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LIFE AFTER WRONGFUL CONVICTION: MAKING THE CASE FOR PARTNERSHIPS ACROSS THE DISCIPLINES

by Angela Inzano

In Illinois, 83 men and two women were exonerated between 1989 and 2010 after having spent a total of 926 years in prison for crimes they did not commit.¹ These wrongful convictions cost taxpayers $214 million.² The true perpetrators of the crimes, meanwhile, remained at large long enough to commit at least an additional 97 felonies, including 14 murders.³
Wrongful convictions are not unique to Illinois. One study showed that from 1989 to 2007, an estimated 208 people were exonerated in the United States through DNA testing alone.4

While much has been written, investigated and litigated regarding the process of obtaining justice for the innocent, little attention has been paid to the plight of these men and women after exoneration.5,6 When the media spotlight fades, exonerates face a lifetime of complex hardships and constant struggle, often through no fault of their own.

These individuals frequently require legal assistance to "prove" their innocence and gain access to proper compensation, housing and job assistance.7 Exonerates also often need financial and technological training, as well as general support and encouragement as they reenter society.8 The wide variety of assistance typically needed by exonerates creates a unique opportunity for lawyers and non-lawyers to work together and form a comprehensive support team. It is only through this sort of meaningful collaboration that we can address the multitude of problems facing exonerates today.

WRONGFUL CONVICTIONS

The vast majority of wrongful convictions are the result of one or more of the following: alleged police misconduct or error, erroneous eyewitness identification, alleged prosecutorial misconduct or error, false confession, incentivized witness testimony, questionable forensic evidence or testimony, or alleged ineffective assistance of counsel.9

Often, distinctions are made between those individuals exonerated through DNA evidence and those exonerated through other means, such as false confessions or recanting witnesses.10 Other scholars, however, believe that these distinctions are not significant and that no matter how people are determined to be innocent, they should be termed exonerates.11

For the purposes of this article, the reason for an individual's exonation is not particularly significant. What is important is that the individual was convicted, served time in prison and was later released when the state determined that the evidence was not sufficient.
Regardless of the cause of a wrongful conviction or the means by which a person was exonerated, many exonerees face the same challenges as they wade into their post-release world. In fact, many of the challenges facing exonerees are no different from those encountered by parolees, those individuals who serve time and are released based upon completion of time served only. For instance, exonerees and parolees each face issues with housing, job searches, technical training and stigmatization of their time spent behind bars.

Exonerees sometimes feel uncomfortable being grouped with parolees given that they were wrongfully convicted and parolees have not similarly proved their innocence. Somewhat shockingly, exonerees do not always meet the qualifications and requirements for parole services, making them arguably even more in need of a community support system.\textsuperscript{12}

Exonerees must jump countless legal hurdles before the state will recognize the injustice they have experienced. In Illinois, that recognition comes in the form of a governor’s pardon or a certificate of innocence.\textsuperscript{13} Exonerees also need legal assistance to pursue financial compensation for their time in prison. In cases of wrongful convictions, the standard for a civil suit is rarely an attainable goal, leaving exonerees in a position where their lives have been turned upside down without suitable recourse.\textsuperscript{14}

Overall, only 27 states nationwide and the District of Columbia currently have some form of statutory compensation for wrongful convictions.\textsuperscript{15} Even when these men and women receive compensation, it is often inadequate.\textsuperscript{16} In Wisconsin, for example, a wrongfully convicted person can receive a maximum of just $25,000, including attorney’s fees.\textsuperscript{17} A 2008 study showed that only 41 percent of 200 exonerees nationwide had received any compensation for their time served.\textsuperscript{18}

In addition to these legal hurdles, exonerees face many challenges that are simply beyond a lawyer’s scope of expertise. Understandably, exonerees often require a fresh start. There are many exonerees who have served multiple decades in prison for crimes they did not commit.\textsuperscript{19} These individuals, when released, subsequently find themselves without homes, jobs or adequate support systems.\textsuperscript{20} They lack sufficient knowledge of technology and other skills necessary to navigate the world they are thrust back into.\textsuperscript{21} Exonerees also have the added angst of having to continuously explain and mentally relive their unique
and devastating situation to potential employers, landlords, advocates and judges.

In order to fully address the multitude of challenges facing exonerees, lawyers must form partnerships with organizations and individuals who have more expertise dealing with these non-legal issues. Only by doing so can lawyers focus their full attention on the specific legal needs of their exoneree clients.

**Potential Partnerships**

The first, and most natural, collaborative relationship that lawyers working with post-release exonerees should consider forming would be with social workers and social work agencies. It is quite common, in a graduate setting, for law students and social work students to collaborate given that the practices often overlap.\(^{22}\) This is a practice that could also be extended past the educational experience to obtain the most effective assistance for clients.\(^{23}\)

Social workers are uniquely experienced in helping people to obtain many of the necessities exonerees require, such as job training and housing, and studies have shown that both lawyers and social workers benefit from working collaboratively.\(^{24}\) Ideally, lawyers working with exonerees should have a formal partnership with a social worker in order to ensure that the immediate needs of the exoneree can be addressed early, thus preventing any significant time period in which the exoneree is left without support services.

In addition to working closely with social workers, lawyers can form other partnerships that would greatly benefit exonerees. A partnership with a financial adviser who would be able to consult with exonerees at different stages of the post-release process may be an overlooked, but important, resource. Many exonerees will not have recent experience in allocating their money and may need a basic tutorial early on in the process. Furthermore, if exonerees are able to obtain compensation through statutory means or a successful civil suit, they would greatly benefit from the advice of someone who can help them decide how to best use that compensation to plan for their financial future.

In addition to financial woes, exonerees often have medical needs — both physical and mental — due to their time spent incarcerated.\(^ {25}\) In Illinois, legislation was recently passed granting exonerees 10 free sessions with a mental
health professional once they obtain a certificate of innocence. Mental health service partnerships allow for exonerees to work through the trauma of their experience, which can positively benefit their overall quality of life, putting them in the right frame of mind to make the most of employment opportunities and social interactions.

Another major challenge facing exonerees is not having anyone to whom they can relate or discuss the many roadblocks they face. One way to combat these feelings of isolation is through collaboration with a peer specialist. This collaboration may be one of the most significant partnerships that a lawyer could form in working with exonerees.

Peer specialists are becoming popular in a number of settings, including mental health services and veterans counseling. In this case, a peer specialist would be an exoneree who has navigated the process and can provide advice, support, and connections to recent exonerees. The social support network that a peer specialist can provide, given the unique experience and emotions that surround a post-release exoneree, may be invaluable as a resource going forward and can positively impact each of the above relationships as well.

CONCLUSION

The various kinds of assistance needed by exonerees can only be obtained through coordinated multi-disciplinary efforts. The above are only a few examples of numerous relationships with that lawyers working with exonerees in a post-release setting should consider fostering. Given that there are not many organizations currently working in post-innocence work, there is much room for growth and experimentation.

That an individual could be wrongfully convicted, spend decades in prison and later be released with little or no support is a shocking and heartbreakingly real experience of today's justice system. There is no doubt that these individuals, whom the system has so egregiously failed, deserve better. Legal advocates have a duty to right the wrongs the justice system has perpetrated against these men and women. In order to best serve their clients, lawyers should strive to form as many partnerships across disciplines as possible. This practice would go a long way toward ensuring that exonerees receive the fresh start they deserve.
NOTES

2. Id.
3. Id.
6. While there are a number of innocence projects across the country, there is currently only one non-filth-based organization that works exclusively with exonerates post-release. Life After Innocence, founded in 2009, is a legal clinic at Loyola University Chicago School of Law composed of both students and faculty. Center, Institutes & Programs: Life After Innocence, LOYOLA UNIV. CHI. SCH. OF LAW, www.luc.edu/law/lifeafterinnocence/index.html (last visited Mar. 20, 2012).
8. Id.
9. Id.
10. Id.
11. Id.
16. Id.
18. Garrett, supra note 4.
21. Id.
23 Id. at 600.
24 Id.
25 Life After Innocence: Services, supra note 7.
26 750 ILL. COMP. STAT. 5/2-702 (2011).
27 For an example of its use with veterans, see Veteran Trauma Court Peer Specialist Program, Pikes Peak Chapter of Military Officers Ass'n of Am. available at http://www.ppmoa.org/documents/VeteranPeerSpecialistApp.pdf (last visited Apr. 19, 2012).
FEATURE ARTICLE

A LONG AND WINDING ROAD: THE STRUGGLE FOR JUSTICE IN THE CHICAGO POLICE TORTURE CASES

by G. FLINT TAYLOR

In the early morning hours of May 29, 1973, Anthony Holmes was taken to Area 2 detective headquarters in Chicago, where he was tortured by recently promoted police detective Jon Burge and several other detectives who worked with Burge on the Area’s midnight shift. The torture included repeated shocks by an electrical device housed in a box, and suffocation with a bag placed over Holmes’s head. Holmes passed out from the pain, felt that he was
dying, and, as a result, gave a detailed stationhouse confession to a Cook County assistant state’s attorney implicating himself in a murder that he has since insisted he did not commit. 4

And so began one of the most far-reaching and long-lasting scandals in the annals of Chicago police history — a scandal that featured two decades of brutal and systemic violence perpetrated on more than 110 African-American suspects, implicated at least two Chicago mayors and numerous officials at the highest levels of the Chicago Police Department and the Cook County State’s Attorney’s Office as well as members of the Cook County judiciary, and continues to this day.

This article will examine this sordid history and the 25-year struggle fought by the torture survivors and their families, a group of dedicated lawyers, community activists and organizations, and a precious few reporters and politicians to expose these crimes against humanity and to pursue justice for those who were tortured.
POLICE TORTURE: THE EARLY YEARS

Throughout the 1970s, Burge spearheaded a torture ring at Area 2 that featured the repeated use of electric shock, a tactic he most likely learned while serving as a military police sergeant in a prisoner-of-war camp in South Vietnam during the Vietnam War. On one occasion, an African-American detective from Area 2 walked in on a Burge torture scene; when he reported it to a supervisor, he was told to mind his own business — then he was transferred out of Area 2. Another Black detective saw what appeared to be the torture box, which Burge sometimes referred to as the "n***** box," sitting on a table near the sergeant's desk at Area 2.

Neither of these detectives, nor any other Area 2 officer, exposed Area 2's "dirty little secret." Torture by the midnight shift continued unabated, and assistant state's attorneys participated in the interrogations, took the tortured confessions and used the confessions to prosecute and convict. Thanks to Burge and his fellow detectives, Area 2 could boast of outstanding arrest and conviction rates, and Burge, who was fast becoming a rising star in the department, was promoted to sergeant.

In the early 1980s, Burge was again promoted, this time to lieutenant, and placed in charge of a newly created Violent Crimes Unit at Area 2. At about the same time, Richard M. Daley was elected state's attorney of Cook County. In February 1982, after two white Chicago gang-crimes officers were shot and killed on the South Side, Police Superintendent Richard Brzeczek and Mayor Jane Byrne instituted the largest manhunt in the history of the city; Burge was placed in charge of the search.

Police kicked down doors and brutalized scores of citizens in what African-American leaders condemned as "martial law" that "smack[ed] of Nazi Germany." Suspected witnesses were tortured with bags and bolt cutters, and Burge and his detectives took several young men — whom they wrongly suspected to be the killers — to police headquarters, where they tortured them.
The Torture of Andrew Wilson

Five days after the murders, Burge and his men arrested two brothers, Andrew and Jackie Wilson, for the crime. Burge and his longtime associate, John Yucaitis, subjected Andrew, who was identified as the shooter, to a regimen of torture that included bagging him, beating him and burning him with a cigarette lighter. Handcuffed across a ribbed steam radiator, Andrew was shocked on the nose, ears, lips, and genitals with Burge’s shock box, which jolted him against the radiator and left serious burns on his face, chest and leg.

Andrew Wilson’s injuries were so pronounced that the lockup keeper refused to accept him, and they were documented by medical personnel and his appointed lawyer, whose investigators took graphic pictures. Dr. John Raba, director of medical services for the Cook County prison hospital, examined Wilson, heard his description of the torture, and wrote a letter to Police Superintendent Brzezek describing Wilson’s injuries and demanding a full investigation.

Wilson was brought to court, and for a short interval the mainstream media’s sensationalized coverage of the murders and manhunt included Wilson’s ghastly appearance. By contrast, the Chicago Defender, the city’s venerable African-American newspaper, gave full coverage to the systemic brutality visited upon Chicago’s African-American community during the manhunt. Several local African-American groups collected approximately 200 police misconduct complaints and conducted a community hearing, but the police department’s own disciplinary agency managed to “lose” the vast majority of the complaints made.

Brzezek — who would admit, decades later, that he excoriated several high-level deputies for permitting Wilson to be tortured — delivered Dr. Raba’s letter directly to State’s Attorney Daley, with a pronouncement that he would not investigate Wilson’s alleged torture unless Daley directed him to do so. After consulting with his first assistant, Richard Devine, Daley decided not to investigate; instead, he and Brzezek both publicly commended Burge. Consequently, Burge and his Area 2 cohorts were left to continue their systemic torture.
AREA 2: TORTURE CONTINUES ON THE MIDNIGHT SHIFT

Further emboldened, Burge brought his friend from childhood, Sgt. John Byrne, to head up Area 2's midnight shift. On this shift detectives tortured scores of African-American suspects, coercing confessions that sent them to prison, sometimes to death row, for crimes that, in at least a substantial number of cases, they did not commit. State's Attorney Daley continued to condone this behavior, and specifically approved his assistants' seeking of the death penalty in several torture cases.

In 1986, Andrew Wilson, now under a death sentence, filed a pro se civil rights action in federal court, alleging that he was tortured by Burge, Yuaitis and several other Area 2 detectives. At about the same time, Burge was promoted to commander. After several appointed lawyers bowed out of Wilson's civil rights case, lawyers from the People's Law Office agreed to represent him. At the recommendation of newly appointed Police Superintendent Leroy Martin, the Chicago City Council agreed to retain and finance Burge's choice of defense lawyers — the law firm of Richard Devine, who was now in private practice.

Wilson's civil rights case went to trial in February 1989, amid little fanfare. While torture at Area 2 had long been an "open secret" at Area 2, the police department and the state's attorney's office managed to keep the lid on that secret, and every Cook County judge who heard allegations of torture on motions to suppress rejected them. Hence, Wilson's lawyers, and the public at large, were ignorant of the depth and breadth of the torture scandal.

THE ANONYMOUS LETTERS FROM "DEEP BADGE"

During the trial, Wilson's lawyers received several anonymous letters from a police source who was close to Burge. The source, dubbed "Deep Badge" by the lawyers, asserted that the torture was deeply racist and systemic. Deep Badge named numerous of Burge's "asskickers," implicated State's Attorney Daley and Mayor Jane Byrne in the scandal, and specifically identified another torture victim, Melvin Jones, who was tortured by Burge with electric shock only days before Wilson.
The lawyers located Jones in the Cook County Jail, confirmed his story, and obtained a transcript of his testimony at his 1982 motion-to-suppress hearing where he first detailed his torture. While the trial judge, Brian Barnett Duff, would not permit Jones to testify at the trial, this breakthrough would open the door to the discovery and documentation, over the next two decades, of more than 110 victims of torture by Burge and his men.25

The eight-week Wilson civil rights trial ended with a hung jury, but Wilson’s lawyers had begun to uncover and document more cases of Area 2 torture. The lawyers presented them to Judge Duff in an unsuccessful attempt to have this evidence presented at the retrial that was scheduled to start in the summer of 1989.26

At the retrial, Judge Duff permitted Burge’s City-financed lawyers to present weeks of what the Seventh Circuit Court of Appeals would later find to be highly prejudicial and irrelevant evidence about the police murders for which Wilson stood convicted.27 Remarkably, the all-white jury nonetheless returned a split verdict, absolving Burge from violating Wilson’s constitutional rights but finding that the police department had a policy of abusing persons accused of killing police officers.28

The hotly contested trials and the revelations that the torture was systemic in nature engendered some sporadic media attention. Wilson’s lawyers insisted on calling the abuse “torture” rather than brutality, and slowly the media followed suit. John Conroy, an investigative reporter for the Chicago Reader, covered both trials, and in early 1990 set forth in detail the systemic nature of the torture in an article aptly entitled “House of Screams.”29

COMMUNITY ACTIVISM INTENSIFIES

Community groups and police watchdog organizations, led by Citizens Alert, also took notice, and began to publicize the issue and organize around it. On the heels of the trials, the head of the police department’s Office of Professional Standards (OPS), David Fogel, after unsuccessfully requesting a federal investigation, was compelled to open an internal police investigation into the allegations.30
Loyola Public Interest Law Reporter

On Christmas Eve 1990, the Chicago City Council held a widely publicized hearing on the torture cases at which Wilson's lawyers, torture expert Robert Kirschner, and County Commissioner Danny Davis presented evidence. Shortly thereafter, Amnesty International requested that the Illinois Attorney General's Office conduct an independent investigation.31

For the next several years, activists led by the Task Force to Confront Police Violence and Citizens Alert staged sit-ins at City Council, led a march to now-Mayor Richard M. Daley's house, made repeated appearances at the Chicago Police Board, and demanded meetings with Police Superintendent Martin to discuss the OPS investigation.32

THE OPS REPORTS

In the fall of 1991 the OPS, in a detailed report authored by investigator Francine Sanders, recommended that Burge, Yuaitis, and a third detective, Patrick O'Hara, be fired for their torture of Andrew Wilson.33 The superintendent concurred, and they were suspended from the force.34 Only weeks before the suspensions, a 13-year-old boy, Marcus Wiggins, was tortured with electric shock by detectives under Burge and Byrne's command.35

Unknown to the general public, there had also been a parallel OPS investigation into the systemic nature of Area 2 torture, conducted by OPS investigator Michael Goldston; its damning findings had been approved by Gayle Shines, who had succeeded Fogel as head of OPS. The Goldston Report found that suspects held in custody at Area 2 had been subjected to "systematic" and "methodical" "abuse," that the abuse included "planned torture," and that Area 2 command personnel were "aware of the systematic abuse" and encouraged it by "actively participating" or failing to take action to stop it.36

Police Superintendent Martin, who had previously been Burge's commander at Area 2, suppressed the report and secretly sought to have the findings discredited by cronies at the Police Foundation.37 By court order, lawyers from the People's Law Office obtained the report and, in February 1992, released it at a press conference that received widespread local, national and international coverage. In response, Martin and Mayor Daley publicly condemned the findings, calling them "only allegations... rumors, stories, things like that."38
The Firing of Jon Burge

Burge, Yucaitis and O’Hara were put on trial before the Chicago Police Board for the torture of Andrew Wilson only weeks after the Goldston Report was made public.39 A large Fraternal Order of Police (FOP) fundraiser for the accused officers’ defense drew extensive media coverage, as did a demonstration staged, at risk of life and limb, by the Task Force to Confront Police Violence, in front of the hall where the fundraiser took place.40

In pleadings filed by the City in the police board case, its lawyers admitted for the first time that there was “an astounding pattern or plan on the part of [Burge and Yucaitis] to torture certain suspects . . . into confessing to crimes.”41 Wilson, Melvin Jones and a third Burge torture victim, Shadeed Mumin, all testified for the City during the six-week hearing.42

The City lawyers who were prosecuting Burge withheld public comment during the hearing, so Wilson’s lawyers and community activists provided the media with the perspective of those who sought justice for Wilson and all police torture survivors, emphasizing that the evidence established torture rather than simply brutality. The struggle to expose police torture was further advanced by the subsequent release of a documentary film that later aired on PBS, which highlighted the work of activists and lawyers in bringing the torture scandal to light.43

A year later, in February 1993, the Chicago Police Board released its written decision — finding Burge and Yucaitis guilty of abusing Wilson, and ordering that Burge be fired and Yucaitis suspended for 15 months.44 While the lengthy decision did not brand the officers’ conduct as torture or specifically find that Wilson was electric-shocked, burned or bagged, it was rightfully claimed as a significant victory by those who had fought for justice in the torture cases.45

The FOP reacted quite differently by condemning the decision as political and attempting to enter a float honoring Burge and Yucaitis in Chicago’s 1993 St. Patrick’s Day Parade. The public outrage, particularly in the African-American community, occasioned by this attempt led to front-page headlines, and the FOP was forced to withdraw the float.46
Later that year, the Seventh Circuit Court of Appeals reversed the verdicts in the Wilson civil rights trials, finding that Wilson had been unfairly prejudiced by the onslaught of evidence about the police murders and was entitled to present the evidence from other torture victims such as Melvin Jones and Shaded Mumin. The case was then reassigned to District Court Judge Robert Gettleman, who ruled that the police board’s finding of abuse was controlling and thereby entered judgment in favor of Wilson.

