with the unlawfulness of recourse to war.” *Id.* The same holds true for subjugated debts, which are “debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory.” *Id.* at 72.

⁹³ *Id.* at 73.

marginalization, and the widespread poverty of its residents.⁹⁴ The Committee recognized that the economic vulnerability of Puerto Rico is a direct consequence of its colonial status and that Puerto Rico's lack of political power to affect decision-making in the United States is reflected in the policies and politics that shape and ultimately cripple the island's economy.⁹⁵

The colonial relationship of Puerto Rico to the United States is relevant to the question of odious debt because Puerto Rico's political status is a critical impediment to its ability to negotiate or renegotiate the debt, to seek foreign investment or financing from international banking institutions, or to implement economic policies that would allow it to restructure the debt in the short-term and build a viable economy for the future.⁹⁶ In a 2015 amicus brief, the United States officially acknowledged for the first time since Puerto Rico's 1952 constitution was created that it in fact has no separate sovereignty and cannot pass laws without the approval and consent of Congress, essentially affirming its colonial status.⁹⁷ This colonial relationship is further illustrated in the text of the Puerto Rican constitution, which contains an unusual clause that requires that the island pay back general-obligation bonds before virtually any other government expenditure, perversely prioritizing private creditors at the expense of public needs.⁹⁸

Puerto Rico's political status cannot be divorced from its ability to make decisions and implement economic policies. The Commonwealth must follow federal law and precedent, except in

⁹⁴ Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Decision of the Special Comm. of 23 June 2014 Concerning Puerto Rico, U.N. Doc. A/AC.109/2015/L.6 (2015).

⁹⁵ For a brief explanation of how Puerto Rico's colonial status impacts its economic standing, see Victor Rodriguez, *Puerto Rico's Economic and Fiscal Crisis: Made in the U.S.A.*, COUNTERPUNCH (July 3, 2015), <http://www.counterpunch.org/2015/07/03/puerto-ricos-economic-and-fiscal-crisis-made-in-the-u-s-a/> [<https://perma.cc/DLJ7-LLL6>].

⁹⁶ As Howse explains, "[T]he concept of odious debt, rather than a self-standing legal doctrine, might be regarded as a *lex specialis* of transitional justice, a form of justice that is inherently and pervasively political and legal as well as highly contextualized in its specific content." Howse, *supra* note 10, at 7.

⁹⁷ Brief for the United States as Amicus Curiae Supporting Respondent at 19–24, *Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 791 (Dec. 23, 2015) (No. 15-108), 2015 WL 9412680.

⁹⁸ P.R. CONST. art. VI, § 8 ("In case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law.").

circumstances where Puerto Rico has been explicitly removed from protections, such as in the case of Chapter 9 of the Bankruptcy Code.⁹⁹ It must follow orders from the U.S. judiciary, to whom vulture funds have appealed to recoup their money. Nowhere is Puerto Rico's status as a colony made more evident than by Congress's willingness to impose a federal fiscal control board to administer the island's finances,¹⁰⁰ regardless of the will of the people and in defiance of any democratic processes or elections. Essentially, Puerto Rico's debt is made more odious because of the lack of viable and dignified options for remedying it, given its inability to engage in meaningful conversations on debt restructuring as a result of its political standing and lack of sovereignty.

Even when it attempts to exercise autonomy, Puerto Rico has been unsuccessful because the island is ultimately bound by federal law. In 2014, a federal district court ruled that the *quiebra criolla* law passed by the Puerto Rican legislature was unconstitutional.¹⁰¹ The First Circuit upheld the decision, noting that Puerto Rico cannot behave like a state in seeking bankruptcy protections that do not apply to it, and thus circumvent United States federal law.¹⁰² Administratively, the U.S. Department of the Treasury explicitly rejected the idea of a federal "bailout" of Puerto Rico akin to the kind that taxpayers funded for investment banks in 2008 in the amount of hundreds of billions of dollars.¹⁰³

If there are few domestic remedies available, there are even fewer international ones. Because of its colonial status, Puerto Rico

⁹⁹ Puerto Rico was originally included in Chapter 9, until Congress amended it in 1984 and removed Puerto Rico, along with other territories and districts, from bankruptcy protection. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(j)(6), 98 Stat. 333, 368-69 (codified at 11 U.S.C. § 101(52) (2012)).

¹⁰⁰ The fiscal control board, or emergency manager, would retain the authority to make decisions concerning the budget, which implicates critical policy choices, even as Puerto Ricans may elect new leadership with a different vision for governing the island or who may prioritize public services over debt repayment. The decision to force a federal control board on Puerto Rico may be inextricably linked to any federal legislative reform or financial assistance for Puerto Rico. See *The Need for the Establishment of a Puerto Rico Financial Stability and Economic Growth Authority Before the S. Comm. on Indian Affairs*, 114th Cong. (2016), <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=399799> [<https://perma.cc/X47G-Z95A>].

¹⁰¹ *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577, 600–01 (D.P.R. 2015).

¹⁰² *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 805 F.3d 322, 341 (1st Cir. 2015), cert. granted sub nom *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 582 (2015).

¹⁰³ Nick Timiraos, *Lew Says No Federal Bailout Being Considered for Puerto Rico*, WALL ST. J. (July 28, 2015), <http://www.wsj.com/articles/lew-says-no-federal-bailout-being-considered-for-puerto-rico-1438118543>.

cannot access international financial institutions such as the Development Bank, Banco del Sur of MERCOSUR, or even the International Monetary Fund, institutions that might offer more favorable rates and terms for lending to Puerto Rico. The lack of sovereignty also complicates Puerto Rico's ability to enter into treaties or commercial agreements. Despite invitations from Venezuelan President Nicolás Maduro, Puerto Rico has not become a member of the Petrocaribe energy initiative between Venezuela and other Caribbean states,¹⁰⁴ which would allow the island to purchase fuel at a preferential price and under favorable terms.¹⁰⁵ Nor does Puerto Rico have control over its borders, customs, aerial space, or communications infrastructure—all areas that could boost the local economy. Ultimately, resolution of Puerto Rico's broader economic crisis will require not only implementation of both short and long-term economic policies but a political solution as well.

V. POTENTIAL SOLUTIONS AND THE ROLE OF THE INTERNATIONAL COMMUNITY

Aside from the more obvious economic consequences of the crisis on the people of Puerto Rico, the odious nature of the debt has also resulted in widespread human rights violations, including the erosion of economic and social rights.¹⁰⁶ Austerity measures, both the ones implemented and the ones advocated for, amount to economic violence and have resulted in the forced migration of hundreds of thousands of people, cuts to critical public services serving marginalized and vulnerable communities, reduced employment, and threats to remove federal labor protections.¹⁰⁷ Forced repayment of the debt in full will only result in increased privatization of public services, tax breaks for the very few and very wealthy, and enhanced tax burdens on poor people, creating more

¹⁰⁴ *Venezuela to Propose Entry of Puerto Rico to Petrocaribe*, EL UNIVERSAL (Jan. 23, 2014), <http://www.eluniversal.com/nacional-y-politica/140123/venezuela-to-propose-entry-of-puerto-rico-to-petrocaribe> [<https://perma.cc/PU5J-HXAZ>].

¹⁰⁵ *Venezuela y PetroCaribe Extienden la Mano a PR*, EL NUEVO DIA (June 27, 2014), http://www.wapa.tv/noticias/locales/venezuela-y-petrocaribe-extienden-la-mano-a-pr_20131122241662.html [<https://perma.cc/8AE5-JUH4>].

¹⁰⁶ Despite not having ratified the ICESCR, the rights enshrined and the principles embodied make up customary international law, which the United States is obligated to consider and abide by when considering its human rights obligations and interpreting its treaty obligations in light of the evolution of customary international law. ICESCR, *supra* note 56, arts. 2(2), 12; *see also* UDHR, *supra* note 64, art. 3 (representing the broad spectrum of rights that states are obligated to protect, regardless of whether they explicitly recognize them).

¹⁰⁷ *See* Request for Thematic Hearing, *supra* note 20.

wealth disparity and inequality in an already very unequal society.¹⁰⁸

A. *Public Audit of the Debt*

In response to those who continue to doubt the odious nature of Puerto Rico's debt, many have called for an audit of the debt and full transparency on what is owed and to whom.¹⁰⁹ While the Puerto Rican legislature approved the creation of an audit commission, it has not yet been funded or convened to initiate a full public auditing of how the debt was contracted and what resources were financed by it. A citizen's audit, which would include direct participation by a broad base coalition of civil society groups, could further detail the nature of the debt; how it was accumulated; by whom and under what terms; how the funds received by the government were spent; a thorough risk assessment and what investors knew of the risk at the time; and what benefit was ultimately granted to the people as an unpayable debt.¹¹⁰ As long as the people of Puerto Rico are being told that the debt is now public, they should be made aware of what they are obliged to pay for.

B. *International Community Response*

Invocation of the doctrine of odious debt as a defense to repayment does not necessarily in itself relieve all obligation of the debtor to pay the debt, but it could aid in establishing a restructuring of the debt or other forms of debt relief. Given that Puerto Rico is constitutionally bound to pay its creditors above public debt,¹¹¹ domestic litigation is unlikely to prove successful or useful in addressing the current economic crisis. In traditional transitional justice contexts, the new regime's contention of the odious nature of debt could be raised in bilateral or multilateral negotia-

¹⁰⁸ Cernic, *supra* note 58, at 137–39.

¹⁰⁹ In 2015, the Centro para Periodismo Investigativo (Center for Investigative Journalism) filed suit against the Governor, requesting that the list of all creditors be made public, along with their demands of the government in order to entertain any notion of debt negotiation. See Mandamus Petition, Centro de Periodismo Investigativo v. Alejandro García Padilla, (Court of First Instance, Superior Court of San Juan, July 13, 2015), <http://27bzcmuksr11z1wycuem83o5.wpengine.netdna-cdn.com/files/2015/07/Demanda.pdf>. The Universal Declaration of Human Rights guarantees the right of citizens to participate in the government of their countries, which naturally extends to an auditing process of government spending and services. UDHR, *supra* note 64, para. 21, 10.

¹¹⁰ *Debt Audit Committee Intends to Bring About Transparency to Debt*, CARIBBEAN BUS. (Jan. 20, 2016), <http://cb.pr/debt-audit-committee-intends-to-bring-about-transparency-to-debt/> [<https://perma.cc/34CF-SCHQ>].

¹¹¹ P.R. CONST. art. VI, § 8.

tions on debt relief. Since the context for Puerto Rico is unique, however, the island should seek support from the international community by asking instead that an independent institution assess the legitimacy of the debt in order to determine its odiousness.¹¹² Similarly, a specialized body or independent commission consisting of various experts could be created to undertake an assessment of the debt and devise a relief or restructuring plan¹¹³ including the establishment of an international and independent tribunal that operates similarly to a bankruptcy court to help restructure sovereign debts.¹¹⁴ Puerto Rico could even suggest that the government engage in arbitration with creditors or advocate for the creation of a special tribunal, or quasi-tribunal, to adjudicate claims where Puerto Rico could present equitable defenses.¹¹⁵ The United Nations Special Rapporteur on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights, has laid out guidelines for establishing a mechanism for resolution of debt repayment issues, which should include the capacity to rule on the odiousness of the debt.¹¹⁶ Regardless of the forum, which could simultaneously include regional and international human rights, any adjudication must consider Puerto Rico's binding legal obligations to uphold human rights and to promote a development agenda that protects human rights.¹¹⁷

VI. CONCLUSION

Odious debt is ultimately an equitable remedy, not a remedy at law, but it is intended to prevent further injustices and abuses

¹¹² See Michael Kremer & Seema Jayachandran, *Odious Debt: When Dictators Borrow, Who Repays the Loan?*, BROOKINGS INST. (Spring 2003), <http://www.brookings.edu/research/articles/2003/03/spring-development-kremer> [<https://perma.cc/ALF7-Y8E4>].

¹¹³ ODIIOUS LENDING, *supra* note 71, at 3.

¹¹⁴ Joseph Stiglitz, *Odious Rulers, Odious Debts*, ATLANTIC (Nov. 2003), <http://www.theatlantic.com/magazine/archive/2003/11/odious-rulers-odious-debts/302831/> [<https://perma.cc/QB9N-9HXM>].

¹¹⁵ DEBT RELIEF AS IF JUSTICE MATTERED, *supra* note 83, at 2.

¹¹⁶ Lumina, *supra* note 53, ¶¶ 84–86.

¹¹⁷ *Id.* ¶ 7 (noting the importance of using human rights forums and tribunals because most international forums “have thus far failed to deliver an equitable and lasting solution to the sovereign debt problem in line with the various commitments made by the international community. In addition, these other forums do not have explicit mandates to promote and protect human rights and have not factored human rights into their policies and programmes in line with the internationally accepted human rights-based approach to development”).

upon the people of a nation who have suffered at the hands of unscrupulous officials and creditors. Puerto Rico's debt is odious, both because of how it was accumulated and because of the human rights toll of the price now required to pay it back. Austerity measures disguised as responsible fiscal policy will only continue to deepen the economic crisis, including the burgeoning wealth disparities, impoverishment, and resulting massive forced migration from the island. Ultimately, though, it is the legacy of colonialism that has created the current economic crisis in the island. The political status of Puerto Rico must be resolved in order to deal with its immediate economic needs, access international capital, grow its economy, create local jobs and sustainable industries, as well as develop long-term economic policies that will prevent economic exploitation and future crises. True economic growth and sustainable development must center human rights and equitable progress, which can only be made possible through self-determination. Puerto Rico must acquire the capacity to determine, fund, and implement its own economic priorities separate and apart from the interests of investors, foreign nations, and the United States. Economic independence cannot be divorced from political sovereignty. The economic collapse of Puerto Rico is the inevitable consequence of its political subordination.

To address the *debt* crisis solely as an issue of debtor-creditor repayment—where Puerto Rico remains subject to the laws, policies, and economic interests that allowed or even facilitated its indebtedness in the first place—misunderstands the source of the ongoing bleeding in an open wound that refuses to heal. Presuming a congressional fix, which alters a few laws and imposes a federal control board under the pretext of “good governance” (but which actually continues to economically colonize Puerto Rico and undermine its democratic processes, subjugating it yet again to the political will of the United States), allows colonialism to remain untouched. The international community has declared such a practice to be immoral and abhorrent.¹¹⁸ Recognizing, however, that Puerto Rico needs economic and political autonomy to address the overall *economic* crisis the country faces names the source of the bleeding for millions of people and allows the nation to begin to heal by prioritizing its own needs and funding them.

Debt that burdens generations of people without an end in sight is indeed odious, as is colonialism. The people of Puerto Rico

¹¹⁸ Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960).

should not be required to pay the price of their own demise in order to enhance the profits of a few. Justice requires that their debt be deemed odious.

A VEIL OF ANONYMITY: PRESERVING ANONYMOUS SPERM DONATION WHILE AFFORDING CHILDREN ACCESS TO DONOR-IDENTIFYING INFORMATION

Aliya Shain[†]

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As the author of an article about anonymous sperm donation, I cannot hide behind my own veil of anonymity: I was conceived through the use of donated sperm. By revealing this information I hope to become a more credible author, illuminating my own biases as I advocate for a national sperm donation model that

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affords children access to donor-identifying information¹ upon their eighteenth birthday while maintaining anonymity as a viable option for the donor. I do not aim to speak for all children conceived through the use of donated sperm; my opinions are distinctly my own. I do, however, wish to present a credible overview of the United States' approach to the regulation of donated sperm, discuss possible improvements to this paradigm, and highlight how anonymous sperm donation plays a crucial role in protecting gay and lesbian families.

I never had the desire to “know” my sperm donor. Unlike many children conceived using donated sperm,² I do not view my donor's identity as fundamental to my own. My lack of desire for a relationship with my donor does not mean, however, that I was not curious about his life and his decision to donate sperm. As a young girl, I remember asking my mothers to describe the process by which they “chose” my donor. I learned that they picked him from a book provided by the sperm bank—a menu of choices offering a glimpse of the child they would conceive. I requested from my parents a description of his physical characteristics and learned his hair color (brown), his height (approximately five feet nine inches), and the color of his eyes (green). I was particularly surprised to learn that at the time he donated sperm, he was employed as a professional dancer. Learning of this fact as a girl with no interest in dance revealed the vast differences between our identities. It made me view my donor as the mere vehicle by which I was born, rather than as my father. The secrecy of my donor's identity and being unable to transpose his known physical characteristics to a familiar face reinforced my view that he was not my parent. This outlook, largely aided by anonymity, diminished any desire I may have had for a relationship with him.

Anonymous donation policies have become the subject of heated debate in recent years, and some donor-conceived individuals have begun to argue for a “re-examination of the

¹ By “donor-identifying information,” I am referring to information regarding genetic heritage, occupation, and geographic location. I am not referring to information that would give children access to the donor's telephone number, email address, or home address unless the donor expressly consents to the sharing of this information at the time of the donation.

² Judith Graham, *Sperm Donors' Offspring Reach Out into Past*, CHI. TRIB. (June 19, 2005), http://articles.chicagotribune.com/2005-06-19/news/0506190276_1_sperm-donor-sperm-bank-dna-sample [<https://perma.cc/B7F8-6JB8>] (describing how many donor-conceived children seek donor-identifying information to obtain a more complete sense of identity).

anonymity that cloaks many donors,”³ criticizing the United States’ sperm donation model as perpetuating a system in which sperm banks are not held accountable for negligent donation policies. Highlighting this debate, *The New York Times* published an article in 2011 describing a man who had fathered 150 offspring by selling his sperm to a United States sperm bank.⁴ The article describes the Donor Sibling Registry⁵—a website that connects donor-conceived individuals with their biological siblings—and it argues that anonymity often perpetuates circumstances in which a single donor’s sperm is used to conceive a large number of offspring.⁶ It also describes a growing anxiety among certain parents and their donor-conceived children about “potential negative consequences of having so many children fathered by the same donors, including the possibility that genes for rare diseases could be spread more widely through the population.”⁷

In contrast to the view that anonymity shields sperm banks from accountability for negligent donation practices, this article argues that anonymous sperm donation is crucial to protect atypical family structures and the relationships within them. To support this argument, I explore different approaches to the sperm donation industry within the United States and Canada. Ultimately, I argue that Washington State’s recently enacted insemination law,⁸ which balances donor privacy with a child’s ability to seek basic donor-identifying information upon his or her eighteenth birthday, provides a model which other sperm donation policies should follow. As explained in the following sections of this article, anonymity is crucial to promote important pecuniary and privacy interests of the donor, and to protect the legal rights of families who rely on donated sperm to conceive a child. Anonymous donation must be preserved as a viable reproductive option in the United States, but a child should be able to pierce the veil of anonymity upon his or her eighteenth birthday if the donor has not expressly requested absolute anonymity at the time of donation.

