

# CUNY LAW REVIEW

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

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Scholarship for Social Justice

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City University of New York School of Law  
2 Court Square  
Long Island City, New York 11101

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Volume Eighteen

Summer 2015

Number Two

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Volume Eighteen

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# WHEN THE INVISIBLE HAND WIELDS A SCALPEL: MATERNITY CARE IN THE MARKET ECONOMY

*Farah Diaz-Tello*<sup>†</sup>

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A 2006 Comment in *The Lancet* exposed a “fundamental but unrecognized flaw in current thinking about cesarean delivery.”<sup>1</sup> According to the authors:

*Modern obstetrics teaching dictates that a caesarean delivery is either medically indicated or not—i.e., elective or on demand. [A] grey area exists that has a larger effect on modern-day obstetrics than most people think.*<sup>2</sup>

The critique was aimed at dichotomous thinking about the medical necessity of cesarean surgery, but the same flaw could be said to apply to the understanding of consent to surgery. Surgeries are assumed to be either consented or unconsented; indeed there exists a significant body of medical, bioethical, and legal scholarship on the issue of unconsented, court-ordered cesarean surgeries.<sup>3</sup> But examining consent to cesarean surgery and the choice of method of delivery through the lens of reproductive justice<sup>4</sup> complicates the picture.

“Choice” and “consent” are concepts that often defy binary thinking. Just as reproductive justice advocates point out that “choice” in the context of abortion lacks resonance for many communities because it implies a range of options that do not exist,<sup>5</sup> “consent” crumbles where external factors, many driven by financial concerns, limit the options available to people giving birth.

Constitutional jurisprudence and common law recognize the fundamental right of all people of sound mind to decide what hap-

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<sup>1</sup> Robin B. Kalish et al., *Decision-Making About Cesarean Delivery*, 367 LANCET 883, 883 (2006), available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(06\)68359-1/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(06)68359-1/abstract), archived at <http://perma.cc/4BUJ-J3U8>.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L. J. 9 (1987).

<sup>4</sup> The term “reproductive justice” was coined by women of color in 1994 to describe a holistic model for understanding reproductive autonomy, taking into account the many factors (individual, familial, cultural, societal, economic) that play a role in whether, when, and how a person births a child, becomes a parent, and cares for their family. See *What is RJ?*, SISTERSONG WOMEN OF COLOR REPROD. JUSTICE COLLECTIVE, [http://sistersong.net/index.php?option=com\\_content&view=article&id=141](http://sistersong.net/index.php?option=com_content&view=article&id=141) (last visited Aug. 28, 2015). This is distinguished from *reproductive rights*, which primarily concern the laws that control access to abortion and contraception, and *reproductive health*, which primarily concerns the provision of such services. See FORWARD TOGETHER, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 2 (2005), <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf>, archived at <http://perma.cc/JQX9-PQKC>.

<sup>5</sup> See, e.g., Andrea Smith, *Beyond Pro-Choice Versus Pro-Life: Women of Color and Reproductive Justice*, 17 NWSA J. 119 (2005); Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. LAW SOC. SCI. 327 (2013).



pens to their bodies.<sup>6</sup> With this comes a virtually sacrosanct right to refuse medical intervention, whether or not that decision is medically reasonable.<sup>7</sup> In theory, the right to avoid cesarean surgery is a “negative”<sup>8</sup> right—the right to demand that medical personnel abstain from performing surgery and permit labor to proceed on its own. Pregnancy does not abridge the Constitutional and common law right to refuse medical procedures;<sup>9</sup> the right, therefore, applies equally to a person in labor. In reality, however, the enjoyment of this right is impeded by a number of economic, institutional, and even political factors.

Over the course of the past century, childbirth has been medicalized to the point where vaginal delivery, the physiological process by which a fetus is expelled from the body, is now treated as a “procedure” that facilities may decide to offer . . . or not.<sup>10</sup> Medicalization transforms a fundamental right—the right to forego an invasive surgery—into a request that a medical facility can grant or deny. And while the denial of the right to decline cesarean surgery is sometimes accomplished through the use of legal or physical force, pregnant people who do not have the means to travel long distances in labor, or who live in places where their only option for an out-of-hospital birth is an unassisted home delivery, face a form of passive coercion that works as surely. The use of the iron fist of the law is rare when health care providers find that the invisible hand works just as well.

As this article will demonstrate, economic and even political

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<sup>6</sup> See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 289 (1990) (O’Connor, J., concurring) (“[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment . . . .”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”); see also *Schloendorff v. Soc’y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) (“Every human being of adult years and sound mind has a right to determine what shall be done with [their] own body.”).

<sup>7</sup> Nancy K. Rhoden, *Cesareans and Samaritans*, 15 L. MED. & HEALTH CARE 118, 122 (1987) (“[T]he whole point of the informed consent doctrine [is that] people should be able to make their own decisions about surgery, even if their choices are idiosyncratic or even harmful.”).

<sup>8</sup> See, e.g., Rebecca A. Spence, *Abandoning Women to Their Rights: What Happens When Feminist Jurisprudence Ignores Birthing Rights*, 19 CARDOZO J.L. & GENDER 75, 81 (2012).

<sup>9</sup> See *In re A.C.*, 573 A.2d 1235, 1252 (D.C. Ct. App. 1990) (holding that the medical decision of a pregnant patient will control in “virtually all cases”).

<sup>10</sup> JENNIFER BLOCK, *PUSHED: THE PAINFUL TRUTH ABOUT CHILDBIRTH AND MODERN MATERNITY CARE* 257-62 (2008).

considerations can impede the exercise of the right to refuse unwanted surgery. It will provide an overview of the U.S. maternity system, the surge in the cesarean rate, and the fluctuating status of vaginal births after cesarean delivery at hospitals across the country. It will examine some of the forces that converge to make it difficult or impossible to avoid surgery, including the commodification of healthcare, inequities in the healthcare market, and a proliferation of claims of fetal rights used to vindicate malpractice concerns. These forces lead to hospital closures and refusals of care, economic threats by providers, and even threats of unconsented care intended to drive away prospective patients.

### I. DEEPLY SIGNIFICANT, HIGHLY CONTESTED: INTRODUCTION TO BIRTH IN THE UNITED STATES

Birth occupies a unique position in culture and medicine. It is a rite of passage of personal and societal significance,<sup>11</sup> accompanying the addition of a new family member or the loss of an anticipated child. It is a common and normal physiological process, experienced by approximately 85% of women.<sup>12</sup> At the same time, it is fraught with the potential for danger: any birth can quickly go from routine to pathological, and birth has been the leading cause of death of women of childbearing years until relatively recently in human history. The landscape of birth is not only colored by the medicalization of childbirth<sup>13</sup> and constantly shifting medical recommendations;<sup>14</sup> it is affected by structural factors such as racism,

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<sup>11</sup> See ROBBIE DAVIS FLOYD, *BIRTH AS AN AMERICAN RITE OF PASSAGE* (2d ed. 2004).

<sup>12</sup> U.S. DEP'T OF HEALTH AND HUMAN SERV., CTRS. FOR DISEASE CONTROL & PREVENTION, *Recommendations to Improve Preconception Health and Health Care – United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care*, 55 MORBIDITY & MORTALITY WEEKLY REPORT, no. RR-6, Apr. 21, 2006, at 1, 2, available at <http://www.cdc.gov/mmwr/PDF/rr/rr5506.pdf>, archived at <http://perma.cc/8FDW-R593>.

<sup>13</sup> See, e.g., TINA CASSIDY, *BIRTH: THE SURPRISING HISTORY OF HOW WE ARE BORN* 131-160 (reprint ed. 2006) (describing the advent of a male dominated practice of obstetrics that supplanted female midwives, and the move from home to “lying in” hospitals and maternity wards); RANDI HUTTER EPSTEIN, *GET ME OUT: A HISTORY OF CHILDBIRTH FROM THE GARDEN OF EDEN TO THE SPERM BANK* (reprint ed. 2010).

<sup>14</sup> For instance, recommendations on induction of labor prior to thirty-nine weeks gestation changed in 2009 in response to evidence-based research and activism by public health advocacy organizations. See Am. Coll. Obstetricians & Gynecologists, *ACOG Practice Bulletin No. 107: Induction of Labor*, 114 OBSTETRICS & GYNECOLOGY, no. 2, Aug. 2009; *Don't Rush Your Baby's Birth Day*, MARCH OF DIMES, <http://www.marchofdimes.org/pregnancy/pregnancy-39weeks.aspx> (last visited Apr. 22, 2015), archived at <http://perma.cc/MV7T-6ALG>; Jane E. Brody, *A Campaign to Carry Pregnancies to Term*, N.Y. TIMES, Aug. 8, 2011, at D7, available at <http://www.nytimes.com/2011/08/09/health/09brody.html>; see also HEIDI MURKOFF & SHARON MAZEL,

gender-based discrimination, and economic marginalization. In theory, people seeking medical care and people giving birth have a larger range of options to choose from for their care than ever before. Of course, availability of options is constrained by the socio-economic position of the chooser, and pregnant people are often treated as less competent or entitled to make decisions about their own bodies. This becomes particularly clear in decision-making around method of delivery.

#### A. *Overview of Cesarean Surgery*

Cesarean surgery is a medical intervention that has saved countless maternal and infant lives. But from the beginning it has been a means of shifting risk between the fetus and the person giving birth. One theory as to the origin of the name of the surgery—and there are many—points to a Roman decree (*Lex Caesare*) in 700 BC that required that fetuses be removed from the womb of dead or dying women. It is unknown how many fetuses survived in antiquity, but such surgeries were almost invariably fatal to women.<sup>15</sup>

According to medical lore, the first patient to survive a cesarean section was Mrs. Jacob Nufer, the wife of a Swiss pig gelder in the 1580s, who suffered an obstructed labor despite the ministrations of 13 midwives.<sup>16</sup> After the kitchen table surgery, which produced a healthy son, Mrs. Nufer went on to deliver several more children, including a set of twins, vaginally.<sup>17</sup> The

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WHAT TO EXPECT WHEN YOU'RE EXPECTING 68-84 (4th ed. 2008) (warning women to avoid, among other things, changing a cat litter box, consuming unpasteurized cheese, sushi or deli meats, gardening without gloves, inhaling when handling household cleaning products, and ingesting excessive caffeine); cf. EMILY OSTER, EXPECTING BETTER 122-130 (2013) (describing several common prohibited activities and exposures, including changing cat litter, gardening, hair dye, Bikram yoga, hot baths, and traveling by airplane, and finding many of these recommendations to be overblown).

<sup>15</sup> CASSIDY, *supra* note 13, at 110.

<sup>16</sup> *Id.* at 103. Interestingly Mr. Nufer was reported to have sought permission from local authorities before performing the surgery, making this the first cesarean performed under color of law.

<sup>17</sup> *Id.* Some medical historians have dismissed the tale as apocryphal. EPSTEIN, *supra* note 13, at 157-58. Scholars question the veracity of the story because of Mrs. Huber's reported subsequent birth history, disbelieving "that Nufer's wife could have survived the amateur operation and then survive five more vaginal deliveries (including a set of twins) without rupturing her uterus." *Id.* This birth history, however, mirrors that of Laura Pemberton, another woman forced to undergo cesarean under color of law 500 years later, *Pemberton v. Tallahassee Mem'l Reg'l Ctr.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999), who subsequently delivered several more babies, including a set of twins, in hiding after *two* cesareans. BLOCK, *supra* note 10, at 249; MARSDEN WAGNER, BORN IN THE USA: HOW A BROKEN MATERNITY SYSTEM MUST BE FIXED TO PUT

Nufers's happy ending was atypical: cesarean surgeries would not become routinely survivable until the advent of antiseptics in the twentieth century.<sup>18</sup>

Cesareans have become much safer,<sup>19</sup> as well as more common: cesarean surgery is the most common operation performed on American women of reproductive age.<sup>20</sup> Nevertheless, this surgery carries its own set of risks<sup>21</sup> and "has potential for great harm when overused."<sup>22</sup> Concerns about the rate of cesarean delivery have existed for nearly as long as the procedure has been routinely survivable.

As early as the turn of the twentieth century, enterprising physicians were suggesting cesarean surgeries as a solution to the supposed frailty of upper-class women.<sup>23</sup> They reasoned that wealthy women, who were prone to "nervous exhaustion," were too weak to endure labor pain and were demanding operative deliveries<sup>24</sup>—an idea that persists to this day in the media portrayal of wealthy women who have cesareans as being "too posh to push."<sup>25</sup> Just as timeless is the skepticism of this perspective, and of the increase in the cesarean rate it supposedly begets. A 1933 review of maternal mortality in New York City blamed poor maternal and infant outcomes on physicians who employed the "technically less demanding" cesarean in cases where "better judgment and greater skill would permit delivery by the less hazardous normal route."<sup>26</sup> This accusation that surgeries were being performed for money and conve-

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WOMEN AND CHILDREN FIRST 124 (2008); Laura Pemberton, Address at NAPW's National Summit to Ensure the Health and Humanity of Pregnant and Birthing Women (Jan. 18-21, 2007), *available at* <http://vimeo.com/4895023>.

<sup>18</sup> EPSTEIN, *supra* note 13, at 159.

<sup>19</sup> CASSIDY, *supra* note 13, at 115-16 (noting a cesarean mortality rate of .04%; vaginal deliveries have a mortality rate of .01%).

<sup>20</sup> EPSTEIN, *supra* note 13, at 154.

<sup>21</sup> For pregnant women those risks include infection, hemorrhage, thromboembolism, bladder and uterine lacerations, and even death. F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 592 (22d ed. 2005). Other nonclinical risks include poor birth experience, less early contact with babies, intense and prolonged postpartum pain, poor overall mental health and self-esteem, and poor overall functioning. CAROL SAKALA & MAUREEN P. CORRY, EVIDENCE-BASED MATERNITY CARE: WHAT IT IS AND WHAT IT CAN ACHIEVE 44 (2008). *See also* NICETTE JUKELEVICS, UNDERSTANDING THE DANGERS OF CESAREAN BIRTH 50 (2008).

<sup>22</sup> SAKALA & CORRY, *supra* note 21, at 44.

<sup>23</sup> EPSTEIN, *supra* note 13, at 160-61; BLOCK, *supra* note 10, at 122.

<sup>24</sup> *Id.*

<sup>25</sup> EPSTEIN, *supra* note 13, at 165-66; CASSIDY, *supra* note 13, at 123-24. Research does not support the claim that women are demanding cesarean surgeries without medical indication in significant numbers. THERESA MORRIS, CUT IT OUT: THE C-SECTION EPIDEMIC IN AMERICA 19 (2014).

<sup>26</sup> EPSTEIN, *supra* note 13, at 162.

nience would not be out of place today.<sup>27</sup> The only difference is the figures: the “inordinately high” cesarean rate in 1933 was 2.2%.<sup>28</sup>

The U.S. cesarean rate has hovered around one in three births for the past few years,<sup>29</sup> a rate which significantly exceeds recommendations by the World Health Organization (WHO).<sup>30</sup> According to a recent statement by the WHO, “[A]t population level, caesarean section rates higher than 10% are not associated with reductions in maternal and newborn mortality rates.”<sup>31</sup> A primary driver of the high rate of cesarean section is the low rate of vaginal birth after cesarean (VBAC),<sup>32</sup> which, as will be explained further below, is more a function of non-clinical concerns than of the actual risks of laboring with a scarred uterus.

The health risks of cesarean surgery are mostly borne by the birthing person,<sup>33</sup> and largely deferred into subsequent pregnancies: with each cesarean, the risk of maternal morbidity increases significantly.<sup>34</sup> Medical and public health authorities recognize that use of cesarean delivery without medical indication should be reduced to the extent possible. Concerns about the potential overuse of cesarean surgery have led the American College of Obstetricians and Gynecologists (ACOG) and the Society for Maternal-Fetal Medicine (SMFM) to issue a joint consensus state-

<sup>27</sup> MORRIS, *supra* note 25, at 50; CASSIDY, *supra* note 13, at 126; BLOCK, *supra* note 10, at 42-43; SAKALA & CORRY, *supra* note 21, at 41 (arguing that increased rates of cesarean surgery are the result of a belief that the procedure is “efficient and lucrative”).

<sup>28</sup> EPSTEIN, *supra* note 13, at 162.

<sup>29</sup> Joyce A. Martin et al., *Births: Final Data for 2013*, 64 NAT’L VITAL STAT. REP., Jan. 15, 2015, at 7, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf), archived at <http://perma.cc/F3S9-8ZM6>. The cesarean rate is 32.7% of births, a slight decrease from 2010-2012. The rate increased every year from 1996 to 2009. *Id.*

<sup>30</sup> See WORLD HEALTH ORG., U.N. CHILDREN’S FUND, U.N. POPULATION FUND, MONITORING EMERGENCY OBSTETRIC CARE: A HANDBOOK 25 (2009); see also SAKALA & CORRY, *supra* note 21, at 42 (“Recent analyses substantiate the World Health Organization’s recommendation that optimal national cesarean rates are in the range of 5 percent to 10 percent of all births and that rates above 15 percent are likely to do more harm than good.”) (internal citations omitted).

<sup>31</sup> WORLD HEALTH ORG., WHO STATEMENT ON CAESAREAN SECTION RATES, Apr. 10, 2015, at 4, available at [http://apps.who.int/iris/bitstream/10665/161442/1/WHO\\_RHR\\_15.02\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/161442/1/WHO_RHR_15.02_eng.pdf?ua=1), archived at <http://perma.cc/QQZ2-2XAD>.

<sup>32</sup> Morris, *supra* note 25, at 111.

<sup>33</sup> See Am. Coll. Obstetricians & Gynecologists, Soc’y for Maternal-Fetal Med., *Obstetric Care Consensus No. 1: Safe Prevention of the Primary Cesarean Delivery*, AM. J. OBSTETRICS & GYNECOLOGY, Mar. 2014, at 179, 181 tbl.1.

<sup>34</sup> Victoria Nisenblat et al., *Maternal Complications Associated with Multiple Cesarean Deliveries*, 108 OBSTETRICS & GYNECOLOGY 21, 25 (2006); MORRIS, *supra* note 25, at 120-21; JUKELEVICS, *supra* note 21, at 81.

ment on the importance of reducing the rate of primary cesarean delivery.<sup>35</sup> The medical groups recognize not only the health risks inherent in a major surgical intervention, but also the impact of the first surgery on subsequent pregnancies. This impact includes the increasing difficulty of finding providers who will support patients in a VBAC, an obstacle largely erected by the providers and facilities themselves.

*B. Overview of VBAC*

Although cesarean surgery is a lifesaving procedure, many women who have had a prior surgical delivery wish to avoid having a repeat surgery.<sup>36</sup> The reasons for this are highly dependent upon individual and cultural factors. For instance, an individual may have experienced medical or psychological trauma during a prior surgery, or may come from a cultural or religious tradition that values having many children, which raises the possibility of multiple cesareans.<sup>37</sup> Even an uncomplicated cesarean delivery entails a surgical recovery, and most people who have had a prior cesarean will have at least one other child to care for while recovering from their birth and tending a newborn.<sup>38</sup>

The medical recommendations around vaginal birth after cesarean have changed significantly since the time when cesarean surgery meant death to a laboring woman. Early in the twentieth century, physicians were admonished to be judicious in their use of surgical delivery, because “once a cesarean, always a cesarean”: once a woman had undergone one surgery, all future pregnancies

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<sup>35</sup> Am. Coll. Obstetricians & Gynecologists, Soc’y for Maternal-Fetal Med., *supra* note 33.

<sup>36</sup> See generally INTERNATIONAL CESAREAN AWARENESS NETWORK, <http://ican-online.org> (“The International Cesarean Awareness Network, Inc. (ICAN) is a nonprofit organization whose mission is to improve maternal-child health by preventing unnecessary cesareans through education, providing support for cesarean recovery, and promoting Vaginal Birth After Cesarean (VBAC).”); EUGENE DECLERCQ ET AL., CHILD-BIRTH CONNECTION, LISTENING TO MOTHERS II: REPORT OF THE SECOND NATIONAL U.S. SURVEY OF WOMEN’S CHILDBEARING EXPERIENCES 36 (2006), available at [http://www.childbirthconnection.org/pdfs/LTMII\\_report.pdf](http://www.childbirthconnection.org/pdfs/LTMII_report.pdf), archived at <http://perma.cc/M5S3-6Z8J> Declercq; BLOCK, *supra* note 10, at 91-97; EPSTEIN *supra* note 13, at 162-64; CASSIDY, *supra* note 13, at 126-30.

<sup>37</sup> CASSIDY, *supra* note 13, at 108 (describing an increase in incidences of potentially life-threatening post-cesarean placental abnormalities in Mormon women).

<sup>38</sup> JUKELEVICS, *supra* note 21, at 45-50; HENCI GOER, THINKING WOMAN’S GUIDE TO A BETTER BIRTH (1999); CASSIDY, *supra* note 13, at 118 (“If all goes as planned, the mother will be home on Monday, nursing the baby and a sore six-inch scar, willing herself not to sneeze or laugh, which just adds to the pain.”).

would have to be delivered surgically.<sup>39</sup> This was true for two reasons. First, the maternal indications that necessitated the procedure—such as rickets—were unlikely to resolve between pregnancies.<sup>40</sup> Second, the vertical or “classical” uterine incision common until the 1970s left a scar that was more susceptible to tearing open during labor, causing a uterine rupture.<sup>41</sup> As surgical techniques and overall pre-pregnancy health improved, so did women’s chances of being able to deliver vaginally after cesarean surgery.

In the early 1980s, the National Institutes of Health and ACOG each released statements directing physicians to encourage women to have VBACs—a trend which continued until 1996.<sup>42</sup> One physician who trained during this period described great pressure from his residency program to keep a low cesarean rate, noting that the attending physicians were “very aggressive with VBAC.”<sup>43</sup> This shift in favor of VBAC took place against a backdrop of attempts to curb health care costs, a high-profile clash between maternity care providers and HMOs that played out in the “drive-through delivery” debates in the media and in statehouses across the country when insurers sharply cut back coverage for post-partum hospital stay.<sup>44</sup> Health insurers jumped at the liberalized VBAC recommendations, pushing avoidance of repeat surgery as a cost-saving measure: a cesarean lengthens the hospital stay and doubles the cost of a delivery.<sup>45</sup> HMOs announced incentives intended to curb unnecessary surgery, such as equalizing the reimbursement rate for vaginal and surgical delivery, and paying physicians bonuses for VBACs.<sup>46</sup> Indeed, some health insurers even stopped covering repeat cesarean sections.<sup>47</sup>

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<sup>39</sup> Edwin B. Cragin, *Conservatism in Obstetrics*, 114 N.Y. MED. J. 1, 3 (1916); CASSIDY, *supra* note 13, at 127-28; MORRIS, *supra* note 25, at 112.

<sup>40</sup> CASSIDY, *supra* note 13, at 128.

<sup>41</sup> *Id.*

<sup>42</sup> MORRIS, *supra* note 25, at 113.

<sup>43</sup> *Id.*

<sup>44</sup> David A. Hyman, *What Lessons Should We Learn From Drive-Through Deliveries*, 107 PEDIATRICS 406 (2001); Joan Beck, ‘Drive-through’ Birth No Bargain For Mother and Child, CHI. TRIB., June 26, 1996, [http://articles.orlandosentinel.com/1995-06-26/news/9506260143\\_1\\_hospital-stays-mother-and-child-maternity-stays](http://articles.orlandosentinel.com/1995-06-26/news/9506260143_1_hospital-stays-mother-and-child-maternity-stays).

<sup>45</sup> MORRIS, *supra* note 25, at 17.

<sup>46</sup> Stacey Burling, *Insurer Seeks to Cut Back Caesareans*, PHILA. INQ., July 24, 1995, [http://articles.philly.com/1995-07-24/living/25678582\\_1\\_c-section-rate-c-sections-caesarean-rate](http://articles.philly.com/1995-07-24/living/25678582_1_c-section-rate-c-sections-caesarean-rate), archived at <http://perma.cc/BSM3-DLKC>.

<sup>47</sup> BLOCK, *supra* note 10, at 87; Mike Stobbe, *C-Sections in U.S. Are at All-Time High*, WASH. POST, Nov. 15, 2005, [http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111500945\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111500945_pf.html), archived at <http://perma.cc/ZD3N-BLYE>.

Then, in 1996, the tide turned with the publication in the *New England Journal of Medicine* of a study of uterine rupture during trials of labor after cesarean. The study revealed nothing new,<sup>48</sup> but did focus public attention to the risks of VBAC.<sup>49</sup> This, coupled with high-profile malpractice cases involving large jury awards for uterine rupture (which some note were attributable to inappropriate use of labor-augmenting medications that increase the risk of rupture<sup>50</sup> even with an unscarred uterus<sup>51</sup>), was enough to push ACOG to issue more restrictive guidelines.<sup>52</sup> In 1999, ACOG issued a practice guideline recommending that VBAC take place only in facilities with “immediately available” surgical and anesthesiology capabilities.<sup>53</sup> VBAC rates steadily plunged from a high of 28% in 1996 to 8% in 2006.<sup>54</sup>

Now, with the benefit of considerably more evidence-based research, and the input of maternity care advocates who emphasized the desire for VBAC among birthing people during the 2010 National Institutes of Health Consensus Development Conference on Vaginal Birth After Cesarean Section,<sup>55</sup> ACOG’s most recent practice guidelines direct that VBAC is a reasonable option for most people who have had one or two low-transverse (horizontal) incisions.<sup>56</sup> And, in fact, people who attempt VBAC are successful 60-80% of the time.<sup>57</sup>

The practice guidelines acknowledge the limiting effect of the requirement of “immediately available” surgical capabilities, and assert that this was not the intent of the recommendation, but nevertheless retain this language. This is tempered by a recognition that, even among pregnant people who are not optimal candidates for a trial of labor under the guidelines, “[r]espect for patient autonomy supports the concept that patients should be allowed to

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<sup>48</sup> MORRIS, *supra* note 25, at 114.

<sup>49</sup> *Id.*

<sup>50</sup> WAGNER, *supra* note 17, at 28-29; BLOCK, *supra* note 10, at 89.

<sup>51</sup> JJ Zwart et al., *Uterine Rupture in the Netherlands: A National Population-Based Cohort Study*, 116 *BJOG: AN INT’L J. OF OBSTETRICS & GYNECOLOGY* 1069, 1074 (2009).

<sup>52</sup> MORRIS, *supra* note 25, at 115-16.

<sup>53</sup> *Id.*

<sup>54</sup> Torri D. Metz et al., *How Do Good Candidates for Trial of Labor After Cesarean (TOLAC) Who Undergo Elective Repeat Cesarean Differ from Those Who Chose TOLAC?*, 208(6) *AM. J. OBSTETRICS & GYNECOLOGY*, 458.c1 (2013).

<sup>55</sup> NIH Consensus Development Conference on Vaginal Birth After Cesarean, Mar. 8-10, Bethesda, MD, <http://consensus.nih.gov/2010/vbac.htm>.

<sup>56</sup> See generally Am. Coll. Obstetricians & Gynecologists, *ACOG Practice Bulletin No. 115: Vaginal Birth After Previous Cesarean Delivery*, 116 *OBSTETRICS & GYNECOLOGY*, no. 2, Aug. 2010, *reaff’d* 2013 [hereinafter *ACOG Practice Bulletin*].

<sup>57</sup> *Id.* at 3.



accept increased levels of risk.”<sup>58</sup>

The risk that raises the greatest clinical concern is uterine rupture, a potentially serious condition in which the scar from a prior surgery breaks open. Uterine rupture occurs in approximately .7% to .9% of VBAC attempts,<sup>59</sup> and requires rapid medical intervention to prevent harm or death to the woman or fetus. Limited research on the rate of uterine rupture after multiple cesareans exists, but the ACOG practice guidelines suggest that the rate of uterine rupture in women with two prior surgeries is between .9% and 1.8%.<sup>60</sup>

Despite the generally positive prognosis for people without complications of past or present pregnancies, and despite the return to cautious endorsement of VBAC, the rates of VBAC remain low. Calculating a national figure is complicated by states’ use of birth certificates that capture differing, non-comparable data, but evidence suggests a VBAC rate near 9.2%.<sup>61</sup> Certainly, elective repeat cesarean surgeries, with people opting to forego the possible risks of vaginal delivery and instead assume those of surgery, play some role in the low rate of VBAC. But there is no evidence to suggest that 91% of people chose repeat surgery.<sup>62</sup> To the contrary, one survey of postpartum women found that nearly half of the women surveyed who had had a prior cesarean were interested in the option of VBAC, but 57% were denied the option, most because of an unwilling provider (40%) or facility (23%), rather than a clinical risk factor (20%).<sup>63</sup> Of the women who had a repeat cesarean delivery, 25% reported feeling pressure to do so.<sup>64</sup>

Even among people who choose to have repeat surgery, the way risks are presented and whether providers appear to be supportive plays a role in decisions about birth options. One study, comparing decision-making among good candidates for VBAC who chose a subsequent cesarean to those who attempted vaginal delivery found that providers have a strong influence on how women chose to deliver.<sup>65</sup> The authors posited that the rate of repeat cesarean among the women surveyed could have decreased from

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<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.* at 2 tbl.1.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> MORRIS, *supra* note 25, at 111.

<sup>62</sup> *Id.* at 137.

<sup>63</sup> Declercq et al., *supra* note 36, at 36; MORRIS, *supra* note 25, at 137.

<sup>64</sup> *Id.* at 57.

<sup>65</sup> Metz et al., *supra* note 54, at 458.e4-e5.

70.4% to 25.5% if the providers had expressed support for VBAC.<sup>66</sup> Another study of women delivering after a prior cesarean found that few had accurate information about the likelihood of successful VBAC (13% of the women attempting VBAC and 3% of those undergoing repeat surgery), and that the women surveyed were extremely likely to choose repeat surgery if they perceived that that was their physician's preference.<sup>67</sup> Of women who perceived their physician to prefer repeat surgery, only 4% attempted a VBAC.<sup>68</sup>

However one decides to deliver, the decision necessarily takes into account not only their own health, but also the health of their baby, their family, and any future children they may wish to bear. The current rate of cesarean deliveries and the low rate of VBAC (in spite of the high probability of success) means that the decision of whether to undergo repeat cesarean surgery or to deliver vaginally is one that many people will face. It is also a decision that is increasingly made in a context that is slanted against access to a variety of options.

## II. BEYOND RISKS AND BENEFITS: FORCES IMPACTING AUTONOMY IN MEDICAL DECISION-MAKING

A number of forces beyond clinical considerations converge to influence the availability of VBAC. First, the U.S. healthcare system treats medical attention as a commodity instead of a right. There is no entitlement to healthcare, which means that some people will be unable to afford the health care providers who take on the added expense of malpractice insurance that covers VBAC. Second, the marketplace in which people seek prenatal care is not set up for even exchange between "buyers" and "sellers." Finally, the prevalent discourse in politics and bioethics incorrectly characterizes the relationship between the birthing person and the fetus as one of tension and conflict, which provides an opportunity for health care providers to assert the welfare of the fetus as justification for depriving people of options for birth.

### A. *The Best Care for the Highest Bidder: Health Care as a Commodity*

International human rights doctrine and many countries

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<sup>66</sup> *Id.*

<sup>67</sup> Sarah Bernstein et al., *Trial of Labor After Previous Cesarean Section Versus Repeat Cesarean Section: Are Patients Making an Informed Decision?*, AM. J. OBSTETRICS & GYNECOLOGY, Supplement to Jan. 2012, at S21.

<sup>68</sup> *Id.*

throughout the world recognize health care as a right.<sup>69</sup> The implementation of such a right varies significantly from country to country, but in the best cases it means that people have access to comprehensive health care in their communities.

The United States, however, recognizes no such right. There are limited entitlements to health care for elders and extremely low-income people through the Medicare and Medicaid programs and through state-based programs, but health care is generally treated as a good or service procured through the market economy. People are only entitled to the health that they can afford, leading to harsh health disparities that are reflected in maternal and infant mortality rates.<sup>70</sup>

The Affordable Care Act has marked an important step forward in ensuring access to healthcare for Americans, particularly with respect to maternity care.<sup>71</sup> Prior to the passage of the Affordable Care Act, which includes maternity care among the essential health benefits that must be provided by Qualified Health Plans and eliminates exclusions for preexisting conditions, it was extraordinarily difficult for people who were not eligible for Medicaid and who did not have an employer-sponsored health plan to find affordable insurance that covered maternity care.<sup>72</sup> Some women who had undergone a previous cesarean surgery were unable to find affordable coverage because their birth history was considered a “preexisting condition.”<sup>73</sup>

However, the Affordable Care Act leaves a number of challenges unaddressed. For instance, one vexing but under-

<sup>69</sup> See generally Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156 (2005) (noting that 70 countries include a right to health in their constitution).

<sup>70</sup> AMNESTY INT’L, DEADLY DELIVERY 19 (2010), <http://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf>; Andrea A. Creanga et al., *Racial and Ethnic Disparities in Severe Maternal Morbidity: A Multistate Analysis, 2008-2010*, 210 AM. J. OBSTETRICS & GYNECOLOGY 435.e1, 435.e2 (2014).

<sup>71</sup> Jessica Arons, *A Supreme Win for Women: The Crucial Benefits of Obamacare*, THE DAILY BEAST, June, 26, 2012, <http://www.thedailybeast.com/articles/2012/06/28/a-supreme-win-for-women-the-crucial-benefits-of-obamacare.html>, archived at <http://perma.cc/6RMG-FC7C>; *Fact Sheet: Why the Affordable Care Act Matters for Women: Health Insurance Coverage for Lower- and Moderate-Income Pregnant Women*, NAT’L P’SHP FOR WOMEN & FAMILIES (Sept. 2014), available at <http://www.nationalpartnership.org/research-library/health-care/lower-and-moderate-income-pregnant-women.pdf>, archived at <http://perma.cc/WAT6-98MJ>.

<sup>72</sup> NAT’L WOMEN’S LAW CTR., STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION, (Oct. 2009), available at <http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf>.

<sup>73</sup> Denise Grady, *After Caesareans, Some See Higher Insurance Cost*, N.Y. TIMES, June 1, 2008, <http://www.nytimes.com/2008/06/01/health/01insure.html>.

researched problem reported by women is the imposition of additional fees for patients who want to deliver vaginally after cesarean surgery. Despite the fact that a vaginal delivery is less expensive than a surgery, care providers attempt to offset the increased costs of malpractice insurance that covers VBACs, or time spent being “immediately available” to a laboring patient, by adding out-of-pocket fees that can make care unaffordable.

Maternity care, left to private hands in the market economy, has not thus far trended toward fairness and justice with respect to reproductive autonomy. The market, it seems, is more sensitive to some parties’ interests than others.

*B. The Myth of the Free Market*

The concept of the marketplace assumes a certain parity of power between the seller and the buyer. By contrast, the provider-patient relationship is one that is characterized by an asymmetry of information and power.<sup>74</sup> This is especially acute when the patient is part of a marginalized community (e.g. low-income, undocumented, living in rural area) whose access to alternative health care providers or facilities is limited, whether by geography or funds.

Directly or indirectly, malpractice concerns play a significant role in the availability and accessibility of VBAC. After ACOG released its 1999 recommendation that VBAC take place in hospitals with “immediately available” resources for emergency surgeries, physicians and hospitals responded by removing VBAC from the list of birthing options.<sup>75</sup> ACOG practice bulletins are not considered an official statement of the standard of care, and the practice bulletin provided no exact definition of immediate availability, but anxiety about the potential for liability in case of a uterine rupture in a facility that did not meet the practice bulletin’s guidelines led to drastic changes in practice among obstetricians.<sup>76</sup> As one physician noted, “The standard of care changed because we do things to make big jury decision lawsuits less feasible.”<sup>77</sup>

In a nonsensical example of circular reasoning, this change in standards that led to such great anxieties about liability was itself spurred by anxieties about liability. The vice president of Practice Activities who oversaw the 1999 practice bulletin defended the con-

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<sup>74</sup> Michelle Oberman, *Mothers and Doctors’ Orders: Unmasking the Doctor’s Fiduciary Role in Maternal-Fetal Conflicts*, 94 Nw. U. L. REV. 451, 457-58 (2000).

<sup>75</sup> BLOCK, *supra* note 10, at 87-88; CASSIDY, *supra* note 13, at 129.

<sup>76</sup> MORRIS, *supra* note 25, at 60.

<sup>77</sup> *Id.*

servative “immediately available” standard by saying that uterine rupture almost always results in legal action, and “[d]efendant physicians are in a better position from a liability perspective if they were present at the time of the complications.”<sup>78</sup> That is, physician’s should be immediately available not because it is actually necessary, but so that they can better testify in malpractice suits.

As a result of this change, hospitals across the country decided that they did not have the resources or staff to meet ACOG’s guidelines, with rural areas hit hardest.<sup>79</sup> In 2009, the International Cesarean Awareness Network conducted a groundbreaking survey of every hospital in the United States with a labor and delivery service to assess the accessibility of VBAC.<sup>80</sup> Of the 2,877 hospitals surveyed, more than 800 responded that they had a policy of refusing care to women who did not consent in advance to cesarean section (“VBAC ban”).<sup>81</sup> Nearly 400 had no physician who would attend a VBAC (“de facto ban”).<sup>82</sup> Between the “VBAC bans” and “de facto bans,” the survey found that 42% of U.S. hospitals deny people giving birth a meaningful opportunity to decide what happens with their bodies with respect to a major medical intervention with potentially serious medical consequences and personal significance.<sup>83</sup>

While malpractice concerns play a role in the availability of VBAC by changing practice among providers, malpractice insurers sometimes have a direct hand in curtailing birthing options altogether. For instance, in Oklahoma, the Physicians Liability Insurance Liability Company (PLICO) decided in 2005 that it would no longer cover physicians who attended VBAC deliveries.<sup>84</sup> As the malpractice insurance carrier for 80% of Oklahoma ob/gyns, PLICO’s policies have enormous sway in dictating the practice cli-

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<sup>78</sup> *Id.* at 129.

<sup>79</sup> *Id.* at 122.

<sup>80</sup> Letter from Christa Billings, International Cesarean Awareness President, to the author, Nov. 29, 2014 (on file with author).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Susan Simpson, *Oklahoma Mom Opts for Traditional Birth after C-Sections*, NEWSOK, Sept. 7, 2009, <http://newsok.com/oklahoma-mom-opts-for-traditional-birth-after-c-sections/article/3398916>; Mary Ellen Schneider, *Medical Malpractice Insurers Address VBAC Risks*, FAMILY PRACTICE NEWS, Feb. 15, 2005, <http://www.familypracticenews.com/specialty-focus/women-s-health/single-article-page/medical-malpractice-insurers-address-vbac-risks/03a0af5782.html>; Leigh Woosley, *Exit Strategy*, TULSA WORLD, Feb. 24, 2005, [http://www.tulsaworld.com/archives/exit-strategy/article\\_c34da24e-7cac-59b2-9fea-64821ebab943.html](http://www.tulsaworld.com/archives/exit-strategy/article_c34da24e-7cac-59b2-9fea-64821ebab943.html); *Vaginal Birth After Cesarean*, TULSA KIDS, Feb. 2010, <http://www.tulsakids.com/February-2010/Vaginal-Birth-After-Cesarean/>, archived at <http://perma.cc/RKV6-SJC2>.

mate. Oklahoma physicians who wish to support their clients in vaginal births after cesarean must either find another insurance carrier or forego malpractice insurance coverage to do so. Unsurprisingly, this is something few are willing to do, leaving pregnant people in Oklahoma with few options.

The same is true in New Jersey, where sixty obstetricians practicing at St. Barnabas Medical Center under the MDAdvantage medical insurer made a verbal agreement to stop attending VBACs and vaginal twin deliveries.<sup>85</sup> The goal of this agreement, explained the group's president and liaison Dr. Donald Chervenak, was "to curb [their] liability."<sup>86</sup>

A California obstetrician described a similar solution in her community, where, in 2002, liability insurance constraints led her facility to stop "allowing" women to deliver vaginally after cesarean surgery despite VBAC successes at that facility.<sup>87</sup> As a result, according to a sadly accurate running joke among local physicians, "the only way to get a vaginal birth after cesarean delivery is to have the birth at home."<sup>88</sup> Situations like this not only deprive birthing people of important options, they put physicians at odds with the hospitals in which they practice by placing pressure on them, ironically, to recommend cesarean surgeries even when they are clinically inadvisable.<sup>89</sup>

In light of these pressures—on institutions, providers, and people giving birth—maternity care looks less and less like a good purchased in an open market in which consumers exercise choice. The truth is more complicated than implied by one physician-journalist, who suggests:

[W]omen who can afford to choose their doctor will opt for one who caters to their wishes. If you want a natural childbirth, go to a doctor who will give you one. And if you want a C-section, it just takes a quick Google search to figure out if your doctor has high rates of surgery.<sup>90</sup>

As the illustrative examples below will demonstrate, even women who can afford to choose their doctor may find that there are

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<sup>85</sup> BLOCK, *supra* note 10, at 88.

<sup>86</sup> *Id.*

<sup>87</sup> Annette E. Fineberg, *An Obstetrician's Lament*, 117 OBSTETRICS & GYNECOLOGY 1188, 1188 (2011).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (describing a situation in which she counseled a patient who presented to the hospital in active labor at term to continue with the labor because of her history of successful VBACs and high BMI which increased her surgical risks; she "spent the following months defending that recommendation").

<sup>90</sup> EPSTEIN, *supra* note 13, at 166.

no VBAC-supportive doctors to choose, or that the doctors they choose may prove to be less supportive than they initially seemed once pregnancy has progressed to a point where money cannot solve the problem. Indeed, once the woman is in or near labor, a political climate that is increasingly hostile to reproductive autonomy may be leveraged to enforce the market constraints.

### C. *The Two-Patient Problem*

Since *Roe v. Wade* articulated a fundamental right to privacy that includes the right to terminate a pregnancy, the movement to recriminalize abortion has included attempts to create a separate legal status for fertilized eggs, embryos, and fetuses.<sup>91</sup> Although voters in even the most abortion-hostile states have rejected ballot measures that would amend state constitutions and criminal codes to redefine legal “persons” to include fertilized eggs,<sup>92</sup> these attempts have by and large been successful in inculcating the notion of the fetus as a subject of the law. Laws related to inheritance, personal injury, and violent crimes confer the status of “person” to the unborn.<sup>93</sup>

One thing is clear: despite the existence of laws that treat the unborn as persons under limited circumstances, no law in any state establishes that people lose their constitutional or statutory rights to medical decision making at any point in pregnancy. Nevertheless, laws that recognize rights for embryos and fetuses have been used as a justification for court-ordered surgery in women who disagree with their medical provider’s recommendations.<sup>94</sup> No court-ordered cesarean surgery has been upheld by an appellate court since 1981,<sup>95</sup> but the threats persist to the present day. More insidi-

<sup>91</sup> See generally Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005*, 38 J. HEALTH POL. POL’Y & L. 299 (2013) (documenting 413 cases in which pregnant women were deprived of their liberty through arrest by law enforcement or detention in a hospital, including thirty cases of forced medical intervention including cesarean surgery, based on arguments that fetuses should be treated as though they are legally separate persons).

<sup>92</sup> See Miss. Initiative 26, OFFICE OF THE SEC’Y OF STATE (2011), available at <http://www.sos.ms.gov/Elections-Voting/Documents/Definition%20of%20Person-PW%20Revised.pdf>; see also N.D. Measure 1, BALLOTPEDIA.COM (2014), [http://ballotpedia.org/North\\_Dakota\\_%22Life\\_Begins\\_at\\_Conception%22\\_Amendment\\_Measure\\_1\\_\(2014\)](http://ballotpedia.org/North_Dakota_%22Life_Begins_at_Conception%22_Amendment_Measure_1_(2014)).

<sup>93</sup> See generally *Ex parte* Ankrom & Kimbrough, 152 So.3d 397 (Ala. 2013) (Parker, J., concurring specially).

<sup>94</sup> See generally Paltrow & Flavin, *supra* note 91; see also Pemberton v. Tallahassee Mem. Reg’l Ctr., 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

<sup>95</sup> See *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457 (1981) (denying motion for stay of order on appeal); cf. *In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. Ct.

ously, perhaps, the duty to provide non-negligent care to fetuses (which exists independently of the physician's duty to the pregnant patient in many states), has been used to justify turning women away from prenatal care, ironically threatening maternal and perinatal health.

Treating fetuses as rights-bearing persons miscasts pregnancy as a struggle between two competing sets of rights. The overwhelming consensus of bioethicists and legal scholars is that it is ethically forbidden to infringe upon a pregnant woman's right to make decisions about the course of her medical care, even when her decisions may pose a risk to fetal health.<sup>96</sup> Nevertheless, a "cottage industry" of bioethical literature on pregnant patients' right to decline medical advice drives a persistent misconception that their rights are uniquely contested or subject to balancing against fetal interests.<sup>97</sup> This extreme outlier perspective miscasts conflict between pregnant patients and their care providers as "maternal-fetal conflict," inserts the medical provider as guardians of "fetal interests,"<sup>98</sup> and dangerously proposes that pregnant people have fewer rights than others.<sup>99</sup> This does not reflect the reality of lived experiences of pregnant people, whose medical decisions—even when they conflict with medical recommendations—virtually always take into account fetal wellbeing as well as their own needs, those of their family, and anticipated future pregnancies. The conflict, then, is not between the mother and the fetus, but between the mother and the health care provider<sup>100</sup> or the state.<sup>101</sup>

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App. 1990) (posthumously vacating an order for a cesarean section that killed both the pregnant woman and her severely premature newborn); *In re Baby Boy Doe*, 632 N.E.2d 326, 393 (Ill. App. Ct. 1994) (refusing to grant a court order for cesarean surgery because "[a] woman's competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus"); *Burton v. State*, 49 So.3d 263, 265 (Fla. Dist. Ct. App. 2010) (vacating order for forced bed rest on the basis of "fundamental constitutional right to refuse medical intervention"). But see *Pemberton*, 66 F. Supp. 2d at 1256 (Fla. Cir. Ct. 1999) (noting that the court order was not appealed after being carried out, but relief under § 1983 denied).

<sup>96</sup> Oberman, *supra* note 74, at 452–53.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., Frank A. Chervenak et al., *The Professional Responsibility Model of Obstetrical Ethics: Avoiding the Perils of Clashing Rights*, 205 AM. J. OBSTETRICS & GYNECOLOGY 315.e1, 315.e1 (Oct. 2011) (calling the assertion that "there is no circumstance in which someone could be brought to the operating room against their will" fallacious "pregnant women's rights reductionism"); Laurence B. McCullough & Frank A. Chervenak, *A Critical Analysis of the Concept and Discourse of 'Unborn Child'*, 8 AM. J. BIOETHICS 34, 38 (2008) ("Pregnant women are [ethically] obligated to take reasonable risks to themselves to protect the fetal patient.").

<sup>99</sup> Oberman, *supra* note 74, at 452–53.

<sup>100</sup> *Id.* at 471



The “fetus as patient” framework makes pregnant women susceptible to rights violations by health care providers who wrongly believe that they have a stronger obligation to the fetus than the pregnant woman.<sup>102</sup> Treating the fetus as an independent patient permits women to be caught “in proxy wars between those who place a premium on maternal autonomy rights and those who believe that fetal interests are more compelling.”<sup>103</sup> As one legal scholar has noted, “the effect of using a two-patient model for pregnancy is that attention shifts to the fetus,” often to the detriment of the pregnant woman, who, unlike the fetus, unquestionably possesses rights.<sup>104</sup>

In cases of disagreement over medical procedures, this sometimes means that instead of abiding by their ethical obligation to the pregnant patient, physicians cite a duty to the fetus in attempting to override a patient’s decisions, or abandoning care.<sup>105</sup> Fetal interests, then, become a proxy for physician’s recommendations and serve as a guise for unethical threats, coercion, and even force. These are not mere hypothetical situations—they are real situations faced by people giving birth across the country.

### III. ILLUSTRATIVE EXAMPLES

The failure of the market economy to respond to the needs of birthing people is evidenced by the difficulties in finding supportive prenatal care providers faced by people seeking to deliver vaginally after cesarean section, and by the passive coercion they experience from health care facilities that do not support their decisions. This may include threats of outlandish economic penalties.

<sup>101</sup> RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COST OF FETAL RIGHTS 6 (2003).

<sup>102</sup> Stephen D. Brown, *The “Fetus as Patient”: A Critique*, 8 AM. J. BIOETHICS 47, 49 (2008); Anne Drapkin Lyerly et al., *A Critique of the ‘Fetus as Patient’*, 8 AM. J. BIOETHICS 42, 43 (2008).

<sup>103</sup> Terri-Ann Samuels et al., *Obstetricians, Health Attorneys, and Court-Ordered Cesarean Sections*, 17 WOMEN’S HEALTH ISSUES 107, 113 (2007).

<sup>104</sup> Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1294 (1992).

<sup>105</sup> See, e.g., Defendant’s Attorney Affidavit in Opposition to Motion for Summary Judgment at 1-2, *Dray v. Staten Island Univ. Hosp.*, No. 500510/2014, 17 (N.Y. Sup. Ct. Kings Cnty. 2014) (responding to a motion for summary judgment in a medical malpractice case by invoking the “controversial” and “thought-provoking” nature of the question of whether a pregnant patient may be forced to undergo cesarean surgery over her explicit objection, and asserting that “an Obstetrician has a legal obligation to an unborn, full-term fetus and must ensure its health and safety”—apparently at the expense of the rights and health of the mother, whose refusal was overridden and who almost died because of injuries sustained in the surgery).

Furthermore, stopping short of actually seeking a court-ordered repeat cesarean, facilities may use threats of legal process (including forced surgeries and child welfare interventions) to minimize liability risk by preventing an “unauthorized” VBAC from transpiring against hospital policy—that is, making the prospect of delivering at that facility so frightful that the pregnant person goes elsewhere.

A. *Between a Rock and a Hard Place: Maternity Service Closures and VBAC Refusal Policies*

As introduced above, the wake of the 1999 ACOG Practice Bulletin saw a rapid decrease in the number of hospitals providing care to people seeking VBAC. This is a problem that has become more troublesome as hospital systems consolidate and shutter labor and delivery units, particularly in rural areas. For instance, a 2015 investigation of the changing maternity care landscape in Alabama found that just twenty-nine of the state’s sixty-seven counties had any maternity service at all.<sup>106</sup> In some cases, women drove more than two hours in labor to the next closest hospital that offered maternity services.<sup>107</sup> Women without the means to travel long distances for maternity care are left with limited options: “go to the nearest emergency room to have their babies delivered by an ER physician, or deliver at home.”<sup>108</sup> State law prohibits midwives and physicians from attending home births, leaving women to deliver unattended;<sup>109</sup> this is an option that is untenable, especially for someone laboring with a scarred uterus.

To add to the problem, lack of reliable access to nearby prenatal care has driven an increase in the rate of scheduled cesareans, as well as an increase in inductions,<sup>110</sup> which carry a heightened risk of cesarean section.<sup>111</sup> According to Dale Quinney, executive director of the Alabama Rural Health Association, “Many of those women are afraid of the distance and elect to go ahead and have a planned delivery.”<sup>112</sup> At Russell Medical Center, which treats women who live in rural areas without maternity units, 57% of babies born in 2013 were delivered by cesarean surgery. More than a

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<sup>106</sup> Anna Claire Vollners, *Many Alabama Women Drive 50+ Miles to Delivery Their Babies as More Hospitals Shutter L&D Departments*, AL.COM (Feb. 10, 2015 10:23AM), [http://www.al.com/news/index.ssf/2015/02/many\\_alabama\\_women\\_drive\\_50\\_mi.html](http://www.al.com/news/index.ssf/2015/02/many_alabama_women_drive_50_mi.html), archived at <http://perma.cc/9PCJ-97CK>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See JUKELEVICS, *supra* note 21, at 139-46.

<sup>112</sup> *Id.*

dozen Alabama hospitals have cesarean rates of over 40 and even 50%.<sup>113</sup>

The closing of maternity services raises serious questions of what becomes of people who have exhausted their options for VBAC. ACOG emphasizes that even at facilities with policies refusing care to women who do not consent in advance to cesarean surgery, “such a policy cannot be used to force women to have cesarean delivery or to deny care to women in labor who decline to have a repeat cesarean delivery.”<sup>114</sup> Instead ACOG recommends “patients should be clearly informed of such potential increase in risk and management alternatives” and “transfer of care to facilities supporting [VBAC] should be used rather than coercion.”<sup>115</sup> Supportive facilities, of course, are becoming increasingly rare.

Even hospitals that have been VBAC-supportive in the past may change their policies without warning, leaving women hoping to deliver at that hospital with no option but to travel hundreds of miles to the next provider. Joy Szabo, a Page, Arizona mother who felt the effect of a sudden change in VBAC policy, made national news in September of 2009 when she protested her local hospital’s turnabout.<sup>116</sup> She spoke to the *Lake Powell Chronicle*, defiantly posed holding her seven-months-pregnant belly next to a minivan with a message scrawled in paint on the rear windshield: “Page Hospital, enter my body without permission . . . Sounds like Rape to me.”<sup>117</sup> Szabo was pregnant with her fourth child, planning to deliver at Page Hospital, the local hospital where she had delivered three times before.<sup>118</sup> Ms. Szabo anticipated a VBAC delivery, and was a good candidate having delivered her first and third children vaginally.<sup>119</sup> Page Hospital, however, changed its stance on VBAC midway through Ms. Szabo’s pregnancy, claiming that it did not have the resources to respond to an emergency.<sup>120</sup> Faced with the possibility that she would have to travel 350 miles to Phoenix for a

<sup>113</sup> Anna Claire Vollers, *Which Alabama Hospitals Have the Highest, Lowest C-Section Rates?*, AL.COM (Jan. 23, 2015, 3:23 PM), [http://www.al.com/news/index.ssf/2015/01/alabama\\_hospitals\\_with\\_highest.html](http://www.al.com/news/index.ssf/2015/01/alabama_hospitals_with_highest.html), archived at <http://perma.cc/B953-K84V>.

<sup>114</sup> ACOG Practice Bulletin, *supra* note 56, at 8.

<sup>115</sup> *Id.*

<sup>116</sup> Mary Forney, *Hospital Policy Pains Expectant Mom*, LAKE POWELL CHRON., Sept. 30, 2009, [http://www.lakepowellchronicle.com/v2\\_news\\_articles.php?heading=0&story\\_id=1849&page=77](http://www.lakepowellchronicle.com/v2_news_articles.php?heading=0&story_id=1849&page=77), archived at <http://perma.cc/V887-DXC3>.

<sup>117</sup> *Id.*; Elizabeth Cohen, *Mom Won’t Be Forced to Have C-Section*, CNN (Oct. 15, 2009, 9:30 AM), <http://www.cnn.com/2009/HEALTH/10/15/hospitals.ban.vbacs/>, archived at <http://perma.cc/8DV6-FG8V>.

<sup>118</sup> Forney, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

VBAC or have an unassisted birth at home, Szabo asked the hospital Chief Executive Officer, Sandy Haryasz, what would happen if she presented to the hospital in labor and refused the surgery.<sup>121</sup> Haryasz responded that the hospital would obtain a court order.<sup>122</sup> In the end, Szabo and her husband relocated to Phoenix, where she easily delivered a healthy baby boy in December of 2009.<sup>123</sup>

*B. Holding Your Uterus for Ransom: Economic Threats*

Mrs. Doe<sup>124</sup> lives in Marquette, a small town in the Upper Peninsula of Michigan. According to her husband, she began her prenatal care with Ob/Gyn Associates of Marquette, the only local ob/gyn practice, with the expectation that she would have a VBAC delivery at the nearby community hospital, Marquette General Hospital. The ob/gyn group was unsupportive of her plan to have a vaginal birth after cesarean, dropping her from care in a letter that stated that they would not treat her, even in an emergency. She received this letter at thirty-six weeks gestation, the cusp of full-term.

Earlier in her pregnancy, the practice had referred her to a Maternal-Fetal Medicine (MFM) specialist, who had a monthly clinic in Marquette but was based in Grand Rapids, 400 miles away. The family reported that that MFM specialist made only a cursory review of her operative report and told Mrs. Doe that she was obliged to deliver surgically because of the risks of cephalopelvic disproportion (a baby too big for the mother's pelvis) and gestational diabetes. None of these predictions were supported by the full medical record, or ever materialized. Her options dwindling, Mrs. Doe sought care from a local Family Physician. When that physician received her file, it included a letter from the MFM specialist detailing his opinion, which was marked with a note from a physician at Ob/Gyn Associates stating, "FYI. We are NOT allowing a VBAC on this [patient]."

Fortunately, Mrs. Doe was able to find a provider in Ann Arbor, and the family made plans to relocate 440 miles away for the final weeks of the pregnancy. The only thing that remained was to plan for the unexpected—a potential premature delivery, a mater-

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<sup>121</sup> Cohen, *supra* note 117.

<sup>122</sup> *Id.*

<sup>123</sup> Elizabeth Cohen, *Mom Fights, Gets the Delivery She Wants*, CNN (Dec. 17, 2009, 9:17 AM), <http://www.cnn.com/2009/HEALTH/12/17/birth.plan.tips/>, archived at <http://perma.cc/X3F6-6E3Q>.

<sup>124</sup> Name withheld at the request of the family.

nal or fetal indication for early delivery—anything that would mean delivery before thirty-nine weeks gestation.

When Mrs. and Mr. Doe attempted to resolve the issue with the hospital, Marquette General Hospital's risk manager informed the family that MGH would not require the ob/gyn practice to assist Mrs. Doe, even in an emergency. They stated that if Mrs. Doe came to MGH in labor, regardless of how far she had progressed in her labor, they would stabilize and transfer her by airplane to the University of Michigan Health System, in Ann Arbor. When Mr. Doe protested, the risk manager demanded his credit card number for the purpose of billing them for plane fuel in advance. Fortunately Mrs. and Mr. Doe had a much more productive meeting with MGH's Chief Medical Officer, who rescinded the demand for plane fuel funds. The family relocated to Ann Arbor at about thirty-seven weeks gestation, and Mrs. Doe had a rapid vaginal delivery of a healthy baby.

Threatening patients with out-of-pocket expenses for transfers is just one way hospitals may attempt to circumvent their responsibilities to patients under federal law by keeping them from becoming patients in the first place. To understand why a hospital would want to ward off a patient, it is important to understand the Emergency Medical Treatment and Active Labor Management Act (EMTALA). EMTALA mandates that anyone who presents in active labor to the emergency department of a hospital that receives Medicaid funds must be examined and stabilized.<sup>125</sup> Once a labor is fully active, stabilization entails the delivery of the newborn and the placenta. If an emergency beyond the hospital's capacity arises, they may initiate a transfer to a suitable facility. While ACOG's practice guidelines recommend that VBAC labors be carefully monitored and take place in facilities where the resources necessary for emergency cesarean surgery are "immediately available," a VBAC labor is not an emergency *per se* that would warrant automatic transfer to another facility (in fact, it stands to reason that hospitals that are not equipped to handle a VBAC are not equipped to handle any birth, which may require surgical intervention at a moment's notice). The request for money for plane fuel from the Doe family was likely not based on any standard hospital practice, but was instead intended to deter the family from coming to MGH in labor, triggering responsibilities on the part of the hospital under EMTALA.