The City, now admitting that Wilson and Jones were tortured by Burge, attempted to avoid responsibility by asserting that Burge was acting outside the scope of his employment, but this argument was rejected by the Seventh Circuit on a second appeal, and in 1997 Wilson and his lawyers obtained a $1.1 million damages-and-attorneys’-fees judgment.

The Focus Shifts

During the mid-to-late 1990s, the legal and activist focus shifted to the criminal courts, with the emphasis on death row cases. Ten death row prisoners who alleged that they had been tortured into giving false confessions by Burge and his men banded together to form the “Death Row Ten.”

Activists on the outside, led by the Campaign to End the Death Penalty and the families of the men, held demonstrations and other public events, sometimes arranging for one of the Death Row Ten to speak by telephone to the crowd. Contemporaneously, the Coalition Against the Death Penalty and lawyers at Northwestern and DePaul Universities were organizing against the death penalty itself. These efforts led to Illinois Gov. George Ryan’s imposition of a moratorium on executions in January 2000.

A few years before, People’s Law Office lawyers had taken up the case of death row prisoner Aaron Patterson, filing a post-conviction petition seeking to introduce the wealth of torture evidence that had been uncovered since his conviction in 1989. Patterson’s case made its way to the Illinois Supreme Court, where his lawyers raised the issue of international law.

At oral argument, which was filmed by a CBS “60 Minutes 2” crew for a segment on Chicago police torture, the lawyers stressed that the nature of torture mandated that the Illinois Supreme Court’s previous rule requiring a
criminal defendant to show physical evidence of torture in order to successfully challenge his confession should be overruled. In companion decisions handed down in the fall of 2000, the Illinois Supreme Court modified its prior rule and granted Patterson and two other Death Row Ten prisoners new hearings where they could present evidence of systemic torture.54

ANOTHER PHASE OF THE CPD COVER-UP

In the early 1990s, the OPS reopened a number of Area 2 torture investigations, and investigators recommended sustained findings in six cases.55 OPS Director Gayle Shines refused to act on the findings, and instead secreted the files in her office for five years.56 Ultimately, in 1998, Police Superintendent Terry Hillard, who had recently been appointed, and his chief counsel, Thomas Needham, summarily overruled the findings. Lawyers from the People's Law Office, however, were subsequently able to bring these files to light, and a front-page Chicago Tribune story followed.57

In August 1999, a contingent of concerned public officials, activists and organizations, led by Citizens Alert and including members of Congress, the Illinois legislature and the Cook County Board, formally requested that Hillard empanel an independent investigation to look into this "obvious violation of police regulations, procedure and legal process by certain OPS and police officials during torture investigations."58 Hillard met with members of the contingent, but took no action.

The movement against police torture also continued to demand an independent criminal investigation into the allegations of systemic torture. During the Clinton administration, a Chicago delegation led by U.S. Rep. Bobby Rush traveled to Washington, D.C., and met with U.S. Attorney General Janet Reno.59 At this meeting, the Chicago delegation emphasized the pattern of police torture as part of a plea for a wide-ranging investigation of Chicago police practices, but no federal investigation was forthcoming.60 Rush also held hearings in Chicago, where evidence of torture was presented.
APPOINTMENT OF A SPECIAL PROSECUTOR AND GUBERNATORIAL INNOCENCE PARDONS

Frustrated by the continuing refusal to investigate and prosecute, lawyers from the MacArthur Justice Center, the Cook County Bar Association, the People’s Law Office, the Illinois Appellate Defenders Office and the National Conference of Black Lawyers, together with Citizens Alert and the mother of an imprisoned torture victim, spearheaded a coalition that sought the appointment of a special prosecutor to investigate the allegations of systemic torture at Area 2. In April 2001, a formal petition for the appointment of a special prosecutor, alleging that the then-current state’s attorney of Cook County, Richard Devine, had a conflict of interest arising from his law firm’s previous representation of Burge in the Wilson civil rights case, was filed before the chief judge of the Cook County Criminal Courts, Paul Biebel.

A year later, Judge Biebel found there to be a conflict, granted the petition and appointed as special prosecutors two attorneys who were former high-ranking assistant state’s attorneys with strong connections to the late Richard J. Daley (Richard M. Daley’s father) and his Democratic political machine.

The coming together of the struggles against the death penalty and police torture gathered strength in the early years of the new century, and in January 2003, Gov. George Ryan on successive days granted innocence pardons to death row torture survivors Madison Hobley, Leroy Orange, Stanley Howard and Aaron Patterson, and then commuted the sentences of all the other men and women on Illinois’ death row to life in prison without parole.

State’s Attorney Devine bitterly opposed the pardons and commutations, and a second petition, this one to remove Devine and his office from representing the State in all post-conviction cases where Burge-related torture was alleged, was filed before Judge Biebel. This petition not only re-raised Devine’s conflict, but also documented the significant role that assistant state’s attorneys had played in taking torture-induced confessions and using those confessions to obtain tainted convictions. In April 2003, Judge Biebel granted the petition and appointed the Office of the Illinois Attorney General to represent the state.
By early 2004, all four of the pardoned torture survivors — Hobley, Orange, Howard and Patterson — had filed federal damages actions alleging that their wrongful convictions and imprisonment were a direct result of the false confessions that Burge and his men had extracted as part of the pattern and practice of torture and cover-up that they directed and implemented.67

These lawsuits gave the lawyers for the pardoned survivors a revitalized avenue to obtain even more evidence of this pattern, including witness statements from five retired African-American detectives who revealed that they periodically heard screams, saw the torture box and knew that torture by Burge and Byrne’s midnight crew was an “open secret” at Area 2 during the 1980s.68

Scores of detectives, including Burge and all of the midnight crew, pleaded the Fifth Amendment when called to testify at their depositions, but Burge initially committed a crucial mistake that would later lead to his indictment for perjury and obstruction of justice by denying in sworn written interrogatory answers that he knew of or participated in torture at any time while he was a police officer.69

THE MOVEMENT TURNS TO THE INTERNATIONAL ARENA

Frustrated by the approach of the special prosecutors, who had repeatedly shown hostility to the torture survivors and their lawyers and who had rejected community requests for independent African-American lawyers to be added to their team, the movement against police torture turned to the international arena to further plead its case.

A group of approximately 50 organizations and individuals, including the Midwest Committee for Human Rights (MCHR), the National Lawyers Guild, the National Conference of Black Lawyers, the NAACP, the ACLU and the Christian Council on Urban Affairs, petitioned and obtained a hearing before the Inter American Commission for Human Rights (IACHR).70 At this hearing, which was held in Washington, D.C., in October 2005, a Burge torture survivor, lawyers from the People’s Law Office and several activists testified and presented evidence to the commission.71

The movement then turned to the United Nations Committee Against Torture (CAT). The MCHR and lawyers from the People’s Law Office, who joined
with numerous national human rights organizations, presented the unresolved issue of Chicago police torture to CAT as part of a broader picture of systemic U.S. human rights violations that also included torture at Guantanamo Bay and Abu Ghraib.\textsuperscript{72}

In May 2006, a lawyer from the People's Law Office appeared before CAT in Geneva, Switzerland, to argue the case for U.S. prosecutions of Burge and his men. In a significant victory for the movement, CAT subsequently issued a report that linked Chicago police torture to Guantanamo Bay and Abu Ghraib while calling on the U.S. government to "promptly, thoroughly and impartially investigate" all allegations of acts of Chicago police torture and to "bring the perpetrators to justice."\textsuperscript{73}

A Report But No Indictments

Meanwhile, in early 2006, the special prosecutors appointed by Judge Biebel announced that they were concluding their investigation. Despite the existence of some prosecutable perjury, obstruction of justice and conspiracy charges against Burge and his confederates, it was becoming apparent that no indictments would be forthcoming.

During the spring of 2006, the special prosecutors on several occasions informed Judge Biebel in open court that their report was not yet ready, while lawyers for Burge and his confederates fought to keep the report secret.\textsuperscript{74} Lawyers for the torture survivors pressed for its release while using these occasions to explain to the media and the public why indictments were both necessary and obtainable and to focus on the central role of former State's Attorney Richard M. Daley in rejecting the opportunity to prosecute Burge when he was first apprised of Burge's criminal conduct decades before.\textsuperscript{75}

Finally, in July 2006, the special prosecutors issued their 192-page report, which was accompanied by front-page headlines, top-of-the-news coverage and newspaper editorials.\textsuperscript{76} In their report, the special prosecutors found that abuse occurred beyond a reasonable doubt in three cases, including Andrew Wilson's, and that it likely occurred in many others; they also singled out former Police Superintendent Brzeczek for his failure to investigate or fire Burge.\textsuperscript{77}
The special prosecutors attempted to justify their refusal to bring perjury and obstruction of justice indictments, and they invoked the statute of limitations as the basis for not indicting for the torture itself. The report absolved Daley and Devine, ignored the systemic and racist nature of the torture and steadfastly avoided calling electric shock, suffocation and mock executions torture. Reacting to the report, Daley condemned the torture but carefully avoided taking any responsibility for the torture scandal.

REACTION TO THE SPECIAL PROSECUTORS' REPORT

Fueled by community outrage at the failure to indict or to place responsibility where it belonged, lawyers and activists at the People’s Law Office, the MacArthur Justice Center and Northwestern University Law School’s Wrongful Convictions Center embarked on the task of drafting a "shadow report." This report set forth in detail the evidence and findings that were ignored by the special prosecutors, and it explained why Burge and his men could be, and should be, indicted. The shadow report also called on the Chicago, Cook County and U.S. governments to take action.

More than 200 local and national human rights, civil rights, and antiracist organizations and activists signed the shadow report, and it was released at a press conference in April 2007. The report led to the holding of open hearings before the Cook County Board and Chicago City Council at which torture survivors, torture experts, lawyers and activists testified.

Evidence presented at the City Council hearing also established that the City had, at that time, spent more than $10 million in taxpayer money to defend Burge and the City in the damages cases, while the special prosecutors had been paid $7 million for their work. A Chicago Sun-Times editorial decried the City’s continued role in defending Burge and for his pension to be "pulled."

At this point a substantial number of city and county politicians became actively and vocally involved, and a number of them spoke out at the City Council hearing, condemning the torture, calling on the city to stop defending Burge in the civil rights damages cases, and calling on the U.S. attorney for the Northern District of Illinois to prosecute Burge for perjury and obstruction of justice.
A Federal Investigation, More Exonerations and an Indictment

In the wake of the special prosecutors’ report as well as the shadow report, the CAT findings, the City and County hearings and the public outcry, U.S. Attorney for the Northern District of Illinois Patrick Fitzgerald announced in September 2007 that his office was investigating Burge for possible federal offenses. A few months later, the City settled the torture cases brought by the four pardoned torture survivors for a total of $19.8 million.

Several torture victims, particularly Darrell Cannon and Anthony Holmes, who had been recently released after spending decades in prison, became eloquent spokesmen for the movement, telling their stories at churches and community meetings, on radio and television, and at Rainbow PUSH, which became a strong advocate for justice in the torture cases.

Several TV reporters, newspaper columnists and radio personalities, particularly Cliff Kelly of WVON Radio and Carol Marin of the Chicago Sun-Times and WMAQ TV, gave serious attention to the torture scandal. Another important community group, Black People Against Police Torture, organized town hall meetings to discuss the torture cases, and joined with other groups to oppose Mayor Daley’s attempt to bring the 2016 Olympics to Chicago.

On Oct. 21, 2008, banner headlines announced that Jon Burge had been arrested in Florida on an indictment charging him with three counts of perjury and obstruction of justice for lying about torture in his November 2003 interrogatory answers. U.S. Attorney Fitzgerald contemporaneously announced that his office was also investigating Burge associates for similar offenses. When asked, Mayor Daley took no responsibility for the torture, but rather issued what the Chicago Sun-Times characterized as a “sarcastic apology.”

Buoyed by this victory, lawyers and activists turned their attention to the 25 torture survivors who still languished behind bars as a result of torture-induced confessions. In May 2009, after an evidentiary hearing, a Cook County Circuit Court judge found that torture victim Victor Safford’s confessions to two separate murders had been coerced pursuant to systemic Burge-related torture, and he was released later that year. Safford, who had converted to Islam while incarcerated, was supported by the Nation of Islam and other commu-
nity activists and religious leaders who regularly attended court and publicized his case.

More releases followed. In July 2009, former death row prisoner Ronald Kitchen, who had been tortured into confessing by Burge, and Kitchen's co-defendant, Marvin Reeves, were exonerated and released after spending 21 years in the penitentiary for crimes they did not commit. In January 2010, torture survivor Michael Tillman was similarly exonerated and released, and this exoneration was front-page news.

**The Burge Obstruction-of-Justice Trial**

In May 2010, amid much publicity, a demonstration and an overflow federal courtroom, Jon Burge went on trial for perjury and obstruction of justice. Three key witnesses against Burge were Anthony Holmes, Shadeed Mumin and Melvin Jones; the testimony of Andrew Wilson, who had died in the penitentiary in November 2007, was read to the jury.

A confederate of Burge's who had been granted immunity from prosecution was a reluctant witness for the government and two African-American detectives also testified for the prosecution. Burge took the stand in his defense to deny everything, but the members of his Area 2 "asskickers" team declared their intention to invoke the Fifth Amendment and were therefore not called as defense witnesses.

On several occasions, the month-long trial captured front-page headlines, but its coverage was significantly diminished by the start of the corruption trial of former Illinois Gov. Rod Blagojevich in early June. People's Law Office lawyers reported on the trial to the African-American community through daily appearances on Cliff Kelly's radio show, John Conroy posted a daily blog on the trial for the local National Public Radio station, and Burge torture survivors also commented publicly.

Then, on June 28, 2010, the movement against police torture claimed another important victory when the jury of 11 whites and one black returned a guilty verdict against Burge on all three counts. On the heels of the verdict, Tillman and Kitchen filed civil rights damages lawsuits alleging torture and wrongful convictions. The lawsuits named Richard M. Daley as a co-conspira-
tor with Burge, his midnight crew, the assistant state’s attorneys who participated in their interrogations, and numerous former high-ranking police officials.105

Undeterred by Burge’s conviction, the city renewed its commitment to provide these defendants, including Burge, with private lawyers at the taxpayers’ expense. The Police Pension Board, in a decision that further fanned community outrage, decided in a 4-4 vote that Burge could continue to collect his police pension despite his conviction.106

In the fall of 2010, Richard M. Daley, who had served as Chicago’s mayor for more than 20 years, announced that he would not run for re-election.107 Activists attempted to put the torture issue on the agenda of the several candidates who subsequently declared for the office, and U.S. Rep. Danny Davis made it a central theme of his campaign.108 However, his campaign was short-lived as he was compelled to withdraw from the race by forces within the African-American community; other candidates, particularly the eventual winner, Rahm Emanuel, studiously avoided addressing how they would deal with the city’s continuing role in the torture scandal.109

In January 2011, U.S. District Judge Joan Lefkow, after conducting a two-day hearing, imposed a four-and-a-half-year sentence on Burge.110 During the hearing, Anthony Holmes spoke movingly about the meaning of the conviction and sentence to the survivors of torture, and University of Chicago history professor Adam Green articulated the importance of restorative justice to Chicago’s African-American community.111

Judge Lefkow, in her findings, without naming names, condemned police and prosecutorial leadership for its role in facilitating the scandal.112 In March 2011, Burge reported to Butner Federal Penitentiary in North Carolina to begin serving his sentence.113

The Struggle for Justice Continues

Several community groups and organizations continued to press for justice in the torture struggle. The Chicago Torture Justice Memorials Project — a group of artists and other activists — organized community meetings with a focus on creating proper memorials “to honor the survivors of torture, their
family members, the African American communities affected by the torture," and the "struggle for justice waged by torture survivors and their families, attorneys, community organizers, and people from every neighborhood and walk of life in Chicago."114

The Illinois Coalition Against Torture gathered more than 3,500 signatures in support of a City Council resolution that declared Chicago a torture-free zone. With Alderman Joe Moore's sponsorship, the resolution passed by a unanimous vote in January 2012.115

Local and national activists and lawyers continued to work with Rep. Davis in championing the Law Enforcement Torture Prevention Act of 2011, an act that would make police torture a federal crime without a statute of limitations.116 Davis reintroduced the legislation in January 2012 after a congressional briefing that featured presentations on Chicago police torture as well as other police and prison human rights violations.

The Illinois Torture Commission, which was created as a result of the work of Black People Against Police Torture and other community groups, began its review of numerous cases, despite a crisis in funding that threatens its continued work.117

In the legal arena, the federal judges in the Tillman and Kitchen cases delivered decisions that, in the main, upheld the legal claims alleged.118 In her precedent-setting decision, U.S. District Judge Rebecca Pallmeyer decided in July 2011 that former Mayor Richard M. Daley could be held as a conspiring defendant in the Tillman case.119

While this decision initially passed below the public radar, a front-page and top-of-the-news exclusive by reporter Carol Marin that trumpeted "Daley the Defendant" later brought a wave of public attention to an issue that had festered for years, particularly in the African-American community — Richard M. Daley's unpunished role in the torture scandal.120

Tillman's lawyers quickly declared that they would seek to depose Daley under oath, and newly elected Mayor Rahm Emanuel, after at first attempting to avoid the issue, vowed, in another front-page exclusive, that it was "time we end" what the Chicago Sun-Times characterized as "one of the ugliest chapters in the history of the Chicago Police Department." Emanuel further asserted
that he was “working towards” settling the cases.\textsuperscript{122} As of June 2012, Daley has not yet been deposed, the cases have not been settled, and the taxpayers continue to pay additional millions to defend Burge, Daley and their alleged co-conspirators.\textsuperscript{123}

In March 2011, torture victim Eric Caine, who had spent 25 years in prison, was released after a Cook County judge ordered that he be given a hearing on his allegations that his confession was tortured from him.\textsuperscript{124} Several other torture victims, including Stanley Wrice, were also granted new hearings; special prosecutor Stuart Nudelman appealed the ruling in Wrice’s case to the Illinois Supreme Court, arguing that it was “harmless error” to admit his confession into evidence, even if it had been obtained by torture.\textsuperscript{125}

The Illinois Supreme Court rejected this disturbing argument in a landmark decision that will hopefully clear the way for obtaining new hearings for the some 15 men who still remain in prison on the basis of tortured confessions.\textsuperscript{126} Meanwhile, the ongoing federal perjury and obstruction-of-justice investigation that has targeted several of Burge’s confederates has yet to yield any additional indictments.