Part I of this article describes regulated sperm donation as an

³ Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), <http://www.nytimes.com/2011/09/06/health/06donor.html>.

⁴ *Id.*

⁵ THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com> [<https://perma.cc/3728-SRL4>].

⁶ Mroz, *supra* note 3.

⁷ *Id.*

⁸ WASH. REV. CODE § 26.26.750 (2016).

economic contract in which anonymity plays a prominent role. It also explains that anonymous donation fosters crucial policy interests, promotes the ability of atypical family structures to produce offspring, and protects the legal rights of these families. Part II discusses the obstacles that opponents of anonymous sperm donation may face when attempting to enjoin anonymity policies through constitutional litigation. Part III explores the Canadian model of regulated sperm donation and describes recent developments in case law weakening donor anonymity. Part IV describes Washington State's legislation regarding sperm donation and argues that Washington's model adequately balances donor anonymity with a child's autonomy. The article concludes that sperm banks should provide offspring with basic donor-identifying information upon their eighteenth birthday. This approach would appropriately balance the child's desire for information with the donor's right to privacy.

I. AMERICAN SPERM DONATION: AN ECONOMIC TRANSACTION

The United States' sperm donation industry is a multi-billion-dollar business, and each year approximately 30,000 to 60,000 children in the United States are conceived using donated sperm.⁹ The total number of U.S. sperm banks providing anonymous donor samples remains a mystery,¹⁰ as sperm banks are largely free-market entities divorced from federal or state regulation.¹¹ While the Food and Drug Administration ("FDA") mandates specific record-keeping guidelines for sperm banks, the guidelines do not limit the number of children conceived through the use of a particular donor's sperm, and they are silent on the issue of donor anonymity.¹² In fact, the FDA permits sperm banks to dispose of donation records after ten years.¹³ In the absence of specific guidelines, United States sperm banks are free to maximize their donors'

⁹ Naomi Cahn, *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIM. LAW. 1, 5 (2011). The fact that this estimate spans a broad range reflects the reality that many sperm banks in the United States are unregulated entities. This lack of regulation makes it difficult to know exactly how many children are born through anonymous sperm donation each year.

¹⁰ See John K. Critser, *Current Status of Semen Banking in the USA*, 13 OXFORD J. HUM. REPROD. suppl. 2, 1998, at 55.

¹¹ See Amy Harmon, *Hello, I'm Your Sister. Our Father Is Donor 150*, N.Y. TIMES (Nov. 20, 2005), <http://www.nytimes.com/2005/11/20/us/hello-im-your-sister-our-father-is-donor-150.html>.

¹² 21 C.F.R. § 1271.270 (2016).

¹³ *Id.*

output, resulting in large numbers of children conceived from a single donor's sperm.

Many of those born through anonymous sperm donation do not have the opportunity to seek donor-identifying information.¹⁴ The paradigmatic approach to regulated sperm donation in the United States favors sealing donor information unless the donor expressly consents to its release at the time of the donation.¹⁵ Some sperm banks require mutual consent between an adult donor-conceived individual and the donor before the sperm bank will release donor-identifying information.¹⁶ Even if both parties consent to a release of identifying information upon the child's eighteenth birthday, a sperm bank might not provide a donor's information until the donor provides updated information to the bank, and if the donor cannot be found, the bank will not release his information.¹⁷ This approach might leave some donor-conceived individuals without access to basic donor-identifying information, even when the donor originally consented to its release.

Although many donor-conceived individuals face difficulties when attempting to access donor information directly from the sperm bank that provided the gamete, the Donor Sibling Registry is a database that allows them to locate information about their genetic roots¹⁸ by providing the opportunity to connect with biological siblings.¹⁹ Upon donating, each donor receives a unique identifying number, which the sperm bank shares with its prospective parent customers.²⁰ Once equipped with this number, one can use the Donor Sibling Registry to connect with others conceived by

¹⁴ See generally Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619 (2012).

¹⁵ See *id.* at 639; cf. Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 379 (2009) (“[M]ost sperm is donated anonymously in one of the two dozen commercial sperm banks in this country.”).

¹⁶ See, e.g., *Anonymous Donor Contact Policy*, CAL. CRYOBANK, <http://www.cryobank.com/Services/Post-Conception-Services/Anonymous-Donor-Contact-Policy/> [<https://perma.cc/8J24-MAYA>] (“While we are NOT opposed in principal to breaking anonymity between the donor and the adult child, it must be by mutual consent of both parties.”).

¹⁷ See R. Hertz et al., *Sperm Donors Describe the Experience of Contact with Their Donor-Conceived Offspring*, 2 FACTS, VIEWS & VISION OBGYN, no. 2, 2015, at 92, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498174/>.

¹⁸ See *Our History and Mission*, THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/about-dsr/history-and-mission> [<https://perma.cc/HU5F-GPSP>].

¹⁹ *Id.*

²⁰ JAMES M. GOLDFARB, *THIRD-PARTY REPRODUCTION: A COMPREHENSIVE GUIDE* 162 (2014).

the same donor. As people conceived through anonymous donation are becoming increasingly aware of the large number of half-siblings born from the same donor, many are calling for a re-examination of sperm bank anonymity policies.²¹

While there is a “growing body of research, largely conducted in the adoption field, [which] supports the argument that knowledge of one’s genetic background is crucial to the development of a sense of identity or self,”²² maintaining anonymity in the donation system is crucial to ensuring an adequate supply of sperm for atypical families.²³

A. *Anonymity Promotes Donation by Reducing Donor Anxiety About Future Contact.*

The virtues of anonymous donation cannot be ignored. Anonymous donation dismantles the donor’s status as a “father” and reinforces sperm donation as a formal economic contract meeting the pecuniary interests of the donor²⁴ and the social interests of the legal parents. Within this contract, anonymity is an essential component of the consideration that the sperm bank provides to the donor in exchange for his sperm. Treating sperm donation as an economic contract promotes donation by allowing men to donate for purely pecuniary reasons,²⁵ while remaining free from the obligations that accompany parenthood. Framing sperm donation as an economic transaction reinforces the view that the donor is not the legal parent of the child, and it provides incentives for men to donate sperm.

Anonymity also ensures an adequate supply of sperm by pro-

²¹ See Mroz, *supra* note 3.

²² Clark, *supra* note 14, at 621. Even in states such as New York, which mandates that sperm banks supply nonidentifying information about donors to facilities that perform assisted reproductive services, “[t]here is no mechanism in the regulations for offspring resulting from gamete and embryo donation to gain access to donor information directly.” See *Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, N.Y. DEP’T OF HEALTH, https://www.health.ny.gov/regulations/task_force/reports_publications/execsum.htm [<https://perma.cc/SWV7-MRHK>].

²³ See Pi, *supra* note 15, at 395.

²⁴ Ken R. Daniels et al., *Semen Donor Recruitment: A Study of Donors in Two Clinics*, 11 OXFORD J. HUM. REPROD., no. 4, 1996, at 747-48 (explaining that a majority of donors choose to donate for economic reasons).

²⁵ I am not suggesting that all men donate sperm solely for the purpose of payment. Certainly, many men donate sperm for altruistic and personal reasons. See Allison Brown, *Money Shots: College Students Profit, Help Infertile Couples by Donating Sperm and Eggs*, DAILY FREE PRESS, https://www.cryobank.com/uploadedFiles/Cryobankcom/_forms/pdf/news/DailyFreePressJan04.pdf [<https://perma.cc/8EVQ-LF77>].

protecting donors from moral opposition to sperm donation.²⁶ In the 1960s myriad state courts held that insemination using donated sperm was adultery on the part of the mother, and children conceived through the process were considered illegitimate.²⁷ These precedents painted sperm donation as an illegitimate means by which to conceive a child, and they shrouded the use of sperm donation in secrecy. In 1973, however, the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission) addressed sperm donation for the first time in the Uniform Parentage Act (“UPA”). The UPA provided that “[t]he donor of semen provided to a licensed physician for use in the insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”²⁸ The UPA helped to promote the legitimacy of sperm donation by codifying this approach in the states that adopted its language, thereby providing a legal means to create a family, albeit in very limited circumstances.

While the adoption of the UPA helped to legitimize donor insemination as a valid means to conceive a child, some donors still experience anxiety about offspring seeking a relationship with them.²⁹ This anxiety might discourage some donors from donating sperm if anonymity did not remain a viable option.³⁰

A man may be more likely to donate sperm when he is able to keep his choice hidden from the broader community. For example, the recent decrease in the supply of Britain’s donated sperm correlates to a ban on anonymously donated sperm.³¹ In 2005, Britain passed a law allowing donor-conceived individuals access to donor-identifying information upon their eighteenth birthday.³² In 2006, merely a year after the law was passed, only 307 people regis-

²⁶ See Pi, *supra* note 15, at 395.

²⁷ Thomas K. Sylvester, *The Case Against Sperm Donor Anonymity* 4-5 (2007) (unpublished J.D. thesis, Yale Law School), <https://www.donorsiblingregistry.com/sites/default/files/images/docs/legal.pdf> [<https://perma.cc/XSM6-YNG8>].

²⁸ UNIF. PARENTAGE ACT § 5(b) (UNIF. LAW COMM’N 1973).

²⁹ See Vasanti Jadva et al., *Sperm and Oocyte Donors’ Experiences of Anonymous Donation and Subsequent Contact with Their Donor Offspring*, 26 OXFORD J. HUM. REPROD., no. 3, 2011, at 641-42.

³⁰ See generally Chris Whitman, *I Fathered 34 Children Through Sperm Donation*, GUARDIAN (Jan. 31, 2014), <http://www.theguardian.com/lifeandstyle/2014/jan/31/fathered-34-children-sperm-donation> [<https://perma.cc/YA32-WURZ>].

³¹ See Denise Grady, *Shortage of Sperm Donors in Britain Prompts Calls for Change*, N.Y. TIMES (Nov. 11, 2008), <http://www.nytimes.com/2008/11/12/health/12sperm.html>.

³² Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511 (Eng.), http://www.hfea.gov.uk/docs/ELC_Annex_B_Sept04.pdf [<https://perma.cc/8DB3-KESD>].

tered to donate sperm even though Britain requires at least 500 donors to provide sperm for approximately 4,000 women.³³

These statistics do not establish a direct causal link between donor anonymity and the supply of donated sperm; however, observations from doctors at the London Women's Clinic suggest a strong correlation. Dr. Kamal Ahuja, director of the London Women's Clinic, revealed that prior to 2005, approximately five to ten men would become donors for every hundred men contacted.³⁴ After the law's passage, that number dropped to fewer than five donors for every hundred men contacted.³⁵ The clinic had previously provided sperm to over sixty in vitro fertilization clinics each year but stopped in 2005 because it could "no longer spare the specimens."³⁶

The decline in the number of men donating sperm in Britain may be linked to donor fears regarding a child's ability to contact them in the future.³⁷ While a donor might choose to donate sperm for altruistic reasons as well as pecuniary reasons, the donor might still have a legitimate desire to foreclose future contact with the person conceived with his sperm. If a sperm bank could no longer ensure anonymity, the donor might be less likely to donate sperm for fear that offspring might desire a relationship with him.³⁸

B. Anonymous Donation Prevents Donors from Obtaining Standing to Assert Parental Rights.

Anonymity prevents donors from being considered the legal parent of a child conceived through the use of their donated sperm, even where artificial insemination statutes do not. For example, New York State's insemination statute³⁹ explicitly ensures that heterosexual, married couples have exclusive parental rights over children conceived with donated sperm if the insemination is performed by a licensed physician. Section 73 of the Domestic Relations Law ("DRL"), enacted July 21, 2008, states: "Any child born

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See, e.g., Whitman, *supra* note 30 (describing how the author received a negative reaction from his girlfriend when he shared with her that he had donated sperm).

³⁸ See Linda Villarosa, *Once Invisible Sperm Donors Get to Meet the Family*, N.Y. TIMES (May 21, 2002), <http://www.nytimes.com/2002/05/21/health/once-invisible-sperm-donors-get-to-meet-the-family.html> (describing the shock that Bob, a donor, experienced when contacted by his biological offspring and explaining that the "experience was so overwhelming that he is not sure he will do it again").

³⁹ N.Y. DOM. REL. LAW § 73 (McKinney 2016).

to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”⁴⁰ This statute abrogates the donor’s parental rights in cases where a child is born to a woman legally married to a man by providing that the husband is the legal parent of the child when the insemination is performed by an individual duly authorized to practice medicine and when the mother gives written consent.

DRL section 73, however, fails to protect atypical families and their children. The statute is silent with regard to the sperm donor’s status when the child is born to a non-married woman, or to a woman married to another woman, or where the insemination was performed by a person other than a licensed physician. The statute’s failure to expressly acknowledge these alternate scenarios elevates the rights of the sperm donor and exposes such families to legal parentage claims by the donor. In *Thomas S. v. Robin Y.*, New York’s First Department Appellate Division held that a sperm donor—who had provided sperm to two women in a committed lesbian relationship, was known to the child, and had spent time with the child—was a legal father with standing to seek visitation and an order of filiation.⁴¹ *Thomas S.* illustrates that courts are willing to recognize sperm donors as legal parents when a child knows the donor and has spent time with the donor. Based on this reasoning, the best way for atypical families to protect themselves from intrusive donors is to maintain anonymity.

More recently, in 2014 Judge Joan Kohout of the Family Court of Monroe County effectively held that New York’s insemination statute does not extend to a married same-sex couple when the biological father is known to the child. Explaining that the DRL section 73 marital presumption of legitimacy does not bar a biological father (who had limited contact with the child) from filing a paternity petition against same-sex parents who conceived through the use of his sperm,⁴² Judge Kohout reasoned that the marital presumption of DRL section 73 was meant to “protect[] the legitimacy of the child and assur[e] that the child had both a father and mother.”⁴³ She explained that under section 73 “there is no legal father” when same-sex female spouses use an *anonymous* sperm do-

⁴⁰ *Id.*

⁴¹ *Thomas S. v. Robin Y.*, 209 A.D.2d 298, 305-08 (N.Y. App. Div. 1st Dep’t 1994).

⁴² *Q.M. v. B.C.*, 46 Misc. 3d 594, 601-02. (N.Y. Fam. Ct. 2014).

⁴³ *Id.* at 598.

nor to conceive.⁴⁴ However, when same-sex spouses use a *known* sperm donor, the presumption of legitimacy would “effectively extinguish” the child’s “right to have a father.”⁴⁵ Judge Kohout’s decision highlights the important legal role that anonymity plays in the sperm donation process for same-sex parents: it effectively bars a donor’s standing to seek parental rights. This decision reveals that banning anonymous donation would allow donors to pursue legal parentage claims and subordinate the rights of non-biological mothers in same-sex relationships.

C. *Anonymity Is Crucial to Promote Relationships Within Atypical Family Structures.*

In addition to serving a donor’s altruistic and pecuniary interests, anonymity is necessary to support atypical family structures and to foster the relationships within them. Atypical family structures—such as lesbian parents, single mothers, or even heterosexual couples who cannot conceive without the assistance of reproductive technologies—often rely on alternative methods of reproduction to create a family, and many children conceived using donated sperm are born into these families.⁴⁶ Banning anonymous sperm donation in the United States likely would diminish the number of men willing to donate—as it seems to have done in Britain—and thereby harm atypical families hoping to conceive.

Anonymity also plays an important role in fostering relationships within atypical family structures by elevating the role of the non-biological parent while minimizing the role of the sperm donor. Couples who cannot conceive together have to make a conscious decision to become parents. For example, two women who seek “to create and co-parent a child could not do so accidentally or spontaneously. Instead, it would require a series of decisions and intentional actions.”⁴⁷ A non-biological mother who adopted her partner’s donor-conceived child might feel that her role as a parent is illusory if the child is able to locate his or her biological father, despite the conscious efforts of the non-biological parent to become a mother. In this sense, anonymity is critical to promoting the legitimacy of the non-biological mother’s parental status by dis-

⁴⁴ *Id.* at 599.

⁴⁵ *Id.*

⁴⁶ See Sheila M. O’Rourke, *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 BERKELEY J. GENDER L. & JUST. 140, 141 (2013).

⁴⁷ Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 137 (2014).

tancing the sperm donor, and thus minimizing the chances that the child will view the donor as a father.

Those who oppose anonymously donated sperm must think critically about alternative avenues to encourage donation for families who cannot conceive absent the assistance of reproductive technologies. To ensure an adequate supply of sperm for these families, and to ensure that their rights are protected beyond conception, anonymity must remain a viable option.

II. CONSTITUTIONAL CHALLENGES TO ANONYMOUSLY DONATED SPERM: A CHILD'S FUNDAMENTAL "RIGHT TO KNOW" DONOR-IDENTIFYING INFORMATION

Opponents of anonymous donation often ground their arguments in constitutional jurisprudence. However, constitutional law will fail to advance the interests of donor-conceived people. Instead of relying on the courts, advocates should use the media to encourage reformation of donation policies.

Many people conceived through the use of donated sperm argue that they have a fundamental constitutional right to know their genetic heritage through access to donor-identifying information.⁴⁸ However, challenging anonymous insemination policies through constitutional jurisprudence likely will fail for three reasons: (1) sperm banks cannot be considered state actors and thus are immune from constitutional scrutiny; (2) a plaintiff likely would be unable to establish standing to bring a constitutional claim; and (3) the Supreme Court is unlikely to recognize a substantive due process right to donor-identifying information for children conceived through artificial insemination.

A. *State Action Doctrine as an Impediment to Constitutional Challenges by Donor-Conceived Children*

Children conceived through artificial insemination likely cannot establish that sperm banks are state actors for purposes of enjoining anonymity policies using constitutional law. The relevant portions of the Constitution on which the opponents of donor anonymity would rely limit only the actions of state and government officials and do not limit the actions of private entities.⁴⁹ This "state

⁴⁸ See, e.g., Jennifer Ludden, *Donor-Conceived Children Seek Missing Identities*, NPR (Sept. 18, 2011, 4:01 AM), <http://www.npr.org/2011/09/18/140477014/donor-conceived-children-seek-missing-identities>.