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<sup>125</sup> Examination and Treatment for Emergency Medical Conditions and Women in Labor, 42 U.S.C. § 1395dd (2011).

Economic threats from health care providers can arise during labor and delivery as well. Many women in labor faced with an un-supportive provider try to seek respite (or optimize their chances for a VBAC) by leaving the hospital to allow labor to progress before returning to deliver. However, a common threat used to induce compliance with medical advice is that health insurance will not cover a birth if a woman leaves the hospital against medical advice (AMA).<sup>126</sup> This threat has been debunked as a “medical urban legend” by a study of insurance billing and payment data for more than 46,000 patients over nine years, which found no denials of payment due to discharge against medical advice.<sup>127</sup> Even so, the study not only found that the belief that insurance would not cover charges in the event of an AMA discharge is pervasive among health care providers, it is memorialized in AMA discharge forms, some of which require the patient to agree that they will accept responsibility for the entire bill.<sup>128</sup> As a result, the threat is given the air of truth and coercive force.

*C. The Medically Unnecessary Vagina: Health Insurance Denials*

Economic threats are not always as direct as being asked to pay for plane fuel, but, as discussed above, may come in the form of having to the sticker price of birth out of pocket. Birth is extremely expensive.<sup>129</sup> In 2011, the average facility costs alone (excluding newborn care fees and provider fees for midwives, physicians, anesthesiologists, and pediatricians) ranged from \$10,657 to \$23,923, depending upon whether the delivery was vaginal or surgical, and whether there were complications.<sup>130</sup> Even at the lower end of the spectrum, these are not costs that people can ordinarily pay out-of-pocket, so most rely on health insurance to cover maternity care. As a result, people’s decisions about location of birth or prenatal care provider are driven by what insurance will or will not cover.

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<sup>126</sup> Cf. Gabrielle R. Schaefer et al., *Financial Responsibility of Hospitalized Patients Who Left Against Medical Advice: Medical Urban Legend?*, 27 J. GEN. INTERN. MED. 825 (2012) (exploring the veracity of nonpayment threats in the general population of hospitalized patients).

<sup>127</sup> *Id.* at 829.

<sup>128</sup> *Id.* at 828.

<sup>129</sup> See generally Maureen P. Corry et al., *The Cost of Having a Baby in the United States*, TRUVEN HEALTH ANALYTICS (2013), available at <http://transform.childbirthconnection.org/wp-content/uploads/2013/01/Cost-of-Having-a-Baby1.pdf>.

<sup>130</sup> *Average Facility Labor and Birth Charge By Site and Method of Birth, United States 2009-2011*, CHILDBIRTH CONNECTION (2013), available at <http://transform.childbirthconnection.org/resources/datacenter/chargeschart/>, archived at <http://perma.cc/M48C-KHQY>.

Where insurance dictates where a person may deliver, it can have the effect of making a vaginal birth after cesarean unaffordable.

In January of 2014, Michelle<sup>131</sup> was hoping to have a vaginal birth after cesarean at a hospital just a block from her house in Santa Barbara, California. The hospital seemed well suited to her needs, advertising a state of the art perinatal center with an onsite NICU. Based on the information provided by the medical group Michelle's insurance provider contracted with and the shared decision-making quiz on their website, she was a good candidate for VBAC. In fact, the desire for a VBAC delivery was a factor in Michelle's decision to purchase her insurance policy.

During the third trimester of her pregnancy, however, it became clear that there was no physician who would actually attend a VBAC at the well-equipped local hospital. Michelle contacted her insurance company and requested that they cover maternity care with another provider, and her request was submitted for review to the medical group. Their response was astonishing:

The service request is being denied because there is a lack of medical necessity . . . . We cannot approve your request for an evaluation for vaginal birth after cesarean (VBAC) . . . . Our physician reviewer has determined that your delivery could be safely rendered by cesarean section . . . .

Michelle appealed the medical group's decision and was refused several more times. She spent the last months of her pregnancy arguing with the medical group, the insurance company, and even her husband, who did not understand why she didn't just give up and agree to surgery. Finally, with less than a month remaining in her pregnancy, she found a supportive ob/gyn who helped her appeal to the insurance company. The medical group admitted to the insurance company that they would not provide a non-surgical option for delivery, so the insurance company approved a transfer of care to an ob/gyn practice at UCLA, 100 miles away.

An upshot of a commodified healthcare system where surgical and vaginal delivery are treated as coequal widgets is that Michelle is neither the first nor last person to be told that her vagina is medically unnecessary to the birthing process. Even where the determination is overturned on appeal, the initial denial can cause delays in care and uncertainty as to whether the patient's wish to avoid unnecessary surgery will be respected.

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<sup>131</sup> Name withheld.

*D. Defensive Medicine Goes On The Offense: Threats And Intimidation*

On July 10, 2014, a letter was delivered to Jennifer Goodall's home. Jennifer was thirty-seven weeks pregnant with her fourth child, whom she hoped to deliver vaginally after three cesareans. She had explained to the ob/gyns at Comprehensive Women's Health Care that she wished to avoid surgery if possible, because prior surgeries had been complicated, traumatic, and required a lengthy recovery process. The physicians had been resistant, but nothing prepared her for the contents of the letter. It read:

After consideration by our Ethics Committee, we wish to advise you of the following actions:

1. We will contact the Department of Children and Family Services about your refusal to undergo a Cesarean section and other care and treatment recommended by your physicians and the high risks your refusals have on your life and health, as well as the life and health of your unborn child.
2. We will begin a process for an Expedited Judicial Intervention Concerning Medical Treatment Procedures. This is a proceeding for expedited judicial intervention concerning medical treatment procedures relating to the delivery of your child.
3. If you present to our hospital in labor, and your physician deems it clinically necessary, a Cesarean section will be performed with or without your consent.

In summary, while we recognize that you have the right to consent to a Cesarean section, you have elected to refuse this procedure despite the advice of your treating physicians. This decision places both you and your unborn child at risk for death or serious injury. We will act in the best interests of you, your family, and your unborn child. Our decision to take this course of action has been the result of multiple conversations with physicians and other experts within our organization.

We encourage you to find a physician who will agree to your demand. We sincerely hope that you will trust your physicians and our staff to do the right thing for you, your unborn child, and family.<sup>132</sup>

The letter was signed by the hospital's Chief Financial Officer.

The threats to her fundamental rights to physical integrity and custody of her children were both serious and terrifying to Ms. Goodall. In threatening to call the Department of Child and Fam-

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<sup>132</sup> Declaration of Jennifer Goodall at 9-10, *Goodall v. Comprehensive Women's Health*, No. 2:14-cv-399-FtM-38CM, 2014 WL 3587290 (M.D. Fla. July 18, 2014), ECF No. 6.



ily Services and perform a surgery “with or without her consent,” the hospital essentially memorialized its intent to commit a battery and misuse child protective authorities by invoking them where they have no jurisdiction to supervise women’s decisions about birth, both of which are torts. Ms. Goodall, who had hoped to deliver at the Bayfront Health Port Charlotte Hospital now found herself at full term in pregnancy and “fired” by her practice. Any hope that she had of availing herself of her rights under EMTALA by presenting to the hospital in active labor evaporated as the hospital had threatened her with a court order or unconsented surgery.

Like anyone threatened with a battery would, Ms. Goodall filed for a restraining order against the hospital and physicians that would prevent them from carrying out the threats. Federal District Judge John E. Steele denied the request, stating in part that Ms. Goodall had no “right to compel a physician or medical facility to perform a medical procedure in the manner she wishes against their best medical judgment.”<sup>133</sup> Perversely, Ms. Goodall was cast as attempting to *compel* a medical procedure when she was trying to avoid a compelled surgery. She was free, the court reasoned, to find another provider who would support her in her desire to avoid surgery—even though no such provider existed in her area.

After her request for a restraining order was denied, Ms. Goodall went into hiding. Rather than presenting to a hospital for medical supervision as she wanted, she labored at home until it was no longer bearable and went to another local hospital where she underwent cesarean surgery. As had always been her plan, she consented to surgery when it became apparent that her labor was not progressing. Even so, the fear and uncertainty and risk to her pregnancy that she had to endure because of the hospital’s threats diminish the happy ending. Ms. Goodall may have had a healthy baby, but Bayfront Health Port Charlotte Hospital learned that they may avoid accepting VBAC patients by threatening them with force and legal coercion.

Ms. Goodall is not the only woman, or even the only woman in Florida, to face threats of court-ordered surgery and wrongful reporting to child protective authorities because of a medical choice that is not within the standard of care.<sup>134</sup> This framing, offered by

<sup>133</sup> Goodall v. Comprehensive Women’s Health, No. 2:14-cv-399-FtM-38CM, 2014 WL 3587290, at \*3 (M.D. Fla. July 18, 2014).

<sup>134</sup> Letitia Stein, *USF Obstetrician Threatens to Call Police if Patient Doesn’t Report for C-section*, TAMPA BAY TIMES, Mar. 6, 2013, <http://www.tampabay.com/news/health/usf-obstetrician-threatens-to-call-police-if-patient-doesnt-report-for/2107387>, archived at <http://perma.cc/C3GX-RRDZ>; see also *Burton v. State*, 49 So.3d 263 (Fla. Dist. Ct.

health care providers and facilities, is illuminating. First of all, the standard of care is not binding upon the pregnant person, who has a right to make even unreasonable medical decisions.<sup>135</sup> Second, it exposes the underlying medicolegal concerns. In fact, hospitals that have sought court orders against their patients have openly acknowledged the fear of malpractice liability as a factor in deciding to override a competent patient's wishes, even where none of the physicians actually wants to perform surgery against their patients' will.<sup>136</sup> Ironically, this is a concern that has been directly addressed by the Florida Supreme Court, which has explicitly held that "patients do not lose their right to make decisions affecting their lives simply by entering a health care facility . . . a health care provider's function is to provide medical treatment in accordance with the patient's wishes and best interests, not as a "substitute parent" supervening the wishes of a competent adult."<sup>137</sup> That court further recognized that court orders are used by hospitals "to determine their rights and obligations to avoid liability" and asserted that health care providers are not liable in tort for following in good faith a competent patient's informed refusal of care.<sup>138</sup>

While the order in Ms. Goodall's case does not represent precedent in any jurisdiction, it reveals a dim prognosis for the right to avoid unwanted surgery. Whereas health care facilities can hale a woman to court to adjudicate their liability in advance, courts have signaled that women, by contrast, may not. The significance of this is that a pregnant person wishing to deliver vaginally after cesarean surgery can expect no guarantee of bodily autonomy. Their only hope for vindication is in the hearing on a court order for surgery which—assuming that they are represented and the order is not granted *ex parte*—is procedurally deficient *per se*.<sup>139</sup>

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App. 2010); *Pemberton v. Tallahassee Mem. Reg'l Ctr.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

<sup>135</sup> 1 Health L. Prac. Guide §11:7 (2014).

<sup>136</sup> ROTH, *supra* note 101, at 118-19.

<sup>137</sup> *In re Dubreuil*, 629 So.2d 819, 823 (Fla. Sup. Ct. 1993).

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., *In re A.C.*, 573 A.2d at 1248 (noting that such proceedings would ordinarily arise under circumstances that would make it difficult or impossible to communicate with counsel or to conduct pre-trial discovery "to which she would be entitled as a matter of course in any controversy over even a modest amount of money"); Gallagher, *supra* note 3, at 49 ("The procedural shortcomings rampant in these cases are not mere technical deficiencies. They undermine the authority of the decisions themselves, posing serious questions as to whether judges can, in the absence of genuine notice, adequate representation, explicit standards of proof, and right of appeal, realistically frame principled and useful legal responses to the dilemmas with which they are being confronted.").

Where these coercive threats of abandonment are successful, patients have no realistic opportunity to find alternative care, and no cause of action in tort unless a medical catastrophe occurs as a result.<sup>140</sup>

#### IV. FINDING SOLUTIONS

The limited entitlement to health in America and the reality of healthcare in the market economy create challenges that defy easy solutions—particularly litigation-based solutions. There are, however, some potential avenues for changemaking. Advocates for gender equity and reproductive justice can use these strategies to ensure that, at minimum, pregnant people have a meaningful right to decide whether or not they will undergo major surgery. Litigation opportunities may be limited, but attorneys can support these efforts with their understanding of contracts, administrative authority, and health policy.

##### A. *Market-based Solutions*

Given that private corporations will continue to control health insurance and healthcare for the foreseeable future, these corporations should be held to account for the service they provide (or fail to provide) to consumers. Most hospitals have some form of internal quality control mechanism that permits patients to register complaints about poor care. Consumer groups should advocate with local health care facilities to change VBAC refusal policies, and develop mechanisms for accountability for threats or other inappropriate actions.

The prospect of consumer complaints to healthcare facilities must be tempered with a dose of reality: complaints often must be addressed to the very institution that has created the problem, and institutional inertia and indifference toward individuals cannot be underestimated. Nevertheless, complaints paired with public pressure may be effective in ensuring that patients have a seat at the table when hospital policies are created. For instance, activists in Cape Coral, Florida were included in the creation of the Lee Memorial Health System's VBAC policies,<sup>141</sup> and maternity care advocates successfully lobbied for the reopening of a maternity service in the Bronx that had a history of using midwives to achieve a low

<sup>140</sup> 1 Health L. Prac. Guide §11:7 (2014).

<sup>141</sup> Frank Gluck, *Mothers Hoping To Avoid C-Sections Often Can't Find Doctors*, NEWS-PRESS.COM, July 28, 2014, <http://www.news-press.com/story/life/wellness/2014/07/27/mothers-hoping-avoid-c-sections-often-find-willing-doctors/13227725/>.

cesarean rate and high rate of VBAC success.<sup>142</sup>

Patients may also file complaints with the nonprofit bodies that provide accreditation to health care facilities. These include the Joint Commission, which oversees hospitals,<sup>143</sup> and the Commission for the Accreditation of Birth Centers, which oversees birthing centers.<sup>144</sup>

Additionally, health insurers may be able to provide some relief. Refusal of care by a practice or provider to people seeking to avoid primary or repeat cesarean delivery may constitute a breach of the contract the provider has with the health insurer. In many situations, complaints and appeals of denials have led to insurers easing restrictions that impede access to VBAC. Many maternity patients are unaware that they can appeal insurance denials, or that they may in some instances be entitled to out-of-network coverage of a provider who will provide the care that they need when there are no others available in-network.

#### *B. Administrative Solutions*

Medicine is a self-regulating profession, which means that each state has a regulatory agency that oversees the profession according to administrative rules and regulations. The creation of rules and regulations generally provides more of an opportunity for input by the public than lawmaking, making this an area where activists can create positive change. One example of such change from collective effort took place in Arizona, where midwives and midwifery advocates won an expansion of home birth services to include VBACs by pushing for a change in the rules governing midwifery practice.<sup>145</sup>

Regulations can also provide avenues for redress, such as viola-

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<sup>142</sup> Ben Kochman, *Baby step! First Infant Born at North Central Bronx Hospital's New Maternity Ward*, N.Y. DAILY NEWS, Oct. 27, 2014, <http://www.nydailynews.com/new-york/bronx/infant-born-north-central-bronx-hospital-new-maternity-ward-article-1.1989399>, archived at <http://perma.cc/8JTZ-WU7X> ("The birthing center reopened with a new post-anesthesia care unit, upgraded security and a core team of experienced physicians and licensed midwives after public outcry and a \$2 million infusion.").

<sup>143</sup> *Report a Patient Safety Event*, THE JOINT COMM'N, [http://www.jointcommission.org/report\\_a\\_complaint.aspx](http://www.jointcommission.org/report_a_complaint.aspx) (last visited Apr. 21, 2015), archived at <http://perma.cc/BD5E-G6LT>.

<sup>144</sup> *How to Report a Complaint About a Birth Center*, THE COMM'N FOR THE ACCREDITATION OF BIRTH CTRS., <https://www.birthcenteraccreditation.org/find-accredited-birth-centers/how-to-report-a-complaint-about-a-birth-center/> (last visited Apr. 21, 2015), archived at <https://perma.cc/PAV6-74LV>.

<sup>145</sup> Rachel Leingang, *Midwives' Role Expands, To Some Controversy, Under New Rules*, CRONKITE NEWS, May 2, 2014, <http://cronkitenewsonline.com/2014/05/role-of>

tions of EMTALA, which are reportable to regional offices of the Centers for Medicare and Medicaid Services.<sup>146</sup> Additionally, the authority of agencies governing the practice of medicine includes the determination and disciplining of misconduct, usually through the Board of Medicine, Board of Nursing, or Board of Midwifery, depending upon the state. Advocates can help ensure that filing of complaints against individual providers is accessible and straightforward. They can also help develop administrative guidelines that include penalties for patient abandonment that do not excuse abandoning patients who disagree with medical recommendations late in pregnancy.

### C. *Policy Solutions*

The Affordable Care Act has provided an opportunity for advocates to shape healthcare policy to meet people's needs during pregnancy and delivery. For instance, not only must all plans cover maternity care, many states have expanded coverage for midwifery services and free-standing birth centers.<sup>147</sup> Federal and state insurance laws should require that insurance cover VBAC and provide out-of-network exceptions when no in-network providers are available.

Another strategy, already adopted by New York<sup>148</sup> and Massachusetts,<sup>149</sup> is the creation of a Maternity Information Act. Mater-

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arizonas-midwives-expanding-with-some-controversy-under-new-rules/, archived at <http://perma.cc/8TSG-7KM3>.

<sup>146</sup> *Where to Report EMTALA Violations*, PUBLICCITIZEN.ORG, [http://www.citizen.org/hrg/article\\_redirect.cfm?ID=6147](http://www.citizen.org/hrg/article_redirect.cfm?ID=6147) (last visited Sept. 2, 2015).

<sup>147</sup> *Fact Sheet: Why the Affordable Care Act Matters for Women: Better Care for Pregnant Women and Mothers*, NAT'L P'SHIP FOR WOMEN & FAMILIES (2014), available at <http://www.nationalpartnership.org/research-library/health-care/better-care-for-pregnant-women.pdf>.

<sup>148</sup> N.Y. PUB. HEALTH L. § 2803-j(2)(a-m) (2015) ("Each hospital's informational leaflet must provide the annual percentage of the following maternity related procedures performed at the hospital: cesarean sections (primary, repeat and total); successful vaginal deliveries by women who have had previous cesarean sections; deliveries by midwives; use of electronic fetal monitoring; use of forceps; breech births delivered vaginally; use of analgesia; use of anesthesia; induction of labor; augmentation of labor; episiotomies; and whether birthing rooms and rooming-in is available at the facility.").

<sup>149</sup> MASS. GEN. LAWS ch. 111, § 70E (2009) ("Every maternity patient, at the time of pre-admission, shall receive complete information from an admitting hospital on its annual rate of primary caesarian sections, annual rate of repeat caesarian sections, annual rate of total caesarian sections, annual percentage of women who have had a caesarian section who have had a subsequent successful vaginal birth, annual percentage of deliveries in birthing rooms and labor-delivery-recovery or labor-delivery-recovery-postpartum rooms, annual percentage of deliveries by certified nurse-midwives, annual percentage which were continuously externally monitored only, annual per-

nity Information Acts require facilities to collect, report, and provide to all maternity patients data on utilization of interventions such as episiotomy, forceps, and cesarean surgery. These laws were passed to ensure that people have the information they need about healthcare facilities and to address overuse of cesarean surgery and other procedures.<sup>150</sup> This permits women to make informed decisions about birth facilities based on their current practice.

## V. CONCLUSION

It is fundamental to the basic premises of dignity and liberty that each person have the right to choose not to undergo potentially life-threatening surgical invasions, and that no such invasion take place without their consent. Respect for equality demands that this right belongs equally to people who can become pregnant and give birth.

In the context of the millions of births that take place each year in the United States, few cesarean surgeries (though likely more than we are aware of) take place over the objection of the person giving birth. But consent is more than there mere absence of objection, and choice is meaningless in the absence of alternatives.

The violence done to a person who is forced to have a surgery against their will is not limited to that of cutting and scalpels: it includes the violence done by the invisible hand, and the violence done by the state for its failure to prevent it. In order to achieve a world in which people can freely and fully make decisions about their reproductive lives, our accounting of the surgeries performed against the will of the person giving birth must include, and our advocacy for reproductive justice address, the many factors that conspire to deprive people of the right to refuse.

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centage which were continuously internally monitored only, annual percentage which were monitored both internally and externally, annual percentages utilizing intravenous, inductions, augmentation, forceps, episiotomies, spinals, epidurals and general anesthesia, and its annual percentage of women breast-feeding upon discharge from said hospital.”).

<sup>150</sup> See LAUREL TUMARKIN ET AL., OFFICE OF THE N.Y.C. PUB. ADVOCATE, GIVING BIRTH IN THE DARK: CITY HOSPITALS STILL FAILING TO PROVIDE MANDATED MATERNITY INFORMATION 7 (2006), available at <http://www.nyc.gov/html/records/pdf/govpub/moved/pubadvocate/GivingBirthInTheDark12.06.pdf>.

# WORKING ON THE OUTSKIRTS OF HOPE: ONE INDEPENDENT LEGAL SERVICES ORGANIZATION’S STRUGGLE TO SURVIVE AND SERVE RHODE ISLAND’S LOW INCOME COMMUNITIES

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I founded and run the non-profit, tax exempt, public interest, civil legal services agency called the Rhode Island Center For Law And Public Policy (RICLAPP).<sup>1</sup> RICLAPP was ambitious in trying to meet the never-ending needs of low income Rhode Islanders. We served clients at or below 300% Federal Poverty Level (FPL) on a variety of civil legal issues: housing/eviction defense, domestic relations (child custody/support, nominal divorce, domestic violence), public benefits, employment issues, credit collection defense, school-based issues, and business formation for low-income entrepreneurs.

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<sup>†</sup> JD, New England Law. My deep thanks to my wife Kathleen and daughter Jeanine for their strength and support over the years; the paid and volunteer RICLAPP staff who worked so hard to make life a little more gentle for those in need; the City University of New York School of Law and the *CUNY Law Review* staff for their support and hard work in publishing this piece; and a profound thanks to Emily Farrell, who guided and nudged me, and worked so hard to make this piece the best it could be.

<sup>1</sup> *RICLAPP President’s Page*, RHODE ISLAND CENTER FOR LAW AND PUBLIC POLICY, <http://www.riclapp.org/president.html> (last updated 2013), available at <http://perma.cc/QPN3-L2BE>.

RICLAPP is largely funded by private donations, with state and federal dollars all but incidental to our organization's income. Simply stated, because of the way RICLAPP is funded, I'm on the hustle quite a bit. The following paper recounts our efforts to financially survive through a down economy, in a politically charged environment, in a culture that neither understands nor cares about the plight of poor people. I can't state this strongly enough—things exist the way they do because the people in power want them that way.

This paper has two goals. The first is to inform those who seek to begin their own agency of particular financial, political, and social obstacles they may confront. The second goal is to at least generate an honest discussion as to how we can provide legal services to those most underserved and vulnerable in our society. Running my organization is the most important work that I've ever done. I would like to think that our efforts, coupled with this paper, will make things a little easier for those who follow me in this work by highlighting the challenges of trying to procure increasingly scarce funds. This paper addresses the challenges that a non-profit legal services agency such as RICLAPP faces situated during the most dysfunctional economy since the 1930s, trying to raise money not merely to survive, but to stabilize and continue to serve its underserved clients. As of this writing, the outcome of our nearly seven year efforts remains in doubt.

This paper is not a "how to" on raising money for a legal services organization. In short, as Basketball Hall of Famer Charles Barkley once famously said, "I am not a role model."<sup>2</sup> Moreover, whatever one concludes from some of our successes and failures, there is no fungibility in any approach to fundraising or development. It always takes place in a unique environment that cannot be automatically replicated in time and place. In other words, I'm not attempting to act as a consultant, telling you to apply boilerplate approaches to a given situation. The location in which an organization exists is unique, and the overall political, social, and particularly economic climates are unique. So the cautionary statement here is to look at your own organization, assess your own climate, take what is useful and applicable, and ignore the rest.

If there are two things that I have learned over the past seven years, they are that there is an ever-expanding number of people

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<sup>2</sup> Larry Platt, *Charles Barkley*, SALON (May 30, 2000, 3:24 PM), <http://www.salon.com/2000/05/30/barkley/>, archived at <http://perma.cc/T8YP-2GHA>.



who are underserved or unserved by the legal community, and that legal service organizations, particularly those like RICLAPP, face a variety of impediments to survival, let alone to serving those most in need. The “justice gap” has been well documented over the years.<sup>3</sup> It has been over fifty years since President Lyndon Johnson, in his 1964 State of the Union address, told the nation that there were millions of people who lived on the “outskirts of hope.”<sup>4</sup> Fifty years later, millions still live on the outskirts of hope.

In this paper, I will detail one effort to meet the legal needs of traditionally underserved people. Part I will describe the Founding of RICLAPP and the milieu in which it was founded. Part II discusses our organizational structure, with a focus on the availability and limitation of resources, and the role of “leadership” in trying to overcome those limitations. Part III further details the challenges which I believe are, because of its size, unique to Rhode Island. Part IV looks at the challenges to obtaining funding for RICLAPP. Part V puts focus on the nature of poverty. Part VI discusses the need for a robust Access to Justice program if we are ever to be serious about ensuring that everyone, no matter their station in life, has an equal opportunity to the justice promised to them. Part VII contains some final thoughts.

## I. FOUNDING RICLAPP

RICLAPP was organized as a Rhode Island non-profit corpora-

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<sup>3</sup> See generally LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf), available at <http://perma.cc/34MS-SGHL>; Justice Earl Johnson Jr., *50 Years of Gideon, 47 Years Working Toward a “Civil Gideon”*, 47 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL’Y 35 (May-June 2013), available at [http://civilrighttocounsel.org/uploaded\\_files/33/47\\_Years\\_Working\\_on\\_Civil\\_Gideon\\_Johnson\\_.pdf](http://civilrighttocounsel.org/uploaded_files/33/47_Years_Working_on_Civil_Gideon_Johnson_.pdf), archived at <http://perma.cc/ZRS3-BFHN>; Stephen Sachs, *Seeking a Right To Appointed Counsel In Civil Cases In Maryland*, 37 U. BALT. L. REV. 5 (2007); Russell Engler, *Reflections On A Civil Right To Counsel And Drawing Lines: When Does Access To Justice Mean Full Representation By Counsel, And When Might Less Assistance Suffice?*, 9 SEATTLE J. SOC. JUST. 97 (2010); But see, Mark Walsh, *A Sour Note from Gideon’s Trumpet: Playing the Blues for the Right of Counsel in Civil Cases*, 97-SEP A.B.A. J. 14 (2011); Lawrence J. Siskind, *Civil Gideon: An Idea Whose Time Should Not Come*, AMERICAN THINKER (August 6, 2011), [http://www.americanthinker.com/articles/2011/08/civil\\_gideon\\_an\\_idea\\_whose\\_time\\_should\\_not\\_come.html](http://www.americanthinker.com/articles/2011/08/civil_gideon_an_idea_whose_time_should_not_come.html), archived at <http://perma.cc/944C-T5K4>; *Turner v. Rogers*, 131 S. Ct. 2507 (2011); *In re Hester-Bey*, No. 14-CV-3903 (CBA) (LB), 2014 WL 6771975 (E.D.N.Y. Dec. 1, 2014).

<sup>4</sup> Lyndon B. Johnson, *State of the Union*, MILLER CENTER, (Jan. 8, 1964), <http://millercenter.org/president/speeches/speech-3382>, archived at <http://perma.cc/PPE3-X9UA>.

tion on March 31, 2008 and received its I.R.C. § 501(c)(3) designation the same year.<sup>5</sup> We started with a five-member Board of Directors, comprised of diverse individuals who, save for one member who became our Chair, had little governing experience, particularly with a start-up grassroots non-profit legal services agency. That said, the one thing they all shared was a desire to serve those in need and a passion for that elusive of all concepts, justice.

From its inception, RICLAPP was to be a pro-active public interest law office. We aggressively partnered with community hosts, mostly senior and community centers, along with one pediatric hospital. This approach enabled us to engage in the implementation of “preventative law.” Not an unusual concept, the idea is to get to a client early enough in the process to resolve an issue before it blows up and goes super nova.<sup>6</sup> Early is better than later. It’s better for the client, and it allows us to conserve resources so that we can assist more people.

Our goal was and remains to bring real value to our hosts and their clients. Based on the feedback we’ve received over the years, we were successful. For us, we had a regularly scheduled monthly or bi-weekly presence in eleven venues located in nine Rhode Island communities. For our hosts, their clients received legal services that they otherwise would not have received. A quintessential win/win.

I was RICLAPP’s incorporator and the first, and so far only, President and Chief Executive Officer. Although I had experience serving with other grassroots non-profit agencies, I had no desire to serve on the Board. Two reasons lead me to this decision. First, the functions of a governing Board are distinctly different than those of management.<sup>7</sup> The Board is charged with defining the big picture, ensuring the integrity of the corporation’s finances, and raising money.<sup>8</sup> Management’s focus has to be on the day-to-day operations, including the supervision of staff, oversight and participation in cases, moving the mission to serve more people, and raise money.<sup>9</sup> Being the manager and a Board member seemed to me to

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<sup>5</sup> *Welcome*, RICLAPP, <http://www.riclapp.org/about.html> (last visited January 29, 2015), *archived at* <http://perma.cc/QK4N-DJL8>.

<sup>6</sup> *See, e.g., Welcome to the NCPL*, NAT’L CENTER FOR PREVENTIVE LAW, <http://www.preventivelawyer.org/main/default.asp?pid=overview.htm> (last visited Mar. 12, 2015), *archived at* <http://perma.cc/7MYZ-ELQ7> (explaining that the center is dedicated to “preventing legal risks from becoming legal problems”).

<sup>7</sup> NGO CONNECT, GOVERNANCE, MANAGEMENT AND THE ROLE OF A BOARD OF DIRECTORS 1 (2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

be an inherent conflict of interest.

Second, if possible, I wanted to get paid. Under Rhode Island's Non-Profit Corporations Act, I couldn't receive any financial inurement from any service on the Board, even though I worked seven days a week running the agency.<sup>10</sup> At its first post-incorporation meeting, the Board did vote to pay me a wage, "if funding was available." There was never any funding available that would not have had to come out of programming, so since 2008 I have worked as the *volunteer* President/CEO of RICLAPP.

You might be asking yourself, "why?" A RICLAPP associate of mine asked me the same question: why do you continue to do this? My answer, without even thinking about it, was a blurted "because I have to."

In 2006, I ran for the Rhode Island State Senate. The district that I sought to represent was economically diverse, comprising many of Cranston, Rhode Island's most distressed neighborhoods with the city's most affluent.<sup>11</sup> For nearly five months, I walked door-to-door to meet voters and discuss issues on their minds. Running for office is a great educational experience in that you learn about the challenges others face in their daily lives. Of course I was aware of much of this, but not in the personal way I became aware by standing at someone's door and listening to these folks tell their stories one-on-one. Over those five months I had acquired a wealth of knowledge that I wanted to draw on to help those in need. And then I lost. With all the information I acquired, it was similar to being all dressed up with nowhere to go.

Compounding the information derived from my race was the exposure to people in need through my private practice. I often ran into those without resources but in need of legal assistance. Unless it was outside the scope of my practice, I did what I could for people, either receiving no money or (and this happened) getting paid in cookies. To be totally frank, they were *great* cookies.

These experiences informed me that, first, there was a seri-

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<sup>10</sup> R.I. Gen. Laws Ann. § 7-6-4 (West 2014) ("Corporations may be organized under this chapter for any lawful purpose or purposes subject to the condition that no part of the net income or profit of any corporation will be distributable to its members, directors, or officers.").

<sup>11</sup> This was Rhode Island Senate District 26. 10.2% of Cranston's population lives below the federal poverty level, but poverty data from individual census tracts within the district reveals that in some areas the percentage is as high as 21%. See *2009-2013 American Community Survey 5-Year Estimates*, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited April 12, 2015) (access Table S1701, "Poverty Status in the Past 12 Months," searching by place for Cranston, RI and by census tracts 135, 136, 137.01, 138, and 141).

ously unmet need for *pro bono* or *low bono* legal services, and second, that there had to be a better way to organize myself to meet that need. In 2007 I had my epiphany and announced to my wife that I was, at age 59, going to form my own non-profit legal services agency. She then looked at me and said with a very straight face, “you’ve been a non-profit for ten years!” It is true that as Mark and Luke wrote in the Gospels, a prophet is never honored in his own land.<sup>12</sup>

The reality of Rhode Island’s need for additional *pro bono* legal services is more than anecdotal; it is supported by solid census data. The number of Rhode Islanders living in poverty has risen even since 2007. The 2007–2009 American Community Survey (ACS)<sup>13</sup> shows the percentage of Rhode Islanders below the poverty line<sup>14</sup> remained relatively constant at an average of 11.9% of Rhode Island’s population of just over one million residents.<sup>15</sup> The 2010-2012 ACS, which was published in 2013, estimated that the percentage of Rhode Island’s poor had climbed to 14.2% of all Rhode Island residents.<sup>16</sup>

The official poverty rate does not even capture the extent of the problem in Rhode Island. A family of two adults with a total income at 200% FPL in 2014 had an annual household income of \$31,460.<sup>17</sup> According to the Economic Progress Institute in Providence, Rhode Island, the annual cost of living for this family is \$35,509,<sup>18</sup> resulting in an annual income deficit of \$4,049. Moreo-

<sup>12</sup> *Mark* 6:4 (King James) (“But Jesus said unto them, A prophet is not without honour, but in his own country, and among his own kin, and in his own house”); *Luke* 4:24 (King James) (“And he said, Verily I say unto you, No prophet is accepted in his own country”).

<sup>13</sup> The American Community Survey (“ACS”) is a statistical survey run by the United States Census Bureau that samples small percentages of the population every year. See generally, *About the American Community Survey*, AMERICAN COMMUNITY SURVEY, [http://www.census.gov/acs/www/about\\_the\\_survey/american\\_community\\_survey/](http://www.census.gov/acs/www/about_the_survey/american_community_survey/) (last visited April 12, 2015), archived at <http://perma.cc/TQZ5-TBVU>.

<sup>14</sup> Based on the Census Bureau’s poverty thresholds. See *How the Census Bureau Measures Poverty*, CENSUS.GOV, <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last visited April 11, 2015), archived at <http://perma.cc/J4BV-XHXQ>.

<sup>15</sup> *2007-2009 American Community Survey 3-Year Estimates*, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited April 12, 2015) (access Table DP03, “Selected Economic Characteristics,” searching by state for Rhode Island).

<sup>16</sup> *2010-2012 American Community Survey 3-Year Estimates*, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited April 12, 2015) (access Table DP03, “Selected Economic Characteristics,” searching by state for Rhode Island).

<sup>17</sup> *2014 Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUMAN SERV., <http://aspe.hhs.gov/poverty/14poverty.cfm#thresholds> (last visited April 13, 2015), archived at <http://perma.cc/W6MD-UT5H>.

<sup>18</sup> *Cost of Living Calculator*, ECONOMIC PROGRESS INSTITUTE, <http://www.economic->

ver, based on the 2012 ACS, there were just over 33% of Rhode Island households with incomes at or below \$34,999,<sup>19</sup> which means that about a third of Rhode Islanders make less money than the cost of living in the state. This level of deficit forces a family to decide whether spend money to pay the rent, or for heat or food. Not many could afford to pay for all three. Somehow or other, this family is going to need to find a way to shave \$337 off its expenditures *each month*. Can anyone say that such a family with a household income at 200% FPL is *not* poor?

Not included in the above is Rhode Island's seemingly intractable unemployment rate. According to the U.S. Bureau of Labor Statistics (BLS) and Rhode Island's Department of Labor and Training (DLT), in June 2008, three months after I filed our incorporation papers, the unemployment rate was 7.6%; by June 2009 it had increased to 10.9%; by December 2009 it jumped to 11.9%; it declined slightly to 11.5% in December 2010; until the "recovery" kicked in to the point that unemployment was reported to be 7.6% in September 2014.<sup>20</sup> Only five years and three months to get back to being just horrible.

These numbers do not include the labor underutilization measure (U6) which is calculated by the BLS. The U6 incorporates persons who are totally unemployed (a number that only includes those who are activity looking for work) plus those who have stopped looking for work or are employed part time for economic reasons.<sup>21</sup> For 2014 this calculated to 13.5% of the workforce.<sup>22</sup>

And this is the tip of a very big and deep iceberg. Suffice it to say that many of the economic issues in Rhode Island are structural and endemic, and not likely to significantly improve in the near future.

In 2008, there were only a couple of legal service providers available to low income folks in our state. The crown jewel was the

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progressri.org/CostofLivingCalculator/tabid/180/Default.aspx (last visited April 13, 2015), archived at <http://perma.cc/G73G-LSR2> (using the tool to calculate the cost of living for two adults and zero children).

<sup>19</sup> *2010-2012 American Community Survey 3-Year Estimates*, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited April 12, 2015) (access Table DP03, "Selected Economic Characteristics," searching by state for Rhode Island).

<sup>20</sup> *Rhode Island Labor Force Statistics Seasonally Adjusted*, RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING, <http://www.dlt.ri.gov/lmi/laus/state/seas.htm> (last visited Feb. 5, 2015), archived at <http://perma.cc/F9HC-3J2X>.

<sup>21</sup> *Alternative Measures of Labor Underutilization for States, 2014 Annual Averages*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/lau/stalt.htm> (last updated Jan. 30, 2015), archived at <http://perma.cc/59XW-V84P>.

<sup>22</sup> *Id.*

Rhode Island Legal Services, Inc. (RILS), which was created as a result of President Lyndon B. Johnson's War on Poverty.<sup>23</sup> By the time RICLAPP was organized, RILS was celebrating its fortieth anniversary.<sup>24</sup> According to some of their representations, RILS clears about 5,000-6,000 cases per year, not an insignificant number.<sup>25</sup> The Disability Law Center has a very discrete mission to serve those with disabilities in a variety of civil legal areas, for example in housing and employment issues.<sup>26</sup> The Rhode Island Mental Health Advocate's office, a state agency, is charged with representing clients involved in the public mental health system.<sup>27</sup> Finally, the Rhode Island Bar Association (RIBA) had a volunteer legal program (VLP)<sup>28</sup> where members of the Bar would sign up to help those with few resources.

Let's assume that RILS completed 6,000 cases in 2008, and that the Disability Law Center and the Mental Health Advocate completed another 1,000, and that the RIBA's VLP completed another 2,000 cases. This would still fall short of the very real level of need in pre-recession, pre-program cut, Rhode Island. This would total 9,000 cases out of a number of 119,000 Rhode Islanders living at or below the poverty line.<sup>29</sup>

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<sup>23</sup> *History, The Founding of LSC*, LEGAL SERVICES CORPORATION, <http://www.lsc.gov/about/what-is-lsc/history> (last visited Feb. 5, 2015), *archived at* <http://perma.cc/YSL9-8Z2G> (stating that the idea of government-provided legal assistance began to take shape during President Lyndon B. Johnson's War on Poverty in the 1960s). *See also* ALTHEA J. HAYWARD ET AL., LEGAL SERVICES CORPORATION, PROGRAM QUALITY VISIT REPORT 3 (2014) (stating that Rhode Island Legal Services began operating as a non-profit legal services organization in 1969).

<sup>24</sup> *About Us*, R.I. CENTER FOR LAW AND PUBLIC POLICY, <http://www.riclapp.org/about.html> (last visited Feb. 5, 2015), *archived at* <http://perma.cc/G7FM-H2YM> (stating that the organization was incorporated in 2008); ALTHEA J. HAYWARD ET AL., *supra* note 23.

<sup>25</sup> R.I. LEGAL SERVICES, INC., ANNUAL REPORT 2012 3 (2012), *available at* <http://www.rils.org/index.cfm>, *archived at* <http://perma.cc/8FM7-DHPJ> (stating that RILS closed 6,071 cases in 2012).

<sup>26</sup> *See Overview*, RHODE ISLAND DISABILITY LAW CENTER, <http://www.ridlc.org/about.htm> (last visited Feb. 5, 2015) ("Rhode Island Disability Law Center (RIDLC) provides free legal assistance to persons with disabilities. Services include individual representation to protect rights or to secure benefits and services; self-help information; educational programs; and administrative and legislative advocacy.").

<sup>27</sup> *Rhode Island Office of the Mental Health Advocate*, R.I. SEC'Y OF STATE, <http://sos.ri.gov/govdirectory/?page=DetailDeptAgency&eid=3868> (last visited April 16, 2015), *archived at* <http://perma.cc/93EV-5927>.

<sup>28</sup> *How to Choose and Use a Lawyer*, RHODE ISLAND BAR ASSOCIATION, <https://www.ribar.com/for%20the%20public/findingandchoosingalawyer.aspx> (last visited Feb. 5, 2015), *archived at* <https://perma.cc/TN4L-6F5S>.

<sup>29</sup> Based on rounding the population of Rhode Island to 1 million and multiplying by the 11.9% poverty rate. *See 2007-2009 American Community Survey 3-Year Estimates*, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited April 13, 2015) (ac-

Let's make one other assumption. For the sake of this analysis, let's take the data published by the Rhode Island Department of Planning and Development and assume that in 2007-2009 there were 31,809 households with annual incomes below \$10,000.<sup>30</sup> We know from studies and our own experience that each household can expect to have approximately 2.5 legal issues per year.<sup>31</sup> If correct, that means that there were 79,523 legal issues each year from this economic cohort alone. If that's the case, and the providers extant in 2008 were clearing 9,000 cases, there was a shortfall of *at least* 70,000 unaddressed legal issues that threatened Rhode Island's lowest-income households. And as you might guess, it hasn't gotten much better over the past six years.

*That's* the need I saw and why I organized RICLAPP—not to pick up the 70,000 or so shortfall, but to assist those doing this work and to try to meet the overwhelming needs of Rhode Island's most vulnerable residents.

## II. RICLAPP: ORGANIZATIONAL STRUCTURE

Any organization should reflect its milieu and its resources. RICLAPP started with nothing, building from the ground up, serving those with nothing and with no hope of moving up. As a result, we needed to keep our grassroots identity foremost in mind as we went about our duties.

A grassroots organization should never scream "hierarchy." Ours consisted of me being in charge, meaning that I had overall responsibility for all RICLAPP activities and programs, with task-related functions delegated to staff. We tried to foster camaraderie, a true brothers-in-arms mentality. It was my job to create a comfortable, welcoming work environment where people were and are treated as professionals. Nobody was asked to do something that I wouldn't do or hadn't done. I created a culture of inclusion, where all voices were heard and respected. I made myself available and accessible to everyone. And I never forgot the commitment that

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cess Table B01003, "Total Population," searching by state for Rhode Island and Table DP03, "Selected Economic Characteristics," searching by state for Rhode Island).

<sup>30</sup> STATE OF RHODE ISLAND, DEPARTMENT OF ADMINISTRATION, DIVISION OF PLANNING, RHODE ISLAND: SELECTED ECONOMIC CHARACTERISTICS: COMPARISON OF THREE-YEAR DATASETS THE PERIOD 2007-2009 VERSUS 2010-2012, *archived at* <http://perma.cc/W85H-Q475>.

<sup>31</sup> See LEGAL SERVICES CORPORATION, *supra* note 3 at 13, 15 (comparing seven large-scale, survey-based studies conducted by independent research entities in various states and determining that "the average low-income households experienced from 1.3 to 3.0 legal needs per year").

our people were making to RICLAPP and its clients. As a small organization we needed to be flexible and nimble and that can't happen if there's an inflexible structured bureaucratic hierarchy in the way.

As a result, we were able to develop a variety of legal and non-legal skills and expertise in attorneys, paralegals, and administrative staff because, in a small organization, each of us may have to do something outside the traditional scope of our individual duties. Any one of us might have to cover for another colleague. And when it came to fundraising efforts, it was everyone's responsibility to engage as needed in that effort.

Thus we became a flat organization, like a rug with only a little bump in the middle. I was that bump, elevated enough to make judgments about delivery of programs, to counsel and mentor staff on a variety of issues, and to protect them if they got into the proverbial deep end of the pool.

#### A. *Resources*

The organization, as noted above, must reflect its resources. Since we had few financial resources, from its beginning to this day, people didn't get paid a lot. And that's a sin as my people, to a person, were worth ten times the top dollar value I was able to pay.

To illustrate this point, at our financial peak, my highest paid attorney earned an annual salary of \$45,000; my next highest paid attorney received a salary of \$38,800; my paralegal/office manager earned \$30,000 per year; while a second paralegal earned only \$16,000; while an administrative clerk earned \$7,500 a year. These were not the salaries they received when they began their RICLAPP careers, but they increased over time.

By way of comparison, the tenth percentile of all lawyers earn \$55,400 annually;<sup>32</sup> the National Association for Law Professionals reports that in 2014 the median entry level salary for a civil legal services attorney was \$44,600 annually;<sup>33</sup> and the median wage for a paralegal or legal assistant was \$48,350 annually.<sup>34</sup>

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<sup>32</sup> *Occupational Employment and Wages, May 2014, 23-1011 Lawyers*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/current/oes231011.htm> (last modified March 25, 2015).

<sup>33</sup> Press Release, National Association for Law Professionals ("NALP"), Top Salaries for First-Year Associates Remain Flat at \$160,000, But Prevalence Shrinks as Large Law Firm Market Becomes Less Homogenous (Oct. 9, 2014), *available at* <http://www.nalp.org/uploads/PressReleases/2014ASSRPressRelease.pdf>, *archived at* <http://perma.cc/C8LG-DRUG>.

<sup>34</sup> *Occupational Employment and Wages, May 2014, 23-2011 Paralegals and Legal Assist-*



These mission-driven, generous souls, whose only motivation was to help underserved Rhode Islanders, were woefully underpaid. As a result of their very real sacrifices, we were able to directly and indirectly help nearly 12,000 Rhode Islanders, many of whom presented with complex issues. Not once did anyone ever complain about conditions or demand more money. Maybe it helped that I didn't take a salary, however most were unaware of my situation until 2012-2013. And to this day, nobody knows how much of my own money I contributed to make sure our financial commitments were met. Because I was able to take myself out of the financial equation, I was able to distribute funds to them.

The reality is that employees, along with interns and volunteers, equals expansion of mission, and that equals more people helped who otherwise would have gone without legal services. We were fortunate in being able to supplement our paid staff with law school interns and volunteer attorneys. Early in our history, RICLAPP established a good relationship with the state's only law school, Roger Williams University School of Law. The law school was a source of smart, dedicated, and hardworking law students who provided great service to RICLAPP and its clients. To this day, we are in touch with many of them as they have since embarked on exciting legal careers, many in public interest law.

We also benefited from a down economy. If that sounds a bit mercantile, I apologize, but truth is truth. In a more robust employment market, we'd never have met and benefited from the service of so many new attorneys. Their contribution to RICLAPP's mission cannot be overstated and if I had room, I'd give each an individual shout-out. Along with the law students and volunteer lawyers, we also were able to attract a variety of administrative volunteers—people who had lost their jobs during the recession and were looking for ways to give back while burnishing their skills and resumes.

Finally, I benefited from the good will and generous spirit of my fellow members of the Bar. No organization can be all things to all people, and we were no different. RICLAPP provided a wide range of civil legal services, but didn't cover some domestic relations issues, bankruptcy, or anything that smacked of complex prolonged litigation. I was allowed to prevail on my friends in the Rhode Island Bar to take some cases on the same basis that we would if we could—that is on either *pro bono* or *low bono* basis.

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ants, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/current/oes232011.htm> (last modified March 25, 2015).

These attorneys, while not wanting to provide *pro bono* services full time, were very generous with our referred clients. I want to sing praises to those who stand ready and willing to help us further our mission to help those with the least among us.

Although underpaid lawyers and staff, and volunteers help to reduce expenses, there were still fixed costs that had to be met. There is nothing like cheap rent in a decent building, rent that includes utilities. I have to say that my landlord, the Central Rhode Island Chamber of Commerce was more partner than landlord. It was a comfortable and lucky fit for us.

I was fortunate to find this office for a manageable rent. It was right across from the Warwick City Hall, giving us easy access to a variety of resources. We had a bus stop right outside our doors, making us accessible to those who rely solely on public transportation. This office suite consisted of four separate offices providing enough workspace for staff, volunteers and interns, and ensured that client conferences were confidential. We also had a conference room, which doubled as an additional client meeting space or a venue for staff meetings. Utilities are included, which is huge! And all this for \$1,500 per month.

Among the other fixed costs were Lexis, library, case management software and licenses, Internet access, website design and updates, and professional and premises liability insurance. Even keeping these costs as low as possible, it still was expensive to operate on even a bare-bones basis. At our zenith, we had a monthly payroll and fixed costs of over \$14,000, not including variable court fees and related costs on behalf of our clients and other expenses for which, because of our indigent clientele, we'd never receive reimbursement. Factor those variable costs into the equation and the monthly budget would sometimes balloon to \$20,000. Overall, everything included, we operated on a \$250,000 per year budget. By way of comparison, Rhode Island Legal Services operates on an annual budget of \$3 to \$4 million.<sup>35</sup>

As our budget suggests, we had an acute challenge, as I'll discuss below.

### B. *Leadership*

I loathe discussing leadership as I have no idea whether I'm good, bad, or somewhere in between. In the saga that was to come, as I now look at events, I am certain that I could have done things

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<sup>35</sup> ALTHEA J. HAYWARD ET AL., *supra* note 23 at 4.

much better to achieve better organizational sustainability. That said, operating in the milieu of Rhode Island in the period post-2008, I look back and think that I didn't do too badly. I'll let the reader and my peers decide.

There are a couple of things I think are important for an organization's performance. The first is a clearly articulated and consistent vision and mission. Nobody was under any delusion as to what we were trying to do or how we were going about it. Second, I am always on mission. I don't care where I go or whom I speak with, I am on mission. And I urged the staff and my board to do likewise, which for the most part they did. To be clear, this is different from marketing, which I am lousy at. But it's important that people engaged in the practice of the organization extol its virtues to the public, including family, friends, and colleagues. Doing this work is not merely a "job;" it's in every sense a calling. The inertia arrayed against us and our clients, the frustrations derived from a political and economic system where our clients have had their humanity stripped from them, and the lack of resources to bring impact litigation in an attempt to ameliorate the problems that impact our clients all conspire to overwhelm the public interest practitioner. In other words, if it ain't a calling, the attorney won't last long in this business. Public interest law is not the stuff of dreams. Too often it's the stuff of nightmares—literally.

Third, I attempt to treat all staff, paid and volunteer, as the professionals that they are. I believe that's an important part of leadership—setting the standard that you expect others to strive for. And because many of these folks are or were new attorneys or legal professionals, it is important that I be available for advice and counsel. It was not often that I felt I had to compel an attorney to do one thing or another. More often, I was able to guide a case review or discussion in a direction that I wanted to go. The attorney assigned to a case was able to bring her perspective to an issue or strategy which allowed for a free exchange of views. Everyone felt better doing this—the attorneys because I wasn't micromanaging a case, and me because I didn't have to micromanage anyone.

As the organization evolved, others took a more active role in the supervision of RICLAPP. One attorney became Project Director at our Medical Legal Partnership program. A paralegal, with extensive corporate supervisory experience, was able to lead the professional and non-professional staff. And I was always available to everyone to answer questions, give advice, and engage in a mentoring moment.

## III. RHODE ISLAND: LOCATION, LOCATION, LOCATION

The mantra of every realtor is “location, location, location.” Location is an important, if not vital, consideration for start-up organizations. What does the local landscape look like? Who are the power players and their agendas? And perhaps more important, is there enough money available to support your mission?

It’s this last part that’s the rub. In a large city with its comparatively infinite resources, in a more economically robust state with a diverse donor base, with local institutions supportive of innovation and a heightened sense of community engagement, a new agency like mine, while having different problems, would at least have had access to financial and institutional resources to some degree. However, in a state with few resources, community leaders and institutions of limited vision, and a real dearth of any community spirit, the chances of success were minimal, if not *de minimis*.

I don’t care whether it was Oliver Wendell Holmes or Alexander Bickel who coined the phrase “nine scorpions in a bottle” to describe the inner workings of the United States Supreme Court.<sup>36</sup> If either or both of them had spent much time working in Rhode Island they’d have described the Court as nine butterflies in a garden on a sunny day. And nothing gets the Rhode Island scorpions revved up more than money, the scarcest commodity in the state.

Because of the scarcity of money, any reallocation of dollars to a start-up agency comes at the expense of an existing entity. This is a classic zero sum game—in order for RICLAPP to win, someone else must lose, and vice versa.<sup>37</sup> There isn’t much incentive for service providers to collaborate.

And if that’s not enough, Rhode Island is a small town, one

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<sup>36</sup> Medha Gargeya, *Feldman’s “Scorpions”*, HARVARD POLITICAL REVIEW, Nov. 20, 2010, <http://harvardpolitics.com/online/hprgument-blog/feldmans-scorpions/> (“In *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices*, Noah Feldman, the Bemis Professor of International Law at HLS, paints the lives of Justices Hugo Black, William O. Douglas, Felix Frankfurter and Robert H. Jackson . . . . The title, ‘Scorpions,’ comes from the description of the Court as ‘Nine scorpions in a bottle’ attributed to either Justice Oliver Wendell Holmes or Alexander Bickel (one-time clerk for Justice Frankfurter).”).

<sup>37</sup> See generally Kathryn E. Kovacs, *Hobby Lobby and the Zero-Sum Game*, 92 WASH. U. L. REV. 255 (2014) (discussing *Burwell v. Hobby Lobby Stores, Inc.* as a zero-sum game in which the net result is zero meaning that for every gain by one side, there is a counterbalancing loss by the other); Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001) (discussing the legal system as one that is adversarial in nature and is essentially a zero sum game); David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331 (2001) (discussing the implications of a zero-sum game for legislation affecting equality).

where everyone seemingly knows one another. The elites often come from the same backgrounds, having attended the same schools, played on the same teams, and worshiped at the same churches and temples. Along with these intellectual and social mindsets comes a cultural mindset, leading to a groupthink that retards social growth and change. In this environment, an oligarchy develops at the intersection of law, politics, and private enterprise. Any innovation and change brought from outside by a non-elite is seen as a threat to the stability of the social order. It's the Iron Law of Oligarchy writ large.<sup>38</sup>

In the traditions of the robber barons and the oligarchs of the 1920s, social programs are only implemented if they serve to support, or at least not threaten, the established order.<sup>39</sup> Whether intentionally or inadvertently, this perpetuates a permanent underclass that is then exploited by those in power for professional<sup>40</sup> or political gain, or at minimum to avoid political liability.<sup>41</sup> The *status quo* is perpetuated because, "The problem of the poor is not only that they lack money, but that they lack power."<sup>42</sup>

In other words, funds will be expended on behalf of social service programs to ensure the extolling of some faux communitarian spirit, but never enough to actually change the status quo or improve the lot of the underserved.

Thus, in Rhode Island, fundraising is political, and in the immortal truth articulated by Finley Peter Dunne's favorite bartender, Mr. Dooley, "Politics ain't beanbag."<sup>43</sup>

Rhode Island is not unique merely because both fundraising and social change are political. What makes Rhode Island unique is the proximity of the players.

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<sup>38</sup> ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMONCRACY* 233-235 (Batoche Books) (2001) *available at* <http://socserv.mcmaster.ca/econ/ugcm/3ll3/michels/polipart.pdf>, *archived at* <http://perma.cc/3WME-E9U5> (explaining that an oligarchy is a predetermined norm of society).

<sup>39</sup> *See generally* DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* (Free Press) (1970).

<sup>40</sup> *See id.* at 21-37 (describing the "professionalization of reform" as a shit in American politics wherein reform is conceived of and implemented by government insiders rather than members of oppressed groups themselves).

<sup>41</sup> *Id.* at 140-46, 158.

<sup>42</sup> *Id.* at 186.

<sup>43</sup> *Politics Ain't Beanbag*, TAEGAN GODDARD'S POLITICAL DICTIONARY, <http://politicaldictionary.com/words/politics-aint-beanbag/> (last visited Feb. 5, 2015), *archived at* <http://perma.cc/2DGA-U72L>.

## IV. FUNDING

## A. “No Money, No Mission”

RICLAPP’s Board Chair has a mantra: “No money, no mission.” So that begs the question, where to get money in order to operate? This is particularly problematic if the public interest legal services organization receives no Legal Service Corporation (LSC) money.

In 1974 the LSC was established as a 501(c)(3) grant making organization to provide financial support to civil legal services organizations throughout the United States serving low-income individuals at or below 125% of the federal poverty guidelines.<sup>44</sup> Today, LSC remains “the single largest source of funding for civil legal assistance to the nation’s poor.”<sup>45</sup> It awards or renews grants in a designated “service area” every three years.<sup>46</sup> However, LSC restricts grantees from participating in class action lawsuits,<sup>47</sup> providing representation in criminal proceedings,<sup>48</sup> engaging in litigation to preserve abortion services,<sup>49</sup> using funds in support of political activities,<sup>50</sup> representing non-citizens,<sup>51</sup> and using funds to support any labor or anti-labor activities.<sup>52</sup> LSC grantees must agree to comply with all LSC regulations and must report on organization activities that use LSC funds.<sup>53</sup>

Each state has at least one local legal services corporation that is supported by the national LSC.<sup>54</sup> In addition, the LSC makes financial contributions to non-LSC agencies.<sup>55</sup> For example, in Massachusetts, there are two LSC organizations that receive federal

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<sup>44</sup> *About LSC*, LEGAL SERVICES CORP, <http://www.lsc.gov/about/what-is-lsc> (last visited Feb. 25, 2015), *archived at* <http://perma.cc/62JA-YXUE>.

<sup>45</sup> *History*, LEGAL SERVICES CORP, <http://www.lsc.gov/about/what-is-lsc/history> (last visited Feb. 25, 2015), *archived at* <http://perma.cc/FP25-3R6N>.

<sup>46</sup> *Legal Aid Grants*, LEGAL SERVICES CORP, <http://grants.lsc.gov/about/legal-aid-grants#award> (last visited Feb. 25, 2015), *archived at* <http://perma.cc/E4AQ-DA54>.

<sup>47</sup> 45 C.F.R. § 1617.3 (2014).

<sup>48</sup> Legal Services Corporation Act § 1007(b)(2), 42 U.S.C.A. § 2996f(b)(2) (West); 45 C.F.R. § 1613.3 (2014).

<sup>49</sup> Legal Services Corporation Act § 1007(b)(8), 42 U.S.C.A. § 2996f(b)(8) (West).

<sup>50</sup> Legal Services Corporation Act § 1007(b)(4), 42 U.S.C.A. § 2996f(b)(4) (West).

<sup>51</sup> 45 C.F.R. § 1626.3 (2014).