\textbf{AND THE BEAT MUST GO ON}

As the Chicago police torture scandal approaches its 40-year mark, the struggle against police torture has, against great odds, obtained many important victories. Originally only faintly heard from distant prison cells, the cry for justice has gathered strength as torture survivors, their families, and the African-American community joined with dedicated lawyers, community activists, human rights advocates, journalists and politicians to advance this historic fight for justice.

However, much remains to be done, and the struggle for justice in the torture cases continues, together with an equally important effort to expose and record for history the complete and truthful account of the horrific crimes committed. In the meantime, this scandal continues to stain the conscience of the City of Chicago.
NOTES

1 Flint Taylor is founding partner of the People’s Law Office (“PLO”) and has represented survivors of police torture in Chicago for more than twenty-five years. Other PLO attorneys who have worked on the torture cases over the years include Jeffrey Haas, John Stainton, Joey Mogul, Tim Lohraff, Ben Sison and Sarah Gelosmini.


3 For a more complete description of Holmes’ torture, see People’s Law Office, Chicago Police Commander Jon Burge and his Victims, YouTube (July 2007), http://www.youtube.com/watch?v=TOyZAFq8eH&feature=relmfu (a 17-minute video produced by the People’s Law Office and shown at a Chicago City Council hearing in July 2007).

4 Although this confession was the only evidence against him, Holmes’ lawyers chose not to challenge his torture-induced admissions by filing a motion to suppress and presenting his chilling story to a Cook County Criminal Courts Judge. Holmes was convicted and spent the next thirty years in the penitentiary.


6 Oct. 4, 2004, statement of William Parker. This and other individual statements cited below are on file with the People’s Law Office.

7 May 20, 2004, affidavit of Melvin Duncan; March 5, 2005, statement of Tony Thompson.


10 July 14, 1989, deposition of Donald White; March 7, 2011, affidavit of Anthony Williams.


12 Id.

13 Id.

14 Letter from Dr. John Rabas, Medical Services Director, Cook County Prison System, to Richard Breczek, Police Superintendent (Feb. 17, 1982) (on file with author).


16 Wilson v. City of Chi., 6 F.3d 1233 (7th Cir. 1993); Police, Bar Group Ask ‘Manhunt’ Probe, supra note 9.

20 These cases include those of torture survivors Leroy Orange, Darrell Cannon, Michael Tillman, Stephen Bell, Aaron Patterson, and Stanley Howard. See civil rights damage complaint filed in Tillman v. Burge, No. 10 C 4951 (N.D. Ill.).
22 The most comprehensive article, titled Torture in Chicago, was published in March 1989 in
the Chi. Lawyer.
23 Nov. 9, 2004, statement of former Area 2 Detective Doris Byrd.
24 Anonymous letters from "Ty" to Flint Taylor, postmarked Feb. 2, 1989, March 6, 1989,
25 Chart, 112 Known Burge Area 2 And 3 Torture Victims 1972-1991, compiled by People's
Law Office, last updated in April 2011.
27 Wilson's criminal trial judge had denied Wilson's motion to suppress his torture-induced
confession, and, in 1983, he had been convicted and sentenced to death. In 1987, the Illinois
Supreme Court reversed his conviction, finding that, given Wilson's injuries, the state had not
met its burden in establishing that his confession was not coerced. See People v. Wilson, 116 Ill.
2d 29 (1987). In 1988 Wilton was reconvicted without the confession and received a life
sentence.
http://www.chicagoreader.com/chicago/house-of-screams/Contentid=875107. This was the first of a series of in-depth articles
Connor wrote on the torture scandal for the Reader over the next two decades. These articles are
archived at http://www.chicagoreader.com/chicago/police-torture-in-chicago-jon-burge-scandal-
articles-by-john-connor/Contentid=1210030.
31 Police torture probe sought here, Chi. Sun-Times, Jan. 28, 1991; transcript of Dec. 24,
1990, hearing before the City Council Subcommittee on Finance.
32 The End of the Nightstick, a documentary which details these and other related actions, can
be viewed at http://mike.docuwatch.ca/videos?alternative=2&channel_id=0&slide=0&subpage=
video&video_id=1263.
35 For a detailed description of Wiggins' torture, see the June 4, 1996, deposition of Marcus Wiggins.
36 OPS Special Project Conclusion Reports and Findings, Nov. 2, 1990 (Goldston Report).
37 Sept. 25, 2006, and Dec. 11, 2006, depositions of Lecoy Martin, and his communications with the Police Foundation. A scathing analysis of Martin's conduct was made by former Minneapolis Police Superintendent Anthony Bouza in his Aug. 19, 2006, expert opinion that was filed in Orange v. Burge No. 94 C 168 (N.D. Ill.).
38 13 years of cop torture alleged, Daily, Martin, rip internal police reports, Chi. Trib., Feb. 8, 1992.
39 The hearing began on Feb. 10, 1992, and was completed on March 20, 1992. See transcript of proceedings before the Chicago Police Board in Case Nos. 1856–58.
43 The documentary, titled The End of the Nightstick, aired on the PBS show "POV" and can be viewed at http://misc.docuwait.ch/videos?alternative=28channel_id=0&skip=0&subpage=video&video_id=1263.
44 In the Matter of the Firing of Jon Burge, John Yucaitis and Patrick O'Hara, Nos. 91-1856-1858, Chicago Police Board, Police Board Decision of Feb. 11, 1993. Yucaitis, who was acquitted on some of the charges, received a 15-month suspension, and O'Hara was acquitted of all charges.
45 One of Wilson's lawyers was quoted as saying that "justice had finally been done," that "the person in charge of the systematic torture had been fired," but that the department should "clean house" and "implement" the Goldston Report. Cop loses job over torture, Chi. Sun-Times, Feb. 11, 1993.
47 Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993).
49 Wilson v. City of Chicago, 120 F.3d 681 (7th Cir. 1997).
50 See, e.g., The Death Row Ten, available online at http://ccadp.org/deathrow10.htm.
52 See People v. Patterson, Reply Brief of Petitioner in the Illinois Supreme Court, No. 82711, filed June 8, 1999.
53 The 60 Minutes 2 segment on Chicago police torture aired on Dec. 7, 1999.
54 See People v. Patterson, 192 Ill. 2d 93 (2000); People v. King, 192 Ill. 2d 189 (2000); People v. Kitchen, 2000 Ill. LEXIS 339 (2000).
55 These cases included those of Darrell Cannon and death row prisoner Stanley Howard. See reopened OPS files in Complaint Register Nos. 126802, 134723, 142017, 142201, 188617, and 200390.
63 In re Appointment of Special Prosecutor, No. 2001 Misc. 4, Opinion and Order of April 24, 2002; see also Did leaders of Burge inquiry favor City Hall?, Chi. Sun-Times, July 31, 2006. It was later revealed that special prosecutor Edward J. Egan had nine relatives in the Chicago Police Department, one of whom served under Burge at Area 2 in the 1980s and participated in the arrest of torture victim Gregory Banks. Torture report and family ties: Top investigator had nephew on Burge’s staff, Chi. Sun-Times, Aug. 6, 2006.
65 For a detailed review of the role of the Cook County State’s Attorney’s Office in the torture scandal, see John Conroy, Desp to the Scramm, Chi. Reader, Aug. 1, 2003.
70 See letters to the IACHR, which is part of the Organization of American States (OAS), dated Aug. 26, 2005, and Sept. 6, 2005, alleging that the pattern and practice of torture violated the American Declaration of the Rights and Duties of Man, and requesting a general interest hearing.
Id.

Report of the Special State's Attorney.


Id.


The Cook County Board hearing of June 13, 2007, available at http://video.google.com/videoplay?docid=-7235577585903007387#. See also Chicago City Council Committee on Police and Fire, Transcript of Proceedings, July 24, 2007. A video of Burge and his victims that was shown at the City Council hearing can be viewed at layid=174073022534210093#. Former Area 2 Detective William Parker's testimony before the council can be viewed at http://video.google.com/videoplay?docid=6163137089482065589#.

These figures were compiled by People's Law Office lawyers from numerous Freedom of Information Act documents obtained from the City and County.


$20M settlement OK'd for Chicago torture, Chih. Sun-Times, Jan. 10, 2008. The city had agreed to settle with three of the four men for $14.8 million more than a year previously, but the city refused to execute the agreement. Burge claimants allege city backed out of $14.8 million settlement, Chih. Trib., Feb. 20, 2007.

To view Cannon recounting his torture, see http://www.youtube.com/watch?v=A9cZ4cJj4oQ&feature=related. Cannon was granted a new suppression hearing in 1997 (see People v. Cannon, 293 Ill. App. 3d 634 (1997)), and after the hearing was conducted, the state dismissed his case, but he was not released until 2007. While in prison, he filed a lawsuit alleging torture, and he reluctantly settled it for $3,000 in 1988, before the evidence of systemic torture started to come to light. After the state dismissed his case in 2004, Cannon filed a torture and wrongful conviction suit, alleging that the cover-up of the pattern and practice of torture constituted fraud, denied him access to the courts, and nullified his original agreement to settle. The district judge initially let the suit go forward (see Cannon v. Burge, 2006 U.S. Dist. LEXIS 40400 (2006)) but later granted the defendants summary judgment on the grounds that Cannon's original settlement precluded him from suing. Cannon v. Burge, 2011 U.S. Dist. LEXIS 105715 (2011).

The City has spent $1.75 million defending the case, which is now on appeal.

The campaign included bringing 1968 Olympic hero John Carlos to Chicago to speak out about police torture, sending documentation about police torture to the Olympic Committee, and meeting the committee with a demonstration when it came to Chicago to meet with city authorities and view the potential site for the games. See, e.g., B. Jerskey, Can Shame Stop the Games? Chih. Reader, March 23, 2007, and Chicago must SAY NO to Daley's Olympics, Chih. Defender, March 15, 2007.


See Taylor, Torture Ringleader Indicted, supra note 92.


96 To view Kitchen recounting his torture, see Crimes Against Humanity: Ronald Kitchen: Tortured, Framed, and Sentenced to Death, available online at http://www.youtube.com/watch?v=AOjXxPlZl&feature=related.

97 To view Tillman recounts his torture and wrongful conviction, see Michel Tillman: The Torture and Wrongful Conviction of an Innocent Man, http://www.youtube.com/watch?v=5I8kG7s91A8&feature=related.


100 Taylor, Chicago Police Commander Convicted of Lying About Torture, see also Burge cop's story changes, Chi. Sun-Times, June 15, 2010.


102 According to one blog, 50 reporters awaited Blagojevich's entry into the federal courthouse on his first day of trial. The Blago Trial Begins, The Blagosphere, June 3, 2010.


106 Illinois Attorney General Lisa Madigan challenged this decision by bringing suit in Cook County Chancery Court, but the case was dismissed and is on appeal. See State of Illinois v. Burge et al., No. 11 CH 04365, Memorandum Opinion and Order of Sept. 2, 2011 (Novak, J.).


108 See Representative Danny K. Davis, Chicago City Government Reform (Dec. 27, 2010).


110 Taylor, supra note 8, at 7.

111 Taylor, Judge Sentences Chicago Police Commander Jon Burge in Torture Case.

112 Id.


114 For more about the memorials project, see http://chicagotorture.org/.

115 The resolution can be viewed at http://illinoiscat.wordpress.com/torture-free-chicago-resolution/.


121 Fran Spielman, Mayor urges end to Burge chapter, CHI. SUN-TIMES (Aug. 16, 2011).

122 Id.

123 See Burge-related lawsuit against Daley moving forward, WBEZ CHI. PUB. RADIO (Mar. 7, 2012). Freedom of Information Act records produced by the City show that, as of January 1, 2012, the City had paid more than $14.3 million of taxpayer money to private lawyers for representing Burge, his co-conspirators, and the city in torture-related legal proceedings, and paid an additional $22.4 million in settlements and judgments to torture survivors and their attorneys.


126 Id.
TEN QUESTIONS FOR SOCIAL CHANGE LAWYERS

by William Quigley

Social change lawyering starts with the idea that history shows us that systemic social change comes not from courts or heroic lawyers or law reform or impact litigation, but from social movements. Social change lawyers work with, assist and are in constant relationship with social movements working to bring about social change.

Social change lawyering is a process, not an achievement. It is a path we walk with others to confront the root causes of injustice. What lies ahead is not known. There is no map. Our directions are set by constantly checking a compass that points toward justice. There are obstacles that force us to change directions and ways of going forward.
What follows are 10 thoughts on social change lawyering. They are questions and criteria we can use to define and evaluate social change lawyering and to help us make sure we are following that path toward justice.

1. **Where does the direction for the lawyering come from?**

Commercial lawyers are very clear about this — whoever pays the bills directs the work. For social change lawyers the direction of the legal work comes from the social movement that is working to bring about institutional or systemic or radical change. This work may include advice, defense, discussion, protection, advocacy or litigation.

The point is not what the work is, but why this work is chosen and who participates in making those choices. For social change lawyers, the movement makes these decisions in consultation and in ongoing relationship with the lawyer. This is unlike other types of public interest lawyering or law reform or impact litigation where the goal is often set by the lawyers themselves or the institution where they work.

2. **Where does the power go?**

Is the purpose of your legal work to redistribute unjust power relationships and diminish the power of the unjustly powerful and transfer that power to the unjustly disempowered? Is the legal work going to empower organizations of people on the margins working for change? Or is this about the lawyer and choices about what is important made by the lawyer?

There is nothing at all wrong with public interest lawyers achieving personal satisfaction in their work. But that is not the primary goal of social change lawyering. The primary goal of social change lawyering is to challenge the injustices identified by social movements working to dismantle unjust structures and to shift power to the people of the movement so they can bring about change.

3. **Who gets the glory?**

If the legal work or the publicity or the fundraising is about the lawyers or their legal organization, then it is not likely empowering social justice movements. If the lawyer is the media face of the work rather than the clients and
the movement, then it is not too likely really in service of the movements — unless that is what the movement decides is right for the occasion.5

4. **Is there an ongoing commitment to work with groups of the most impoverished and the most marginalized people?**

The focus of the work must remain on these groups and their efforts to overturn the root causes of the unjust status quo.6

5. **Is human rights advocacy an essential part of the work?**

Human rights advocacy, though still in its infancy compared to constitutional and civil rights work, offers tremendous upside for social justice.7 It is people-based, offers a radical critique to most current law, and illustrates the gap between law and justice.

6. **Is the legal work just one part of the overall social change movement?**

Is the lawyer part of a team in the movement working in partnership with other strategies for social change? An organizer friend of mine likes to talk about the legal component of social change as one finger on the hand — or 20 percent of the effort. Other fingers can include education, outreach, communications, and continual organizing to build the group and to expand the number of people involved.8

If the legal work is the primary part of the campaign, it is unlikely that the legal component is in relationship with a real social change movement. The civil rights era provides cautionary examples here with examples of many different types of lawyering, from the lawyer-led litigation method of the NAACP Legal Defense and Educational Fund to the grassroots lawyers who specifically rejected lawyers as leaders of the movement.9

7. **What work is the lawyer actually doing?**

Social change movements depend on face to face and group meetings and outreach and planning and evaluating actions. Is the lawyer spending time on the ground, going out, meeting with movement partners, participating in group
meetings and actions? Or is the lawyer an office advocate whose primary relationship is with the computer and law?

This is a tough challenge. Litigation, once started, tends to create its own internal life, a very demanding life of memos and briefs and legal conferences and research and writing and emails that can quickly take over. All that is important, and it is important to do it well. However, the lawyer and the social change organization she is in relationship with need to work together to maintain that relationship.

All relationships demand time. An honest examination of how the lawyer spends her time will indicate whether the lawyer is working with and for a social movement or is some other type of lawyer. No matter how demanding litigation is, social change lawyers have to create room to work and be in relationship with the people and the movement that they are taking direction from.

8. Is the lawyer willing to be uncomfortable on some sort of regular basis?

Legal education does not train anyone to be a social change lawyer — quite the opposite. Social change lawyering forces us to confront our training and our privilege and the patterns of work that sometimes constitute our definition of self. Law school culture encourages people to think of themselves not just as educated and trained but as culturally and politically and economically different from, even superior to, most other people. In order to be a social justice lawyer, people have to consciously set aside the social privilege of being a well-educated professional and rediscover their own shared humanity with the people whom our legal education would have us call clients.

This does not mean people have to stop being lawyers; it simply means to stop acting like socially privileged, specially powered individuals. Lawyers must learn that while they certainly have much to teach and to give, they also have much to learn and to receive in true social justice-based relationships. If lawyers are going to be in solidarity and service to social change movements, this is challenging but essential.

Working with groups of people involved in social change movements is often messy and chaotic compared to litigation. There is no book of rules or library
of precedents about how this is done, and no judge to make people behave or move on. Social change lawyers need to have good analytical tools but also need to have big hearts and understanding and patience and a willingness to participate in experiences where it is not clear that participation will necessarily translate into traditional legal work.

Consider, for example, the instructions from the Lawyers Constitutional Defense Committee to incoming volunteer grassroots social justice lawyers who were arriving to help out in the civil rights struggle in the South:

The volunteer civil rights lawyer is not a leader of the civil rights movement. We are there to help the movement with legal counsel and representation, not to tell the movement what it should do. You may, if asked, suggest what the legal consequences of a course of action might be, but you may not tell them whether or not they should embark on it. They have more experiences than you in civil rights work in the South, and they are responsible for the action programs. Even if they make mistakes, they are theirs to make; your task is to defend their every constitutional and legal right as resourcefully and as committedly as you can, even if they have made a mistake. Until the time comes when they ask us to lead the movement, do not be misled by any advantage of education, worldly experience, legal knowledge, or even common sense, into thinking that your function is to tell them what they should do. The one thing that the Negro leadership in the South is rightly disinclined to accept is white people telling them any further what to do and what not to do, even well-meaning and committed white, liberal Northerners.10

9. IS THE WORK ON THE MARGINS?

If someone else is already doing the work, social change lawyers are probably needed elsewhere. Social change lawyering is a bit like leaving the main camp and going out to scout and claim some unchartered or contested territory. Working out there is social change work. If enough others come out to join in the work, it is probably time to leave that area and move to another contested area where social change organizations need a partner.

For example, the National Guestworker Alliance worked with foreign student guestworkers to organize a challenge to the State Department’s J-1 cultural visa program. The program, which turned a cultural exchange opportunity into the nation’s largest temporary worker program, was overturned when State banned a leading sponsor company from bringing any more foreign students
to the United States for summer jobs. Students, with help from the National Guestworker Alliance and its legal team, protested working conditions at a plant in Pennsylvania that packed Hershey's chocolates, and they ultimately forced significant changes in the program.¹¹

10. IS IT WORK WITH PEOPLE?

Work on "issues" alone is not social change lawyering and, for most people, is not sustainable. You have to be in relationships with the people you are working with and for. You have to give but also realize you have to take — you teach but you also learn. Only people offer opportunities for excitement and joy and hope and love.