⁴⁹ See U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state

action” doctrine effectively immunizes private actors from constitutional scrutiny.⁵⁰ An action performed by a private individual or entity is generally subject to constitutional review only if (1) the challenged act resulted from the exercise of a right or privilege having its source in state authority; and (2) the private party charged with the constitutional deprivation can be fairly characterized as a state actor.⁵¹

When determining whether the challenged act resulted from the exercise of a right having its source in state authority, the Supreme Court has asked whether the state provided the means that caused the deprivation of a constitutional right.⁵² For example, in *Lugar v. Edmonson Oil Co.*, the Court held that the right to peremptory challenges had its source in state authority because such challenges derived from federal statutes and case law.⁵³ Similarly, in *Shelley v. Kraemer*, the Court held that judicial enforcement of a racially restrictive covenant had its source in state authority because the judiciary derives its authority to adjudicate private contractual matters between parties from state and federal law.⁵⁴

Actions that take place in an intimate relationship, within the home, or between private individuals divorced from governmental regulation are generally considered private actions that do not have their source in state authority. Fewer than half of the states in the United States have enacted regulatory legislation regarding sperm banks, leaving a majority of states without a statute expressly granting sperm banks the authority to provide donated sperm.⁵⁵ Moreover, the amended 2002 UPA does not address the authority of sperm banks to enact anonymous donation policies, and instead merely provides guidelines for determining whether a donor is a legal parent in certain cases.⁵⁶ In fact, statutory research suggests that Washington State is the only state that has enacted a law requiring full disclosure of donor information upon the child’s eight-

deprive any person of life, liberty, or property without due process of law.”) (emphasis added).

⁵⁰ See generally *Civil Rights Cases*, 109 U.S. 3 (1883).

⁵¹ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

⁵² *Id.*

⁵³ *Id.* at 941-42.

⁵⁴ *Shelley v. Kraemer*, 334 U.S. 1, 19-22 (1948).

⁵⁵ See Pi, *supra* note 15, at 384 (“Only twenty-four states have created regulatory legislation addressing the operations of sperm banks.”); see also Christina M. Eastman, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 *MCGEORGE L. REV.* 371, 380 (2010) (explaining that only seven states have adopted the exact language of the 2002 amended UPA).

⁵⁶ See UNIF. PARENTAGE ACT § 702 (amended 2002).

eenth birthday.⁵⁷ Thus, the majority of sperm banks in the United States are unregulated and do not derive their right to provide anonymously donated sperm from statute or governmental authority.

A sperm bank's acceptance of anonymously donated sperm also fails the second "state action" prong because the bank cannot "in all fairness" be considered a state actor. In this part of the analysis, a court assesses the extent to which the state or federal government is entrenched within the private entity's actions. A court will look to whether the private party relies upon state governmental assistance and benefits, whether the party is performing an exclusive governmental function, and whether the alleged injury was aggravated in a unique way by incidents of governmental authority.⁵⁸

A private party that receives government funding and is intimately entangled with the state or federal government can be considered a state actor. In *Burton v. Wilmington Parking Authority*, the Supreme Court held that a private restaurant was sufficiently entangled with the State of Delaware so as to be considered a state actor and subject to constitutional scrutiny.⁵⁹ The restaurant was located on land owned by the City of Wilmington, and the owner utilized a publicly-owned parking garage for his patrons.⁶⁰ The Court noted that the "peculiar relationship" between the restaurant and the city-owned parking facility provided each entity with "mutual benefits" that sufficiently entrenched the City of Wilmington within the actions of the private restaurant.⁶¹

Unlike the parking garage in *Burton*, United States sperm banks are largely divorced from governmental regulations and do not receive significant state and federal funding.⁶² The FDA does mandate specific recordkeeping guidelines for sperm banks but many United States sperm banks are for-profit companies that do not receive state or federal funds.⁶³ Thus, sperm banks in the

⁵⁷ See WASH. REV. CODE § 26.26.750 (2016).

⁵⁸ See generally Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1389-90 (2006).

⁵⁹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

⁶⁰ *Id.* at 719.

⁶¹ *Id.* at 724.

⁶² See Critser, *supra* note 10, at 55.

⁶³ See generally Rene Almeling, *The Unregulated Sperm Industry*, N.Y. TIMES (Nov. 30, 2013), <http://www.nytimes.com/2013/12/01/opinion/sunday/the-unregulated-sperm-industry.html>; see also *Why Choose TSBC Above Other Sperm Banks?*, THE SPERM BANK OF CALIFORNIA, <http://donors.thespermbankofca.org/why-choose-tsbc> (explaining that TSBC is the only non-profit sperm bank in the United States).

United States cannot be considered sufficiently entrenched in state and federal government to be considered state actors.

Finally, sperm banks do not perform a function traditionally reserved to state and federal governments. The Supreme Court has recognized certain political and community establishment rights as traditional governmental functions, including the regulation of political primaries⁶⁴ and the ability to establish local communities.⁶⁵ However, a person's ability to reproduce derives from private and individual choices existing outside of governmental purview. In *Eisenstadt v. Baird*, the Supreme Court recognized that "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁶⁶ Assisted reproduction facilitated by a sperm bank cannot be considered a traditional governmental function because the Supreme Court has expressly recognized the decision to reproduce as a private choice that transcends governmental influence.

Moreover, the injury caused to children conceived through artificial donation—an inability to know their genetic heritage—is not aggravated in a unique way by incidents of governmental authority. Unlike in *Shelley v. Kraemer*, where the Court held that enforcement of a racially restrictive covenant would violate the Constitution because of the judiciary's involvement in the enforcement process,⁶⁷ no branch of government is involved in enforcing the anonymity policies of sperm banks located in the United States.

The government is simply not entrenched enough in sperm bank policies and regulations to meet the state action threshold for constitutional scrutiny. Therefore, the state action doctrine effectively immunizes sperm banks from constitutional suits.

B. Standing Doctrine as an Impediment to Constitutional Challenges by Donor-Conceived Children

Even if donor-conceived children could overcome the state action barrier, they likely could not establish standing to bring a federal constitutional claim to enjoin sperm bank anonymity policies. Standing doctrine, grounded in the Article III limitation that fed-

⁶⁴ *Terry v. Adams*, 345 U.S. 461 (1953).

⁶⁵ *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁶⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁶⁷ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

eral courts adjudicate only actual cases and controversies,⁶⁸ requires a plaintiff to assert a concrete injury that is fairly traceable to the challenged state action and likely to be redressed by the requested relief.⁶⁹

The inability to access donor-identifying information—such as current contact information, medical history, and physical characteristics—certainly would be considered a concrete injury for standing purposes.⁷⁰ However, a plaintiff challenging sperm bank anonymity policies likely would be unable to establish the requisite causation requirement necessary to show standing because the causal link is too attenuated.⁷¹ In *Allen v. Wright*, the Court denied standing to a class of plaintiffs suing the Internal Revenue Service (“IRS”) for granting tax-exempt status to racially segregated private schools, alleging that the IRS’s actions endorsed racial segregation in such schools.⁷² The Court noted that the causal link between the IRS’s conduct and the desegregation of schools was “attenuated at best” and the plaintiffs had not established that a “withdrawal of a tax exemption from any particular school would lead the school to change its policies.”⁷³ The Court further noted that it was “speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status.”⁷⁴ While I do not endorse the outcome in this particular decision, its reasoning reveals that the actions of third parties that contribute to the plaintiff’s injury may attenuate the causal chain to the point that standing is unavailable to the plaintiffs.

Using this same reasoning, a donor-conceived individual likely would not be able to establish that sperm bank anonymity policies directly cause the injury of being unable to obtain donor-identifying information because the donors themselves are third parties that attenuate the causal chain. In many sperm bank policies, the onus is on the donor to inform the banks of updated contact infor-

⁶⁸ *Allen v. Wright*, 468 U.S. 737, 750 (1984).

⁶⁹ *Id.* at 751.

⁷⁰ See generally *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981) (holding that adoptees do not have a fundamental right to examine their adoption records and implying, through the court’s adjudication on the merits, that the plaintiffs had standing).

⁷¹ See *Allen*, 468 U.S. at 739 (finding that respondents lacked standing to challenge the IRS’s implementation of its tax-exemption policies because, *inter alia*, causation was too attenuated).

⁷² *Id.* at 744-45.

⁷³ *Id.* at 757-58.

⁷⁴ *Id.* at 758.

mation, employment status, and medical information.⁷⁵ Even if a sperm bank allowed donor-conceived individuals to access donor-identifying information, it is speculative to assume either that the donor has properly informed the sperm bank of updated contact and personal information, or that the child would be able to locate the donor based on identifying information the donor provided eighteen years prior. Thus, the donor's responsibility to inform sperm banks of updated identifying information erodes the causal link between the bank's anonymity policy and the plaintiff's asserted harm of being unable to obtain donor-identifying information. This attenuation of the causal link makes it unlikely that opponents of anonymity policies could demonstrate standing to seek constitutional review of such policies.

C. Due Process Arguments as an Impediment to Constitutional Challenges by Donor-Conceived Children

In addition to state action and standing hurdles, plaintiffs likely would be unable to challenge anonymous sperm donation policies under substantive due process jurisprudence. The Supreme Court has articulated that the Due Process Clause of the Fourteenth Amendment protects fundamental rights that are deeply rooted in this nation's history and tradition and "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed," even when such rights are not expressly enumerated in the text of the Constitution.⁷⁶ The Supreme Court applies strict scrutiny to state action that intrudes upon fundamental rights and requires a compelling state interest and narrowly tailored means for such action to pass constitutional muster.⁷⁷

The Supreme Court has never deemed a right to know one's genetic heritage to be fundamental.⁷⁸ In *Alma Society v. Mellon*, a plaintiff class of adopted individuals filed suit to enjoin a New York statute that required the sealing of adoption records absent a showing of good cause for release.⁷⁹ The Second Circuit rejected the

⁷⁵ See generally Mark Ballantyne, Comment, *My Daddy's Name Is Donor: Evaluating Sperm Donation Anonymity and Regulation*, 15 RICH. J.L. & PUB. INT. 569 (2012).

⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁷⁷ *Id.*

⁷⁸ *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225, 1231-32 (2d Cir. 1979); see Kathryn J. Giddings, *The Current Status of the Right of Adult Adoptees to Know the Identity of Their Natural Parents*, 58 WASH. U. L. REV. 677, 696-97 (1980).

⁷⁹ *Alma Soc'y*, 601 F.2d at 1227.

plaintiffs' argument that the statute violated the Due Process Clause by infringing upon a right to learn the identity of one's genetic heritage, instead upholding it as legitimate to foster relationships between the adoptee and the adopted family and rationally related to achieve that goal.⁸⁰ In its holding, the Second Circuit essentially viewed anonymity as a tool crucial to fostering a relationship between the intentional adoptive parents and the child.⁸¹ The court also valued the relationship between the adoptive parents and the child over the child's alleged right to seek information about genetic heritage.⁸² The Supreme Court denied certiorari to review the Second Circuit's holding in 1979.⁸³ Two years later, the Illinois Supreme Court similarly held that the ability to seek information about one's genetic heritage was not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.⁸⁴ Because the Supreme Court denied certiorari to review both the decisions of the Second Circuit and the Illinois Supreme Court and has never formally ruled on the subject, it is unlikely that the Court will ever be willing to recognize a right to know donor-identifying information as fundamental under substantive due process jurisprudence.

By contrast, the Supreme Court has deemed fundamental the right of parents to the "care, custody, and control" of their children,⁸⁵ which includes the right of fit parents to make decisions for their children without government interference. The Court would likely hold that permitting minor children to receive donor-identifying information without their parents' consent infringes upon a parent's fundamental decision-making rights, because when a non-fundamental right conflicts with a fundamental right, the fundamental right prevails. For example, in *Troxel v. Granville*, the Court struck down section 26.10.160(3) of the Washington Revised Code, which provided authority for "any person" to petition for visitation

⁸⁰ *Id.* at 1233 (noting that the New York statutes, in providing for release of the information on a showing of good cause, "do no more than to take these other relationships into account").

⁸¹ *Id.* at 1232 ("[E]ven though appellants are adults we must assume that they are still part of their adoptive families, families still in existence as to each of them which might be adversely affected by the release of information as to the names of natural parents or the unsealing of the adoption records.").

⁸² *Id.*

⁸³ *Alma Soc'y, Inc. v. Mellon*, 444 U.S. 995 (1979).

⁸⁴ *In re Roger B.*, 418 N.E.2d 751, 754 (Ill. 1981) ("Although information regarding one's background, heritage, and heredity is important to one's identity, it does not fall within any heretofore delineated zone of privacy implicitly protected within the Bill of Rights.").

⁸⁵ *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000).

rights of a child whenever it might serve a child's best interest.⁸⁶ The Court held that the statute violated the Due Process Clause because it gave no weight to a "parent's estimation of the child's best interest"⁸⁷ and instead favored grandparent visitation at the expense of the parent's fundamental right. While *Troxel* presented the separate issue of grandparent visitation, the Court is equally likely to view a right to access donor-identifying information as infringing upon a parent's fundamental right to make decisions for his or her child by ignoring the parent's estimation of what is in the child's best interest.

Constitutional jurisprudence regarding state action, standing, and substantive due process presents serious constitutional hurdles for those seeking information about their donor's identity. Therefore, donor-conceived individuals should use the media to influence state legislatures to enact legislation regarding sperm donor anonymity policies. Such legislation could effectively balance a child's right to know with a donor's expectation of privacy without involving the courts.

III. CANADIAN CONSTITUTIONAL RECOGNITION OF DONOR-CONCEIVED CHILDREN'S "RIGHT TO KNOW"

While constitutional claims in the U.S. will likely fail to advance the interests of individuals who oppose anonymous donation, Canadian constitutional law might be more amenable to their arguments. In 2011 the Supreme Court of British Columbia, the province's superior trial court,⁸⁸ briefly held that anonymous donation policies violated the rights of donor-conceived children. While the Court of Appeal of British Columbia—the province's highest court—later overturned that decision, this section highlights how constitutional arguments have been tailored to advance the rights of donor-conceived children living outside of the United States.

Olivia Pratten, a citizen of British Columbia conceived through artificial insemination, sought access to records regarding her donor's identifying information from the doctor who had performed the insemination on her mother.⁸⁹ Pratten learned that

⁸⁶ *Id.* at 57.

⁸⁷ *Id.*

⁸⁸ *Supreme Court, COURTS OF B.C.*, http://www.courts.gov.bc.ca/supreme_court/ [<https://perma.cc/KLQ9-YAW4>].

⁸⁹ *Pratten v. British Columbia (Att'y Gen.)*, 2011 BCSC 656, para. 1-2 (Can. B.C.), *rev'd in part Pratten v. British Columbia (Att'y Gen.)*, 2012 BCCA 480 (Can. B.C.), <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf> [<https://perma.cc/EP54-5MJB>].

records related to her conception were destroyed pursuant to the rules of the College of Physicians and Surgeons of British Columbia, which authorized sperm banks to destroy records pertaining to artificial insemination six years after the last recorded entry.⁹⁰ Pratten brought a constitutional suit against the College of Physicians and Surgeons seeking to enjoin the record destruction policy.⁹¹ On appeal to the Supreme Court of British Columbia, Pratten argued that permitting adopted children to trace their genetic heritage under existing provincial legislation,⁹² while prohibiting donor-conceived children like her from accessing such information, violated her equal protection rights under section 15 of the Canadian Charter of Rights and Freedoms,⁹³ and her liberty and self-security rights under section 7 of the Charter.⁹⁴

Justice Adair, writing for the court, agreed with Pratten.⁹⁵ Justice Adair recognized that “donor offspring experience sadness, frustration, depression and anxiety—in other words, they suffer psychological and psychosocial difficulties—when they are unable to obtain information. They feel the effects both for themselves and, when they become parents, for their own children.”⁹⁶ Justice Adair ultimately concluded that by treating adopted children and donor-conceived children differently, the manner of their conception “gave rise to a difference in treatment that in turn caused social disadvantage by perpetuating prejudice or stereotyping,” in violation of section 15 of the Charter.⁹⁷ Justice Adair articulated the law as making a classification between adopted individuals and donor-conceived individuals, noting that while parents have an important interest in decision-making regarding the level of detail given to their donor-conceived children,⁹⁸ donor offspring are par-

⁹⁰ *Id.* at para. 2.

⁹¹ *Id.* at para. 4.

⁹² *Id.* at para. 3 (describing provincial legislation of British Columbia that mandates strict record-keeping guidelines regarding information about the biological origins and family history of adopted individuals).

⁹³ See Constitution Act, 1982, Schedule B, Pt. I, s. 15 (U.K.), reprinted in R.S.C. 1985, app II, no 44 (Can.) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

⁹⁴ *Pratten*, 2011 BCSC 656, at para. 7.

⁹⁵ *Id.* at para. 111.

⁹⁶ *Id.*

⁹⁷ See *id.* at para. 240-58; *id.* at para. 268 (“I conclude further that excluding donor offspring from the benefits and protections of the *Adoption Act* and *Adoption Regulation* creates a distinction between adoptees and donor offspring, and that distinction is based on . . . manner of conception.”).

⁹⁸ *Id.* at para. 111(h).

ticularly vulnerable because they do not have “the benefit of the kind of . . . legislative support provided to and for adoptees in B.C.”⁹⁹ The decision effectively favors a child’s interests in donor information over parental authority to control the child’s upbringing and the sperm donor’s right to reproductive privacy. This case highlights a growing movement outside of the United States that favors the rights of donor-conceived children over the privacy interests of the donor.

Pratten’s victory was short-lived. In 2012, the Attorney General appealed the decision to the British Columbia Court of Appeal, which overturned the lower court’s decision and held that the Charter of Rights and Freedoms “does not guarantee a positive right to know one’s past.”¹⁰⁰ The Court of Appeal implied that adoptees experience far greater negative effects from being unable to know information about their genetic heritage than do donor-conceived children. The Court relied on this theory when writing, “it is open to the Legislature to provide adoptees with the means of accessing information about their biological origins without being obligated to provide comparable benefits to other persons seeking such information.”¹⁰¹

Despite being overturned by the Court of Appeal, the decision of the Supreme Court of British Columbia reveals how equal protection jurisprudence can be used to advance the interests of donor-conceived children outside of the United States. Similar equal protection arguments likely would fail in the United States, however, because donor-conceived children likely would not be considered a suspect class under *Carolene Products*’ footnote four.¹⁰² Thus, U.S. courts would likely apply rational basis scrutiny to policies denying donor-conceived children access to their donor’s records. Under rational basis scrutiny, courts defer to the legislature’s purpose in enacting such policies, requiring only a legitimate state interest and means rationally related to effectuate such interest.¹⁰³ Under rational basis scrutiny, such policies would be upheld under the U.S. Constitution.