<sup>52</sup> Legal Services Corporation Act § 1007(b)(6), 42 U.S.C.A. § 2996f(b)(6) (West).

<sup>53</sup> *See Legal Aid Grants*, *supra* note 46.

<sup>54</sup> *Grantee Profiles*, LEGAL SERVICES CORPORATION, <http://www.lsc.gov/local-programs/program-profiles> (last visited Mar. 12, 2015), *archived at* <http://perma.cc/QQ2Z-PG29>.

<sup>55</sup> CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL34016, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING 2 (2013).

funding and two non-LSC organizations that receive funding.<sup>56</sup> In Rhode Island, we have just one LSC, with no non-LSC organizations that receive funding.<sup>57</sup>

Over the past forty years, LSC funding has been subject to political whim. Some years, the LSC has received generous financial support from the Congress.<sup>58</sup> However, more often than not, the LSC's budget has been reduced to levels below its original funding level in 1976, adjusted for 2013 dollars.<sup>59</sup>

In conjunction with LSC funding, civil legal service organizations may receive funds from Interest on Lawyer's Trust Accounts (IOLTA),<sup>60</sup> provided they are not used for any restricted purpose.<sup>61</sup> In Rhode Island, the Rhode Island Bar Association manages the state's IOLTA account and awards grants to provide and improve the delivery of legal services to the poor.<sup>62</sup> As noted above, in Rhode Island, there is only one LSC-funded agency, the aforementioned Rhode Island Legal Services Corporation (RILS).<sup>63</sup> When we started out in 2008, a significant source of RILS' funding came largely from two sources: the LSC and IOLTA funds distributed by the Rhode Island Bar Foundation.<sup>64</sup> By way of example, in 2011, RILS received over \$3 million in government grants and an additional \$225 thousand (rounded) from the Rhode Island Bar

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<sup>56</sup> See *LSC-Funded Programs in Massachusetts*, LEGAL SERVICES CORP., <http://www.lsc.gov/local-programs/state-profile?st=MA> (last visited Mar. 12, 2015), *archived at* <http://perma.cc/72Q6-9ZFH>.

<sup>57</sup> *Rhode Island Legal Services, Inc.*, LEGAL SERVICES CORPORATION, <http://www.lsc.gov/local-programs/program-profile?RNO=140000> (last visited Mar. 12, 2015), *archived at* <http://perma.cc/BH4Z-7GN2>.

<sup>58</sup> Legal Services Corporation, *Annual LSC Appropriations 1976-2013 in Constant 2013 Dollars*, <http://www.lsc.gov/congress/funding/funding-history> (last visited Mar. 12, 2015), *archived at* <http://perma.cc/GE89-PLDR>.

<sup>59</sup> *Id.*

<sup>60</sup> When the amount of money a lawyer holds for a client is large, the client is entitled to the interest earned on the account. However, when the amount of money held is nominal, the lawyer is required to deposit the funds into a pooled interest bearing account. The bank then transfers the interest earned to the IOLTA program. The amount of interest earned from the pooled trust is used to support non-profit civil legal services providers. See *What Is IOLTA?*, IOLTA, <http://www.iolta.org> (last visited Feb. 25, 2015), *archived at* <http://perma.cc/KX5F-RFGK>.

<sup>61</sup> 45 C.F.R. § 1610.4(b) (2014).

<sup>62</sup> *What Is IOLTA?*, R.I. BAR ASS'N, <https://www.ribar.com/Members%20Only%20Area/IOLTA.aspx> (last visited Feb. 25, 2015), *archived at* <https://perma.cc/5568-5JY5>.

<sup>63</sup> LEGAL SERVICES CORP., 2013 ANNUAL REPORT 1 (2013), *available at* <http://lsc.gov/sites/lsc.gov/files/LSC/Publications/AnnualReport2013/LSC2013AnnualReportW.pdf>.

<sup>64</sup> Rhode Island Legal Services IRS Form 990; Rhode Island Bar Foundation IRS 990, both accessed via Guidestar on April 20, 2015.

Foundation.<sup>65</sup> For RILS, those were big bucks. For an agency like RICLAPP, they were unattainable.

In 2008, there was a non-LSC/IOLTA source of funding that we had hoped to tap—the Rhode Island Foundation, one of the nation’s oldest, and Rhode Island’s only community foundation.<sup>66</sup> In pre-recession 2008, the Foundation divided its focus, and thus its dollars, into six broad categories, with each category having several sub-categories.<sup>67</sup> We had hoped that RICLAPP would be eligible for funding from two of those funding categories, “Community Development” and “Health.” Both were broad categories and we thought we would be a good fit for some of those dollars, particularly as we began our community-based programs and joined the Medical Legal Partnership.

Unfortunately, over the years, in part due to the recession and in part due to a change in leadership focus, although the broad categories remained, the sub-categories became much more restricted.<sup>68</sup> For example, the “Health” category became focused on increasing primary medical services only.<sup>69</sup> The “Economic Security” category (successor to “Community Development”) became limited to improving Rhode Island’s “environment” for economic growth.<sup>70</sup> There was a “Basic Human Needs” category but it focused on community agencies that provide so-called “basic needs”: food, clothing, housing, and prescription services to low-income people.<sup>71</sup> Legal services, which can secure many of the above “needs,” are not considered a “basic need” under this regime.

Over time, the nature of the way in which the Foundation awarded grants also changed.<sup>72</sup> When we started, there were large

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<sup>65</sup> *Id.*

<sup>66</sup> *Overview*, THE RHODE ISLAND FOUNDATION, <http://www.rifoundation.org/InsidetheFoundation/Overview.aspx> (last visited Feb. 12, 2015) (“Founded in 1916, the Rhode Island Foundation is one of the nation’s oldest and largest community foundations. We are Rhode Island’s only community foundation and the largest funder of Rhode Island’s nonprofit sector.”).

<sup>67</sup> *Grant Opportunities*, THE RHODE ISLAND FOUNDATION, [http://web.archive.org/web/20081201182647/http://www.rifoundation.org/matriarch/Switch.asp\\_Q\\_PageID\\_E\\_870](http://web.archive.org/web/20081201182647/http://www.rifoundation.org/matriarch/Switch.asp_Q_PageID_E_870) (accessed by searching for The Rhode Island Foundation in the Internet Archive Index).

<sup>68</sup> *See* RHODE ISLAND FOUNDATION, 2013 ANNUAL REPORT 18 (2013), *available at* [http://www.rifoundation.org/2013report/downloads/RIF\\_2013\\_Annual\\_Report.pdf](http://www.rifoundation.org/2013report/downloads/RIF_2013_Annual_Report.pdf).

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> R.I. FOUNDATION, 2012 ANNUAL REPORT 4 (2012), *available at* [http://www.rifoundation.org/Portals/0/Uploads/Documents/Inside-The-Foundation/RIFAnnualReport\\_2012.pdf](http://www.rifoundation.org/Portals/0/Uploads/Documents/Inside-The-Foundation/RIFAnnualReport_2012.pdf) (hereinafter “R.I. FOUNDATION 2012 REPORT”) (stating that in 2012 the Rhode Island Foundation awarded grants to over 1,300 organizations).



numbers of small grants given every six months, but that changed to larger grants to fewer organizations awarded every month.<sup>73</sup> We were told that the Rhode Island Foundation's thought was that these larger grants awarded to fewer agencies would have a greater impact on the areas funded. However, by 2012, the Foundation drastically limited the scope of programs it would fund, and the two categories we thought we were eligible for closed up.<sup>74</sup> In 2014, they answered an email of inquiry stating that the Foundation no longer considers funding programs like RICLAPP. As it turned out, for a couple of years we were able to obtain development dollars from the Foundation. But we were never able to get any substantial funding for direct services programs.

There were other local granting agencies,<sup>75</sup> but while they liked what we were trying to do, we ultimately weren't a good fit. They funded programs addressing "basic needs" such as food, housing, even health care. Again, legal services weren't thought of as being a basic need.

Like any other non-profit agency, we wrote grants, mailed annual appeal letters to potential donors,<sup>76</sup> and even did an annual event to raise money. All of these efforts met with a modicum of success. But fundraising is tough work, and required the participation of everyone associated with the agency. Employees, volunteers, management, and Board members all have a role in raising money. If there is one thing that needs 100% buy-in by everyone, it's raising money. Again, no money, no mission.

As experience taught me, there aren't a lot of funders willing to fund direct legal service programs, and those that do usually do so in a specific geographic area. There are more funders that will fund legal education and consultation programs, but while rights education and consultation were part of the mission, the main part—the expensive part—was direct services.

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<sup>73</sup> *Id.*

<sup>74</sup> See generally RHODE ISLAND FOUNDATION, 2012 ANNUAL REPORT 2 (2012), available at [http://www.rifoundation.org/Portals/0/Uploads/Documents/Inside-The-Foundation/RIFAnnualReport\\_2012.pdf](http://www.rifoundation.org/Portals/0/Uploads/Documents/Inside-The-Foundation/RIFAnnualReport_2012.pdf).

<sup>75</sup> See e.g., OCEAN STATE CHARITIES TRUST, <http://www.osct.org/> (last visited April 2, 2015); *About Episcopal Charities*, EPISCOPAL DIOCESE OF RHODE ISLAND, <http://www.episcopalri.org/ProgramsMinistries/EpiscopalCharities.aspx> (last visited April 2, 2015).

<sup>76</sup> An organization's annual appeal letter is a yearly letter that gets sent out, usually around the same time each year, to current and prospective donors asking for general operating funds for the non-profit. Joe Garecht, *The 5 Rules of Successful Annual Appeal Fundraising Letters*, THE FUNDRAISING AUTHORITY, <http://www.thefundraisingauthority.com/fundraising-by-mail/annual-appeal-letters/> (last visited Feb. 12, 2015).

While the Great Recession brought about changes in foundation funding, it wreaked havoc on corporate and individual donations.<sup>77</sup> As time went on, especially in Rhode Island, corporate and individual donors became less inclined to fund organizations like ours.<sup>78</sup> Even those organizations serving basic needs that had previously enjoyed foundation, corporate, and individual support suffered.<sup>79</sup> Last year *The Providence Journal* reported that Rhode Islanders were forty-first in the nation for making charitable donations.<sup>80</sup>

We did receive some money from the usual fundraising methods, and we scored big with a share of the lead paint litigation settlement money. Rhode Island sued several paint manufacturers regarding the lead content in their paint, under Rhode Island's public nuisance statute.<sup>81</sup> In 2005, one of the defendants, DuPont Co., settled with the State and agreed to make a \$12.5 million payment for education, lead abatement, and building code enforcement.<sup>82</sup> The money was to be distributed to the Children's Health Forum, from which money would be distributed to advance the various purposes of the settlement agreement.<sup>83</sup> Finally, by late 2007, some of the money began to flow.

Part of this money was to be devoted to legal services that would enforce building codes and hold landlords accountable for cleaning up their rental properties. According to the National Association of Home Builders, 65% of all residential buildings were constructed prior to 1970.<sup>84</sup> Additionally, 83% of Rhode Island's low income children lived in older housing,<sup>85</sup> which if not properly maintained put children at risk for lead poisoning.

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<sup>77</sup> Paul Davis, *Recession Has Taken a Toll on Charitable Giving in R.I.*, THE PROVIDENCE JOURNAL (December 6, 2014, 11:15 PM), <http://www.providencejournal.com/news/content/20141206-middle-class-squeeze-recession-has-taken-a-toll-on-charitable-giving-in-r.i.-video-interactive.ece>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *State v. Lead Indus. Ass'n*, 951 A.2d 428, 434 (Jul. 1, 2008); R.I. Gen. Laws § 10-1-1 (2014).

<sup>82</sup> Katie Zezima, *Rhode Island Drops DuPont From Suit Over Paint in Deal*, N.Y. TIMES (July 1, 2005), <http://www.nytimes.com/2005/07/01/national/01paint.html>.

<sup>83</sup> See *id.*

<sup>84</sup> ROBERT DIETZ, *The Geography of the Age of the Housing Stock*, NATIONAL ASSOCIATION OF HOME BUILDERS (Aug. 8, 2012), <http://eyeonhousing.org/2012/08/the-geography-of-the-age-of-the-housing-stock/>, archived at <http://perma.cc/37B4-TPSZ>.

<sup>85</sup> RHODE ISLAND DEPARTMENT OF HEALTH, *HEALTHY HOUSING DATA BOOK 4* (2012), available at <http://www.health.ri.gov/publications/databooks/2012HealthyHousing.pdf>, archived at <http://perma.cc/37B4-TPSZ>.

In late 2010, RICLAPP was awarded \$150,000 to conduct community education to raise awareness of the danger of lead poisoning and, when appropriate, take legal action against non-compliant landlords.<sup>86</sup> This grant was by far the largest grant we had received. We showed that not only could we manage, report, and meet and exceed our targets, but we could do so efficiently and effectively. These dollars enabled us to hire staff and serve more low-income families, while using code-enforcement and litigation to improve the housing stock in Rhode Island's core cities. This money was meant to last two years, but when combined with other funds we made it last over three and a half years.

Sadly, there aren't many grants like that available, and those who received less than they thought was their due (see discussion of Zero Sum Game<sup>87</sup>) weren't about to let this happen again. And it didn't.

Another means of earning money was by charging a sliding fee scale for those who could afford to pay something toward keeping the doors open. We provided *pro bono* services for those at or below 125% FPL. For those with incomes at 126% to 300% FPL, we assessed a modest fee on a sliding scale, with the top fees at the higher end of the scale. This sliding fee scale was a twin edged sword. On the one hand, it provided at least a trickle of revenue desperately needed by RICLAPP. On the other hand, it increased administrative costs of tracking and collecting the money. But worst of all, it gave our enemies ammunition with which to attack us. For example, the head of one competing organization and a member of his staff went to several of our collaborative partners, claiming that we were really a for-profit organization disguised as a non-profit agency. That assertion was laughable, if not ludicrous, but it forced me to have to defend RICLAPP and its people, diverting time and attention away from our essential mission of serving those who our attackers claimed to also serve.

### B. Collaborations

Most studies that I've read regarding the justice gap in America point to four reasons why the gap exists.<sup>88</sup> Two of the rea-

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<sup>86</sup> Press Release, Dep't of the Attorney Gen., Attorney Gen. Peter F. Kilmartin and the Children's Health Forum Award \$850,000 in Competitive Grants for R.I. Lead Safety Compliance Programs (March 14, 2011), *available at* <http://www.ri.gov/press/view/13391>, *archived at* <http://perma.cc/3EWB-FQHD>.

<sup>87</sup> See Kovacs, *supra* note 37.

<sup>88</sup> See Robert Echols, *State Legal Needs Studies Point to "Justice Gap"*, DIALOGUE (National Legal Aid Defender Association), Summer 2005, *available at* <http://www.nlada>

sons relate to access to services: knowledge of the availability of services and the ability of the prospective client to actually get to the provider of these services. Interestingly, a low-income person's lack of money is not considered to be as significant an issue as one might have thought. But the inability to afford counsel often leads to a person acting *pro se*, which in turn creates more problems for the clients, attorneys, and courts. The fourth reason for the justice gap is that low-income people are often unaware of any legal component to the daily problems they confront.<sup>89</sup>

To overcome the problems related to lack of access, we began regular collaborations, with senior and community centers. Our collaborations were different than the usual presence that members of the private bar have at these centers, where they give a little educational seminar or presentation and take a couple of cases with them, never to return. We provided regular office hours for the clients of our host center.<sup>90</sup> During these office hours we met with "clients" and provided either counsel, or if necessary, direct services. The key was that we weren't there only for a day, a week, or a month; we were there every month, sometimes more often if there was sufficient demand and interest. While we were a new organization working on establishing our own credibility, we were able to benefit from the imprimatur bestowed by our host.

By providing services in this manner, we not only overcame the access hurdle that our clients faced, but we saved money by expanding capacity without increasing overhead. We also enjoyed some logistic support provided by the host, and we were able to collaborate to provide wrap-around services for our joint clients. Thus, from our end, was the birth of our "preventative law" approach to public interest law. We thought that if we could make ourselves available *before* a minor issue grew to be a legal war, it would better serve our clients and allow us to do more with fewer resources. Therefore, this became a quintessential win/win.

It's important to realize that conserving scarce financial and material resources is *not* the same as receiving money. To help off-

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.org/DMS/Documents/1125689452.32/Dialogue.pdf, archived at <http://perma.cc/8ZLQ-CGRM>; LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 6 (2d ed. 2007), available at <http://www.lsc.gov/sites/default/files/LSC/images/justicegap.pdf>, archived at <http://perma.cc/7XVY-5NFN>.

<sup>89</sup> *Id.* See also generally Mark Andrews, *Duties Of The Judicial System To The Pro Se Litigant*, 30 ALASKA L. REV. 189 (2013); Kaitlyn Aitken, *Unbundled Legal Services: Disclosure Is Not the Answer*, 25 GEO. J. LEGAL ETHICS 365 (2012).

<sup>90</sup> See generally *Community Partners*, R.I. CENTER FOR LAW AND PUBLIC POLICY, <http://riclapp.org/partners.html> (last visited Feb. 19, 2015), archived at <http://perma.cc/BBP7-7TA2>.

set the money drain, we were able to obtain small Community Development Block Grant (CDBG)<sup>91</sup> dollars from some of the communities in which we provided services. To shore up the shortfall, we needed to allocate discretionary dollars to these center programs.

This obviously begs the question as to why we didn't just charge the centers for our services. The answer is simple—many of these centers were no more financially well-off than was RICLAPP. And while many centers were city agencies,<sup>92</sup> many of Rhode Island's cities and towns adopted austerity measures due to the recession.<sup>93</sup> Even if times were flush, in hindsight, I doubt that we'd have done much better. As time went by, it became clear to me that not only were legal services not thought to be a "basic" need, but that attorneys as a group were morally suspect, even we cute cuddly public interest lawyers.

It was always fascinating to me how the traditional Bar reacted to our programs at these centers. Some members of the private bar would show up when we were there, snoop around, ask us questions, and leave. Others tried to collaborate with us—as though we were onto a profitable thing and should share with others. But the unkindest cut of all came from those who sought to shut us down at the expense of our clients. One example occurred in a small town where we conducted monthly office hours at one of the town's own community centers. To advertise RICLAPP's free service at the center, the town placed an ad in its own weekly newspaper. A local attorney, who paid for her ads, complained to the publisher and threatened to remove her ads if the publisher didn't stop this "free advertising of RICLAPP services."

Some in the Bar don't like RICLAPP because they think that somehow we are unfairly taking food out of their families' mouths. Frankly, if some of these folks weren't so focused on fee generation, they'd realize that the clients we serve are those that would never be served by the members of the traditional Bar because

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<sup>91</sup> See, e.g., *Mayor Announces \$540,300 in Block Grant Funding*, WARWICK ONLINE (June 9, 2011), <http://warwickonline.com/stories/Mayor-announces-540300-in-block-grant-funding,54904>, archived at <http://perma.cc/UBN4-SLL6>.

<sup>92</sup> See, e.g., *The Pilgrim Senior Center*, WARWICK, [http://www.warwickri.gov/index.php?option=com\\_content&view=category&id=64&Itemid=251](http://www.warwickri.gov/index.php?option=com_content&view=category&id=64&Itemid=251) (last visited Mar. 12, 2015), archived at <http://perma.cc/QEP9-H5YB>; *Senior Services*, CRANSTON, <http://www.cranstonri.com/generalpage.php?page=35> (last visited Mar. 12, 2014), archived at <http://perma.cc/7WKN-QKML>.

<sup>93</sup> Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1130 (2014) (stating that state revenues plunged during the recession and that cuts in Rhode Island were especially severe for non-education local government entities).

there was no money in it. As I noted before, there are exceptions to this, but over the years it seems that we ran into more of the traditional attorneys and fewer exceptions.

We also were able to collaborate with the Small Business Development Center (SBDC), until recently at Johnson & Wales University, to assist their small business clients with the legal issues associated with starting and running a business.<sup>94</sup> For that service, the SBDC would pay us a modest hourly rate. We also collaborated with an organization out of Massachusetts that was expanding into Rhode Island called Bridges to Business (BTB), which focused primarily on indigent entrepreneurs.<sup>95</sup> BTB also paid us a modest, but welcome, fee for our services.

By far, our most lucrative collaboration was with the Medical Legal Partnership (MLP) at Hasbro Children's Hospital in Providence.<sup>96</sup> Briefly stated, the MLP combines the talents of attorneys and physicians to achieve good health outcomes for traditionally underserved patients.<sup>97</sup> Essentially, we would see a patient's family referred to us by a doctor who determined the possible presence of some social determinant adversely impacting a patient's health. For example, if there was an unhealthy housing issue preventing a good health outcome, we'd seek to remediate that housing issue so that the medical interventions could have better effect.

Hasbro paid a stipend for this service, which increased a bit over time but was still not enough to pay for the program. Because of the MLP collaboration, we were able to receive some of the lead paint settlement money referenced above. Relatedly, under the Affordable Care Act not-for-profit hospitals are required to work with community based organizations to support the health needs of the community.<sup>98</sup> Unfortunately, while not excluded, legal service providers are not specifically contemplated as a community-based

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<sup>94</sup> See *About, AMERICA'S SMALL BUSINESS DEVELOPMENT CENTER RHODE ISLAND*, <https://www.risbdc.org/DocumentMaster.aspx?doc=1665> (last updated Nov. 19, 2014 7:50 PM), archived at <https://perma.cc/2NBE-3TPF>.

<sup>95</sup> See *Entrepreneurs Wanted!*, INTERNATIONAL INSTITUTE OF NEW ENGLAND (May 11, 2011), <http://iine.us/2011/05/entrepreneurs-wanted/>, archived at <http://perma.cc/SV45-Q7BU> (explaining that Bridges to Business provides business classes, coaching, and support services to entrepreneurs).

<sup>96</sup> See HASBRO CHILDREN'S HOSPITAL, <http://www.hasbrochildrenshospital.org/> (last visited March 20, 2015), archived at <http://perma.cc/P2B8-JEMY>.

<sup>97</sup> *The MLP Response*, NATIONAL CENTER FOR MEDICAL LEGAL PARTNERSHIP, <http://medical-legalpartnership.org/mlp-response/> (last visited Feb. 19, 2015), archived at <http://perma.cc/7MPP-S8PA>.

<sup>98</sup> 26 C.F.R. § 1.501(r)-3; Sara Rosenbaum, et al., *Encouraging Nonprofit Hospitals To Invest In Community Building: The Role Of IRS 'Safe Harbors'*, HEALTH AFFAIRS BLOG (Feb. 11, 2014), <http://healthaffairs.org/blog/2014/02/11/encouraging-nonprofit-hospi>

partner with which recipients of ACA dollars need collaborate.<sup>99</sup> So the struggle continues.

*C. Follow The Money . . .*

While the mythical words attributed to W. Mark Felt, Deep Throat of Watergate fame,<sup>100</sup> are an appropriate admonition for investigating a story, I'm not certain that "follow the money" is particularly good advice for a non-profit agency. On the one hand, there's little to no non-LSC money available for what we do, but there seems to be more dollars available for what we don't do. RICLAPP is a direct services agency, with a component of dissemination and distribution of legal information and education. Yet there seems to be a bit of money available for legal education and counsel.<sup>101</sup>

We could apply for and probably receive our share of legal education dollars, but these dollars would be dedicated to a specific purpose and not be available to our prime direct services mission.<sup>102</sup> On the other hand, we could chuck the whole direct services mission and morph into legal information and education.

But why would we do that? The only reason would be to chase

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tals-to-invest-in-community-building-the-role-of-irs-safe-harbors/, *archived at* <http://perma.cc/S9AV-UC29>.

<sup>99</sup> See 26 C.F.R. § 1.501(r)-3; *see also* SARA ROSENBAUM, PRINCIPLES TO CONSIDER FOR THE IMPLEMENTATION OF A COMMUNITY HEALTH NEEDS ASSESSMENT PROCESS (2013) *available at* [http://nnphi.org/CMSuploads/PrinciplesToConsiderForTheImplementationOfACHNAProcess\\_GWU\\_20130604.pdf](http://nnphi.org/CMSuploads/PrinciplesToConsiderForTheImplementationOfACHNAProcess_GWU_20130604.pdf), *archived at* <http://perma.cc/VQM3-SPFZ>.

<sup>100</sup> Kee Malesky, *Follow The Money: On The Trail Of Watergate Lore*, NPR (June 16, 2012, 12:15 PM), <http://www.npr.org/2012/06/16/154997482/follow-the-money-on-the-trail-of-watergate-lore>.

<sup>101</sup> *See, e.g., Child Custody & Adoption Pro Bono Project*, ABA, [http://www.americanbar.org/groups/probono\\_public\\_service/projects\\_awards/child\\_custody\\_adoption\\_pro\\_bono\\_project.html](http://www.americanbar.org/groups/probono_public_service/projects_awards/child_custody_adoption_pro_bono_project.html) (last visited April 24, 2015), *archived at* <http://perma.cc/67FM-8FNW> (funding to attended educational conference); THE CHARLES EVANS HUGHES MEMORIAL FOUNDATION, [http://www.cehughesfoundation.org/Program\\_Focus.html](http://www.cehughesfoundation.org/Program_Focus.html), *archived at* <http://perma.cc/8BNL-CWTL> (general legal rights education); *Housing*, MACARTHUR FOUNDATION, <http://www.macfound.org/programs/housing/> (last updated May 2014) (housing policy); *Office of Grant Support, Law Funding Sources*, ALBERT EINSTEIN COLLEGE OF MEDICINE, <https://www.einstein.yu.edu/administration/grant-support/law-funding.aspx> (last visited April 24, 2015), *archived at* <https://perma.cc/8FYV-CJK9> (list of law student scholarships and fellowships).

<sup>102</sup> *See* NIKI JAGPAL & KEVIN LASKOWSKI, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, THE STATE OF GENERAL OPERATING SUPPORT 2011, at 1 (May 2013), *available at* <http://ncrp.org/files/publications/PhilanthropicLandscape-StateofGeneralOperatingSupport2011.pdf>, *archived at* <http://perma.cc/C2SK-WWB5> (reporting that in 2011, 1,121 American grantmakers reported that 24% of their overall funding went toward general operating support rather than to restricted purposes).

dollars. However, once an agency goes down the slippery slope of changing mission to chase dollars, too soon it loses focus and identity, and over time becomes less competitive for money for any purpose from any source.

Deciding between these two approaches represents a true Hobson's choice.<sup>103</sup> On the one hand, in order to take the money we'd cease to exist. On the other hand, changing mission might secure the agency's survival, but have a lesser effect that doesn't get to the root cause of underserved people. I never believed we should allow ourselves to get into this kind of take-it-or-leave-it position.

*D. Fund Development: Be Creative*

When you're the smallest dog in the fight, you have to get a little creative, especially in fundraising. One way that we thought to do it was to ask the Rhode Island General Assembly to increase certain court filing fees by five dollars in the district court and ten dollars in both the family and superior courts—with the increase being devoted to support RICLAPP.<sup>104</sup>

I'd like to take credit for this approach, but to be honest, I stole the idea from RILS. In 2009, RILS petitioned the legislature to increase fees by the same amount to be assessed on very specific filings.<sup>105</sup> In 2010, they got the fee increase; in 2014 we didn't.<sup>106</sup>

Making this kind of effort consumes tremendous resources. We worked for nearly a year introducing and supporting these bills. We met individually with senators and representatives, and collectively with them when we testified before the Senate and House Judiciary Committees.<sup>107</sup>

A member of my Board was the Senate President's Chief of Staff. As such, we had a certain imprimatur going in. For example, through him I was able to get the senator who sponsored the RILS legislation in 2009 to sponsor our legislation in the Senate in 2014. I was able to have my local representative and friend sponsor our

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<sup>103</sup> *Hobson's choice*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/hobson's%20choice> (last visited Mar. 3 2015), *archived at* <http://perma.cc/3ZJ2-AE25> ("the necessity of accepting one of two or more equally objectionable alternatives").

<sup>104</sup> S. 2368, 2369, 2014 Gen. Assemb., Jan. Sess. (R.I. 2014); H. 7841, 7842, 2014 Gen. Assemb., Jan. Sess. (R.I. 2014).

<sup>105</sup> Legislative Status Report, 2009 Session, Senate Bill No. 311-Sub A, Chapter 372, <http://status.rilin.state.ri.us/> (search Session Year "2009" and Bills "311").

<sup>106</sup> R.I. Gen. Laws §§ 9-29-14, 9-29-19, 9-29-1, 9-29-18.

<sup>107</sup> *Organizing for RICLAPP*, RICLAPP, <http://riclapp.org/organizing.html> (last visited April 13, 2015), *archived at* <http://perma.cc/U3HX-DJK5>.



bills in the House. We provided fact-based, data-driven materials that demonstrated both the level of legal need in the state and our effectiveness in meeting that need.

We sponsored online and written petitions to support our legislation and delivered over 1,000 signatures to both the Senate President and Speaker of the House. We rallied in the rotunda of the State House. Realizing that we needed more traction, we were ready to commit a significant amount of our limited resources to engage a local well-regarded lobbying firm. After a hopeful start, the firm declined to take our project or our money.

The Rhode Island General Assembly is a part-time legislature, meeting annually for six months, usually from January through end of June. As time for enactment of our legislation was waning, my board chair, who had friendly relations with members of the judiciary, reached out to see if we could elicit some support for our bills. Our thinking was that the judges, who saw low-income people appearing before them without representation on a daily basis, would be interested in any effort to contribute to the more efficient operation of the courts and along with more consistent judicial outcomes. We provided them with materials, which were well received. But, they too, declined to support our legislation.

By mid-June, what had become increasingly obvious became official—our legislation was never going to leave committee for floor votes in either chamber. Physically and mentally exhausted, and I have to admit being bitterly disappointed, finally the fight was over.

I could recount in exhaustive detail the “what” and “how” of this legislative dance, but in these instances the salient question is not *what* happened but *why*? I think I know why this outcome occurred, but to detail that is well beyond the scope of this piece. We had some well placed and, to some degree, powerful friends; we had a well-documented and righteous cause; we worked hard and successfully engaged the community. However, dissecting the past in some self-indulgent retrospective would keep us from moving forward. As will be noted below, we were working on other initiatives to keep our programs alive. That said, it cannot be stated emphatically enough how important this legislation was. Aside from the obvious, these dollars would serve notice to other donors, both institutional and individual, that we were a credible investment. And given the limited availability of such investors, it is impossible to overstate the importance of our legislation. With it, we could continue and expand our programs and services; without it . . . .

The postscript to this is that my board and I resolved to make one more try to introduce legislation in the 2015 session of the General Assembly. This time, however, we decided to engage the judiciary earlier in the process, again for the same reasons as noted below. My board chair arranged to have lunch with the Chief Justice of the Rhode Island Supreme Court to discuss whether he could support our bills. I had previously met the Chief Justice and found him to be fair and open to discussion of RICLAPP and the need for legal services to be provided to underserved Rhode Islanders. This meeting was no different. Yet, after a broad ranging hour-long discussion, the Chief Justice told us that not only could he not support our bills, but that he was opposed to the legislation in general because the court fees are already too high.

This fees argument surfaced from time to time throughout our 2014 efforts. I even had one person connected to the General Assembly tell me that any increase in fees would prevent *our* clients from accessing the courts, the fact that our clients would enter most actions *in forma pauperis* notwithstanding.<sup>108</sup> Added to that, in 2014, the court itself sought and won passage of legislation to pay for an e-filing system throughout the court system that carried with it a \$25 user's fee.<sup>109</sup>

The argument clearly ignores the fact that even with the \$25 up-charge for e-filing, Rhode Island's fees on those filings we targeted were *less* than those of our neighbors to the north and west. For example, in Rhode Island, even with the additional \$25 e-filing fee, it costs \$80 (without any RICLAPP surcharge) to file a complaint in the District Court;<sup>110</sup> in Massachusetts the same filing costs \$180.<sup>111</sup> In the Rhode Island Superior Court, it now costs \$185 to file a complaint;<sup>112</sup> in Massachusetts, the same complaint will cost \$275 (including two surcharges).<sup>113</sup> In the Connecticut Su-

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<sup>108</sup> *In forma pauperis* literally translates to "in the manner of a pauper." In practice, this means an indigent person is permitted to disregard filing fees and court costs. BLACK'S LAW DICTIONARY 357 (3rd pocket ed. 2006).

<sup>109</sup> Katie Mulvaney, *R.I. Judiciary in Midst of \$5.9-million Transition to Online Case-File System*, PROVIDENCE JOURNAL (May 19, 2014), <http://www.providencejournal.com/article/20140519/News/305199989>, archived at <http://perma.cc/JW97-8WC8>.

<sup>110</sup> R.I. Gen. Laws § 9-29-1 (West 2015).

<sup>111</sup> MASS. GEN. LAWS ch. 262, § 2 (West 2014).

<sup>112</sup> R.I. Gen. Laws Ann. § 8-15-11(a) (West 2014) (requiring an additional \$25 for e-filing); R.I. Gen. Laws Ann. § 9-29-18(a) (requiring \$160 filing fee for every civil action).

<sup>113</sup> MASS. GEN. LAWS ch. 262, § 4A (West 2015) (requiring \$240 as a filing fee, plus a \$20 security fee); MASS. GEN. LAWS ch. 262, § 4C (requiring an additional \$15 surcharge on filing fees).

perior Court, filing a complaint will cost \$325.<sup>114</sup> To be blunt, even with the requested RICLAPP surcharge, Rhode Island filing costs are still significantly lower than fees in Massachusetts and Connecticut.

The eminent political science professor Harold Lasswell's classic work, *Politics: Who Gets What, When, How* described how political outcomes were determined by elites.<sup>115</sup> Of course he later refined his view by including personalities and culture as components that influence outcomes.<sup>116</sup> A non-elite trying to achieve a desired political outcome that is opposed by elites is like bringing a knife to a gunfight.<sup>117</sup> Nobody ever bets on the guy with the knife and RICLAPP was holding the knife.

Once when discussing the banks, President Harry S. Truman is reputed in the 1975 play, *Give 'Em Hell, Harry*, to have said, "You want a friend in life, get a dog!"<sup>118</sup> Whether about banks or politicians, with both an upper and lower case "P," this is good advice. Too often in my view political decisions are not made on the basis of merit or acquaintance; rather, they are made on the basis of an alignment and advancement of the agendas of the elites that Lasswell wrote about.

The inescapable fact is that RICLAPP's agenda did not mesh with the agendas of those who had the power to support and enact our legislation. Given the import and merit of our bills, it's not unfair to ask, *why not?*

#### E. Other Initiatives

There were other initiatives that we explored. For example, we reached out to the Department of Elderly Affairs to see if we could obtain some of the Administration on Aging Title III money for legal services that the Department administers.<sup>119</sup> This money goes

<sup>114</sup> CONN. GEN. STAT. § 52-259(c) (West 2015).

<sup>115</sup> HAROLD LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

<sup>116</sup> HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (Yale University Press 1950).

<sup>117</sup> *THE UNTOUCHABLES* (Paramount Pictures 1987).

<sup>118</sup> The Harry S. Truman Library has no evidence of Harry S. Truman actually saying this; rather, this line is attributable to the character of Harry S. Truman in Samuel Gallu's play, *Give 'Em Hell, Harry*. David Rothman, *Google Book Search, Harry S. Truman and The Get-a-Dog Quote: Presidential Library Unable to Confirm It*, TELEREAD (June 28, 2008), <http://www.teleread.com/books/google-book-search-harry-s-truman-and-the-get-a-dog-quote-presidential-library-unable-to-confirm-it/>, archived at <http://perma.cc/BQN6-QKML>.

<sup>119</sup> Programs for Older Americans, 42 U.S.C. §§ 3001-3057 (West 2015) (explaining the grants for state and community programs on aging, which include legal services programs for the elderly).

to serving the legal needs of Rhode Island's elder population. I thought our programs in the various senior centers throughout Rhode Island showed our commitment to that goal. Unfortunately, no portion of these Title III dollars was diverted to us.

We've sought corporate and grant support to expand the MLP, to no avail. The Rhode Island Foundation is indifferent to our program, and other corporations and donors who would support direct legal services to low-income people, even in a hospital setting, are hard to come by. Although the two major health corporations in Rhode Island have internal budget issues, they are reluctant to support a partnership that not only would serve their patients, but also save them money over the long run (an outcome that would be rewarded by the Affordable Care Act<sup>120</sup>). Medical Legal Partnerships have been shown to provide a positive economic outcome to its medical host.<sup>121</sup>

We are in the process of trying to link with the local Veterans Administration Hospital to open an MLP for its patients. There is a lot of interest and this shows great promise, but as of this writing, our proposal hasn't gone to the upper echelons of the Veterans Administration. My guess is that if this initiative bears fruit, it won't be until late 2015 or early 2016.

## V. POVERTY: A COMMUNITY PROBLEM

I am writing this in early 2015. According to data reported by the Pew Research Center on December 5, 2014, income inequality in America is at the highest level since 1928, one year prior to the Stock Market Crash of 1929.<sup>122</sup> Citing work by Professor Emmanuel Saez of UC-Berkley, in 1928, Pew reported that 1% of families received 23.9% of all pre-tax income; the bottom 90% received

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<sup>120</sup> CENTER FOR MEDICARE & MEDICAID SERV., THE AFFORDABLE CARE ACT: LOWERING MEDICARE COSTS BY IMPROVING CARE EFFORTS WILL SAVE OVER \$200 BILLION FOR TAXPAYERS THROUGH 2016, NEARLY \$60 BILLION FOR BENEFICIARIES IN TRADITIONAL MEDICARE 3 (2012), available at <http://www.cms.gov/apps/files/aca-savings-report-2012.pdf>, archived at <https://perma.cc/ZJX2-Q54W?type=pdf> (explaining that under the ACA the Center for Medicare & Medicaid Services was "putting into place payment methods that reward quality of care delivered, not just the quantity of services provided").

<sup>121</sup> JAMES A. TEUFEL ET AL., RURAL MEDICAL-LEGAL PARTNERSHIP AND ADVOCACY: A THREE-YEAR FOLLOW-UP STUDY 710-711 (2012), available at <http://medical-legalpartnership.org/wp-content/uploads/2014/03/Rural-Medical-Legal-Partnership-and-Advocacy-A-Three-Year-Follow-up-Study.pdf>, archived at <http://perma.cc/2AFP-4DKV>.

<sup>122</sup> Drew Desilver, *U.S. Income Inequality, on Rise for Decades, is Now Highest Since 1928*, PEW RESEARCH CENTER, (Dec. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/>, archived at <http://perma.cc/4LSK-XFM5>.

50.7% of all pre-tax income.<sup>123</sup> Compare that data to 2012 when 1% of families received 22.5% of all pre-tax income while pre-tax income of the lower 90% of families dropped below 50% for the first time ever.<sup>124</sup>

In President Lyndon B. Johnson's 1964 State of the Union address, he stated that "many Americans live at the outskirts of hope."<sup>125</sup> And thus began the War on Poverty. There's a bit of an academic debate as to the effect of this war, but one thing seems certain: the programs instituted during the War on Poverty had a positive, even a dramatic effect on reducing the poverty rate, until they were cut back in the mid-1970s and further eviscerated during the 1980s to the present.<sup>126</sup>

Even the poverty rate today is disputed.<sup>127</sup> According to pretty much everybody who's looked at the measure of the rate of poverty in America, the current measure isn't accurate.<sup>128</sup> Scholars writing for the Institute for Research on Poverty at the University of Wisconsin-Madison in 2013 noted that while the poverty rate had improved since 1964, it was worse than the rate reported by the Census Bureau.<sup>129</sup> The best guess is that there's 15% to 16.2% of the population living in poverty.<sup>130</sup> Or maybe not.

I don't care as to which methodology is used. I know that there are at least 300,000 Rhode Islanders, perhaps more, who

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Lyndon B. Johnson, *supra* note 4.

<sup>126</sup> See Stanley Meisler, 25 Years After the Dream, L.A. TIMES, July 14, 1989, available at 1989 WLNR 2553852; Terrance Heath, *After 50 Years, How to Move Forward in the War on Poverty*, CAMPAIGN FOR AMERICAN'S FUTURE, (Jan. 8, 2014), (explaining that President Johnson's safety-net programs helped reduce poverty rate in 1960s, then the programs lost steam in the 1970s, and finally were not supported by President Reagan in the 1980s).

<sup>127</sup> Drew Desilver, *Who's Poor in America? Fifty Years in to the 'War on Poverty,' a Data Portrait*, PEW RESEARCH CENTER (Jan. 13, 2014), <http://www.pewresearch.org/fact-tank/2014/01/13/whos-poor-in-america-50-years-into-the-war-on-poverty-a-data-portfolio/>, archived at <http://perma.cc/2YV3-YBQM>.

<sup>128</sup> See, e.g., Statement of Nancy K. Cauthen, Ph.D., Hearing on Measuring Poverty in America, Subcommittee on Income Security and Family Support House Committee on Ways and Means (Aug. 1, 2007), available at [http://www.nccp.org/publications/pdf/text\\_752.pdf](http://www.nccp.org/publications/pdf/text_752.pdf), archived at <http://perma.cc/5K5G-P3R7> (critiquing current measurements of poverty as being based on outdated assumptions about family expenditures and inadequately estimating family resources and detailing recommendations by the National Academy of Sciences to change the way poverty is measured).

<sup>129</sup> CHRISTOPHER WIMER et al., TRENDS IN POVERTY WITH AN ANCHORED SUPPLEMENTAL POVERTY MEASURE, 17 (Institute for Research on Poverty) (Dec. 11, 2013), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp141613.pdf>, archived at <http://perma.cc/YE3L-DNNJ>.

<sup>130</sup> *Id.* at 7-8.

have trouble making ends meet.<sup>131</sup> What I know is that many of these people have legal problems that require the assistance of a lawyer.<sup>132</sup> And what I know is that there are very few lawyers available to these folks.<sup>133</sup>

According to data published by the National Center for Access to Justice, there are 40.20 attorneys for every 10,000 Rhode Islanders.<sup>134</sup> However, there are only 1.33 attorneys for every 10,000 Rhode Islanders living in poverty.<sup>135</sup> The disparity in these numbers is staggering.

In 1970, a former Attorney General wrote that if one was looking to discover the location of a municipality's highest crime rates, he would only need to visit the poorest sections of the community.<sup>136</sup> From our experience we know that poverty is a prime contributor to the alienation, marginalization, and stress that impoverished people, in this culture, at this time, live with each day. Poor kids too often attend poor schools, poor people live in poor housing, and poor families often exist on public benefits that are reduced or eliminated, seemingly at whim.<sup>137</sup> We have placed over 45 million people in a Dickensian, if not Malthusian, nightmare and wonder why they can't make their way in life like those with fewer or no barriers to overcome.<sup>138</sup>

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<sup>131</sup> The American Community Survey shows that 303,430 individuals were living at 200% of the federal poverty level during the years 2009-2013. This equates to an annual income of \$23,340. See 2009-2013 American Community Survey 5-Year Estimates, American Fact Finder, <http://factfinder.census.gov/> (last visited April 13, 2015), archived at <http://perma.cc/5FTQ-CN8B> (access Table S1701, "Poverty Status in the Last 12 Months," searching by state for Rhode Island); 2014 Federal Poverty Level (FPL) Guidelines By Family Size, RI DEP'T OF HUMAN SERV. (2014), <http://www.dhs.ri.gov/Portals/0/Uploads/Documents/Public/General%20DHS/FPL.pdf>, archived at <http://perma.cc/BZ8F-H7QE>.

<sup>132</sup> LEGAL SERVICES CORPORATION, *supra* note 3 at 17.

<sup>133</sup> According to the American Bar Association, there were 4,179 active attorneys in Rhode Island in 2014. AMERICAN BAR ASSOCIATION, NATIONAL LAWYER POPULATION BY STATE (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-by-state-current.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-current.authcheckdam.pdf), archived at <http://perma.cc/QW2Z-LKQP>.

<sup>134</sup> *The Justice Index, Attorney Access: Number of Attorneys for People in Poverty, Comparison of Number of Civil Legal Aid Attorneys to All Attorneys*, NATIONAL CENTER FOR ACCESS TO JUSTICE (Nov. 13, 2014), <http://www.justiceindex.org/findings/attorney-access/>, archived at <http://perma.cc/F9R2-79EP>.

<sup>135</sup> *Id.*

<sup>136</sup> Ramsey Clark, *Crime In America: Observations on its Nature, Causes, Prevention and Control*. Simon & Schuster, 1970.

<sup>137</sup> See Nicholas Johnson, Phil Oliff & Erica Williams, *An Update on State Budget Cuts, At Least 46 States Have Imposed Cuts That Hurt Vulnerable Residents and Cause Job Loss*, CENTER ON BUDGET AND POLICY PRIORITIES 66 (2011), <http://www.cbpp.org/research/an-update-on-state-budget-cuts>.

<sup>138</sup> *Poverty – 2013 Highlights*, U.S. CENSUS BUREAU, SOCIAL, ECONOMIC, AND HOUSING

These are social issues to be sure, but they are legal issues as well. And unless we're willing to perpetuate a permanent underclass, with all the social upheaval that entails, then poverty is a community problem that calls for a community solution. Not only is a broad-based solution the right thing to do, but it's also the smart and cost effective thing to do. Nowhere is this more evident than ensuring that every low-income person who needs a lawyer, and wants a lawyer, gets a lawyer.

## VI. ACCESS TO JUSTICE

On April 5, 1968, the day after Martin Luther King, Jr. was assassinated, Robert F. Kennedy spoke to the Cleveland City Club on the topic of violence in America. Included in his remarks was the following:

For there is another kind of violence, slower but just as deadly, destructive as the shot or the bomb in the night. This is the violence of institutions; indifference and inaction and slow decay. This is the violence that afflicts the poor, that poisons relations between men because their skin has different colors. This is a slow destruction of a child by hunger, and schools without books and homes without heat in the winter . . . Yet we know what we must do. It is to achieve true justice among our fellow citizens. The question is no[t] what programs we should seek to enact. The question is whether we can find in our own midst and in our own hearts that leadership of human purpose that will recognize the terrible truths of our existence.<sup>139</sup>

Without so intending, our courts are too often seen as instruments of institutional violence against persons without the sophistication or resources to defend themselves. I have seen the results of lives turned upside-down due to illegal evictions, improper benefit denials, unlawful employment termination, and myriad other occurrences that were ratified by the courts and allowed to stand because people lacked access to representation.

Kennedy's words are as true today as they were in 1968: we need to find "that leadership of human purpose that will recognize these terrible truths,"<sup>140</sup> and act decisively.

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STATISTICS DIVISION, <https://www.census.gov/hhes/www/poverty/about/overview/> (last revised Sept. 16, 2014).

<sup>139</sup> Robert F. Kennedy, Remarks to the Cleveland City Club (April 5, 1968), *available at* <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/RFK-Speeches/Remarks-of-Senator-Robert-F-Kennedy-to-the-Cleveland-City-Club-Cleveland-Ohio-April-5-1968.aspx>, *archived at* <http://perma.cc/5D6M-BCFZ>.

<sup>140</sup> *Id.*

To that end, there are jurisdictions and states that are acting to provide legal assistance to indigent parties. California passed the Sargent Shriver Civil Counsel Act, AB 590 in 2011 and appropriated \$9.5 million each year to provide civil legal services to low-income Californians, up to 200% FPL, in seven pilot projects throughout the state through 2015.<sup>141</sup> Clearly this will not serve every low-income person who needs a lawyer, but it's a start.

Massachusetts has also been a leader in recognizing the importance of legal representation for low-income residents of its state. In 2008 The Boston Bar Association stated that "[a] rigid delineation that presumes that counsel is important in criminal cases but not civil cases is untenable in the United States in the twenty-first century."<sup>142</sup> In October 2014, the Boston Bar Association released a report that determined that the Commonwealth would reap a return in savings of from \$2 to \$5 for every dollar spent on providing an attorney for indigent parties in eviction and domestic violence cases.<sup>143</sup> On December 4, 2014, the Massachusetts Access to Justice Commission unanimously adopted a resolution to support the recommendations of the Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, urging the Legislature to enact, and the Governor to sign, appropriations increasing Massachusetts Legal Assistance Corporation funding by a total of \$30 million over the next three fiscal years.<sup>144</sup>

In New York, Chief Judge Jonathan Lippman appointed the Task Force to Expand Access to Civil Legal Services, which found in its 2010 report that because of an enormous percentage of *pro se* litigants in the New York Court system, the state economy lost approximately \$400 million per year.<sup>145</sup> The Task Force proposed a four-year plan to allocate dollars from the Judiciary's Budget to

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<sup>141</sup> Cal. Gov. Code § 68650 (West 2010).

<sup>142</sup> BOSTON BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 1 (2008).

<sup>143</sup> BOSTON BAR ASSOCIATION STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASSACHUSETTS, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL NEED IN MASSACHUSETTS 2 (2014).

<sup>144</sup> BOSTON BAR ASSOCIATION, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 5 (2014), *available at* <http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma—investing-in-justice.pdf>, *archived at* <http://perma.cc/8KCG-FTKS>.

<sup>145</sup> THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010), *available at* <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>, *archived at* <http://perma.cc/Z2GU-HTKZ>.



fund grants to civil legal service providers.<sup>146</sup> By the time the Task Force's 2011 Report was published, fifty-six grants had been awarded and 51,297 low-income families and individuals had received legal assistance to help address the "essentials of life."<sup>147</sup>

These are just a sample of the state-level efforts being made to bring legal services to indigent individuals and families. Nobody asserts that any of these individual efforts addresses the totality of need extant in America, but it's a good start.

## VII. CONCLUSION

There are three conclusions to this Article that I would like to share. First, as of this writing, Rhode Island has not established an "Access to Justice Commission" nor is it likely to do so in the near future. According to the American Bar Association, in 2014 there were thirty-eight such Commissions throughout the country.<sup>148</sup> Rhode Island is one of the remaining twelve.<sup>149</sup> Evidently, in 2013 the American Bar Association awarded the State of Rhode Island a grant to form its own Access to Justice Commission.<sup>150</sup> As of this writing, such a commission has not been formed.<sup>151</sup> Its absence continues to be a shame and a stain on the Aristotelian notion of the moral virtue of justice.<sup>152</sup>

Second, if we're really serious about serving those in need, both through legal and social service programs, we need to drop

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<sup>146</sup> *Id.* at 39.

<sup>147</sup> THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2011), *available at* [http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT\\_web.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf).

<sup>148</sup> Resource Center for Access to Justice Initiatives, *ATJ Commission Movement*, A.B.A. J. (last visited Mar. 5, 2015), [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_for\\_access\\_to\\_justice/state\\_atj\\_commissions.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html), *archived at* <http://perma.cc/GKY8-M9H8>.

<sup>149</sup> *Id.*

<sup>150</sup> *ABA Access to Justice Commission Expansion Project 2013 Grants to Promote the Creation of New Access to Justice Commissions*, AMERICAN BAR ASS'N (March 15, 2013), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_atj\\_grant\\_awards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_grant_awards.authcheckdam.pdf), *archived at* <http://perma.cc/5896-7QS9>.

<sup>151</sup> The ABA's Access to Justice website states that Rhode Island's commission remains in the "process of formation." Resource Center for Access to Justice Initiatives, AMERICAN BAR ASS'N, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_for\\_access\\_to\\_justice/state\\_atj\\_commissions.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html) (last visited April 16, 2015), *archived at* <http://perma.cc/X8JS-K22W>.

<sup>152</sup> *See generally* ARISTOTLE, *NICOMACHEAN ETHICS* BK. V (2nd ed., Terrence Irwin trans., Hackett Publishing Co., Inc. 1999); *see also* ARISTOTLE, *POLITICS* (Benjamin Jowett trans., Dover Publications, Inc.).

the pernicious word “benefit” from describing these programs. As the above examples demonstrate, money spent on these kinds of programs are investments to save money, not dollars sent down the drain as too many pundits in our toxic political and social climates would opine.<sup>153</sup> I, for one, would rather spend a dollar on a program that will save me from two to five dollars than spend five dollars on a program that isn’t working.

Third, as you can guess, the Rhode Island Center For Law And Public Policy is in trouble. In December 2014, save for its Medical Legal Partnership program, RICLAPP had to suspend operations. During what I hope is a brief hiatus, the board and I will continue to search for resources and collaborations that will stabilize and sustain us. That there is an endemic need for our services is not in dispute. That we were effective in meeting this need is not in dispute. And that the way we met that need was both cost efficient and effective is not in dispute.

I am something of a student of history and I am particularly fond of Theodore Roosevelt. What I like about him was that for the most part he was not afraid to stand for something, whether it was an idea or a policy.<sup>154</sup> He took his hits, but he kept trying to affect social change.<sup>155</sup> I am especially enamored of his 1912 speech “Confession of Faith,” which concluded with this statement: “We stand at Armageddon, and we battle for the Lord.”<sup>156</sup> Over the past seven years, and in particular during this past year, I have come to better appreciate what he meant.

As I mentioned at the beginning of this paper, I started RICLAPP in an attempt to answer many questions that I had about

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<sup>153</sup> See Kenneth F. Boem & Peter T. Flaherty, *Why the Legal Services Corporation Must be Abolished*, THE HERITAGE FOUNDATION (Oct. 19, 1995), <http://www.heritage.org/research/reports/1995/10/bg1057nbsp-why-the-legal-services-corporation>, archived at <http://perma.cc/SSC3-S6B3> (arguing that taxpayer-funded legal groups do not adequately provide meaningful legal services for the poor).

<sup>154</sup> For example, “[Roosevelt] turned to the Sherman Anti-Trust Act to challenge business monopolies, bringing suit against the Northern Securities Company (a railroad trust) in 1902. The Justice Department initiated forty-two additional anti-trust cases during his presidency.” Kirsten Swinth, *The Square Deal: Theodore Roosevelt and the Themes of Progressive Reform*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <http://www.gilderlehrman.org/history-by-era/politics-reform/essays/square-deal-theodore-roosevelt-and-themes-progressive-reform> (last visited Mar. 5, 2015), archived at <http://perma.cc/66EH-HCSV>.

<sup>155</sup> *Id.*

<sup>156</sup> Theodore Roosevelt, 26th President of the United States, Address at the Progressive Party Convention: A Confession of Faith (Aug. 6, 1912), available at <http://www.theodore-roosevelt.com/images/research/speeches/trarmageddon.pdf>, archived at <http://perma.cc/KP7X-67CJ>.

the law, society, and justice. Although I made some headway in my quest over the past years, I still have more questions than answers. However, one thing I did learn is that organizations like RICLAPP cannot exist without community support. It is the community that determines what to invest in and what causes to champion.

I believe that people are essentially good and want to do the right thing—whatever that may be. There has been a dearth in Rhode Island of real information detailing the level of need that exists in our community. The state government, along with its local counterparts, has narrowly defined “investments” to encompass only a *quid pro quo* relationship with commercial interests. Because of these relationships there is no urgency to reform what we do and how we do it.

My job going forward is the try to engage in these conversations as I attempt to rebuild RICLAPP. In this venue and this political climate, I may resemble Sisyphus and the rock but I need to try. I have worked all my life championing causes that I thought would make the world, or at least my little corner of it, a better place in which to live. RICLAPP was the expression of that belief and as I continue to work on making my agency sustainable and my goal more of a reality, I recall the words of Senator Edward Kennedy in 1980.<sup>157</sup> Conceding that he lost the presidential nomination, Kennedy addressed the Democratic convention and by all accounts gave the speech of his life.<sup>158</sup> At the conclusion of his speech he said, “For all those whose cares have been our concern, the work goes on, the cause endures, the hope still lives, and the dream shall never die.”<sup>159</sup>

*The dream shall never die.*

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<sup>157</sup> Senator Edward M. Kennedy, Address to the Democratic National Convention (Aug. 12, 1980) (transcript available in the John F. Kennedy Library and Museum).

<sup>158</sup> See *Kennedy's Dream Will Outlive Us All*, BOSTON HERALD (Aug. 26, 2008); *To the Mountaintop*, THE ECONOMIST (Aug. 26, 2009), [http://www.economist.com/blogs/democracyinamerica/2009/08/to\\_the\\_mountaintop](http://www.economist.com/blogs/democracyinamerica/2009/08/to_the_mountaintop), archived at <http://perma.cc/6743-FKGJ>; John Nichols, *Still Dreaming Ted Kennedy's Dream*, THE NATION (Sept. 4, 2012), available at <http://www.thenation.com/blog/169738/still-dreaming-ted-kennedy-dream#>, archived at <http://perma.cc/5C8E-YL36>.

<sup>159</sup> Senator Edward M. Kennedy, *supra* note 157.



# TOXIC SWEATSHOPS: REGULATING THE IMPORT OF HAZARDOUS ELECTRONICS

*Allie Robbins*<sup>†</sup>

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## INTRODUCTION

The rise in consumer use of personal electronic devices has led to a boon in electronics manufacturing worldwide. Along with the expansion of production have come serious questions about the safety of production processes, as large numbers of workers and their children have fallen ill. This article proposes that the United States create an Electronics Import Safety Commission, similar to the Consumer Protection Safety Commission (CPSC), to regulate the import of electronic devices and make sure that both workers and consumers are safe.

In Part I, I outline some of the health concerns that have arisen in the global electronics-manufacturing sector. Part II provides a brief overview of the global electronics supply chain, while Part III explores some of the ways that the United States currently regulates global production. In Part IV, I detail key aspects of the CPSC and the Consumer Product Safety Improvement Act of 2008 (CPSIA). I propose that the CPSC serve as a model for the development of the Electronics Import Safety Commission.

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## I. HEALTH CONCERNS IN ELECTRONICS MANUFACTURING

A lot has been written recently about the increasing use of electronic devices by infants and toddlers, and the concern that this use might negatively impact their brain development.<sup>1</sup> The American Academy of Pediatrics's most recent policy statement on the topic discourages screen media exposure for children less than two years of age.<sup>2</sup> Little attention has been paid, however, to potential long-term health effects of manufacturing those electronic devices. Even less attention has been paid to the health of the children of those workers. "The issue of reproductive toxicity, when children fall ill because of the accumulation of various toxic compounds over a long period in their parents' bodies, has not surfaced very often because many parents blame themselves and keep their children's condition hidden."<sup>3</sup> Yet the issue is very real and quite serious. Many individuals who have labored in semiconductor factories have experienced not only death and long-term illness themselves, but have also suffered "infertility and miscarriages."<sup>4</sup> Those who are able to conceive sometimes give birth to children with chronic debilitating illness.<sup>5</sup> It is critical that we pay attention to these members of the electronic device revolution as well.

While little has been done to address reproductive toxicity, slow but important progress is being made in addressing the health and safety concerns of workers who work in electronics manufacturing plants. On April 21, 2014, "the ninth civil division of Seoul High Court . . . ruled . . . that the leukemia claimed the lives of former Samsung Electronic semiconductor plant workers Hwang Yu-mi and Lee Sook-young constituted an industrial accident," ending years of legal battles over Samsung's complicity in the

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<sup>1</sup> See e.g., JuJu Chang, Christine Rakowsky & Daniel Clark, *Toddlers and Tablets: Way of the Future?*, ABC NEWS, (June 5, 2013), <http://abcnews.go.com/Technology/toddlers-tablets-future/story?id=19332916>; Elise Hu, *What You Need to Know About Babies, Toddlers and Screen Time*, NPR, (Oct. 28, 2013, 12:47 PM), <http://www.npr.org/blogs/alltechconsidered/2013/10/29/228125739/what-to-know-about-babies-and-screen-time-kids-screens-electronics>.