Real social change work will partner us with people who live on the edge. Life at that edge seems precarious and insecure from the perspective of the traditional legal profession. But working with people at the edge is amazing because where the world sees poverty, oppression, and want — at that same place you will find people and organizations demonstrating generosity, beauty, courage, community, and solidarity in inspiring acts that will radically transform your life.

This will give you the energy to keep challenging the status quo in your work and in your personal life. This is the essence of social change lawyering — addressing the root causes of injustice by putting your legal skills at the service of social justice movements and the people in them.

A FINAL WORD

These are just some preliminary thoughts of one person. They surely leave out many ideas and probably misstate some others. You must figure out your own way of being a social justice lawyer — but you have to do it as part of a team. There are no solo social justice actors; everyone is on a team.

Being on a team is critical because social change lawyers are swimming upstream against the current of our profession and usually the law itself. Law, as an institution and as a profession, is primarily about commerce and either maintaining the status quo or altering the current order slightly to accommodate modest change. It is uninterested in, if not hostile to, systemic social
change. Any type of justice-based lawyering is therefore only a tiny bit of the profession and is actually — despite high-minded pledges to do justice and the like — profoundly countercultural to the law and legal profession.

Further, we lawyers are not educated at all about social justice change or social justice movements unless we do it outside of legal education. Lawyers, like everyone else, take pride and satisfaction in their skills and the development of their abilities. Because of our training, our profession, and our models of lawyering, social change lawyering seems to challenge the idea of being a good lawyer because it seems to take skills and ideas and work outside of our skill set.

There is a good reason why we want to continue to do what we have been doing — we are comfortable and confident in those skills and in who we are. That is fine. That might even be some beneficial type of lawyering, but it is not social change lawyering.

All of us need to work continuously to re-center ourselves to become social change lawyers. We will fall many times, and we will make lots of mistakes. But when we fall, if we are willing to get back up and keep trying along with the rest of the team, we will be on the path to social change lawyering.

NOTES

1. William Quigley is Janet Mary Riley Distinguished Professor of Law at Loyola University New Orleans College of Law, where he also directs the Law Clinic and the Gillis Long Poverty Center.
4. Arthur Kinoy, a legendary social change lawyer, worked with and represented the Mississippi Freedom Democratic Party in its challenge to the all white Mississippi delegation to the national Democratic convention. They fought before, during, and after the convention for the rights of black voters, especially those in Mississippi. When it ended, Kinoy wrote: "As I considered the result, I felt that we as people's lawyers, now not just a tiny band but hundreds of us all over the
country, had fulfilled our responsibilities. We had found ways to use our knowledge, our skills, and our techniques for the purpose of assisting and advancing the struggle of millions of people for their fundamental rights to freedom, liberty, and equality.” Arthur KinoY, Rights on Trial: The Odyssey of A People’s Lawyer 294 (1994).

5 "Another problem is when the lawyer comes in and just takes over and becomes the leader and the spokesperson and it disempowers the community. The lawyer becomes the one everyone wants to talk interview and everybody wants to talk to. Then the media and the powerful don’t ever talk directly to the people any more. The community’s struggle becomes the lawyer’s struggle and not the people’s struggle... I find it real destructive when outside people speak for the community. It is the simple folk that sustain us as people—no some lawyer or nun or hot shot organizer who comes in and does work in the community.” Community organizer Barbara Major, quoted in William Quigley, Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations, 21 OHIO N. U. L. REV. 455, 462–63 (1994).


7 One great example is the Vermont Healthcare is a Human Right Campaign detailed in James Haslam, Lessons From the Single Payer State, IN THESE TIMES (Oct. 27, 2011), http://www.inthesetimes.com/article/12122/help_wanted_lessons_from_the_single-payer_state.


8 Eric Mann, Playbook for Progressives: 16 Qualities of the Successful Organizer (2011).


10 Id. at 73.

GROWING THE TOOLBOX: DIVERSE STRATEGIES FOR PUBLIC INTEREST LAWYERS IN CAMPAIGNS TO EXPAND ACCESS TO HEALTH CARE FOR LOW-INCOME PEOPLE

by John Bouman

What can a public interest lawyer bring to campaigns to expand or protect access to care for low-income people? Traditional lawyer skills include technical expertise in the governing legal framework, drafting statutes and rules and litigation. These are welcome and extremely valuable skills, espe-
cially because in most state-level campaigns the public interest lawyer is the only lawyer in the core coalition group.

This essay focuses on three specific campaigns in which I was personally involved and discusses various additional skills or strategies that public interest lawyers should consider. The examples have a central theme: In campaigns to expand or protect access to care, public interest lawyers who intend to be involved in leadership of the campaigns must think about multiple and multiforum strategies and a variety of skills and capacities.

A campaign public interest lawyer's burden of persuasion calls for more than the standard legal toolbox. It takes strategies with multiple components, a variety of players and a wide range of skills. Public interest lawyers who want to be leaders in campaigns to expand or protect health care access should have an awareness of the various needs of a campaign and the diverse skills and capacities necessary to succeed.

Further, lawyers should be aware of what they can provide themselves and what resources the campaign needs to secure from another source. These other skills and capacities include, for example, relationships with important policymakers, lobbying capacity, media relations, message development, grassroots contacts and organizing, academic research, access to religious leaders and groups, relationships with health care provider organizations and contacts in the business community. Bringing all of these factors together into an effective strategy is the challenge for a successful campaign.

**Traditional Lawyering Skills and Capacities Open a Leadership Role**

It is important for public interest lawyers to develop and maintain classic lawyering skills and capacities. These skills are a rare commodity in public interest coalitions, and can position a lawyer in a leadership role within a coalition. In broad terms, there are three areas of these traditional skills and capacities:

**A. Lawyers Can Develop Unique Subject Matter Expertise**

This encompasses knowledge of the applicable laws, regulations, sub-regulatory materials, budget allocations, intergovernmental relationships and con-
tractual arrangements. Access to health care is an immense and complex subject matter. Technical expertise across the range of issues is rare and by itself makes the public interest attorney who possesses the expertise highly valuable and a welcome addition to decision-making processes and core planning groups among the advocates. Technical expertise is always an important component of a campaign, but it rarely provides the most important political argument in favor of an expansion, nor does it offer persuasive public rhetoric. Thus, by itself, it rarely can win the day.

B. Lawyers Can Develop Unique Drafting Skills

This skill is also a valuable addition to any public interest campaign. Campaigns to expand health care access frequently have to do without this legal skill and sometimes fail to realize how important it is. This puts them at the mercy of legislative or agency staff attorneys for the drafting of the statutory language, and those experts may not share the same intent or understanding. Being able to write a tight bill or regulation accomplishes the intended goal, avoids traps or loopholes and effectively lays groundwork for regulations, potential litigation or follow-up legislation. It is also important to use good political judgment about whether certain language is unnecessarily provocative, whether to be prescriptive or to leave more to agency rulemaking and other similar considerations. Still, these crucial skills are not what win a campaign. Few voters and surprisingly few legislators read the actual language of a bill.

C. Lawyers Can Engage in Litigation

When litigation is appropriate, and when the stars align properly, the ability to litigate successfully gives a lawyer the power to force officials to do things they have not been talked into doing and that they in fact do not want to do. The ability to litigate, or to credibly threaten to litigate, is exclusive to lawyers and is usually enough to give lawyers access to decision-making processes and core planning groups in health care access campaigns when litigation is one possible option. But by itself the ability to litigate usually only provides power to stop something (like an eligibility cutback or a denial of access), not create something (like an expansion of coverage or access).

While it is possible to win important victories relying entirely on these traditional lawyer skills, important incremental advances in health care access almost always require more. These advances require big-picture public policy
decisions and budgetary allocations that come only from the political branches of government—the executive and the legislative.

Policymakers must be persuaded to make the expansion, to design it in the most effective way and to pay for it. People whose livelihoods depend on elections — and the people who work for them on their staffs and in the bureaucracy — must be convinced through any means available that the expansion of health care access is politically advantageous and that opposing it is politically dangerous. Similarly, when a cutback in access is under consideration, the policymakers must be convinced that carrying it out is more dangerous politically than adopting it, even to balance a budget.

THREE EXAMPLES USING THE LARGER TOOLBOX

The three health care access campaigns described below contextualize the point that diverse strategies, skills and capacities are important. The FamilyCare campaign in Illinois was a successful health coverage expansion over a period of years that resulted in coverage being expanded to as many as 400,000 working parents. The Memisovski v. Maram litigation dealt with a crisis in access to care for children covered by Medicaid that was not only successful but morphed into a major "medical home" initiative and, along with the residual impact of the FamilyCare campaign, helped bring about an expansion of coverage for all children in Illinois. Finally, the Bell v. Leavitt litigation, while unsuccessful in court, was an important part of a larger strategy to limit the loss of access to health care that would be caused by the citizenship documentation requirement for Medicaid contained in the Deficit Reduction Act of 2005.

A. The FamilyCare Campaign: Working with Community Group

In 2002, with the state in the clutches of a historically deep fiscal crisis, Illinois launched FamilyCare, a brand new health coverage program aimed at the parents of children covered by Medicaid or the State Children's Health Insurance Program (SCHIP).2 The Governor was a moderate Republican, the state Senate was controlled by conservative Republicans and the state House of Representatives was Democratic. Over the next three years, as the fiscal crisis continued and the political lines were redrawn, the program steadily was expanded until its eligibility threshold came to rest at 185 percent of the federal poverty level, offering coverage to approximately 400,000 working parents.
Loyola Public Interest Law Reporter

With respect to the expanded toolbox for health care access campaigns, perhaps the most important of several lessons of the FamilyCare campaign for public interest lawyers is the power that can be generated through collaboration between the lawyers and grass roots community organizations and organizers. This is generally not a body of information or skill set taught in law school. In fact, legal training is much more likely to get in the way of effective collaboration with community groups than it is to foster it.

Lawyers are trained to be linear thinkers and result-oriented, bringing legal expertise and adversarial skills to bear to solve the problems of clients. The prime interest to be served is that of the client, so that the goal of any particular representation is to achieve maximum results for the client. For a public interest lawyer engaged in policy or systemic work, the “client” is the low-income community or the issue-specific interest group for whom the lawyer works. The prime goal of a health care access campaign is thus to win increased health care access to the fullest extent possible. This is of course laudable and correct, but working effectively with community organizers and groups requires understanding of a different way of thinking.

There are a number of community organizing doctrines, and there are important differences among them, but as a general matter the goals of a community organizer are to build the power of the organization and to identify and build leaders — defined as people who are not professional advocates but decide to become involved in public life on issues that matter to them and their neighbors. The issues on which these organizations work must be identified through the organization’s own processes that discern what is important to the members. Winning the issues is important, but secondary. The primary goal, toward which working on issues is only a means, is to build the organization’s power and to grow the organization’s leaders.

Thus, while there is significant potential for common health care access goals between public interest lawyers and community organizers, their primary goals are not the same. If the primary goals of each are not known and understood by the other, then misunderstandings are likely to arise, and a productive relationship can be difficult. The lawyer may shop an issue to a community organization that the lawyer thinks the organization obviously should support, given the demographics and apparent self-interests of the residents of the community the organization serves. But if the issue is not one that has gained legitimacy through the organization’s own discernment process, the lawyer may not get
the participation of the organization, and in fact the lawyer may be perceived as a carpet-bagging person who might undermine the building of indigenous leaders.

Similarly, while the lawyer is used to being the spokesperson on issues due to superior knowledge and public speaking skills, the community group will always want its own leaders out in front, especially in interactions with powerful officials (meetings with legislators, testimony, media appearances, etc.).

This apparent reduction in the technical quality of a presentation can seem deliberately nonstrategic and be extremely frustrating for the lawyer if the lawyer does not understand how important it is to the organization, and vice versa. Moreover, the organizer's deep concern with building organizational power means that there is usually an intense interest in the organization gaining exclusive public credit and visibility. To a public interest lawyer who does not understand this, it might look like the organizer is simply egotistical and a publicity hound, unreasonably denying the public interest organization a needed opportunity to gain publicity, and vice versa.

If the lawyer and the organizer identify and talk through these issues, accommodations can be reached. When there is successful communication and collaboration is established, the results can be very powerful, precisely because the skills and capacities of the two participants are complementary. While there can also be substantial overlap, the lawyer and organizer each brings to the table assets that the other does not, so that the overall effort the two can put forth is much more complete, strategic and hard-hitting.

The community organizer and organization, for example, bring these assets:

- Access to powerful human stories that illustrate the health care access issues.

These stories are extremely important in advocacy campaigns for media, testimony and public storytelling, but they are chronically — famously — elusive and difficult for lawyers and other advocates to obtain.

- Ground-level perspective. This is especially important for lawyers or policy organizations that are not grounded in communities through their own direct service capacity. It is crucial to a pragmatic identification of issues and potential solutions: What will really work to solve the problem? The answer is not
always revealed by academic research or political ideology. Perspective based in ground-level reality improves the development of issues and policy solutions.

- The ability to "fill a room" or populate a public rally, and carry out district-level visits with politicians consisting of actual voting constituents and local leaders (like clergy). This projection of apparent voter power is usually the number one capacity that lawyers lack, yet it is crucial to the fundamentally political task of persuading politicians to expand health care access.

- Wide-ranging existing relationships. This is what organizers do: develop relationships, not only with residents of their communities but also with politicians, businesses, media members and other sources of power and information. When an alliance is established, the lawyer can tap into these relationships.

- The ability and willingness to be confrontational and develop tension with political leaders. Because the organization consists of, or has the appearance of, representing voting constituents, it can and will use hardball tactics in the arena of political persuasion. The organization is concerned with its long-term relationship with the politician — it wants the politician to respect its power, so it will often seek and invoke tension with the politician. Among other things, this can lead to a coordinated "good cop-bad cop" strategy, with the lawyer positioned as the friendly policy expert.

The traditional legal skills that a public interest lawyer possesses, plus the lawyer's own relationships and credibility, are in turn complementary and valuable to the community organization. The lawyer and the organization have to communicate to determine how the lawyer’s assets can be framed as an enhancement of the organization’s power.

The FamilyCare campaign is a strong example. FamilyCare began when the public interest lawyers at the Sargent Shriver National Center on Poverty Law in Chicago identified an important public policy problem that grew out of the welfare reform process in the late 1990s. Low-income working people who did what was expected of them and left the welfare program through employment were getting punished by losing their health coverage. Medicaid would stop when welfare stopped. This population of working parents became the focus of the need for a health coverage expansion. The Shriver Center began to work on the problem by identifying program models and funding streams, initiating
advocacy among legislative leaders and beginning to build a coalition mostly consisting of allied advocacy organizations.

Meanwhile, on a separate track completely, a newly formed metropolitan-wide community organization in the Chicago area, United Power for Action and Justice, was undertaking its initial issue-identification process through a lengthy on-the-ground series of meetings. Based mostly in more than 300 religious congregations, local community groups and unions, United Power was a unique collection of disparate economic, ethnic, racial, religious and geographic forces united by shared values and a desire to find common ground, build power and take action.

One of the issues identified in the United Power discernment process was “access to health care for the uninsured.” United Power developed a three-part strategy to address this issue: expanded coverage, more vigorous enrollment in existing coverage and expanded capacity to provide care to the uninsured through community-based clinics.

To accomplish the expanded coverage feature of this strategy, United Power was shopping for a policy option. The organizers heard about the Shriver Center’s existing campaign to expand coverage to low-income working parents and approached the Shriver Center about a possible collaboration. The Shriver Center had a worked-up and costed-out policy model, a strong head start in legislative advocacy and a growing coalition behind it. United Power had grassroots capacity and a wide array of important relationships (including business interests) that the Shriver Center’s campaign lacked.

While the collaboration may seem obviously advantageous to both sides, it was not undertaken lightly and its success was by no means a foregone conclusion. By sharing leadership of an issue identified in its own processes, United Power risked losing public identification with the issue, with the attendant risk of diluting its organizational power and the growth of its citizen leaders. It also risked losing its freedom of movement to confront and create tension with political leaders in order to build respectful and balanced long-term relationships with those politicians, if the Shriver Center tried to veto those tactics, seeing them as unproductive in accomplishing the expansion of health coverage, its prime goal.
For its part, the Shriver Center risked losing its own well-earned identification with the issue, as United Power would demand major public leadership and recognition. It also risked losing control of the advocacy, since it had to concede real power in the strategic and tactical decisions made about the campaign. It risked damage to its own relationships with politicians, if displeasure with United Power's tactics was attributed to the Shriver Center. And by sharing leadership and conceding much of the public identification with the issue to United Power, the Shriver Center risked some of its essential capital with donors and foundations, the lifeblood of the Center's budget.

With strong initial meetings and continuous communications, these issues were resolved. There was plenty of tension, but workable compromises emerged once each side understood the other's needs and the reasons for its positions. As trust and familiarity grew, a powerful combination emerged. In a burst of organizing energy, United Power directly provided or substantially assisted in:

- The public relations acumen to suggest the name FamilyCare for the expansion. The lawyers had not named the program and had been clumsily calling it "KidCare for Adults."

- A postcard drive that produced and sent 70,000 postcards to the governor and speaker of the House demanding passage of FamilyCare. United Power also had an extremely effective media event with small children, delivering the postcards in wagons.

- Large and very public actions with as many as 1,000 people in attendance.

- Unlikely alliances with Blue Cross Blue Shield and large hospital systems.

- Leadership in organizing an open letter signed by over 150 religious leaders.

- Substantial contributions to favorable op-eds and editorials.

- Strong turnout for lobby days.

- Consistent production of powerful personal stories.

- Powerful district-level advocacy, including meetings with legislators, walking precincts and conversations with likely voters and work with small local media.
The combination of these activities with the Shriver Center's own efforts and those of the wider coalition not only accomplished the establishment and year-by-year expansion of FamilyCare, but also created a strong political and policy atmosphere in Illinois favorable to additional health care access expansions, which also stood as an effective block against health care cuts that may otherwise have surfaced in a fiscal crisis. This collaboration illustrates the value of adding to the toolbox of the public interest lawyer interested in a leadership role in health care access campaigns the knowledge and skills necessary to interact productively with community organizers and their organizations.

B. Memisovski v. Maram: Litigation in the Political Context

Litigation is a standard part of the lawyer's traditional toolbox, and it is one capacity that only lawyers have. A public interest lawyer, acting alone or with colleagues, can accomplish important health care access policy goals with a successful suit for declaratory and injunctive relief. There are many examples of good outcomes on health care access obtained through litigation by lawyers essentially working alone.

Yet there are limitations to what can be done through litigation. It is impossible to achieve anything on health care access solely through litigation if it is not already provided for in law. Thus, it might be possible to achieve improved health care access in litigation through better enrollment efforts or a better program design to produce required levels of care, but it is not possible to expand coverage or improve the level of mandated enrollment or care.

Litigation is also subject to the possibility of a bad outcome. There is always a chance of sinking years and great amounts of scarce resources into an effort that ends in a loss or a reversal on appeal, with the further risk that such a loss could also do lasting damage to the law itself through an unfavorable interpretation that limits the scope of the law or prevents its enforceability.