⁹⁹ *Id.* at para. 111(i).

¹⁰⁰ Pratten v. British Columbia (Att’y Gen.), 2012 BCCA 480, para. 7 (Can. B.C.) (internal quotation marks omitted), <http://www.canlii.org/en/bc/bcca/doc/2012/2012bcc480/2012bcc480.pdf> [<https://perma.cc/PEA4-ZQQR>].

¹⁰¹ *Id.*

¹⁰² *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (introducing the concept that discrimination against discrete and insular minorities warrants heightened judicial scrutiny).

¹⁰³ *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

IV. WASHINGTON STATE'S APPROACH TO SPERM DONATION: A
SUCCESSFUL BALANCE OF ANONYMITY AND PRIVACY

While anonymous donation policies promote crucial pecuniary, family unity, and privacy interests, donor-conceived children should be afforded access to some information about their genetic heritage upon their eighteenth birthday. The United States' sperm donation industry should model its policies after Washington State's newly enacted insemination law, which safeguards the rights of donor-conceived children while protecting a donor's choice to keep his information private. In this section, I argue that Washington's model effectively balances the rights of the donor-conceived individual with that of the donor, and therefore should serve as a prototype for donation policy across the United States.

In 2011, the Washington State legislature passed a law requiring full disclosure of donor-identifying information and medical history upon the child's eighteenth birthday.¹⁰⁴ Under this legislation, however, the donor can choose to keep his identifying information private by signing an affidavit of nondisclosure at the time of donation.¹⁰⁵ Even if the donor signs the nondisclosure affidavit, the child is entitled to receive information regarding the donor's medical history upon his or her eighteenth birthday.¹⁰⁶

Unlike the majority approach to artificial insemination, which presumes a right to anonymity unless the donor expressly consents to a release of his information, Washington's model presumes a right to donor-identifying information unless the donor affirma-

¹⁰⁴ The statute reads in its entirety:

(1) A person who donates gametes to a fertility clinic in Washington to be used in assisted reproduction shall provide, at a minimum, his or her identifying information and medical history to the fertility clinic. The fertility clinic shall keep the identifying information and shall disclose the information as provided under subsection (2) of this section.

(2)(a) A child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to identifying information of the donor who provided the gametes for the assisted reproduction . . . , unless the donor has signed an affidavit of nondisclosure with the fertility clinic that provided the gamete for assisted reproduction.

(b) Regardless of whether the donor signed an affidavit of nondisclosure, a child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to non-identifying medical history of the donor who provided gametes for the assisted reproduction that resulted in the birth of the child.

WASH. REV. CODE § 26.26.750 (2016).

¹⁰⁵ *Id.* § 26.26.750(2)(a).

¹⁰⁶ *Id.* § 26.26.750(2)(b).

tively withholds such information by signing the nondisclosure affidavit. By reversing the standard presumption, Washington's donation statute protects the rights of donor-conceived children prior to their conception. This is especially appropriate because it occurs at a time when the child cannot make his or her own decisions regarding a right to donor-identifying information. In addition, Washington's donation statute balances the right of the donor by allowing the donor to assert his privacy interests at the time of the donation. This model recognizes the virtues of anonymity by allowing the donor to make a decision about the release of his information, while permitting the child to obtain donor-identifying information (or at least medical history) upon his or her eighteenth birthday. Under this model, if a donor fails to sign the nondisclosure affidavit, he implies consent to a release of his information and thus permits access to basic identifying information without infringing upon his privacy rights.

Washington's statute admirably attempts to balance donors' rights with their offspring's interest in obtaining information about genetic heritage. However, the model continues to give donors complete decision-making power at the time of donation by affording them the right to sign a nondisclosure affidavit, thereby subjecting their offspring to a decision made before the date of their conception. While donor-conceived children are always afforded access to medical history information under this approach, it continues to subordinate the wishes of the child to that of the sperm donor. Nevertheless, the Washington model propels the industry in the right direction by presuming open donation and placing a hurdle—albeit a small one—in front of the donor if he wishes to maintain anonymity. Even if Washington's approach is more symbolic in nature than meaningful nationwide, it should be heralded as a step forward in the attempt to balance donor control and privacy with the legitimate identity interests of donor-conceived individuals.

V. CONCLUSION

In June of 2010, when I was 22 years old, I contacted the sperm bank that provided the gamete to my mothers and read my five-digit identifying number to an employee on the receiver. She put me on hold for approximately two minutes and then nonchalantly told me that my number matched that of a 16-year-old girl living in New York City—a half-sibling living in the same city as me. My first thought was how strange it felt to call this person my “half-

sister.” To me, she was just another person who shared my genetic heritage.

I decided to call the sperm bank again five years later in 2015 to verify the accuracy of that information in preparation for this article. I spoke to a doctor at the facility who told me that his records indicated the existence of one girl born from the particular gamete in 1989. I realized that he was describing me, although his records had an incorrect date of birth (I was born in 1988). I corrected my date of birth, and I asked him about a half-sister. He informed me that his records did not reflect her existence. When I relayed the information I had received five years prior, he told me that the company had moved facilities and reiterated the difficulty of maintaining accurate information about half-siblings due to lax reporting requirements. He also suggested that I check the Donor Sibling Registry because it was “entirely possible that another person was born from that same gamete.”

Hearing that the sperm bank’s records did not reflect the existence of a half-sibling after all—or at least could not conclusively establish her existence—highlighted the unfortunate role that anonymity plays in perpetuating a system of lax record-keeping practices. The doctor’s unconcerned tone of voice in relaying this information also reflected how anonymity decreases the importance of genetics in one’s perception of family. Most importantly, hearing this information made me realize that the people who raised me, including the family friends with whom I had shared Thanksgiving and Christmas for over twenty years, are the people who have contributed to my identity. This realization helped to temper the sadness and confusion I felt upon learning that I may not have a biological half-sister.

While a sperm donation model premised on anonymity certainly does have pitfalls, the benefits of this model still outweigh the negatives. Anonymity must be preserved as an option to protect non-traditional family structures and the relationships formed within them. States should consider creating sperm donation laws modeled on Washington State’s insemination statute, which balances a child’s request for basic identifying information with a donor’s fundamental right to privacy. The model should presume a right to donor-identifying information upon a child’s eighteenth birthday, yet should seal donor-identifying information if the donor expressly forbade such disclosure at the time of donation. Information related to medical history and genetic disposition should never be sealed from donor-conceived children.

Sperm donation, and the anonymity that cloaks many donors, has afforded me the opportunity to be born into a non-traditional family. It has also helped to develop my own sense of self by allowing me to choose my identity without the guidelines often imposed by genetics. Most importantly, it has taught me that I can choose to create a family with whomever I love.

FAST FOOD SWEATSHOPS: FRANCHISORS AS EMPLOYERS UNDER THE FAIR LABOR STANDARDS ACT

Thomas J. Power[†]

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The truly powerful feed ideology to the masses like fast food . . . while they dine on the most rarified delicacy of all: impunity. —Naomi Kline¹

I. INTRODUCTION

On November 29, 2012, hundreds of fast food workers walked off their jobs in New York City with a unified demand that their hourly wages be increased to \$15.² The movement quickly spread nationally as workers stood up to the corporations that make billions in profit off of their cheap labor.³ The fast food workers put their plight on the national radar—the public soon got a glimpse of the conditions in a Taco Bell kitchen and the poverty wages paid to workers at KFC. While the movement persists, however, fast food workers continue to be abused while the large corporations that employ them remain impervious to challenges under the Fair Labor Standards Act (“FLSA”).

But why do fast food worker advocates struggle to hold behemoth corporations liable for violations of federal employment law? This note will answer that question, while comparing fast food workers to agricultural and garment sweatshop workers, who have had more success in lawsuits against their corporate employers. My intention is to demonstrate that the subcontracting structure that proliferates though the garment and agricultural industries is roughly equivalent, for the purposes of finding that a business owner⁴ is an employer, to the franchising scheme that currently

¹ Naomi Klein, *Baker Does Bono*, NAOMIKLEIN.ORG (Dec. 20, 2003), <http://www.naomiklein.org/articles/2003/12/baker-does-bono>.

² See *About Us*, FIGHT FOR \$15, <http://fightfor15.org/november10/about-us/> [<https://perma.cc/3FQT-FDHD>].

³ See IRENE TRUNG ET AL., NAT’L EMP. LAW PROJECT, *THE GROWING MOVEMENT FOR \$15* (2015), <http://www.nelp.org/publication/growing-movement-15/> [<https://perma.cc/JNN8-ULWX>].

⁴ This note uses the term “business owner” to refer to the business entity at the top of the corporate ladder. Throughout this note, “business owner” is used to refer to garment manufacturers, farm owners, and fast food franchisors. While the middlemen who perform work at lower levels of the corporate chain are oftentimes owners of independent businesses, these middlemen will not be referred to as “business owners” to avoid confusion.

dominates the fast food industry. To do so, I will examine the predominant employment structures of all three industries, with the majority of my focus on the fast food industry, in order to identify the relationship between the low-wage workers at the bottom of the structure and the business owners on top. I will also analyze FLSA joint employment jurisprudence within the three industries to articulate a litigation strategy for advocates representing fast food workers who want to sue their corporate employers. Ultimately, to be successful in this fight, the American public must see fast food kitchens for what they are—modern American sweatshops.⁵

Business owners within the agricultural and garment industries evolved their structures in the nineteenth and twentieth centuries to minimize risk and evade liability.⁶ One prominent component of this sophisticated evolution involved the use of a middleman, often an independent contractor, who stood between the business owner at the top of the corporate ladder and the low-wage workers at the bottom.⁷ This use of intermediaries in the workplace was commonly referred to in the nineteenth century as the “sweating system,” while the workplaces in this system were called “sweating shops.”⁸ The middleman, or contractor, was referred to as the “sweater,” while the low-wage workers were colloquially known as the “sweated” or “oppressed.”⁹ Well-intentioned efforts by worker advocates to attack this system of subcontracting conflicted with the notorious constitutional right to contract that came from *Lochner*.¹⁰

⁵ The phrase “modern American sweatshop” was coined in Bruce Goldstein et al.’s article, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, which discusses workplaces that utilize an intermediary to supervise work between business owners and low-wage workers. See generally Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

⁶ See *id.* at 987-88.

⁷ “It also meant that manufacturers sought to insulate themselves from the legal consequences of contractor abuse. Contracting was therefore done not just to implement an economic division of labor, but also to enforce a legal division of accountability.” Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 15-16 (2009).

⁸ See BRUCE GOLDSTEIN & CATHERINE K. RUCKELSHAUS, LESSONS FOR REFORMING 21ST CENTURY LABOR SUBCONTRACTING: HOW 19TH CENTURY REFORMERS ATTACKED “THE SWEATING SYSTEM” 1, <http://nelp.org/content/uploads/2015/03/Lessons-For-Reforming-21st-Century-Labor-Subcontracting-How-19th-Century.pdf> [<https://perma.cc/8DHD-LGRN>]

⁹ *Id.* at 2.

¹⁰ See *id.* at 4; *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that a state labor law that prohibited bakery employees from working extremely onerous hours was in violation of *Lochner*’s freedom of contract, a right entitled to him under the

The FLSA was passed at the height of the New Deal, and in addition to articulating a federal minimum wage and overtime protections, the FLSA defined “employ” in a supremely expansive way.¹¹ Subsequent FLSA jurisprudence utilized this expansive definition to remedy existing problems with the subcontracting system in workplaces where low-wage workers were “sweated” in the name of profit motives.¹² From this grew “joint employment” doctrine, which recognizes that workers are often employed by several employers¹³ in a single operation.¹⁴ As a litigation tool, joint employment doctrine allows workers to assert several employers as defendants in a single complaint, effectively increasing chances of recovery and allowing workers to collect damages from diverse business entities that may be better suited to comply with a judgment for monetary damages.¹⁵

Over the years, the joint employment doctrine has been utilized to attack business owners who use subcontractors to indirectly abuse their workers. Worker advocates in many industries have recently had relative success utilizing this doctrine.¹⁶ As franchising, a

Due Process Clause of the 14th Amendment), *overruled by* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952) *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

¹¹ “‘Employ’ includes to suffer or permit to work.” Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014) (enacted in 1938).

¹² *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947). In *Rutherford*, the Supreme Court considered a group skilled “boners” who worked at a slaughterhouse. The Court found that because the workers performed jobs that were integral to the success of the slaughterhouse and were controlled by the operational systems of the slaughterhouse, they were covered as employees under the Fair Labor Standards Act. *Id.* at 729-30.

¹³ “‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.” Fair Labor Standards Act, 29 U.S.C. § 203(d) (2014) (enacted in 1938).

¹⁴ “A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer.” 29 C.F.R. § 791.2(a) (2000).

¹⁵ “By imposing full liability for unpaid or underpaid wages on all employers, the joint employer rule helps ensure that workers will be paid their lawful wages.” Richard J. Burch, *A Practitioner’s Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L.J. 393, 405 (2002).

¹⁶ *See, e.g.,* Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003) (discussing use of joint employment doctrine within the New York garment industry and specifically finding that functional control can be sufficient for determining that an entity is an employer under the FLSA); Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973) (considering the use of joint employment doctrine by harvest workers to hold a farming company jointly liable with the crew leader contractors they utilized); NLRB v. Gass, 377 F.2d 438, 442 (1st Cir. 1967) (using joint employment

particular form of subcontracting considered below, has grown in popularity, courts have balked when faced with the question of whether a franchisor can be an employer under the FLSA.¹⁷ Recent trends, both within FLSA and the National Labor Relations Act (“NLRA”) jurisprudence, suggest that courts might soon be willing to reconsider whether franchisors can be employers of workers at franchised locations.¹⁸ This note will trace and amplify those developments, while drawing from successful litigation in the garment and agricultural industries to form a litigation strategy for fast food workers suing their corporate employers.

II. FLSA’S BROAD EMPLOYMENT DEFINITION

Though many have contributed to the scholarship on FLSA’s broad definition of “employ,” this note would be remiss if it accepted the current jurisprudence defining “employ” without first elaborating on the congressional intent behind it.

The FLSA defines “employ” as including “to suffer or permit to work.”¹⁹ The Supreme Court has twice traced this language back to early efforts to eliminate child labor.²⁰ Those no-nonsense laws were specifically engineered to end child labor and impose liability on any entity that was aware of child labor, yet allowed it to persist.²¹ The broad language was utilized to avoid confusion—Congress wanted to cut through obfuscating levels of the corporate ladder.²²

Congress’s inclusion of this language in the FLSA was no coincidence. This pro-labor New Deal legislation was meant to aid

doctrine to find both a poultry company and a contracted trucking company were joint employers of the employee truck drivers); *see also* Katarina E. Wiegele, *Franchisors and the Specter of Joint Employment Liability for Franchisee Misconduct*, BLOOMBERG BNA (Sep. 19, 2014), <http://www.bna.com/franchisors-specter-joint-n17179895132/> [https://perma.cc/C4SW-S5VH].

¹⁷ *See, e.g.*, *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014); *Chen v. Domino’s Pizza, Inc.*, No. 09-107, 2009 U.S. Dist. LEXIS 96362, at *14 (D.N.J. Oct. 16, 2009).

¹⁸ *See* *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, *4 (Aug. 27, 2015) (redefining the joint employment standard under the National Labor Relations Act); *see also* *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 (S.D.N.Y. 2012) (granting Plaintiff’s motion to file an amended complaint to add corporate defendants Domino’s Pizza Inc., Domino’s Pizza LLC, and Domino’s Pizza Franchising LLC to FLSA complaint); *Cordova v. SCCF, Inc.*, No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, *16 (S.D.N.Y. July 16, 2014) (denying a franchisor’s motion to dismiss).

¹⁹ Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014) (enacted in 1938).

²⁰ *See generally* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *see* Goldstein et al., *supra* note 5, at 1115-16.

²¹ *See* Goldstein et al., *supra* note 5, at 1030-37.

²² *Id.* at 1032.

abused workers in their pursuit of workplace justice.²³ Subsequent case law, however, impacted by corporate interests, obscured the FLSA's broad reach, as trends that emphasized notions of physical control as necessarily indicative of an employment relationship dominated the jurisprudence.²⁴ The proper standard, imputed from congressional intent, contemplates for workplaces where the business owner does not directly control the workers or the workplace, but rather where the employer knows about and can prevent work from being performed.²⁵

Worker advocates are now somewhat constricted by a several decade long judicial misapplication of the FLSA's definition of "employ." Litigators using this definition, however, must understand this history so that arguments under the FLSA's broad employment roots make their way into legal briefs. Had fast food franchising been a business practice when the FLSA was written, Congress clearly would have considered these corporations as employers of workers at franchised locations.

III. FUNCTIONAL SIMILARITY OF MIDDLEMEN IN THE GARMENT, AGRICULTURAL, AND FAST FOOD INDUSTRIES

This section of the note will examine the prevailing business structure of the garment and agricultural industries to (1) identify parallels between these structures and the franchising system and (2) isolate themes in litigation that will be helpful for worker advocates to utilize against fast food franchisor corporations.

²³ *Id.* at 1100. ("The background and legislative history of the statutory definitions afford particularly persuasive evidence that Congress did not mean to exclude workers from the scope of this Act because they might be regarded as independent contractors for some purposes under common law concepts. In the original Black-Connery bill, which was not to be applicable to employers employing less than a prescribed number of employees, it was provided that the administrative board should have power to define and determine who were employees of a particular employer, and there was an explicit direction that the definition should be designed 'to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.' A broad definition of 'employee,' including 'any individual suffered or permitted to work by an employer,' subsequently took the place of this provision.").

²⁴ See *Rutherford*, 331 U.S. at 728-29 (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)) ("The definition of 'employ' is broad. . . . 'This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'"); cf. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (articulating a test for joint employment that was probative of whether the putative employer exerted physical control over workers).

²⁵ See Goldstein et al., *supra* note 5, at 1136-37.