<sup>2</sup> American Academy of Pediatrics, *Policy Statement: Children, Adolescents, and the Media*, 132 PEDIATRICS, No.5 Nov. 2013 at 959, <http://pediatrics.aappublications.org/content/early/2013/10/24/peds.2013-2656.full.pdfhtml>.

<sup>3</sup> Sungyoon-Won, *Samsung's Devastating Secret: The Tears of 'Semiconductor Children*, HUFFINGTON POST KOREA, (updated Dec. 12, 2014, 8:59 PM), [http://www.huffingtonpost.com/2014/12/01/samsung-semiconductor-children\\_n\\_6200380.html](http://www.huffingtonpost.com/2014/12/01/samsung-semiconductor-children_n_6200380.html), archived at <http://perma.cc/CB3D-B63Q>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

deaths of these two young women.<sup>6</sup> “The court acknowledged that they had been exposed to benzene and ionizing radiation, both known causes of leukemia.”<sup>7</sup> “The court also acknowledged the possibility of ‘partial exposure to harmful substances’ for the three other victims, but did not recognize their diseases as industrial accidents.”<sup>8</sup> This case led to an unprecedented “public apology to workers who contracted rare cancers linked to chemicals at its semiconductor plants and to the surviving family members.”<sup>9</sup> “The company’s statement fell shy of accepting a connection between some of the diseases, including leukemia, and carcinogens used in its plans, a link Samsung has always denied.”<sup>10</sup> The apology did state, however, that “Samsung would make ‘appropriate compensation to those who were affected and their families.’”<sup>11</sup> On January 16, 2015, Samsung announced that it would “compensate all former workers who contracted leukemia and other diseases after working at its display and semiconductor facilities.”<sup>12</sup> In a huge breakthrough for workers who have become ill with leukemia, Samsung Electronics’s chief negotiator Baek Soo-hyun stated, “Samsung workers who left two decades ago could be compensated, while those who left a decade after the illnesses developed would also be included for monetary compensation.”<sup>13</sup>

This game-changing judicial decision, and Samsung’s apology, come after a series of battles with former employees who suffered (and often died) from debilitating diseases. On December 14, 2012, for example, the South Korean government formally acknowledged a connection between an employee developing breast cancer and her work at a Samsung electronics factory.<sup>14</sup> “The Ko-

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<sup>6</sup> Kim Min-kyung & Lee Jung-ae, *Another Court Recognizes Samsung’s Complicity in Leukemia Cases*, THE HANKYOREH (Aug. 22, 2014), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/652335.html](http://www.hani.co.kr/arti/english_edition/e_national/652335.html), archived at <http://perma.cc/SS6V-TB42>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Cam Simpson, *In Samsung’s War at Home, an Apology to Cancer-Stricken Workers*, BLOOMBERG BUSINESSWEEK (May 14, 2014), <http://www.businessweek.com/articles/2014-05-14/in-samsungs-war-at-home-an-apology-to-cancer-stricken-workers>, archived at <http://perma.cc/M9E2-ULZ3>.

<sup>10</sup> *Id.*

<sup>11</sup> Rick McCormick, *Samsung Offers ‘Deep Apology’ and Compensation to Workers Who’ve Contracted Incurable Diseases*, THE VERGE, May 14, 2014, <http://www.theverge.com/2014/5/14/5716064/samsung-offers-apology-and-compensation-to-workers-who-got-leukemia>.

<sup>12</sup> Kim Yoo-chul, *Samsung to Compensate All Leukemia-Stricken Workers*, THE KOREA TIMES (Jan. 16, 2015), [http://m.koreatimes.co.kr/phone/news/view.jsp?req\\_newsidx=171849](http://m.koreatimes.co.kr/phone/news/view.jsp?req_newsidx=171849), archived at <http://perma.cc/WZ6Z-2P4W>.

<sup>13</sup> *Id.*

<sup>14</sup> Youkyung Kee, *SKorea Says Samsung Chip Plant Caused Cancer*, THE ASSOCIATED

rea Workers' Compensation and Welfare Service, which is part of the labor ministry, ruled . . . that there was a 'considerable causal relationship' between the woman's cancer and her five years of work at a semiconductor plant near Seoul."<sup>15</sup> The woman, who passed away at age thirty-six after a three-year battle with breast cancer, was exposed to organic solvents and radiation.<sup>16</sup> The woman's family was compensated, only the second time that a causal connection between working conditions at Samsung factories and illness on the part of Samsung employees was formally recognized by the South Korean government.<sup>17</sup> In April 2012, the South Korean Ministry of Employment and Labor also recognized a connection between a case of aplastic anemia and the employee's work at a Samsung semiconductor plant.<sup>18</sup>

While these cases illustrate some progress for the legal rights of Samsung's factory workers in Korea, jobs in electronics factories worldwide remain extremely dangerous. The vast majority of the workers described above died from their illnesses before receiving any government recourse. No laws have been changed mandating an alteration of production processes as a result of these rulings, and no preventative measures have been put in place to ensure that workers are no longer exposed to the chemicals that are causing these fatal injuries.

This is not a problem that is unique to Samsung, or to electronics manufacturing facilities in Korea. In factories run by Pegatron in China, which produces the iPhone 6 for Apple, for example, "masks for workers working with chemicals are not provided."<sup>19</sup> Additionally, "workers suffered from skin peeling, blisters, and skin allergy in their hands . . . [and] the shop floor [is] a closed environment where fresh air cannot flow in."<sup>20</sup> While Pega-

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PRESS (Dec.14, 2012), <http://bigstory.ap.org/article/skorea-says-samsung-chip-plant-caused-cancer>, archived at <http://perma.cc/5Z4Y-AYYG>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Statement of SHARPS [Supporters for the Health and Rights of People in the Semiconductor Industry] Hailing KCOMWEL's First Recognition of Workers' Compensation of a Samsung Worker Victim, on April 10, 2012*, STOP SAMSUNG, Apr. 28, 2012, <http://stopsamsung.wordpress.com/2012/04/28/statement-of-sharps-hailing-kcomwels-first-recognition-of-workers-compensation-of-a-samsung-worker-victim-on-april-10-2012/>, archived at <http://perma.cc/4ZPC-X4US>.

<sup>19</sup> STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOUR, *THE LIVES OF iSLAVES: REPORT ON WORKING CONDITIONS AT APPLE'S SUPPLIER PEGATRON 3* (2014), available at <http://sacom.hk/wp-content/uploads/2014/09/SACOM-The-Lives-of-iSlaves-Pegatron-20140918.pdf>, archived at <http://perma.cc/V36L-CEXG>.

<sup>20</sup> *Id.* at 11.



tron has arranged for workers in high-risk positions to receive annual medical checkups, “workers have never been informed of the results” of those checkups.<sup>21</sup> These working conditions are not unique, and they have had disastrous results. Pegatron recently paid \$12,800 to the family of an iPhone 6 manufacturer after he was literally worked to death.<sup>22</sup> “In March 2010, China’s State Administration for Workplace Safety (SAWS) confirmed that 47 workers at the United Win cell phone plant in Suzhou, China, had been hospitalized in the last year for n-hexane poisonings resulting in peripheral neuropathies, severe muscle atrophy and long-term disabilities.”<sup>23</sup> “By the end of May 2010, at least 49 young semiconductor workers had contracted cancer—including 32 brain, leukemia, and lymphoma cancers—while working at Samsung’s huge electronics plants throughout Korea. Nineteen deaths have occurred, mostly to workers in their 20s.”<sup>24</sup> Similar conditions exist in electronics factories throughout Asia, where hazardous chemicals are used in the production of cell phones, digital cameras, and other electronic devices.<sup>25</sup> According to the Environmental Protection Agency, “[m]ost electronic devices contain a printed wiring board and battery, and these and other components may contain hazardous materials such as lead, mercury, hexavalent chromium, arsenic, beryllium, nickel, zinc, copper, cadmium, and flame retardants.”<sup>26</sup> Workers who are repeatedly exposed to large quantities of these hazardous chemicals are particularly at risk, especially when they are not provided with proper training or safety equipment.

## II. THE GLOBAL ELECTRONICS SUPPLY CHAIN

According to the United Nations, between 2010 and 2011,

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<sup>21</sup> *Id.* at 3.

<sup>22</sup> Philip Elmer-DeWitt, *Apple Supplier Pays \$12,800 to Family of Dead iPhone 6 Worker*, FORTUNE, Mar. 11, 2015, <https://fortune.com/2015/03/11/apple-supplier-pays-12800-to-family-of-dead-iphone-6-worker/>, archived at <https://perma.cc/2382-7TJZ>.

<sup>23</sup> Garrett Brown, *Global Electronics Factories In Spotlight*, OCCUPATIONAL SAFETY AND HEALTH, Aug. 4, 2010, [http://ohsonline.com/articles/2010/08/04/global-electronics-factories-in-spotlight.aspx?sc\\_lang=en](http://ohsonline.com/articles/2010/08/04/global-electronics-factories-in-spotlight.aspx?sc_lang=en), archived at <http://perma.cc/8GM3-KAKJ>.

<sup>24</sup> *Id.*

<sup>25</sup> See e.g., Anna Kakuli & Irene Schipper, *Out of Focus: Labour Rights in Vietnam’s Digital Camera Factories*, SOMO – CTR. FOR RESEARCH ON MULTINATIONAL CORPORATIONS 29-30 (Nov. 2011), [http://somo.nl/publications-en/Publication\\_3720](http://somo.nl/publications-en/Publication_3720), archived at <http://perma.cc/SCX4-UQTZ>.

<sup>26</sup> U.S. ENVTL. PROT. AGENCY, Report No. 2004-P-00028, MULTIPLE ACTIONS TAKEN TO ADDRESS ELECTRONIC WASTE, BUT EPA NEEDS TO PROVIDE CLEAR NATIONAL DIRECTION, U.S. ENVTL. PROT. AGENCY 2 (Sept. 1, 2004), <http://www.epa.gov/oig/reports/2004/20040901-2004-P-00028.pdf>, archived at <http://perma.cc/3BJ5-RM6D>.

there were six billion cell phone subscriptions in the world; approximately six hundred million of them were in the developing world.<sup>27</sup> Cell phones represent only one component of the electronics market, and in order to meet this high demand electronics factories have emerged worldwide, with high concentrations in East and South Asia. The dramatically increased production of cell phones, tablets, and other electronic devices in recent years has added a layer of danger on an already exploitative global supply chain system that prioritizes low prices over worker safety and health. Following the model of other global supply chain industries, such as the apparel industry, the electronics industry spreads its manufacturing worldwide and major companies outsource manufacturing to contract manufacturers whose names consumers do not recognize.<sup>28</sup> Also similar to other industries, the electronics global supply chain lacks meaningful oversight and monitoring, meaning that brands and retailers have little knowledge of what happens inside the factories that supply their goods.<sup>29</sup>

Not everything about electronics manufacturing mirrors other global supply chains, however. “The electronics industry added its own special twist to sweatshop manufacturing—the introduction of mass, temporary-help agency work forces, the most precarious and least-paid form of employment . . . [For example, t]he Mexican electronics industry centered in Guadalajara now consists of 55 percent to 60 percent temporary help agency employees, or some 240,000 workers employed by 60 different temporary agencies. These ‘perma-temp’ workers have low pay and virtually no benefits, and, of course, do not work for any of the global electronics giants whose products they make.”<sup>30</sup> Similarly, a report on mobile phone manufacturing in India found that most workers were trainees or contract workers.<sup>31</sup> Workers are often kept as contract workers for

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<sup>27</sup> MEASURING THE INFORMATION SOCIETY 2012, INT’L TELECOMM. UNION 2 (2012), [http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2012/MIS2012\\_without\\_Annex\\_4.pdf](http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2012/MIS2012_without_Annex_4.pdf).

<sup>28</sup> Garrett Brown, *Global Electronics Industry: Poster Child of 21st Century Sweatshops and Despoiler of the Environment?*, EHS TODAY (Sept. 1, 2009), <http://ehstoday.com/safety/news/global-electronics-industry-sweatshops-environment-1063>, archived at <http://perma.cc/SG7S-XSQP>.

<sup>29</sup> Steven Greenhouse, *Documents Reveal New Details About Walmart’s Connection to Tazreen Factory Fire*, N.Y. TIMES (Dec. 10, 2012), [http://www.nytimes.com/2012/12/11/world/asia/tazreen-factory-used-by-2nd-walmart-supplier-at-time-of-fire.html?\\_r=0](http://www.nytimes.com/2012/12/11/world/asia/tazreen-factory-used-by-2nd-walmart-supplier-at-time-of-fire.html?_r=0).

<sup>30</sup> Brown, *supra* note 29.

<sup>31</sup> Anibel Ferus-Comelo & Päivi Pöyhönen, *Phone Equality: Labour Standards of Mobile Phone Manufacturers in India*, SOMO – CTR. FOR RESEARCH ON MULTINATIONAL CORPORATIONS 24 (2011), [http://somo.nl/publications-en/Publication\\_3697](http://somo.nl/publications-en/Publication_3697), archived at <http://perma.cc/B2R3-XBLS>.

a couple of years, receiving lower wages than permanent employees and having no job security.<sup>32</sup> Even where electronics brands such as Apple proclaim to be improving conditions in their supplier factories, employees in those factories have not generally substantiated those claims.<sup>33</sup> This additional twist on sweatshop labor is particularly troubling because workers on short-term contracts are less likely to speak up about unsafe working conditions out of fear that their contract will not be renewed and are often not afforded the same legal protections as “permanent” workers.

Unions are practically unheard of in electronics manufacturing and workers work long hours exposed to toxic chemicals with little recourse. The vast and oblique nature of the global electronics supply chain makes it nearly impossible for U.S. consumers to know who is making the electronics they purchase, what that production process is like, and how those workers are treated.<sup>34</sup> Consequently, consumers unwittingly purchase goods that cause fatal illness to the people who manufacture them. In addition, consumers have little idea of the dangerous chemicals that are in the products they purchase and the potential health consequences they face from regular use of those products.

Voluntary adoption of production standards and codes of conduct has not succeeded in the apparel industry,<sup>35</sup> and has not thus far successfully improved conditions for workers in the electronics industry either. As multinational corporations engaged in global supply chain production continue to disregard the health and well being of their workforce, protection of worker rights must be sought through greater regulation by importing countries such as the United States. While the only way to fully ensure that the rights of workers are respected is for those workers to form a union and represent their own interests,<sup>36</sup> regulation of imports into the United States by the federal government has the potential to make it easier for supply chain workers to organize without fear of losing their jobs, and makes it more likely that multinational corporations

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<sup>32</sup> *Id.*

<sup>33</sup> See e.g., Scott Nova & Isaac Shapiro, *NYT Story Emphasizes Apple's Positive Statements, Obscures Ongoing Labor Abuses*, ECON. POLICY INST. BLOG (Jan. 9, 2013, 1:53 PM), <http://www.epi.org/blog/new-york-times-apple-statements-labor-abuses/>, archived at <http://perma.cc/RR8Y-6SG7>.

<sup>34</sup> See *infra* Section IV-A.

<sup>35</sup> See e.g., Allie Robbins, *Could Sourcing from Union Shops Be Against the Law?*, 5 ORIGINAL L. REV. 46 (2009).

<sup>36</sup> Carolyn Butler, *Bangladesh: 17 Garment Fires Since 112 Killed in Tazreen*, SOLIDARITY CENTER (Dec. 21, 2012), <http://www.solidaritycenter.org/bangladesh-17-garment-fires-since-112-killed-in-tazreen/>, archived at <http://perma.cc/BNH9-YHNT>.

will pay close attention to working conditions in their supplier factories. The current production environment is dominated by major multinational corporations whose singular goal is to get the most production for the lowest price. Implementing import-side regulations will force corporations to prioritize the health and safety of the employees in their supply chain, or risk not being permitted to import their goods into the United States.

### III. REGULATION OF GLOBAL PRODUCTION BY THE UNITED STATES

Generally, the United States plays an extremely limited role in regulating working conditions in other countries. Even where production is primarily destined for import into the United States, the federal government does not commonly inspect conditions in supplier factories. The United States government does, however, closely monitor production in specific industries, and has the power to regulate electronics manufacturing as well.

When it comes to food production, for example, the United States Department of Agriculture (USDA) conducts on-site inspections of meat and poultry plants worldwide.<sup>37</sup> The USDA only permits imported meat, poultry, and egg products from countries they “deem eligible, and only from establishments certified by the foreign government.”<sup>38</sup> Further, the United States Food and Drug Administration’s (FDA) “Hazard Analysis and Critical Control Point (HACCP) programs governing food safety compel firms to assess food-safety hazards and to identify points in the production process at which they can be eliminated, minimized, or reduced to an acceptable level. They also establish procedures to measure and address risks at those points through corrective action.”<sup>39</sup> The FDA also inspects drug-manufacturing facilities and conducts quality control inspections of those facilities.<sup>40</sup> These regulations were put in place largely because the U.S. corporations that profit from this production, similar to companies in other sectors that rely on the global supply chain such as the apparel and electronics industries, were unable to ensure the safety of the U.S. consumer. “U.S. partners have, in general, performed poorly as ‘regulators’ of foreign activities . . . . U.S. food and drug companies sometimes do not know the identity of some of their suppliers, let alone participate in

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<sup>37</sup> Kenneth A. Bamberger & Andrew T. Guzman, *Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade*, 96 CALIF. L. REV. 1405, 1414-15 (2008).

<sup>38</sup> *Id.* at 1422.

<sup>39</sup> *Id.* at 1414-15.

<sup>40</sup> *Id.* at 1415.

comprehensive monitoring and oversight.”<sup>41</sup> Multinational corporations engaged in electronics manufacturing have the same weaknesses. This lack of control is purposefully built into the supply chain model in order to shelter companies from liability and public outrage in the event that faulty products or oppressive working conditions are discovered.

Given the vastness of the electronics supply chain, a system of inspection by an agency of the United States government may be unrealistic. What is certainly plausible, however, is regulating the import of the goods themselves. This would put the onus on the multinational corporations and their partners throughout the supply chain to ensure compliance with import guidelines. Such a model has already proved successful through regulations governing the permissible lead and phthalates content of children’s products under the Consumer Product Safety Improvement Act of 2008,<sup>42</sup> and could be adapted to electronics manufacturing. Similar to the Consumer Product Safety Commission, which was created in 1972 when Congress passed the Consumer Product Safety Act,<sup>43</sup> and strengthened by the Consumer Product Safety Improvement Act of 2008, a federal agency should be set up to regulate and monitor the import of electronic devices and components. The agency could be called the Electronics Import Safety Commission, and could focus on ensuring that the health and safety of individuals manufacturing the goods is protected. If safety is made a top priority during the manufacturing process, the products are more likely to be safe for consumer use as well.

#### IV. CONSUMER PRODUCT SAFETY IMPROVEMENT ACT

The Consumer Product Safety Improvement Act was signed into law largely in response to a series of recalls of tainted food and children’s toys that contained unacceptably high levels of lead.<sup>44</sup> Congress wanted to ensure that the products imported into the United States and used by U.S. consumers were safe enough for their intended uses. The CPSIA contains several provisions that could be translated to the import of electronic devices to help en-

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<sup>41</sup> *Id.* at 1430.

<sup>42</sup> Consumer Product Safety Improvement Act, Pub. L. No. 110-314 (codified in sections of 15 U.S.C.).

<sup>43</sup> Michele Boyer, *Consumer Product Safety Commission CPSC History*, US RECALL NEWS, <http://www.usrecallnews.com/us-consumer-product-safety-commission-cpsc/> (last visited Apr. 27 2015), *archived at* <http://perma.cc/Z7KV-KXBF>.

<sup>44</sup> Eileen Flaherty, *Safety First: The Consumer Product Safety Improvement Act of 2008*, 21 LOY. CONSUMER L. REV. 372, 380-84 (2009).

sure that products whose manufacture makes employees fatally ill would not be allowed to enter the U.S. marketplace.

The CPSIA can be used as a model to create similar legislation regulating the import of electronic devices and components. The current production methods used to manufacture these devices have proven extremely harmful to the individuals working in electronics factories.<sup>45</sup> Consumers of these products have a duty to do what they can to protect the workers who produce them. Lobbying the United States government to create import regulations that protect the life and health of the workers, and an Electronics Import Safety Commission to enforce those regulations, is an important step. The increased use of such devices may also be hazardous to the health of consumers,<sup>46</sup> and thus consumers have an added incentive to push for such regulation. This section will explore several provisions of the CPSIA and their potential for replication in the electronics industry.

#### A. *Product Tracking*

Section 103 of the CPSIA requires that all children's products covered under the Act be affixed with a tracking label.<sup>47</sup> The label must include "(A) the manufacturer to ascertain the location and date of production of the product, cohort information (including the batch, run number, or other identifying characteristic), and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks; and (B) the ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information (including the batch, run number, or other identifying characteristic)."<sup>48</sup> The purpose of this provision was to aid in the recall of non-compliant products, should such a recall be necessary. A 2011 amendment relaxed these requirements somewhat by creating exceptions, but the core mandate still remains.<sup>49</sup>

One of the primary obstacles to holding major corporations

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<sup>45</sup> See *infra* Section I.

<sup>46</sup> See e.g., *Cell Phones and Cancer Risk*, NAT'L CANCER INST. AT THE NAT'L INSTITUTES OF HEALTH (June 24, 2013), <http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones> (last visited Dec. 27, 2012), archived at <http://perma.cc/3UTW-AULJ>.

<sup>47</sup> 15 U.S.C. § 103.

<sup>48</sup> *Id.*

<sup>49</sup> Beveridge & Diamond PC, *Congress Fixes Problems in Consumer Product Safety Improvement Act*, BDLAW.COM (Sept. 2, 2011), <http://www.bdlaw.com/news-1194.html>, archived at <http://perma.cc/U5ME-NJUQ>.

accountable for the conditions in their supplier factories is that the supply chain is such a vast and complicated web of contractors and subcontractors that it is nearly impossible to know which companies are producing in which factories at any given time.<sup>50</sup> Presently all items imported into the United States, including electronic devices, are required to include a country of origin label,<sup>51</sup> but this does little to actually pinpoint the location of manufacture. Rarely do the multinational brands with whom consumers are familiar own their own production facilities. The general practice is to hire contractors who place orders in factories owned by smaller corporations. These factories receive orders from several companies and often produce for different brands simultaneously. When catastrophes occur or abuses are uncovered, corporations claim plausible deniability.<sup>52</sup> They state either that they had no idea their goods were being produced in that specific factory or that they have no control over conditions in supplier factories and thus no responsibility. The difficulty in determining which corporations are utilizing which supplier factories at any given time, and the short production cycles utilized by the major corporations so that they are only producing in a particular factory for a few months at a time, has made it very difficult to track corporate use of supplier factories. Electronics brands still refuse to disclose the names and locations of their supplier factories, arguing that they fear the release of trade secrets, despite the apparel industry losing this same argument nearly a decade ago.<sup>53</sup>

Requiring companies to place tracking labels on each component and device they produce would make each item instantly traceable. Corporations would no longer be able to claim that they did not know whether or not their goods were produced in a specific factory. Mandating tracking labels would go a long way towards increasing accountability and providing corporations with an incentive to ensure that conditions in their supplier factories meet baseline health and safety standards. If corporations knew that consumers could easily trace the components of their electronic devices back through the entirety of the production cycle, it would

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<sup>50</sup> Greenhouse, *supra* note 30.

<sup>51</sup> 19 C.F.R. § 134.11.

<sup>52</sup> See, e.g., Greenhouse, *supra* note 30.

<sup>53</sup> See, e.g., *Nike Reveals Overseas Factory Names, Locations*, THE ASSOCIATED PRESS, Apr. 13, 2005, [http://www.msnbc.msn.com/id/7480688/ns/business-us\\_business/t/nike-reveals-overseas-factory-names-locations/#.UO7cV7bR2AE](http://www.msnbc.msn.com/id/7480688/ns/business-us_business/t/nike-reveals-overseas-factory-names-locations/#.UO7cV7bR2AE), archived at <http://perma.cc/F6QL-SCD7>.

create an entirely new level of accountability and would render corporations unable to distance themselves from their supply chain.

The university apparel sector has achieved a modicum of this accountability by requiring brands that produce for colleges and universities to disclose the names and locations of the factories that produce for them.<sup>54</sup> This has allowed the Worker Rights Consortium, the only independent monitoring agency working in the university apparel sector, to determine which university apparel is being made, or has recently been made, in factories from which they receive complaints of worker rights abuses. The responsibility for maintaining and updating disclosure data falls to the brands, however, which has meant that the data disclosed is often incomplete or untimely. Therefore, apparel brands are still able to disclaim liability by saying that their goods were not produced in a particular factory at a particular time. Tracking labels would solve this problem by instantly allowing components to be traced back to exactly when and where they were produced. Presently this system facilitates recalls in the event that certain toxic goods are imported in the United States. If expanded to the electronics industry, this system could also facilitate improvement of health and safety in supplier factories by directly linking major multinational corporations to supplier factories by the date that their goods were produced inside those factories.

Tracking devices would not only create a threat of accountability that would loom over major multinational electronics firms and permit easy recall of electronic devices whose components were found to be hazardous to the health of consumers, it would also provide a tangible tool for U.S. organizers to use as they act in solidarity with workers in supplier factories. Using information provided by workers who complain about unsafe working conditions, U.S. consumers and labor rights organizations could themselves determine which brands produce those goods and which retail stores sell the goods produced in those factories. They could then directly pressure those brands to reach a resolution with the workforce in their supplier factory and improve conditions. If such a resolution could not be reached, the tracking label and the results of such tracking could be used by the United States government, consumers, or the workers themselves, to sue the electronics brand for noncompliance with the new import regulations.

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<sup>54</sup> See *e.g.*, Allie Robbins, *supra* note 36, at 55.



*B. Public Product Database*

The CPSIA also established a publicly available consumer product safety information database.<sup>55</sup> The database was formally launched in March 2011 at SaferProducts.gov. “Consumers can submit reports on any safety hazard they have experienced or observed in a product, and the CPSC will transmit the reports to product manufacturers or labelers. Ten days after the transmission, the reports are published to the database. Companies have a limited ability to respond to or challenge publication of the reports.”<sup>56</sup> Additionally, “the searchable public database [allows] consumers to get updated information on possible hazardous products.”<sup>57</sup> “Members of the public can search the Database for safety information about products that are in their home already, or that they may be thinking about purchasing.”<sup>58</sup> The Fourth Circuit recently upheld the validity of this public database, despite potential reputational damage a company could suffer as a result of having a product listed in the database.<sup>59</sup>

A publicly searchable database would revolutionize the way that consumers shop for electronic devices. With a publicly available database through which consumers could research whether complaints have been filed regarding health and safety violations or the negative health effects of electronic components, consumers could have more information about the products they purchase. Workers in manufacturing facilities could directly report health and safety violations through this database from anywhere in the world that has an Internet connection. Consumers could choose not to purchase products from factories about which complaints have been registered.

With the CPSIA’s registry, “[a]gency staff reviews every Report that is submitted. Where appropriate, [the Agency] may undertake

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<sup>55</sup> 15 U.S.C. § 212.

<sup>56</sup> Melissa Maleske, *How to Implement Safe Measures for Food and Consumer Products*, INSIDE COUNSEL MAGAZINE, (Dec. 21, 2012), available at <http://www.insidecounsel.com/2012/12/21/how-to-implement-safe-measures-for-food-and-consum?r=regulatory&page=4>, archived at <http://perma.cc/YL26-VBGH>.

<sup>57</sup> Flaherty, *supra* note 45, at 385.

<sup>58</sup> Frequently Asked Questions, SAFERPRODUCTS.GOV, <http://saferproducts.gov/FAQ.aspx> (last visited Feb. 23, 2013).

<sup>59</sup> George Gombossy, *Company Doe Sued to Keep Complaint Out of Federal Database Designed to Warn Consumers of Faulty Products*, CTWATCHDOG.COM (Apr. 16, 2014), <http://ctwatchdog.com/finance/company-doe-sued-to-keep-complaint-out-of-federal-database-designed-to-warn-consumers-of-faulty-products>, archived at <http://perma.cc/JAG7-CRYD>.

additional product investigations.”<sup>60</sup> With a publicly searchable database of electronic imports, the Electronics Import Safety Commission could similarly begin to investigate when workers report violations of their rights. Workers could report abuses on their own or through unions. Violations of worker rights could then be independently investigated and verified. Electronics manufacturers would not be able to hide from such reports, as they would be publicly available. If funding were not available for such an endeavor through the federal government, however, workers’ rights advocates in the United States would still have access to the information in the database, could verify the information themselves, and could then use that information to conduct community organizing campaigns, leveraging their consumer power to pressure companies into compliance with health and safety standards.

*C. Independent Third Party Certification*

The CPSIA requires that an independent third party certify product compliance with all “rules, bans, standards, or regulations” applicable under the Act.<sup>61</sup> The Act defines a “third party conformity assessment body” as one that “is not owned, managed, or controlled by the manufacturer or private labeler of a product assessed by such conformity assessment body.”<sup>62</sup> “Testing can be completed by a government agency unless it is determined that the government is influenced by the industry or company.”<sup>63</sup> The Act lays out compliance requirements in great detail, including timelines for product testing, publication requirements, and audit protocols.<sup>64</sup> A 2011 amendment to the CPSIA also “authorizes certification of compliance with an applicable product standard by documentation that a product meets another national or international governmental standard that the CPSC determines is the same as or more stringent than the applicable product standard.”<sup>65</sup> To facilitate this process, the Consumer Product Safety Commission maintains a list of accredited third party testing laboratories.<sup>66</sup>

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<sup>60</sup> File a Report, How Will You Use My Report?, SAFERPRODUCTS.GOV, <https://www.saferproducts.gov/CPSRMSPUBLIC/INCIDENTS/REPORTINCIDENT.ASPX> (last visited Feb. 23, 2013).

<sup>61</sup> 15 U.S.C. § 102.

<sup>62</sup> *Id.*

<sup>63</sup> Flaherty, *supra* note 45, at 385.

<sup>64</sup> 15 U.S.C. § 102.

<sup>65</sup> Beveridge & Diamond P.C., *supra* note 49, at 4.

<sup>66</sup> List of CPSC-Accepted Testing Laboratories, UNITED STATES CONSUMER PRODUCT SAFETY COMM’N, available at <http://www.cpsc.gov/cgi-bin/labsearch/> (last visited Feb. 23, 2015), archived at <http://perma.cc/VTG3-XZDN>.

A similar third party monitoring program should be set up under the Electronics Import Safety Commission. Companies have been slow to recognize safety and health concerns in electronics manufacturing,<sup>67</sup> and cannot be trusted to self-certify that their products are manufactured under safe conditions. This is especially true given the vast nature of the electronics supply chain.<sup>68</sup> As has been seen in other industries, independent third party monitoring is the only way to adequately ensure compliance with worker safety regulations. Without the involvement of organizations that are truly independent from all of the companies involved in the supply chain, too many questions will be raised about the veracity of any investigative findings.<sup>69</sup> The CPSIA (as well as the FDA)<sup>70</sup> clearly recognized the danger of corporate control over certification processes, and their wisdom should be heeded.

Independent third party verification of working conditions is different from independent verification of the levels of contaminants in a particular consumer product, but it is not impossible, nor is it without precedent. In the United States, the Occupational Safety and Health Administration is tasked with inspecting workplaces for compliance with health and safety regulations.<sup>71</sup> The USDA and FDA actively work to minimize hazards in food and drug production internationally.<sup>72</sup> Additionally, non-governmental independent monitoring agencies such as Verite and the Worker Rights Consortium already inspect factories worldwide.<sup>73</sup> Similar

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<sup>67</sup> See *infra* Section I.

<sup>68</sup> See *infra* Section IV-B.

<sup>69</sup> See e.g., Charles Duhigg and Nick Wingfield, *Apple Asks Outside Group to Inspect Factories*, BITS BLOG N.Y. TIMES, (Feb. 13, 2012, 9:10 PM), [http://bits.blogs.nytimes.com/2012/02/13/apple-announces-independent-factory-inspections/?\\_r=0](http://bits.blogs.nytimes.com/2012/02/13/apple-announces-independent-factory-inspections/?_r=0).

<sup>70</sup> See *infra* Section III.

<sup>71</sup> *OSHA Fact Sheet: OSHA Inspections*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., available at [https://www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-inspections.pdf](https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf), archived at <https://perma.cc/RD7L-XWJQ>.

<sup>72</sup> See *supra* Section III.

<sup>73</sup> See e.g., *Workplace Assessment & Performance Improvement*, VERITE, <http://www.verite.org/Auditing> (last visited Mar. 16, 2015), archived at <http://perma.cc/Z772-BJKZ> (Verité for example “evaluates facility conditions against Verité Best Practices- social compliance benchmarks aligned with International Labor Organization (ILO) core conventions, and reflecting Verité’s 15 years of experience conducting social compliance assessments in manufacturing and processing workplaces. The service incorporates extensive worker interviews, management interviews, an inspection of the physical plant, the collection of documents, detailed analysis, and verification.”); *Mission*, WORKER RIGHTS CONSORTIUM, <http://workersrights.org/about/> (last visited Mar. 16, 2015), archived at <http://perma.cc/83Z9-K3EM> (“The Worker Rights Consortium (WRC) is an independent labor rights monitoring organization, conducting investigations of working conditions in factories around the globe. Our purpose is to combat sweatshops and protect the rights of workers who make apparel and other products.

organizations could be developed in order to comply with independent third party inspection regulations under the Electronics Import Safety Commission, so that the federal government does not have to bear this burden alone. These organizations would be experts in the specific hazards caused by the chemicals used in electronics manufacturing, and would likely need to set up a system that included both surprise factory investigations, and long-term monitoring of worker health conditions since many health issues in the electronics industry do not manifest themselves until prolonged exposure to hazardous chemicals has occurred.

*D. Whistleblower Protections*

“The Act contains a ‘whistleblower statute’ that makes it illegal for retailer, manufacturer, import, or distributor’s employer to fire or discriminate against employees who report violations or testify in enforcement proceedings.”<sup>74</sup> Specifically, the Whistleblower Protection Section states:

SEC. 40. (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee’s initiative or in the ordinary course of the employee’s duties (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

(2) testified or is about to testify in a proceeding concerning such violation;

(3) assisted or participated or is about to assist or participate in such a proceeding; or

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this Act or any other Act enforced by the Commission, or any

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The WRC conducts independent, in-depth investigations; issues public reports on factories producing for major brands; and aids workers at these factories in their efforts to end labor abuses and defend their workplace rights.”).

<sup>74</sup> Flaherty, *supra* note 45, at 386.

order, rule, regulation, standard, or ban under any such Acts.<sup>75</sup>

Including a similar whistleblower protection provision in a statute designed to provide protection for workers in electronics factories is critical, particularly given the history of union busting and retaliation that workers have faced when attempting to improve their conditions.<sup>76</sup> Without whistleblower protections, workers will be hesitant to register claims against their employers for hazardous working conditions. With the whistleblower protections, however, workers would have recourse if they were disciplined, fired, or otherwise discriminated against after registering a complaint or otherwise providing information regarding health and safety conditions inside an electronics manufacturing plant. Workers would also be protected if they refused to work under hazardous conditions. Therefore if workers did not receive proper safety equipment, if a factory did not have proper ventilation, or if workers were not given proper health and safety training, they could refuse to work under those circumstances, and would themselves have recourse that would prevent retaliation. Of course, language protecting whistleblowers is insufficient by itself. The Electronics Import Safety Commission must also have mechanisms for enforcing this provision, just as the CPSIA mandated.

#### *E. Enforcement Power*

The crux of the enforcement power laid out by the CPSIA falls in its recall<sup>77</sup> and state attorneys general provisions.<sup>78</sup> Not only do civil penalties attach to noncompliance with the sections of the Act,<sup>79</sup> but criminal penalties attach as well.<sup>80</sup> Further, “the Act expands the CPSC’s recall authority to products that violate any rule under the act or ‘imminently hazardous consumer products.’”<sup>81</sup>

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<sup>75</sup> 15 U.S.C. § 2087.

<sup>76</sup> See e.g., Mischa Gaus, *Korean Workers Get Sirius*, IN THESE TIMES (Dec. 31, 2008), [http://inthesetimes.com/article/4118/korean\\_workers\\_get\\_sirius1](http://inthesetimes.com/article/4118/korean_workers_get_sirius1), archived at <http://perma.cc/DKX6-KNJQ> (When workers at a Korean factory producing radios for Sirius Satellite Radio formed a union, the company fired the union’s organizers and threatened to fire nearly the entire workforce. Management then began a practice of firing one worker per week in an attempt to keep workers fearing for their jobs.); Sun Li & He Dan, *Workers Laid Off Illegally After Two-Week Strike, Arbitrators Rule*, CHINA-WIRE (June 11, 2014), <http://china-wire.org/?p=34588>, archived at <http://perma.cc/4UF4-WREK> (Similarly, when workers at a plant producing for Coactive Technologies in China’s Fujian Province went on strike, the company laid off forty workers.).

<sup>77</sup> 15 U.S.C. § 2064.

<sup>78</sup> 15 U.S.C. § 2073.

<sup>79</sup> 15 U.S.C. § 2069.

<sup>80</sup> 15 U.S.C. § 2070.

<sup>81</sup> Flaherty, *supra* note 45, at 386.

These enforcement mechanisms are regularly used. Recalls are commonplace,<sup>82</sup> and the CPSC has brought a number of lawsuits in order to mandate recalls.<sup>83</sup> The Department of Justice has also filed suit in federal court against several companies it accused of violating the Consumer Product Safety Act.<sup>84</sup>

Regulation of the electronics manufacturing industry through an Electronics Import Safety Commission must include similar enforcement mechanisms. The threat of public recrimination when it is found that a company's manufacturing process puts workers' lives at risk would be a tremendous improvement, but would be insufficient to create real change if not paired with tangible legal recourse. The Department of Justice, the Attorney General, and other agencies must have the power to sue the brands that import goods manufactured under repressive and unsafe conditions. This is the only way to truly hold these companies accountable for the processes by which their goods are made. If workers themselves were granted jurisdiction to sue the manufacturers, this would provide an even more direct line of accountability, as they are the ones who live these violations daily and are in the best position to identify and document health hazards. However, multinational corporations are generally more fearful of the U.S. Department of Justice than they are of their own workers. Thus, the U.S. government must have both the power and the resources to take legal action against violators of U.S. import regulations.

## V. CONCLUSION

The issue of sweatshop labor and the exploitation of workers

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<sup>82</sup> See e.g., *Recent Recalls*, CONSUMER PRODUCT SAFETY COMM'N, <http://www.cpsc.gov/en/Recalls/> (last visited Mar. 16, 2015) (For example, twenty-four products were recalled in March 2015 and twenty-two products were recalled in February 2015, primarily due to risks of falling, choking, electric shock, and flammability.).

<sup>83</sup> *Recall Lawsuits: Adjudicative Proceedings*, CONSUMER PRODUCT SAFETY COMM'N, <http://www.cpsc.gov/en/Recalls/Recall-Lawsuits/Adjudicative-Proceedings/> (last visited Mar. 16, 2015), archived at <http://perma.cc/6DNY-Y8CK> (Recently, the Consumer Product Safety Commission brought a lawsuit a suit against Maxfield and Oberton Holdings, the makers of Buckyballs and Buckycubes, for selling products that pose a risk of ingestion, resulting in serious medical complications. Similar lawsuits have been brought against Zen Magnets and Star Networks USA, who also make magnet products. The Commission has also recently sued Baby Matters LLC, to "protect children from the substantial risks of injury and death posed by infant recliners.").

<sup>84</sup> Matthew Cohen, *Toy Companies Sued for Importing Defective Products*, CONSUMER PRODUCT MATTERS, Mar. 6, 2014, <http://www.consumerproductmatters.com/2014/03/toy-companies-sued-for-importing-defective-products/>, archived at <http://perma.cc/RUH2-XWSP>.

in the global supply chain is not new. What is new, and what deserves our attention and government regulation, is the particular struggle of those workers manufacturing electronic components and devices. Electronic devices have revolutionized nearly every aspect of our lives—the way we work, play, communicate, and interact with one another. The impact on daily life in western nations is clear. What is also becoming clear, however, is that the people who make these electronic devices for us suffer uniquely, developing cancers and other chronic and terminal diseases, and possibly passing severe health issues along to their children. It is the responsibility of countries importing these devices to make sure that these health risks are minimized. This is not only the moral approach; it also has the potential effect of helping to protect the safety of consumers. Safety in manufacturing will lead to safety for consumers as well, as corporations will be forced to confront the toxic nature of the chemicals that they use, and their impact on the health and safety of all human beings. The United States already has mechanisms in place for addressing what happens in manufacturing facilities worldwide. In order to keep up with rapidly changing times, we must mirror those mechanisms and expand them to the arena of electronics manufacturing.





# REVISITING S.C.P.A 17-A: GUARDIANSHIP FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES\*

*A Report of the Mental Health Law Committee and the  
Disability Law Committee of the New York City Bar Association†*

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\* This Report is dedicated to the memory and spirit of Karen Andreasian, former Chair of the Committee on Mental Health Law, who initiated the project of critiquing Art. 17-A, encouraged its completion, and who cared passionately about the rights to dignity and self-determination of people with intellectual and developmental disabilities.

† This is a report of the Mental Health Law Committee and the Disability Law Committee of the New York City Bar Association. This report was researched and written by Karen Andreasian, Natalie Chin, Kristin Booth Glen, Beth Haroules, Katherine I. Hermann, Maria Kuns, Aditi Shah, and Naomi Weinstein on behalf of the New York City Bar Association. It has been reviewed and approved by the New York City Bar Association and is being published by the City University of New York Law Review in accordance with the Association's protocols in the interest of bringing to publication an important contribution to the discussion on how the law should respond to people with intellectual disabilities.

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## I. INTRODUCTION

More than four decades ago, in 1969, the New York State Legislature enacted Surrogate's Court Procedure Act, Article 17-A (17-A) authorizing a Surrogate to appoint a guardian over the person and/or the property of a person with mental retardation. At the time, various organizations and advocates for this population, primarily parents and parent organizations, voiced the need for an abbreviated proceeding for individuals with mental retardation when they reached the age of eighteen.<sup>1</sup> The underlying assumption was that the mentally retarded were perpetual children,<sup>2</sup> such that the legal powers all parents had over persons under eighteen should simply be extended indefinitely for the parents of the mentally retarded; 17-A was the outcome.<sup>3</sup> In 1989, despite a substantial change in the understanding of disability, including intellectual and developmental disability, now based on a social, rather than a medical model, and without any significant discussion, S.C.P.A. Article 17-A was amended to include other "developmental disabilities."<sup>4</sup>

<sup>1</sup> At that time, the only vehicles available for substituted decision-making were the committee and conservator proceedings of Articles 77 and 78 of the Mental Hygiene Law ("M.H.L.").

<sup>2</sup> See generally, Janice Brockley, *Rearing the Child Who Never Grew: Ideologies of Parenting and Intellectual Disability in American History*, in *MENTAL RETARDATION IN AMERICA*, 130 (Steve Noll & James Trent, Jr. eds. 2004).

<sup>3</sup> See Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 ALB. L. REV. 807, 817-19 (2012).

<sup>4</sup> 1989 N.Y. Sess. Laws 675 § 2 (McKinney).

In 1990, the legislature directed a study to re-evaluate Article 17-A in light of changes in the “care, treatment and understanding of these individuals,”<sup>5</sup> as well as “new legal theories regarding the rights of such individuals.”<sup>6</sup> Proposed amendments were to be submitted to the legislature by the close of 1991.<sup>7</sup> Rather than altering 17-A, however, the New York State Law Revision Commission examined adult guardianship issues and proposed Mental Hygiene Law (“M.H.L.”) Article 81 (Art. 81), which was enacted in 1992 and which became effective in 1993.<sup>8</sup> Apparently, a good deal of work was done on 17-A, and an extensive draft report with recommendations produced, but that draft never saw the light of day, and 17-A remains essentially unchanged today.<sup>9</sup>

The need for reconsideration, reform, or possibly even repeal is, however, greater than ever. There have been changes in the law, in other states and federally, as well as an evolution in constitutional principles and a burgeoning human rights movement. The population of persons covered by the now outdated term “mental retardation” and the preferred term developmental (or intellectual) disabilities<sup>10</sup> has exploded, making issues relating to their

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<sup>5</sup> Nationally, the Developmental Disabilities Act, first enacted in 1963, was also the subject of updating based on these concerns. With the last significant amendments in 2000, changes in the “landscape” of developmental disability have been described as follows:

The [Developmental Disabilities] Act, in conjunction with activities of self-advocates, families, other advocacy groups, state and local governments, and other stakeholders, has changed the way people with [developmental disabilities] live. The social landscape in the United States has shifted from a place where people with [developmental disabilities] were unheard and neglected to a country where far fewer people are relegated to institutional care, children with [developmental disabilities] are in public schools, adults are living and in some cases working in the community, and a burgeoning self-advocacy movement is demanding that people with intellectual and developmental disabilities have power over their own lives.

*Rising Expectations: The Developmental Disability Act Revisited*, NAT’L COUNCIL ON DISABILITY, (Feb. 15, 2011), <http://www.ncd.gov/publications/2011/Feb142011>, archived at <http://perma.cc/T9FD-76L6>.

<sup>6</sup> L. 1990, ch. 516, § 1.

<sup>7</sup> *Id.* at § 4.

<sup>8</sup> Bailly, Practice Commentary, McKinney’s Consol. Laws of N.Y., Book 34A Mental Hyg. § 81.01.

<sup>9</sup> One major change was the addition of provisions allowing guardians to make end-of-life decisions for their wards. See N.Y. Surr. Ct. Proc. Act. § 1750-b and discussion in Bailly & Nick-Torok, *supra* note 3, at 820. The general provisions of 17-A remained the same.

<sup>10</sup> See discussion *infra* at 12. The preferred term is “People with Intellectual and Developmental Disabilities” (“PWIDDS”), which will be utilized here, except where specific references to the existing statute are involved.

protection and rights an increasingly central question in legal and bio-ethical discourse. As in 1990, there have, as well, been significant social and cultural changes in the “care, treatment and understanding of such individuals.” Rethinking this clearly outdated statute is, thus, clearly both necessary and overdue.<sup>11</sup>

This Report is intended to start the conversation about how, under what circumstances, or if at all, the state should provide substituted decision-making<sup>12</sup> for this vulnerable population. The Report begins with a brief description of relevant demographic trends that illustrate the extent, and growing importance of the issue. There is also a brief, but critical discussion about the changes in language that have occurred since the enactment of 17-A, including how those changes reflect and/or impact the ways in which society perceives PWIDDs. The Report then describes two very different lenses, due process and human rights, through which reconsideration of 17-A might proceed, seeking to locate each in the legal/historical contexts of the decades leading up to the initial call for reconsideration in 1990, and the enormous changes in disability laws, disability rights, and the growth of human rights that have occurred since the 1990s.

The shortcomings—or overkill—of existing 17-A are then examined through each of those lenses, noting also the legislature’s relatively recent efforts to provide substituted decision making outside of the guardianship context through its enactment of the Family Health Care Decisions Act (FHCDA).<sup>13</sup> The Report neither proposes, nor attempts to propose, a revised statute, but without necessarily endorsing them, offers some suggestions for consideration and some available models under each of the lenses that have been previously identified.

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<sup>11</sup> A recent report by a cabinet created by Governor Cuomo to further the mandate of *Olmstead v. L.C.*, 527 U.S. 581 (1999) called for modernization of 17-A in light of the *Olmstead* mandate. NEW YORK STATE, REPORT AND RECOMMENDATIONS OF THE OLNSTEAD CABINET: A COMPREHENSIVE PLAN FOR SERVING NEW YORKERS IN THE MOST INTEGRATED SETTING, 27-28 (Oct.2013), <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/olmstead-cabinet-report101013.pdf>, archived at <http://perma.cc/96YH-LAFV>.

<sup>12</sup> As discussed more fully, *infra*, 17-A and guardianship statutes generally involve the state giving power to an individual or institution to make decisions *for* a PWIDD, that is, *substituting* the guardian’s decision for that of the PWIDD and affording legal recognition only to the former. While the standard to be utilized by the guardian may differ, *see, e.g.*, Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491 (2014), it is clear that the decision belongs solely to the guardian.

<sup>13</sup> N.Y. PUB. HEALTH LAW § 2994 *et seq.*

## II. THE CHANGING LANDSCAPE OF PEOPLE WITH INTELLECTUAL DISABILITIES

### A. *Demographics*

There are an estimated 4.7 million individuals in the United States with developmental disabilities.<sup>14</sup> According to the American Association of Intellectual and Developmental Disabilities (“AAIDD”), “[d]evelopmental [d]isabilities is an umbrella term that includes intellectual disability but also includes other disabilities that are apparent during childhood.”<sup>15</sup> Developmental disabilities are a group of conditions that result from an impairment in physical, learning, language, or behavior.<sup>16</sup> The conditions generally begin during the developmental period, before the age of twenty-two, and may impact day-to-day functioning, and usually last throughout a person’s lifetime.<sup>17</sup>

Intellectual disability encompasses the cognitive aspect of a developmental disability, generally affecting thought processes.<sup>18</sup> The elements of intellectual disability include “(1) significant impairments in intellectual functioning, as measured by IQ testing; (2) deficits in real-world skills and abilities resulting from the disability (adaptive behavior deficits); and, in the case of developmental disability (3) onset of the disability before the individual became an adult.”<sup>19</sup>

Recent studies indicate a steady increase in the number of children diagnosed with a developmental disability in the United States. In a 2008 study spanning the course of twelve years, the Centers for Disease Control and Prevention (CDC) and the Health Resources and Services Administration surveyed children aged between three and seventeen years who had a current or prior diag-

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<sup>14</sup> See *Rising Expectations*, *supra* note 5.

<sup>15</sup> *Frequently Asked Questions on Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITY, <http://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.VPxCklvfeal> (last visited Mar. 8, 2015), *archived at* <http://perma.cc/96QV-WWEN>.

<sup>16</sup> *Facts About Developmental Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/developmentaldisabilities/facts.html> (last visited Mar. 8, 2015), *archived at* <http://perma.cc/R537-2XA3>.

<sup>17</sup> *Id.*

<sup>18</sup> *Frequently Asked Questions on Intellectual Disability*, *supra* note 15. Intellectual disability also refers to persons with psychosocial disability (mental illness) and progressive cognitive decline, such as Alzheimer’s disease, or dementia. Those persons are not, however, covered by 17-A.

<sup>19</sup> Brief for the Am. Assoc. on Intellectual & Developmental Disabilities & the Arc of the U.S. et al. as Amici Curiae Supporting Pet’r, at 8, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882), *available at* [http://aaidd.org/docs/default-source/policy/freddie-lee-hall-v-state-of-florida .pdf?sfvrsn=0](http://aaidd.org/docs/default-source/policy/freddie-lee-hall-v-state-of-florida.pdf?sfvrsn=0).

nosis of attention deficit hyperactivity disorder; intellectual disability; cerebral palsy; autism; seizures; stuttering or stammering; moderate to profound hearing loss; blindness; learning disorders; and/or other developmental delays.<sup>20</sup> The data indicated that between 1997 and 2008, there was an alarming 17.1% increase of parent-reported developmental disabilities, with about one in six children in the United States diagnosed with a developmental disability.<sup>21</sup> The study noted that “low-income and public health insurance were associated with a higher prevalence of many disabilities.”<sup>22</sup>

Autism is the fastest growing developmental disability in the United States.<sup>23</sup> Based on the most recent statistics released by the CDC, the number of children diagnosed with an autism spectrum disorder<sup>24</sup> has increased dramatically. In the year 2010, one in fifty children eight years old were diagnosed with autism, compared to one in sixty-eight children of the same age in the year 2000,<sup>25</sup> a 30% increase from ten years ago.

The number of children with cerebral palsy, a developmental disability caused by damage to the brain “usually occurring during fetal development; before, during or shortly after birth; during infancy; or during early childhood,” is also staggering.<sup>26</sup> According to the CDC, one in every 323 (or 3.3 per 1,000) children in the United States has been identified with cerebral palsy, with almost

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<sup>20</sup> *Key Findings: Trends in the Prevalence of Developmental Disabilities in Children 1997-2008*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/developmentaldisabilities/features/birthdefects-dd-keyfindings.html> (last updated Feb. 12, 2015).

<sup>21</sup> *Id.*

<sup>22</sup> Boyle et al., *Trends in the Prevalence of Developmental Disabilities in US Children, 1997-2008*, 127 PEDIATRICS 6, 1035-42 (2008), available at <http://pediatrics.aappublications.org/content/early/2011/05/19/peds.2010-2989.abstract> (abstract).

<sup>23</sup> *Facts and Statistics*, AUTISM SOC'Y, <http://autism-society.org/about-autism/facts-and-statistics/> (last visited Apr. 19, 2015), archived at <http://perma.cc/42DH-LYHF>.

<sup>24</sup> Autism Spectrum Disorder is defined as “a lifelong developmental disability . . . that include deficits in social communication and social interaction and restricted, repetitive patterns of behavior, interests, or activities.” *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years—Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010 Surveillance Summaries*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2015), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>, archived at <http://perma.cc/S7WH-NW57> (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013)).

<sup>25</sup> *Autism Spectrum Disorder*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/autism/index.html> (last visited Apr. 19, 2015), archived at <http://perma.cc/CX8E-NA5F>.

<sup>26</sup> *Cerebral Palsy Fact Sheet*, UNITED CEREBRAL PALSY, available at <http://ucp.org/wp-content/uploads/2013/02/cp-fact-sheet.pdf> (last visited Apr. 19, 2015), archived at <http://perma.cc/SL6T-3BA5>.

7% having a co-occurring autism spectrum disorder.<sup>27</sup> Cerebral palsy affects body movement, posture, and muscle coordination.

Down Syndrome, formerly referred to as mental retardation,<sup>28</sup> occurs when an individual has a full or partial extra copy of chromosome twenty-one. One in every 691 babies in the United States is born with Down Syndrome. There are currently more than 400,000 people living with Down Syndrome in the United States, and they are living considerably longer—into their 60's and 70's—than when 17-A was passed (a life expectancy of less than twenty-five). This addition in life expectancy has, unfortunately, also led to increased risk of early onset Alzheimer's.<sup>29</sup>

It is not just persons with Down Syndrome who are now expected to live longer. The total number of PWIDDS aged sixty and older is projected to nearly double from 641,860 in 2000 to 1.2 million in 2030.<sup>30</sup> All these demographics, but particularly those relating to aging, have significant consequences for 17-A, which was premised on the assumption that parents would almost certainly outlive their children with intellectual disabilities. That is no longer the case.<sup>31</sup>

### B. *Changing Views and Resource*

History reflects that a diagnosis of a developmental and/or intellectual disability was once considered an insurmountable deficit to achieving independence and self-determination. As the National Institutes for Health has noted:

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<sup>27</sup> It is important to note that the CDC's estimate comes from the Autism and Developmental Disabilities Monitoring (ADDM) Network, which tracks the number and characteristics of 8 year old children with autism spectrum disorder (ASD) and other developmental disabilities in diverse communities throughout the U.S. In 2008, there were 14 ADDM Network sites tracking ASD, and four of those sites also tracked CP. These four sites, which include areas in Alabama, Georgia, Missouri and Wisconsin.

<sup>28</sup> The leading advocacy organization for people with Down Syndrome notes that while "mental retardation" may still be clinically acceptable, the term "person with an intellectual disability" is preferable. *Preferred Language Guide*, NAT'L DOWN SYNDROME Soc'y, <http://www.ndss.org/Down-Syndrome/Down-Syndrome-Facts> (last visited Apr. 19, 2015), *archived at* <http://perma.cc/7GQZ-79YU>.

<sup>29</sup> *Id.*

<sup>30</sup> Carolyn C. Tingling, *Adults With Intellectual and Developmental Disabilities: A Unique Population*, 6 TODAY'S GERIATRIC MED. 3, 22 (2013), <http://www.todaysgeriaticmedicine.com/archive/050613p22.shtml>, *archived at* <http://perma.cc/74UZ-57QB> (citing Tamar Heller, *People With Intellectual and Developmental Disabilities Growing Old: An Overview*, 23 IMPACT 1, 2 (2010), *available at* <https://ici.umn.edu/products/impact/231/231.pdf>, *archived at* <https://perma.cc/8HNR-EE7C>).

<sup>31</sup> Anecdotally, many 17-A petitions are now brought by siblings or family friends when parents have died or become too frail to serve as guardians.

Historically, people with intellectual disabilities did not live as long as others and were at increased risk for health problems. Children often died because their condition could not be diagnosed. It was common for people with intellectual disabilities to be institutionalized, and treatments were either non-existent, ineffective, or harmful.<sup>32</sup>

Through medical advances and policy initiatives designed to increase the independence, autonomy and self-determination of PWIDDS, intellectual and developmental disability is no longer a static diagnosis. Treatments and training techniques, for example, which focus on communication and behavior have proven effective in increasing the mental capacity of people with an intellectual disability.<sup>33</sup>

Studies show that, if taught, self-determination, (e.g., decision making, problem solving, goal setting and attainment, self-advocacy, self-regulation, perceptions of efficacy, self-awareness, self-knowledge) can be learned in order to permit an individual with a disability to develop skills that promote independent decision-making.<sup>34</sup> Research has also shown that individuals with intellectual and developmental disabilities who maintain a self-determination status have more positive post-secondary outcomes, including employment, independent living and community inclusion.<sup>35</sup> And “students with disabilities given access to transition services focused on self-determination and independent living skills are more likely to live independently, be employed and exercise effective choice and decision-making,” removing the undue burden of guardianship.<sup>36</sup> Further, the advent of Assistive Technology Resources,

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<sup>32</sup> *Fact Sheet—Intellectual and Developmental Disabilities*, NAT'L INSTS. HEALTH (last updated Oct. 2010), <http://report.nih.gov/nihfactsheets/ViewFactSheet.aspx?csid=100>, archived at <http://perma.cc/LV7R-D2YH>.

<sup>33</sup> *Id.*

<sup>34</sup> Susan B. Palmer & Michael L. Wehmeyer, *A Teacher's Guide to Implementing the Self-Determined Learning Model of Instruction Early Elementary Version*, BEACH CTR. ON DISABILITY (2002), available at [http://www.beachcenter.org/resource\\_library/beach\\_resource\\_detail\\_page.aspx?%20Type=book&intResourceID=2599&JScript=1](http://www.beachcenter.org/resource_library/beach_resource_detail_page.aspx?%20Type=book&intResourceID=2599&JScript=1), archived at <http://perma.cc/EZT5-B7A3>; see also *Fact Sheet*, *supra* note 26.