Even with a victory, the favorable outcome is no good unless it is implemented productively and it is enforced. A court victory after years of litigation is often just the beginning of another years-long battle to win effective enforcement.

The toolbox of the litigator should therefore include the capacity to think beyond the four corners of the case. It should include the ability to recognize the need for an assessment of the larger political context, to make or acquire
that assessment and to develop and carry out — or have allies carry out — a political strategy that is a companion to the litigation. A litigator acting alone can force things. But in the larger picture, it is almost always more productive for the interests of the plaintiffs when the defendant officials willingly undertake the needed reforms, own and are proud of them and have a stake in their success.

It is close to impossible to achieve this solely through litigation, which invariably prompts resentment in a politician regardless of the merit of the plaintiffs’ cause or the politicians’ record with respect to that cause. Politicians reflexively fight litigation. Moreover, they turn it over to their counsel and try to forget about it, or, worse, take retributive action. The politicians’ counsels are not interested in policy concerns, but in the adversarial contest. To turn that kind of situation around and get it on a track for productive resolution, the politician has to be convinced of the advantages of making the reforms — the political arguments more than the policy ones.

Since the litigator is bound by rules of ethics not to discuss the case with defendants outside of the presence of counsel, a political strategy requires allies and surrogates to carry the messages. If it is strategically warranted, the litigator can make the case to opposing counsel or to the defendant officials in the presence of counsel. But the litigator’s toolbox should include not only an awareness of the larger political landscape, but access to allies who can develop and carry out a strategy to communicate directly to the officials. Media strategies can also be useful to reinforce the political framing.

The case of Menisowski v. Maran is an example of the benefits of this expanded toolbox for public interest health care access litigators. The case was a class action involving the claims of children in Cook County covered by Medicaid (at least 600,000 at any given time) that they were not receiving the access to doctors and the levels of care mandated by several sections of the Medicaid Act. The case was filed in 1992 in response to crisis-level complaints from frustrated families to Legal Aid and other agencies in the communities.

The litigation was immediately acrimonious, and the public officials turned it entirely over to their attorneys. There were repeated efforts to dismiss the case with claims that the Medicaid Act is not enforceable in court — claims that could always haunt the case on appeal even as the plaintiffs won them in the
trial court. There was a long stay of proceedings and then an extremely intense discovery process leading to an eleven-day bench trial in May 2004.

The judge issued a comprehensive ruling in favor of the plaintiffs in August 2004, declaring the whole Medicaid system for children out of compliance with the Medicaid Act and indicating a willingness to order sweeping reforms that implied substantial new expenditures for the state. The judge ordered the parties to attempt to negotiate a judgment order that would include the necessary injunctive relief.

In the normal course of litigation, this resounding victory for the plaintiffs after a twelve-year litigation process would have been followed by negotiations over the remedial order. Then would follow litigation of the inevitable disagreements and litigation of the issue of a stay pending appeal. And finally, there would be appeal proceedings probably all the way to attempted review by the Supreme Court by the loser in the court of appeals, with attendant stay pending appeal proceedings there.

In addition, assuming implementation was ordered, there would be ongoing litigation over implementation issues caused by recalcitrant officials attempting to limit the sweep of the court’s mandate and to manage compliance with inadequate funds voted by a legislature resenting federal court interference during a fiscal crisis.

One foreseeable reaction from this kind of adversarial atmosphere could be a rollback of eligibility for coverage blamed on the expense of compliance with the court-mandated levels of care for those with insurance.

The attorneys on the Memisovski team recognized that these were the downside risks of proceeding solely within the litigation to consolidate their victory. They also knew from experience that reforms implemented by willing officials staking their reputations and careers on such reforms are more advantageous to their clients than efforts by unwilling officials under court constraints, even if on paper the court-mandated reform is stronger. This suggested the advisability of exploring settlement even after the victory.

Moreover, the attorneys recognized the need and had the capacity to make an assessment of the larger political environment and to consult allies to fill out and confirm their judgments. The goal was to frame the potential settlement
politically and take it away from the lawyers' purely legal calculations (which indicated for the defendants that their chances on appeal might be good, given the judicial trend against enforceability of Medicaid rights in court).

The relatively new governor was the first Democrat in office in 25 years and had made health coverage, especially for children, a priority. He wanted to be a leader on that issue, and he would not want to be embarrassed by a court ruling holding his administration responsible for terrible performance on children's access to care, especially smart and inexpensive preventive and primary care. There was also a steep fiscal crisis requiring the governor to do many austere things in the budget and have a positive accomplishment to balance his public image. In addition, Illinois was riding a years-long trend of health coverage expansions, including the FamilyCare campaign described above, and politicians, especially the governor, were beginning to identify the political advantages of being a leader on ambitious health care reforms.

The litigation team expanded its toolbox in several ways to take advantage of this political assessment. It developed a media strategy to keep the court victory relatively quiet and to place blame on prior administrations for a situation "inherited" by the incumbent one. This preserved the ability to make it a part of the settlement offer for plaintiffs to coordinate publicity and allow the administration to frame its own credit for the reforms without reference to the case or contradiction from the plaintiffs' attorneys. It was made clear to the defendants that the reason for this approach was to preserve the governor's opportunity to be the hero of children's healthcare by "fixing" the problem he inherited. This could not be said directly to the governor, so the lawyers informed a variety of surrogates in the legislature and the advocacy community, and they carried the message and suggested this framing. All of these same messengers also stressed the substantive points, based on research, that preventive and primary care for children is indeed sound policy, fiscally sensible over time and long overdue.

The negotiations were not easy and took months. During that process, the political arguments began to gain traction. In the process of thinking through the settlement, the administration began to understand the relatively reasonable price of preventive care for children and indeed for everyone, and particularly the advantages of measures designed to acquire "medical homes" for everyone. Coordination of care can save money, in fact relatively quickly, in the cases of chronically ill people.
The administration also began to appreciate the political advantages of leadership on bold health care reform initiatives. In the court case, a settlement was reached in June 2005 that was very strong on the mandates and the data reporting, but was phased and reasonable on the measures requiring public expenditures. Before the settlement became final in November 2005, the administration announced in September 2005 that it would expand coverage to all children in the state, and that it would pay for that expansion over time with savings from a companion initiative to put the entire Medicaid, FamilyCare and children's health insurance system into a "medical home" initiative, in which every insured person would select or be assigned to a primary care doctor who would coordinate care.4

It is no doubt rare for litigation and political factors to line up like they did in the Memisowki context. Nevertheless, it is clear that litigators should have an expanded toolbox that allows them to be aware of and to associate with players in the wider political context.

C. Bell v. Leavitt: Litigation as Part of a Larger Defensive Strategy

A standard part of the public interest lawyer's toolbox is to be careful about litigation. Litigation requires significant resources of time and money, so public interest law organizations generally are very careful to only undertake cases that have a strong possibility of success. This is also important to the credibility of the organizations, because their track record in litigation is what vindicates their views on what the law requires and what makes people pay attention to their implied or stated threats to sue. If they get a reputation for being unable to win in court, or for filing frivolous claims, their essential capital as law-oriented organizations — their power — is diminished. They will also have spent scarce resources on unsuccessful pursuits, and this can be of concern to supporters and boards.

An expanded toolbox can provide an understanding of how even difficult litigation with a low probability of success can be a productive strategy. As in Memisowki, the expanded toolbox involves understanding the larger political context and coordinating roles with allied advocates to achieve public policy goals. It brings to bear media, lobbying, grassroots and research capacities in a coordinated way.
Litigation is an aggressive confrontational tactic. It is therefore often newsworthy, especially when there are political angles or powerful human-interest stories associated with it. The news coverage and framing of the issues can be politically important, more so than the actual impact of the litigation in strictly legal terms. In that context, the litigation can serve as the news hook to publicize the issue and create political tension and pressure. Combined with grassroots pressure and lobbying resources, the total strategy can bear fruit, no matter how the litigation is resolved.

The litigation still has to be credible and non-frivolous, because the attorneys handling the case have ethical obligations as well as all of the normal considerations mentioned above. Indeed, regardless of the power of the claims, even or perhaps especially where the claims are solid, and the case would be filed anyway (like Menisouki), the larger political context and the potential productivity of combined strategies should be considered. The point here, though, is that in some circumstances public interest lawyers who have an expanded toolbox of skills and allies might bring a meritorious, but long-shot case as part of a larger strategy when they might not otherwise bring the case at all.

An example of the uses of this expanded toolbox is Bell v. Leavitt. Early in 2006, Congress passed and the president signed the Deficit Reduction Act of 2005. Among its provisions was a requirement that, effective July 1, 2006, to be eligible for Medicaid, applicants and current recipients claiming to be U.S. citizens must provide documentary proof of their citizenship. Enacted as a tactic in the ongoing political conversation in the country around immigration issues, this provision would endanger the health coverage of millions of American citizens who were unable to procure the required documentation.

The most endangered people were the most vulnerable ones: the infirm elderly, the disabled, people with mental illness, the homeless, victims of disasters whose records had vanished, children separated from their birth homes and people born in places other than hospitals (often because of racially discriminatory policies and practices) who never had official birth records. It was not clear that the proponents had considered the potential impact. They clearly had not assessed the downside political risks, banking instead on what they perceived as a national anti-immigrant sentiment.

The Shriver Center began to assess legal claims for potential litigation and put together a litigation team. Meanwhile, however, the Center also realized the
need for a political strategy to influence the rulemaking under the new law and potential congressional fixes in the event that litigation did not succeed. While this assessment and organizing was being done, the Shriver Center sent a threat-to-sue letter to the responsible federal authorities in April 2006, hoping to influence the rulemaking. The Center agreed with its allies to be the only signatory on this letter, in order to preserve the freedom of movement of allies who still wanted to engage in direct conversations with the federal officials (they would otherwise have to have had counsel present if they had threatened to sue).

The organizations that would be active in Washington, D.C., decided not to participate in the litigation, in order to preserve their ability to work with Congress and the bureaucracy. The organizations in the litigation included the Shriver Center, Health and Disability Advocates (a Chicago firm with substantial legal expertise on health issues), the National Health Law Project, the National Senior Citizens Law Center and the Chicago litigation firm of Goldberg, Kohn, acting pro bono.

The legal claims were under the U.S. Constitution and were legitimate claims, but it is not clear that any of the organizations would have undertaken them outside of the larger strategy. It was agreed early on to coordinate the media that would flow from the lawsuit with the legislative and administrative advocacy and grassroots pressure. It was agreed to file the case in Chicago to separate it from the Beltway pressures, foster the reality that what was at stake was more than squabbling over immigration policy and partisan point-scoring and to insulate the Washington advocates somewhat from congressional pressure to back off of the suit.

Less than three weeks before the law was to take effect on July 1, the administration released a letter to state Medicaid directors spelling out perhaps the worst possible implementation scheme in terms of damage to U.S. citizens in need of health care who would be deprived of it in spite of being eligible for it (other than the technical documentation currently being required). On June 28, the plaintiffs filed a nationwide class action. The named plaintiffs were from across the nation and presented extremely powerful stories of need and impending doom if the law were carried out as specified in the letter.

The lead plaintiff, Ruby Bell, for example, was born in Little Rock, Ark., in the early 20th century, years before the county began collecting birth records
and during the era when African-Americans were often not welcome in hospitals and were born at home. She had never left the Mississippi River Valley in her life and was in a nursing home in Rockford, Ill., without an original birth certificate, any living relatives to vouch for her, or any way to prove a citizenship that nevertheless was obvious. Loss of Medicaid would have probably led to her death.

Families USA, an ally not on the pleadings, coordinated a well-attended national telephone press conference. The case and the powerful stories of the plaintiffs received broad coverage. Grassroots pressure was brought to bear on key legislators and the administration. In the court case, a hearing on the motion for a temporary restraining order was set for June 13. Late on June 12, the administration published proposed and emergency regulations substantially softening the documentation requirements and procedures. Most importantly, the rules as a practical matter exempted all of the elderly and disabled Medicaid recipients and applicants from the new documentation rules (they were still subject to much more reasonable documentation rules that had previously been in effect). This relieved approximately eight million of the most vulnerable people, a substantial victory before the court ever made a ruling.

Plaintiffs reformulated their pleadings and added new plaintiffs, most of the original ones having been mooted by the new rules. The case became much more difficult because the new rules gave flexibility to states that made it hard to litigate nationally. The cleanest claim was on behalf of a subclass consisting of about a half-million foster children. The media and legislative advocacy and grassroots pressure continued, even as the case ran into procedural difficulties.

In December 2006, Congress itself passed a “clarification” stating that it did not intend the documentation rule to apply to foster children. With that victory in hand, the plaintiffs voluntarily dismissed the case in early 2007, with no adverse rulings on the merits, preserving the issues for possible future state-by-state litigation if necessary.

The Bell story illustrates the value of public interest lawyers having an expanded health care access toolbox. Litigation, the consummate lawyer’s skill and capacity, is just one of many tactics that can be melded into a larger strategy. In that context it can be highly useful to accomplish the goals of a larger strategy, even if the litigation itself is not successful.
CONCLUSION

It is important to expand the toolbox for public interest attorneys engaged in leadership of health care access campaigns. It would be useful for law schools to consider a curriculum teaching additional skills, such as working with community organizations, lobbying, political assessments, media and messaging, and case studies of a variety of successful multi-dimensional advocacy campaigns involving attorneys. In any event, practitioners should think beyond the traditional legal skills and develop these added tools.

NOTES

1 John Bouman, a panelist at the 2012 Loyola University Chicago Public Interest Law Symposium, is president and director of advocacy of the Sargent Shriver National Center on Poverty Law. He received his J.D. from the Valparaiso University School of Law. An earlier version of this article appeared in 2008 in the Georgetown Journal on Poverty Law and Policy (15 Geo. J. Poverty L. & Pol’y 833). The current version has been published with permission.
4 See Bouman, The Path to Universal Health Coverage for Children in Illinois, supra note 3.
5 Bell v. Leavitt, 2007 WL 551553 (N.D. Ill. 2007).
THE INVISIBLE UNINSURED: NON-CITIZENS AND ACCESS TO HEALTH CARE COVERAGE UNDER THE AFFORDABLE CARE ACT

by STEPHANIE ALTMAN, GENÉ STEPHENS & ANNIKA YATES

People immigrate to the United States in hopes of making a better life for themselves, their family and their children. They may seek employment, health care and freedom from poverty or persecution in their home country. The term "immigrant" or "non-citizen" covers a wide range of people who come to and stay in the United States for different reasons. Non-citizen is the most encompassing term so we have used it in this article to represent many categories of people who visit or reside in the United States. Immigrants and
visitors enter the United States with different types of legal documentation and may change their status during their stay in the United States. Legal status and immigration documentation largely determines if a person is eligible to receive government benefits such as public health insurance.²

Some immigrants enter the United States with the intention of becoming legal permanent residents and, eventually, United States citizens; however, these opportunities are limited. Some foreign nationals enter the United States for a designated time period as employees or students and do not intend on immigrating or becoming permanent residents. Visitors often come into the United States on a tourist visa or other temporary visa.

Most commonly, visitors who stay beyond the length of their visa potentially become “undocumented”, or without legal documentation to remain in the country. If they become sick or disabled and unable to work or care for themselves or their family here in the United States, they have very limited access to public health care coverage. Many low-income jobs do not provide health insurance to their employees and private health insurance is often prohibitively expensive. In addition, immigrants and other non-citizens are rarely eligible for public medical coverage such as Medicaid and Medicare.³ Unfortunately, the Patient Protection and Affordable Care Act (“ACA”) may not significantly improve the health insurance status of non-citizen populations.⁴

Medicaid is the largest insurer in the nation of people under age 65.⁵ The federal Social Security Act and conforming regulations govern eligibility and coverage under Medicaid with some variation among the states.⁶ Eligibility for and access to medical coverage under Medicaid and other public programs generally depend upon four major factors: categorical eligibility, citizenship/immigration status, income and assets. Categorical eligibility for Medicaid includes adults over age 65, pregnant women, children under age 19, parents of children under age 19 and people with disabilities. In 2014, this categorical eligibility will also expand to non-disabled adults without minor children.⁷

However, current citizenship and immigration requirements will continue to apply to all categories of coverage under Medicaid with the exception of pregnant women and children under age 19 who may have more liberal requirements applied at state option.⁸ As the ACA largely followed the regulatory scheme of Medicaid, it did not expand or broadly liberalize access to coverage under Medicaid. The only other significant new avenue for health care cover-
age authorized in the Affordable Care Act are the opportunity for some lawfully present non-citizens, including legal permanent residents, to purchase health insurance through state health benefits exchanges or cooperatives.

Availability of Public and Private Health Care Coverage for Non-Citizen Populations Historically, non-citizens have faced challenges obtaining health care coverage due to a myriad of issues including a failure to meet the eligibility requirements for Medicaid, limited availability of coverage through employment and low income. While non-citizens are approximately 7 percent of the total population, they make up 21 percent of the uninsured population. They are also more likely to have characteristics associated with being uninsured, including youth, low income, Hispanic ethnicity and employed by small employers who are less likely to offer health insurance. Therefore, due to the lack of access to private insurance and lack of eligibility for public insurance, non-citizens are disproportionately more likely to have no health care coverage available to them.

As a result of a political backlash against non-citizens combined with a similar backlash against welfare recipients, eligibility for Medicaid and other public programs was significantly curtailed in 1996 with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act. While Medicaid remains generally available to certain special populations (e.g., legal permanent residents after they have been lawfully present in the country for 5 years, pregnant women, refugees, asylees and victims of domestic violence, torture and trafficking), undocumented and temporary immigrants remain ineligible for Medicaid regardless of their length of residency in the country except for coverage of limited emergency conditions. Restriction on public health care coverage for undocumented non-citizens continues to be debated as a major political issue often wrapped up in debates over immigration policy.

Documentation of citizenship and identity has provided another hurdle to coverage for non-citizens as well as for citizens. The citizenship documentation requirement, first imposed in the Deficit Reduction Act of 2005, requires a new and arduous level of identification and documentation to prove eligibility for Medicaid. A class of Medicaid recipients, many of them elderly, disabled and unable to adequately prove their citizenship due to a host of barriers including lack of original birth certificates, lack of passports, missing identity information and sealed adoption files, challenged the legality of these requirements that required Medicaid applicants and recipients who claim to be
United States citizens to prove their citizenship in some instances after decades of receiving Medicaid.

Although some populations, notably foster children, SSI recipients and Medicare beneficiaries, were eventually exempted from the requirements after the dismissal of Bell v. Leavitt, most applicants for Medicaid must still meet these requirements. These restrictions are often difficult for citizens to meet (e.g., presenting a United States Passport, original birth certificate and certified documentation), and, while they do not directly affect non-citizens, the chilling effect of requiring a high level of documentation from applicants for health care coverage can discourage any applicant from seeking coverage. Similarly, non-citizens may be afraid to seek health care coverage for their citizen children or for themselves for fear of being reported to immigration authorities, even though it is well-established that applying for health benefits can have no impact on immigration status or deportation risk.