Garment and agricultural business owners typically utilize intermediary subcontractors to shield themselves from liability.²⁶ To build this shield, business owners find contractors who are willing to complete the work needed at the lowest price possible.²⁷ Fierce price competition between a large supply of contractors ensures that the business owner will get a favorable deal, while subcontractors are forced to take deals so unfavorable, the only way to make a profit is to sweat their workers.²⁸ The contractors are the direct source of physical abuse, while the business owner pleads ignorance because of an arm's-length relationship with the low-wage workers. The genius of the subcontracting system is that it allows business owners to make huge profits by manipulating contracts and indirectly exploiting workers, while evading FLSA liability.

Jurisprudence under the FLSA has deviated from Congress's initial intent and now utilizes what courts refer to as the "economic realities" test to determine whether an entity is an employer under the Act.²⁹ Under this test, an employment relationship is said to be determined based on the economic realities of the workplace.³⁰

Two competing lines of cases emerged that articulate differing standards for assessing the economic realities of workplaces.³¹ The first line has been criticized by advocates for favoring against a joint employer finding, because it is only probative of employment where the putative employer exerts direct physical control over

²⁶ See Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 *LOY. U. CHI. L.J.* 291, 300 (2003).

²⁷ *Id.* at 301.

²⁸ "Within this pyramid system, power flows downward. Retailers have substantial bargaining power to determine the wholesale price to the manufacturer, which, in turn controls the price paid to contract shops. Because contractors compete for bids and face the threat of foreign competition they are under intense pressure to cut costs, which they must achieve by reducing wages. The pressure on contractors to reduce labor costs often translates into illegal labor abuses committed against the workforce. In the worst cases, contract shops become sweatshops, characterized by extreme exploitation, including the absence of a living wage or benefits, poor working conditions, such as health and safety hazards, and arbitrary discipline." Cummings, *supra* note 7, at 9-10; LINDA G. MORRA, U.S. GEN. ACCOUNTING OFFICE, B-257458, *GARMENT INDUSTRY: EFFORTS TO ADDRESS PREVALENCE AND CONDITIONS OF SWEATSHOPS 3* (1994) (finding that the garment industry is dominated by less than 1,000 manufacturers who parcel out production to about 20,000 contractors and subcontractors).

²⁹ The "economic realities" language comes from *NLRB v. Hearst Publications*, but was cited in *Rutherford Food Corp. v. McComb*, which has become the bedrock of the joint employment doctrine. *Rutherford*, 331 U.S. at 727 (citing *NLRB v. Hearst Publications, Inc.*, 311 U.S. 111 (1944)).

³⁰ Lung, *supra* note 26, at 316.

³¹ *Id.* at 317.

workers and the workplace.³² Under this standard, the relevant factors that many courts have utilized to determine whether economic realities favor finding an employment relationship include whether the alleged employer:

1. “[H]ad the power to hire and fire the employees[;]
2. [S]upervised and controlled employee work schedules or conditions of employment[;]
3. [D]etermined the rate and method of payment[;] and
4. [M]aintained employment records.”³³

This approach is more appropriate in industries where there is overlapping ownership and management and only nominal distinction between separate entities.³⁴ The second, more recent line of cases takes a more holistic look at the economic realities of the employment relationship and deemphasizes physical control over workers as necessarily indicative of employment.³⁵ This standard was articulated for subcontracting industries because the rigid traditional standard does not fully grasp the economic realities of those industries.³⁶ While the more holistic standard comes closer to congressional intent in defining “employ,” both standards fail to fully contemplate the full, expansive intent of Congress.³⁷

A. *Economic Realities of the Garment Industry*

Garment factories in the United States resemble many of the shops that proliferate other countries and are just as notorious for their poor working conditions.³⁸ Much of this is hidden from the American public because of complex networks of supply chains that bring products from the factory to a retail store.³⁹ While research suggests that many Americans prefer ethically made clothing, it is almost impossible to find garments that are produced with

³² See *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

³³ *Carter*, 735 F.2d at 12; *Bonnette*, 704 F.2d at 1470.

³⁴ Andrew Elmore, *State Joint Employer Liability Laws and Pro Se Back Wage Claims in the Garment Industry: A Federalist Approach to A National Crisis*, 49 UCLA L. REV. 395, 404 (2001).

³⁵ See *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (articulating five additional factors); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (articulating six factors pertinent to determining an employment relationship in the garment industry).

³⁶ See *Dole*, 875 F.2d at 805.

³⁷ See Goldstein et al., *supra* note 5, at 1008-10.

³⁸ Lung, *supra* note 26, at 294.

³⁹ Jake Blumgart, *Sweatshops Still Make Your Clothes*, SALON (Mar. 21, 2013, 11:36 AM), http://www.salon.com/2013/03/21/sweatshops_still_make_your_clothes/ [<https://perma.cc/W2AU-3CAR>].

integrity.⁴⁰ Even corporations that pride themselves on their “sweat-free” labels are difficult to monitor because of the multiple layers of contractors and subcontractors that obfuscate the supply chain.⁴¹

The garment industry is particularly notorious for its use of an intermediary system to avoid employment liability.⁴² Under the common scheme, firms, oftentimes called “jobbers” are tasked with the production of clothing.⁴³ These jobbers then source much of the actual production to a complex network of subcontractors.⁴⁴ Subcontractors serve as the vehicle and means for providing low cost labor.⁴⁵ Many of these subcontractors come to contracting as former shop workers and usually lack the managerial experience requisite to run a profitable business.⁴⁶ The jobbers oftentimes have long-term relationships with different subcontractors and they control all aspects of design, sales, quality, delivery, purchasing, coordination, and dissemination of the work.⁴⁷ Securing contracts with jobbers can be incredibly valuable, since a high level of price competition between subcontractors is characteristic of the industry.⁴⁸ This competition creates a “race to the bottom”⁴⁹ by contractors that incentivizes substandard working conditions and low-wages.⁵⁰

Two concepts that have emerged as successful in determining the economic realities of the joint employment relationship within the garment industry are “functional control”⁵¹ and “economic

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Goldstein et al., *supra* note 5, at 997.

⁴³ *Id.*

⁴⁴ *Id.* at 997-98.

⁴⁵ *Id.* at 998.

⁴⁶ *Id.*

⁴⁷ *Id.* at 999.

⁴⁸ Cummings, *supra* note 7, at 15; MORRA, *supra* note 28, at 3 (finding that the garment industry is dominated by less than 1,000 manufacturers who parcel out production to about 20,000 contractors and subcontractors).

⁴⁹ “Race to the bottom” refers to the competition between subcontracting entities that often results in bidding on a contract at decreasing dollar values. To decrease their bids, subcontractors often cut wages and reel back workplace safety protections. With such great competition, the subcontractor who is willing to offer the lowest wages and most dangerous workplaces generally wins. *See generally* Steven Willborn, *Labor Law and the Race to the Bottom*, 65 MERCER L. REV. 369 (2014).

⁵⁰ *See* Cummings, *supra* note 7, at 9-10.

⁵¹ *See* Irizarry v. Catsimatidis, 722 F.3d 99, 116 (2d Cir. 2013) (“[T]here is . . . no question that Catsimatidis had functional control over the enterprise as a whole. . . . This involvement meant that Catsimatidis possessed, and exercised, ‘operational control’ over the plaintiff’s’ employment in much more than a ‘but-for’ sense”).

dependency.”

1. Functional/Operational Control

Lopez v. Silverman is a critical case in joint employer jurisprudence, where the Southern District of New York focused primarily on who wields the real power and control of the garment industry.⁵² In *Lopez*, Renaissance, a jobber, contracted a number of phases of the assembly process to various subcontractors.⁵³ The plaintiffs worked as garment pressers for one of those subcontractors, each asserting unpaid wages or overtime of roughly \$3000.⁵⁴ In their FLSA complaint the workers named both Renaissance and the subcontractors as defendants, asserting that although Renaissance did not have physical control over the plaintiffs’ workplace, they exerted sufficient control over operations to be liable as employers under the FLSA.⁵⁵

To find that Renaissance was indeed an employer under the FLSA, *Lopez* deviated from the traditional rigid test for physical control. The court instead tailored a test that had utility within a subcontracting structure.⁵⁶ This new standard is appropriate where economic realities dictate that an employment relationship exists, yet the putative employer does not exert sufficient direct control to qualify as an employer under the traditional test.⁵⁷ In advancing this adapted standard, the *Lopez* court expressly recognized and took into account the nature of the garment industry’s complex usage of contractors to shield liability. Thus, the court emphasized the need for an analysis that examines if an entity exerts *functional control* over workers.⁵⁸ The court advanced the following seven factors to determine whether there was an employment relationship:

- (1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer’s integrated process of production or overall business objective;
- (2) whether the putative joint employer’s premises and equipment were used for the work;
- (3) the extent of the putative employees’ work for the putative joint employer;
- (4) the permanence or duration of the working relationship between the workers and the putative joint employer;
- (5) the degree of control exer-

⁵² See *Lopez v. Silverman*, 14 F. Supp. 2d 405, 423 (S.D.N.Y. 1998); see also Lung, *supra* note 26, at 341.

⁵³ *Lopez*, 14 F. Supp. 2d at 408.

⁵⁴ *Id.* at 408-09.

⁵⁵ See *id.* at 412-13.

⁵⁶ *Id.* at 415.

⁵⁷ *Id.* at 419-20.

⁵⁸ See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003).

cised by the putative joint employer over the workers; (6) whether responsibility under the contract with the putative joint employer passed without material changes from one group of potential joint employees to another; and (7) whether the workers had a business organization that could or did shift as a unit from one putative joint employer to another.⁵⁹

More recently, in *Zheng*, the Second Circuit emphatically rejected the traditional four factor economic realities test, chastising its “unduly narrow” focus on formal control of the physical performance of another’s work.⁶⁰ The Second Circuit adopted *Lopez*’s reasoning, holding that the traditional four-factor test is sufficient for a finding of joint employment, but not necessary to establish a joint employment relationship in all industries.⁶¹ It found grounding for a slightly modified *Lopez* standard from the Supreme Court, in the landmark *Rutherford* case.⁶² Using this standard, the court found that Liberty, a garment manufacturer, was the employer of workers that operated several layers beneath Liberty in the subcontracting scheme.⁶³

The concept of functional control is central to joint employment litigation within the garment industry because it considers the dynamics of the prevalent subcontracting structure.⁶⁴ The *Lopez* and *Zheng* courts expressly recognized that subcontracting indus-

⁵⁹ *Id.* at 68 (internal citations omitted).

⁶⁰ *Id.* at 69. The Court cites the *Restatement of Agency* § 220(1)(1933), which references the master-servant relationship. “A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other’s control or right to control.” While this expresses the common law, master-servant view of the employment relationship, it does not account for the broad definition of “employ” found in the FLSA. The Court rejects the rigid traditional approach as one that “cannot be reconciled with the ‘suffer or permit’ language in the statute, which necessarily reaches beyond traditional agency law.” *Id.*

⁶¹ *See id.* at 71.

⁶² *See id.* at 70. *Rutherford* considered conditions that were closer to the factual circumstances of *Zheng* and *Lopez* than *Carter*. It found that an employer can be joint employer under FLSA even when it is apparent that that employer did not exercise direct control over the employees.

⁶³ The factors that the court considered are: “(1) whether Liberty’s premises and equipment were used for the plaintiffs’ work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty’s process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs’ work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.” *Id.* at 72.

⁶⁴ *Lung*, *supra* note 26, at 343; *Lopez v. Silverman*, 14 F. Supp. 2d 405, 414 (S.D.N.Y. 1998); *Zheng*, 355 F.3d at 68.

tries, namely the garment and agricultural industries, are dominated by “relationship-defining owners” who control the terms of their contract with the middleman subcontractors.⁶⁵ The highly regulated assembly-line-style production emblematic of the garment industry is prescribed not by the subcontractor shop owners, but rather by the business owners—the engineers of the unfair unilateral contracts.⁶⁶

2. Economic Dependency

Various courts have exalted that the “touchstone” of the economic realities test is economic dependency,⁶⁷ which is not a specific test, but rather a theme articulated by courts that diverge from reliance on physical control as the central component of a joint employment finding.⁶⁸ Courts that tout the concept of economic dependency tend to skew their analyses of the economic realities test towards a determination of whether the workers are dependent upon a putative employer.⁶⁹

Courts have found that low-wage garment workers are economically dependent on their putative employers when contracts with shop owners are one-sided with little room for maneuverability or negotiation of terms.⁷⁰ Within *Sureway Cleaners's* analysis of economic dependency, the court considered the specific terms of the contracts that Sureway Cleaners initiated with its subcontractor “agents.” The terms of the contracts were unilateral in nature, while subcontractors could not assign their rights under the contract without Sureway Cleaners’s express consent.⁷¹ A similar imposition of unilateral contracts was considered in *Lopez*, where the

⁶⁵ *Lopez*, 14 F. Supp. 2d at 418 (“Simply put, the dynamic between unskilled workers performing a discrete aspect of production, middle-man contractors, and dominant, relationship-defining owners is highly similar whether those owners are farmer-growers or manufacturer-jobbers.”); see also *Zheng*, 355 F.3d at 68.

⁶⁶ Cummings, *supra* note 7, at 15.

⁶⁷ *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (deemphasizing control over workers, while focusing on dependence of the orchestra members upon ballroom operators); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) (holding that Sureway, a laundry service company, was a joint employer although the service used “agents” or independent contractors to operate individual laundromats); see generally *Castillo v. Givens*, 704 F.2d 181, 190 (5th Cir. 1983).

⁶⁸ *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987); see generally *Bartels*, 332 U.S. at 130; *United States v. Silk*, 331 U.S. 704, 713 (1947); *Sureway Cleaners*, 656 F.2d at 1370; *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987).

⁶⁹ *Sureway Cleaners*, 656 F.2d at 1372-73; *Lopez*, 14 F. Supp. 2d at 414.

⁷⁰ See *Lopez*, 14 F. Supp. 2d at 417.

⁷¹ *Sureway Cleaners*, 656 F.2d at 1371.

business owner was independently responsible for determining piece rates per garment.⁷² This kind of control, while not physical, is characteristic of the garment industry, where the business owner exerts dominance in all levels of employment.

Notions of functional control and economic dependency, while commonplace in a joint employment analysis within the garment industry, have largely evaded courts' analyses of employment relationships in the fast food industry. Worker advocates must weave these concepts into their litigation strategies when attempting to hold fast food corporations liable for violations of the FLSA.

B. *Economic Realities of the Agricultural Industry*

The agricultural industry in the United States is one that we indirectly interact with on a daily basis, yet the workers who pick our food are often invisible to consumers.⁷³ Like the garment industry, the typical agricultural business scheme involves a network of contractors and subcontractors, distancing the workers who harvest fields from business owner farmers.⁷⁴ These farmers hire "farm labor contractors," who provide daily seasonal workers to pick the crop.⁷⁵ The same "race to the bottom"⁷⁶ that suppresses wages by fierce competition for contracts that is seen in the garment industry, is also characteristic of the agricultural industry.

Farm labor contractors, the middlemen of the agricultural industry, supervise the day-to-day work of the harvesters.⁷⁷ Many of them come from deep poverty, some rising as former migrant laborers themselves, and lack the independent resources to meet a weekly payroll.⁷⁸ They operate independently to recruit, supervise, and pay harvesting workers.⁷⁹ Because a language barrier often exists between the workers and the business owner farmers, the farm labor contractor is typically the only supervisory personnel in com-

⁷² *Lopez*, 14 F. Supp. 2d at 409.

⁷³ See Lenni B. Benson, *The Invisible Worker*, 27 N.C.J. INT'L L. & COM. REG. 483, 490 (2002); see also Jeff Severns Guntzel, *Vital and Invisible: Minnesota's Migrant Workers and Their Children*, MINNPOST (Oct. 5, 2011), <https://www.minnpost.com/rural-minnesota/2011/10/vital-and-invisible-minnesotas-migrant-workers-and-their-children> [<https://perma.cc/268A-SNN2>].

⁷⁴ See generally *Aimable v. Long & Scott Farms*, 20 F.3d 434, 437 (11th Cir. 1994) (outlining the contractual relationships that are typical within the industry).

⁷⁵ *Id.*

⁷⁶ See Willborn, *supra* note 49, at 369.

⁷⁷ See generally *Aimable*, 20 F.3d at 441.

⁷⁸ Goldstein et al., *supra* note 5, at 992-93.

⁷⁹ *Id.* at 993.

munication with the workers.⁸⁰ Unless the harvest is going poorly, the farm labor contractor also generally controls work schedules, determines which fields to harvest, and generally asserts physical control over employee working conditions.⁸¹

Agricultural workers are protected by an additional statute, the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), which was specifically put into place to redress the “historical pattern of abuse and exploitation of migrant and seasonal farmworkers.”⁸² Under this statute, litigators have been very successful in holding business owners liable for workplace abuses of harvesters, which makes it extremely useful for our purposes.⁸³

Although the AWPA defines “employ” in the same way that the FLSA does,⁸⁴ the AWPA expressly stipulates factors, often called “regulatory factors,” that should be used when examining the agricultural work relationship.⁸⁵ The AWPA regulations expressly state that the enumerated regulatory factors are not exhaustive to a joint employment analysis.⁸⁶ When courts determine whether a farmer is a joint employer for purposes of the FLSA and the AWPA, they usually do so using both the regulatory factors and various other factors, referred to as non-regulatory factors, which were articulated by federal courts.⁸⁷ Analysis of the regulatory factors, much like the traditional economic realities test, tends to illicit whether the putative employer maintained physical control over the har-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1007 (citing H.R. Rep. No. 97-885, at 3 (1982)).

⁸³ *See, e.g.,* Torres-Lopez v. May, 111 F.3d 633, 645 (9th Cir. 1997).

⁸⁴ “Employ” includes to “suffer or permit to work.” Agricultural Workers Protection Act, 29 CFR § 500.20(h)(5); *see* Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014).

⁸⁵ The regulatory factors are: “(i) The nature and degree of the putative employer’s control as to the manner in which the work is performed; (ii) The putative employee’s opportunity for profit or loss depending upon his/her managerial skill; (iii) The putative employee’s investment in equipment or materials required for the task, or the putative employee’s employment of other workers; (iv) Whether the services rendered by the putative employee require special skill; (v) The degree of permanency and duration of the working relationship; and (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer’s business.” 29 C.F.R. § 500.20(h)(4)(i)-(vi).

⁸⁶ *Id.* The regulations cite to several cases to determine economic realities: *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1329 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983); *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 756 (9th Cir. 1979).