<sup>35</sup> *Self-Determination and People with Intellectual and Developmental Disabilities: What Does the Research Tell Us?*, NAT'L GATEWAY TO SELF-DETERMINATION, <http://www.aucd.org/docs/SD-WhatDoWeKnow.pdf> (last visited Apr. 19, 2015), archived at <http://perma.cc/B92W-2HRJ>.

<sup>36</sup> Jonathan G. Martinis, *One Person, Many Choices: Using Special Education Transition Service to Increase Self-Direction and Decision-Making and Decrease Overboard or Undue Guardianship*, THE JENNY HATCH JUSTICE PROJECT, 13, available at [http://jennyhatchjusticeproject.org/docs/publications/jhjp\\_publications\\_draft\\_article\\_guardianship.pdf](http://jennyhatchjusticeproject.org/docs/publications/jhjp_publications_draft_article_guardianship.pdf) (last visited Apr. 19, 2015) (working paper), archived at <http://perma.cc/ZU3Y-ZWTV>.



which are devices and services (e.g. speech-recognition and word prediction programs, alternative keyboards and talking calculators) that advance learning and increase functionality, are being used to lessen or remove barriers faced by PWIDDS.<sup>37</sup>

The diagnosis-driven regime of Article 17-A is out of step with the social, legal and medical advances that have evolved over the last forty years. Despite this social and cultural shift, Article 17-A has failed to recognize the ability of individuals with intellectual and developmental disabilities to live full, independent lives.

### C. Language

The language utilized to name and define persons with a large variety of intellectual disabilities has changed—if not necessarily evolved—over centuries, with movement toward “respectful language” promoted by disability rights activists, only within the past two decades. Early English guardianship law divided PWIDDS into two classes: the “*idiot*,” who had never had mental capacity, and the “*lunatic*,” “a person who hath had understanding but hath lost the use of his reason.”<sup>38</sup> Our own laws followed a progression from “feeble-minded” to “mentally deficient,” and then in the 1960’s, to “mentally retarded”<sup>39</sup> (the latter now frozen in time in 17-A).

The stigmatizing, derogatory, and hurtful uses of “retarded” and “retards” are too well known to be repeated here.<sup>40</sup> Advocates for PWIDDS and self-advocates successfully lobbied states and, eventually the federal government, to abandon the term, and in October, 2010 President Obama signed “Rosa’s Law.”<sup>41</sup> With its

<sup>37</sup> *How Does Rehabilitative & Assistive Technology Benefit People With Disabilities?*, NAT’L INST. OF CHILD HEALTH & HUMAN DEV., <http://www.nichd.nih.gov/health/topics/rehabtech/conditioninfo/pages/help.aspx> (last updated Nov. 30, 2012), *archived at* <http://perma.cc/F4LF-3ALX>.

<sup>38</sup> A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis With Procedural Safeguards and Due Process in Guardianship Adjudication*, 7 ELDER L.J. 33, 48-49 (1999); AM. BAR. ASS’N, *THE MENTALLY DISABLED AND THE LAW* (Samuel J. Brakel & Ronald S. Rock, eds., 1971). This distinction was noted by the Supreme Court in *Heller v. Doe*, 509 U.S. 312, 326-27 (1993).

<sup>39</sup> See, e.g., ROBERT L. BURGDORF, JR., *THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS AND TEXT*, 46-47 (1980).

<sup>40</sup> Sadly, however, they have returned to our attention in the current concerns and debates around bullying.

<sup>41</sup> Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (codified as amended in scattered sections of 20, 29, 42 U.S.C.). Rosa’s Law is named after a Maryland girl with Down Syndrome, whose elementary school recoded her education from stating she was “health impaired” to “mentally retarded.” Her family was successful in having the school change the terminology, and later successful in advocating for the change of terminology in Maryland’s Health and Education Code. See Susan Donaldson James, *Rosa’s Law to End Term “Mentally Retarded,”* ABC NEWS (Nov. 18, 2009), <http://>

passage, federal health, education and labor laws must no longer use the term “mental retardation,” rather substituting “intellectual disability.”<sup>42</sup>

To some, dwelling on semantics might seem academic, and, of course, superficial changes without corresponding progress would be pointless. In fact, however, the movement to change terminology reflects a significant change in the evolving understanding of intellectual disability and what it means in, and to, the medical, advocacy and legal communities, as well as to families, support providers, and policy makers.

While “intellectual disability” is now the term of choice, it is also important to note the shift from the use of all these terms to modify the subject “person” or “child” (as in “mentally retarded child”) to a primary emphasis on the person, with the condition, intellectual disability, now seen as a characteristic of her/him, but not what defines her/him. Hence the move to a “*person with* (intellectual or other) disability,” underscoring her or his position as a legal *subject*.<sup>43</sup> The importance of language, the centrality of the person, and the harmful and stigmatizing effect of the term “mental retardation” are echoed in New York State’s “historic” decision in 2010 to change the name of the agency responsible for coordinating services for PWIDDS from the Office of Mental Retardation and Developmental Disabilities (OMRDD) to the Office for People With Developmental Disabilities (OPWDD).<sup>44</sup>

### III. EVOLVING MODELS OF DISABILITY AND THE TWO LENSES

As often noted in the literature, just as the language of intellectual disability has changed, so too, and perhaps partly because of that change, “models,” or general understandings of disability have also evolved. From the status model of 15th century England (the “idiot,” the “lunatic”) to a medical model of the late of the late 19th and early 20th centuries, in which disability was a condition to be treated and cured (and, for those who could not be cured, pitied), the civil rights movements of the 60’s and 70’s, embraced by an emerging disability rights movement, changed the model once

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[abcnews.go.com/Health/rosas-law-asks-senate-kill-slur-mentally-retarded/story?id=9109319](http://abcnews.go.com/Health/rosas-law-asks-senate-kill-slur-mentally-retarded/story?id=9109319).

<sup>42</sup> Rosa’s Law, *supra* note 41.

<sup>43</sup> This change, growing from an equality model of human rights, as discussed in, e.g., Arlene S. Kanter, *What’s Disabilities Studies Got to Do With It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 434 (2011).

<sup>44</sup> See *Agency Overview*, OFFICE FOR PEOPLE WITH DEV. DISABILITIES, [www.opwdd.ny.gov/opwdd\\_about/overview\\_of\\_agency](http://www.opwdd.ny.gov/opwdd_about/overview_of_agency) (last visited Feb. 8, 2015).

again, to a *social* model. As Syracuse Law Professor Arlene Kanter writes, that model “places the responsibility squarely on society (and not on the individual with a disability) to remove the physical and attitudinal barriers that ‘disable’ people with various impairments and prevent them from exercising their rights and fully integrating into society.”<sup>45</sup> Also referred to as the “socio-political” model, the “problem” of disability is understood as external to the PWIDD, that is, “in stereotypical attitudes and an environment that fails to meet their needs, rather than within [PWIDDs] themselves.”<sup>46</sup> This social model of disability was conclusively enshrined in U.S. law with the passage of the Americans With Disabilities Act (“the ADA”), whose twenty-fifth anniversary we celebrate this year.<sup>47</sup>

#### A. *The Social Model and a Due Process Lens*

Rejection of the prior medical model of disability was implicitly reflected in the movement to reform adult guardianship laws that began in the late 1980’s; Article 81 of the Mental Hygiene Law (“Art. 81”), a product of that movement, specifically eschews a diagnosis-driven definition of incapacity, focusing instead on a functional analysis of the ways in which what is now denominated “the allegedly incapacitated person” (AIP) is unable to protect him/herself from harm with regard to specific domains. That is, it is no longer enough to allege—or prove—that an AIP “suffers from” a named disability like dementia or Alzheimer’s in order to appoint a guardian or substituted decision maker.<sup>48</sup>

The move to a social, or socio-political model was very much a product of a variety of forces within and without the disability movement.<sup>49</sup> It was not, however, the end of reconceptualizing dis-

<sup>45</sup> Kanter, *supra* note 43, at 422.

<sup>46</sup> Nicholas A. Dorsey, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 433, 446 (2009).

<sup>47</sup> Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* As a leading commentator has noted:

The enactment of the [ADA] was viewed as a watershed in the disability community, not only because of the substantive rights it guaranteed . . . but also because it reflected a departure from the medical model and an adoption of the movement’s socio-political model of disability.

Laura L. Rovner, *Disability, Equality and Identity*, 55 ALA. L. REV. 1043, 1044 (2004) (citations omitted).

<sup>48</sup> See, e.g., ]Bailly, Practice Commentary, McKinney’s Consol. Laws of N.Y., Book 34A, N.Y. Mental Hyg. Law § 81.02.

<sup>49</sup> These included the rise of self-advocacy and the legacy of various civil rights movements. See, e.g., Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 COLUMBIA HUM. RTS. L. REV. 93, 107-11, 123-31

ability and, by extension, disability rights. The rise of international human rights, the specific inclusion of disability in the discussion of human rights, and the imperative of equality, dignity and inclusion for all persons, regardless of disability, including intellectual disability, began in the 1990's<sup>50</sup> and reached its culmination with the entry into force of the United Nations Convention on the Rights of Persons With Disabilities (CRPD) in 2008.<sup>51</sup>

*B. The Human Rights Model and Lens*

The concept of human rights arose out of the horrors of World War II with the founding of the United Nations in 1945, and adoption of the Universal Declaration of Human Rights ("UDHR") in 1948.<sup>52</sup> The fundamental principles of human rights law, as enunciated by the UDHR, are "the equal and unalienable rights of all members of the human family" and "every person's inherent dignity."<sup>53</sup> Unlike the "negative rights" conferred by the U.S. Constitution (freedom from government interference with, e.g., speech, association, etc.) or by statutes such as the ADA, human rights exist solely by virtue of the fact that one is born human. As such, they are inalienable, indivisible, intra-dependent and inter-related; that is, each depends on the others, and none can be taken away by any law or any government.

Insofar as intellectual disability and guardianship are at issue, the critical human right is that of legal capacity, first recognized in Article 6 of the UHDR ("Everyone has a right to recognition, every-

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(2012) ("*Changing Paradigms*"). For a fuller, and extremely rich account of the social movements and changes that fueled this first revolution in disability rights, see AL-LISON C. CAREY, *ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH CENTURY AMERICA* (2009).

<sup>50</sup> See Arlene S. Kanter, *The Globalization of Disability Law*, 30 SYRACUSE J. INT'L. L. & COM. 241 (2003).

<sup>51</sup> The United Nations General Assembly resolution 61/106 for the Convention on the Rights of Persons With Disabilities (Dec. 13, 2006) entered into force with ratification by 20 Member States in 2008. *Entry into Force*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?id=210> (last visited Apr. 20, 2015), archived at <http://perma.cc/K39L-NPKE>. As of September 2014, the CRPD has been ratified by 150 Member States including all members of the European Union and the E.U. itself. *Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/countries.asp?id=166> (last visited Apr. 20, 2015), archived at <http://perma.cc/9WZV-2QE6>.

<sup>52</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/810 (Dec. 10, 1948). For a general discussion of this evolutionary process, see Robert S. Drinan, S.J., *The Mobilization of Shame: A World View of Human Rights*, 3-12 (2001).

<sup>53</sup> *Id.*

where, as a person before the law”)<sup>54</sup> and further explicated in Article 12 of the CRPD,<sup>55</sup> which additionally provides that

- (2) States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life [and that]
- (3) States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>56</sup>

Debate that preceded adoption of the CRPD clarified that legal capacity involves not only all persons’ capacity to have, or bear rights, but also to have the exercise of those rights legally recognized.<sup>57</sup> On its face, the CRPD would appear to prohibit substituted decision making of any kind. In its First General Comment, the body charged with interpreting and enforcing the CRPD, the Committee on the Rights of Persons With Disabilities, has clearly stated that guardianship as it currently exists is in violation of the Convention while recognizing, as well, that Article 12 and the right to legal capacity also necessarily includes freedom from abuse and exploitation.<sup>58</sup>

Rethinking 17-A may thus be grounded in the due process framework prevalent when the legislature first called for re-examination, a framework reflected in the multiple procedural protection included in the coterminous enactment of Art. 81. Alternatively, it may take into account the “paradigm shift” in understanding the rights of PWIDDs through a human right lens that has arisen since then with the globalization of disability rights and

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<sup>54</sup> *Id.* at 207.

<sup>55</sup> It is important to note that the CRPD does not create any *new* human rights; legal capacity is enshrined in the UDHR, which the U.S. has ratified. The CRPD merely expounds the specific obligations of member states for implementation of that right. *See, e.g.,* Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision-Making*, 48 CLEARINGHOUSE REVIEW 17 (2014) (“*Perils of Guardianships*”).

<sup>56</sup> CRPD, *supra* note 51, Art. 12. The CRPD Preamble also states this essential principle that States parties:

Recogniz[e] the importance for persons with disabilities of their individual autonomy and independence including the freedom to make their own choices . . .”

*Id.* at Preamble.

<sup>57</sup> *See, e.g.,* Anita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future*, 34 SYRACUSE J. INT’L. L. & COM. 429 (2007).

<sup>58</sup> Committee on the Rights of Persons with Disabilities, *Eleventh Session General Comment*, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, at No. 1 ¶¶21-23 (April 11, 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> (last visited Apr. 20, 2015), archived at <http://perma.cc/J732-Q586>.

the enactment of the CRPD.<sup>59</sup> First, however, the obvious shortcomings of the existing statute, and the case law that it has engendered, must be examined.

*C. Utilizing Art. 81 in a Due Process Critique of 17-A*

What follows is a description of the obvious and uncontroverted deficiencies of 17-A; that description utilizes the more nuanced approach of Article 81 to highlight those deficiencies. It is not, however, intended to endorse the provisions of Article 81 as an alternative for at least two reasons.

First, the population of persons employing 17-A, or, in the future, seeking some statutory power over or protection for PWIDDs, is quite different from petitioners under Article 81.<sup>60</sup> The 17-A procedure is, admittedly, far simpler, and can be managed relatively easily by *pro se* petitioners. Clerks in most Surrogate's Courts have been trained to, and do assist *pro se* petitioners, including a significant group for whom English is not a first language. Many 17-A petitioners are also poor, so the cost of a court evaluator, mandated by Article 81, becomes a serious issue. A statute that is exemplary on paper, but unusable by those for whom it is designed, cannot be a desirable goal for any rethinking of 17-A.

Second, a statute exemplary on paper, as Art. 81 arguably is under the due process lens, may look very different as it is applied in practice. That is certainly the case as to many of the provisions of Article 81 that are routinely ignored, including the availability of less restrictive alternatives, the preference for tailored guardianship, and the requirement of detailed periodic reporting and review. It would be cynical in the extreme to change 17-A to look more like Art. 81, without an honest assessment of whether such change would actually protect the rights of PWIDDs, rather than simply making society feel better about the process.<sup>61</sup>

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<sup>59</sup> *Changing Paradigms*, *supra* note 49.

<sup>60</sup> A recent article by an investigative journalist suggests that Art. 81 may be utilized for reasons other than the protection or care of an "incapacitated person," noting the use of guardianship by nursing homes as a bill collection technique. Nina Bernstein, *To Collect Debts, Seizing Control Over Patients*, N.Y. TIMES, January 26, 2015, at A1.

<sup>61</sup> For example, any proposal to increase the protection of rights for persons for whom guardianship is sought by requiring the assignment of counsel is, at best, disingenuous without a commitment to the additional financial and personnel resources that would be required.

## IV. THE CURRENT LAW OF GUARDIANSHIP FOR PWIDDs

17-A was intended to provide a simple, speedy method to permit parents of mentally retarded children<sup>62</sup> to retain sole legal decision making power when those children reached their majority, and it more than accomplished that goal, albeit at great cost to the rights of those young adults.<sup>63</sup> The main features of 17-A are that:

- It is entirely diagnosis driven, relying on a finding, by certain enumerated health care professionals, of mental retardation (and, after 1989, certain enumerated developmental disabilities);
- In most instances there is no hearing, the Surrogate makes a determination based solely on the papers submitted by the petitioner, and never sees or hears from the person for whom guardianship is sought;
- The guardianship is plenary; that is, the person under guardianship loses to right to make any and all decisions.
- The appointment of a guardian has no time limit and continues indefinitely;
- There is no requirement that a guardian of the person ever report on her “ward’s”<sup>64</sup> situation, and there is no review of the necessity for continuation of guardianship by the court.

As this cursory description of the statute demonstrates, it is entirely out of date with regard to procedural protections that are now both statutorily and constitutionally required.<sup>65</sup>

<sup>62</sup> Despite the earlier discussion of the importance of respectful language, because the statute, and the legislative history, utilize the terms “mental retardation” and “mentally retarded,” those terms are employed here as well.

<sup>63</sup> For the intent of the statute, *see, e.g.*, Bailly & Nick-Torok, *supra* note 3, at 817-819 (“[T]he legislature was mindful of the desire of parents to ‘provide for a lifetime guardianship’ because ‘the present law does not take into account the unique status of a retardate in that the fact and degree of retardation and the need for guidance and assistance are determinable at a very early age and remain so for life.’ (footnote omitted)).

<sup>64</sup> For the same reason that language has evolved with regard to the disabilities that persons may possess, and to an emphasis on the person rather than her/his disability, *see* Bailly & Nick-Torok, *supra* note 3, advocates argue against the term “ward” as entirely defining a person for whom guardianship may have been ordered. Thus, the use of the terms “person to whom guardianship is sought” or “person under guardianship”. There is currently a legislative proposal in Texas to change that state’s statute precisely in this way. Guardianship Reform and Supported Decision Making Group, *Changing the Term Ward to Person Under Guardianship, A Policy Paper in Bill Form* (on file with committees).

<sup>65</sup> The apparent constitutional infirmities of 17-A have been noted by commentators. *See, e.g.*, Bailly & Nick-Torok, *supra* note 3; *Changing Paradigms*, *supra* note 49, at 119-21; Jeffrey A. Cohen, Thomas A. Dickerson & Joanne Matthews Forbes, *A Legal Review of Autism, A Syndrome Rapidly Gaining Attention Within Our Society*, 77 ALB. L. REV. 381 (2013) (“[P]rior to judicial interpretation, [17-A] lacked most, if not all the due

A. *Least Restrictive Means*

Central to the substantive, as opposed to procedural due process required for the deprivation of liberty caused by the imposition of guardianship, and resonating throughout the discussion of 17-A which follows, is the concept of least restrictive means. That is, as one court has explained:

Beginning with *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 [1975], substantive due process has been understood to include a requirement that when the state interferes with an individual's liberty on the basis of its police power, it must employ the least restrictive means available to achieve its objective of protecting the individual and the community. New York courts have embraced the principle of least restrictive alternatives (see, e.g., *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 165, 350 N.Y.S.2d 889, 305 N.E.2d 903 [1973]) ("To subject a person to a greater deprivation of his personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violative of due process"); *Manhattan Psychiatric Center v. Anonymous*, 285 A.D.2d 189, 197-98, 728 N.Y.S.2d 37 (1st Dept. 2001).<sup>66</sup>

When passing non-criminal statutes that curtail liberty, the legislature has taken account of the constitutional imperative of least restrictive means.<sup>67</sup> And, of course, that is precisely the rationale behind Art. 81, where the Law Revision Commission described the goal of the statute as "requiring a disposition that is the least restrictive form of intervention."<sup>68</sup>

Taking Article 81 as a due process-based model of what the legislature has understood as necessary before the deprivation of liberty (and, in the case of guardianship of the property, of that

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process protection of Art. 81.") (citing *In re Mark C.H.*, 28 Misc.3d 765 (Sur. Ct. N.Y. Cnty. 2010)) (note that the two lead authors are Associate Justices of the Appellate Division, Second Department). It has also been noted in judicial decisions. See, e.g., *In re Dameris L.*, 38 Misc.3d 570 (Sur. Ct. N.Y. Cnty. 2012); *In re Chaim A.K.*, 26 Misc.3d 837 (Sur. Ct. N.Y. County 2009); *In re Mark C.H.*, 28 Misc.3d 765 (2010).

<sup>66</sup> *Matter of Dameris L.*, 38 Misc.3d at 526; see also *In re Andrea B.*, 94 Misc.2d 919, 925 (Fam. Ct., N.Y. Cnty. 1978) ("[S]ubstantive due process requires adherence to the principle of least restrictive alternative . . .").

<sup>67</sup> See, e.g., MENTAL HYG. LAW §§ 9.60(h)(4), (i)(2) (codifying "Kendra's Law," which deals with assisted outpatient treatment).

<sup>68</sup> Law Revision Commission Comments, 34 A. McKinney's Consol. Laws of N.Y. § 81.03. The statutory language incorporates the least restrictive means imperative in slightly different language, "The legislature recognized that the legal remedy of guardianship should be the *last resort* for addressing a person's need because it deprives the person of so much power and control over his or her life." MENTAL HYG. § 81.01 (emphasis added).



right as well), the specific deficiencies of 17-A in this respect are apparent.

*B. Basis for Appointing a Guardian*

Following the general reform trend of the late 1980's, Article 81 eschews a diagnosis-driven determination of "incapacity," requiring instead a functional determination.<sup>69</sup> The New York Court of Appeals has embraced the functional approach: "Recognizing that the presence of a particular [medical or psychiatric] condition does not necessarily preclude a person from functioning effectively."<sup>70</sup>

Utilizing this functional approach, and proceeding from the presumption that all adults possess full capacity, guardianship can only be imposed when:

- 1) the person is likely to suffer harm; *and*
- 2) the person is unable to provide for personal needs and/or property management; *and*
- 3) the person cannot adequately understand and appreciate the nature and consequences of such inability, MHL 81.02(s)(b)(1)-(2).<sup>71</sup>

By contrast to the tri-partite requirement of likely harm, inability to provide, and inability to understand and appreciate, 17-A provides:

When it shall appear to the satisfaction of the court that a person is a developmentally disabled person, the court is authorized to appoint a guardian of the person or property, or both, if the appointment of such guardian or guardians is in the best interest of the developmentally disabled person.<sup>72</sup>

That is, amazingly for 2014, a person with a developmental disability, no matter how high functioning, and in the absence of any likelihood of danger or harm, may have all decision-making permanently removed *solely* on the subjective determination of a surrogate that the appointment of a guardian is in the person's "best interest." No citation is necessary to demonstrate that such a standard falls far short of any notion of constitutional liberty and/or property rights and substantive due process.

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<sup>69</sup> "In reading its determination the Court shall give primary consideration to the functional level and functional limitations of the person." MENTAL HYG. § 81.02(c).

<sup>70</sup> Law Revision Commission Notes to N.Y. Mental Hyg. Law §81.02 (McKinney 2012) (citing *In re Grinker* (Rose), 77 N.Y.2d 703 (1991), and *Rivers v. Katz*, 67 N.Y.2d 485 (1986), *reargument den.*, 68 N.Y.2d 808 (1986)).

<sup>71</sup> This is the classic definition of cognitive incapacity that informs most existing guardianship laws, often shortened to "understand and appreciate."

<sup>72</sup> N.Y. Surr. Ct. Proc. Act. § 1750-(1).

C. *The Requirement of a Hearing*

Given the liberty and/or property interests at stake, Art. 81 requires a hearing in all cases.<sup>73</sup> By contrast, under 17-A, if the petition for guardianship is brought by the parents, or by another person with the consent of the parents, the court may, in its discretion, dispense with the hearing. Anecdotally, most 17-A guardians are appointed without a hearing, and thus without the court, which is charged with determining “best interest,” ever seeing the person for whom guardianship is sought. While both statutes theoretically provide for a jury trial,<sup>74</sup> anecdotally, and for obvious reasons, such trials are seldom demanded in Art. 81 guardianships, and are essentially non-existent for guardianships under 17-A.

D. *Presence at the Hearing*

Art. 81 provides that the person for whom guardianship is sought must presumptively be present at the hearing, even if that requires the judge to travel to a place, outside the courthouse, where the person resides, “so as to permit the court to obtain its own impression of the person’s capacity.”<sup>75</sup> Exceptions are limited to situations in which the person is outside the state or, by clear evidence, the person “is completely unable to participate” or “no meaningful participation will result from the person’s present . . . .”<sup>76</sup>

By contrast, presence may be dispensed with under 17-A where, upon medical evidence, presence “is likely to result in physical harm” or the person is “medically incapable” of attendance, or,

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<sup>73</sup> “A determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing.” MENTAL HYG. § 81.11(a). As the Third Department has held, the failure to hold a hearing makes it impossible for an appellate court to determine whether the powers granted to either the guardian of the person or guardian of the property are the least restrictive form of intervention or, for that matter, whether there is clear and convincing evidence of incapacity. *See, e.g., In re Ruth T.T.*, 267 A.D.2d 553, 554 (3d Dep’t 1999); *In re Lula XX*, 224 A.D.2d 742 (3d Dep’t), *appeal dismissed*, 88 N.Y.2d 842 (1996); *In re Maher v. Maher*, 207 A.D.2d 133 (2d Dep’t 1994), *appeal denied*, 86 N.Y.2d 703 (1995).

<sup>74</sup> MENTAL HYG. § 81.11(f); N.Y. Surr. Ct. Proc. Act. §1754. Both also provide that unless a jury trial is demanded, it is deemed waived.

<sup>75</sup> MENTAL HYG. § 81.11(2).

<sup>76</sup> *Id.* §§ 81.11(c)(1)-(2). The Law Revision Commentary to MENTAL HYG. § 81.11 stresses the importance of “having present at the hearing the person whose rights may be affected by the proceeding,” and notes that “seeing the person” also allows the court to draw a carefully crafted and nuanced order which takes into account the person’s dignity, autonomy and abilities, because the judge has had opportunity to learn more about the person as an individual rather than a case description in a report.”

under an indeterminate standard, big enough to drive a truck through, there are “such other circumstances which the court finds would not be in the best interests of the mentally retarded or developmentally disabled person.”<sup>77</sup> And, of course, the person is not present at a hearing in the vast majority of cases, because no hearing is held.

*E. Burden of Proof*

In accordance with the importance of liberty issues implicated, Art. 81 requires proof of clear and convincing evidence of each of the three criteria—likely harm, inability to provide, and inability to understand and appreciate—described above.<sup>78</sup> There is no indication of the burden of proof in Art. 12, so, as a civil proceeding, the burden is presumptively preponderance of the evidence.<sup>79</sup>

*F. Right to Counsel*

While Art. 81 grants the AIP “the right to choose and engage legal counsel of the person’s choice,”<sup>80</sup> it also requires appointment of counsel in a number of circumstances, including when the AIP requests counsel, wishes to contest the proceeding, does not consent to major medical or dental treatment, or to transfer to a nursing home. As a matter of case law, where the AIP is indigent, and important constitutionally protected interests are at stake, the state, or its appropriate subdivision, is required to pay for assigned counsel.<sup>81</sup>

There are no such provisions in, or case law, about 17-A except that where the person for whom guardianship is sought resides in a facility, as defined by MHL 47.01 (a). Mental Health Legal Services (“MHLS”) in the appellate division department must be

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<sup>77</sup> Surr. Ct. Proc. Act. §1754(3). Where there is a hearing, but the presence of the person for whom guardianship is sought has been dispensed with, the court *may* (but is not required to) appoint a guardian *ad litem*. Surr. Ct. Proc. Act. § 1754(4). There is no provision for payment of anyone so appointed.

<sup>78</sup> MHL § 81.12(a).

<sup>79</sup> See *In re Chaim A.K.*, 26 Misc.3d 837, 847 n.28 (Surr. Ct. N.Y. Cnty. 2009) (citing *In re Jaime S.*, 9 Misc.3d 460 (Fam. Ct. Monroe Cnty. 2005); *In re Jonathan Alan Mueller*, 25 Misc.3d 165, 166 (Surr. Ct., Dutchess Cnty. 2009) (stating that it is unlikely that Art. 81’s requirement of clear and convincing evidence applies. “[T]he decision to appoint a guardian of the person or property, or both, under N.Y. Surr. Ct. Proc. Act. § Art. 17-A is based upon a less stringent standard of proof, namely, the best interests of the mentally or developmentally disabled person.”).

<sup>80</sup> MENTAL HYG. § 81.10(a).

<sup>81</sup> See *In re St. Lukes-Roosevelt Hospital Ctr. (Marie H.)*, 226 A.D.2d 106 (1st Dep’t 1996), *aff’d*, 89 N.Y.2d 889 (1996).

served with the petition.<sup>82</sup>As a matter of practice, MHLS generally appears when a hearing is held, or files a report when a hearing is dispensed with.

*G. Right to Cross Examine*

Art. 81 specifically provides a person opposing guardianship with the hallowed right to cross examine.<sup>83</sup> Not only is there no comparable provision in 17-A, but the use of form affidavits for the medical “proof” necessary to impose guardianship means that the critical element of the need for 17-A guardianship—the medical diagnosis of mental retardation or developmental disability<sup>84</sup>—is routinely met by pure, and purely inadmissible, hearsay. The healthcare professionals need only check a box, on a form, that the person “suffers from” mental retardation or developmental disability; a box that such disability began prior to the persons reaching twenty one; a box that by virtue of her or his disability, the person is unable to manage her or his affairs; and a box that such disability is likely to continue indefinitely.

*H. Medical Privacy and the Doctor-Patient Privilege*

There is another major issue related to the use of affidavits in 17-A proceedings, and the records, however incomplete, that are frequently appended to them. Such submissions clearly violate the privacy rights,<sup>85</sup> and the physician/patient privilege,<sup>86</sup> of the person for whom guardianship is sought as well as her/his statutory

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<sup>82</sup> Surr. Ct. Proc. Act §1753(2)(b).

<sup>83</sup> MENTAL HYG. § 81.11(b)(3). The Supreme Court has continuously emphasized the centrality of this right to due process. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004) (reviewing the history of the confrontation clause and concluding its purpose was directed at keeping *ex parte* examinations out of the record); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (holding that one of the minimum requirements of due process includes the right to confront and cross-examine adverse witnesses).

<sup>84</sup> Two health care professionals, one of whom must be an M.D., must certify that the person for whom guardianship is sought suffers from either mental retardation, or developmental disability, that the condition is likely to continue indefinitely, and that s/he cannot manage her personal affairs and/or property. *See* N.Y. Surr. Ct. Procedure Act Law §1750-a (McKinney 2005), Affidavit (Certification) of Examining Physician or Licensed Psychologist (GMD-2a), and Affirmation (Certification) of Examining Physician (GMD-2B) as included in the Petition for Appointment of Guardian, available at [www.nycourts.gov/forms/surrogates/omni/gd17A.pdf](http://www.nycourts.gov/forms/surrogates/omni/gd17A.pdf), archived at <http://perma.cc/HEX2-MKFU>.

<sup>85</sup> *See* Joseph Rosenberg, *Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?*, N.Y. ST. BAR ASS'N J., Jan. 2013, at 34.

<sup>86</sup> The physician/patient privilege is codified in C.P.L.R. § 4504. Additionally, MHL Section 33.13(c) provides that records maintained by a mental health facility may be disclosed only with a patient's consent or by court order.

rights under the Health Insurance Portability and Accountability Act (“HIPAA”).<sup>87</sup> HIPAA requires health care providers to maintain the confidentiality of information about a patient unless the patient gives consent or a court orders the production of such information; neither of these circumstances routinely—if ever—occur in 17-A proceedings.

One Surrogate’s Court has recognized this issue in a contested proceeding where the person for whom guardianship was sought made an equal protection claim. Relying on an appellate decision that disallowed testimony by a former physician in an Art. 81 proceeding without the consent of the AIP as violative of CPLR 4504,<sup>88</sup> the Surrogate held that there was no rational basis for treating the subjects of Art. 81 and 17-A proceedings differently. The court went on to hold that when the subject of a guardianship proceeding does not waive the privilege, or affirmatively put his or her medical condition into controversy, testimony about her/his medical treatment is inadmissible.<sup>89</sup> The same, presumably, would be true for medical records.

### *I. Findings*

In order to appoint a guardian of the person and/or property under Art. 81, the court must make specific findings on the record.<sup>90</sup> Even where the AIP agrees to appointment, the court must find (in addition to the agreement) the person’s functional limitations; necessity for a guardian to deal with those limitations; the specific powers granted to the guardian; and the duration of the appointment.<sup>91</sup>

Where there is no consent, additional findings are required, demonstrating that petitioner has met its burden, by clear and convincing evidence, that the AIP lacks understanding and appreciation of the nature and consequences of her or his functional limitations; the likelihood of harm resulting from the lack of understanding and appreciation; not only the specific powers granted to the guardian, but that they are the least restrictive form of intervention necessary;<sup>92</sup> and whether the A.I.P.,<sup>93</sup> now denominated

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<sup>87</sup> 45 C.F.R. §§160.103, 164.508, 164.512(e) (2006).

<sup>88</sup> *In re Rosa B.S.*, 1 A.D.3d 355 (2d Dep’t 2003).

<sup>89</sup> *In re Derek*, 12 Misc.3d 1132 (Surr. Ct. Broome Cnty. 2006).

<sup>90</sup> MENTAL HYG. § 81.15.

<sup>91</sup> *Id.* §§ 81.15(a)(2-5).

<sup>92</sup> *Id.* §§ 81.15(b)(2-3), (5).

<sup>93</sup> Like the term “ward,” the language employed by Art. 81 after the imposition of guardianship, “Incapacitated Person,” or “I.P.” unfortunately and inappropriately en-

the I.P.<sup>94</sup> should receive copies of the initial and annual report. Where a guardian of the property is appointed, the court must also make findings as to the type and amount of property involved and “any additional findings that are required under Section 81.21.”<sup>95</sup>

The purpose of record findings in Art. 81 as in other proceedings where the legislature has also required findings<sup>96</sup> is to ensure that the court has fully complied with the statutory requirement of proof, as well as to provide a record for appeal. There is no requirement for findings after a hearing under 17-A and, of course, where there is no hearing, there can be no record findings.

### *J. Eligibility and Qualification of Guardian*

Article 81 provides detailed considerations for who should be appointed a guardian, including consideration of the AIP’s preferences and/or nomination.<sup>97</sup> The court is required to consider, *inter alia*, the social relationship between the proposed guardian and the AIP, and between the proposed guardian and “other persons concerned with the welfare of the incapacitated person;”<sup>98</sup> the care and services being provided to the incapacitated person;<sup>99</sup> the unique requirements of the incapacitated person;<sup>100</sup> and whether there are any conflicts of interest between the proposed guardian and the incapacitated person.<sup>101</sup>

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tirely defines the person by virtue of her/his disability; while I.P. is used here in its statutory context, “person under guardianship” is the preferred term.

<sup>94</sup> Given that a person for whom a guardian is appointed under Art. 81 has the right to move to terminate the guardianship, MENTAL HYG. §§ 81.36(a) and (b), it is difficult to understand—or to justify—why she or he should not be entitled to copies of the report that allegedly contain information as to why the guardianship should continue.

<sup>95</sup> MENTAL HYG. § 81.15(c)(1).

<sup>96</sup> See, e.g., N.Y. DOM. REL. LAW § 236(B)(5)(g) (stating that in equitable distribution of marital property, court must consider fourteen enumerated factors and, in its decision “shall set forth the factors” consider that were not waived by counsel).

<sup>97</sup> MENTAL HYG. § 81.19.

<sup>98</sup> MHL 81.19(d)(2).

<sup>99</sup> MHL 81.19(d)(3).

<sup>100</sup> MHL 81.19(d)(7).

<sup>101</sup> MHL 81.19(d)(8). Unfortunately, the reality of ensuring appropriate qualifications for guardians under Art. 81 has fallen far short of what is necessary to protect those who are placed under their power and control. A 2010 study by the federal Government Accountability Office found that in New York, among other states, persons who applied for certification as guardians using false identification with the name of a deceased person, or with a bad credit record, were routinely certified. U.S. Govt. Accountability Office, GAO-1046, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (2010), available at <http://www.gao.gov/products/GAO-10-1046> (last visited Apr. 20, 2015), archived at <http://perma.cc/3P7R-3DGY>. The practice in appointing 17-A guardians appears more thorough in some respects, as

Presumably because 17-A was enacted to allow parents to continue exercising control over children with mental retardation who attained their majority, and because it was presumed that parents were the “natural” caretakers who inevitably had their children’s best interests at heart, there are no provisions whatever in 17-A as to considerations to be taken into account by the court if a guardian is to be appointed.<sup>102</sup>

*K. Powers of the Guardian: Plenary or Limited*

One of the most significant differences between the protection of Art. 81 and 17-A, and perhaps the most glaring constitutional failure of the latter, is that, upon the diagnosis and “best interest” finding, the Surrogate’s only choice, without regard to “least restrictive alternative,”<sup>103</sup> is imposition of a plenary guardian, and thus removal of *all* decision making power from the person on whom guardianship is imposed.

As the legislative findings clearly state,<sup>104</sup> Art. 81 demonstrates

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both prospective guardians and standby guardians must be fingerprinted, with their prints sent to the statewide criminal registry for review.

<sup>102</sup> One court has read into the statute a preference for relatives, and in particular, for a parent, finding a “presumption that ‘parents prevail in a contest with a non-parent’ that can be overcome only where the non-parent establishes ‘extraordinary, circumstances.’” *In re Timothy R.R.*, 42 Misc.3d 775 (Sur. Ct. Essex Cnty. 2013) (relying on, *e.g.*, *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976), and citing an unreported case, *In re Boni P.G.*, 13 Misc.3d 1235[A] (N.Y. Sur. Ct. 2006)).

<sup>103</sup> One court, considering 17-A, has noted that “least restrictive means” is a constitutional imperative, as well as a statutory requirement under Art. 81. *In re Dameris L.*, 38 Misc.3d at 526.

<sup>104</sup> “Legislative findings and purpose. The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs. Conservatorship, which traditionally compromises a person’s rights only with respect to property frequently, is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention, which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person’s life.” MENTAL HYC. § 81.01.

a strong, if not overwhelming preference against plenary guardianship, in favor of guardianship that is closely tailored to meet the specific functional impairments that might result in harm to the I.P. The statute specifically provides that if the court has found the AIP incapacitated *and* that appointment of guardian is necessary: “The order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management.”<sup>105</sup>

Subsequent sections detail in illustrative, but not exhaustive examples, the powers which may be conferred on guardians of the person and the property.<sup>106</sup> Art. 81 also provides for protective, or single purpose transactions (“one shots”) as an even less restrictive means than appointing a full guardian.<sup>107</sup> And, reiterating the least restrictive means mandate, Art. 81 imposes an obligation on every guardian to “[a]fford the incapacitated person the greatest amount of independence and self determination with respect to [personal needs and/or property management]—in light of—that person’s wishes, preferences and desires . . . .”<sup>108</sup> By contrast, 17-A simply provides that “[i]f the court is satisfied that the best interests of the mentally retarded or developmentally disabled person will be promoted by the appointment of a guardian of the person, or the property, or both, *it shall make a decree naming such person or persons as guardians.*”<sup>109</sup> That is, there is not only no preference for a lim-

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<sup>105</sup> *Id.* § 81.16(c)(2).

<sup>106</sup> *Id.* § 81.21-22.

<sup>107</sup> *Id.* § 81.16. As the Law Revision commentary notes with respect to 81.16, “[t]he list of alternatives available to the court emphasizes the statute’s underlying goal of promoting the least restrictive alternative. The most significant part of this section is the provision governing protective arrangements and single transactions, a provision based on section 5-40 of the Uniform Probate Code. With this section, Article 81 fills a gap in New York’s law identified by the Court of Appeals in *In re Grinker* (Rose), namely, that where a person may require assistance but does not require the equivalent of either a conservator or a committee, or even where the equivalent of either a conservator or a committee, or even where the equivalent of a conservator is appropriate, appointment of the equivalent of “a conservator with its consequent affront to the integrity and independence of the individual . . . ought to be among the last alternatives.” 77 N.Y.2d at 712. Proposed Article 81 allows the court to fashion remedies which may include protective arrangements or single transactions which assure security, service or care to meet the foreseeable needs of the incapacitated person but do not deprive the person of independence and autonomy.” Law Revision Commission Comments, McKinney’s Cons. Laws of N.Y., Book 34A, Mental Hygiene Law § 81.16.

<sup>108</sup> MENTAL HYG. §§ 81.20(6)(1), (7) (“Duties of Guardian”).

<sup>109</sup> N.Y. Surr. Ct. Proc. Act. § 1754(5) (emphasis added).



ited or tailored guardian, there is no provision for anything *but* a plenary guardian.<sup>110</sup>

There is one very limited exception to the plenary guardianship imposed under 17-A. The statute provides for a “limited guardian of the property” when the person for whom guardianship is sought is 18 or over and “wholly or substantially self-supporting by means of his or her wages or earnings from employment.” Under these circumstances, the court may appoint a guardian for all property of the person other than that received from wages or earnings. In addition, despite the imposition of a property guardian with the specified restriction, the person who is otherwise denied the right to contract by virtue of the guardianship “shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month’s wages or earnings . . . or three hundred dollars, whichever is greater, or as otherwise authorized by the court.”<sup>111</sup>

While it is difficult to understand why a PWID who is working and supporting him or herself needs a guardian at all, calling the entire enterprise into question, this is the sole instance of “tailoring” permitted by 17-A.

Relying on this “*inclusio unius est exclusio alterius*,” one Surrogate has held that 17-A does not permit tailoring such that guardians of the property may make gifts from that property,<sup>112</sup> while another Surrogate in New York County has read into 17-A authority to tailor a guardianship where necessitated by best interests.<sup>113</sup> This difference in approaches, without clarification from a higher court, has led to confusion among practitioners,<sup>114</sup> but, more sig-

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<sup>110</sup> Because 17-A is such a “blunt instrument,” as well as because of its constitutional infirmities, one court has held that it must be strictly construed, such that where proof indicated that the person for whom guardianship was sought had a primary diagnosis of mental illness, rather than mental retardation or developmental disability, only the more flexible, limited Art. 81 could be employed. *In re Chaim A.K.*, 26 Misc.3d 837 (Sur. Ct. N.Y. Cnty. 2009).

<sup>111</sup> N.Y. Surr. Ct. Proc. Act. § 1756.

<sup>112</sup> See *In re John J.H.*, 27 Misc.3d 705 (Surr. Ct. N.Y. Cnty. 2010). The court also relied in the general proposition that “when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject.” *In re Jonathan E.E.*, 86 A.D.3d 696, 698 (3d Dep’t 2011) (citing McKinney’s Consol. Laws of N.Y., Book 1 Statute §222 at 384). Upon a finding that the relief requested was not available in a 17-A proceeding, the petitioner parents withdrew their petition in favor of commencing a new proceeding under Art. 81, under which such relief is specifically authorized.

<sup>113</sup> *In re Yvette A.*, 27 Misc.3d 945 (Surr. Ct., N.Y.Cnty. 2010); see also *In re Joyce SS.*, 30 Misc.3d 765 (Surr. Ct. Bronx Cnty. 2010) (holding that Surrogate had the power to invoke the doctrine of substituted judgment in authorizing gifting by a guardian).

<sup>114</sup> Bailly & Nick-Torok, *supra* note 3, at 834.

nificantly, spotlights the shortcomings of a statute that makes no provision for the limitation of powers that is constitutionally required, or the tailoring necessary to delineate the powers of a guardian if one is appointed.

It is also important to note that as a consequence of the requirement of “tailoring,” Art. 81 specifically provides that a person for whom a guardian is appointed “retains all powers and rights except those powers and rights which the guardian is granted.”<sup>115</sup> Such rights include constitutionally protected rights such as voting and marriage. The wholesale grant of plenary power to a 17-A guardian would appear to deprive the person under guardianship of *all* rights, though there is surprisingly little case law explication.<sup>116</sup>

There is also a strong caveat here. Although Art. 81 uses all the right words, and includes all the appropriate provisions to ensure the constitutional imperative of least restrictive intervention, the reality on the ground is far different. There are no available statistics on the number of guardianships sought or awarded,<sup>117</sup> much less on whether plenary or limited,<sup>118</sup> but anecdotally, the vast majority of adult guardianships imposed are plenary; a 2007 national survey found that in 90% of cases, persons found to be incapacitated were deprived of all of their liberty and property rights.<sup>119</sup> That is to say, while Art. 81 is useful as a comparison in demonstrating the shortcomings of 17-A, it is hardly a guarantee that the rights of “incapacitated persons” are actually being protected.

#### *L. Reporting and Review*

Art. 81 includes detailed reporting requirements<sup>120</sup> for guardi-

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<sup>115</sup> MHL 81.29(a).

<sup>116</sup> One court has placed limitations on a 17-A guardian’s power where reproductive rights are involved, refusing to permit sterilization upon the guardian’s consent. *In re DD*, 90 Misc.2d 236 (Tompkins County Ct. 2002).

<sup>117</sup> Bernstein, *supra* note 60, ¶ 5.

<sup>118</sup> This is a national problem: see Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*, in *Future Trends in State Courts* 107, 109 (2011).

<sup>119</sup> Pamela B. Teaster, *et al.*, *Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?*, National Study of Public Guardianship, Phase II Report, 96 (2007).

<sup>120</sup> For guardians of the person, the report must include information on the person under guardianship’s residence, including whether the current residence is best suited to the person’s needs; physical condition, including a health care provider’s report made within three months, also detailing the current functional level of the incapacitated person; any major changes in physical or mental condition, or in medications; an account of medical treatment over the preceding year and a plan for medi-

ans of both the person and the property, including an initial report, to be filed within ninety days of issuance of a commission to the guardian;<sup>121</sup> and, thereafter, annual reports, MHL 81.31, which are reviewed by court examiners, appointed and supervised by the Appellate Division for the Department in which the appointing court is located.<sup>122</sup> The purpose of the report is primarily to ensure the well being of the person under guardianship and, where appropriate, the good stewardship of her/his property,<sup>123</sup> but, significantly, the report also must include any “facts indicating the need to terminate the appointment of the guardian” or for any change in powers. That is, Art. 81 recognizes that conditions may change, and/or functional capacity increase (or decrease), thus altering the least restrictive intervention and requiring a “new look” by the court.<sup>124</sup>

By contrast, although 17-A requires a yearly filing on finances

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cal, dental and mental health treatment for the coming year; and “information concerning the social condition of the incapacitated person including: the social and personal services currently utilized . . . , the social skills . . . and the social needs of the incapacitated person.” MHL § 81.36(6)(iv). For guardians of the property, “the information required by [the Surrogate’s Court Procedure Act] . . . for an annual accounting of a general guardian of an infant’s property.” MHL § 81.31(7). The initial report also requires a complete inventory of the person’s property over which the guardian has control and the guardian’s plan for that property’s management and control. MHL § 81.30(b).

<sup>121</sup> MHL 81.30(b).

<sup>122</sup> MHL 81.32(b).

<sup>123</sup> Two leading commentators have summarized the reasons for periodic reporting and review, also called “monitoring” as follows:

First, historically courts have had a *parens patriae* duty to protect those unable to care for themselves. *Parens patriae* is the fundamental basis for guardianship and the primary justification for curtailing civil rights. The court appoints the guardian to carry out this duty and the guardian is a fiduciary bound to the highest standards. ‘In reality,’ observed one judge, ‘the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.’ Second, unlike with decedents’ estates, the incapacitated person is a living being whose needs may change over time. This argues for a more active court role in oversight. Third, monitoring can be good for the guardian by offering guidance and support in the undertaking of a daunting role. Fourth, monitoring can be good for the court by providing a means of tracking guardianship cases and gauging the effect of court orders. Finally, monitoring can boost the court’s image and inspire public confidence.

Sally Balch Hurme and Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L.Rev. 867, 871-872 (citations omitted) (2002).

<sup>124</sup> The importance of periodic reporting and review was noted in the “Wingspread Recommendations” that led to guardianship reform in the late 1980’s and early 1990’s the Uniform Guardianship Procedure and Protection Act (UGPPA) and in the National Probate Court Standards, *In re Chaim A.K.*, 26 Misc.3d 837, n.18 and 19.

by a guardian of the property,<sup>125</sup> once a guardian of the person is appointed s/he is *never, ever* again required to provide any information about the well-being—or not—of the person under guardianship, or whether there is any continuing reason *for* a guardian.<sup>126</sup> The former raises serious concerns that abuse and/or neglect may be occurring, unknown to the court which has vested total power in the guardian. Surely substantive due process requires that when the state intervenes to deprive someone of her/his liberty in the guise of protection, that person should not be worse off because of the intervention. This is what monitoring is intended to prevent; its absence is a grave and almost certainly a constitutional failure.

The latter is equally serious, continuing a massive deprivation of liberty when a person is capable of living—and thriving—with a less restrictive form of intervention, or no intervention at all. Without periodic review there is no way for the court to know whether the guardianship should be modified (assuming that such tailoring were available under the statute) or terminated (see discussion *infra*). In addition to the likely constitutional violation,<sup>127</sup> the failure to review, caused by absence of any periodic reporting, may well also violate the “least restrictive setting” requirement of the American With Disabilities Act (ADA).<sup>128</sup>

#### M. *Modification, Termination, & Restoration of Rights*

However defined, a person’s “capacity” is seldom static; people gain or lose functional capacity, or their circumstances change such that greater or lesser functional capacity is required to permit

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<sup>125</sup> Unlike the Art. 81 reports, which are reviewed by paid outside court examiners, the clerks in Surrogate’s Court are expected to perform this service for reports by guardians of the property, including following up when reports are not timely filed. The extent to which this occurs, and the care and/or expertise available is nowhere assessed or reported.

<sup>126</sup> The absence of any reporting requirement was undoubtedly premised on the view that it was parents who would be guardians, and that parent always have the best interests of their children at heart. Unfortunately, as the tragedies of child abuse demonstrate, this is not always the case. But, equally important—and now mistaken—was the view forty years ago that mental retardation and, subsequently, developmental disabilities were permanent, unchanging conditions, with little or no likelihood of improvement, much less “cure.”

<sup>127</sup> One court has held that, in the absence of periodic reporting and review, 17-A is unconstitutional; the Surrogate administratively imposed the requirement of yearly reporting on all guardians of the person in that court. *In Re Mark C.H.*, 28 Misc.3d 765 (2010).

<sup>128</sup> See *Olmstead v. L.C.*, 527 U.S. 581. For a thorough and provocative discussion of the ADA in the context of PWIDDS and guardianship, see Leslie Saltzman, *Rethinking Guardianship (Again): Substituted Decision-Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act*, 81 U. Colo. L. Rev. 157 (2010).

them to live without substantial risk of harm. For persons who are under Art. 81 guardianship because of a stroke or a traumatic brain injury, symptoms can be alleviated through medical treatment; functional abilities lost to disease or accident can be regained (by the same token, of course, function and/or cognitive abilities may progressively decline, as they do with Alzheimer's Disease). When such changes occur, the imperative of least restrictive intervention mandates concomitant changes in the powers granted to a guardian, or, in some cases, termination of the guardianship and the full restoration of all rights.

Article 81 recognizes this shifting continuum of functional capacity/incapacity and specifically provides for modification of a guardian's powers—whether an increase<sup>129</sup> or decrease—or termination<sup>130</sup> “where the incapacitated person has become able [or unable] to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized [or not authorized] to exercise.”<sup>131</sup> There is broad standing to initiate a proceeding for modification or termination.<sup>132</sup> A hearing is presumptively required,<sup>133</sup> and a jury trial is available on demand by the incapacitated person or her/his counsel.<sup>134</sup> Where the relief sought is termination, the burden of proof is on the *party opposing such relief*—that is, it must be proven, by clear and convincing evidence, that the grounds for guardianship continue to exist.<sup>135</sup> These provisions embody and instrumentalize the principle

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<sup>129</sup> If the statute were strictly adhered to, for example, a person with early or moderate Alzheimers might have a property guardian to manage investments, but still retain a bank account and the power to engage in ordinary, day-to-day financial transactions. If and when her cognitive abilities significantly declined, the guardian might seek—and obtain—more extensive powers. In actual practice, partly out of concern for the expense and disruption of repeated proceedings, courts tend not to tailor, or limit powers, but rather to grant plenary guardianships, even when unjustified under the statute, to avoid having petitioners return to court at a later date when expanded powers might be required.

<sup>130</sup> MENTAL HYG. LAW § 81.36

<sup>131</sup> MENTAL HYG. LAW §§ 81.36(a)(1)-(2).

<sup>132</sup> “The application . . . may be made by the guardian, the incapacitated person, or any person entitled to commence a proceeding under this article.” MENTAL HYG. LAW § 81.36(b). There is a wide range of persons “entitled to commence proceedings.” While *Id.* § 81.06(a)(1)-(6) does not explicitly include a close friend, domestic partner, or other relative who is not a “presumptive distributee” under the Surrogate's Court Procedure Act, it includes “a person otherwise concerned with the welfare of the person alleged to be incapacitated” which could presumably include any or all of the above.

<sup>133</sup> MENTAL HYG. LAW § 81.36(c).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 81.36(d). By the same token, where the petitioner seeks to increase the powers of the guardian, the same evidentiary burden falls on her/him. *Id.*

of least restrictive intervention.

Like those persons for whom guardianship is commonly sought under Art. 81, PWIDDs also fall on a spectrum of capacity requiring greater or lesser intervention or assistance,<sup>136</sup> and, like the subjects of Art. 81 guardianships, their conditions and life circumstances may change.<sup>137</sup> For example, no longer is a diagnosis of autism (or a condition on the autism spectrum) an indication of a permanent, unchanging disability. Persons with autism may, with various interventions, significantly improve their functioning<sup>138</sup> or even “recover” or be “cured,”<sup>139</sup> and there is promising new research on interventions for persons with Down Syndrome.<sup>140</sup>

Under 17-A, guardianship presumptively continues for the entire life the person under guardianship.<sup>141</sup> The statute provides for modification “to protect the mentally retarded or developmentally disabled person’s financial situation and/or his or her personal interests.”<sup>142</sup> Such modification, which does not require a hearing,<sup>143</sup> is generally employed to replace one family member guardian with another,<sup>144</sup> or where a person for whom a guardian of the person has been appointed comes into money, requiring the additional powers of a guardian of the property.

While there is explicit statutory provision for termination,<sup>145</sup>

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<sup>136</sup> For example, mental retardation is determined by IQ scores, themselves subject to “challenge, as illness, motor or sensory impairments, language barriers, or cultural differences may hamper a child’s test performance.” The Merck Manual of Diagnosis and Therapy, Mental Retardation, 18th ed. 2006.

<sup>137</sup> A change in life circumstances, as in the development of a system of supported decision-making (*see* discussion *infra*) may alter or negate the need for a guardian. *See, e.g., In re Dameris L.*, 38 Misc.3d 570 (Sur. Ct. N.Y. Cnty. 2012); A recent article in the American Journal of Intellectual and Developmental Disabilities reports research that young adults with Down Syndrome have significantly higher “adaptive” skills than their low I.Q. scores might suggest. James Edgin & Fabian Fernandez, *The Truth About Down Syndrome*, N.Y. TIMES, Aug. 28, 2014, [http://www.nytimes.com/2014/08/29/opinion/the-truth-about-down-syndrome.html?\\_r=0](http://www.nytimes.com/2014/08/29/opinion/the-truth-about-down-syndrome.html?_r=0).

<sup>138</sup> Advances in treatment of autism may result in substantial and potentially legally significant increases in functional capacity. *See, e.g., Susan Kabot et al., Advances in the Diagnosis and Treatment of Autism Spectrum Disorders*, 34(1) PROF. PSYCHOL.: RES. & PRAC. 26 (2003).

<sup>139</sup> *See, e.g., Ruth Padawer, After Autism: The Recovered*, N.Y. TIMES MAG., Aug. 3, 2014, at 20.

<sup>140</sup> *See* Edgin & Fernandez, *supra* note 137.

<sup>141</sup> N.Y. Surr. Ct. Proc. Act. § 1759 (“[G]uardianship shall not terminate at the age of majority or marriage of [the] mentally retarded or developmentally disabled person but shall continue during the life of such person, or until terminated by court.”).

<sup>142</sup> *Id.* § 1755.

<sup>143</sup> *See In re Lemmer*, 179 A.D.2d 926 (3d Dep’t 1992).

<sup>144</sup> *See, e.g., In re Garrett YY*, 258 A.D.2d 702 (3d Dep’t 1999).

<sup>145</sup> A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, on behalf of a

there is no indication as to the burden of proof, or, indeed, even what must be proved for the guardianship to be “dissolved.” Anecdotally, applications for termination of guardianship brought by a person under guardianship are extremely rare.<sup>146</sup>

N. *Brief Detour: OPWDD Regulations and The Health Care Decisions Act*

One reason that parents or others might be motivated to seek guardianship for a PWIDD is the fear that, in the absence of a guardian, no one would be empowered to make major medical decisions, including end of life decisions, for the person. This concern may be slightly, if not entirely alleviated by two legal regimes that permit surrogate decision-making for a PWIDD with respect to major medical decisions, including end of life decisions.

With respect to major medical decisions that do NOT involve the withholding or withdrawal of life sustaining medical treatment, individuals who are receiving services under the auspices of New York State Office for People with Developmental Disabilities (“OPWDD”), fall within the OPWDD regulation contained in title 14, section 633.11 of the Compilation of Codes, Rules & Regulations of the State of New York. Section 633.11 sets forth the procedures for obtaining informed consent for “professional medical treatment.”<sup>147</sup> If a guardian has not been appointed, the following individuals may provide consent for a minor:

- (2) an actively involved spouse;<sup>148</sup>
- (3) a parent;

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mentally retarded or developmentally disabled person for whom a guardian has been appointed may petition the court which made such appointment or the court in his or her county of residence to have the guardian discharged and a successor appointed, or to have the guardian of the property designated as a limited guardian of the property, or to have the guardianship order modified, dissolved or otherwise amended. Upon such a petition, the court shall conduct a hearing pursuant to section seventeen hundred fifty-four of this article.

N.Y. Surr. Ct. Proc. Act. § 1759(2). The reference to N.Y. Surr. Ct. Proc. Act. § 1754 suggests that the determination might be made without a hearing, though no case law has been found one way or the other.

<sup>146</sup> *In re Mark C.H.*, 28 Misc.3d 765, n.28 (2010).

<sup>147</sup> The term “professional medical treatment” is defined as follows: “A medical, dental, surgical or diagnostic intervention or procedure in which a general anesthetic is used or which involves a significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation or having a significant recovery period, or any professional diagnosis or treatment to which informed consent is required by law.” 14 N.Y. COMP. CODES R. & REGS. § 633.99(da) (2015).

<sup>148</sup> “Actively involved” is defined as: “Significant and ongoing involvement in a person’s life so as to have sufficient knowledge of the person’s needs.” *Id.* § 633.99(ax).