Emergency medical coverage under Medicaid remains one of the only exceptions to the limitations posed for non-citizens in Medicaid and the ACA. Emergency Medicaid is available to those immigrants who are in need of emergency services, assuming they meet the other eligibility requirements. Some states also have state-funded only programs to fill the coverage gaps in Medicaid and CHIP for low-income, lawfully residing non-citizens who would otherwise be ineligible for Medicaid. For example, several states provide coverage to children regardless of their immigration status, including Massachusetts, Illinois, New York and Washington states, as well as the District of Columbia. The state option in the ACA to provide Medicaid and SCHIP to children and pregnant women who are lawfully present but have not yet met the 5-year bar may expand the number of states who cover non-citizen children and will surely be a focus for collaborative advocacy.

Advocacy efforts to expand coverage to non-citizens have focused on building collaborations between providers, consumers, and community-based organizations to organize support for health care access. Hospitals and Federally Qualified Health Centers that serve ineligible undocumented non-citizens have a joint interest with advocates and consumers in expanding coverage to these populations as a potential funding source for their care.

However, advocacy efforts are typically more successful for non-citizens who have legal status than for those who have no legal status. For example, a class of
non-citizens with legal status successfully enforced their rights to state insurance focusing on the inequality between citizens and non-citizens in the provision of health care. The Massachusetts State Supreme Court held that the restrictions in access to state health insurance imposed violated the equal protection rights of legal immigrants. Still, the problem of coverage for undocumented or “illegal” immigrants remains largely unaddressed.

**Collaboration Leads to Policy Reform: All Kids and the Expansion of Health Care Coverage to Non-Citizen Children in Illinois**

Public opinion and political discourse has narrowed the support for health care coverage for non-citizens over the past decade, especially those persons who do not have legal documentation for being present in the United States. Federal Medicaid law has restricted eligibility and narrowed the emergency coverage for non-citizens exceptions, resulting in less funding for health care for undocumented immigrants. At the same time, collaborations between social activists, advocates and providers have convinced some states to expand coverage through state-only funds seeing the value in maintaining population health (e.g., vaccinating children of all immigration status to avoid communicable diseases) and covering preventative health care to avoid more expensive emergency and urgent care costs in the future. There have been multiple political amnesty and health care coverage proposals through federal and state legislation primarily focusing on children such as the DREAM Act but they have been largely unsuccessful. The focus among collaborative partners in Illinois, therefore, has been to protect coverage for non-citizen children at a minimum.

Illinois set an early example for the nation in expansion to uninsured children regardless of immigration status by creating All Kids in 2005. This was in part a response to the settlement in *Meninowski v. Maram*, a class action in which Illinois was found to be in non-compliance with federal law in the provision of equal access to providers and Early and Periodic Screening Diagnosis and Treatment for children on Medicaid. A collaboration of providers, hospitals, policymakers, advocates for children and consumers came together in unprecedented support for health care coverage for all children and the law implementing coverage passed easily in the state legislature. All Kids, although under frequent political attack, continues to cover children under 300% of the Federal Poverty Level (“FPL”) regardless of immigration status. This coverage has
resulted in one of the highest insured rates of children in the nation and set an example for health care reform and the reauthorization of SCHIP.\textsuperscript{20}

It is unknown whether Illinois will continue All Kids coverage for undocumented children beyond the implementation of health care reform in 2014. The coverage of children who do not meet federal Medicaid immigration requirements must be financed with state-only funds. These funds are always in jeopardy during a difficult budget climate. In addition, audits of the Illinois All Kids program have provided fodder for its critics finding that Illinois categorizes some children as undocumented when they actually qualify for federal Medicaid. In order to improve political support for the program, Illinois needs to improve documentation of citizenship and immigration status to maximize federal funding. Such an improvement could bring in more federal financial participation and strengthen political support for the coverage.

**THE AFFORDABLE CARE ACT: WHAT IT WILL MEAN FOR NON-CITIZENS**

Under the Affordable Care Act, non-citizens are divided into two groups: "Qualified" and "Non-Qualified", generally referring to whether they are qualified for health benefits under the ACA.\textsuperscript{21} Qualified non-citizens are generally legal permanent residents who have been lawfully present in the United States for at least 5 years, as well as certain humanitarian immigrants, such as refugees, persons granted asylum or withholding of deportation/removal, conditional entrants, persons granted parole for a period of at least one year by the Department of Homeland Security, Cuban and Haitian entrants, certain abused immigrants and their families, and certain victims of human trafficking.\textsuperscript{22} All other non-citizens, including undocumented non-citizens are considered "Non-Qualified."\textsuperscript{23} As non-qualified, they cannot enroll in major public benefits programs, including Medicaid, The State Children’s Health Insurance Program ("SCHIP"), or Medicare.\textsuperscript{24}

Even when qualified, most non-citizens must still wait for the 5-year period before they may apply for Medicaid, with the notable exception of lawfully residing children and pregnant women who can be covered by state option without a 5-year waiting period.\textsuperscript{25}

The ACA will also significantly expand Medicaid by requiring states to cover nearly all people under the age of 65 with household incomes at or below 133
percent of the PPL beginning in January 2014. This expansion will mean that many low-income people will now be eligible for Medicaid who have formerly been ineligible for Medicaid due to their failure to meet categorical eligibility (i.e., they have not fit in a prior category of coverage such as pregnant women, children, parents, disabled or elderly). Medicaid expansion for each participating state will be covered by the Federal Government at 100 percent of the state’s costs of coverage in 2014, with a gradual decrease in funding to 90 percent over time through 2020. Thus, the Medicaid expansion could make a considerable difference in coverage among childless adults who meet the income requirements for Medicaid including qualified non-citizens. However, the Medicaid expansion will not expand coverage to non-citizens who are not qualified—generally those with no legal documentation or who are lawfully present but have not yet met the 5-year bar.

One of the most controversial elements of the ACA is the individual mandate, which requires citizens and some non-citizens who are deemed financially able (and not eligible for Medicaid) to purchase insurance, either through an employer or by purchasing an individual plan. Those who fail to purchase insurance will be subject to financial penalties. Legal permanent residents are generally subject to the individual mandate. In addition, some non-citizens will be subjected to the mandate. Non-citizens, however, are exempt from the individual mandate if they are not expected to be in the United States for the whole period of enrollment for an insurance plan. The shortest period of enrollment available will not be known until the state-run health benefits exchanges are operational. Currently, no one will be fined for not having coverage for less than 3 months (limited to one 3-month period in a year). Therefore, non-citizens residing in the United States for a period shorter than 3 months within one year will not be fined. Undocumented non-citizens will not be subject to the mandate, as they are ineligible for coverage.

THE AMERICAN HEALTH BENEFIT EXCHANGES

The ACA calls for the establishment of a “health benefits exchange” in every state. The exchange is intended to provide a user-friendly marketplace to allow consumers to purchase an insurance plan that best suits their needs. The exchange has the potential to create a regulated, competitive environment that ideally will decrease the cost of health insurance. States will have the option to implement increased consumer protections into the structure of the
exchange. These factors combined are predicted to make insurance purchased through the exchange more affordable to Americans. Furthermore, those persons who have incomes between 133-400 percent of the FPL will be eligible for tax credits, which are intended to make purchasing insurance easier financially.

Lawfully present non-citizens will be allowed to purchase insurance through the exchange and are eligible for certain tax credits. Undocumented non-citizens, however, still will not be allowed to purchase insurance through these exchanges and are also ineligible for any tax credits, regardless of whatever other qualifications they may meet. Certain lawfully present non-citizens who are in the United States for a temporary period will also be allowed to purchase insurance through the exchange if they are in the United States for a period of time long enough to subject them to the individual mandate or if they will be in the country for the full enrollment period of the plan.

CO-OP: CONSUMER OPERATED AND ORIENTED PLAN

The Affordable Care Act afforded an opportunity to qualified nonprofits to provide health insurance to the individual and small group market. These co-ops are designed specifically to provide an alternative to the state and federal administered health care exchanges and to be administered with a strong consumer focus. Co-ops may receive federal loans but since they are not a state or federal entity, the requirements for eligibility to purchase insurance in the co-op including citizenship and immigration status is not governed by federal or state law. Thus, Co-ops may provide another new opportunity for non-citizens to purchase health insurance if they do not meet the eligibility requirements for Medicaid or to purchase health insurance in the health benefits exchange.

CONCLUSION

The Affordable Care Act did not significantly expand health care coverage for non-citizens, especially for those with no legal documentation. The ACA liberalizes the requirements for legal resident children and pregnant women to qualify for Medicaid, but only at state option. It is hoped that more states will exercise this option and coverage will be expanded to these populations; how-
ever, states are facing budget deficits that may prevent significant expansion in the near future. The ACA also allows lawfully present non-citizens to purchase health insurance through the health care exchanges with a subsidy; however, undocumented non-citizens will experience little or no change in their access to coverage.

These reforms will certainly expand coverage to certain non-citizens and improve financing of health care to non-citizens; however, providers such as safety net hospitals and federally qualified health centers will most likely continue to bear the burden of uncompensated care for the undocumented population. The ACA also invests significant funds into community health centers to bolster their ability to care for the uninsured in general, which may help to finance continuing care for undocumented populations.

Collaborations of providers, advocates and consumers have been partially successful in the expansion of Medicaid coverage for non-citizen children and for lawfully present non-citizens. Traditional safety-net providers including Federally Qualified Health Centers, clinics, school health centers, and hospitals will remain the primary access points for immigrants without health insurance or Medicaid. These providers may be better able to handle the financial burden of caring for uninsured immigrants because of the cost-shifting through the move to more insured patients. However, as more non-immigrants are insured in 2014 through the Affordable Care Act, the patient distribution patterns may change, leaving some hospitals such as County hospitals and clinics with a greater percentage of the uninsured immigrant population. The "problem" of providing and paying for health care for non-citizens who are undocumented or otherwise ineligible for public coverage will remain a burden for those individuals and on our health care system.

**Notes**

1. Authors: Stephanie Altman, J.D., Programs and Policy Director, Health & Disability Advocates; Gené Stephens, J.D., candidate for LL.M. in Health Law, Loyola University Chicago Bentley Health Law Institute; Annila Yates, Intake Specialist and Social Media Community Manager, Health & Disability Advocates.

2. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), P.L. 104-193 (Aug. 22, 1996), which placed new limitations on federal funding for health coverage of immigrant families; Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA), P.L. 111–5, Section 214, which permits states to cover certain children and preg-

3 Id.


6 Social Security Act, 42 U.S.C. 1396 et seq.; 42 C.F.R. § 430 et seq. Every state plan consists of a mix of required and optional categories of health services. See also 42 U.S.C. § 1396d(a).

7 Patient Protection and Affordable Care Act, P.L. 111–148 (Mar. 23, 2010).


10 Department of Health and Human Services, Overview of the Uninsured in the United States, http://aspe.hhs.gov/health/reports/05/uninsured-cps/index.htm#citizenship.


13 Bell v. Leavitt, 2007 U.S. Dist. LEXIS 11675 (N.D. Ill. Feb. 16, 2006), a suit which challenged the legality of provisions in the 2005 Deficit Reduction Act and HHS implementing regulations that required Medicaid applicants and recipients who claim to be United States citizens to prove their citizenship with passports, birth certificates and other special documents. Immediately after the case was filed, defendant Secretary of HHS exempted SSI and Medicare beneficiaries from the documentation requirement, a change that exempted approximately eight million disabled and elderly people. Subsequently, Congress corrected defendants’ misinterpretation of the 2005 Deficit Reduction Act and expressed its intent that 500,000 foster children and children receiving adoption assistance be exempt from the citizenship documentation requirement. Concluding that the potential for further progress in a nationwide class action is limited, plaintiffs decided to dismiss the case voluntarily and to clear the way for activity on the state level, including possible litigation. Sargent Shriver National Center on Poverty Law, Parties Voluntarily Dismiss Action Challenging Citizen Documentation Requirements for Medicaid, No. 06 C 3520 (N.D. Ill., May 7, 2007), available at http://www.povertylaw.org/poverty-law-library/case/56000/56034. See also U.S. Government Accountability Office, States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizen and Poor Administrative Burdens, GAO-07-889 (June 2007), available at http://www.gao.gov/new.items/d07889.pdf.


15 42 U.S.C. § 1396 (c)(1)-(3); 42 C.F.R. §440.255
17 Id.
19 Development, Relief, and Education for Alien Minors Act, S-1291 (107th), (June 20, 2002).
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
39 Id.
40 Id.
41 Id.
42 Id.

FEATURE ARTICLE

CONSTITUTIONAL CATASTROPHE: THE NATIONAL DEFENSE AUTHORIZATION ACT VS. THE BILL OF RIGHTS

by Shahid Buttar

I will touch on a number of different issues today, including the National Defense Authorization Act (NDAA), as I discuss the new and expanding power of our government to detain even U.S. citizens indefinitely without trial. There is an even greater power being asserted by our government in
connection with national security, to kill U.S. citizens without trial — a power that was defended right down the street about a week ago by the Attorney General of the United States. I will address that in my remarks, as well.

I want to couch what I am about to offer in the terms of legal realism. There are two primary audiences with which I intend to share that frame of reference. The first is to law students, who I imagine are still being indoctrinated with the false pretense that the law is made in the courts — which quite frankly could not be further from the truth — and so I will try to put the role of courts in context. The other audience consists of the public generally, but particularly reporters and elected office holders who, with respect to the NDAA and the military detention authority, have failed to grasp what it at stake, how the law that was recently passed and signed into law by the president on the last day of last year impacts very fundamental rights, and a legal realist perspective of that law.

Then I will try to wrap all that up, rather than leaving you entirely dejected and disillusioned, with some action opportunities and ways for you to raise your voices here in Chicago.
A REALIST'S VIEW OF COURTS

The first piece I want to touch on just by way of introduction is the role of courts. Obviously, in legal education case law is primary. That's what you study as a lens through which to understand how the common law develops, how the principles interrelate, and it's a useful teaching method. But the teaching method obscures the reality on the ground, which is to say that courts are largely a sideshow with respect to how the law evolves.

You could think of this through a couple of different lenses. First, consider the branches of government: we are all taught that in our system of divided and separated powers there is an executive branch, a legislative branch and a judicial branch.

Complicate that now with the federalist system, which is to say we have at least three layers of government: federal, state, and local. There are executive branches at the federal layer, the state layer, and the local layer, as well as legislatures at each of those three layers. And while courts don't generally have local equivalents, we at least have state and federal courts. We have, then, at least eight branches of government. If you add the press as a theoretical additional branch, we actually have nine branches -- nine -- of which the federal courts are only one.

You read federal case law in law school. This is a useful teaching method, but if you look at the branches of government and the sets of institutions that collectively comprise and decide how the law will apply, at least on the ground, federal courts are just one-ninth of the equation.

Another very simple way to capture this notion is the adage that possession is nine-tenths of the law. Think about the role of courts where potential litigants lack the resources to litigate. Stasis is the norm. It doesn't matter what the doctrinal commitments for some other case or controversy might be when litigants don't have the resources to litigate.

The analysis also holds when courts lack the doctrinal hooks to reach a set of issues. For instance, if a particular case does not satisfy constitutional standing or ripeness requirements, there are any number of issues that elude the jurisdiction of courts. So whether it is because potential litigants lack the resources to
actually litigate, or because judges lack doctrinal opportunities to engage the issues, judges play a profoundly passive role in the system.

If any of you aspire to be judges, and follow the canard that to get there you have to hide your political perspectives for your entire careers, I would just plead with you to wake up, because: a) there aren’t that many spots on the federal bench — you’re talking about under 700; b) there is no particular guarantee that stealth nominees will be the fashion du jour at that stage in your careers; c) there are any number of issues on which you can raise your voice between now and then; and d) judges are very disempowered. To become a judge takes decades of preparation, and when you are on the bench you might sit your entire career and hear just a handful of cases with any particular public relevance.

The disempowerment of courts is a theme I want to leave with you. This is a bit of a digression, but I don’t want to make the claim that the courts are irrelevant. Courts are absolutely relevant; they are just marginalized, and the last way in which I present this is the judicial vacancy crisis. In the U.S. Senate, Republicans have mounted essentially a dragnet filibuster impeding any effort to confirm particularly circuit court nominees. There is a long-running crisis with respect to vacancies on several of the judicial circuits, which further undermines the capacity of the judiciary to provide meaningful justice, either to discrete litigants on the ground or with respect to very important doctrinal questions that we’ll explore over the next few minutes.

Public Mobilization and the Responsibility of Law Students

Maybe the last piece with respect to the marginalization of courts that I think is particularly interesting for this crowd, given you are in Chicago, are the opportunities for public mobilization. Chicago earlier this year, just a few months ago, maybe even weeks, became the first city in the country, as far as I know, to become a torture-free zone. And that reflected public mobilization.

The Chicago City Council passed, I believe unanimously, a resolution affirming that torture is unacceptable in the United States, but further finding that extended solitary confinement constitutes torture. Many states across the country practice extended solitary confinement as a relatively routine instru-
ment of retribution. But it is torturous, and your city has taken the lead in announcing that principle despite the prevailing view.

Your city, if pressed by its residents, can take similar positions with respect to any number of issues. And the most compelling opportunities to raise your voice are not in the courts nor even necessarily in legislatures, but rather in the public sphere. This is an overarching theme I want to leave with you.

The last thing I will just say before I dig into some of the subject matter here is that, for those of you who are law students, you occupy a particularly privileged position in our society. Students, except for professors, are the only people who essentially get paid to learn. Granted, you might be racking up a lot of debt while you are being paid to learn, but the fact of the matter is you have the privilege of having the opportunity to study and dedicating — at least for that moment — your lives to that end.

Few people have that opportunity. And by virtue of that, you are becoming increasingly acquainted with the levers through which these decisions are made. So you have the privilege not only of focus, but also of training. And as busy as you might feel (this might be the most depressing thing I tell you today), it gets only worse. So you actually have a fair amount of flexibility in your lives; in retrospect you will see this.

This combination of attributes — the opportunity for focus, the acquaintance with the levers and the training you are getting in those schools, and the flexibility over how to allocate your time — also includes a freedom from institutional constraints. Let's say some of you go on to clerk in courts; you will essentially sacrifice your First Amendment rights for the privilege of occupying that position. You don't have those constraints at the moment. So I would just, again, invite you to wield that privilege assertively.

**The Perspective of Legal Realism**

So let's talk about what legal realism is. We'll apply it to a few different discrete doctrinal settings, starting with the First Amendment. We'll compare it to the Attorney General's recent defense of the ability to assassinate U.S. citizens at will without judicial oversight, and then we'll apply it to the National Defense
Authorization Act. Finally, we'll link all of that to action opportunities that you might consider pursuing here in the weeks and months ahead.

Legal realism is essentially the perspective that the law is not necessarily reflected in the contorted justifications that judges reach in order to decide the cases before them, nor in the theories constructed by law professors to lend coherence to an incoherent body of case law. Legal realism recognizes that the law includes whatever potential litigants, or government agencies, are able to get away with. Which is to say, legal realism acknowledges that the law includes, for instance, acts by an executive branch that no court ever oversees, like torture, or systematic and pervasive dragnet spying by the National Security Agency.

There are all kinds of issues that elude the courts, whether because of the standing barrier, the ripeness barrier or the lack of resources available to litigants. Those facts — the possession that is the nine-tenths of the law — that is what the law is, whatever judges might articulate in the limited number of cases they actually decide.