⁸⁷ *See Torres-Lopez*, 111 F.3d at 646; *Aimable*, 20 F.3d at 439.

vester workers,⁸⁸ while the non-regulatory factors provide for a more holistic determination of the economic reality of the employment relationship.⁸⁹ It is through both sets of factors that courts are able to determine the true economic realities of the agricultural employment relationship.⁹⁰

Courts have varied in their application of specific non-regulatory factors under the AWP. The plaintiffs in *Aimable v. Long & Scott Farms* argued for the inclusion of six regulatory factors to aid the court's calculus concerning the true economic realities of the employment relationship.⁹¹ Although the court did not ultimately adopt these factors in their entirety, its reasoning was criticized by the Ninth Circuit for devaluing the importance of the non-regulatory factors.⁹² The Ninth Circuit, in *Torres-Lopez*, offered eight non-regulatory factors which the court grounded in *Rutherford*, the landmark Supreme Court case, and *Real*, a Ninth Circuit case.⁹³ An analysis of these eight factors, in addition to the regulatory factors, led the Ninth Circuit to find that the harvesting workers were economically dependent upon farmer business owners, thus an employment relationship had been established.⁹⁴

An analysis of relevant joint employment cases within the agricultural industry yields many different non-regulatory factors con-

⁸⁸ See *Aimable*, 20 F.3d at 439 (explaining that the defendant growers argued for the regulatory factors to conclude that there was no joint employment).

⁸⁹ *Antenor v. D & S Farm*, 88 F.3d 925, 934 (11th Cir. 1996). Many of the regulatory factors were based on common law master-servant employment relationships and do not take into consideration the expansive "suffer or permit to work" standard of the FLSA. The FLSA standard was articulated to assign responsibility to businesses who do not directly supervise the activities of putative employees. *Id.*

⁹⁰ See *Torres-Lopez*, 111 F.3d at 636; *Aimable*, 20 F.3d at 439; *Antenor*, 88 F.3d at 934.

⁹¹ The factors articulated by the plaintiffs in *Aimable* include: (1) investment in equipment and facilities; (2) the opportunity for profit and loss; (3) permanency and exclusivity of employment; (4) the degree of skill required to perform a job; (5) ownership of facilities where work occurred; and (6) performance of a specialty job integral to the business. *Aimable*, 20 F.3d at 439.

⁹² See *Torres-Lopez*, 111 F.3d at 641.

⁹³ These factors include: (1) whether the work was a specialty job on the production line, (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes, (3) whether the premises and equipment of the employer are used for the work, (4) whether the employees had a business organization that could or did shift as a unit from one worksite to another, (5) whether the work was piecework and not work that required initiative, judgment or foresight, (6) whether the employee had an opportunity for profit or loss depending upon managerial skill, (7) whether there was permanence in the working relationship, and (8) whether the service rendered is an integral part of the employer's business. *Id.* at 640. See generally *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979).

⁹⁴ See *Torres-Lopez*, 111 F.3d at 644.

sidered by various courts. A synthesis of these cases reveals the following factors as indicative of economic dependence in this industry: (1) ownership of facilities where work occurred;⁹⁵ (2) performance of a line-job integral to the business;⁹⁶ and (3) investment in equipment and facilities.⁹⁷ These factors capture the unique nature of the employment relationship within the agricultural industry.⁹⁸

These themes of economic dependency that come from the non-regulatory factors must be used by worker advocates attempting to prove that fast food corporations are employers under the FLSA. The factors expressly consider the business owner's reliance on the workers as integral to the model, which, as the next section explores, is a theme prevalent in the fast food franchising system.

C. The Franchising Relationship and Joint Employment Within the Fast Food Industry

Much unlike the sweated workers in the garment and agricultural industries, low-wage workers are the personification of the fast food industry to the consuming population. They greet customers at the drive-through window, salt french fries, and swipe customers' credit cards at the cash register. While other subcontracting relationships keep workers at arm-length distance from the consumer, the exploitation of fast food workers is in our face, yet the legal framework has not evolved to allow fast food workers to sue their corporate employers for wage and hour violations.

Historically, franchisors have not been held liable for FLSA violations at franchised locations.⁹⁹ Fast food giants have effectively exploited a system that allows them to control various aspects of the workplace, while evading employment liability.¹⁰⁰ Though litigation against franchisors is scarce in most circuits, courts that have analyzed the franchisor relationship have done so under the traditional economic realities test for physical control. Thus, worker ad-

⁹⁵ See *Aimable*, 20 F.3d at 444; *Antenor*, 88 F.3d at 934; *Rutherford*, 331 U.S. at 730; *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 238 (5th Cir. 1973); *Torres-Lopez*, 111 F.3d at 640.

⁹⁶ See *Rutherford*, 331 U.S. at 730; *Torres-Lopez*, 111 F.3d at 640; *Aimable*, 20 F.3d at 444; *Antenor*, 88 F.3d at 934; *Griffin & Brand*, 471 F.2d at 237.

⁹⁷ See *Antenor*, 88 F.3d at 934; *Rutherford*, 331 U.S. at 730; *Ricketts v. Vann*, 32 F.3d 71, 74 (4th Cir. 1994).

⁹⁸ See *Antenor*, 88 F.3d at 934; *Aimable*, 20 F.3d at 444; *Torres-Lopez*, 111 F.3d at 640.

⁹⁹ See generally *Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014) ("Orozco II"); *Chen v. Domino's Pizza, Inc.*, No.09-107 (JAP), 2009 U.S. Dist. LEXIS 96362 (D.N.J. Oct. 16, 2009).

¹⁰⁰ *Id.*

vocates have not been successful.¹⁰¹ Fast food franchisors, however, often exert control over working conditions that parallels or eclipses the control that has led courts to find joint employment in the garment and agricultural industries.

1. The Franchising System Within the Fast Food Industry

To determine whether there is anything inherent within a franchising contract that would prohibit a finding that a franchisor is an employer of workers at franchised locations, this note will analyze the structure of the predominant franchising system in the American economy. This section will consider how a typical franchise works and take a detailed look at the McDonald's franchising system to determine the true economic realities of fast food employment relationship.

i. *How Does Franchising Work?*

Franchising is a new, yet rapidly growing innovation in American business systems.¹⁰² Today, franchising relationships dominate many industries, including fast food restaurants.¹⁰³ McDonald's, rated the number one franchise system by Franchise Times,¹⁰⁴ "alone[,] daily[,] serves nearly 50 million customers at over 36,000 restaurants in the United States and more than 100 countries, which employ 1.9 million people."¹⁰⁵ When taken as a whole, the American workforce employed at franchised locations is massive.¹⁰⁶

One definition of "franchise" is a "license from the owner of a trademark or trade name permitting another to sell a product or

¹⁰¹ *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 259 (S.D.N.Y. 2012).

¹⁰² In the early 1980s, the U.S. Dept. of Commerce estimated collective gross revenues of franchises at \$350 billion. According to the U.S. Census Bureau, franchising companies and their franchisees now account for around \$1.3 trillion in U.S. retail sales. David Kaufmann et al., *A Franchisor is not the Employer of its Franchisees or their Employees*, 34 *FRANCHISE L.J.* 439, 452 (2015).

¹⁰³ *Id.* ("Today, franchising not only entirely dominates certain industries—such as guest lodging, real estate brokerage, quick-service restaurants, vehicle repair, tax preparation, lawn care, pest control, and convenience stores—but has propelled itself to the forefront of not only the American economy but, increasingly, the global economy as well.")

¹⁰⁴ *Franchise Times Top 200+*, *FRANCHISE TIMES*, <http://www.franchisetimes.com/Top-200/> [<https://perma.cc/2DSZ-CMZL>]

¹⁰⁵ Kaufmann et al., *supra* note 102, at 452 (citing McDonald's, *Getting to Know Us, ABOUT McDONALD'S*, http://www.aboutmcdonalds.com/mcd/our_company.html [<https://perma.cc/7JJN-VJ65>]).

¹⁰⁶ See *Census Bureau's First Release of Comprehensive Franchise Data Shows Franchises Make Up More Than 10 Percent of Employer Businesses*, U.S. CENSUS BUR. (Sept. 14, 2010), https://www.census.gov/newsroom/releases/archives/economic_census/cb10-141.html [<https://perma.cc/F3ZF-GPFK>].

service under that name or mark.”¹⁰⁷ One of the major franchising lobbies, the International Franchise Association (“IFA”), highlights three main components to a franchising relationship: “(1) the licensing of a protected trademark, (2) no negotiability on the part of the franchisee, and (3) ongoing interaction between the franchisor and the franchisee.”¹⁰⁸

Franchising is a simple concept—franchisees are granted the right to market goods and services of the franchisor business owner in return for a fee and an agreement to operate within that franchisor’s standards and practices.¹⁰⁹ Franchisees buy into the brand, which is already known and trusted by a consumer base.¹¹⁰ Thus, they do not need to establish reputation—reputation is purchased from the franchisor. Business owners are relieved of certain responsibilities, including: finding locations; leasing or purchasing units; building and equipping units; hiring staff; purchasing inventory; securing licenses and permits; and operating the unit.¹¹¹ These can all be passed off to franchisees, saving the business owner significant cost.

American fast food restaurants operate under an arrangement referred to as “business format franchising.”¹¹² This type of franchising system positions the franchisor business owner as a support system to trademarked franchisees.¹¹³ The model envisions the franchising relationship as a “team effort,” dependent on the ongoing partnership between the franchisor and the franchisee.¹¹⁴ Partnership is exemplified by a common saying within the business model: “Franchising means working for yourself, but not by yourself.”¹¹⁵ Thus, franchisors and franchisees can be seen as entwined

¹⁰⁷ 1-2 GLADYS GLICKMAN, *FRANCHISING* § 2.02 (2015).

¹⁰⁸ *Telecomm’s. v. Comm’r of Internal Revenue*, 95 T.C. 495, 511 (1990).

¹⁰⁹ Kaufmann et al., *supra* note 102, at 452.

¹¹⁰ See generally *id.*; Eddy Goldberg, *Weighing the Pros and Cons of Franchising vs. Traditional Business*, FRANCHISING.COM, http://www.franchising.com/howtofranchiseguide/weighing_the_pros_and_cons.html [https://perma.cc/7FX-YDT36] (“If you’re Joe’s Pizza, you’re on your own when it comes to marketing and advertising. If you’re a Pizza Hut franchisee, you have the power of the brand’s multi-million-dollar national and regional marketing and advertising behind you.”).

¹¹¹ Kaufmann et al., *supra* note 102, at 453.

¹¹² David A. Beyer, *Considerations in the Development of a Franchise System*, 1996 FL BAR FRANCHISE LAW AND PRACTICE 10.

¹¹³ See Alisa Pinarbasi, *Stop Hamburglaring Our Wages: The Right of Franchise Employees to Union Representation*, 47 U. PAC. L. REV. 139, 151-52 (2015).

¹¹⁴ Eddy Goldberg, *The Basics of Franchising*, FRANCHISING.COM, http://www.franchising.com/howtofranchiseguide/what_is_franchising_the_basics.html [https://perma.cc/LW5N-3AV9].

¹¹⁵ *Id.*

in a symbiotic relationship, mutually dependent upon each other for survival and success.

Fees paid to franchisor business owners vary widely, though the cost of opening and operating a fast food franchise is significant.¹¹⁶ Franchisors typically require a franchise fee, hefty royalty payments, and other miscellaneous payments, all in addition to overhead expenses that the franchisee incurs to staff and stock the restaurant.¹¹⁷ The overall investment required to open a fast food franchise restaurant typically ranges from \$250,000 to close to \$2 million.¹¹⁸

ii. *Case Study: The McDonald's Franchising System*

Since the McDonald's Corporation ("McDonald's" or "McDonald's Corporate") sets the pace of the fast food market,¹¹⁹ this section will examine the McDonald's franchising system to determine the economic realities of the fast food franchising relationship.¹²⁰ For this analysis, I draw from McDonald's own advertising materials and several recent FLSA complaints filed in district courts that assert McDonald's Corporate as an employer.

McDonald's attracts potential franchisees by flamboyantly establishing its clout within the industry.¹²¹ The corporation's advertising materials suggest that people want to become franchise owners because: (1) franchisees want to be their own boss; (2) the product is well-established and high quality; (3) franchisee's re-

¹¹⁶ Eddy Goldberg, *The Costs Involved in Opening a Franchise*, FRANCHISING.COM, http://www.franchising.com/howtofranchiseguide/the_cost_of_opening_a_franchise.html [https://perma.cc/96P8-NHLQ].

¹¹⁷ *Id.*

¹¹⁸ *See id.* ("Fast food restaurants cost from about \$250,000 to \$1 million and up. . . . A Burger King will cost about \$2.2 million for a typical restaurant. . . ."); *see also McDonald's Franchise*, FRANCHISE HELP, <https://www.franchisehelp.com/franchises/mcdonalds/> [https://perma.cc/T6PQ-FLET] ("To open a McDonald's franchise, however, requires a total investment of \$1.06 million-\$1.9 million. . . .").

¹¹⁹ Franchise Times Magazine ranks McDonald's number one among the top franchises, with global sales of just under \$90 billion annually. Notably, six of the top ten franchises are fast food corporations. *Franchise Times Top 200+*, FRANCHISE TIMES, <http://www.franchisetimes.com/Top-200/> [https://perma.cc/AA3A-BAZN].

¹²⁰ By examining the franchising relationship of the McDonald's Corporation, the author does not intend to demonstrate bias against McDonald's. McDonald's was chosen for this case study because it generates the most profit of fast food franchisors. *Id.*

¹²¹ "There are now more than 30,000 McDonald's restaurants in over 119 countries and territories, serving nearly 50 million people each day. In 2006, McDonald's global sales were over \$57 billion, making it by far the largest food service company in the world." *From Small Beginnings*, CAREERS AT McDONALD'S 1 (2008), http://www.retail-square.com/sites/default/files/mcd_franchising.pdf [https://perma.cc/DJC8-XE6W].

ceive excellent training in business management, leadership skills, team building, and handling customer inquiries; (4) continuous support is provided by McDonald's; (5) franchisees benefit from national marketing carried out and paid for by McDonald's Corporate; and (6) franchisees receive access to McDonald's Corporate's business forecast information.¹²²

In exchange, McDonald's receives a slew of fees from their franchisees. McDonald's begins by charging their franchisees an initial franchising fee of \$45,000 to get through the door.¹²³ These fees are a common element to the franchising relationship and are roughly equivalent for all fast food restaurants.¹²⁴ Franchisees are also indebted through royalty fees to McDonald's of about 5% of gross sales,¹²⁵ advertising fees of approximately 5% more of gross sales,¹²⁶ and oftentimes rental fees of about an additional 15% of gross sales.¹²⁷ Though McDonald's does not have the same net worth requirement as do many fast food franchises,¹²⁸ an estimated investment of \$1.1–\$1.9 million dollars, with \$500,000 of liquid capital, is required to bring the business into full operation.¹²⁹

In addition to the various fees that McDonald's charges their franchisees, a multitude of other terms in the contract either ensure significant corporate oversight of operations or restrict the

¹²² *Franchising at McDonald's*, MCDONALD'S 2-4 (2008), http://www2.mcdonalds.co.uk/static/pdf/aboutus/education/mcd_franchising.pdf [<https://perma.cc/K97U-4N37>].

¹²³ *McDonald's Franchise*, *supra* note 118.

¹²⁴ The franchise fees for some of the leading fast food franchises are as follows: Taco Bell: \$45,000; Wendy's: \$40,000; KFC: \$45,000; McDonald's: \$45,000; Pizza Hut: \$25,000. Hayley Peterson, *Here's How Much It Costs To Open Different Fast Food Franchises In The US*, BUSINESS INSIDER (Nov. 4, 2014, 1:39 P.M.), <http://www.businessinsider.com/cost-of-fast-food-franchise-2014-11> [<https://perma.cc/DD2A-XYMS>].

¹²⁵ Jana Kasperkevic, *McDonald's franchise owners: what they really think about the fight for \$15*, GUARDIAN, (Apr. 14, 2015), <http://www.theguardian.com/business/2015/apr/14/mcdonalds-franchise-owners-minimum-wage-restaurants> [<https://perma.cc/44KT-EUDV>]. Royalty fees for some of the leading fast food franchises are as follows: Taco Bell: 5.5% of gross sales; Wendy's: 4% of gross sales; KFC: 4% of gross sales; McDonald's: 4% of gross sales; Pizza Hut: 6% of gross sales. Peterson, *supra* note 124.

¹²⁶ Kasperkevic, *supra* note 125.

¹²⁷ *Id.*

¹²⁸ Net worth requirements refer to minimum net worth requirements and liquid asset requirements that franchisors can impose. Some of the net worth requirements for leading fast food franchise are as follows: Taco Bell: \$1.5 million minimum net worth, \$750,000 minimum liquid assets; Wendy's: \$5 million minimum net worth, \$2 million minimum liquid assets; KFC: \$1.5 million minimum net worth, \$750,000 minimum liquid assets; Pizza Hut: \$700,000 minimum net worth, \$350,000 minimum liquid assets. Peterson, *supra* note 124.

¹²⁹ *McDonald's Franchise*, *supra* note 118.

rights of the franchisee.¹³⁰ A recent FLSA complaint details some of the terms of the franchising agreement.¹³¹ Relevant contract terms include:

(1) a 20-year term; (2) McDonald's Corporate's sole right, at its discretion, to renew or extend the Franchise Agreement at the end of the term; (3) no right of the franchisee to terminate the Agreement; (4) the right of McDonald's Corporate to terminate the Agreement for cause, including, among others, the failure to maintain the restaurant in a good, clean, wholesome manner and in compliance with McDonald's System standards, violation of franchise restrictions, knowing sale of foods other than those approved by McDonald's System or those that fail to conform to McDonald's System standards, denial of access to McDonald's, or any conduct that damages the McDonald's System's reputation; (5) McDonald's Corporate's right of first refusal to acquire the franchisee's business by matching any offer; and, (6) prohibitions on the franchisee's involvement in competing or similar business during the term of the franchise, and further prohibitions on involvement in competing business within 10 miles for 18 months after the termination or expiration of the franchise.¹³²

According to public filings, McDonald's also selects the site where each one of its franchises will be located and owns the land and buildings used by franchisees.¹³³ To outfit and equip their restaurants, franchisees must purchase equipment from McDonald's Corporate or McDonald's Corporate approved vendors.¹³⁴

McDonald's Corporate manages and regulates daily operations by requiring franchisees to use a variety of software applications.¹³⁵ These applications compile inventory, labor, and payroll information.¹³⁶ They produce profit projections, of which McDon-

¹³⁰ See generally *McDonald's Franchising Agreement*, SCRIBD, <http://www.scribd.com/doc/233487415/McDonalds-Franchise-Agreement#scribd> [<https://perma.cc/8756-Q9WW>].