- (4) an actively involved adult sibling;
- (5) an actively involved adult family member;<sup>149</sup>
- (6) a local commissioner of social services with custody over the person pursuant to the social services law or family court act (if applicable); or
- (7) a surrogate decision-making committee (SDMC) or a court.<sup>150</sup>

If the person is eighteen or older, but lacks capacity to understand appropriate disclosures regarding proposed professional medical treatment, and no guardian or health care agent has been appointed, informed consent shall be obtained from one of the surrogates listed, in the order stated:

- (2) an actively involved spouse;
- (3) an actively involved parent;
- (4) an actively involved adult child;
- (5) an actively involved adult sibling;
- (6) an actively involved adult family member;
- (7) the Consumer Advisory Board for the Willowbrook Class (only for class members it fully represents); or
- (8) a surrogate decision-making committee (SDMC) or a court.<sup>151</sup>

There is no standard for decision-making by the identified surrogate set out in the OPWDD regulation, nor is there any duty imposed on the surrogate to consult with the person on whose behalf the surrogate is providing informed consent.

End-of-life decision-making, also known as the withholding or removal of life-sustaining treatment, is governed by the provisions of the Health Care Decisions Act for Persons with Mental Retardation (the "HCDA-MR").<sup>152</sup> The HCDA-MR affords both court-appointed guardians,<sup>153</sup> as well as "qualified family members" who do not need to be court-appointed guardians, the authority to consent to medical treatment, including but not limited to the withholding or withdrawing of life-sustaining treatment.<sup>154</sup> The HCDA-MR pro-

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<sup>149</sup> Family member is defined as "Any party related by blood, marriage, or legal adoption." *Id.* § 633.99(bf).

<sup>150</sup> *Id.* § 633.11(a)(1)(iii)(a).

<sup>151</sup> *Id.* § 633.11(a)(1)(iii)(b).

<sup>152</sup> See N.Y. Surr. Ct. Proc. Act § 1750-b (McKinney's Supp. 2007), 2002 N.Y. Laws. 500, S4622-B, A8466-D, signed on September 17, 2002.

<sup>153</sup> The New York Court of Appeals has held that the HCDA-MR applies not only to guardians appointed after its effective date (Mar. 17, 2003), but to all guardians regardless of when appointed. See *In re. M.B.*, 6 N.Y.3d 437 (2006).

<sup>154</sup> Surr. Ct. Proc. Act § 1750-b(1)(a).



vides for surrogate decision-making on the withholding or withdrawal of medical treatment for persons with developmental disabilities which either include mental retardation or result in similar impairment of intellectual functioning or adaptive behavior.<sup>155</sup> If there is no guardian, a surrogate decision maker will be appointed from a list of priorities:

- (1) Article 17-A guardian
- (2) an actively involved spouse
- (3) an actively involved parent
- (4) an actively involved adult child
- (5) an actively involved adult sibling
- (6) an actively involved adult family member
- (7) The Consumer Advisory Board for the Willowbrook Class (only for class members it fully represents): or
- (8) a surrogate decision-making (SDMC) or a court.<sup>156</sup>

The surrogate is empowered to make any and all decisions to withhold or withdraw life-sustaining treatment.<sup>157</sup> The surrogate is required to base all advocacy and health care decision-making solely and exclusively on the best interests of the person with mental retardation or developmental disabilities and,<sup>158</sup> “when reasonably known or ascertainable with reasonable diligence,” on the wishes of the person with mental retardation or developmental disabilities, including moral and religious beliefs.<sup>159</sup>

The statute specifically provides that if the PWIDD objects to the surrogate’s decision to withhold or withdraw life-sustaining treatment, the surrogate’s decision will be suspended pending judicial review, except if the suspension would be likely to result in the death of the person with mental retardation or developmental disa-

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<sup>155</sup> N.Y. Surr. Ct. Proc. Act § 1750(1).

<sup>156</sup> Surr. Ct. Proc. Act § 1750-b(1)(a); 14 N.Y. COMP. CODES R. & REGS. §§ 633.10(a)(7)(iv), 633.11(a)(1)(b).

<sup>157</sup> N.Y. Surr. Ct. Proc. Act § 1750-b.

<sup>158</sup> An assessment of the best interests of the person with mental retardation or developmental disabilities shall include consideration of five factors: (1) the dignity and uniqueness of every person; (2) the preservation, improvement or restoration of the health of the person; (3) the relief of the suffering of the person by means of palliative care (care to reduce the person’s suffering) and pain management; (4) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the person; and (5) the entire medical condition of the person. In addition, a surrogate’s health care decisions may not be influenced by a presumption that the person with mental retardation or developmental disabilities is not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to other persons, nor by financial considerations of the surrogate. *Id.* § 1750-b(2)(b).

<sup>159</sup> *Id.* § 1750-b(2)(a).

bilities.<sup>160</sup> OPWDD regulations and the HCDA-MR thus provide family members some power, in limited circumstances, to make healthcare decisions for a PWIDD without the necessity of a proceeding under 17-A.

## V. RETHINKING 17-A THROUGH TWO DIFFERENT LENSES

### A. *The Civil Rights/Procedural Due Process/Civil Liberties Lens*

Had the legislature's 1990 direction been followed to completion, any reconsideration of 17-A would have involved an analysis roughly similar to that which informed guardianship reform at the time. In the same way in which procedural guarantees were incorporated into the Adult Guardianship Statute, Art. 81, a reformed 17-A would be expected to include those guarantees, including the right to a hearing; to presence at that hearing; to call witnesses and cross examine; to an enhanced burden of proof, namely clear and convincing evidence; to specific findings on the record; to the privacy of medical records and the Fifth Amendment right against self-incrimination; to periodic reporting and review; and to an avenue for modification and/or termination in which the burden of proof was squarely on the opponent of such relief. In addition, the constitutional and potentially statutory<sup>161</sup> imperative of least restrictive intervention which so permeates Art. 81 would necessarily imbue the requirements *for* guardianship, the obligation to explore and exhaust less restrictive alternatives, and a non-waivable preference for limited or tailored guardianship. All of these were aspects of the "first round" of guardianship reform.<sup>162</sup>

Since that "first round," however, the movement for reform has continued,<sup>163</sup> and there are several widely acknowledged subse-

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<sup>160</sup> *Id.* § 1750-b(5).

<sup>161</sup> See discussion of the potential impact of the ADA on guardianship law, Saltzman, *supra* note 128.

<sup>162</sup> As illustrated by, *e.g.*, the Uniform Guardianship Protective Proceedings Act (UGPPA), Prefatory Note (1998). These include the Standards of Practice of the National Guardianship Association adopted in 2007, available at [www.guardianship.org/documents/standards\\_of\\_practice.pdf](http://www.guardianship.org/documents/standards_of_practice.pdf) (last visited Sept. 15, 2014), *archived at* <http://perma.cc/QQ4R-GQMX> and the Yokohama Declaration of the First World Congress on Guardianship, *available at* [http://www.international-guardianship.com/pdf/IGNY-okohama\\_Declaration\\_2010.pdf](http://www.international-guardianship.com/pdf/IGNY-okohama_Declaration_2010.pdf) (last visited Sept. 15, 2014). The Commission on National Probate Standards has promulgated standards for courts, Nat'l Probate Court Standards (Comm'n on Nat'l Probate Court Standards & Advisory Comm. on Interstate Guardianships 1993) (revised 1999) (upcoming review in process).

<sup>163</sup> A useful summary of state actions to reform existing guardianship laws in a variety of areas, from pre-adjudication issues, mediation in contested guardianships, qualification of guardians, to post-appointment monitoring, is found in COMM'N ON LAW & AGING, AM. BAR ASSOC., STATE ADULT GUARDIANSHIP LEGISLATION: DIRECTIONS OF

quent sources that ought to be considered in any rethinking of 17-A. Foremost among these are the recommendations of the Third National Guardianship Summit, which grew out of an invitation-only conference of national guardianship experts held in Salt Lake City in 2011.<sup>164</sup> The Uniform Law Commissioners have begun a process to reconsider the UGPPA in light of those recommendations.<sup>165</sup>

Among the Summit Recommendations that go farther than the UGPPA and most “reform” guardianship statutes, including Art. 81, are recommendations that:

- In healthcare decision-making, the guardian should maximize the participation of the person (55.1) and encourage and support the individual in understanding the facts and *directing a decision*. (55.2).<sup>166</sup>
- In residential decision-making, the guardian should utilize a person-centered plan that seeks to fulfill the person’s goals, needs and preferences, and emphasizes her/his strengths, skills and abilities to the fullest extent in order to favor the least restrictive setting. (56.4).

More recently, a conference held at Cardozo Law School brought together attorneys, advocates, court personnel, judges, and service providers “to foster dialogue and develop consensus about the next wave of guardianship reform in the state.”<sup>167</sup> Rec-

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REFORM 2013, available at [http://www.americanbar.org/publications/bifocal/vol\\_35/issue\\_2\\_dec2013/2013\\_guardianship.html](http://www.americanbar.org/publications/bifocal/vol_35/issue_2_dec2013/2013_guardianship.html) (last visited Apr. 15, 2015), archived at <http://perma.cc/XK9M-JAZU>. Similar compilations exist for every year since 2004.

<sup>164</sup> The recommendations are published in a symposium issue of the Utah Law Review, Julia R. Nack, Carolyn L. Dessin, & Judge Thomas Swift, *Creating & Sustaining Interdisciplinary Guardianship Committees*, 2012 UTAH L. REV. 1157 (2012), and are also available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_gship\\_sumt\\_stmnt\\_1111v2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_sumt_stmnt_1111v2.authcheckdam.pdf) (last visited May 9, 2015).

<sup>165</sup> See David English, Chair, Am. Bar Assoc. on Law and Aging, Presentation at the Third World Congress on Adult Guardianship (Apr. 14, 2014), available at <http://www.guardianship.org/IRL/Resources/Handouts/Beyond%20Substituted%20Judgment%20Presentation.pdf> (last visited Apr. 15, 2015), archived at <http://perma.cc/HCP2-PD3R>.

<sup>166</sup> This recommendation has been seen as moving traditional guardianship law toward supported decision-making, insofar as it differs significantly from formulations like “taking the person’s wishes and desires into consideration.” *Changing Paradigms*, *supra* note 49, at 139, n.207.

<sup>167</sup> THE GUARDIANSHIP CLINIC, BENJAMIN N. CARDOZO SCHOOL OF LAW, GUARDIANSHIP IN NEW YORK: DEVELOPING AN AGENDA FOR CHANGE, REPORT OF THE CARDOZO SCHOOL OF LAW CONFERENCE 4 (2012), available at <http://www.cardozo.yu.edu/sites/default/files/GuardianshipReport.pdf>, archived at <http://perma.cc/UXL6-3WEM>. Although the conference focused on Art. 81, the Report notes that “some of the recommendations bear on Article 17-A guardianships as well.” *Id.*

ommendation 4 was to “Promote Alternatives to Guardianship and Create a Guardianship Diversion Program.” The group assigned to this issue noted, “Guardianship is a last resort. Yet, there was widespread recognition that guardians are sometimes appointed when less restrictive alternatives would address unmet needs.”<sup>168</sup>

Other relevant recommendations included “Screen All Potential Guardians Up-Front” (Recommendation 10); “Evaluate Guardianships Regularly to Determine if They Should Be Terminated” (Recommendation 7); and, creating a segue to the other lens through which 17-A might be re-thought, “Explore Replacing Guardianship with Supported Decision-Making Models” (Recommendation 5).<sup>169</sup>

#### *B. Other State Statutes On Guardianship for PWIDDs*

There is one additional area that might be profitably explored in a traditional, due process-based reconsideration of 17-A, that of the few other states that have statutes dealing separately with guardianship for this population (California, Connecticut, Idaho and Michigan).<sup>170</sup> Those statutes all require specific attention to the individual’s functional limitations rather than her or his diagnosis, seek to authorize only the most limited form of guardianship sufficient to address otherwise current needs,<sup>171</sup> and obligate the guardian to seek support to develop and maximize the individual’s functioning.<sup>172</sup>

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<sup>168</sup> *Id.* at 7.

<sup>169</sup> Interestingly, the group that developed this recommendation also proposed “developing a lawsuit to challenge the validity of Article 17-A guardianships, which have been widely recognized as not comporting with all the due process and rights-based principle incorporated in Article 81.”

<sup>170</sup> CAL. PROB. CODE §§ 1801, 1821-23, 1828.5, 1830, 1850.5, 1860.5, 1872, 1890-91, 1952 (West 2014); CONN. GEN. STAT. §§ 45a-669 to -684 (2015); IDAHO CODE ANN. §§ 15-5-301 to -318 (West 2014); KY. REV. STAT. ANN. §§ 387.500-.800 (2014); MICH. COMP. LAWS ANN. §§330.1600 -1644 (West 2014) (guardianship for the developmentally disabled).

<sup>171</sup> For example, the California statute permits the appointing court to allow the person for whom limited conservatorship (guardianship) is sought, to “enter into transactions . . . as may be appropriate in the circumstances of the particular conservatee.” CAL. PROB. CODE § 1873 (West 2014). The Law Revision Comments on this section explain: “The court might, for example, permit the conservatee to enter into specific types of transactions or transactions not exceeding specified amounts (such as contracts not in excess of \$500).” *Id.*

<sup>172</sup> For example, closely adhering to the constitutional requirement of least restrictive means, the California statute (which uses the term “conservator” rather than guardian) provides:

A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well

The California statutory scheme is particularly strong in its provisions for independent fact gathering, both for the initial determination as to whether a conservator or guardian should be appointed<sup>173</sup> and, in contradistinction to Art. 81,<sup>174</sup> whether there is a basis for continuing the conservatorship. The appointing court is mandated to review the “appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee’s placement; quality of care, including physical and mental treatment; and finances” six months after the initial appointment, one year later, “and annually thereafter.”<sup>175</sup> The court is, therefore, actively engaged not only in ensuring the conservatee’s well being, but in determining whether changes have occurred such that a conservatorship is no longer the

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being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual’s proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

*Id.* § 1801. Similarly, Michigan provides:

(1) Guardianship for individuals with developmental disability shall be utilized only as is necessary to promote and protect the well-being of the individual, including protection from neglect, exploitation, and abuse; shall take into account the individual’s abilities; shall be designed to encourage the development of maximum self-reliance and independence in the individual; and shall be ordered only to the extent necessitated by the individual’s actual mental and adaptive limitations.

(2) If the court determines that some form of guardianship is necessary, partial guardianship is the preferred form of guardianship for an individual with a developmental disability.

MICH. COMP. LAWS ANN. § 330.1602 (West 2014).

<sup>173</sup> When a petition for limited conservatorship is filed, the person for whom the conservatorship is sought is, if s/he consents, to be examined by a regional center in accordance with Cal. Prob. Code § 1827.5; if the conservatee withholds the consent to be assessed by the regional center, the court shall determine the reason for such withholding. *Id.* § 1828.5(a)(5).

<sup>174</sup> While under Art. 81’s reporting requirements, the guardian is supposed to advise whether the guardianship should continue, the court, through the court examiner, has only the guardian’s word, which may or may not accurately describe the situation.

<sup>175</sup> CAL. PROB. CODE §§ 1850(a)(1)-(2). The court may set any subsequent review at two years, but if it does so, in the interim, a court examiner must make an investigation including an unannounced visit to the conservatee, and file a report as to whether, *inter alia*, “the conservatorship still appears to be warranted.” *Id.* § 1850(a)(2).

least restrictive alternative, and that it should be terminated or modified.

Significantly, the independent court investigator is required to inform the conservatee of her or his right to petition for termination of the conservatorship and to determine whether she or he wishes to do so.<sup>176</sup> The investigator is also required to issue a report, prior to the court's review, as to "whether the present condition of the conservatee is such that the terms of the [appointing] order should be modified or the order revoked."<sup>177</sup>

Michigan takes a somewhat different approach to ensuring that continuation of a guardianship remains the least restrictive means. In addition to a requirement that the appointing court verbally inform the PWID of his or her "right . . . to request at a later date his or her guardian's dismissal or a modification of the guardianship order," the person for whom a guardian has been appointed is also entitled to "a written statement . . . indicating his or her rights pursuant to [the section on termination and modification] and specifying the procedures to be followed in petitioning the court."<sup>178</sup>

The burden to initiate termination however, is not, however, left solely to the person under guardianship or those acting on her or his behalf. By statute, all guardianships of PWIDDS are limited to five years;<sup>179</sup> if the guardianship is to continue, a new petition for guardianship has to be filed, and a hearing held, with all the attendant due process protections, including the imposition of a burden of proof by clear and convincing evidence<sup>180</sup> on the proponent of the guardianship.<sup>181</sup> And, it should be noted, when guardianship—or renewal of guardianship—is sought, Michigan offers another protection to the PWID, the right to assigned counsel paid for by the state.<sup>182</sup> Despite all the protections contained the Michigan statute, one of its authors, Dohn Hoyle, Executive Director of The Association for Retarded Children (ARC) Michigan, notes the inconsistency of its application, and is, instead, strongly advocating

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<sup>176</sup> CAL. PROB. CODE § 1851(a).

<sup>177</sup> *Id.* For a more extensive description and discussion of the California statute, see Melinda Hunsaker, *Limited Conservatorships: A Delicate Balance*, 50 ORANGE CNTY. LAWYER 26 (2008).

<sup>178</sup> MICH. COMP. LAWS § 330.1634.

<sup>179</sup> *Id.* § 330.1626(2).

<sup>180</sup> Like California, and Art. 81, Michigan imposes this enhanced burden of proof. MICH. COMP. LAWS § 330.1618(4).

<sup>181</sup> MICH. COMP. L. SERV. § 330.1626(3).

<sup>182</sup> *Id.* § 330.1615.

for a human rights based supportive decision-making regime.<sup>183</sup>

The guardianship/conservatorship statutes of other states that deal specifically with PWIDDs should thus be instructive and valuable in any rethinking of 17-A, especially insofar as they provide, in muscular fashion, either through mandatory periodic review or time-limited guardianship, that the twin imperatives of least restrictive means and the protection and well being of the person under guardianship are being met.

### C. *The Human Rights Lens*

Passage of the CRDP, and its ratification by more than 120 nations, has spurred a movement away from traditional guardianship and substituted decision-making, to a new model of autonomy and self-determination, based on supported decision-making.<sup>184</sup> The movement has, necessarily, involved two separate projects: one to collect existing models of supported decision-making and to plan and create pilot projects around the world; and, second, to develop and propose new legislation consistent with Article 12 and premised in the human right of legal capacity.<sup>185</sup> These efforts are useful in understanding supported decision-making and in imagining how it might be incorporated in New York law grounded in a human rights model.<sup>186</sup>

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<sup>183</sup> DOHN HOYLE, THE ARC MICHIGAN, RETHINKING GUARDIANSHIP, n.d., <http://www.arcmi.org/pdf/Rethinking%20Guardianship%20MAF%20-%20Michigan.pdf> (last visited Apr. 15, 2015), *archived at* <http://perma.cc/BRC6-VLHC>; *See also* personal communication with Dohn Hoyle, on file with author.

<sup>184</sup> As Professor Arlene Kanter has written: “Instead of paternalistic guardianship laws, which substitute a guardian decision for the decision of the individual, the CRPD’s supported decision-making model recognizes first, that all people have the right to make decisions and choices about their own lives.” Arlene Kanter, *The United Nations Convention on the Rights of Persons With Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U.L. REV. 527, 563 (2009); *see also*, Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (Winter 2012).

<sup>185</sup> For an example of a planning process to bring a State Party’s laws into compliance with Article 12, see Elizabeth Kumandia, The Kenya National Commission on Human Rights and the Open Society Initiative for Eastern Africa, *How to Implement Article 12 of the Convention on the Rights of Persons With Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper* (June 2013), *available at* <http://www.knchr.org/portals/o/group/rightsreports/briefing%20on%20legal%20capacity-disability%rights.pdf>.

<sup>186</sup> The two leading theorists of Canadian law reform on legal capacity, Michael Bach and Lana Kerzner, have suggested three main kinds of supports that could or should be provided for decision-making consistent with Art. 12: supports to assist in formulating one’s purpose; supports to explore the range of choices and make a decision; supports to engage in the decision-making process with other parties to make agreements where one’s decision requires this; and supports to act on the decision

It is important, however, first to understand the concept of supported decision-making, and the various models it may take. Quite simply, it begins with an understanding that no one makes decisions, especially important decisions like where to live, whether to have a particular medical treatment, or who to marry, entirely alone, or in a vacuum. Ordinary citizens seek information from others, consult, and solicit opinions. PWIDDS similarly utilize support in making choices and decisions, but because of their disabilities, may require different kinds, and a greater degree of support—to have information made available to them in a way they understand, to consider and weigh consequences, and, for PWIDDS with communicative disabilities, to make their wishes known.<sup>187</sup>

As the Committee on the Rights of Persons With Disabilities notes in the first General Comment:

Support is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self advocacy support, or assistance with communication).

The Comment also notes that:

For many persons with disabilities, the ability to plan in advance is an important form of support . . . A choice of various forms of advance planning mechanisms can be provided . . . but all options should be non-discriminating. Support should be provided to an individual where desired to complete an advanced planning document.<sup>188</sup>

Support systems also can, and quite frequently do, grow quite

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one has made, and to meet one's obligations, under any agreement made for that purpose. Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Oct. 2010), available at <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>, archived at <http://perma.cc/M53F-U8RL>.

<sup>187</sup> The First General Comment notes that “[s]upport can . . . constitute the development and recognition of diverse, non-conventional means of communication, especially for those who use non-verbal forms of communication to express their will and preference.” No.1 at ¶17. General Comment, *supra* note 58. For a discussion of a variety of forms of supported decision-making and a call for more research in the area, see Nina A. Kohn, Jeremy A. Blumental, & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. ST. L. REV. 1111, 1121-25 (2013).

<sup>188</sup> The significance of the “non-discriminating” and “support” language with respect to advanced planning requires moving away from traditional requirements of “mental capacity” necessary for, e.g., creating a valid power of attorney or healthcare directive, using, if necessary, supports to make an individual’s “will and preference” known. This, together with a “trusting relationship,” is the basis for representation



informally, in ways that may eliminate<sup>189</sup> or limit the need for guardianship.<sup>190</sup> The now well-publicized story of Jenny Hatch demonstrates how a young Virginia woman with Down Syndrome lived safely and successfully in the community with a support network of friends, co-workers and service providers for twenty-seven years. An accident that caused her mother and stepfather to bring a guardianship proceeding resulted in the denial of her right to choose where and with whom to live, her job, and contact with her friends and supporters. Fortunately, her plight came to the attention of Quality Trust, an advocacy organization in D.C. which, in a six-day trial, with expert witnesses, persuaded a Virginia judge to remove her parents, and appoint as guardian, for one year only, two of her supporters, to work with her on supported decision-making.<sup>191</sup> Happily, Jenny's guardianship was entirely terminated in August, 2014.<sup>192</sup> As a result of the publicity around Jenny's story, Quality Trust has created the Jenny Hatch Justice Project, which collects and disseminates information about supported decision-making.

One model of supported decision-making, pioneered in British Columbia Canada, involves "representation agreements" by which a PWIDD names one or more persons to assist her or him in making particular kinds of decisions.<sup>193</sup> The support persons do not make decisions *for* the PWIDD, and if there is disagreement, the PWIDD's choice prevails. The PWIDD may also cancel the agreement at will. For this model to work, however, that is to afford

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agreements under British Columbia law. Representation Agreement Act, R.S.B.C. Ch. 405 (1996).

<sup>189</sup> *In re Dameris L.*, 38 Misc.3d 570 (Sur. Ct. N.Y. Cnty. 2012), the court terminated a 17-a guardianship on a finding that a support network had grown up around the person under guardianship such that she was able—with their support—to make her own decisions, and so no longer required a guardian.

<sup>190</sup> *See, e.g.*, the story of a Texas woman with Down Syndrome whose support network convinced a judge to replace her state agency guardian with her supporter/foster care provider, in anticipation of terminating the guardianship completely. Robin Thorner, *Challenging Guardianship and Pressing for Supported Decision-Making for Individuals With Disabilities*, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW (Jan. 7, 2014), <http://stage.povertylaw.org/content/challenging-guardianship-and-pressing-supported-decision-making-individuals-disabilities>.

<sup>191</sup> Materials and press about Jenny's story are available at <http://www.jennyhatchjusticeproject.org/trial>, archived at <http://perma.cc/93GJ-2GB4>.

<sup>192</sup> Don Dahler, *Woman with Down Syndrome Becomes Icon for Disabled*, CBSNEWS.COM (Nov. 30, 2013), <http://www.cbsnews.com/news/woman-with-down-syndrome-becomes-icon-for-disabled/>.

<sup>193</sup> Different people, or groups of people might be chosen for different kinds of decisions, like financial, residential, healthcare, etc. R.S.B.C. 1996 Chapter 405, Part 2.

the PSWIDD her or his right to have her or his decisions acted upon, third parties, like financial institutions, healthcare providers, landlords, etc. have to be willing—or required—to recognize those decisions; this is where legislation is necessary to facilitate and enforce supported decision-making.

While all of this may seem Utopian, there are at least partial models in existence in Canada and several European countries.<sup>194</sup> Thoughtfully planned pilot projects have been successful in Bulgaria<sup>195</sup> and Australia.<sup>196</sup> Similarly, there is proposed legislation,<sup>197</sup> a set of principles for legislation,<sup>198</sup> and actually enacted legisla-

<sup>194</sup> See, e.g., *Changing Paradigms*, *supra* note 49, at 140-52 for a discussion of Sweden, Germany, and several provinces in Canada (British Columbia, Manitoba, Yukon, and Alberta).

<sup>195</sup> For materials on this project, which was funded by the Open Society Foundation, see Bulgarian Ctr. For Not-For-Profit Law, <http://www.bcnl.org/en/nav/40-analyses.html>, archived at <http://perma.cc/JN7T-JTAE>. It is particularly inspiring as it involved a number of PWIDDs who had long been institutionalized in Bulgaria's horrendous "hospitals" and who, with the aid of support, are now living and functioning successfully in the community.

<sup>196</sup> Margaret Walker, *Evaluation of the Supported Decision-Making Project*, Office of the Public Advocate (South Australia) (Muirgen Nominees Pty. Ltd., 2012), available at [http://www.opa.sa.gov.au/files/batch1376447055\\_final\\_supported\\_decision\\_making\\_evaluation.pdf](http://www.opa.sa.gov.au/files/batch1376447055_final_supported_decision_making_evaluation.pdf).

<sup>197</sup> A multi-year effort in Canada has produced a detailed legislation proposal, for the Law Commission of Ontario, Bach & Kerzner, *supra* note 186; see *Policy Document Submitted to Justice Aims to Aid People with Intellectual Disabilities*, Nfld. ASS'N OF CMty. LIVING, <http://www.nlacl.ca/news/article/getting-power-make-decisions-policy-document-submi>. See Shih-Ning Then, *Evaluation and Innovation in Guardianship Laws: Assisted Decision-Making*, 35 SYDNEY L. REV. 133 (2013), for an extensive discussion of proposals for legislative reform in Australia.

<sup>198</sup> E.g., Ctr. of Disability Law and Policy, *Essential Principles: Irish Legal Capacity Law*, NAT'L UNIV. OF IRELAND GALWAY (Apr. 2012), available at [http://www.nuigalway.ie/cdlp/documents/principles\\_web.pdf](http://www.nuigalway.ie/cdlp/documents/principles_web.pdf) (the National University of Ireland Galway Center of Disability Law and Policy created a "Principles and Key Issues for Capacity Legislation" after a year of extensive consultation with stakeholders). Its principles and key issues include:

The law must protect people's rights to make decisions about all aspects of their lives . . . [for example] healthcare, finances, relationships and where and with whom to live.

People who need support to make decisions have a right to be provided with that support by the state, e.g. advocate supports should be recognized and assist the person in understanding options and expressing their "will and preference."

Reasonable accommodation should be made to help the person understand the decision. Different ways of providing information must be explored (including sign language, alternative communication, flexibility with regard to time and location for delivering information . . . , etc.). There should be a range of advocacy supports including state-appointed advocates with statutory powers, as well as other forms of individual advocacy (e.g., citizen advocacy, peer advocacy, self-advocacy support).

Decisions made by someone else is [are] a last resort when all supports

tion<sup>199</sup> that incorporates supported decision-making to a greater or lesser degree.

Work on supported decision-making, legal capacity and guardianship is not only international, it is very much alive and thriving in the U.S.<sup>200</sup> and in New York.<sup>201</sup> In 2012, the A.B.A. Commissions on Disability Rights (CDR) and on Law and Aging (COLA) sponsored an invitational, interdisciplinary Roundtable, *Beyond Guardianship: Supported Decision-Making by Persons with Intellectual Disabilities*, funded in part by the New York Community Trust.<sup>202</sup> The Roundtable noted the need for a central body to collect information and best practices on supported decision-making, and to do policy advocacy and strategy around legislative reform.<sup>203</sup>

In May 2014, the U.S. Administration for Community Living (ACL)<sup>204</sup> announced a five-year grant to create a Supported Deci-

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have been considered (facilitated decision-making). It should only apply for specific decisions and for the length of time necessary for that purpose.

See, e.g., *Czech Republic Enacts Legal Capacity Law Reform*

<sup>199</sup> See Eilionoir Flynn and Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction or Fantasy*, 32 BERKELY J. INT'L L. 134, 144-146 (2014) (discussing legislation adopted or proposed in countries including Canada, India, and Ireland); see also *Legal Capacity in Europe: A call to Action to Governments and to the EU*, MENTAL DISABILITY ADVOCACY CTR. (2013), available at [http://mdac.info/sites/mdac.info/files/legal\\_capacity\\_in\\_europe.pdf](http://mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf), for a discussion of the legislation in Czechoslovak Republic that has abolished plenary guardianship and introduced alternatives to guardianship such as supported decision-making.

<sup>200</sup> See CTR. FOR PUB. REPRESENTATION, <http://www.centerforpublicrep.org/litigation-and-major-cases/supported-decision-making> (last visited Mar. 6, 2015), for information about the first planned pilot project on supported decision-making that is currently underway in Northampton, Mass., as a joint venture between the Center for Public Representation and Nonotuck Resource Associates. See, e.g., *Czech Republic Enacts Legal Capacity Law Reform* (Feb. 12, 2012), available at [www.mdac.org/en/news/czech-republic-enacts-legal-capacity-law-reform](http://www.mdac.org/en/news/czech-republic-enacts-legal-capacity-law-reform), archived at <http://perma.cc/V8S4-QTGM> (“[N]ew law introduced support [for] decision-making as an alternative to the guardianship system.”).

<sup>201</sup> New York State’s new P&A, Disability Rights New York, is proposing a pilot project on supported decision-making as well as a project on restoration of rights (utilizing supported decision-making) for persons currently under 17-A guardianships (on file with author). Disability Rights New York, the Protection and Advocacy organization for New York State, with the Developmental Disability Planning Council, will be funding a three-to-five year pilot program on supported decision-making.

<sup>202</sup> See *Beyond Guardianship: Supported Decision-Making by Individuals with Intellectual Disabilities: A Short Summary from the 2012 National Roundtable*, AM. BAR ASS’N, [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/SDMRoundtable\\_Summary.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/SDMRoundtable_Summary.authcheckdam.pdf), archived at <http://perma.cc/XV2L-Y6SY> (last visited Apr. 15, 2015).

<sup>203</sup> *Id.*

<sup>204</sup> ACL is a newly created body within the U.S. Department of Health and Human Services that incorporates the Administration on Intellectual and Development Disabilities (AIDD) and the Administration on Aging (AOA).

sion Making Technical Assistance and Resource Center. According to ACL, “[s]upported decision making is a process that provides individuals, including older adults and people with I/DD assistance to understand the situations and choices they face, so they can make decisions for themselves. The process is an alternative to and an evolution from guardianship.”<sup>205</sup> Specifically citing and embracing the CRPD and Article 12, ACL continues:

By declaring “legal capacity” for all people, the CRPD separates a person’s cognitive and communicative abilities from this basic right. In other words, all people, regardless of their disability or cognitive abilities have the right to make decisions and have those decisions implemented. These concepts have helped inform and frame the conversation around developing the supported decision-making process.<sup>206</sup>

The purpose of the Center on Supported Decision Making is to:

[D]ocument and disseminate successful decision-making practices; conduct research to fill data and information gaps; develop training materials and provide technical assistance to ACL networks on SDM issues, including youth transition; develop a strategy that measures and demonstrates the impact of supported decision-making on the lives of people with I/DD and older Americans; design and commence implementation of a small grants demonstration program that awards funding to four to seven community organizations . . .; and develop a clearinghouse of existing materials and resources, academic work and practices, success stories, and newly-developed research and training materials, to be made available to the general public.”<sup>207</sup>

In August 2014, the grant was awarded to a consortium headed by Quality Trust, the entity responsible for Jenny Hatch case,<sup>208</sup> and including the Autistic Self Advocacy Network (ASAN).<sup>209</sup> Now up and running, the Center has become a major resource for information about supported decision-making and an

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<sup>205</sup> Dep’t of Health & Human Serv. Admin. for Cmty. Living, *Supported Decision Making*, HHS-2014-ACL-AIDD-DM-0084, 6 (2014), available at <http://www.grants.gov/web/grants/view-opportunity.html?oppId=256168> (last visited Apr. 15, 2015), archived at <http://perma.cc/4AQV-A2XF>.

<sup>206</sup> *Id.* at 7.

<sup>207</sup> *Id.* at 1.

<sup>208</sup> See *infra* p. 59.

<sup>209</sup> Admin. for Cmty. Living, *Preserving the Right to Self-Determination: Supported Decision-Making*, ACL Blog (Jan. 29, 2015), [http://www.acl.gov/NewsRoom/blog/2015/2015\\_01\\_28.aspx](http://www.acl.gov/NewsRoom/blog/2015/2015_01_28.aspx), archived at <http://perma.cc/VM22-A8X3>.

instigator of legislative reform from a human rights perspective.<sup>210</sup>

There are a variety of other U.S.-based resources for re-consideration of 17-A in light of the CRPD, including materials developed by Michigan ARC,<sup>211</sup> a well planned restoration of rights project incorporating supported decision-making, now in its second year in Florida,<sup>212</sup> and efforts toward legislative reform including those in Texas and Virginia.<sup>213</sup> And, as a superb starting point, ASAN has drafted model legislation, dealing with one area of decision-making and avoiding the need for guardianship.<sup>214</sup>

## VI. FINAL THOUGHTS

The Committee notes an “intermediate” approach that will be proposed in the Uniform Law Commissioners’ forthcoming reconsideration of the UGGPA.<sup>215</sup> Drawing in part on the New York Surrogate’s Court decision in *In re Dameris L.*,<sup>216</sup> the existing UGPPA would be amended to specifically include supported decision-making as an alternative that must be attempted before guardianship may be considered or imposed.

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<sup>210</sup> See the impressive collection of materials at [www.supporteddecisionmaking.org/research\\_library](http://www.supporteddecisionmaking.org/research_library).

<sup>211</sup> HOYLE, *supra* note 183.

<sup>212</sup> *Restoration of Capacity Study and Work Group Report*, FLORIDA DEVELOPMENTAL DISABILITIES COUNCIL, (Feb. 28, 2014), available at [http://www.guardianship.org/IRL/Resources/Handouts/Charting%20a%20New%20Course\\_Restoration%20Report.pdf](http://www.guardianship.org/IRL/Resources/Handouts/Charting%20a%20New%20Course_Restoration%20Report.pdf). This project is sponsored by H.H.S., AIDD and the Florida Development Disabilities Council, Inc., with significant input from the Florida judiciary.

<sup>213</sup> Guardianship Reform and Supported Decision Making Group Relating to a Supported Decision-Making Agreement: A Policy Paper in Bill Format (2014) (on file with committees). See Peter Blanck & Jonathan G. Martinis, “The Right to Make Choices”: *The National Resource Center for Supported Decision-Making*, 3 Inclusion 24-33 (2015), available at [http://bbi.syr.edu/publications/2015/SDM\\_Overview.pdf](http://bbi.syr.edu/publications/2015/SDM_Overview.pdf), archived at <http://perma.cc/4NS3-M9PF>.

<sup>214</sup> *Model Legislation: An Act Relating to the Recognition of a Supported Health Care Decision-Making Agreement for Adults With Disabilities*, AUTISTIC SELF ADVOCACY NETWORK (2014), <http://autisticadvocacy.org/wp-content/uploads/2014/07/ASAN-Supported-Decisionmaking-Model-Legislature.pdf>.

<sup>215</sup> *Perils of Guardianships*, *supra* note 55. See English, *supra* note 165.

<sup>216</sup> *In re Dameris L.*, 38 Misc.3d 570, 580 (Sur. Ct. N.Y. Cnty. 2012), the Court wrote:

The internationally recognized right of legal capacity through supported decision making can and should inform our understanding and application of the constitutional imperative of least restrictive alternative. That is, to avoid a finding of unconstitutionality, N.Y. Sur. Ct. Proc. Act. § 17-A must be read to require that supported decision making must be explored and exhausted before guardianship can be imposed or, to put it another way, where a person with an intellectual disability has the ‘other resource’ of decision making support, that resource/network constitutes the least restrictive alternative, precluding the imposition of a legal guardian.

While not endorsing any particular approach or proposing specific provisions in a rethinking of 17-A, the Committee embraces one imperative of the CRPD,<sup>217</sup> the ACL proposal and new National Center on Supported Decision-Making, and the decades long disability rights movement—that the conversation must prominently include PWIDDS. While lawyers, judges, providers, parents and siblings, and academics all have important contributions to make, the Committee urges meaningful inclusion of PWIDDS in accordance with the slogan they brought to the U.N. working group on the CRDP, and which has informed the work of self-advocates for decades,<sup>218</sup> “Nothing about us without us.” And, as the discussion of language demonstrates, any reform effort must pay serious attention to the necessity of “person-centered” terminology that respects and enhances dignity.

It should also be noted that guardianship, or any legally sanctioned form of substituted decision-making, is never entirely beneficial. It is, therefore, important to consider the “downsides” of guardianship for a PWIDDS. As one commentator has noted:

This loss of decision-making rights deprives individuals with disabilities of numerous opportunities to participate in daily community life. For example, individuals under guardianship may not be able to bank, shop, apply for jobs, or seek routine health care without the participation and consent of the guardian. This lack of autonomy can cause individuals under guardianship to withdraw from community life and become disengaged from management of their own affairs. Thus, disengaged, they also lose opportunities to practice previously acquired decision-making skills or build new ones.<sup>219</sup>

Whatever lens is employed, there must be concern for, and provision to protect decision-making, whether for or by (with supports) PWIDDS, against abuse<sup>220</sup> and/or exploitation.<sup>221</sup> Although the motivating principle of 17-A is the protection of vulnerable persons, the existing statutory scheme is entirely devoid of any mecha-

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<sup>217</sup> CRPD, *supra* note 51, at §4(3). The CRPD requires that PWID’s be actively engaged and included in its implementation.

<sup>218</sup> For a general history of disability rights activism incorporating this principle, see JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (2000).

<sup>219</sup> Samantha Alexandra Crane, *Is Guardianship Reform Enough? Next Steps in Policy Reforms to Promote Self-Determination Among People With Disabilities*, *INTERNAT’L J. OF LAW & AGING* \_\_\_\_ (2014) (forthcoming) (citing Kohn, *supra* note 188, at 1119 n.27).

<sup>220</sup> Potential abuse could be physical, sexual, or emotional.

<sup>221</sup> Exploitation primarily, but not exclusively, applies to guardians (or supporters) over financial matters.

nisms to provide oversight or to ensure against abuse.<sup>222</sup>

Article 81 relies on court supervision, through an extensive reporting and review system—on paper—that may or may not be working, especially in a period of shrinking court budgets and competition for resources.<sup>223</sup> But that system, even at its best, has serious issues in terms of any real certainty about the protection of those whose rights have been taken away and conferred on third parties, giving them the power to act in ways that should be beneficial, but may also be detrimental, to the needs of persons under guardianship.

First, obviously, the system relies entirely on what guardians report, with no provision for independent verification. Second, the use of paid court examiners, whose compensation depends on the size of the estate of the person under guardianship being reviewed, raises serious equity issues. There is no necessary correlation between the needs or vulnerability to abuse of a person with substantial financial resources and a frail elderly person on SSI living in the community—or a nursing home—yet the funds available for review vary tremendously.<sup>224</sup> Finally, court examiners are chosen almost entirely for their ability to review reports of property guardians, and are not screened for (nor do most possess) any expertise in the issues relevant to evaluating guardians of the person, like rehabilitation services, appropriate medication, community services that enhance inclusion and participation, government benefits availability, etc.

These defects of Art. 81's monitoring system were pointed out in a Report of this Association more than two decades ago,<sup>225</sup> but since that time virtually nothing has changed. That is, any hopes that grafting the "protective provisions" of Art. 81 onto a replace-

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<sup>222</sup> As previously noted, there is absolutely no requirement that a 17-A guardian of the person ever report to the court—or anyone else—once the appointment is made. And, without reporting, there can be no oversight.

<sup>223</sup> The statute was described as "revenue neutral" in order to secure its passage, and has never provided any additional resources for court supervision. Although the primary responsibility for review falls on external court examiners, it is the court's responsibility both to supervise them and then to review and act on their reports.

<sup>224</sup> The incapacitated person ("IP") shall pay for the examination of initial and annual reports if her/his estate amounts to \$5,000 or more; or otherwise, the expenses is paid out of court funds. MENTAL HYG. LAW § 81.32(f). When the court appoints a counsel and/or referee for the purpose of protecting the IP's interest and assessing the immediate and final reports, the court has discretion to determine the compensation for the counsel and referee. *Id.* § 81.33(e).

<sup>225</sup> The Comm. on the Legal Problems of the Aging, *Guardianship Monitoring in the Supreme Court*, 49 REC. ASS'N B. CITY N.Y 604 (1994).

ment for 17-A would provide meaningful protection against abuse, neglect or exploitation are naïve at best, and dishonest at worst.

The human rights lens explicitly calls for protection against abuse and exploitation; drawing directly on provisions of the CRPD. Article 12 requires:

States Parties all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measure relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.<sup>226</sup>

Article 16 provides, with more explicit obligations, for "Freedom From Exploitation, Violence and Abuse."<sup>227</sup> Legislative proposals to replace substituted decision-making<sup>228</sup> with supported decision-making and existing models incorporate provisions for protection, generally focusing on the use of "monitors"<sup>229</sup> but many questions

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<sup>226</sup> U.N. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Article 12, § 4, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), *available at* <http://www.un.org/esa/socdev/enable/documents/tccconve.pdf>.

<sup>227</sup> *Id.* Article 16, §§ 2, 3, 5, naming three types of measures which States Parties are required to undertake to ensure assistance and support for persons with disabilities, their families and caregivers, including information and education on how to avoid, recognize and report instances of exploitation, violence and abuse, to ensure effective monitoring by independent authorities, and to put in place effective legislation and policies to ensure that instances of exploitation, violence and abuse are identified, investigated and, where appropriate, prosecuted.

<sup>228</sup> As two leading proponents of supported decision-making have written:

The key difference between safeguards for support model and those which have existed in substitute decision-making regimes is that safeguards for support are based on the core principle of respect for the individual's will and preferences, no matter what level of decision-making ability she holds. For example, in a support model there must be an adjudication mechanism for challenging support people if they fail to respect the will and preference of the individual. In contrast, adjudication in most current substituted decision-making regimes focuses on "protecting" the individual and discovering what is in her "best interest," with little importance placed on her will and preference.

Flynn and Arstein-Kerslake, *supra* note 199, at 152.

<sup>229</sup> *Statutory Framework for the Right to Legal Capacity and Supported Decision-Making*, THE CANADIAN ASS'N FOR CMTY. LIVING (Draft 2012), *cited in The Roundtable Briefing*, AM. BAR ASS'N, 20 (Oct. 18, 2012), [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/Roundtable\\_brief\\_10182012.authcheck](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Roundtable_brief_10182012.authcheck)



remain. Among them:

To what extent, and how, will there be qualifications, standards and screening for those serving in either a supportive or substituted decision-making role, including identifying and avoiding existing and/or potential conflicts of interest?

In addition to, or in lieu of a required reporting system, should there be a system of routine or targeted checks to ensure against abuse by guardians or persons serving as supporters? What entity would conduct such checks and how? Who would pay for it?

How can PWIDDs have meaningful access to the court system to challenge abusive practices or to end unnecessary restrictions on their autonomy?

## VII. CONCLUSION

SCPA 17-A, as it currently exists, discriminates against persons with intellectual and developmental disabilities, denies procedural and substantive due process to those for whom guardianship is sought, and over whom guardianship is imposed, fails to honor or promote autonomy, self-determination and dignity, and fails to protect persons under guardianship from abuse, neglect and exploitation. The compelling need to address these issues, first raised almost a quarter of a century ago, should be delayed no longer.

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dam.pdf. It provides perhaps the most well-considered approach to protection from abuse in its concept of designated “monitors.” It states:

Given that some people are at higher risk of neglect and abuse because of the nature of their disability, isolation, or other factors, some provision should be in place to enable ‘monitors’ of supported decision-making and representative decision-making arrangements to be appointed. An appointment should be made only on request by an adult, supporter, representative or where there are reasonable grounds to indicate that this safeguard is required to ensure the decision-making process with and around the adult maintains integrity . . . . A monitor would be independent and act to ensure supporters and representatives are fulfilling their statutory obligations.



# **“I DON’T REALLY SLEEP”<sup>1</sup>: STREET-BASED SEX WORK, PUBLIC HOUSING RIGHTS, AND HARM REDUCTION**

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<sup>1</sup> JUHU THUKRAL & MELISSA DITMORE, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY, SEX WORKERS PROJECT 62 (2003), *available at* <http://sexworkersproject.org/downloads/RevolvingDoor.pdf>, *archived at* <http://perma.cc/DKL9-4538> (“Michelle said ‘I really don’t sleep’ because she has no place to go to sleep.”).

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*“It’s killing me, the room, you know, the atmosphere I’m not used to, the whole situation. It makes a lot of issues with my use, you know, continuing on going, because of the depression, the endless sleepless nights, the slamming doors, the people who just . . . .”*

—Dorothy, street-based sex worker discussing living in a shelter<sup>2</sup>

## I. INTRODUCTION

When discussing the rights of sex workers in New York City, the resounding sentiment of lawmakers and community groups is “not in my neighborhood!” However, for street-based sex workers, a question proposed by advocates is: where are sex workers living in poverty supposed to find housing? In scholarship about sex work within New York City, many authorities discuss decriminalization of prostitution, drug use among sex workers, and increased HIV rates. However, there is little discussion about sex workers and housing even though housing is essential for survival. This is especially true in a city where there is a 0.95% vacancy rate for public housing<sup>3</sup> and the price of the average private studio apartment in Harlem exceeds \$1,500 dollars per month.<sup>4</sup> While the number of homeless people in municipal shelters in New York City is at an all time high, more than 52,000 people,<sup>5</sup> public housing authorities and

<sup>2</sup> *Id.* at 31 (“Dorothy elaborated on the conditions that create a difficult environment in which an individual can experience great stresses while trying to confront her own substance dependency, because drugs were pervasive in the shelter.”).

<sup>3</sup> *About NYCHA Fact Sheet*, N.Y.C. HOUS. AUTH., <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (last updated Apr. 1, 2014), *archived at* <http://permacc/CPG6-4L66>.

<sup>4</sup> MANHATTAN MARKET RENTAL REPORT FEBRUARY 2015, MNS REAL IMPACT REAL ESTATE (Feb. 2015), *available at* [http://www.mns.com/pdf/manhattan\\_market\\_report\\_feb\\_15.pdf](http://www.mns.com/pdf/manhattan_market_report_feb_15.pdf), *archived at* <http://permacc/4DV8-G59P>. Harlem historically has been a source of affordable housing for Black communities, immigrants, and other marginalized communities. In recent years, Harlem has been experiencing a shift that has many concerned about gentrification of the area. For further discussion, *see* HARLEM HERITAGE TOURS, <http://www.harlemheritage.com/history-of-harlem/> (last visited Apr. 1, 2015), *archived at* <http://permacc/JH7Z-P8PJ>.

<sup>5</sup> *Number of Homeless People in NYC Shelters Each Night*, COAL. FOR THE HOMELESS, <http://www.coalitionforthehomeless.org/pages/basic-facts-about-homelessness-new-york-city-data-and-charts> (last visited Mar. 24, 2015), *archived at* <http://permacc/7WP5-U92X>.

lawmakers currently enact strict regulations to push sex workers into overcrowded shelters, onto the streets, and further from safer housing environments.<sup>6</sup>

In New York City, sex work is the source of income or survival for an indeterminate number of individuals whose work is street-based or who work in indoor environments.<sup>7</sup> Street-based sex work "means that the initial transaction occurs in a public place (sidewalk, park, truck stop). The sex act takes place in either a public or private setting (alley, car, park, hotel, etc.)."<sup>8</sup> Although it is difficult to determine how many women, men, gender non-conforming, and trans\* individuals are part of this population, the New York Police Department ("NYPD") makes around 2,700 arrests annually for "prostitution" and "loitering for purposes of prostitution" city-wide.<sup>9</sup> A 2002 study of thirty street-based sex workers in New York City conducted by the Sex Workers Project revealed the issues that sex workers faced obtaining housing, elaborated on the experiences of those who perform street-based prostitution activities, and emphasized the impact of law enforcement approaches.<sup>10</sup>

The report concluded that twenty-six respondents out of the thirty surveyed street-based sex workers had unstable housing and that few had a place of their own.<sup>11</sup> Only four of the twenty-six respondents reported having stable housing.<sup>12</sup> Providers from New York non-profit agencies reported that there is a lack of housing options available for street-based sex workers and that there is no supportive housing outside of rehabilitation facilities or detoxification programs.<sup>13</sup> Because public housing precludes people who have previous convictions or have performed criminalized sex acts

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<sup>6</sup> See THUKRAL & DITMORE, *supra* note 1, at 22-23 (describing the criminal sanctions and civil regulations targeted towards sex work).

<sup>7</sup> *Id.* at 17. ("Researchers are often asked to estimate the number of sex workers in a given area. Due to the covert nature of commercial sex, it is difficult, perhaps impossible, to determine how many sex workers are currently working in New York City, and almost impossible to make a blanket statement as to their needs and working conditions. We remain skeptical of all statistics that claim to be representative or exhaustive, especially when such estimates may be influenced by political viewpoints.").

<sup>8</sup> Ronald Weitzer, *New Directions in Research on Prostitution*, 43 n.1 CRIM., L., & SOC. CHANGE 211, 230 (2005) (defining "street prostitution" as compared to "indoor prostitution").

<sup>9</sup> Jeff Storey, *Q&A: Kate Mogulescu*, N.Y. L.J. (July 26, 2013), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202612471658> (accessed by Lexis Nexis) (on file with CUNY Law Review).

<sup>10</sup> THUKRAL & DITMORE, *supra* note 1, at 5.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 65.

on the premises, sex workers utilize alternative living arrangements such as single-room occupancy hotels (“SROs”), hotels, shelters, or sharing a room with friends or associates in SROs and hotels.<sup>14</sup> “Some paid to sleep in crack houses, some stayed with friends as much as they could, while a few said that they tried not to sleep because it was dangerous to sleep without a place to go.”<sup>15</sup> In addition to a fear of violence during street-based sex work activities, sex workers feared “robbery, rape and other violence” within their housing conditions.<sup>16</sup>

Housing rights should be at the forefront of civil rights for sex workers, and city policies should reflect the trend of decriminalization of sex work in New York City.<sup>17</sup> Having access to public housing allows sex workers to escape a deepening cycle of impoverishment. These policy changes should be supported by both sex work decriminalization advocates and advocates for the abolishment of sex trafficking. Removing “prostitution” conviction bans from public housing not only allows sex workers to have increased access to safe and affordable housing, but also allows people with prostitution convictions on their records to escape impoverishment. This often-stigmatized group of individuals are among those most in need of housing advocacy.

This article urges public housing authorities, shelter systems, and lawmakers to take an approach to sex work that mirrors the harm reduction approach of the hypodermic syringe (“needle exchange”) program implemented in New York City. Harm reduction can be achieved by compelling the New York City Housing Authority (“NYCHA”) to adopt less restrictive policies to housing sex workers in line with the trend of decriminalization adopted by the New York State courts. These less restrictive policies can include: (1) compelling the New York City District Attorneys and NYCHA not to evict tenants purely for being arrested for prostitution offenses and (2) removing the “sex or morals” bans from

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<sup>14</sup> *Id.* at 30.

<sup>15</sup> *Id.*

<sup>16</sup> THUKRAL & DITMORE, *supra* note 1, at 62.

<sup>17</sup> See Andrew Keshner, *Special Parts Created to Aid Human Trafficking Victims*, N.Y.L.J., Sept. 26, 2013, <http://www.newyorklawjournal.com/id=1202620764959/Special-Parts-Created-to-Aid-Human-Trafficking-Victims?slreturn=20150301181904> (accessed by LexisNexis) (on file with CUNY Law Review) (explaining that the creation of “Human Trafficking Intervention Courts” (“HTIC”)s in New York City is anticipated to reduce the criminal convictions for prostitution by identifying trafficking victims and referring them to programs such as drug treatment and job training, which may result in non-criminal dispositions or reduced or dismissed charges upon successful completion of such programs).

NYCHA applications and eviction process.<sup>18</sup> For the greater cause of harm reduction to sex workers, in addition to policy changes, the city should create supportive shelter environments to cater to their needs and implement unsanctioned sex worker environments.<sup>19</sup>

This article explains the public health and safety concerns that sex workers face because they do not have access to safe and affordable public housing in New York City and how the lack of housing deepens the cycle of impoverishment that sex workers experience. Part II of this article discusses the dangers of street activity, risks to sex workers’ health, consent and bargaining issues with street-based sex work, and how indoor sex work environments decrease this risk. Part III outlines public and private housing laws designed to exclude sex workers and “prostitution” offenses occurring on the premises and the extent to which sex work convictions affect eligibility and ejection from NYCHA. Part IV examines the sociological and long-term effects of housing laws on the lives of sex workers.

In Part V of this article, I describe three different public housing models developed by proponents for sex workers’ rights in North America with an emphasis on an unsanctioned indoor sex work model utilized in Vancouver, British Columbia. This section will examine the risk reduction that results from indoor sex work and supportive housing environments. In Part VI, I draw a parallel between unsanctioned indoor sex work environments and needle exchange programs that operate on harm reduction and public health models. Finally, Part VII concludes by urging New York City housing authorities to adopt less restrictive public housing laws and create unsanctioned indoor sex environments, highlighting the changes that this would have for socioeconomic status of sex workers, public health, and safety for sex workers within New York City.

## II. SEX WORKERS AND STREET ACTIVITY: PUBLIC HEALTH AND HARMS

### A. *Background on Street-Based and Survival Sex Work*

The United Nations defines sex work as “the exchange of money or goods for sexual services, either regularly or occasionally, involving female, male, and transgender adults, young people and

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<sup>18</sup> See *infra* part III C.

<sup>19</sup> See *infra* text accompanying footnotes 178-90.

children where the sex worker may or may not consciously define such activity as income generating.”<sup>20</sup> Although this definition may differ from New York laws regarding prostitution charges, it covers a broad range of activities and groups of people who may consider themselves sex workers.<sup>21</sup> Street-based sex workers are the most vulnerable population involved in sex work because they experience excessive police contact as they are targeted by law enforcement and often find themselves in a cycle of arrests.<sup>22</sup> Further, street-based sex workers are economically deprived, have limited job opportunities outside of sex work, and lack housing and supportive services to reduce the risk of homelessness.<sup>23</sup> Some street-based sex workers engage in “survival sex,” which involves trading sex to meet the basic needs for survival (such as food, shelter, or clothing).<sup>24</sup> Although these individuals are not forced or coerced to engage in sex work, they feel there is no other choice to obtain the necessities needed to survive.<sup>25</sup> Others engage in street-based sex work by choice to supplement income because they are unable to conform to working in a different field or can’t find a position in indoor sex work environments.<sup>26</sup>

Indoor sex work was preferred among a study of New York City street-based sex workers: “17 respondents reported that they would prefer to work indoors entirely.”<sup>27</sup> Explanations for their continued outdoor work included the lack of any private space to receive clients, reluctance of indoor venues such as brothels or escort services to employ women with substance dependencies, difficulty in maintaining the fixed schedule of an indoor venue (particularly in the case of subjects with substance dependencies), and difficulty of meeting or making contact with clients without being present on

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<sup>20</sup> UNAIDS INTER-AGENCY TASK TEAM ON GENDER AND HIV/AIDS, HIV/AIDS, GENDER AND SEX WORK, (2002), *available at* <http://www.unfpa.org/sites/default/files/pub-pdf/factsheets.pdf>, *archived at* <http://permacc/5THQ-S8NP>.

<sup>21</sup> Michael W. Ross et al., *Occupational Health and Safety Among Commercial Sex Workers*, 38 SCAND. J. WORK AND ENVIRON. HEALTH 105, 105 (2012), *available at* [http://www.sjweh.fi/show\\_abstract.php?abstract\\_id=3184](http://www.sjweh.fi/show_abstract.php?abstract_id=3184), *archived at* <http://permacc/E6YX-KFGL> (explaining that “sex work” is a broad term that encompasses a “range of transactions”).

<sup>22</sup> THUKRAL & DITMORE, *supra* note 1, at 10-11.

<sup>23</sup> *Id.*

<sup>24</sup> JAYNE BIGELSON ET AL., HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY YOUTH OF COVENANT HOUSE NEW YORK, COVENANT HOUSE 1, 7 (May 2013), *available at* <http://center.serve.org/nche/downloads/cov-hs-trafficking.pdf>, *archived at* <http://permacc/ZLN7-BP52>.

<sup>25</sup> *Id.*

<sup>26</sup> THUKRAL & DITMORE, *supra* note 1, at 29-30, 55-56.

<sup>27</sup> *Id.* at 6.



the street.<sup>28</sup>

In addition to this preference, sex workers stated that they would participate in indoor sex work by calling up regular clients, setting up appointments in hotels or clients' apartments to avoid street work or interactions with the police.<sup>29</sup> However, this technique was frustrated because many workers could not bring clients back to their housing or because sex workers did not have mobile phones.<sup>30</sup>

Street-based sex workers face ramifications such as increased police harassment and criminal charges, risk of violence including harassment, battery, abuse, elevated risk of HIV and other Sexually Transmitted Infections ("STIs"), depression, substance abuse, and an increased risk of unconsented services,<sup>31</sup> including rape.<sup>32</sup> Many of these issues are a part of a deepening cycle of impoverishment and are exacerbated by the fact that many sex workers are significantly underhoused.<sup>33</sup> Sex workers with prior prostitution convictions do not qualify for affordable public housing due to a prior criminal record and cannot afford to get back on their feet due to expensive and unstable housing.<sup>34</sup> Reforms to public housing can alleviate a number of devastating and recurring issues experienced by sex-based workers by mitigating violence against sex workers, improving sex workers' physical and mental health, and preventing the risk of unconsented services.

#### B. Violence Against Sex Workers

Street-based sex workers are at a higher risk of victimization and violence due to their increased exposure during street activities.<sup>35</sup> Violence against sex workers may include assault, robbery,

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<sup>28</sup> THUKRAL & DITMORE, *supra* note 1, at 8.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Unconsented or unwanted services means services not agreed to by the sex worker, which includes any forced sex acts. *See infra* Part II D.