When you read case law, what you are really looking at are reflections on the law from its periphery. They don’t determine what the law is. They are advisory with respect to a particular set of facts that find themselves before someone who is in a position to do something about it. So I just want to place in context the instruments of your legal education.

**Legal Realism Applied: Two Cases and the First Amendment**

Another way to look at this is to examine the contrast between similar cases that reach very different doctrinal conclusions. Let's look at the First Amendment as a particular crucible.

In the 2010 Supreme Court term, there were a pair of First Amendment decisions, one of which has gotten a great deal of attention and the other of which has gotten some, but not nearly as much. So just a show of hands: who here has heard of *Holder v. Humanitarian Law Project*? I see a handful of hands. Who here has heard of the *Citizens United* case? More of you. Good.
So, before we get into the doctrine on how these cases compare and contrast with one another, you see a very stark discrepancy as to how many of you have heard of one of the cases versus the other. But the reason you have heard about *Citizens United* is because of public mobilization. The fact that one of those cases is an object of mainstream political public awareness even outside this room reflects the public mobilization that responded to this decision, from all corners, left and right, across the country, in the halls of government, on the street, at Occupy sites, in Tea Party rallies. You see in this mobilization from all corners the opportunity to promote an idea and reflect a consciousness in the polity, in the electorate, in the populace, in the public, beyond the rarified institutions in which we discuss these things.

Let's talk about how these cases differ. They're both First Amendment cases, decided, ironically, on the first and last days of Supreme Court term 2010. The *Citizens United* decision essentially gave corporations the First Amendment right under the free speech doctrine to buy elections. The *Humanitarian Law Project* case rescinded from U.S. persons, including charities or individuals, the right to promote nonviolence abroad. I'm going dig into the facts of the latter case, present the holding, then give you another way to look at it beyond the narrow facts before the Court.

In Turkey, there has been a long-running insurgency conducted by a Kurdish minority concentrated in the southern part of the country, straddling the northern border of Iraq. The Kurdish minority in those two countries has an irredentist aspiration to its own state, and that has led to, at times, violent insurgency against the Turkish state, in particular.

The Kurdish Workers' Party, or PKK (Partiya Karkeran Kurdistan), was the target of a series of workshops promoted by a U.S.-based charity called the Humanitarian Law Project aiming to bring peace to this conflict. Its method was to enable nonviolent conflict-resolution workshops.

Who might you think you would want to participate in workshops aiming to bring peace to a conflict? Any guesses? Do you want bank customers in Alabama to participate in those workshops? Do you want members of Congress to participate in those workshops? You want militants to participate in the workshops. That's the point: if you're trying to bring peace to a region and there is an active conflict, the people you want in your workshops are the people who would otherwise be out there committing violence.
But because the PKK had previously been categorized by the State Department and the Treasury Department as a foreign terrorist organization, the charity would risk being charged with providing “material support” to a terrorist organization if it went ahead with its workshops, thanks to an amendment to the material-support provision included in the PATRIOT Act. The Humanitarian Law Project challenged the material-support law.

You might think of the PATRIOT Act as a surveillance authority. It is more than merely that. The amendment to the material-support statute, and the resulting Humanitarian Law Project case, help reveal the extent to which the PATRIOT Act also included the government’s power to criminalize what used to be First Amendment-protected activity.

The interesting parts about the case, to me, were particularly that the defendant, the Humanitarian Law Project, committed no violence. The government did not even allege that it committed any violence. Nor did the charity intend to support violence, a point the government conceded as well. All of which is to say, you can face conviction for material support for terrorism even if there has been no act of violence and you never intended to support any. I would then ask: what exactly does terrorism actually mean? Is it just whatever the government wants it to mean?

Terrorism rooted entirely in association, with no violent action or intent to support such action, drives a hole the size of a train through the First Amendment. What it does, particularly if you contrast it with the decision in the Citizens United case, is create a very dramatic tension in the First Amendment doctrine: corporations have a free speech right to buy elections, but you don’t have a right to fund nonviolence abroad. And if the government comes after you to say that you are talking or coordinating with the wrong people, you don’t have the right to claim you never intended to support violence or that such violence never happened.

This is the state of the First Amendment, and when you look at it through a legal realist lens, particularly as revealed through these two cases during the Supreme Court’s 2010 term, it demonstrates how little the rule of law actually means in America today. We sing anthems at baseball games about living in the land of the free, but the shoe does not fit.
I'll explain a few other things that are even worse, quite frankly, than the Humanitarian Law Project case in a second.

THE FRAGILITY OF CONSTITUTIONAL RIGHTS: A NOTE ON AETA

Before I get to the Attorney General and the authority to kill U.S. citizens without judicial process, let’s talk briefly about the Animal Enterprise Terrorism Act (AETA), which became law in 2006. AETA amended and strengthened the Animal Enterprise Protection Act of 1992, which had introduced the federal crime of “animal enterprise terrorism” — that is, causing physical disruption to the functioning of an animal enterprise, such as a commercial lab using animals as test subjects.

AETA and its predecessor basically fit the same line that I was drawing out in the Humanitarian Law Project (HLP) case. If HLP stands for the proposition that terrorism can include what used to be First Amendment-protected activity, then the prohibitions against animal enterprise terrorism did the same thing, even well before 9/11.

Let me give you a fact pattern that reveals how AETA can be (and has been) abused. If you stand on the sidewalk in front of a house that, let’s say, happens to belong to an executive of a company that experiments on monkeys for pharmaceutical research, or a company that is involved in factory farming, and you do so because you have an interest in animal rights, or food safety, or bioethics, or any number of other issues that drive these particular movements — if you do nothing more than wave a placard outside the home of an executive of an “animal enterprise” — then you have committed an act of terrorism.

You might often hear that in the years after 9/11 our government sacrificed civil liberties for the sake of national security. Don’t buy it. That started well before 9/11.

The extent to which the First Amendment has been essentially shredded in service of corporate power is better shown in the AETA legislation than in the HLP litigation. Who do you think lobbied to get AETA passed? These were businesses that had been targeted by protesters.
So when you think about the right to speech or the right to association, two among the several rights that the First Amendment protects, doctrinally consider a legal realist perspective, which is to say the First Amendment doesn’t protect much, depending on who you are or the settings in which the facts emerge. So let’s go beyond them.

**The Killing of U.S. Citizens Without Trial**

Let’s talk particularly about the Fifth Amendment and the Sixth Amendment and the right to assassinate U.S. citizens without trial. The Fifth Amendment guarantees due process. The Sixth Amendment guarantees the right to confront witnesses and evidence.

Yet, just last week, the chief prosecutor of our country spoke down the street from here and defended the president’s authority to disregard both of those amendments at will to essentially order the death of a U.S. citizen without any process. Now there’s a secret process that the Attorney General claimed would suffice to guard against any potential liberty interest that we might perceive as threatened here, but I want to invite you to think about a couple things here, and again, to do so from a legal realist perspective.

I will grant that the Attorney General articulated a series of limiting principles that govern whether killing a U.S. citizen is legal, such as the seniority of a target within a known terror network and the imminence of an attack that might ensue from the target’s activities. But what value are limiting principles if there is no forum in which to articulate or contest them? And if there is no transparency to the decision — if this is a process that happens entirely behind closed doors — how can we have any faith that the application of those limiting principles reflects any degree of legitimacy?

The short answer is: we can’t. The canard that we can simply construct a vision of due process that doesn’t involve judicial process, that we can cut our Article III of the Constitution because it is inconvenient to the executive branch, is not only foolish and draconian, it is authoritarian. You cannot claim to lead the free world when you don’t even belong in it.

And that is the unfortunate situation in which we’ve found ourselves today. We have an executive branch that, under administrations from each of our
major political parties, claims the right, quite frankly, to do whatever it likes, regardless of what the Constitution says.

The Constitution constitutes the republic. It is the founding document. But what if courts are not in a position to defend it? What if there is never an opportunity to hear evidence? What evidence is there to hear if the executive branch is just running around vaporizing people with CIA drones?

Think about a legal realist perspective here. Does the Fifth Amendment mean anything? Go abroad, say something our government doesn’t like, and then we’ll see how much the Fifth Amendment means. We’ve already seen how little the First Amendment means. The Fifth and the Sixth suffered a dramatic setback just last week when the Attorney General claimed the authority to disregard them. And that is under a president that claims to be a constitutional scholar!

But that’s a whole other story, which I will leave aside for a minute.

Before I move into the NDAA, let’s note another voice, just so that you are not hearing this only from me. Jonathan Turley, a law professor at George Washington University Law School in Washington, D.C., where I live, wrote an op-ed in The Washington Post in January essentially assessing precisely this question: Can we claim to live in the land of the free?

Turley looked at many of these same pieces. He didn’t look closely at the justifications for the kill doctrine, because I don’t know that it had actually emerged yet. Holder had not defended it yet, but it was in the news.

There is another lens with respect to the state secrets doctrine that relates to the marginalization of courts that we discussed before, and he talks about that. I would invite you to read it. It would be interesting follow up to our conversation today.

THE NDAA AND THE DETENTION OF U.S. CITIZENS

So let’s talk about the NDAA, the National Defense Authorization Act. A show of hands on how many of you have heard about NDAA? So somewhere between HLP and Citizens United.
I would dare say that the reason you've heard about the NDAA is because of public mobilization. You didn't hear it on the news. Nobody covered it when it happened. You didn't hear it from Washington. They signed it into law in the figurative dead of night on New Year's Eve. Why would you sign a bill into law on New Year's Eve? When you want no one to see what is happening.

So if you haven't heard about it in the news, and you haven't heard about it from our government agencies, you heard about it through public mobilization — the same mechanism through which you heard about the PATRIOT Act, the same mechanism through which you heard about Citizens United. And the missing ingredient, public mobilization, is why many of you hadn't heard about the Humanitarian Law Project.

The NDAA includes a great many things. It is a long bill, hundreds of pages long. One passes every year. It is the act that authorizes the Pentagon to spend money separately appropriated in an appropriations bill; so the NDAA itself, the acronym, is meaningless. It is a bit of a red herring. It is the detention provisions of the NDAA, in particular, on which I invite you to focus: sections 1021 and 1022.18

Each of those sections has different contours. One of them is a permissive detention authority. The other is a mandatory detention authority. The mandatory detention authority has a caveat that essentially makes quite clear that it cannot apply to U.S. citizens.19

The permissive authority has a comparable caveat, but one that is weaker. The caveat for the permissive detention authority says that nothing in this law shall be read to change the laws or authorities relating to the due process rights of U.S. citizens.20 Nothing shall change the existing laws or authorities. So let's look at some existing laws or authorities.

Is anyone familiar with the Authorization for Use of Military Force (AUMF)?21 It was passed by Congress in the immediate wake of 9/11. It was an authorization to use military force against those who the president determined "planned, authorized, committed or aided" the 9/11 attacks, or who harbored such persons or groups. The Bush administration subsequently claimed the AUMF authorized the domestic military detention of a U.S. citizen, also not far from here, at O'Hare International Airport. I'm talking about José Padilla, for people who are familiar with that case.22
This is a U.S. citizen of Latino decent, born in the United States, accused of plotting to detonate a radioactive device over a U.S. city. He was held in a naval brig for three years, during which he lost his mind.

Remember the torture ordinance that your city just passed declaring that solitary confinement is torture? Padilla is an example of what happens when you torture someone in that way for three years.

He emerges, with his mind no longer intact, on the eve of his hearing before the U.S. Supreme Court. The Bush administration mooted the case by shifting him from a military brig into a civilian prison. He was ultimately convicted in a normal Article III trial of an offense bearing no relationship to the allegations for which he was originally detained.23

Again, let's look at this from a legal realist perspective. Did the Supreme Court ever say that the AUMF allowed domestic military detention? No. Why? Because the executive branch contrived an opportunity to keep it out of court. But the AUMF is an existing authority, one to which the NDAA looks itself as a baseline. In the wake of the NDAA, the Bush administration's controversial use of the AUMF now extends beyond that one individual, José Padilla, to the hundreds of millions of Americans living here within the domestic United States. You can think of the NDAA's military detention provisions as essentially taking principles that work at Guantanamo Bay, importing them, and now subjecting all of us to them, rather than only the 800 people that were subjected to it at that facility.

This may sound preposterous — and quite frankly, it is. Even more prosperous is the fact that half of you never heard about it. And you're law students and lawyers. If you haven't heard about it, do you think the people on the street have heard about it? Do you think our members of Congress, quite frankly, have any idea what they voted for?

Applying Legal Realism to the NDAA

Several members of Congress in the weeks since the NDAA became law have claimed that it does not authorize domestic military detention of U.S. citizens. I don't know a kinder way to say this: They're clueless.
You can't necessarily blame them: the reason they're clueless is because if you read the particular provisions of the act without context, it doesn't seem so disturbing. "Nothing in this law shall affect the existing law or authorities." Well, we all have a right to trial. "Nothing to see here, move along. Go home."

Except that when you look at the legal realist perspective of the authorities that have been asserted, the ways in which the AUMF has been itself twisted to enable the torture of U.S. citizens domestically, a whole different picture emerges.

If you look at the Humanitarian Law Project case as an opportunity to treat as terrorism First Amendment-protected activity, association, and speech, a whole different picture emerges. It's here in Chicago, as well as Minnesota, Michigan, and Los Angeles, that two dozen peace and justice activists face a long-running investigation by the FBI.24 Under the NDAA, people suspected of associational crimes, like those activists, won't face grand jury investigations. We'll just lock them up and throw away the key. That is a power that was not around when those individuals were first investigated.

This is a very chilling time in our nation's history, and it's not just the dramatic expansiveness under administrations and congressional leadership from both major parties, it also the abject ignorance pervading our society of what is happening under our noses. But in public mobilization we have the opportunity to fix that ignorance, and then to fix the law.

And I will just say this: I'm going to drop the "F word": fascism. Never is it apparent when you are within it. It is always easy to get along if you go along in a fascist system. It is when the boot is on your neck that it becomes very clear, and by that time there is no recourse.

You can see this in the evolution of the AETA first criminalizing environmental and animal rights activism, then to the post-9/11 crackdown on Muslims, which has now extended to peace and justice activists. We came for the communists; we came for the trade unionists. And when they come for you there will be no one left — unless we figure out as a civil society, between now and then, how to join together to restore meaning to the fundamental principals that have long made our country great.
I'll give just one last piece here about the ways in which the NDAA, if abused, could threaten democracy and the desabilization that could result. I want to particularly take a quick moment to riff on the state secrets doctrine; this will connect to two different points in the discussion — both with respect to the ways in which courts have marginalized themselves and also the need for public education on issues that might otherwise evade attention.

**THE USE AND ABUSE OF THE STATE SECRETS DOCTRINE**

Are people familiar with the state secrets doctrine?²⁵ Show of hands. It emerged in a Korean War-era case²⁶ involving the families of three civilian observers who were killed when a B-29 Superfortress bomber they were aboard crashed in Waycross, Georgia, in 1948. The executive branch claimed before the U.S. Supreme Court that the disclosure of the circumstances surrounding this incident would compromise national security, and the Court accepted the executive’s claim of the need to protect particular pieces of evidence. This was an evidentiary doctrine deferring to the executive.

Remember, mind you, that the founders of our country claimed explicitly in the Federalist Papers that the need for the independence of the judiciary was paramount.²⁷ Without an independent judiciary, your rights are meaningless. All of the rights embodied in the Bill of Rights rest on the opportunity to get before a court.

Despite that, the Court allowed the executive to keep particular pieces of evidence hidden. It just so happens that many years later, when the facts about the Waycross crash came did come out, the declassified accident report revealed there was no national security secret that would have been disclosed by releasing the facts of the case.²⁸

Half a century after the Reynolds decision, the Bush administration used the state secrets doctrine to keep out of court allegations of corporate complicity in torture — specifically, corporate assistance with the CIA’s extraordinary rendition flights.²⁹ These flights involved sending people to countries that were known to use torture as an instrument of “enhanced interrogation.” Having other countries conduct torture for us kept our hands theoretically clean.
Corporate involvement in such flights wouldn’t seem necessarily to rise to the level of a state secret. We’re talking about a private corporation. Nor is the state secret doctrine, in this case, limited to an evidentiary doctrine. It was cited as a wholesale immunity doctrine to confer immunity on both the government and private actors for conduct that violates our nation’s most fundamental commitments — I dare say our species’ most fundamental commitments.\(^{30}\)

That is one example of the state secrets application. Another would be the NSA’s warrantless wiretapping scheme, which has been struck down as unconstitutional by every federal court that has ever reached the merits of a challenge to the NSA’s program.\(^{31}\) Yet it persists. Why? Because all of those cases have been overturned on appeal, particularly because of the state secrets doctrine, or constitutional standing, which has been an independent reason to keep those cases out of court. And let’s just follow that latter strand really quickly.

**The Self-Marginalization of the Judiciary**

If you need to demonstrate a particular case or controversy to a court, you have to demonstrate that you have been subjected to the NSA’s spying. But if the spying program is secret, how do you establish that you were subjected to it? The fact of the secrecy impedes judicial review.

So this use, this allowance, of the state secrets doctrine impedes any meaningful judicial review of private complicity in torture, the NSA’s warrantless wiretapping scheme, or quite likely in the future, the military detention of any discrete individual or set of people. And they might not be Japanese Americans, they might not be Jewish Americans, they might not be Muslim Americans, they might not be environmentalists, they might not be peace and justice activists, but they could be any of them or anyone else. That could also be a state secret.

The complicity of the judiciary in writing itself out of the equation here is what I’m trying to drive home to you. And remember, we started this discussion with the marginalization of courts. I wanted to stop short of saying they’re irrelevant, but they are marginalized, and this is an arena in which the courts have marginalized themselves.
The most recent case, as far as I know, in which the state secrets doctrine has been asserted by the government is a case involving the FBI’s infiltration of a whole series of mosques in Southern California in which an ex-convict was paid $100,000 to bribe Muslims to participate in plots that the FBI proposed so that there would be then something to prosecute — which incidentally is the pattern in almost every FBI prosecution of a Muslim American involving people recruited in a mosque over the last 10 years.32

Let’s bring this back to a legal realist perspective of the state secrets doctrine, in an interesting way in which it has been flipped on its head in the advocacy arena recently. The state secrets doctrine you might sum up as the idea that you can talk about some sensitive issues anywhere except a courtroom. You can write articles about the NSA’s warrantless wiretapping scheme, you can talk in the street or have a protest about corporate complicity in torture, but you can’t talk about those issues in courts because if you talked about it in court, that would risk national security.

In the discussion around how to respond to the NDAA — I won’t name any names here — one of the big public interest litigation shops with a four-letter acronym articulated a particular concern that is the inverse of the state secrets privilege: you can’t talk about your fear of the NDAA in public because then that very construction of an otherwise ambiguous law might later show up in court.

Some don’t want to admit to the public that the NDAA could be used to allow domestic military detention, because we don’t want a court buying that argument in the future. This again speaks to where law is constructed. If you think of the law as constructed in a courtroom, that concern makes sense. But the law is not constructed in courtrooms.