¹³¹ Complaint ¶ 62, Pullen v. McDonald's Corp., No. 5:14CV11081, 2014 WL 978792 (E.D. Mich. Mar. 13, 2014) [hereinafter Pullen Complaint]; Complaint ¶ 62, Wilson v. McDonald's Corp., No. 2:14CV11082, 2014 WL 978785 (E.D. Mich. Mar. 13, 2014) [hereinafter Wilson Complaint].

¹³² Pullen Complaint, *supra* note 131, ¶ 62; Wilson Complaint, *supra* note 131, at ¶ 62.

¹³³ Pullen Complaint, *supra* note 131, ¶¶ 64-65; Wilson Complaint, *supra* note 131, ¶¶ 64-65.

¹³⁴ Pullen Complaint, *supra* note 131, ¶ 68; Wilson Complaint, *supra* note 131, ¶ 68.

¹³⁵ McDonald's Corporation requires franchisees to use Point of Sale ("POS"), In Store Processor ("ISP") and Regional Restaurant Data Diagnostics ("R2D2"). Pullen Complaint, *supra* note 131, ¶ 74; Wilson Complaint, *supra* note 131, ¶ 74.

¹³⁶ Pullen Complaint, *supra* note 131, ¶ 76; Wilson Complaint, *supra* note 131, ¶ 76.

ald's Corporate has unfettered independent access and closely monitors.¹³⁷ The systems also configure daily activity reports to send to McDonald's Corporate, which detail employee hours, sales made, and customer counts, among other things.¹³⁸ With these reports and other information compiled through both formal audits and surprise inspections, McDonald's determines whether cause exists to terminate the franchise agreement or makes certain recommendations on how franchisees can improve profits.¹³⁹ Failure to comply with these regulations puts franchisees at a significant risk of losing their businesses.¹⁴⁰

This pressure is felt by franchisees. "People look at McDonald's like it's a cash-generating behemoth, but the restaurants are expensive to maintain," reported one McDonald's franchisee.¹⁴¹ Franchisees claim that McDonald's Corporate charges too much to operate franchised restaurants, including rent, remodeling fees, training fees, and software.¹⁴² "[McDonald's is] doing everything they can to shift costs to operators . . . It is not as profitable a business as it used to be," claims another franchisee.¹⁴³ Decisions about whether to renew contracts with franchisees are done on a case-by-case basis, with failures to remodel, failure to comply with McDonald Corporate's rigorous standards, or failure to pay the required fees as grounds for McDonald's Corporate to not renew or terminate the agreement.¹⁴⁴

One of the few components to operating a franchise that McDonald's Corporate does not officially monitor is employee wages at franchisee-managed stores.¹⁴⁵ However, since a large portion of gross sales goes immediately to McDonald's Corporate as part of

¹³⁷ See Pullen Complaint, *supra* note 131, ¶¶ 77-81; see also Wilson Complaint, *supra* note 131, ¶¶ 77-81. The integrated applications produce a "labor cost percentage," which is calculated by adding up labor costs and dividing by gross sales revenue. Pullen Complaint, *supra* note 131, ¶ 78; Wilson Complaint, *supra* note 131, ¶ 78.

¹³⁸ Pullen Complaint *supra* note 131, ¶ 81; Wilson Complaint, *supra* note 131, ¶ 81.

¹³⁹ Pullen Complaint, *supra* note 131, ¶ 87; Wilson Complaint, *supra* note 131, ¶ 87.

¹⁴⁰ See Pullen Complaint, *supra* note 131, ¶ 87; see Wilson Complaint, *supra* note 131, ¶ 87.

¹⁴¹ Julie Jargon, *Discontent Simmers Among McDonald's Franchisees*, WALL ST. J. (June 2, 2015, 4:35 PM), <http://www.wsj.com/articles/discontent-simmers-among-mcdonalds-franchisees-1433272884> [<https://perma.cc/PMA7-BMED>].

¹⁴² Leslie Patton, *McDonald's Franchisees Rebel as Chain Raises Store Fees*, BLOOMBERG BUS. (Aug. 6, 2013, 4:16 PM), <http://www.bloomberg.com/news/articles/2013-08-06/mcdonald-s-franchisees-go-rogue-with-meetings> [<https://perma.cc/L5R2-UJFS>].

¹⁴³ *Id.*

¹⁴⁴ See Kasperkevic, *supra* note 125.

¹⁴⁵ See generally *id.*

the monthly fees, franchisees are left with little cushion when it comes to employee wages. One franchisee reported:

We try and accommodate our workers, but there's [sic] several issues. The way McDonalds [sic] does it, they work to bring customers into the stores with their very low prices. So the difference for us between a dollar hamburger and a \$3 hamburger is huge. So that was why I was telling McDonalds [sic] that you have to get away from these low value sandwiches years ago, and they said, 'just pay your employees less.'¹⁴⁶

It is no coincidence that franchisees are encouraged to pay employees less and cut corners when it comes to complying with employment laws—employee wages become one of the only elements of operating a franchised fast food restaurant that franchise owners have the ability to adjust.¹⁴⁷ McDonald's workers are routinely stretched as far as possible on the job, frequently forced to work while off the clock,¹⁴⁸ or to work during designated break times without pay.¹⁴⁹ These violations of employment laws have led to innumerable judgments against McDonald's (for violations in company owned stores)¹⁵⁰ and their franchisees over the years.¹⁵¹

¹⁴⁶ Lydia DePillis, *McDonald's Franchisee Says the Company Told Her "Just Pay Your Employees Less"*, WASH. POST (Aug. 4, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/> [https://perma.cc/B8E8-NJV6].

¹⁴⁷ While McDonald's, in theory, gives franchisees the ability to set prices for specific products sold at franchise restaurants, in practice, franchisees get the "not a team player" branding that could put their franchise in jeopardy when it comes time for contract renewal. "One time our coffee price was a nickel over what the advertised sale price was and the head of the McDonald's region came in and he said: 'You are over. You can't do this.' That was the first time he told us to sell our business" one contractor reports. See Kasperkevic, *supra* note 125.

¹⁴⁸ See Clare O'Connor, *McDonald's Reviews Wage Theft Claims as Workers in 30 Cities Protest for Overtime Pay*, FORBES (Mar. 18, 2014, 6:04 PM), <http://www.forbes.com/sites/clareoconnor/2014/03/18/mcdonalds-reviews-wage-theft-claims-as-workers-in-30-cities-protest-for-overtime-pay/> [https://perma.cc/J95D-F2WL]. ("Thousands of workers like me in McDonald's across the state are forced to work off the clock all the time before their shift by being told they can't punch in till it's "busy," said Franklin LaPaz, a 25-year-old who said he works between 30 and 40 hours weekly.")

¹⁴⁹ See C.A. Pinkham, *McDonald's Managers Admit to Employee Wage Theft*, KITCHENETTE (Apr. 4, 2014, 12:57 PM), <http://kitchenette.jezebel.com/mcdonalds-managers-admit-to-employee-wage-theft-1558344968> [https://perma.cc/6RU3-R6BS]. ("Other examples of theft include denying employees breaks—while docking them the time anyway—forcing employees to clock out but continue working and making employees work off the clock before and after their scheduled times.")

¹⁵⁰ Emphasis is placed on the fact that McDonald's is held liable for employment violations at *company owned* stores. About 18% of McDonald's restaurants are owned and operated by McDonald's Corporate. *Company Profile*, MCDONALD'S, http://www.aboutmcdonalds.com/mcd/investors/company_profile.html [https://perma.cc/RJ9Z-HLM2].

¹⁵¹ Emily Jane Fox, *McDonald's Workers Sue for Wage Theft*, CNN MONEY (Mar. 14,

2. Joint Employment Jurisprudence when a Franchising Relationship Exists

The majority of franchisor liability cases considered under the economic realities test have relied exclusively on the traditional test for physical control.¹⁵² Recent jurisprudence, however, suggests that worker advocates may be successful against fast food franchisors by utilizing litigation strategies that focus on functional control and economic dependence as key to the economic realities consideration.¹⁵³

i. *Orozco and Reliance on Physical Control*

Although the jurisprudence is confined mostly to district courts,¹⁵⁴ *Orozco II* is the only available circuit court case that considered whether a fast food franchisor could be an employer under the FLSA.¹⁵⁵

Orozco II's procedural posture illustrates a cautionary tale for advocates pursuing a more liberal application of franchisor liability under the FLSA.¹⁵⁶ In this case, Plaintiff Benjamin Orozco worked for a franchised Craig O's Pizza and Pasteria ("Craig O's"), where he experienced multiple violations of the FLSA.¹⁵⁷ After settling with the franchisees, Orozco added the franchisor to his complaint.¹⁵⁸ By denying the franchisor's motion for judgment as a

2014, 11:56 AM), <http://money.cnn.com/2014/03/13/news/companies/mcdonalds-wage-theft-class-action/> [https://perma.cc/NN62-A8UY] ("Since 1985, the Labor Department has found that McDonald's and its franchises have had to pay back wages more than 300 times for FLSA violations.").

¹⁵² See *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014) ("Orozco II"); see *Singh v. 7-Eleven, Inc.*, No. C-05-04534 RMW, 2007 U.S. Dist. LEXIS 16677, at *9 (N.D. Cal. Mar. 7, 2007).

¹⁵³ See *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 262 (S.D.N.Y. 2012) (allowing Domino's Pizza Inc. to be amended to a FLSA complaint.), *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 208 (S.D.N.Y. 2014) (denying a motion to dismiss submitted by franchisor Bareburger Group LLC). Cf. *Chen v. Domino's Pizza, Inc.*, No. 09-107, 2009 U.S. Dist. LEXIS 96362, at *15 (D.N.J. Oct. 16, 2009) (granting a motion to dismiss submitted by franchisor Domino's Pizza, Inc.).

¹⁵⁴ See, e.g., *Reese v. Coastal Restoration & Cleaning Servs.*, No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *8 (S.D. Miss. Dec. 15, 2010) (finding no joint employment relationship between franchisor SEVPRO, a coastal restoration and cleaning franchisor, and an employee of the franchisee); *Singh*, 2007 U.S. Dist. LEXIS 16677, at *9 (finding no joint employment relationship between franchisor 7-Eleven and employees of a 7-Eleven franchise).

¹⁵⁵ See generally *Orozco II*, 757 F.3d 445.

¹⁵⁶ *Id.* at 447-48.

¹⁵⁷ *Id.* at 447.

¹⁵⁸ *Id.*

matter of law, *Orozco* became one of the first cases of its kind.¹⁵⁹ The case was appealed to the Fifth Circuit, where, to the dismay of worker advocates, the court initiated a textbook analysis for physical control.¹⁶⁰ Notably, in *Orozco II*, the Fifth Circuit did so without mentioning concepts of functional control or economic dependence.¹⁶¹ The Fifth Circuit instead prioritized the franchise agreement, which stated, in relevant part:

‘Franchisee shall at all times comply with all lawful and reasonable policies, regulations, and procedures promulgated or prescribed from time to time by Franchisor in connection with Franchisee’s shop or business. . . . Franchisee shall, irrespective of any delegation of responsibility, reserve and exercise ultimate authority and responsibility with respect to the management and operation of Franchisee’s shop.’¹⁶²

Taking this document at face value, however, was a distinct error by Fifth Circuit. The court failed to consider the true power that the franchisor maintained over daily operations at the franchised restaurants.

This litigation was fiercely fought with Amici supporting both sides.¹⁶³ Notably, one of the Amici Curiae Briefs in this case, submitted by the Secretary of Labor, focuses heavily on themes of functional control.¹⁶⁴ “This Court considers several factors in assessing this economic reality . . . [four traditional factors]. . . . [But,] these factors are not to be looked at in isolation; rather, *the ‘dominant theme’ in applying them is to discern whether the alleged employer had sufficient ‘operational control’ to be held liable for FLSA violations.*”¹⁶⁵ The Secretary of Labor warned that corporate structures often insulate legally responsible entities from liability.¹⁶⁶ He also added that franchisors’ interests vary significantly, but they often go beyond merely maintaining a brand name and system of marketing.¹⁶⁷ “Therefore, under the FLSA and its broad view of who is an employer, the question is whether, under the particular facts, a

¹⁵⁹ See *Orozco v. Plackis*, 952 F. Supp. 2d 819, 827 (W.D. Tex. 2013).

¹⁶⁰ See *Orozco II*, 757 F.3d at 448.

¹⁶¹ *Id.*

¹⁶² *Id.* at 451-52 (emphasis added).

¹⁶³ See generally Brief for United States Secretary of Labor as Amici Curiae Supporting Appellee, *Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014) (No. 13-50632); Brief for Nat’l Restaurant Ass’n & the Tex. Restaurant Ass’n in Support of Appellant, *Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014) (No. 13-50632).

¹⁶⁴ See generally Brief for United States Secretary of Labor, *supra* note 163.

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.* at 13.

¹⁶⁷ *Id.* at 14-15.

franchisor's principal exerts sufficient *operational control* of the employment situation at a franchisee to warrant individual employer liability."¹⁶⁸

The Fifth Circuit's error in *Orozco II* was not negligible. Although in theory, it did not foreclose the possibility that a franchisor could be found an employer under the FLSA,¹⁶⁹ it stuck to an outdated method of determining an employment relationship that does not adequately contemplate the economic realities of the predominant franchising relationship existent in fast food franchising. In doing so, the Fifth Circuit affirmed the age-old, yet highly regulated, arm's-length approach to controlling franchisees that leads to violations of the FLSA.

ii. *Cano's Consideration of Functional Control*

Successful litigation strategies concerning the economic realities of the employment relationship within the fast food industry highlight functional control.¹⁷⁰ *Lopez*, *Zheng*, and *Barfield* paved the way for fast food workers to bring FLSA actions against their corporate employers.¹⁷¹ Recent trends in joint employment jurisprudence suggest that district courts are willing to consider the functional control that fast food franchisors exert over franchised employees.¹⁷²

Cano v. DPNY represented the first real deviation (with the exception of *Orozco*) from the traditional economic realities analysis within joint employment franchising cases.¹⁷³ The plaintiffs in this case, organized workers at a franchised Domino's Pizza, alleged numerous FLSA complaints against both the franchisee and Dom-

¹⁶⁸ *Id.* at 15 (emphasis added).

¹⁶⁹ *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014) ("*Orozco II*") ("We do not suggest that franchisors can never qualify as the FLSA employer for a franchisee's employees; rather, we hold that *Orozco* failed to produce legally sufficient evidence to satisfy the economic reality test and thus failed to prove that [Defendant] was his employer under the FLSA.")

¹⁷⁰ See *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 258 (S.D.N.Y. 2012).

¹⁷¹ See *Lopez v. Silverman*, 14 F. Supp. 2d 405, 419-20 (S.D.N.Y. 1998); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 68 (2d Cir. 2003); *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 138 (2d Cir. 2008). *Barfield*, not discussed in the text of this note, was a Second Circuit case that followed *Zheng's* standard for functional control. The Second Circuit asserted "*Zheng* makes clear that the reason for looking beyond a defendant's formal control over the physical performance of a plaintiff's work is to give full content to the broad 'suffer or permit' language in the statute." *Barfield*, 537 F.3d at 138 (internal quotations omitted).

¹⁷² See *Cano*, 287 F.R.D. at 258; *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014); *Cordova v. SCCF*, No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *16-*19 (S.D.N.Y. July 16, 2014).

¹⁷³ *Cano*, 287 F.R.D. at 259.

ino's Pizza, Inc. ("Domino's" or "Domino's Corporate").¹⁷⁴ The Southern District of New York compared the circumstances of the franchising relationship with those alleged by plaintiffs in *Orozco*.¹⁷⁵ Under a theory of functional control,¹⁷⁶ it found that the plaintiffs pled enough to add Domino's Corporate to the complaint.¹⁷⁷ Plaintiffs argued that Domino's: (1) created system-wide management policies, (2) required prospective franchise owners to have managed a store that was owned by Domino's for at least one year, (3) monitored employee performance by means of required computer software, (4) implemented hiring policies for employees of individual franchisees, and (5) had the right to inspect the franchisee's stores to ensure compliance with their policies.¹⁷⁸ The court paid particular attention to a time-tracking system implemented by the defendants, which included a system for tracking hours and wages and retaining payroll records, which were then submitted to Domino's Corporate for review.¹⁷⁹ In light of the concept of functional control, the court concluded that the plaintiffs could amend their complaint to include Domino's Corporate.¹⁸⁰ *Cano* subsequently settled for just shy of \$1.3 million for 61 delivery workers.¹⁸¹

¹⁷⁴ *Id.* at 255.

¹⁷⁵ The *Orozco* complaint alleged that the employer controlled the employment relationship by: (1) making regular announced and unannounced visits to the store to monitor the work of employees and discuss their performance; (2) regularly discussing feedback with franchisees and giving suggestions for improvement; (3) maintaining authority to hire managerial staff; (4) selecting and setting up timekeeping systems and training managerial staff on how to use them; (5) training employees at one location for work at another location with the same wages; and (6) sharing employees with multiple franchise stores. *Orozco v. Plackis*, No. A-11-CV-703 LY, 2012 U.S. Dist. LEXIS 91916, at 2-*3, *rev'd*, 757 F.3d 445, 452 (5th Circ. 2014) (applying the traditional four factor "economic reliance" test).

¹⁷⁶ "Courts must look beyond an entity's formal right to control the physical performance of another's work, indeed, simply exercising *functional control* over workers may be sufficient to be an employer under the FLSA. Accordingly an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours or pay them. Nor does employer status require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA." *Cano*, 287 F.R.D. at 258 (internal citations and quotations omitted) (emphasis added).

¹⁷⁷ *Id.* at 260.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Notably, the Court in *Cano* pointed to the broad "suffer or permit" definition of employ in its analysis. *Id.* at 258.