<sup>32</sup> Kari Lyderson, *Sex Workers and Civil Rights*, ALTERNET (July 18, 2003), <http://www.rapecis.org/activism/prostitution/sexworkerscivilrights.htm>, *archived at* <http://permacc/77DHJETN>.

<sup>33</sup> Steven P. Kurtz et al., *Barriers to Health and Social Services for Street-Based Sex Workers*, 16 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 345-46 (2005).

<sup>34</sup> *See infra* Part III A-C.

<sup>35</sup> *See generally* THUKRAL & DITMORE, *supra* note 1 (discussing the violence street-based sex workers suffer at the hands of customers and police); *see also* Michael L. Rekart, *Sex-Work Harm Reduction*, 366 THE LANCET 2063, 2124 (2005), *available at* <http://myweb.dal.ca/mgoodyea/Documents/Health%20and%20wellbeing/Sex%20work%20harm%20reduction%20Rekert%20Lancet%202005%20366%20p2123.pdf>, *archived at* <http://permacc/3QM3-XCR3>.

harassment, death, verbal assault, sexual abuse, gang rape, trauma, and confinement.<sup>36</sup> A New York study of street-based sex workers concluded that:

24 out of 30 respondents (80 percent) experienced either violence or threats in the course of their work. 18 out of 30 respondents (60 percent) had experiences with male clients who became violent or tried to force them to do things they did not want to do. These problems include rape, assault and robbery.<sup>37</sup>

In comparison, indoor sex workers are at a much lower risk of violence:

A British study, for instance, of 115 prostitutes who worked on the streets and 125 who worked in saunas or as call girls found that the street prostitutes were more likely than the indoor workers to report that they had ever been robbed (37 vs. 10%), beaten (27 vs. 1%), slapped/punched/kicked (47 vs. 14%), raped (22 vs. 2%), threatened with a weapon (24 vs. 6%), or kidnapped (20 vs. 2%).<sup>38</sup>

The differences in the rate of violence against street-based and indoor sex workers can be attributed to the fact that indoor workers can screen out customers, can perform sex acts indoors, and may see lower-risk regular clients.<sup>39</sup> Although the risk of these harms still exist in generally safer environments (e.g. indoor sex work or bringing a client back to an apartment), risks of violence are exacerbated by street-work activity because of the greater exposure to the police and the increased control the client has over the sex worker on the street.<sup>40</sup> When participating in street activity, sex acts occur in alleys, the home or car of the client, or in public areas like parks.<sup>41</sup> In these scenarios (especially in industrial areas) sex workers may feel that they do not have any options for help when being attacked or raped.<sup>42</sup> Sex workers experience high rates of violence in the course of their work, and both indoor and outdoor sex workers are exposed to risks of violence and crime at the hands of their clients.<sup>43</sup> Increased housing for sex workers affords sex

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<sup>36</sup> Rekart, *supra* note 35.

<sup>37</sup> THUKRAL & DITMORE, *supra* note 1, at 8.

<sup>38</sup> Weitzer, *supra* note 8, at 216.

<sup>39</sup> *Id.* at 215-16.

<sup>40</sup> See THUKRAL & DITMORE, *supra* note 1, at 75 (“[P]rostitutes know from past experience, their own or from their friends, that police will say something [negative] to them, or threaten to arrest them, even though they’re the victim.”).

<sup>41</sup> Weitzer, *supra* note 8, at 214 n.1.

<sup>42</sup> See THUKRAL & DITMORE, *supra* note 1, at 75.

<sup>43</sup> See *id.* at 44-46 (describing the violence sex workers experience with some customers).

workers the opportunity to bring clients back to their homes. This would decrease their exposure to violence because it could allow sex workers to call for help or remove clients from their homes.

Bringing a client back to an apartment could be safer than the risk of violence a sex worker is exposed to on the streets because of the increased selection and control of clientele one has in their own apartment as opposed to in a car, in public, or in a client's apartment.<sup>44</sup> Bringing a client back to an apartment exposes a sex worker to less violence—like indoor sex work—because a home environment allows for the possibility of greater safety mechanisms, third-party controls, and narrowing or vetting of clientele.<sup>45</sup> However, bringing a client back to an apartment is different than indoor sex work in many aspects and is not completely without risk.<sup>46</sup> For example, violence, unconsented services, rape, and risks to a sex worker's health may still occur in one's apartment. However, a sex worker may have the ability to employ additional precautions to prevent these attacks that are unavailable on the streets.<sup>47</sup> Particularly, sex workers have greater power and control in their own apartment than the apartment of a client by having the ability to employ their own systems or safety mechanisms.<sup>48</sup>

### C. Health

*"If he don't want to use a condom, we're in extreme danger. I want to try to use one [condom], but the violence might ensue."*<sup>49</sup>

<sup>44</sup> See, e.g., Andrea Krüsi et al., *Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safe Indoor Sex Work Environments: A Qualitative Study*, 102 AM. J. PUB. HEALTH 1154, 1155 (2012) (explaining that these safety mechanisms have been implemented in a sex worker housing environment and the lessened risk of violence) ("Women's accounts indicated that both the structural-environmental and the informal safety mechanisms facilitated by the indoor sex work environment greatly increased women's control over negotiating risk in sex work transactions . . . . Women's narratives suggested that these models can promote increased control among sex workers over negotiating transactions with clients on their own terms, including types of services provided, amount charged, and overall health and safety. Many described how the control afforded by an enhanced sense of safety allowed them to refuse unwanted risky services that they would have to perform in other environments where support from staff, other sex workers, or police was not readily available when clients used violence to force unwanted services such as unprotected sexual intercourse.").

<sup>45</sup> *Id.*

<sup>46</sup> See Weitzer, *supra* note 8, at 216 (illustrating the risk of risk of violence against indoor sex workers); see also THUKRAL & DITMORE, *supra* note 1, at 44-46 (describing that one indoor sex worker was robbed by a customer).

<sup>47</sup> See Krüsi, *supra* note 44, at 1156.

<sup>48</sup> See *id.*

<sup>49</sup> Kate Shannon et al., *Social and Structural Violence and Power Relations in Mitigating HIV Risk of Drug-Using Women in Survival Sex Work*, 66 SOC. SCI. & MED. 911, 915-16 (2007) ("The everyday violence and ongoing fear of violence, feelings that abusive

It is hard to estimate the number of street-based sex workers infected with HIV/AIDS. Female sex workers risk HIV infection at a rate fourteen times higher than other female populations worldwide.<sup>50</sup> Of the population of sex workers worldwide, HIV rates were significantly lower among call girls and women working in legal brothels than among street workers.<sup>51</sup> The highest rates of HIV are among street-based sex workers who use intravenous drugs.<sup>52</sup>

Other issues regarding health and street-based sex work involve the availability and use of condoms. Sex workers expressed concern of police using condoms to arrest for prostitution and discussed apprehension of carrying around condoms while participating in street sex work activity.<sup>53</sup> Sex workers have also reported that police confiscated condoms when searching them.<sup>54</sup> Recently, the New York City police commissioner released a “no condoms as evidence” directive, which prevents New York police officers from confiscating condoms to be used for evidence under certain charges.<sup>55</sup> However, the directive still allows the use of condoms as evidence against those accused of “promoting prostitution and sex trafficking.”<sup>56</sup> This directive does not protect sex workers in all criminal charges, and many sex workers are still afraid of being arrested for carrying condoms.<sup>57</sup>

When sex workers cannot freely carry condoms, it exposes them to increased risk of HIV and sexually transmitted infections (“STI”) and directly negates New York City public health program promotion of safe sex and free condom distribution.<sup>58</sup> UNAIDS specifically argues: “Confiscation of condoms is clearly counter-productive from a health perspective and disrespectful of the rights of sex workers to protect themselves from HIV.”<sup>59</sup> When street-

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johns were frequently not criminalized, lack of protections offered by current policing, meant that women’s ability to insist on condom use was severely compromised.”).

<sup>50</sup> Roger Pebody, *Female Sex Workers have 14 Times the Risk of Having HIV as Other Women*, AIDSMAP (July 31, 2012), <http://www.aidsmap.com/Female-sex-workers-have-14-times-the-risk-of-having-HIV-as-other-women/page/2457223/>, archived at <http://permacc/BP6F-WVED>.

<sup>51</sup> See Weitzer, *supra* note 8, at 217.

<sup>52</sup> *Id.*

<sup>53</sup> See THUKRAL & DITMORE, *supra* note 1, at 36.

<sup>54</sup> *Id.* (“Candy reported that police officers tell her to ‘open her condoms and drop them into the sewer, all the time, ten times a month.’”).

<sup>55</sup> Wilson Dizard, *NYC to Stop Using Condoms as Evidence—in Some Cases*, ALJAZEERA AMERICA, (May 12, 2014, 6:20 PM), <http://america.aljazeera.com/articles/2014/5/12/sex-condoms-nyc.html>, archived at <http://permacc/ZQV2-NUM8>.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> Freeman Klopott, *Prostitutes Push for N.Y. Law Banning Condoms as Evidence*,

based sex workers try to reduce visibility due to fear of arrest, sex workers reduce the amount of time negotiating with clients on consenting acts and condom use. This can cause sex workers to carry out sex acts that are at higher risk of HIV and STI infection.<sup>60</sup> Although New York City is changing the way condoms are used against sex workers in criminal charges, sex workers are still not completely free from arrest and able to use condoms in street activity as they may need to.<sup>61</sup>

*D. Unwanted Services, Consent, and Power*

*Well a good date is someone that you can get out of the car with after. We don't know how lucky we are. When they drive us back. You know and we take it for granted a little bit I think. It just seems that once you're taken away in a car, your power and control are gone.*<sup>62</sup>

When street-based sex workers are trying to reduce visibility, they make quicker decisions to get into a client's car, which makes it more difficult to screen potentially violent clients and allots less time to negotiate what sex acts to which they consent.<sup>63</sup> Lack of power to control whom sex workers chose as clients and where sex acts take place can be the basis of risks for street-based workers' health and safety.<sup>64</sup> Power is reflected within the economics of sex work, where street-based workers have little power and less pay as opposed to indoor sex workers who demand higher pay, have their own premises for work, have a more robust ability to screen clients, and may work by referral.<sup>65</sup> Lack of a safe place to take clients is consistently described as the reason why sex workers face an increased risk of violence from their clients.<sup>66</sup>

The manner in which they are policed and excluded from public and private housing, examined in the following section, illustrates the depth of sex workers' subjection to a deepening cycle of impoverishment.

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BLOOMBERG BUSINESS, (Apr. 17, 2012, 2:20 PM), <http://www.bloomberg.com/news/articles/2012-04-17/prostitutes-push-for-new-york-law-banning-condoms-as-evidence>, archived at <http://perma.cc/R2J6-59JU>.

<sup>60</sup> Ross, *supra* note 21, at 3.

<sup>61</sup> Dizard, *supra* note 55.

<sup>62</sup> Shannon, *supra* note 49, at 916.

<sup>63</sup> Ross, *supra* note 21, at 3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* notes 35-39.

## III. BANS FROM PUBLIC AND PRIVATE HOUSING

A. *Prostitution Related Offenses*

In New York State there are separate laws regarding prostitution in the criminal context versus prostitution in the sphere of housing. Importantly, prostitution related criminal offenses exclude sex workers from housing, when the same treatment does not apply to clients. Criminal charges related to prostitution include: prostitution,<sup>67</sup> patronizing a prostitute,<sup>68</sup> prostitution in a school zone,<sup>69</sup> promoting prostitution,<sup>70</sup> permitting prostitution,<sup>71</sup> and loitering for the purpose of engaging in prostitution.<sup>72</sup> In addition, under the New York Penal Law (“N.Y.P.L.”), accomplice liability, sex trafficking, and promoting sex with a minor carry charges up to a class E felony.<sup>73</sup>

New York Penal Law section 230.00, which codifies the prostitution offense, is a class B misdemeanor and provides that “[a] person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”<sup>74</sup> Sexual conduct is defined in the statute and allows courts case-by-case discretion over what conduct conforms to the statute.<sup>75</sup> Permitting prostitution on one’s property (N.Y.P.L. § 230.40 ), a class B misdemeanor, is especially relevant in the housing context, providing: “a person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use.”<sup>76</sup>

In addition, one can be guilty of “promoting prostitution” under N.Y.P.L. § 230.15 if a person either knowingly “advances” or “profits” from prostitution.<sup>77</sup> One “advances prostitution” when:

[A]cting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists

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<sup>67</sup> N.Y. PENAL LAW § 230.00 (McKinney 2014).

<sup>68</sup> *Id.* § 230.02.

<sup>69</sup> *Id.* § 230.03.

<sup>70</sup> *Id.* § 230.15.

<sup>71</sup> *Id.* § 230.40.

<sup>72</sup> N.Y. PENAL LAW § 240.37.

<sup>73</sup> *Id.* §§ 230.33-230.36.

<sup>74</sup> *Id.* § 230.00.

<sup>75</sup> THUKRAL & DITMORE, *supra* note 1, at 22.

<sup>76</sup> PENAL § 230.40.

<sup>77</sup> *Id.* § 230.15.

in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.<sup>78</sup>

Further, one profits from prostitution when: “acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.”<sup>79</sup> Although this penal law may not impose criminal liability for sex workers themselves, it could create liability for roommates, boyfriends, or “pimps” if they help provide housing for a sex worker and acts of prostitution occur on those premises. This penal law shows the further policing of sex workers’ acts that occur behind close doors.

#### B. *Multiple Dwelling, Illegal Use, and Nuisances*

New York Public Health Law and New York Real Property Law contain civil laws that exclude sex workers and “pimps” from both private and public housing but likewise do not affect clients.<sup>80</sup> New York Public Health Law § 2320 governs “houses of prostitution, equipment and nuisance” and provides: “Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.”<sup>81</sup> Houses of prostitution are defined as “[t]he building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists.”<sup>82</sup> This action is subject to an injunction, abatement, or temporary restraining order.<sup>83</sup>

Owners of private multiple-dwelling buildings and apartment units can terminate a tenancy or repossess a dwelling if the apartment or any portion of the building is being used for sex work activities. Multiple Dwelling Law § 352 provides,

[I]f a multiple dwelling, or any part thereof, shall be used as a house of prostitution or assignation with the permission of the

<sup>78</sup> *Id.* § 230.15, explained in *Antonucci v. Town of Irondequoit*, 438 N.Y.S.2d 417, 419 (4th Dep’t 1981).

<sup>79</sup> *Id.*

<sup>80</sup> N.Y. PUB. HEALTH LAW §§ 2320-2334 (McKinney 2014); N.Y. REAL PROP. LAW § 231(3) (McKinney 2014).

<sup>81</sup> PUB. HEALTH § 2320(1).

<sup>82</sup> *Id.* § 2320(2).

<sup>83</sup> *Id.* § 2323.

lessee or his agent, the lease shall be terminable at the election of the lessor, and the owner shall be entitled to recover possession of said premises by summary proceedings.<sup>84</sup>

This statute effects the availability of housing to sex workers because it creates liability for those who bring clients back to their houses or imposes liability for friends and partners who allows sex acts on the premises even if the sex worker is not a party to the lease.

New York Real Property Law § 231(3) renders a lease void if made with any person convicted two or more times in one year for prostitution related offenses that occur on the premises.<sup>85</sup> There are a number of issues sex workers face accessing or retaining housing as a result of this statute. First, sex workers may not be able to secure representation in order to combat these charges.<sup>86</sup> Should an arrest or conviction occur, the lessor has the right to enter the premises,<sup>87</sup> giving a sex worker little notice to find alternative housing and recourse to save her home. A judgment under this statute also prevents a sex worker's future access to public and private housing opportunities, even if the person is no longer a sex worker. Finally, the statute may discriminate against those who experience trafficking or are part of heavily policed communities.<sup>88</sup> These individuals are more likely to be arrested and prosecuted for prostitution-related offenses,<sup>89</sup> exposing them to increased risk of a void lease under this statute.

The law also allows rights and regulations for a landlord to

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<sup>84</sup> N.Y. MULT. DWELL. LAW § 352 (McKinney 2014).

<sup>85</sup> REAL PROP. § 231.

<sup>86</sup> See generally Mark Levine & Jaron Benjamin, *Justice Denied: A Call for Action in Our City's Housing Courts*, GOTHAM GAZETTE (Jun. 10, 2014), <http://www.gotham-gazette.com/index.php/opinions/5094-justice-denied-call-action-housing-courts-attorney-levine-benjamin>, archived at <http://permacc/H7T7-PYM4> (explaining that low-income tenants generally appear unrepresented in higher rates in housing court since no current right to counsel exists) ("Fewer than 10 percent of tenants in housing court in the five boroughs have the benefit of legal counsel.").

<sup>87</sup> N.Y. REAL PROP. LAW § 231(3).

<sup>88</sup> See Donna M. Hughes, *Race and Prostitution in the United States 1* (Dec. 2005) (unpublished report), available at [http://webcache.googleusercontent.com/search?q=cache:4wAitfPLf9cJ:www.uri.edu/artsci/wms/hughes/race\\_prost.doc+&cd=1&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:4wAitfPLf9cJ:www.uri.edu/artsci/wms/hughes/race_prost.doc+&cd=1&hl=en&ct=clnk&gl=us), archived at <http://permacc/T99V-99ZS> ("U.S. Service providers that assist women and girls to escape prostitution in cities throughout the U.S. report that their client population has proportionately more racial minorities than their city's population."); see also *infra* notes 123-24 and accompanying text.

<sup>89</sup> See *id.* at 5-6 ("In 2001, Black and Hispanic women made up 85 percent of all women arrested in New York City. From 1995 to 2001, the percentage of Black, Hispanic and White women, aged 16 to 24, incarcerated for prostitution rose dramatically, particularly for Black and Hispanic women.").



repossess an apartment if it is "illegally used" pursuant to New York Real Property Actions and Proceedings Law (R.P.A.P.L.) §715.<sup>90</sup> Illegal use includes use as a "bawdy house" or for "purposes of prostitution."<sup>91</sup> Not only do these laws have negative effects for sex workers seeking private housing, but also they impose statutory liability on landlords who fail to evict tenants who use the premises for prostitution related purposes.<sup>92</sup> This can create difficulties for sex workers because of the increased scrutiny of sex workers' acts on the premises and the incentive for landlords to eject workers. The statute also allows a neighboring tenant to bring an eviction proceeding.<sup>93</sup> Additionally, two or more prostitution convictions of any occupant within a year in their apartment or their building shall be presumptive evidence of conduct constituting use of the subject premises for the purposes of prostitution.<sup>94</sup>

Private housing laws also unnecessarily infringe on the rights of sex workers by allowing the District Attorney to evict a tenant for engaging in sex work. R.P.A.P.L. § 715(1) allows an owner, fellow tenant, or the District Attorney to serve a notice on the landlord requiring her to make an application for the removal of a tenant engaged in illegal activity.<sup>95</sup> This statute further states that if the landlord does not make an application for eviction within five days of receiving the notice or does not diligently "prosecute" the tenant, the person or agency giving notice to the landlord of the illegal activity:

may bring a proceeding under this article for such removal as though the petitioner were the owner or landlord of the premises, and shall have precedence over any similar proceeding thereafter brought by such owner or landlord or to one theretofore brought by him and not prosecuted diligently and in good faith.<sup>96</sup>

A 1997 case explains that the District Attorney has power to

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<sup>90</sup> N.Y. REAL PROP. ACTS. LAW § 715 (McKinney 2014).

<sup>91</sup> *Id.* § 711(5).

<sup>92</sup> REAL PROP. § 231.

<sup>93</sup> REAL PROP. ACTS. § 715(1).

<sup>94</sup> *Id.* § 715(2).

<sup>95</sup> *Id.* § 715(1) ("An owner or tenant . . . of any premises . . . used or occupied . . . for purposes of prostitution . . . or any duly authorized enforcement agency of the state . . . under a duty to enforce the provisions of the penal law [etc.] . . . may serve personally upon the owner or landlord of the premises . . . a written notice requiring the owner or landlord to make an application for the removal of the person so using or occupying the same.").

<sup>96</sup> *Id.* The District Attorney typically initiates these suits by threatening the landlord with a counter claim for attorney fees if they refuse to file a suit against their tenant. See Gerald Lebovitz & Douglass J. Seidman, *Drug Holdover Proceedings: An Over-*

initiate suit or to require the landlord to initiate suit against a tenant engaged in illegal activity within a dwelling.<sup>97</sup> Under R.P.A.P.L. § 715(3), “the District Attorney retains the right to become an actual party, the petitioner, in a new and separate proceeding commenced by such office in the event that the original petitioner landlord fails to diligently prosecute this matter.”<sup>98</sup> However, while the District Attorney has the power to become a party to an eviction proceeding under R.P.A.P.L., her power is limited in that she does not have authority over settlement agreements or the authority to force a landlord to appeal a decision.

When the District Attorney has the power to compel or to initiate proceedings against tenants who may participate in sex work in private housing and rent-stabilized units, the State infringes on the rights of individuals, including sex workers, to engage in private conduct in their home and oversteps its role by acting as landlord. In these cases, the landlord is threatened by the State to evict a tenant when the landlord may want to continue the tenancy. This creates additional barriers for sex workers because they may not have the availability, means, or notice to secure representation to combat the charges.<sup>99</sup> This practice likely leads to increased rates of homelessness and poverty among sex workers.

Sex worker tenants may also be evicted based on the conduct in their home, even without evidence of arrest or conviction. A tenant can be evicted for a nuisance, even if the tenant did not violate a provision of lease, by engaging in objectionable conduct that threatens the life, health, or safety of the owner or other tenants.<sup>100</sup> Evictions based on objectionable conduct for non-rent regulated units give the “landlord the right to terminate the time fixed for occupancy under such agreement if he deem [sic] the tenant objectionable.”<sup>101</sup> Rent regulated tenancies are also subject to termination on nuisance grounds:

[A] tenant can be evicted for: (1) committing or permitting a nuisance; or (2) is maliciously, or by reason of gross negligence, substantially damaging the housing accommodation; or (3) the tenant engages in a persistent and continuing course of

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view From “Knew,” To “Should Have Known,” To “Strict Liability,” 35 N.Y. REAL PROP. L.J. 16 (2007) (citing N.Y. REAL PROP. ACTS. § 715(4)).

<sup>97</sup> Rochdale Village Inc. v. Harris, 172 Misc.2d 758, 762 (Civ. Ct. Queens Cnty. 1997).

<sup>98</sup> *Id.*

<sup>99</sup> Levine & Benjamin, *supra* note 86.

<sup>100</sup> See Domen Holding Co. v. Aranovich, 802 N.E.2d 135, 140 (2003).

<sup>101</sup> REAL PROP. ACTS § 711(1).

conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others.<sup>102</sup>

Case law defines what type and pattern of behavior creates a nuisance or rises to the level of objectionable conduct.<sup>103</sup> Nuisance law can be detrimental for sex workers because it could allow the court discretion when determining whether conduct rises to the level of a nuisance. No previous case law exists on whether a sex worker bringing clients home constitutes nuisance because other methods are available for ejectment. In the case of sex workers, having loud or frequent visitors at night may rise to the level of a nuisance that would permit a private landlord to institute eviction proceedings against a tenant.

Recently, other cities in the United States have adapted their current nuisance laws to explicitly target sex worker tenants. In late 2014, Oakland, California’s City Council voted to “expand an existing law that allows the city to evict private property tenants who have become a ‘nuisance’ to their communities.”<sup>104</sup> The City Council argued that it intended to cut rates of child trafficking despite the lack of evidence that the ban would have this impact.<sup>105</sup> The existing “nuisance eviction ordinance” adopted in 2004 was designed to evict tenants of commercial or residential private property who were “engaging” in violence and illegal drug activities.<sup>106</sup> The expansion “added a number of other ‘nuisance activities’ to the law—the most controversial being ‘pimping, prostitution, pandering, and solicitation.’”<sup>107</sup> Critics of this law argue that:

[T]he law enables the City Attorney’s Office to force sex workers out of their homes in a wide range of circumstances without giving them meaningful opportunities to contest the accusations. The law also empowers residents to make complaints about neighbors they believe are involved in sex work while incentivizing landlords to evict tenants they suspect may be prostitutes—or possibly avoid renting to them in the first place.<sup>108</sup>

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<sup>102</sup> N.Y. UNCONSOL. § 2524.3(b) (McKinney 2014).

<sup>103</sup> See, e.g., *Berenger v. 261 West LLC*, 93 A.D.3d 175, 182-83 (1st Dep’t 2012) (describing the elements of “nuisance” and explaining that nuisance is characterized by a pattern of behavior).

<sup>104</sup> Sam Levin, *Oakland’s Threat to Sex Workers*, E. BAY EXPRESS (Nov. 12, 2014), <http://www.eastbayexpress.com/oakland/oaklands-threat-to-sex-workers/Content?oid=4121332>, archived at <http://permacc/B76D-Q9Y6>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

These concerns mirror the concerns of sex work advocates in New York City and emphasize that these types of laws are being used to disproportionately evict low-income tenants.

Critics of the Oakland law expressed concern that, “[i]ts implementation would likely reflect existing law enforcement biases and profiling patterns—meaning that low-income tenants, transgender residents, and people of color would most likely be targeted.”<sup>109</sup> Much like the laws in New York City allowing the District Attorney to evict tenants in private residential properties, these laws increasingly infringe on the rights of sex workers and should be repealed.

*C. Criminal Convictions, NYCHA, and the “Sex or Morals” Offense*

1. Application

NYCHA has laws to exclude sex workers in both its application procedures and eviction proceedings. NYCHA provides public housing to more than 400,000 low and moderate income New Yorkers in 334 housing projects within the five boroughs of New York City.<sup>110</sup> In addition to residents of public housing projects, NYCHA provides rental assistance in private homes to over 235,000 renters through the Section 8 Leased Housing Program.<sup>111</sup> Federal law governs the availability of housing to individuals with criminal records and gives local housing authorities discretion to create policies regarding the admission and termination of tenancies for people with criminal records or those who commit crimes on the premises.<sup>112</sup> NYCHA has authority for these policies in New York City and creates policies regarding termination, rules of tenancy, and admission pursuant to federal law.<sup>113</sup>

NYCHA considers the criminal history of every member of the household who is sixteen years or older when reviewing housing applications, and the information they review contains criminal activity from violations to convictions.<sup>114</sup> Pursuant to federal law, NYCHA “has the discretion to deny housing to applicants who have

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<sup>109</sup> *Id.*

<sup>110</sup> N.Y.C. HOUS. AUTH., *supra* note 3.

<sup>111</sup> *Id.*

<sup>112</sup> PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS, LEGAL ACTION CENTER 1 (Feb. 2001), *available at* [http://lac.pmhclients.com/doc\\_library/lac/public-housing-policies/wv.pdf](http://lac.pmhclients.com/doc_library/lac/public-housing-policies/wv.pdf), *archived at* <http://permacc/H38L-XLQW>.

<sup>113</sup> N.Y. PUB. HOUS. LAW § 400 (McKinney 2014).

<sup>114</sup> *Applying for Public Housing General Questions*, N.Y.C. HOUS. AUTH., <http://www.nyc.gov/html/nycha/html/assistance/generalfaq.shtml> (last visited Apr. 1, 2015), *archived at* <http://permacc/GR2Z-9T2P>.

been convicted of any criminal offense, including a violation."<sup>115</sup> NYCHA's review of an applicant's criminal history requires that people with convictions must at minimum complete their sentence, yet may still be ineligible for public housing, depending on the severity of the crime of conviction.

In general, class A, B, or C violent felonies or felonies involving drugs or alcohol mandate a six-year period of ineligibility. Class D or E offenses of the same caliber result in a five-year period of ineligibility. People convicted of class A drug or alcohol misdemeanors are ineligible for four or five years, whereas those with class B or unclassified drug or alcohol misdemeanors are ineligible for three to four years. Finally, a drug or alcohol violation or infraction triggers a two to three-year period of ineligibility.<sup>116</sup>

Therefore, NYCHA explicitly lays out periods of ineligibility for felonies of any caliber and has specific rules for misdemeanor drug and alcohol offenses. However, as stated above, NYCHA is afforded discretion when no bright-line rule for a certain criminal charge exists.<sup>117</sup>

In addition to imposing guidelines for housing eligibility, NYCHA also has discretion to waive ineligibility when it is "convinced that there is reasonable probability that the offender's future conduct would not be likely to affect adversely the health, safety or welfare of other tenants, and would not be likely to affect adversely the physical environment or the financial stability of an Authority project."<sup>118</sup> If NYCHA believes the applicant does not pose any immediate danger to other tenants or to the Housing Authority project in general, NYCHA considers the following factors to mitigate or waive periods of ineligibility:

(1) The seriousness of the applicant's offense; (2) the frequency of the offense; (3) when the offense occurred; (4) evidence about the conduct underlying the offense; (5) evidence about rehabilitation; and (6) evidence showing a willingness to participate in counseling or social service programs (and the availability of such programs).<sup>119</sup>

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<sup>115</sup> SETTING THE RECORD STRAIGHT: WHAT DEFENSE ATTORNEY NEED TO KNOW ABOUT THE CIVIL CONSEQUENCES OF CLIENT CRIMINAL RECORD, LEGAL ACTION CENTER 11 (2001), *available at* [http://hirenetwork.org/sites/default/files/setting\\_the\\_record\\_straight.pdf](http://hirenetwork.org/sites/default/files/setting_the_record_straight.pdf), *archived at* <http://permacc/AM7G-VHR5>.

<sup>116</sup> *Id.*

<sup>117</sup> *See id.*

<sup>118</sup> NYCHA TRESPASS POLICY FOR FELONY DRUG ARREST, N.Y.C. HOUS. AUTH., *available at* [http://www.nyc.gov/html/nycha/downloads/pdf/trespass\\_policy.pdf](http://www.nyc.gov/html/nycha/downloads/pdf/trespass_policy.pdf) (last visited Mar. 24, 2015), *archived at* <http://permacc/BCL4-WDN4>.

<sup>119</sup> *Id.*

Therefore, a NYCHA applicant with a “prostitution” conviction on their record, or multiple convictions of any kind on their record, may become ineligible based on the above discretionary factors. However, such an applicant may be granted housing on the condition that they participate in social service or rehabilitation programs<sup>120</sup>

These application policies are overall detrimental to sex workers who have prostitution or drug related convictions on their record. Federal law gives discretion to local housing authorities to exclude people with convictions, and local policies are overly restrictive and can be a roadblock to tenants who pose no threat to the safety and welfare of other tenants and public property.<sup>121</sup> Federal law only requires barring lifetime registered sex offenders or those who have been convicted for the production of methamphetamine from public housing.<sup>122</sup> NYCHA policies are over-inclusive with respect to federal policies because they can bar access to housing based on an arrest that never leads to a conviction.<sup>123</sup> However, barring applicants arrested for sex work offenses disparately impacts street-based sex workers and women and trans\* women of color because they are selectively targeted and profiled

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<sup>120</sup> See *id.*

<sup>121</sup> *Advocacy Toolkit: Improving Housing Opportunities for Individuals With Conviction Records*, LEGAL ACTION CENTER, <http://www.lac.org/toolkits/housing/housing.htm> (last visited Mar. 24, 2015), archived at <http://permacc/43JU-VTVM>.

<sup>122</sup> *Know Your Rights: Housing and Arrests or Criminal Convictions*, THE BRONX DEFENDERS (Oct. 2, 2010), <http://www.bronxdefenders.org/housing-and-arrests-or-criminal-convictions/>, archived at <http://permacc/7A5F-Q9NF>.

<sup>123</sup> See LAW ENFORCEMENT VIOLENCE AGAINST WOMEN OF COLOR & TRANS PEOPLE OF COLOR: A CRITICAL INTERSECTION OF GENDER VIOLENCE & STATE VIOLENCE, INCITE! WOMEN OF COLOR AGAINST VIOLENCE, 26, available at [http://www.incite-national.org/sites/default/files/incite\\_files/resource\\_docs/3696\\_toolkit-final.pdf](http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf) (last accessed Apr. 26, 2015) (“Women of color, and particularly transgender women of color, are often perceived by police through racialized and gendered stereotypes framing us as highly sexualized and sexually available. Law enforcement officers’ internalization and perpetuation of these stereotypes, combined with the high degree of discretion afforded by vague “quality of life” regulations, results in police profiling women of color, and particularly transgender women of color, as sex workers, and selective targeting of women of color for harassment, detention, and arrest. For instance, trans women of color across the country report frequent arrests for “loitering with intent to solicit” while engaging in such lawful and routine activities as hailing a cab, walking their dog, going to get groceries or cigarettes, walking home from work, eating out, or talking to friends. Such disproportionate enforcement is compounded by law enforcement focus on street-based sex work, where a greater proportion of sex workers are women of color.”) (citing AMNESTY INTERNATIONAL, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S., 13-18, 34 (Amnesty International U.S.A. 2005); THE SAN FRANCISCO TASK FORCE ON PROSTITUTION, FINAL REPORT, (Mar. 1996), available at <http://www.bayswan.org/1TF.html>).

by police resulting higher rates of arrest (including false arrest).<sup>124</sup> Furthermore, NYCHA housing bans re-victimize sex workers who are exploited by boyfriends or pimps by barring these individuals from public housing based on forced sex work that resulted in arrest.<sup>125</sup> This policy also discriminates against those who have left sex work and seek other employment.

## 2. Eviction

NYCHA reserves the power to evict any person on the grounds of "Non-Desirability, Breach of Rules and Regulations, Chronic Breach of Rules and Regulations, Chronic Delinquency in the Payment of Rent, Non-Verifiable Income, Assignment or Transfer of Possession, and Misrepresentation."<sup>126</sup> Under "non-desirability" and breach of rules and regulations, NYCHA can evict a tenant due to their conduct or that of a roommate, someone that claims to live at the address, or a frequent visitor.<sup>127</sup> This conduct includes activity that occurs in the subject apartment, on NYCHA premises, or near project grounds.<sup>128</sup>

Conduct that constitutes "non-desirability" includes:

- (1) a danger to the health and safety of the tenant's neighbors;
- (2) "a sex or morals offense;" (3) a source of danger or a cause of damage to the employees, premises or property of the Authority; (4) "a source of danger to the peaceful occupation of other tenants;" or (5) a common law nuisance.<sup>129</sup>

Sex work falls squarely within the designation of a "sex or morals"

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<sup>124</sup> Suzannah Phillips et al., CUNY School of Law, Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims 43 *available at* <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf> (last accessed Apr. 26, 2015) ("In addition to the cruel, inhuman, and degrading treatment that trafficking victims suffer as a result of arrest, detention, and prosecution for crimes they were compelled to commit, survivors of trafficking experience long-term mental suffering and humiliation as a result of having a criminal record . . . . [A] criminal record hinders a trafficking victim's ability to rebuild their life by preventing them from obtaining stable employment and safe housing.").

<sup>125</sup> *Id.*

<sup>126</sup> NYCHA TERMINATION OF TENANCY PROCEDURES, COLUMBIA LAW (2008), *available at* <http://blogs.law.columbia.edu/4cs/files/2008/11/nycha-termination-of-tenancy-procedures1.pdf>, *archived at* <http://permacc/EC6X-GDTF>.

<sup>127</sup> HOW DO I KEEP MY NYCHA APARTMENT?, MFY LEGAL SERVICES (2005), *available at* [http://www.mfy.org/wp-content/uploads/facts/NYCHA%20\\_HSG-1%20KeepApt.pdf](http://www.mfy.org/wp-content/uploads/facts/NYCHA%20_HSG-1%20KeepApt.pdf), *archived at* <http://permacc/7N8K-ZGUK>.

<sup>128</sup> *Id.*

<sup>129</sup> KATE RUBIN, ET AL., THE CONSEQUENCES OF CRIMINAL CHARGES: A PEOPLE'S GUIDE, THE BRONX DEFENDERS & REENTRY.NET (2008), *available at* [http://www.sikhcoalition.org/documents/pdf/criminal\\_charges.pdf](http://www.sikhcoalition.org/documents/pdf/criminal_charges.pdf), *archived at* <http://permacc/5GQN-UNZ3>.

offense and imposes liability on sex workers who engage in prostitution on or near NYCHA premises or allow others to engage in these acts regardless of whether they are on the lease. Therefore, sex workers and family members who reside with them may find themselves in a termination of a tenancy proceeding. Specifically, a whole family may find themselves in an ejectment proceeding if someone visiting them is arrested for prostitution on the premises.<sup>130</sup> This “non-desirability” clause is overly inclusive and uses a discriminatory policy as a catch-all to exclude sex workers when they see fit. Federal laws give NYCHA discretion when evicting tenants.<sup>131</sup> However, by including “sex or moral” offenses in termination proceedings, NYCHA has overstepped its discretion by allowing the policing of its own tenants on the private conduct that occurs within their homes.

Despite the rules regarding “sex or morals,” the rate of prostitution in NYCHA premises is quite low. When NYCHA residents were asked what crimes occurred in the development currently or in the last twelve months, forty-three out of 1,166 respondents (four percent) responded that prostitution occurred.<sup>132</sup> By continuing the policy of evicting and barring sex workers, NYCHA continues discrimination without any benefit on its behalf. By forcing sex workers out of public housing to avoid sex work on the premises, it pushes sex workers into surrounding areas and into the open, making sex work within community surrounding NYCHA buildings more visible and dangerous.

### 3. Shelter Housing and SROs

Shelter housing is not a conducive environment for sex workers to live or participate in sex work activity. Shelter housing has fixed hours and presents a roadblock for sex workers who work the streets at night. This is detrimental to sex workers not only because it eliminates their ability to earn income, but also because sex workers cannot bring clients to the shelter housing, preventing them from finding stable housing to create a permanent residence.<sup>133</sup> Residents of shelter housing in New York City have further reported that they have been raped by security guards and

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*; 42 U.S.C. § 13661 (1999).

<sup>132</sup> SAFETY AND SECURITY TAKE REPORT, N.Y.C. HOUS. AUTH. 26 (2011), *available at* <http://www.nyc.gov/html/nycha/downloads/pdf/safety-and-security-task-force-report.pdf>, *archived at* <http://permacc/699D-L4VY>.

<sup>133</sup> N.Y. MULT. DWELL. LAW §§ 12, 352 (McKinney’s 2015).



exposed to theft and substance abuse.<sup>134</sup>

SRO accommodations do not offer a safe environment for sex workers. A study in Vancouver, British Columbia noted that co-ed SROs create additional difficulty for female sex workers.<sup>135</sup> Women reported that they experienced violence by male residents and discrimination by male staff due to their involvement with sex work.<sup>136</sup> These same issues were not experienced in women-only SROs, which created a support system for women in this housing environment.<sup>137</sup> By housing one or two occupants in single room, they usually do not offer a place for sex workers to bring back clients and lack private kitchens for sex workers to prepare meals. In addition to offering limited facilities, sex workers reported SROs as being undesirable and filled with drugs and other criminal activity.<sup>138</sup> Additionally, SROs are detrimental to sex workers recovering from or refraining from drug use. Sex workers reported being able to hear, see, and smell drug use and transactions in SROs.<sup>139</sup> This can exacerbate stress on sex workers struggling with substance dependency.<sup>140</sup>

Inefficiencies of city agencies and housing discrimination are contributing factors for sex workers' inability to find and maintain affordable housing. A respondent from a study on street-based sex workers developed by the Urban Justice Center's Sex Worker Project discussed that she was getting "the runaround" from a city agency in her search for housing.<sup>141</sup> "She was seeking housing assistance from a city agency that was providing her with other services, but the agency was not being effective, helpful, or active in assisting with the search for housing."<sup>142</sup> Without access to technology, telephone, or helpful housing assistance services, many sex workers are left to fend for themselves in the housing market.

Transgender respondents noted housing discrimination as being an issue with finding stable housing.<sup>143</sup> "Jamie, who is trans-

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<sup>134</sup> THUKRAL & DITMORE, *supra* note 1, at 36.

<sup>135</sup> WOMEN SEX WORKERS' STRUGGLE TO FIND SAFE, SECURE HOUSING IN VANCOUVER'S DOWNTOWN EASTSIDE, GENDER AND SEXUAL HEALTH INITIATIVE (2011), *available at* <http://gshi.cfenet.ubc.ca/sites/default/files/PLS%20RtP%202011%20Risky%20Housing.pdf>, *archived at* <http://permacc/WQD6-7USB>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> THUKRAL & DITMORE, *supra* note 1, at 31.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 62.

<sup>142</sup> *Id.*

<sup>143</sup> *See generally Housing And Homelessness*, TRANSEQUALITY, <http://transequality.org/issues/housing-homelessness> (last visited Apr. 5, 2015), *archived at* <http://permacc/>

gender, said ‘[I would like to] get my own apartment. I’m tired of being discriminated against.’”<sup>144</sup> Transgender respondents of the study further noted discrimination by city agencies, the police, and employers in addition to housing discrimination.<sup>145</sup> Discrimination is not specific to transgender sex workers as stigmatization is widespread against street-based sex workers.<sup>146</sup> Complaints among residents and community patrols have caused sex workers to go outside to low-income industrial areas where sex workers are exposed to increased risk of harm having little chance to escape violent clients who pressure them into unconsented or unprotected sex acts.<sup>147</sup>

#### IV. EFFECTS OF BANS ON PUBLIC HOUSING

##### A. *Deepening Impoverishment, Inabilities to Leave Sex Work, and Drug Use*

Respondents of a study on street-based sex work noted that housing was essential for sex workers who wished to make enough money to leave sex work, be reunited with their families, or combat substance abuse issues.<sup>148</sup> Respondents of the study best articulated these issues:

Marlene is homeless and was interviewed just after being released from police custody. With no place to go, she returned to the area she knows best, a neighborhood known for drug and sexual commerce . . . . [T]he environment is not conducive to her transitioning out of substance dependence and street-based sex work, especially when she lacks any indoor place to which to retreat, even for sleep.<sup>149</sup>

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7PC5-378N (“One in five transgender people in the United States has been discriminated when seeking a home, and more than one in ten have been evicted from their homes, because of their gender identity.”).

<sup>144</sup> *Id.*

<sup>145</sup> THUKRAL & DITMORE, *supra* note 1, at 63 (“She also noted the specific discrimination that transgender women face by adding, ‘the courts and the police . . . I don’t think we should be harassed because of who we are, regardless if they know what we are, I don’t think we should be discriminated against . . . because it happens anyway, you go to courthouse, you’ll still be discriminated against by the judge, by the DA, by the lawyers in [sic] society, you’re discriminated against.’”).

<sup>146</sup> Rekart, *supra* note 35, at 2124.

<sup>147</sup> Krüsi, *supra* note 44, at 1155.

<sup>148</sup> THUKRAL & DITMORE, *supra* note 1, at 9 (“Housing presents a specific difficulty for those who want to leave sex work. Homeless respondents and those with unstable or marginal housing, such as those living in SROs, described the difficulties of combating substance dependency when remaining amid people who also use drugs. Being offered drugs to share by neighbors presented nearly irresistible temptation, especially in a climate without peer support from non-drug users.”).

<sup>149</sup> THUKRAL & DITMORE, *supra* note 1, at 62.

Substance abuse is frequently associated with sex work as a means of self-medicating in order to cope with the stresses of the nature of the work.<sup>150</sup>

Without safe and affordable housing, workers are unable to earn enough money to pay for private housing, and paying for short substandard accommodations like rooms or SROs are costly and impose a further financial burden.<sup>151</sup> These same factors complicate family reunification:

Many prostitutes who are mothers and have lost or are in danger of losing custody of their children place a high priority on restoring ties with their children. Some want to re-gain custody once they are in a position to care for their children, but such family reunification is impossible without stable housing.<sup>152</sup>

Without access to safe, affordable, and stable housing environments many sex workers are road blocked from keeping or reuniting with their children. It is of the utmost importance that this stigmatized group be provided with supportive housing, especially since access to safe and affordable housing keeps families together.

In addition, unstable housing situations make it difficult for sex workers to feed themselves, have good nutrition, maintain personal hygiene, or have a place to get enough sleep. This inability to maintain a safe and clean lifestyle impairs a sex worker’s ability to leave sex work for work in the formal economy. Without a place for workers to sleep, eat, or bathe, many sex workers will not be hired into the workforce. Without housing, many sex workers do not have a telephone or fixed address, items necessary to those seeking employment.<sup>153</sup>

#### B. *Mental Health, Self-Esteem, and Vulnerability*

Research on streetwalkers and call girls in California and legal brothel workers in Nevada found that 97% of the call girls reported an *increase* in self-esteem after they began working in prostitution, compared with 50% of the brothel workers but

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<sup>150</sup> Amy M. Young et al., *Prostitution, Drug Use, and Coping with Psychological Distress*, 30 J. OF DRUG ISSUES 789, 790 (2000), available at <http://myweb.dal.ca/mgoodyea/Documents/Health%20and%20wellbeing/Prostitution,%20drug%20use,%20and%20coping%20Young%20J%20Drug%20Iss%202000%2030%284%29%20789-800.pdf>, archived at <http://permacc/T9LK-PT5D>.

<sup>151</sup> THUKRAL & DITMORE, *supra* note 1, at 31.

<sup>152</sup> *Id.* at 79.

<sup>153</sup> For example, a sex worker named John expressed concern that without housing, he had difficulty appearing “presentable.” THUKRAL & DITMORE, *supra* note 1, at 62.

only 8% of the streetwalkers.<sup>154</sup>

Mental health issues that street-based sex workers face include poor self-esteem, vulnerability to negative societal attitudes to sex work, depression, and post-traumatic stress disorder (“PTSD”):<sup>155</sup> as opposed to indoor sex workers who experienced higher levels of self-esteem than the street-based sex workers surveyed here.<sup>156</sup> A study conducted in Canada, Columbia, Germany, Mexico, South Africa, Thailand, Turkey, United States, and Zambia of street-based sex workers found that nearly seventy percent of women met the criteria for PTSD.<sup>157</sup> A second study conducted in Holland argued that the cause of the high rates of PTSD included high rates of “victimizing experiences,” homelessness, and substance abuse.<sup>158</sup> Research shows that street-based sex workers experience more stress and depression than brothel workers.<sup>159</sup> Although much of the research on sex worker psychological impact is done in other countries in conjunction with the United States, “[a] comparison of 176 streetwalkers who use crack cocaine and a matched sample of 130 crack cocaine using non-prostitutes, interviewed on the streets in Harlem, found that the street prostitutes were more likely to exhibit psychological disorders.”<sup>160</sup>

## V. HOUSING MODELS AND HARM REDUCTION

In addition to urging public and private housing law makers to adopt less restrictive policies to housing in line with the trend of

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<sup>154</sup> Weitzer, *supra* note 8, at 218.

<sup>155</sup> See Ross, *supra* note 21, at 2 (“In a comment in *The Lancet*, Groneberg and colleagues (3) included the following occupational hazards that need to be taken into account in the lives of commercial sex workers: violence, harassment, infections, bladder problems, stress, depression, alcohol or drug addiction, latex allergy, and death.”); see also Rekart, *supra* note 35, at 2124.

<sup>156</sup> Weitzer, *supra* note 8, at 218.

<sup>157</sup> Ross, *supra* note 21, at 5 (“Mental health issues vary considerably among female sex workers. Farley et al. (7) found that PTSD among sex workers in South Africa, Thailand, Turkey, the US, and Zambia was present in two thirds of the sample, and did not differ by country. In an update five years later in nine countries (Canada, Colombia, Germany, Mexico, South Africa, Thailand, Turkey, the US, and Zambia), they found that close to 70% of the women met criteria for PTSD. While Farley et al concluded that prostitution is intrinsically traumatizing and the harm of prostitution is not culture-bound[.]”).

<sup>158</sup> *Id.*

<sup>159</sup> Priscilla Alexander, *Sex Work and Health: A Question of Safety in the Workplace*, 53 J. AM. MED. WOMEN ASS’N 77, 79 (1998).

<sup>160</sup> Weitzer, *supra* note 8, at 217-18 (citing Nabilla El Bassel et al., *Sex Trading and Psychological Distress Among Women Recruited from the Streets of Harlem*, 87 n.1 AM. J. PUB. HEALTH 66 (Jan. 1997), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.87.1.66>).

decriminalization adopted by the New York State courts,<sup>161</sup> New York City must adopt a housing model that will help street-based sex workers escape the deepening cycle of impoverishment created by homelessness. In spite of the large population of homeless and shelter-housed individuals in New York City, sex workers are among the most stigmatized individuals and have few resources when faced with homelessness, drug dependency, or poverty. Below, I analyze three separate housing models discussed by sex worker advocates, which address the problem of sex worker homelessness.

A. *Transitional Shelters*

Advocates for sex workers' rights insist that it is necessary for New York City to create transitional shelter support systems for street-based sex workers similar to the domestic violence shelter model.<sup>162</sup> This includes short- or long-term housing integrated with onsite support staff to assist with finding permanent housing solutions for workers. One advocate stated that:

[T]hese shelters offer women a safe and confidential place to go and get their lives together . . . [T]o stop and figure out what's next for them . . . where services are more seamless. And the best thing is that [women who stay at shelters] are living with other women who are going through similar situations, and they can be a support network for each other.<sup>163</sup>

A crucial element of this model is a 24-hour support staff system. The same advocate said that support staff:

provide counseling and advocacy, and referrals to take care of other needs, like maybe rehab or job training or with ACS, that a client has . . . They could drive a client directly from finishing rehab to this special shelter, so there's no opportunity to get into trouble or distracted.<sup>164</sup>

This model is especially essential for street-based sex workers who work outside, are homeless, or are marginally housed in the winter-time. This model could also be used for sex workers who were recently released from institutions or who were previously incarcerated.

Advocates for transitional shelters distinctly noted that transgender sex workers are in need of a shelter system that provides

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<sup>161</sup> See Keshner, *supra* note 17.

<sup>162</sup> THUKRAL & DITMORE, *supra* note 1, at 80.

<sup>163</sup> *Id.* at 65.

<sup>164</sup> *Id.*

specific supportive services.<sup>165</sup> This model would include “dress for success” classes or mental health support such as therapy, caseworkers, and food programs.<sup>166</sup> This model would help alleviate hunger and domestic violence: two issues specifically stated to affect the transgender sex worker community.<sup>167</sup> An advocate noted that transgender sex workers, and transgender women in general, are not always eligible for domestic violence shelters and may have decreased access to shelter and services they may need.<sup>168</sup> This model would be a helpful adaptation of the current shelter system. However, it would create barriers for sex workers who wish to continue sex work by preventing them from bringing clients home.

*B. Housing First Model*

The “housing first” methodology provides a critical link between the emergency shelter/transitional housing systems and the community-based and governmental services and resources that are often fragmented, difficult to access or simply not available to homeless families trying to attain stability and independence in permanent housing.

The program methodology facilitates the move into permanent housing for homeless families and then engages the newly-housed family in a progressive set of individualized case management activities and interventions for a limited period of time, as they move toward improved social and economic well-being. The “housing first” methodology is premised on the belief that multi-problem and at risk families are often more responsive to interventions and support after they are in their own housing, rather than still living in housing programs that are temporary or transitional.<sup>169</sup>

This model finds apartments for clients and rents them out as a Social Security benefits payee program. This program takes Social Security benefits on behalf of clients, pays rent, telephone, and other utilities, and then returns the remainder of the money to clients. Advocates noted that this model is not particularly conducive for clients with substance abuse issues because of the risk of

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<sup>165</sup> *Id.* at 80-81.

<sup>166</sup> *Id.* at 66.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> THUKRAL & DITMORE, *supra* note 1, at 66; *Best Practices and Profiles Report on Beyond Shelter*, NAT'L ALLIANCE TO END HOMELESSNESS (Apr. 17, 2003), <http://www.endhomelessness.org/library/entry/beyond-shelter-los-angeles-ca>, archived at <http://permacc/565G-Q2NP>.

falling out of treatment because the recipients have control over the remainder of the money. For example:

The people [they] take are not housing ready. And the woman you're talking about on the streets is not housing ready according to all these other models, but this is a model, he has [a very successful] retention rate in two years [as compared to] other supportive housing providers that only serve housing ready people.<sup>170</sup>

Although there is a risk of substance abuse among clients of this model, advocates noted that clients at risk of substance abuse do not spiral out of control to the point of homelessness. She noted, "The first step to recovery is getting somebody a house. Once you have a house, then you have like something to live for and like a reason to bring yourself together."<sup>171</sup> Another advocate agreed, saying, "yeah, I mean, the more I do this work, the more I see that it's housing that's like the most fundamental thing for people."<sup>172</sup> An issue of this program is that not all sex workers are eligible for Social Security and may work around a cash only environment.

In these situations, a housing program would not be able to make rental payments on the behalf of sex workers. An expert on advocacy for homeless sex workers agreed that "commitment to housing is important for street-based sex workers, whether it is a domestic violence shelter or 'housing first' program."<sup>173</sup> This model provides basic needs and housing for sex workers but fails to assist the needs of sex workers who may need other supportive services. Additionally, by not reforming the laws regarding private and public housing, sex workers, and eviction, many sex workers would be pushed out of the housing procured by the housing first model if arrested for prostitution.

### C. *Unsanctioned Indoor Sex Work Environment*

In addition to traditional indoor sex work environments like massage parlors and brothels, a recent study in Canada reported that research calls for indoor sex work environments with "environmental-structural interventions." These "interventions" or "systems of support" create "enabling environments" to reduce violence and sexual risks associated with sex work contributed by "contextual factors, gendered power dynamics, and access to resources."<sup>174</sup> Fur-

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<sup>170</sup> THUKRAL & DITMORE, *supra* note 1, at 66.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 67.

<sup>174</sup> Krüsi, *supra* note 44, at 1154.

ther, environmental-structural supports instituted in indoor sex work in countries such as Brazil and the Dominican Republic include “supportive management policies, security measures, and access to HIV and STI prevention resources strongly associated with increased control among female sex workers in negotiating sexual risk reduction, including condom use.”<sup>175</sup>

Unfortunately, these “environmental-structural interventions” have been scarce among developed countries and formal implementations of these policies are road blocked by restrictive laws. However, in Canada, Parliament recently enacted a law that criminalized the purchase of sex work, those who “materially benefit from sexual services,”<sup>176</sup> the discussion of the sale of sex in certain areas, and those who “knowingly advertise an offer to provide sexual services for consideration.”<sup>177</sup> Much like the laws in the United States, these restrictive laws impede the ability of sex workers to engage in sex work without fear of arrest and conviction. Although “prostitution” or sex work is not completely decriminalized in Canada, “erotic massage parlors” or “licensed body rub parlors” act as indoor sex work environments throughout the country. In addition to these indoor sex work environments, activists call for unsanctioned indoor sex work environments where sex workers can live and work free from violence, arrest, and risk of harm.

In British Columbia, a new unsanctioned indoor sex work model has been utilized that focuses on “low-barrier, supportive housing programs for women.”<sup>178</sup> This indoor unsanctioned sex work model differs from a brothel or indoor sex work environment because operators do not profit from the sex work occurring on the premises. Further, this environment exists purely to support sex workers and to provide them a safe place to live, work, and receive supportive services. This unsanctioned sex work environment is neither legalized nor regulated by the Canadian government. The following study focuses on how these environments

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<sup>175</sup> *Id.*

<sup>176</sup> Protection of Communities and Exploited Persons Act, S.C. 2014, c. C-36 (Can. 2014) (codified as amended at Criminal Code R.S.C 1985, c. C-46 § 286.2 (Can. 2014)), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6646338&File=33#3>, archived at <http://permacc/E6MX-8YS8>. (The amended Criminal Code Act added language that made obtaining sexual services for consideration an indictable offense and liable to imprisonment.)

<sup>177</sup> *Id.* (“Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.”).

<sup>178</sup> Krüsi, *supra* note 44, at 1155.



positively impact "safety and risk negotiation with clients during sex work transactions."<sup>179</sup>

### 1. The Unsanctioned Safer Sex Work Housing Model<sup>180</sup>

Despite a "prohibitive legal environment" for sex work in Canada, a recent innovative program has combined an indoor sex work environment with a supportive housing model in British Columbia to create the "Unsanctioned Safer Sex Work Housing Model."<sup>181</sup> These housing programs "offer a minimal-barrier, high-tolerance environment and follow a women-centered empowerment and harm reduction/health promotion philosophy."<sup>182</sup> Residents of this housing model "represent the most marginalized, chronically homeless women in the community who live with trauma and substance use issues and support themselves through sex work."<sup>183</sup> Simply put, this model is a supportive housing environment that also helps facilitate the female residents' involvement with sex work. Therefore, the building policies reflect "the needs of women who are working in the street-level sex trade" and allow women to bring sex work clients into their rooms.<sup>184</sup>

Further, this model employs "environmental-structural policy supports" to help facilitate a safe environment for residents to provide sex work transactions.<sup>185</sup> These supports include: (1) building/management policies; (2) environmental cues/security measures; and (3) access to health, prevention, and harm reduction resources.<sup>186</sup>

Building and management policies provide that the Unsanctioned Safer Sex Work Housing Model buildings consisted of only women (management, residents, and staff), had required guest hours where women could bring their clients, required clients to register at the front desk (sometimes requiring photo identification), and restricted guests to one at a time.<sup>187</sup> However, some women reported that these policies interfered with client's anonymity, as discussed in the "effects of study" below.

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<sup>179</sup> *Id.*

<sup>180</sup> This model will be used extensively throughout the remainder of the article and referred to as "the model."

<sup>181</sup> Krüsi, *supra* note 44, at 1155.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Krüsi, *supra* note 44, at 1155.

Environmental cues and security measures consist of bad date reports to monitor client violence, camera surveillance systems in public areas, and residents' ability to call for help from the staff or the police in the case of a client altercation.<sup>188</sup> These bad date reports are distributed to other residents of the buildings and allow women to screen out potentially violent clients, even leading to the arrest of particular violent clients and offenders.<sup>189</sup>

Lastly, access to health, prevention, and harm reduction resources include support by doctors and mental health practitioners (who often visit the buildings), access to condoms, syringes, and other harm reduction paraphernalia, and onsite staff who distribute medication (including methadone and antiretroviral therapy).<sup>190</sup>

The author of the the "Unsanctioned Safer Sex Work Housing Model" study states:

We drew upon data from 39 in-depth qualitative interviews and 6 focus groups conducted with residents of the two housing programs from July 2009 to March 2010. All residents of the housing programs, who were willing to participate and met the minimum criterion of having engaged in sex work in the previous month, were interviewed.<sup>191</sup>

This study, examined below, illustrates the positive effects that a supportive sex work housing environments has on the health, safety, and socioeconomic status of sex workers.

## 2. Effects of Study

Generally, the study found that an unsanctioned indoor sex work environment decreased the rate of violence sex workers experience, increased control and negotiations of sex work transactions, and improved the health risks inherent in sex work.<sup>192</sup> All respondents of the study reported that violence and rape were inherent in street-based sex work. All respondents additionally re-

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1156.