¹⁸¹ Interestingly, in a statement to the media, Domino's Corporate said it was "not contributing to the settlement in any way." Valuations of Domino's actual contribu-

Other New York district court cases highlight a trend—it is possible to survive a defendant franchisor’s motion to dismiss if the franchisor exercised functional control over the franchisee’s employees.¹⁸² *Olvera v. Bareburger* and *Cordova v. SCCF* rely heavily on *Zheng’s* articulation of functional control.¹⁸³ In denying the defendant franchisor’s motion to dismiss, the *Cordova* court systematically worked through a *Zheng* analysis to find that the plaintiffs had sufficiently pled facts suggesting joint employment.¹⁸⁴ Although the reasoning in *Bareburger* is thin,¹⁸⁵ these cases, taken together, suggest that the Second Circuit might soon be in a position to determine whether a franchisor can qualify as an employer under the FLSA.

3. Trends in Labor Law

This note does not consider the NLRA in length, however, recent developments in labor law are particularly useful to illuminate trends of holding business owners liable for the actions of their franchisees. Although the NLRA and FLSA utilize different definitions of the term “employ,”¹⁸⁶ the political motivations for finding that a fast food franchisor is a joint employer under the NLRA and FLSA are roughly equivalent. Regardless of how “employ” is defined within the respective statutes, courts are beginning to identify that franchisors wield a large amount of power in the franchising relationship, controlling systems that influence the day-to-day of the workplace.

The NLRA’s joint employment standard was significantly complicated in 1984 by *Laerco* and *TLI*, two cases that imposed new

tion, by way of waiving some of the franchisee’s monthly fees, were about \$140,000. Steven Greenhouse, *Domino’s Delivery Workers Settle Suit for 1.3 Million*, N.Y. TIMES, Feb. 1, 2014, at A3, http://www.nytimes.com/2014/02/01/nyregion/dominos-franchise-settles-delivery-workers-lawsuit-for-1-28-million.html?_r=0.

¹⁸² See *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 206 (S.D.N.Y. 2014); *Cordova v. SCCF*, No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *16 (S.D.N.Y. July 16, 2014).

¹⁸³ See *Bareburger*, 73 F. Supp. 3d at 205-08 (denying franchisor Bareburger Group LLC’s motion to dismiss under theories of functional control from *Zheng*, *Lopez*, and *Barfield*); *Cordova*, 2014 U.S. Dist. LEXIS 97388 at *16-*18 (denying franchisor SCCF’s motion to dismiss under theories of functional control from *Zheng*, *Lopez*, and *Barfield*).

¹⁸⁴ See *Cordova*, No. 2014 U.S. Dist. LEXIS 97388 at *16-*18.

¹⁸⁵ See *Bareburger*, 73 F. Supp. 3d at 205-08.

¹⁸⁶ The National Labor Relations Act follows the common-law agency test when determining if an employment relationship exists under the Act. *BFI Newby Island Recyclery*, 362 N.L.R.B. 186, at *16 (2015). *Cf.* Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014) (defining “employ” to include to suffer or permit to work).

requirements that forced the National Labor Relations Board (“NLRB” or “Board”) to look away from the *right* to control workers to the *actual* exercise of that control.¹⁸⁷ Cases that followed this unfounded precedent abandoned themes of passive control as probative of employer status.¹⁸⁸ Since the notorious 1984 decisions, the American workplace evolved to include more temporary and contract workers,¹⁸⁹ which corporations used to separate themselves from labor laws. The standard that they set, however, was inconsistent with common law principles, which contemplate more than just actual control, rather the *right to control* as probative of an employment relationship.

This precedent was untangled in August 2015 when the Board refined its joint employer standard to accommodate for changes in the modern workplace.¹⁹⁰ In *Browning-Ferris*, the Board found that two or more entities are joint employers where: “[1] they are both employers within the meaning of common law,¹⁹¹ and [2] if they share or codetermine those matters governing the essential terms and conditions of employment.”¹⁹² The Board noted that, central to both of those inquiries, is the “existence, extent, and object of the putative joint employer’s control.”¹⁹³ Most importantly, the Board parted ways with the traditional notion that entities must exercise direct control over employees to be considered employers

¹⁸⁷ See BFI Newby Island Recyclery, 362 N.L.R.B. 186, at *10; Laerco Transportation, 269 N.L.R.B. 324, 325 (1984); TLI, Inc., 271 N.L.R.B. 798, 798 (1984).

¹⁸⁸ See BFI Newby Island Recyclery, 2015 N.L.R.B. LEXIS 672, *47. The Board uses *Airborne Express* to illustrate this point. This restrictive approach has resulted in findings that an entity is not a joint employer even where it indirectly exercised control that significantly affected employees’ terms and conditions of employment. For example, the Board refused to find that a building management company that utilized employees supplied by a janitorial company was a joint employer notwithstanding evidence that the user dictated the number of workers to be employed, communicated specific work assignments and directives to the supplier’s manager, and exercised ongoing oversight as to whether job tasks were performed properly. *Airborne Express*, 338 N.L.R.B. 597 (2002).

¹⁸⁹ See BFI Newby Island Recyclery, 2015 N.L.R.B. LEXIS 672, *50.

¹⁹⁰ See Office of Public Affairs, *Board Issues Decision in Browning-Ferris Industries*, NAT’L LABOR RELATIONS BD. (Aug. 27, 2015), <https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries> [<https://perma.cc/28MP-SBA3>] (citing BFI Newby Island Recyclery, 2015 N.L.R.B. LEXIS 672).

¹⁹¹ Under the Restatement’s common-law agency test, a “servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other’s control or *right to control*.” RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (emphasis added).

¹⁹² BFI Newby Island Recyclery, 2015 N.L.R.B. Lexis 672, *68-69.

¹⁹³ *Id.* at *7.

within the NLRA.¹⁹⁴ This standard, the Board articulated, is more consistent with traditional interpretations of employer status that emphasized the “*right* to control the work of employees and their terms of employment as probative of joint-employer status.”¹⁹⁵ Notably, the Board did not require that this right be formally exercised by the putative employer.¹⁹⁶

In anticipation of *Browning-Ferris*, in July 2014, the General Counsel of the NLRB authorized numerous unfair labor practice complaints against McDonald’s Corporate.¹⁹⁷ Corporations that utilize franchising, as well as the IFA, are fighting these complaints fiercely, calling them:

direct assault[s] by unelected Washington bureaucrats at the National Labor Relations Board, with the Service Employees International Union and its allies in organized labor pulling the strings behind the scenes. . . . SEIU has made dismantling the proven and time-tested franchise business model a top priority, in order to increase its steadily declining membership.¹⁹⁸

A finding of liability as a joint employer would mean that McDonald’s would be forced to bargain with unions, likely leading to higher wages and improved benefits for workers at franchised locations.

IV. JOINT EMPLOYMENT ANALYSIS WITHIN THE FAST FOOD INDUSTRY: A STANDARD INFORMED BY THE GARMENT AND AGRICULTURAL INDUSTRIES

This section will consider whether fast food franchisors are employers under the FLSA. Since the McDonald’s franchising sys-

¹⁹⁴ *See id.*

¹⁹⁵ *Id.* at *39 (emphasis added).

¹⁹⁶ *See id.*

¹⁹⁷ Michael J. Lotito & Missy Parry, *Redefining “Employer”: How the NLRB Plans to Treat Separate Companies as One*, WASH. LEGAL FOUND. 1 (Sept. 26, 2014), http://www.wlf.org/upload/legalstudies/legalbackgrounder/092614LB_Lotito2.pdf [<https://perma.cc/8JWE-4NGK>] (“Between November 2012 and July 29, 2014, 181 charges were filed against McDonald’s franchisees and/or McDonald’s USA. Of those charges, the NLRB authorized 43 complaints against both McDonald’s franchisees and McDonald’s USA.”); Kaufmann et. al., *supra* note 102, at 440 (“The allegations of unlawful conduct advanced against McDonald’s and its franchisees include discriminatory discipline; reductions in hours; discharges; and allegedly coercive conduct directed at employees in response to union activity, including allegedly overbroad restrictions on employees communicating with union representatives and other employees about unions.”).

¹⁹⁸ Lisa Jennings, *First round of McDonald’s ‘joint employer’ hearings held*, NATION’S RESTAURANT NEWS (Apr. 1, 2015), <http://nrn.com/hr-training/first-round-mcdonalds-joint-employer-hearings-held> [<https://perma.cc/F573-N94D>].

tem was considered at length above, this section will specifically analyze whether McDonald's Corporate is an employer of workers at franchised McDonald's restaurants.

A. *Analysis Under the Proper "Suffer or Permit" FLSA Standard*

Under the proper definition of "employ" that Congress intended for the FLSA, the primary inquiry should be whether the fast food franchisor could have known about employment and prevented it.¹⁹⁹ The FLSA standard contemplates for passive employment where physical control is sufficient, but not a necessary finding of whether the franchisor "suffer[s] or permit[s]" individuals to work. Under this standard, fast food franchisors are very clearly employers of all workers that don the uniform that bears their brand. In a franchising relationship, the workers and franchisee are dependent upon the business owner, such that the franchisee cannot operate independently if the corporate franchisor disbands. Although workers are not physically controlled by the franchisor, their employment rests on the corporation's vitality. Thus, the fate of a McDonald's employee may be controlled on a day-to-day basis by her franchisee employers, but on a fundamental level, is dependent upon the operations of McDonald's Corporate.

Franchisors in this industry are conclusively employers under the broad interpretation of FLSA's definition of "employ." However, because courts have moved towards a more conservative understanding of what it means to employ a worker, advocates must craft the crux of their arguments within the economic realities test to determine whether franchisors can be liable for violations of the FLSA.

B. *Analysis Under the Economic Realities Test*

When assessing economic realities of employment relationships within specific industries, courts have articulated different standards tailored specifically to those industries.²⁰⁰ While the traditional test for physical control is sufficient for a finding of joint employment in some circumstances,²⁰¹ it is not well-suited to determine the economic reality of the fast food industry, which

¹⁹⁹ Goldstein et al., *supra* note 5, at 1136-37.

²⁰⁰ See *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008) ("In assessing the 'economic reality' of a particular employment situation, we have identified different sets of relevant factors based on the factual challenges posed by particular cases.").

²⁰¹ See *generally* *Int'l House v. N.L.R.B.*, 676 F.2d 906 (2d Cir. 1982).

utilizes franchisees as the middleman between the franchisor and employees at respective restaurants. For a more appropriate determination of economic realities in the fast food industry, courts must adopt concepts of functional control and economic dependency that have been emblematic of joint employment cases within the garment and agricultural industries.

1. Towards a Standard—How is the Fast Food Industry Similar to the Garment and Agricultural Industries?

Various aspects of the employment relationship in the garment and agricultural industries mirror those of the franchising relationship in the fast food industry. For brevity, this note will consider only a few of the similarities that are most applicable for the articulation of a standard that courts can use when analyzing whether fast food franchisors are employers of workers at franchised restaurants.

The most prominent parallel is the unilateral imposition of contract terms by the business owner of all three industries. Lack of negotiation on behalf of the middlemen in these industries necessarily suppresses wages paid to workers. In the garment and agricultural industries, middlemen are forced to take less than favorable deals because of the intense competition.²⁰² In the fast food industry, on the other hand, gross profit is eaten up by exorbitant monthly fees and start up costs that are paid to the business owner.²⁰³ With very little left to pay workers, middlemen in all three of these industries can feel the pressure to cut corners to enhance their profit or even break even. Thus, business owners, although they do not sign the checks of workers or set pay rates, indirectly control workers' wages and working conditions.

Economic dependency, a key concept in finding an employment relationship in the agricultural and garment industries, is taken to new levels in the fast food industry. Ownership of land and investment in equipment often dictates the finding of a joint employment relationship in the agricultural industry.²⁰⁴ Although land ownership varies across fast food franchisors, McDonald's Corporate maintains ownership of the land and buildings on which all McDonald's franchises operate.²⁰⁵ McDonald's also requires

²⁰² See MORRA, *supra* note 28, at 3; see also Goldstein et al., *supra* note 5, at 997.

²⁰³ Peterson, *supra* note 124.

²⁰⁴ See *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994); *Antenor v. D & S Farm*, 88 F.3d 925, 932 (11th Cir. 1996); *Torres-Lopez v. May*, 111 F.3d 633, 640-41 (9th Cir. 1997).

²⁰⁵ Pullen Complaint, *supra* note 131, ¶ 65; Wilson Complaint, *supra* note 131, ¶ 65.

that franchisees purchase specified equipment either directly from McDonald's Corporate or through corporate-approved sources.²⁰⁶ Further, employees at fast food restaurants perform line-jobs that are similar to those emblematic of the garment and agricultural industries for the maintenance of the fast food brand.²⁰⁷ The McDonald's system is an integrated economic unit—the specialty jobs that employees perform at franchised locations are developed and operated by McDonald's Corporate.²⁰⁸ These franchised restaurants are heavily regulated²⁰⁹ and controlled to meet corporate standards and pass corporate review, which puts pressure on franchisees to ensure that employees are maximizing output.²¹⁰ This mutual economic dependence is the fast food business model—the system is engineered to give the franchisor control over the operations, which generates profit for the franchisor, while the franchisee shoulders all of the risk.

Somewhat unlike the agricultural and garment industries, where subcontractors can, in theory, operate independent from one specific business owner, franchise agreements in the fast food industry often prohibit franchisees from shifting their business units to another fast food franchisor.²¹¹ By definition, franchisees are brand dependent²¹²—if the franchisor terminates or fails to renew the franchise agreement, the franchised business must disband and employees lose their jobs. McDonald's also includes a non-compete provision within its franchise agreements, which ensures that a franchisee is not involved with a competing business within a certain mile radius for a period of at least 18 months.²¹³ While contractors in the agricultural and garment industries can often compete for different contracts and bring their employees with them, franchisees are afforded much less liberty. This takes

²⁰⁶ Pullen Complaint, *supra* note 131, ¶ 68; Wilson Complaint, *supra* note 131, ¶ 68.

²⁰⁷ “McDonald's Corporate's standard Franchise Agreement requires the McDonald's Franchisee to acknowledge ‘that every component of the McDonald's System is important to McDonald's and to the operation of the Restaurant as a McDonald's restaurant, including a designated menu of food and beverage products; uniformity of food specifications, preparations methods, quality, and appearance; and uniformity of facilities and service.’” Pullen Complaint, *supra* note 131, ¶ 50.

²⁰⁸ *See id.* ¶ 16.

²⁰⁹ *See* Pullen Complaint, *supra* note 131, ¶ 67; Wilson Complaint, *supra* note 131, ¶ 67.

²¹⁰ *See* Pullen Complaint, *supra* note 131, ¶¶ 21-22; Wilson Complaint, *supra* note 131, at 22.

²¹¹ *See* Pullen Complaint, *supra* note 131, ¶ 70.

²¹² *See* Goldberg, *supra* note 110.

²¹³ *McDonald's Franchising Agreement*, *supra* note 130, at 6.

notions of economic dependency to a magnitude that is rarely even seen in the garment and agricultural industries.

2. Synthesizing a Standard that is Indicative of the Economic Realities of the Fast Food Industry.

An analysis of the economic realities within the fast food industry requires a standard that considers the dynamics of the franchising relationship. Thus, the standard must be able to effectively test for functional control of the employees and economic dependence of workers on the franchisor. Guided in part by joint employment jurisprudence within the garment and agricultural industries, the proposed factors for determining the economic realities of the employment relationship within the fast food industry are as follows:

1. Whether the fast food corporation owns the premises;²¹⁴
2. The extent to which the fast food corporation owns or standardizes the equipment used by workers;²¹⁵
3. The extent to which the workers perform a discrete line-job that is integral to the fast food corporation's overall process and success;²¹⁶
4. The extent to which there is uniformity or standardization of the contract;²¹⁷
5. The degree to which the employees in fast food restaurants are supervised by the business owner;²¹⁸
6. The risk of profit and loss that franchisors take on within the franchising agreement;²¹⁹ and
7. Whether the workers were part of a "business organization" that could or did shift as a unit from one fast food franchisor to another.

None of these factors are meant to be dispositive determinations of

²¹⁴ See *Antenor v. D & S Farm*, 88 F.3d 925, 934 (11th Cir. 1996); GLICKMAN, *supra* note 107.

²¹⁵ See *Antenor*, 88 F.3d. at 937.

²¹⁶ See *id.*

²¹⁷ *Id.*

²¹⁸ See *id.* at 934.

²¹⁹ *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1371-72 (9th Cir. 1981) ("Agents' [made] no capital investment and therefore [bore] no risk of a significant loss; most of the factors that determine profit (advertising, price setting, location, etc.) [were] controlled by Sureway. Although 'agents' [were] responsible for bad checks, theft losses, and the disposal of abandoned clothing, the district court found these to be burdens that Sureway chose to place on them. Thus, the lack of opportunity for loss of capital investment and the control by Sureway of the major factors determining profit indicate that in this respect also the 'agents' [were] economically dependent upon Sureway.") (internal citations omitted).

the employment relationship, rather, the factors, when taken together, are meant to determine control and economic dependency of the workers on the fast food corporation.

Advocates using this proposed analysis should note that the *Zheng* factors for determining functional control and economic dependency form the structural basis of this new standard.²²⁰ Recent complaints alleging an employment relationship between franchisor and employees at franchises locations have survived motions to dismiss primarily with reference to *Zheng*'s augmented standard.²²¹ This proposed standard, with factors informed by jurisprudence in both the garment and agricultural industries, presents the best chance of success in both jurisdictions that are bound by *Zheng* and those that are not.

V. CONCLUSION

Fast food workers across the country are currently engaged in a fight to improve their wages and form unions.²²² To win this fight, workers will need to demonstrate to the American public that their exploitation mirrors the oppressive working conditions that predominate in sweatshops. As franchising has grown as an American business model, courts have been slow to penalize franchisors for the use and sometimes exploitation of an intermediary system that is a modern derivative of the "sweating system" that arose in the 19th Century. Worker advocates must challenge notions of corporate protectionism that have influenced a misapplication of the breadth of liability that Congress wished to impose when it defined "employ" within the FLSA.

Although joint employment jurisprudence in the fast food industry is still largely stuck in an analysis that tests exclusively for physical control, recent trends suggest a tide shift. With increased litigation against fast food franchisors using a standard that is indic-

²²⁰ *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) ("The factors [considered] are (1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.").

²²¹ See *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 206-07 (S.D.N.Y. 2014); *Cordova v. SCCF, Inc.*, No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, *16 (S.D.N.Y. July 16, 2014).

²²² See TRUNG ET AL., *supra* note 3.

ative of the economic realities of the industry, advocates can expose the franchising relationship as a current form of the time-honored system of producing corporate profit on the backs of oppressed workers.