<sup>190</sup> *Id.* at 1155.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* ("Women's accounts indicated that unsanctioned indoor sex work environments promoted increased control over negotiating sex work transactions, including the capacity to refuse unwanted services, negotiate condom use, and avoid violent perpetrators. Despite the lack of formal legal and policy support for indoor sex work venues in Canada, the environmental-structural supports afforded by these unsanctioned indoor sex work environments, including surveillance cameras and support from staff or police in removing violent clients, were linked to improved police relationships and facilitated the institution of informal peer-safety mechanisms.").

ported that safety and control over sexual risk reduction were prominent living and working under this model.

i. *Safety*

*It’s safer. I can just yell for help and you know, in the alley you can’t really yell, you know? It’s hard to run away, and . . . you don’t know whether they’re going to get violent or something. There’s a lot more chance of that outside than at my place . . . It’s happened before, and the staff have come and they’ve told him to leave or they even got the police to get him to leave. They do that right away. It took four cops to get this guy to leave. (Participant #30)<sup>193</sup>*

Safety in these supportive housing environments involved the implementation of “environmental-structural safety mechanisms,” which included programs such as bad date reports, camera surveillance, and contact with staff and police.<sup>194</sup> Bad date reports compiled lists of violent clients and are made available to residents and staff and posted on the entrance of buildings.<sup>195</sup> Women of the study noted that this technique increased their sense of safety by allowing staff to recognize and report violent clients in their housing.<sup>196</sup>

Issues with this model included concern that the lack of anonymity would be a barrier for clientele as opposed to the anonymous nature of street-based sex work.<sup>197</sup> However, sex workers felt that camera surveillance was an important feature of vetting and identifying violent clients. Only a minority of women reported that identification policies were a barrier to clients.<sup>198</sup>

Relationships with the staff and police were integral to the sex workers’ perception of safety. They reported that they could count on police for support to remove violent clients.<sup>199</sup> This aspect of the model cannot be found in other indoor sex work environments and is in direct opposition to police interactions discussed among street-based sex workers in New York City.<sup>200</sup> A large proportion of study respondents noted that police welcomed their indoor conduct and showed concern for their safety. One woman noted, “Police just stop me and then sometimes they ask if I’m okay or if I’ve

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<sup>193</sup> Krüsi, *supra* note 44, at 1156.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Krüsi, *supra* note 44, at 1156.

<sup>200</sup> *Id.*

had dates with assholes or jerks lately. They used to hassle us a long time ago; it's changed." (Participant #26).<sup>201</sup> Formal and informal safety mechanisms allow for safer housing and work environments, which create spaces that allow women to look out for each other's safety.

ii. *Negotiation Risk Reduction in Sex Work Transactions*

One of the positive effects of this model is that sex workers have increased control of client transaction negotiations regarding types of services, amounts charged, as well as sexual health and condom use. This model grants sex workers agency not afforded in street-based sex work by allowing them to refuse services that are risky or unwanted. Women also reported that safety and support staff allowed them to feel more dignified and receive more respectful treatment from clients.<sup>202</sup> This empowerment experienced by participants was linked to increased prices of services and less risk of women being "slighted," or not paid for their work.<sup>203</sup> Respondents noted that they could count on other the women in the housing program if a client did not pay.<sup>204</sup> However, one issue of living in a support community of sex workers was that women would undercut fellow sex workers due to competition for dates within the small environment.<sup>205</sup>

In summary, this model represents the best housing environment for sex workers in New York City because it consists of unsanctioned and unregulated housing environments that combine the ability of sex workers to live, work, and receive supportive services all under one roof. This allows sex workers to significantly reduce the risk to their health and risk of violence, as well as eliminate unnecessary police actions, arrests, and criminal convictions. This environment could be made to accommodate sex workers with children by having on-site child care centers. Additionally, the affordable unsanctioned sex work-housing environment would assist sex workers in escaping poverty by working and paying to live in affordable housing, freeing funds to afford living expenses and build savings. Once sex workers are able to afford their own housing, they would ideally have access to public housing that no longer discriminates against their current involvement in sex work or pre-

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1157.

<sup>203</sup> *Id.* at 1157.

<sup>204</sup> *Id.* at 1157-58.

<sup>205</sup> Krüsi, *supra* note 44, at 1158.

vious sex work convictions as discussed in this paper.<sup>206</sup>

#### VI. ADOPTING HARM REDUCTION MODELS TO SEX WORK IN NEW YORK CITY

Like prostitution, the use of intravenous controlled substances is illegal under New York law.<sup>207</sup> However, approved not-for-profit organizations are given the authority to “obtain, possess, and furnish” hypodermic syringes and needles for drug-using patients for the purpose of preventing HIV and blood borne pathogens.<sup>208</sup> New York law protects patients who possess hypodermic needles under the needle exchange program and decriminalizes possession of a residual amount of a controlled substance in the needles as part of the program as well.<sup>209</sup>

Using the Unsanctioned Safer Sex Work Housing Model, housing authorities and lawmakers should create similar harm reduction programs to combat violence and public health concerns without fear of facilitating conduct that it is not sanctioned under state law. New York City has successfully used the needle exchange policy as a basic, adaptive technique for harm reduction regulation of illegal activity. New York City should similarly adopt the unsanctioned indoor sex work model instead of banning sex workers from public housing entirely.

Needle exchange programs reduce public health concerns related to intravenous drug use by substantially decreasing HIV and Hepatitis transmission rates. However, syringe and needle exchanges were not always legal under state law.

In 1990, 54 percent of injection drug users in New York City were HIV positive. To combat the disease, state lawmakers legalized clean syringe exchange programs in 1992. By 2001, the HIV rate among IV drug users in the city had fallen to 15 percent.<sup>210</sup>

Through these efforts, needle exchange programs became legalized despite the increased control and criminalization of the buying and selling of drugs like heroin and cocaine. Most importantly,

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<sup>206</sup> See *supra* Part III B-C.

<sup>207</sup> N.Y. PENAL LAW § 220.00 et seq. (McKinney 2014).

<sup>208</sup> N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (2015).

<sup>209</sup> Press Release, Office of the New York State Governor, Governor Paterson Signs Bills to Promote HIV Testing and Remove Barriers to Needle Exchange and Syringe Access (July 30, 2010), available at <http://readme.readmedia.com/Governor-Paterson-Signs-Bills-to-Promote-HIV-Testing-and-Remove-Barriers-to-Needle-Exchange-and-Syringe-Access/1658422>, archived at <http://perma.cc/F5WJ-BNVG>.

<sup>210</sup> Kenny Goldberg, *Syringe Exchange Widespread in New York City*, KBPS (July 9, 2009), <http://www.kpbs.org/news/2009/jul/09/syringe-exchange-widespread-new-york-city/>, archived at <http://perma.cc/N8A4-TZRU>.

these decreased HIV rates show that harm reductive services that support an “illegal activity” can have a substantial positive impact on the lives of those affected while decreasing risks to public health.

The unsanctioned indoor sex work environment model of British Columbia should be the next utilization of the needle exchange harm reduction technique because the public good of decreasing the risk of violence to sex workers, decreasing the risk of HIV transmission, and helping this vulnerable population to escape poverty outweighs the fear of allowing sex work activity in violation of state law. Just as independent and grassroots needle exchange forced lawmakers to pioneer harm reduction legislation relating to intravenous drug use, the implementation of an indoor sex work environment could push the trend of increased decriminalized sex work in New York City while drastically reducing the devastations faced by sex workers, the risk of violence, and public health concerns.

## VII. CONCLUSION

No matter the reason sex workers chose to engage in this work, whether it is survival sex work or to supplement low-wage income, many face issues finding and maintaining housing in New York City. These issues may be due to public housing laws, previous convictions, or housing conditions that prevent them from performing sex acts for money in or near their apartments, homes, shelters, or rooms.

Public housing authorities, shelter systems, and lawmakers must take an approach to sex work that mirrors the harm reduction approach of the hypodermic syringe and needle exchange program and follow the trend of increasing decriminalization of sex work in New York City. Harm reduction can be exemplified by compelling NYCHA to adopt less restrictive policies that do not discriminate against those with sex work convictions. These less restrictive policies include: (1) compelling the New York City District Attorneys and NYCHA to not evict tenants purely for being arrested for prostitution offenses and (2) removing the “sex or morals” bans from NYCHA applications and eviction process.

In addition to policy changes, the city should create supportive shelter environments that cater to sex workers’ needs and implement unsanctioned sex work environments for the greater cause of harm reduction to sex workers. By creating a model that mirrors the harm reduction approach exemplified by the needle

exchange programs and the implementation approach developed by the British Columbia unsanctioned indoor sex work environment model, sex workers will have a better chance to escape violence, mitigate HIV risk, and overcome the cycle of poverty.





# TOWARD A SYNTHESIS: LAW AS ORGANIZING

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## ABSTRACT

*This paper analyzes tensions within current models of partnership between law and organizing. It draws on the insight developed from recent projects to propose further development of “Law as Organizing” as a new synthesis in which social movement lawyers incorporate organizing principles and techniques into their practice. Part II traces the historical trajectory of public interest lawyering, leading from impact litigation, through rebellious lawyering, and into Law and Organizing. Part III focuses in on “Know Your Rights” trainings as a common site of collaboration between organizers and lawyers, in order to draw out the tension between litigation-oriented and organizing-oriented frameworks in law and organizing. This analysis is based on articles by prominent practitioners and theorists as well as on primary source research conducted by the author in 2012. Part III concludes by articulating the challenge presented to social movement lawyers seeking to address the contradictions in the partnership model. Part IV proposes moving away from the partnership model, and toward a synthesis between law and organizing. This approach draws on principles and techniques of organizers and popular educators, and thereby moves toward relationship-building over longer periods, and focuses on a problem as a socio-political question, not merely a discrete legal issue. The current examples of synthesis are analyzed with an eye toward ongoing tensions, and the potential benefits that may be found in such a synthesis.*

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## INTRODUCTION

In an effort to draw the Central Virginia Latino community together for a new immigrant rights campaign, an organizer with the Wayside Center for Popular Education invites a public interest attorney to lead a “Know Your Rights” training at a community meeting. The organizer thinks of the training as a draw, a way to get more people through the door and involved in the group. The attorney thinks of the training as a way to empower individuals to know how to use the law to defend their interests. These goals may have seemed compatible on the surface, but in reality, a substantial problem emerged: “[W]e [were] trying to organize an immigrant rights march, [it was] fully legal and permitted, [but the lawyers we invited for the training] recommended that people just don’t participate in political actions like that.” He reflected further, “[I]t’s harder to build a base with enough numbers and real power to demand change because the people who are telling them how to protect themselves by exercising their rights in interactions with law enforcement are telling them also, either directly or subtly, to not rock the boat.”<sup>1</sup>

In an ideal situation, by providing legal education in partnership with community organizing efforts, attorneys empower participants and strengthen the organizing initiative. However, efforts by well-meaning attorneys frequently frustrate the goal of the organizers and reinforce (generally poor or marginalized) participants’ dependency on lawyers and other social elites for fixing their problems. This contradiction is generally due to two fundamentally distinct frameworks that guide the work of lawyers and organizers. Part II of this paper charts the path that lawyers have taken in seeking to grapple with the contradictions contained within public interest practice. The section traces the historical trajectory of public interest lawyering, leading from impact litigation, through rebellious lawyering, and into “law and organizing,” in order to contextualize more recent contributions to the discussion.

Part III focuses on Know Your Rights trainings for undocumented immigrants to draw the contradictory frameworks out into the open to explore the tension between a “litigation-oriented” framework and an “organizing-oriented” framework. Know Your Rights trainings are one of the most common forms of collaboration between organizers and lawyers. Through this pedagogical experience, public interest lawyers and their co-trainers promote a

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<sup>1</sup> Research interviews, on file with author. 2012.

specific way of viewing rights and the law. These trainings provide a space in which the tension between the two frameworks is clearly visible, and, at times, particularly troublesome. While the organizing-oriented framework leads trainers to focus on building horizontal relationships, or a politically engaged community that can act in its own interests, the litigation-oriented framework views the trainings as an opportunity to distribute information about formal legal rights and how to identify violations, with the recommended solution almost without fail being “call a lawyer.”

The use of these terms does not mean that all lawyers follow a litigation-oriented framework, or that all organizers follow the organizing-oriented framework; there are many examples of transgression from the expected roles. However, because of the relatively narrow focus of legal training, it is likely difficult for lawyers to imagine other types of solutions. Alizabeth Newman captured this dilemma in her article *Bridging the Justice Gap*, reminding us that “it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.”<sup>2</sup>

At the core, these frameworks promote different roles for the participants. For example, the litigation-oriented framework conceives of the participant as a rights-bearing legal subject, who may suffer a legally cognizable injury, but is then dependent on the lawyer to get any sort of remedy or resolution. This implicitly reinforces the authority and legitimacy of the legal system, and obscures the relationship between formal legal structures and systems of domination such as capitalism, nationalism, white supremacy, patriarchy, and heteronormativity. In addition, deference to formal legal process reproduces the relationship of dependency between lawyers as members of the professional elite and marginalized populations. While formal legal discourse understands the client as an injured individual, the organizing-oriented framework understands participants as members of a subordinated group. The purpose of the training, as conceived by the organizer, is to empower participants to enact collective control over decisions that affect them. The litigation-oriented framework, on the other hand, implicitly encourages participants to abdicate decision-making capabilities, granting them to professional advocates. While an emphasis on “client-centered lawyering” is welcome, this approach remains individualized representation hemmed in by the limits of formal legal practice.

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<sup>2</sup> Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 616 (2011).

After articulating and exploring the implications of this tension, Part IV focuses on innovations law and organizing, to learn how to overcome the oppositional logic. This paper proposes, as one possible methodology, that public interest lawyers approach law and organizing as a synthesis rather than a partnership. This means breaking the dichotomy between litigation and organizing by creating spaces for building a collective power through commonalities in legal issues faced by participants. Building a collective identity is a long-term process and cannot be done in one Know Your Rights training. Such trainings may retain some value, but are unlikely to be the space of a synthesis because they do not allow for a long-term relationship, which is necessary for transformative organizing work. The practical examples of this approach are few, but are crucially important guides for moving toward a synthesis of law and organizing, or Law *as* Organizing.

## PART II

Public interest lawyering is a broad term, encompassing various approaches to legal work that share the common goal of addressing issues faced by poor or marginalized people in order to achieve a more just society.<sup>3</sup> A basic premise of public interest lawyering is that as distributed through a private market, the law does not serve the needs of the subordinated.<sup>4</sup> A second premise is that, without a political consensus to create greater protections or redistribute wealth, governmental regulation and service provision are woefully insufficient to fill the gap left by the market.<sup>5</sup> Public interest lawyering emerged with the recognition that social justice legal work must be developed in a third space, outside of both the private market and public offices.<sup>6</sup> Since its emergence, however, there has been significant disagreement about the best way to use the law to meet the needs of poor and marginalized people.

At the beginning of the 20th Century, public interest lawyer-

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<sup>3</sup> I am using a broader definition to encompass the many different approaches that have emerged under this title. Other definitions have included "efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process." NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 3 (1989); Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1252 (2006).

<sup>4</sup> ARON, *supra* note 3, at 3; BURTON A. WEISBROD, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 1 (1978).

<sup>5</sup> WEISBROD, *supra* note 4, at 1.

<sup>6</sup> Despite operating outside the government, public interest lawyering generally has sought to push the government to regulate private activity in the interest of the public welfare.

ing consisted of a charitable model in which private lawyers performed pro bono work for indigent clients who otherwise would have no legal representation.<sup>7</sup> Continuing today, this model depends heavily on formal engagement with the law and focuses on the individual's legal problem in isolation from the social context. In the early 1900s, organizations like the NAACP, followed by the ACLU, developed precedent-setting litigation strategies to protect the interests of African Americans and political dissidents, respectively.<sup>8</sup> By the 1950s and 1960s, cases such as *Brown v. Board of Education* stood as a symbol to public interest lawyers, suggesting that carefully prepared litigation can transform society.<sup>9</sup> This much-celebrated form of legal work was institutionalized in 1967 by the creation of the Office of Economic Opportunity's Neighborhood Legal Services Program as part of the federal government's War on Poverty.<sup>10</sup> Impact litigation was further promoted by the spread of the non-profit corporate model, supported by foundation funding, and it came to be one of the most prominent forms of public interest lawyering.<sup>11</sup> In general, impact litigation (both the practice and the theory that accompanies it) prioritizes precedent-setting litigation over other social change strategies.<sup>12</sup> It is premised on the belief that changes in laws and policy can provide a remedy for deep-seated social injustices.

A series of victories in the Supreme Court and the "existence of structural opportunities and organizational resources, fed a sense of optimism about the power of law to change society."<sup>13</sup> From the 1950s through the 1970s, the Supreme Court was the site of significant legal transformations with broad implications for society. These included outlawing racial segregation in *Brown v. Board of Education*, guaranteeing a right to an attorney when defending against criminal charges in *Gideon v. Wainwright*, establishing the entitlement to a pre-termination hearing for recipients of public benefits in *Goldberg v. Kelly*, and recognizing women's right to

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<sup>7</sup> Handler et al., *supra* note 3, at 43.

<sup>8</sup> *Id.* at 44.

<sup>9</sup> *Id.*; see also Cummings & Eagly, *supra* note 3 at 1252.

<sup>10</sup> WEISBROD, *supra* note 4, at 45.

<sup>11</sup> See James DeFilippis, *Community Control and Development* in THE COMMUNITY DEVELOPMENT READER, 33-35 (2012).

<sup>12</sup> Cummings & Eagly, *supra* note 3, at 1252 ("In the classic legal aid model, law is used to achieve individual client goals through case-by-case representation. In the public interest law reform model, law is used to advance a lawyer-defined reform agenda using impact lawsuits to build legal precedent.").

<sup>13</sup> *Id.* at 1268.

choose to terminate pregnancy in *Roe v. Wade*.<sup>14</sup>

However, these cases (and others in other areas of law) constituted the high water mark for legal protections for the poor, people of color, women, and workers. Since the late 1970s, the rights secured through such impact litigation have been narrowed. This was related to a number of social transformations, including the advent of neoliberalism,<sup>15</sup> deindustrialization and the decline of unions,<sup>16</sup> the emergence of a “color blind” regime of racial ordering,<sup>17</sup> the militarization of police,<sup>18</sup> and immigration enforcement,<sup>19</sup> and a general counter-mobilization by conservative sectors of society in response to the symbolism of progressive legal victories.<sup>20</sup> These tendencies reshaped United States culture, society, and the economy, closing the political opportunities for future progressive change through impact litigation.

Concurrently with these systemic and institutional transformations, public interest lawyering and the use of “impact litigation” came to be heavily critiqued by lawyers and academics inspired by postmodernism and Critical Legal Studies (CLS). Analysis coming from the CLS perspective sought to “demystify the power hierarchies embedded in liberal individual rights discourse by showing the indeterminacy of legal rules and the inherently political choices underlying the current legal order.”<sup>21</sup> CLS charged that under the current legal system “judges and other individuals who wield public power could impose their own views of the moral or political good on others under the cover of law.”<sup>22</sup> This included a

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<sup>14</sup> These victories have been critiqued as primarily symbolic. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420-25 (2nd ed. 2008) (“A further danger of litigation as a strategy for significant social reform is that symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful . . . . [For example,] the celebration of *Brown* may serve an ideological function of assuring Americans that they have lived up to their constitutional principles of equality without actually requiring them to do so.”).

<sup>15</sup> See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

<sup>16</sup> See generally BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* (1982).

<sup>17</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 15 (2012).

<sup>18</sup> See generally RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (1st ed. 2013).

<sup>19</sup> See generally MIGUEL ANTONIO LEVARIO, *MILITARIZING THE BORDER: WHEN MEXICANS BECAME THE ENEMY* (2012).

<sup>20</sup> ROSENBERG, *supra* note 14, at 425.

<sup>21</sup> Scott Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 452 (2001).

<sup>22</sup> ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 13 (1993).

critique that “rights discourse” is “incoherent and manipulable, traditionally individualist, and willfully blind to the realities of substantive inequality.”<sup>23</sup> Moreover, rights discourse is seen as a “trap” that “imposes constraints on those who use it . . . [It is] difficult for it to function effectively as a tool of radical transformation.”<sup>24</sup> Within CLS, analysis of these general characteristics exposes the law as “a major vehicle for the maintenance of existing social and power relations . . . . The law’s perceived legitimacy confers a broader legitimacy on a social system . . . characterized by domination.”<sup>25</sup>

These CLS critiques of liberal rights and the rule of law, combined with the conservative and neoliberal shift that narrowed the political opportunities for transformation, led many progressive lawyers to prioritize direct action and popular mobilization over impact litigation.<sup>26</sup> In addition, legal scholars began to challenge the narrative that placed pivotal Supreme Court cases of the 1950s through the 1970s at the center of social transformation.<sup>27</sup> Impact litigation was seen as a distraction from movement building that draws resources away from other social change efforts.<sup>28</sup>

Related to this, another critique of litigation, and traditional

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<sup>23</sup> *Id.* at 13

<sup>24</sup> DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983), *reprinted in* *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* 9, 39-42 (2004).

<sup>25</sup> DAVID KAIRYS, *THE POLITICS OF LAW* 5-6 (3d ed. 1998), *reprinted in* ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 15 (1990).

<sup>26</sup> Cummings & Eagly, *supra* note 21, at 446 (“The CLS contention that the law merely codified the outcome of struggles over political power supported the view that real institutional change was possible only through direct action. Law reform strategies, in contrast, were incapable of achieving fundamental social change because the law was circumscribed within the existing political order and thus could not address the core issue of unequal power.”).

<sup>27</sup> ROSENBERG, *supra* note 14, at 420-21 (providing a thorough analysis of efforts to produce social reform in civil rights, abortion, women’s rights, the environment, reapportionment, criminal rights, and same-sex marriage, and concluding that impact litigation can be successful only if it overcomes three fundamental constraints: (1) the need for political support of the court’s decisions; (2) the judiciary’s structural lack of implementation powers; and (3) the need for established legal precedent supporting claim).

<sup>28</sup> *Id.* at 423 (“[N]ot only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent and runs the risk of weakening political efforts . . . . Funding a litigation campaign means other strategic options are starved of funds.”); *see also* Ann Southworth, *Lawyers and the ‘Myth of Rights,’ Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 470-71 (1999); Anthony V. Alfieri, *The Antinomies of Poverty Law and A Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 664 (1988) (“[P]overty cannot—indeed should not—be remedied by [direct service and impact litigation]. Remedial litigation should not be mounted, even where altruistic relief is possible, without the activa-

public interest lawyering in particular, focused on how social domination of poor and marginalized people is reproduced through the relationship between lawyer and client.<sup>29</sup> This critique argued that even well-meaning lawyers can be “active impediments to social change, disempowering clients by controlling litigation strategies and disregarding client stories.”<sup>30</sup> In this analysis, lawyers develop a paternalistic relationship that denies the agency of their clients.<sup>31</sup> Gerald Lopez’s influential book *Rebellious Lawyering* juxtaposed traditional public interest lawyering (which he calls “regnant lawyering”) against an alternative form that understands the lawyer-client relationship as a partnership of equals and opens the space for other social actors to join in the collaboration.<sup>32</sup> Lopez’s argument that “lawyers, clients, and other community members should work together in nonhierarchical relationships to challenge existing systems of power”<sup>33</sup> has had a major impact on how public interest lawyering is taught and practiced.

Coincidentally, however, as these critiques of public interest lawyering emerged and sought to push the profession to make deeper systemic changes, there was a backlash against the legal reforms made by activist lawyers through impact litigation. Federal funding for public interest lawyering was reduced and restricted to a very specific framework that sought to tie lawyers to practices that did not threaten the social order.<sup>34</sup> This diminished the capacity of lawyers to pursue strategies aimed at social transformation, but innovation and critique continued to grow regardless.

Both the scholarly and applied fields of public interest lawyer-

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tion of class consciousness among the poor, nor without the political organization and mobilization of the poor.”).

<sup>29</sup> Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1609 (1989) (“In the regnant idea of lawyering for the subordinated . . . lawyers work for clients, almost always by formally representing them, through offices designed to facilitate if not compel a relationship where lawyers regularly (perhaps even ideally) dominate and where clients quite nearly vanish altogether, except when circumstances make their presence absolutely necessary.”); Steve Bachman, *The Hollow Hope: Can Courts Bring About Social Change?* 19 N.Y.U. REV. L. & SOC. CHANGE 391, 391-92 (1992) (book review) (“When ordinary people perceive that they can change nothing or that they have to rely on ‘experts’ or ‘magic’ to solve their problems, they come to believe they are powerless . . . the deplorable conditions of the status quo are intensified, not ameliorated.”).

<sup>30</sup> Cummings & Eagly, *supra* note 21, at 458.

<sup>31</sup> *Id.*

<sup>32</sup> GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAWYERING* 23-8 (1992).

<sup>33</sup> *Id.*

<sup>34</sup> See Ingrid V. Eagly, *Community Education: Creating A New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 438-9 (1998).



ing that emerged from these critiques have developed theories and methods of collaboration between lawyers and organizers. Emerging out of the CLS and rebellious lawyering critiques of traditional public interest lawyering,<sup>35</sup> “Law and Organizing” argues that legal strategies should be deprioritized, and subordinated to the strategies developed by community and social movement organizations.<sup>36</sup> Law and Organizing adopts the perspective that social change must come from below, and that, fundamentally, the lawyer’s goal should be no different than that of the organizer: to empower subordinated people to transform society.<sup>37</sup> Within this process, lawyering is “viewed instrumentally—not as a means to achieve specific legal victories, but as a spur to collective action.”<sup>38</sup> By subordinating legal tactics to a community-based decision making process, Law and Organizing also carries the potential to disrupt the hierarchical relationship between lawyer and client. This also necessitates a reformulation of a lawyer’s interpersonal relationships, in which a lawyer must “join rather than lead . . . listen rather than speak . . . [and] assist people in empowering themselves rather than manipulating the levers of power for them.”<sup>39</sup> This form of lawyering “involves not advocacy for individual interests, but advocacy with a group of people organized to reclaim what is rightfully theirs, their own power.”<sup>40</sup>

There are many ways that lawyering and organizing converge. In *Power With*, Michael Grinthal maps out five different models of such convergences, seeking to provide a set of vocabulary and concepts for lawyers to reflect on their work, including the corporate model, MASH model, enabling model, organizing on the scaffold

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<sup>35</sup> In the trajectory mapped out here, the term “Law and Organizing,” and its prominence as a framework for lawyering, developed out of the CLS and rebellious lawyering critiques, but the conceptual framework predates the emergence of CLS. See, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970) (“Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves. This is not the traditional use of a lawyer’s skills; in many ways it violates some of the basic tenets of the profession. Nevertheless, a realistic analysis of the structure of poverty, and a fair assessment of the legal needs of the poor and the legal talent available to meet them, lead a lawyer to this role.”).

<sup>36</sup> CAUSE LAWYERS AND SOCIAL MOVEMENTS 2-3 (Austin Sarat & Stuart A. Scheingold eds., 2006).

<sup>37</sup> Wexler, *supra* note 35, at 36.

<sup>38</sup> Cummings & Eagly, *supra* note 3, at 1268.

<sup>39</sup> William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 479 (1995).

<sup>40</sup> *Id.* at 472.

of litigation, and lawyering *as* organizing.<sup>41</sup> As discussed in the Part IV of this paper, however, Grinthal promotes a collaborative relationship between lawyers and organizers, not a synthesis.

Because of a lawyer's position in relationship to the legal system, she may have a unique role in either reinforcing or demystifying legal authority. Demystification of this authority is a necessary precondition to community empowerment.<sup>42</sup> To assist in mobilizing social power and collective action, a lawyer must serve to disrupt the legitimacy of legal authority, and thereby create space for people to locate authority within their organization.<sup>43</sup> In this process, the lawyer must expose the ways in which the law upholds relationships of domination, offering an analytical framework that supports what the community members already know to be true.

Lawyering skills can support organizing efforts in a number of significant ways. For the purposes of this paper, it is sufficient to focus on the practice of community education<sup>44</sup> in general, and Know Your Rights trainings in particular, because this context highlights the tension between litigation-oriented and organizing-oriented frameworks. Community education is used in lawyering "to increase the legal knowledge of a specific community or about a particular issue to support individuals in developing their own problem-solving skills."<sup>45</sup> It is additionally seen as valuable for its potential as a non-traditional lawyering practice that can empower the participant beyond the legal sphere "by planting seeds for leadership development, community empowerment, and mobilization."<sup>46</sup> Ingrid Eagly states that in its full potential "community education reaches under-served populations, provides opportunities for clients to have their voices heard, responds to concerns that

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<sup>41</sup> Mike Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 44-58 (2011).

<sup>42</sup> Quigley, *supra* note 39, at 477 ("In contemporary society, the lawyer holds a position of power partly because the law has drawn away from regular people and become a system unto itself, inaccessible to a nonlawyer, with its own language, and its own liturgies of practices . . . the ignorance of the client enriches the lawyer's power position. Thus, the lawyer, even the well intentioned public interest lawyer, has a share of power that is only the result of others not having access to it.").

<sup>43</sup> *Id.*

<sup>44</sup> Eagly, *supra* note 34, at 480 ("Community education is a lawyering model grounded in theories of progressive practice that view client empowerment as one of the goals of social change . . . [B]y creating opportunities for community leadership, encouraging poor people to resolve their own problems, and providing a space for lawyer/client collaboration, community education [has] helped to expand the boundaries of traditional Legal Services practice.").

<sup>45</sup> See Newman, *supra* note 2, at 631.

<sup>46</sup> *Id.* at 632.

cannot be adequately addressed by the legal system, encourages individuals to solve their own problems, and develops leadership skills in community members.”<sup>47</sup> It should be noted that this is the ideal and that not all community education initiatives necessarily meet these goals.

Community organizers (and occasionally lawyers<sup>48</sup>) often reference popular education as a tool for mobilization and/or a philosophy of revolution,<sup>49</sup> in which marginalized people come together to collectively analyze their immediate and systemic situation and engage in context-specific problem solving strategies. In this process, the narratives that disguise systemic injustice behind a veil of “objectivity” can be disassembled and the educational space becomes a site of building new identities, relationships, and worldviews. When utilized as a law and organizing strategy, popular education cannot simply be a presentation of formal legal structures, but must be a space to question the law and to build confidence in challenging an unjust social order. It is within this theoretical framework that I place Know Your Rights trainings in order to examine how they promote legal knowledge and analyze their potential for both liberation and oppression.

### PART III: KNOW YOUR RIGHTS TRAININGS

With a general goal of empowerment, Know Your Rights trainers offer participants a set of tools for resolving difficult situations. They provide a narrative that bolsters the position of participants in interactions with authorities. The following section will draw on the sociological concept of “discourse” as an analytical tool for examining the effects of using a litigation-based versus an organizing-based framework in the trainings. Discourse refers to how every-day language shapes relationships of social power (such as racial, gendered, etc.). It produces distinct, stigmatized, and hierarchized categories of persons.<sup>50</sup> According to this theory, “the ways in which discourses constitute the minds and bodies of individuals is

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<sup>47</sup> Eagly, *supra* note 34, at 436.

<sup>48</sup> See Newman, *supra* note 2, at 631.

<sup>49</sup> See generally PETER McLAREN, CHE GUEVARA, PAULO FREIRE, AND THE PEDAGOGY OF REVOLUTION 34-6 (2000); PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (2009); Sameer Ashar, *Public Interest Law and Resistance Movements*, 95 CALIF. L. REV. 1879, 1890 (2007).

<sup>50</sup> See MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE, 1975-76, (David Macey trans., Picador, 2003) (lectures three & eleven); MICHEL FOUCAULT, HISTORY OF SEXUALITY VOLUME I (Robert Hurley trans., Pantheon Books, 1978) (Part V).

always part of a wider network of power relations.”<sup>51</sup> A Know Your Rights training will promote a narrative that relates to existing systems of power and legal authority. The framework used by trainers determines the degree to which the power relations will be reinforced or challenged.

Using the immigration context as an example, one of the most powerful discursive concepts is the term “illegal.” The heightened importance of immigration law in the production of national identity has produced subordinated populations through legal codifications of immigration status.<sup>52</sup> The “illegal,” at its root, is constituted by the civil infraction of either violating the terms of one’s visa (such as overstaying, or working while on a tourist visa) or illegally crossing a national border. In addition to the technical definition, it is simultaneously inscribed with a moral judgment, framing migrants to be “increasingly perceived as ‘criminal.’”<sup>53</sup> This, in turn, fosters public support for, or at least acceptance of, “the broad range of crackdown measures currently being implemented, including stripping these individuals of procedural and substantive rights.”<sup>54</sup>

The implications embedded within this term suggest that the person is stripped of her “right to have rights.”<sup>55</sup> This also suggests that the “illegal” is the enemy of the state, which, in turn, must work to detect, detain, and deport this population. Following the logic further, the legal system should not afford the “illegal” the various rights established by federal and state law.<sup>56</sup> To the extent this set of ideas is widely held, the “illegal” person is also vulnerable to subordination, abuse, and exploitation by other actors throughout society and the economy.

In response to this this, Know Your Rights trainings operate as a “counter-discourse”. Counter-discourse promotes a way of thinking that disrupts the dominant discourse’s legitimacy. A counter-

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<sup>51</sup> CHRIS WEEDON, *FEMINIST PRACTICE & POSTSTRUCTURALIST THEORY* 105 (1996).

<sup>52</sup> See *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>53</sup> CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* 16 (2008).

<sup>54</sup> *Id.* at 16-17.

<sup>55</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296-97 (1966). Arendt identifies a contradiction between the universal and inalienable Rights of Man and the right of the Nation-State to decide who is a legitimate member of its political community and who may be excluded. She argues that the “right to have rights” is dependent on state recognition of such a right. “We became aware of the existence of a right to have rights . . . and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights . . .” *Id.*

<sup>56</sup> See *Hoffman*, 535 U.S. at 156 (Breyer, J., dissenting).

discourse provides a person with the tools to “speak on [her] own behalf, to demand that [her] legitimacy or ‘naturalness’ be acknowledged, often in the same vocabulary, using the same categories by which [she is] disqualified.”<sup>57</sup> In the immigration context, Know Your Rights trainings offer counter discourses that seek to subvert the narrative that creates the “illegal” by asserting that the participants do have the right to have rights. In this way, discourse operates as both “an instrument and effect of power as well as a starting point for resistance.”<sup>58</sup>

For lawyers conducting Know Your Rights trainings, with or without the help of organizers, two frameworks emerge. The litigation-oriented framework presents formal notions of rights as they are written and practiced within the legal system. In contrast, the organizing-oriented framework promotes a struggle for new claims and challenges the authority of formal legal structures to the extent they are interlaced with systems of oppression and subordination.<sup>59</sup>

In Know Your Rights trainings, a primary objective in the litigation-oriented framework is to “demystify laws and procedure. The hope is that with more understanding and knowledge [of the legal system], the immigrants develop confidence in their own abilities and feel less powerless.”<sup>60</sup> This goal represents a formalistic approach to the trainings that covers rights such as “the right to remain silent, the right to be free from unreasonable searches and seizures, the right to consult with a lawyer, and the right to advocate for change.”<sup>61</sup> This is a formal presentation of rights, which depoliticizes the legal structure and promotes faith in due process and rule of law. While this type of training asserts that undocumented immigrants do in fact have the right to have rights, it maintains deference to the legal system as the source of those rights and therefore narrows the remedy to those offered under the law. This

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<sup>57</sup> Michel Foucault in WEEDON, *supra* at note 51, 109-10.

<sup>58</sup> Bettina Lange, *Researching Discourse and Behavior as Elements of Law in Action*, in *THEORY AND METHOD IN SOCIO-LEGAL RESEARCH* 176, 177-78 (Reza Banakar et al. eds., 2005).

<sup>59</sup> Wendy Brown, *Suffering the Paradoxes of Rights*, in *LEFT LEGALISM / LEFT CRITIQUE* 420, 431 (Wendy Brown, et al. eds., 2002) (analyzing the rights of discourse as presenting a seemingly irresolvable paradox between and within these two currents, and arguing that in a critical framework, emancipatory rights tend to reproduce the subordinated subject in need of those rights, while in the formal framework, the notion of universal rights “depoliticize the conditions they articulate”).

<sup>60</sup> Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 WASH. U. J.L. & POL’Y 265, 283 (2008).

<sup>61</sup> *Id.*

understanding suggests that the law operates independently from oppressive systems of power (heterosexism, white supremacy, and capitalism, for example); as a counter-discourse, it does not recognize the inherently political nature of the legal system,<sup>62</sup> or the imbalance that results from the treatment of unequals as though they were equal.<sup>63</sup> In teaching formal conceptions of rights, Know Your Rights trainings promote the mythology of the unbiased, autonomous power of the rule of law. This framework is unable to expose the systems of oppression that reinforce and are supported by legal structures without destabilizing its own foundation.

Contrasting with the litigation-oriented trainings, some law and organizing practitioners have designed alternative frameworks that recognize the political nature of law, displace its authority, facilitate broader rights claims, and foster collective mobilization. In *Suburban Sweatshops*, for example, Jennifer Gordon reflects on the trainings she helped coordinate with the Workplace Project, an immigrant worker's center in Long Island. Contrasting their "Worker's Course" with the litigation-oriented model of Know Your Rights training, she explains how rights were not presented as objective fact, but as a site of contention.<sup>64</sup> Organizers and lawyers with the Workplace Project used the concept of rights primarily to generate discussions about systems of oppression, to envision how things should be, and to brainstorm how to get there.

Drawing on a popular education model, the goal was "to sensitize workers to the commonality of their exploitation, to make them understand that theirs were not isolated instances of individualized abuse, but part of a larger structure with deep historical and political roots."<sup>65</sup> Representing the organizing-oriented framework in Know Your Rights trainings, this counter discourse simultaneously decenters legal authority and challenges oppressive discourses. Also, this exemplifies the seemingly emancipatory po-

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<sup>62</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 97 (1995) ("[The abstract concept of rights is] an ahistorical, acultural, [and] acontextual idiom: they claim distance from specific political contexts and historical vicissitudes, and they necessarily participate in a discourse of enduring universality rather than provisionality or partiality.").

<sup>63</sup> Brown, *supra* note 59, at 423 (arguing that these forms of rights sustain the "invisibility of [their] subordination," as well as enhance it); see also Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM / LEFT CRITIQUE* 189 (2002).

<sup>64</sup> Cummings & Eagly, *supra* note 3, at 1257 ("In ordinary 'know-your-rights' classes, lawyers stand up and lecture to workers about their entitlement to a minimum wage, a safe workplace, and freedom from discrimination. The Workers Course, in contrast, was interactive and confrontational.").

<sup>65</sup> *Id.* at 1258.

tential of context-specific rights that Wendy Brown identifies as paradoxical. Brown warns that by mobilizing context-specific rights discourse, the injured subject may reinforce their subordinated subjectivity, locking themselves into a particular category.<sup>66</sup> An example of this may be seen in analyzing how rights established specifically for “immigrants” work to reinforce the outsider designation of “immigrant,” the national identity of the “citizen,” and borders of the nation-state.

In *Making People Illegal*, Catherine Dauvergne seeks to explain how globalization contributes to the construction of “illegal”. While “in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion,’”<sup>67</sup> Dauvergne argues that the threat of losing national sovereignty due to neoliberal globalization has made migration law an even more important site of “national assertions—of power, of identity, of ‘nationness.’”<sup>68</sup> As an assertion of sovereignty, the basic power of migration law is to determine who can enter and who must be turned away, thus reinforcing an insider population “and also spell[ing] out degrees of belonging and entitlement through the hierarchical systems they establish.”<sup>69</sup> Dauvergne shows that migration law does not remain at the border; it is also directed internally to enforce these distinctions within United States society.<sup>70</sup> Thus, the heightened importance of migration law in the production of national identity has produced subordinated populations through legal codifications of immigration status.<sup>71</sup>

The moral judgment invoked by the term “illegal” “reinforces migration law’s exclusionary capability.”<sup>72</sup> As “illegals,” racialized migrants are treated as “permanent outsiders, as less than fully human, as people with fewer rights because of first and foremost who they [are and] where they [are] from, a characteristic the migrants [have] no control over.”<sup>73</sup> The production of an illegal population “accomplishes this exclusion when the border itself does

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<sup>66</sup> BROWN, *supra* note 59, at 423.

<sup>67</sup> ARENDT, *supra* note 55, at 278.

<sup>68</sup> DAUVERGNE, *supra* note 53, at 17.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 17; Michael Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007).

<sup>71</sup> See *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 156(2002) (Breyer, J., dissenting) (arguing that the majority’s decision “level[s] helpless the very persons who most need protection from exploitative employer practices”).

<sup>72</sup> DAUVERGNE, *supra* note 53, at 17.

<sup>73</sup> JOSEPH NEVINS, *DYING TO LIVE* 177 (2008).

not . . . . [The population] is excluded from within.”<sup>74</sup> In a study of the United States-Mexico border, Wendy Brown argues that the barrier “is built from the fabric of a suspended rule of law and fiscal nonaccountability,” that it functions within a “state of emergency.”<sup>75</sup> Drawing on Dauvergne, Brown’s analysis can be extended from the border to the manifestation of migration law throughout society in the construction of the “illegal.” In the narratives that create the “illegal” classification, legal status and legal rights are systematically suspended. Undocumented migrants are then seen first as criminal, and second as outsiders. An obvious consequence of this is the constant threat of being detected by authorities, detained, and deported. Additionally, fear of the state acts as an obstacle to the assertion of rights or legal defense of interests when in conflict with non-state actors. This creates an environment that facilitates slavery, non-payment of wages, sexual harassment or other forms of workplace abuse, domestic violence, robberies and other street-crime, and contracting of illnesses.<sup>76</sup> These are forms of structural violence that are inflicted by society against the perceived threat of the “illegal.”

At their core, Know Your Rights trainings are an attempt to disrupt the power-effects of illegality by asserting a legal claim to the right to have rights. Trainers often talk about the trainings in ways that go beyond a legal framework of “rights knowledge” and suggest the importance of knowing how to negotiate cultural power.<sup>77</sup> I use the phrase “cultural power” to signal the way that culturally constructed ideas of family, language, work, and race uphold relationships of power.<sup>78</sup> Cultural power further suggests that “common sense” ideas reproduce informal systems of domination, echoing a Gramscian understanding of the political nature of cultural production.<sup>79</sup> Cultural power strengthens the idea of the “ille-

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<sup>74</sup> DAUVERGNE, *supra* note 53, at 17.

<sup>75</sup> WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 38 (2010).

<sup>76</sup> JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRATION RIGHTS* 46 (2007); *see also* Mathew Coleman, *The “Local” Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South*, 34 L. & POL’Y 159 (Apr. 2012); Ingrid V. Eagly, *Prosecuting Immigration*, 108 NW. U. L. REV. 1281 (2010); *see generally* DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* (2008); Virginia P. Coto, *Lucha, The Struggle for Life: Legal Services for Battered Immigrant Women*, U. MIAMI L. REV. 749 (1999).

<sup>77</sup> Interviews conducted by author.

<sup>78</sup> Ann Swidler, *Cultural Power and Social Movements*, in *SOCIAL MOVEMENTS AND CULTURE* 30 (2013).

<sup>79</sup> Antonio Gramsci, *Selections from Prison Notebooks*, in *ESSENTIAL CLASSICS IN POLITICS: ANTONI GRAMSCI* 142-46 (Quentin Hoare & Geoffrey Nowell Smith eds. & trans., 1999) (arguing that intellectuals in the fields of sciences, art and philosophy generate



gal” as a threat to society. Know Your Rights trainings do not merely develop legal strategies to defend oneself, but also generate *cultural* strategies that disrupt the concept of the “illegal.”

Susan Coutin identified a similar form of strategic cultural production in her research on legalization strategies of Central Americans in Los Angeles during the mid-1990s. Coutin showed that in response to increasingly restrictive immigration policies (such as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Proposition 187 in California), Central Americans and their allies fought back with cultural strategies that disrupted the idea of their foreign-ness. They sought to show: “that as a group . . . they had adapted to the United States, formed strong community ties, and given birth to U.S. citizen children who needed to go to U.S. schools . . . [In short, they] had to demonstrate that they had *acculturated*”<sup>80</sup> and were, in fact, a legitimate part of U.S. society. In making this claim, undocumented immigrants must “meet definitions of ‘Americanness’ not unlike those promoted by English-only advocates.”<sup>81</sup> They claimed that Central Americans have the right to stay because of the degree to which they have become integrated into the dominant U.S. culture.

The construction of this identity emphasizes certain qualities that fit into the expectations and demands of the dominant cultural power. It is a strategy that also necessitates the suppression of qualities deemed “foreign,” in order to put forward a normalized image of the immigrant as a member of United States society. Coutin argues that this is both a cultural and a legal strategy, citing the importance of law and culture in identity production. In this strategy, “claiming rights requires assuming an identity that the legal system can recognize, a process that can be simultaneously dehumanizing and empowering.”<sup>82</sup> She explains further that “as they challenge the established order, subordinate groups appropriate and redefine what might otherwise be derogatory or restrictive terms.”<sup>83</sup> Through emphasizing cultural power, Coutin shows how immigrant rights claims engage in strategic negotiations of identity

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ideas amongst civil society that allow for a seemingly “‘spontaneous’ consent” to the social, economic and political order, reinforcing the social hegemony of capitalism, and that social hegemony does more to ensure capitalism’s existence than the political force of the state).

<sup>80</sup> Susan Coutin, *Reconceptualizing Research: Ethnographic Fieldwork and Immigration Politics in Southern California*, in PRACTICING ETHNOGRAPHY IN LAW 108, 111 (June Starr and Mark Goodale eds., 2002) (emphasis added).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 112.

<sup>83</sup> *Id.*

within discourses of subordination, producing both oppressive and liberatory senses of self.

The tensions and contradictions made visible through analysis of Know Your Rights trainings, theoretical contributions offered by critical scholars, and empirical research on liberatory social movements are significantly more profound than the dichotomy I have drawn between litigation-oriented and organizing-oriented frameworks. Challenging questions emerge about the efficacy of social change agents and the impact of compromises made to achieve substantive goals. For the purposes of this paper, however, it is enough to understand the potential and serious pitfalls present when drawing on legal practice to engage clients in a relationship of transformative change of self and system. The next section moves from this foundation of critique toward an exploration of recent trends in law and organizing. It identifies an emerging model that synthesizes law and organizing, creating the space for lawyers to re-imagine and reconfigure their relationship to the individuals and communities they serve.

#### PART IV: ATTORNEY AS ORGANIZER

Lawyers seeking to grapple with the tensions articulated thus far should experiment with moving past the partnership model, and toward a synthesis of the two: “Law *as* Organizing.” By proposing deeper development of Law as Organizing, I draw on the contributions of recent authors who have developed models of Law as Organizing that build relationships of support, develop leadership, and deepen critical consciousness of clients.<sup>84</sup> I also challenge some recent contributions that argue that a clear division of roles is strategically and ethically preferable to a model that enmeshes lawyers in organizing-oriented relationships with clients.<sup>85</sup> By bringing these authors into dialogue with each other, I hope to overcome any conclusions that lawyers are only fit to play certain professionalized roles in social change work, highlight the dynamic innovations that are occurring, and stoke our collective imagination to produce innovations in lawyering practice.

There are significant arguments against lawyers’ direct involvement with organizing activities. These critiques focus on problems

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<sup>84</sup> Newman, *supra* note 2, at 625-26; Karen Gargamelli & Jay Kim, *Common Law’s Lawyering Model: Transforming Individual Crises into Opportunities for Community Organizing*, 16 CUNY L. REV. 201, 205-06 (2012).

<sup>85</sup> Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213 (2011); Grinthal, *supra* note 41, at 61;

such as “role confusion,” the presence of distractions that act as obstacles to competent lawyering, and the concentration of leadership authority in the attorney-organizer.

Faced with the tensions between law and organizing, Tammy Kim, an attorney at Urban Justice Center, has argued for a greater degree of separation between the two roles. She characterizes her work as “resource ally” lawyering and argues that the role of community-minded lawyers should be to “support community organizing through legal representation of members of external grassroots organizations.”<sup>86</sup> Kim highlights dysfunctional aspects of past law and organizing projects and argues that lawyers should “avoid role confusion” by distancing themselves from day-to-day organizing.<sup>87</sup> She recommends that lawyers should be “distinct but accessible entities . . . able to prioritize our most basic and fundamental duty—to be excellent in our craft.”<sup>88</sup> This model retrenches the lawyer’s work in the technical role of “resolv[ing] discrete legal problems.”<sup>89</sup>

There appears to be very little distinguishing the lawyer-client relationship in resource-ally lawyering from more traditional legal services models of lawyering. Although the source of the client is based on strategic support of social movement organizations, and although the attorneys may take into consideration the ally organization’s goals in representation of the client, the model’s design offers little to avoid reproducing the relationship of domination that may emerge within a traditional attorney-client relationship. This power relationship is not likely to be disrupted by merely “wearing street clothes, avoiding legalese, and speaking in . . . clients’ languages.”<sup>90</sup> If deconstruction of hierarchical relationship between attorney and client were to occur within this model, it would be due to the social skills and intention of the individual attorney, not due to any programmatic design offered by the “resource ally” model.

In *Power With: Practice Models of Social Justice Lawyering*, Michael Grinthal maps out five distinct models of collaborations between lawyers and organizing initiatives. Although Grinthal envisions a myriad of manifestations of partnerships between organizers and lawyers, he shares Kim’s belief that the “lawyer as organizer” model

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<sup>86</sup> Kim, *supra* note 85, at 220.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 221.

<sup>90</sup> *Id.* at 231.

is not desirable, citing the danger that the lawyer's involvement in organizing could actually increase dependency through the new role as an organizer. Grinthal characterizes this approach as an unstable and, ultimately, undesirable methodology.<sup>91</sup> When it is used, he recommends that the organization "should work toward differentiating the roles of lawyer and organizer as soon as possible."<sup>92</sup>

His cursory review of this approach to lawyering, apparently based only upon the histories of two New York City-area worker centers, is unsatisfying. Grinthal presents the idea that a paradox exists within the Law as Organizing model: while Law as Organizing may at first appear to be "the most radical enactment of the core values of organizing, in practice it often aggrandizes and foregrounds the lawyer."<sup>93</sup> However, this threat is not inherently more dangerous in Law as Organizing than it is in traditional organizing. Any organizer runs the risk of dominating the community empowerment process and stifling leadership development. It is the explicit goal of an organizer, however, to develop leaders that can go on to organize others independently of the original organizer. Despite any shortcomings in practice, the organizing framework pushes the lawyer/organizer to seek opportunities to develop new leaders in ways that the litigation framework never could.

While the articles by Kim and Grinthal propose that lawyers retreat (to varying degrees) from the milieu of organizing, other practitioners have charted an alternative path for addressing difficulties of law and organizing. Instead of retrenchment in traditional lawyering roles, two recent articles describe innovative Law as Organizing projects: i) *Bridging the Justice Gap: Building Community by Responding to Individual Need*, by Alizebeth Newman;<sup>94</sup> and ii) *Common Law's Lawyering Model: Transforming Individual Crisis into Opportunities for Community Organizing*, by Jay Kim and Karen Gargamelli.<sup>95</sup> These two articles provide concrete and successful examples of Law as Organizing, emphasizing the need to retrain ourselves to practice law in a new way.

A synthesis of law and organizing may take on various manifestations. At its core, Law as Organizing builds community power by addressing individual legal problems within the context of a transformative collective process. Newman, a clinical instructor at CUNY

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<sup>91</sup> Grinthal, *supra* note 41, at 58-9.

<sup>92</sup> *Id.* at 59.

<sup>93</sup> *Id.*

<sup>94</sup> Newman, *supra* note 2, at 630-6.

<sup>95</sup> Gargamelli & Kim, *supra* note 84, at 199.

School of Law, has developed “Collaborative Individual Lawyering” (CIL) as a form of Law as Organizing.<sup>96</sup> CIL is a model that addresses individual legal problems through a group process designed to form a community of support, develop leaders, foster critical consciousness, and bolster a community organization’s membership base.<sup>97</sup> Newman proposes this model as a way to “bridge the gap” between individualized legal services and lawyering to support already mobilized organizations.<sup>98</sup> Newman identifies an “opportunity to have the overwhelming demand for free legal services become a path for our clientele toward joining the social justice efforts already underway in their communities.”<sup>99</sup> The legal work meets the needs of individual clients, but also acts “as a bridge between the individual and the mobilized group.”<sup>100</sup> Newman emphasizes that CIL, “must be grounded in a long-term vision for mobilization and the project design must be non-hierarchical, participatory, and community-driven.”<sup>101</sup>

In this model the attorney “partners with a social justice organization to increase its membership and build leadership”<sup>102</sup> by utilizing popular education methodology in a community-oriented legal clinic. As discussed earlier in this paper, popular education “is the process of nonhierarchical learning through dialogue in which people come to a critical understanding of their own conditions of power and oppression, which then forms the basis for collective action.”<sup>103</sup> For Newman, it offers a solution to the obstacles of role confusion, and the oppressive power relations identified by Kim and Grinthal. CIL calls for the lawyer to act as a “facilitator” who “sets the stage for leadership to emerge but does not insert herself in a position of power.”<sup>104</sup> The clinic runs a course in which participants “not only learn the law and obtain assistance with their immediate legal cases” but also examine “a problem’s historical, economic, social, and political roots, thereby encouraging the natural human tendency to come together with others toward social change.”<sup>105</sup> This process “requires the lawyer to relinquish the distance embedded in the traditional professional role,” and provokes

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<sup>96</sup> Newman, *supra* note 2, at 636.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 637.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 636.

<sup>101</sup> *Id.* at 637.

<sup>102</sup> Newman, *supra* note 2, at 636.

<sup>103</sup> *Id.* at 649.

<sup>104</sup> *Id.* at 638.

<sup>105</sup> *Id.* at 637.

“disorienting moments” in the lawyers practice that “destabilize predominant norms and dichotomies of professionalism . . . [encouraging] students to craft their own legal identities in pursuit of justice.”<sup>106</sup> In this way, Newman seems to suggest that some degree of role confusion is, in fact, necessary to catalyze the deconstruction of the traditional relationship of domination between lawyer and client.

The substantive focus of the clinic is to assist women in preparing applications under the Violence Against Women Act to secure visas as survivors of domestic violence.<sup>107</sup> Through the group process, each participant gained “a deep understanding of the abusive dynamic in her own marriage, the tactics used by her abuser, and the patterns and cultural norms of her community.”<sup>108</sup> In addition to facilitating individual empowerment, the collaborative process facilitates group building, shared problem-solving, and collective action in support of each other. In the long-term, the clinic supported the ally organization by developing its volunteer base and leadership capacity.

Through Common Law, Karen Gargamelli and Jay Kim have developed a similar approach to lawyering, but in a different substantive area: foreclosure defense. Although Gargamelli and Kim do not give their model a particular label, nor do they locate it within the literature on law and organizing, their approach shares core elements with Newman’s CIL model. Common Law runs foreclosure defense clinics for *pro se* homeowners.<sup>109</sup> Participants receive assistance from the attorneys in the form of consultations, drafting motions, preparing for court appearances, and referrals.<sup>110</sup> However, in addition to this formal legal work normally associated with *pro se* assistance, the clinics are carefully crafted to allow homeowners from many different backgrounds to build community and gain a deeper understanding of how their lives relate to the foreclosure crisis.<sup>111</sup> The participants also learn from and help each other prepare their own defenses. Through this process, Common Law deviates from a traditional legal services model by utilizing a participatory group setting for legal education that “emphasiz[es] and valu[es] the homeowners’ knowledge and experience,” and “expos[es] the widespread nature of seemingly

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<sup>106</sup> *Id.* at 649.

<sup>107</sup> *Id.* at 639.

<sup>108</sup> Newman, *supra* note 2, at 654.

<sup>109</sup> Gargamelli & Kim, *supra* note 84, at 208.

<sup>110</sup> *Id.* at 213-14.

<sup>111</sup> *Id.* at 209-210.

individual problems.”<sup>112</sup> As with Newman’s U-Visa clinic, Common Law’s weekly foreclosure clinic is simultaneously a legal clinic and a space of community organization. They support clinic participants in identifying commonalities, carefully develop leadership among the homeowners, and prepare the homeowners for collective mobilization and extra-legal action against banks and lenders.<sup>113</sup>

Through this process, Common Law’s organizing has supported the clinic participants in forming a homeowner organization called Foreclosure Resisters.<sup>114</sup> This newly formed organization is still closely tied to Common Law. The weekly foreclosure clinic functions as a source of new members and leaders. Kim and Gargamelli provide ongoing facilitation, strategic and tactical advice, and access to networks of resources such as foundations, and ally organizations. Though the Foreclosure Resisters continue to rely on the support of Common Law, as homeowners they now have the infrastructure to shape their power, and develop a reciprocal relationship of solidarity and collective action with other homeowners. This organization is the fruit of a law and organizing synthesis, and sets an important precedent for other practitioners to follow.

#### CONCLUSION

This comment does not advocate for a cessation of more established forms of public interest lawyering. It aims instead to highlight and contextualize innovations in law and organizing. I believe that public interest lawyers should develop a new skillset, and be able to draw on an organizing-oriented framework. Without the capacity to choose between tools and without an organizational structure that allows space for alternative approaches, a lawyer will inevitably default to a formal representation of rights and the law, leaving intact an associated model of lawyering that can reproduce, even unintentionally, a paternalistic relationship of dependency.

The projects discussed in this comment chart a path for a sus-

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<sup>112</sup> *Id.*

<sup>113</sup> Catherine Curan, *Mortgage crisis pickets hit Midtown*, N.Y. Post (Apr. 6, 2014, 4:54 AM), available at <http://nypost.com/2014/04/06/mortgage-crisis-pickets-hit-midtown/>; Saabira Chaudhuri, *Mortgage Complaints Overrun Wells Fargo Shareholder Meeting*, WALL ST. J. (Apr. 29, 2014, 12:28 PM), available at <http://online.wsj.com/news/articles/SB10001424052702304893404579531643398601288?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304893404579531643398601288.html>.

<sup>114</sup> FORECLOSURE RESISTERS, <http://foreclosureresisters.org/> (last visited April 26, 2015), archived at <http://permacc/LJC2-9TKN>.

tainable Law as Organizing model, which may be exported to other practice areas. The emphasis on addressing discrete legal issues, and on carefully facilitating a process of community building and collective action, are two key elements of this model. The first element is, in some ways, a limitation to social mobilization through Law as Organizing. It is not clear whether this model could extend to areas in which some form of legal rights do not already exist. In addition, there are likely some claims that require more technical legal skills than would be amenable to a collective process.

While this model necessarily entails a longer-term relationship to the clients than the Know Your Rights trainings, an unresolved issue is how to extend the relationship beyond the duration of the legal problem. Once the participants obtain a U-Visa or successfully fight off foreclosure, what keeps them engaged in the community? Structurally, these models do not offer a clear path to continued membership or participation. It seems to ultimately depend on the partner organization's capacity to absorb new members who have passed through the leadership development process. Although the question is not adequately addressed by the authors, this does not undermine the important contributions discussed above. Newman, Kim and Gargamelli have shared important innovations that lead toward re-imagining what it is to be a public interest lawyer.