We’ve looked at that through several lenses now. We’ve looked at that through the barriers presented by standing, by ripeness, by the state secrets privilege; we’ve looked at this through the tension demonstrated in the First Amendment jurisprudence, in the summary disregard for the Fifth and Sixth Amendments demonstrated by the Attorney General just last week down the street. We have seen in various ways how the law is not constructed in courts, but rather on the ground, and if the law is constructed on the ground and in public, for us as advocates, or for that matter even as students of the law, I dare say it is incumbent upon us in this time of constitutional crisis, quite frankly,
to be as loud as we can possibly get, because most people on the street don’t have access to the privilege you enjoy to study these issues.

WIELDING OUR RESPONSIBILITY

It is a responsibility that we wield, as members of a profession with unique access to this information, to reveal to the public what these laws actually mean. When I say “public,” I include elected representatives because, again, they don’t get it. It’s not surprising, quite frankly, that members of Congress don’t get this. And these are opportunities for us, every day, to raise our voices.

I’m going to go back to the resolution that the Chicago City Council recently passed that made this city a torture-free zone. There are any number of issues on which you, and your city or your state, are poised to raise your voice.

There have already been, in the less than three months that have passed since the NDAA became law, nearly a dozen oppositional resolutions emerging from county boards and city councils around the country, from jurisdictions as geographically and ideologically dissimilar as Albany County, N.Y. — surrounding the state capital, one of the largest states in the country, a blue state, a machine Democrat state — and El Paso County, Colorado, which was the first to pass an anti-NDAA resolution and encompasses Colorado Springs, which is hardly a progressive hotbed. Colorado Springs encompasses several military bases, including the Air Force Academy, and that community raised its voice, in no uncertain terms, decrying domestic military detention even before the NDAA became law. When the Air Force Academy is telling you there is a problem with domestic military detention, we should all take notice.

And we should do a lot more than that. The most powerful act you can perform is not filing a case, it’s not signing a petition, it’s not even going to a protest. It’s making introductions, it is extending networks, it is building grassroots communities that can speak truth to this power.

Our emperor, whoever this figurative body is, has no clothes — but we have to reveal that to our friends and neighbors, to our communities. It is incumbent upon us to reach out across communities to offer information and analysis about these kinds of issues that do unite all Americans.
We all share an interest in the right to trial. It doesn’t matter what the government might accuse you of. If you have no right to trial, then you don’t have an opportunity to vindicate it, which is to say, the right to trial unites every conceivable political interest. It unites every community.

I think this is a crucial moment in our nation’s history — I dare say a world historical moment. We have started to see cracks in the edifice of the authoritarian regimes of North Africa and the Middle East. How then can we, in the country that pioneered democracy, resign with such stunning passivity the rights that inspired the world to follow our lead?

I invite you to take the lead here in Chicago, where it matters, and where you have reach. You have a voice to speak truth to that power and shine a light on these abuses. Thanks again for being here this morning.

NOTES

1 This article is an edited version of the keynote address delivered March 16, 2012, at the Loyola University Chicago Public Interest Law Symposium. Andrew Bashi, a 2013 graduate of the Loyola Chicago Law School, transcribed the remarks.
2 Shahid Buttar is executive director of the Bill of Rights Defense Committee. The organization’s website can be found at http://www.brdc.org/. He is a 2003 graduate of Stanford Law School.
4 Attorney General Eric Holder spoke at the Northwestern University School of Law on March 5, 2012. During his speech, he asserted the legality of killing a U.S. citizen “who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans . . . .” For the full text of his remarks, see http://www.justice.gov/iso/opa/ag/speeches/2012/052512.html.
5 See, e.g., Amnesty Int’l USA v. Clapper, 639 F.3d 118, 138 (2d Cir. 2011), cert. granted, 132 S. Ct. 2431, 182 L. Ed. 2d 1061 (2012) (raising the question of whether the National Security Agency’s warrantless wiretapping scheme, struck down as unconstitutional by every federal judge ever to have reviewed the program on its merits, can be challenged in court given the barriers to constitutional standing implicit in executive secrecy); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010), cert. denied, 131 S. Ct. 2442, 179 L. Ed. 2d 1235 (2011) (reflecting judicial deference to assertions of the state secrets privilege as an immunity doctrine protecting
even private parties complicit in government-facilitated human rights abuses, such as torture outsourced through extraordinary rendition).

6 As of March 12, 2012, seventeen federal judicial nominees were being blocked by Senate Republicans. The average number of days between Senate Judiciary Committee approval and a Senate vote for circuit court nominees was 28 days during the George W. Bush presidency and 136 days during Obama’s presidency. The average for district court nominees was 22 days under Bush and 93 days under Obama. See Ian Millhiser and Adam Peck, Reid Will File To End Seventeen GOP Filibusters of President Obama’s Judicial Nominees, ThinkProgress Justice, March 12, 2012, available online at http://thinkprogress.org/justice/2012/03/12/442841/reid-will-file-to-end-seventeen-gop-filibusters-of-president-obamas-judicial-nominees/

7 The Chicago City Council on Jan. 18, 2012, voted 49-0 to approve a resolution proclaiming Chicago a torture-free zone. For the full text of Resolution 2011-1239, see http://chicago.legis- tator.com/LegislationDetail.aspx?ID=933196&GUID=4575C890-448D-4585-83D6-AC09816AE159&Options=Id|Text|Attachments|&Search=torture+free+zone.

8 Id. The relevant language in the resolution states, “Whereas, many Chicagoans are being held in prolonged solitary confinement in Illinois prisons in conditions which often lead to physical and psychological breakdown and are a form of torture . . . .”

9 Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010) (interpreting a provision from the PATRIOT Act expanding prosecution for “material support of terrorism” in the face of a First Amendment challenge, and holding that conviction does not require the government to establish the intent of the defendant to support violence).


15 Id.


18 Section 1021 is titled, Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use o Military Force. Section 1022 is titled, Military Custody for Foreign Al-Qaeda Terrorists. The full text of the NDAA can be found at http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf.
20 NDAA 2012, § 1021(e).
23 For a timeline of events in Padilla’s case, see id.
24 For background concerning this investigation, see Committee to Stop FBI Repression, Timeline of Events, at http://www.stopfbi.net/about/timeline. See also Press Coverage at the same site, http://www.stopfbi.net/about/press-coverage.
27 See Federalist No. 78.
28 The accident report can be found at http://www.fas.org/sgp/othergov/reynoldspetapp/pdf, beginning at page 10a.
29 Jeeperen Dateplan, 614 F.3d 1070.
MIXED-INCOME HOUSING: A COLLABORATIVE STRATEGY TO SPARK URBAN ECONOMIC DEVELOPMENT

by DAINA STAISIUNAS

Failing schools. Crime. Poverty. What was once a Petri dish for these urban diseases may also be, in a modified way, the cure: affordable housing. Mixed-income housing is the new strategy to attack urban poverty, and legal minds can play a role in this multi-disciplined effort.
WHAT IS MIXED-INCOME HOUSING?

Mixed-income housing refers to housing developments that offer units based on an income scale. The rental or ownership rates slide according to the incomes of low, moderate and market-rate households. The tenant base of mixed-income developments may vary by the number of income groups included; anywhere from 20 to 60 percent of the units may be designated for low-income households. Additionally, the median incomes of the wealthiest households can vary from 51 percent of the area median income to as high as 200 percent.

The location of units within the development may also vary. In some developments, households from every income group may live on the same floor. By contrast, in other developments, floors, wings, or even entire buildings may be separated by household income.

The geographic location of mixed-income housing may also vary by city. For example, many of Chicago’s mixed-income developments are built on the site of former housing projects such as Cabrini Green and ABLA. A major critique of such notorious projects was that they concentrated poverty in dense, urban areas. Mixed-income developments, by contrast, facilitate diversity that de-concentrates poverty and, hopefully, lessens the social problems associated with it.

IS MIXED-INCOME HOUSING JUST A TREND?

Though mixed-income housing has recently caught on throughout the country, the concept is not new. In 1992, the federal government first launched its mixed-income housing initiative via the Hope VI program. Increased federal spending suggests that mixed-income housing will be more than a fleeting trend.

Since its creation in 2009, the White House Office of Urban Affairs has issued directives to emphasize a multi-disciplinary approach to cultivating economic opportunity and development, which specifically includes mixed-income housing. Washington’s directive has reached Chicago most recently by way of two federal programs: the Department of Housing and Urban Development
(HUD)'s Choice Neighborhoods Initiative,9 and the Education Department's Promise Neighborhood.10

These initiatives prompt federal agencies and local groups to work together "to develop more comprehensive responses that attempt to simultaneously address all of the interlocked challenges that plague low-income neighborhoods."11 This collaborative approach comes in response to the failure of prior anti-poverty programs that tried to attack problems facing poor communities — education, unemployment, and crime — in isolation.12

HOW DOES MIXED-INCOME HOUSING BENEFIT FROM A MULTI-DISCIPLINE APPROACH?

The mixed-income housing theory takes the approach that, since several ills plague low-income communities, there is no single cure that will remedy the situation. There must be collaboration between the schools, local businesses, community members and police.

Money is typically what separates a "good" neighborhood from a "bad" one. Thus, economic opportunity is a vital prong of revitalization efforts. Under the mixed-income model, not only will the community benefit from crime reduction, youth enrichment programs and job training, but these improvements will also make the community more attractive for commercial retail investors. Local retailers, in turn, can reinvest their profits into the surrounding community by providing employment opportunities and increasing local tax revenue.

The remainder of this article will explore Woodlawn Park, a new Chicago mixed-income housing community. First, I will outline the background leading up to the project. Second, I will discuss its goals for both the neighborhood and its residents. Third, I will compare these goals with similar housing developments already existing in Chicago. Fourth, I will discuss the likelihood of success for Woodlawn Park. Finally, I will suggest examples of ways that attorneys can become involved in the development of mixed-income housing.

BEFORE WOODLAWN PARK

Woodlawn Park, formerly known as Grove Parc Plaza, is located on Cottage Grove between 61st and 63rd streets. Prior to its revitalization, Grove Parc
Plaza was in unspeakable condition. In 2008, roughly 99 of the 504 units were vacant, and those that were not condemned were virtually uninhabitable due to rat infestation and sewage that backed up into kitchen sinks.13

Sixty-four percent of Grove Parc Plaza residents had no education beyond high school; only 28 percent of the households reported employment income; and the Chicago Police Department designated the surrounding Woodlawn community as one of the three neighborhoods in the City most impacted by gang violence.14 The housing complex was truly, as HUD Secretary Shaun Donovan phrased it in a news conference with Chicago Mayor Rahm Emanuel, “Ground Zero for all of the challenges” Woodlawn faces: crime, foreclosed homes and vacant lots, unemployment and failing schools.15

In 2007, with HUD threatening to foreclose on Grove Parc’s private owner, the Woodlawn Preservation & Investment Corp., residents invited Boston-based nonprofit development company Preservation of Affordable Housing, Inc., (POAH) to present a plan that would preserve the affordable units and revitalize the site.16

POAH works in major cities throughout the country to preserve and steward affordable rental housing. The organization surveyed Grove Parc Plaza residents to develop a demographic profile and to assess their housing and community needs. In partnership with the City of Chicago, the Jane Addams Hull House, the University of Chicago, Local Initiatives Support Coalition (LISC) Chicago and other community groups, POAH developed a comprehensive plan to transform Grove Parc Plaza into a mixed-income development named Woodlawn Park.17

THE VISION FOR WOODLAWN PARK

In accordance with POAH’s redevelopment plan, the original Grove Parc site will be demolished and redesigned “to create a new mixed-income pedestrian friendly corridor connecting the University of Chicago on one end to the Chicago Transit Authority’s El’ Station on the other.”18 A total of 965 units are planned — offering affordable units as before, but combining them with moderate/workforce rental, market-rate rental, and homeownership units.19 Some 65,000 square feet of retail and 40,000 square feet of recreational and community facilities are planned as well.20
The goal is to build on the site’s existing strengths of a prominent location on a major street (Cottage Grove) and close proximity to both public transportation (directly next to the Cottage Grove Green Line station) and the University of Chicago (a world-class research institution). Similarly, the project also calls for direct investment in the neighborhood’s many foreclosed and abandoned properties. The revitalization includes constructing new units on currently vacant lots and aesthetic updates to existing building façades, with an emphasis on local hiring for these projects.

Following the multi-disciplinary approach favored by mixed-income housing advocates, the plan sets out concrete goals in a number of areas, including economic development, public safety and education and workforce development.

As to economic development, the lack of commercial infrastructure forces Woodlawn residents to do 70 percent of their shopping outside of the community. With a new wave of local economic development, about $160 million could be captured by Woodlawn’s own retail outlets. Hand in hand with employment opportunities comes job training. According to the 2000 Census, Woodlawn’s poverty rate is 45 percent. The on-site community building center will partner with the University of Chicago and the local Kennedy King City College to implement a community jobs program that will offer job-training and certificate programs for residents. Additionally, the partnership will link 140 young adults with summer employment.

Because public safety is integral to attracting investors and residents, the improved safety effort begins with enhanced Chicago Police Department enforcement of gang intervention programs, additional street and police “blue” lighting, police coordination with community watch groups and alternative recreational services for youth. The presence of new youth programming and job training, in addition to the elimination of abandoned buildings (largely havens for drug activity), will also contribute to the public safety effort.

The job-training center will also serve as a community forum to address current education issues among school-aged residents. Programs will emphasize to parents the importance of early childhood development programs in preparing their young children to start school, and local institutions will work to strengthen existing early learning programs. Absenteeism is another problem than hinders school achievement. POAH’s resident survey suggested that
failure to immunize children in a timely fashion was one leading cause of this problem.32 The job-training center will work with the nearby University of Chicago Hospital's community health initiative program to encourage timely vaccinations.33 The communal space itself will be a resource center to disseminate information about local after-school, summer and college readiness programs.34

While POAH's goals may seem idealistic at first glance, the organization laid out a very specific plan of projects and partnerships in order to address each of the social areas in need of improvement.35 It also created a metric for assessing improvement.36 Woodlawn Park intends to continue seeking feedback from residents and public records in the areas of student attendance rate, graduation, job placement, income, local school profiles and crime incidents.37

POAH was awarded a $30.5 million federal grant in August 201138 and is in the early stages of its plan for transforming the site.39 Currently, two of the eleven residential buildings have been constructed.40 These two buildings, named Woodlawn Center South, are three-story buildings that together offer 67 units.41 Woodlawn Center South is currently filled to capacity — with all market rate and subsidized units leased.42 POAH intends to demolish all of the old Grove Parc Plaza complexes by the end of 2013 and replace those units with an additional three-story, mixed-income housing unit.43 Also in 2013, POAH will break ground on its senior building that will offer affordable housing to residents 55 years and older.44

MIXED RESULTS? OLDER CHICAGO MIXED-INCOME HOUSING INITIATIVES

Woodlawn is not the only Chicago community experimenting with mixed-income housing. The Chicago Housing Authority's demolition of former housing projects has forced the relocation of thousands of residents.45 As a result, various Chicago neighborhoods offer a glimpse of how mixed-income housing works in practice.

Since 2006, low-income renters and middle-class condo owners have shared Westhaven Park Tower on the Near West Side.46 Built on the site of the former Henry Horner Homes, the development has been successful at attracting market-rate buyers with features like landscaped walkways, central air and views of downtown. Recent reports suggest that, contrary to its vision for socioeco-
nomic integration, this 113-unit complex is more akin to a Tower of Babel. Antagonistic tensions have erupted over building security, domestic disturbance, rowdy guests and whether the lobby should be used as a place to congregate.

Some residents attribute the tensions to racial differences — the low-income residents are mostly black and the market-rate residents are "more racially diverse." Other residents say the tensions stem from lifestyle differences. Antwan Dobson, an owner and former condo president who is African-American, questions his decision to invest in the building: "I don't think they intentionally oversold the place, I just think the adversities weren't all thought out."

Will Woodlawn Park also be rife with adversity? One point to consider is that, unlike privately owned Woodlawn Park, Westhaven Park Tower is owned and operated by the Chicago Housing Authority (CHA). Perhaps private management at Woodlawn Park will facilitate a different environment through stricter building rules and security measures. Enforcement of these building rules may also force a system of resident accountability.

Privately owned mixed-income housing buildings may also offer additional amenities that CHA buildings lack. For example, Woodlawn Park will offer a variety of communal areas: outdoor patio seating, a community resource center, youth recreation facility and a playground. These are residential social forums that are alternatives to building lobbies. Indeed, no major incidents have occurred among residents in Woodlawn Park, as of yet, says Felicia Dawson, Woodlawn Park's Director of Community Engagement. Dawson notes that, "Property Management has done a good job of setting the tone for how people perceive the common areas, etc. Loitering, while it periodically happens, is dealt with swiftly."

Additionally, only 34 of the 113 units in Westhaven are low-income CHA units, accounting for roughly 30 percent of the tenants. Only four of those 34 units (3.5 percent of the total residents) contribute to "95 percent" of the problems, according to Rich Sciortino, Westhaven's developer. Woodlawn Park, by contrast, will have 43 percent of units at market-rate, 7 percent moderate/workforce rental units, and 50 percent low-income Section 8 units. (As stated before, surplus housing will be built near Woodlawn Park to ensure all former Parc Grove residents have their affordable housing replaced.)
This more even balance between market-rate and Section 8 units may eliminate feelings of marginalization. At the same time, this balance between the most and least affluent tenants leaves a small population of moderate/workforce units. This middle group’s residential experience could take on an interesting dynamic. Thoughtful planning and community outreach are essential to this process, says Felicia Dawson, Woodlawn Park’s Director of Community Engagement. Acting with “intentionality” needs to start from the beginning, before a single resident moves in.

Dawson explains that one aspect of “intentionality” involves “setting the tone, developing a character and identity for both the building and the surrounding neighborhood.” Block club meetings, block parties, potluck dinners – Dawson identified these as opportunities that should be coordinated to allow Woodlawn Park residents to meet local homeowners and long-time residents. As part of her “Acquisition Community Engagement Strategy,” Dawson encourages building residents to participate in larger community forums intentionally designed to welcome new and existing members to the community. Residents not only have a chance to meet neighbors, but fellow residents also get an opportunity to work together to solidify the character of that block, community, neighborhood, etc.

Residential communities that are devoid of this “intentional” and positive community interaction can be, in a word, dangerous. Wentworth Gardens, a CHA housing complex directly south from Cellular Field, home of the White Sox, became a haven for displaced housing project residents. While the CHA does not offer Wentworth Gardens as a mixed-income building, it serves as a helpful example that residential tensions do not automatically abate when residents belong to the same race and socioeconomic status. Rather, Wentworth Gardens demonstrates that social problems may arise from housing integration among residents who share the same race and household income. People from housing projects such as Ida B. Wells, Cabrini Green and Parkway Gardens have moved into buildings with long-time Wentworth Gardens residents.

The longstanding residents have been less than welcoming toward their new neighbors. Willie J.R. Fleming, a former Cabrini resident and father of two, details the hostilities: “There have been beatings. Children have had their wrists broken. My daughter had a gun pulled on her in July because she’s from Cabrini.”
New residents attribute the violence to an attempt by Wentworth long-timers to preserve their turf and chase the newcomers out. The CHA has visited the complex several times and issued a statement that it was working closely with management, the police and private security to keep the peace.

The CHA has not relocated all displaced residents to housing communities like Wentworth Gardens. In fact, the CHA has issued many residents rent vouchers for houses or assisted them with purchasing their own homes in various neighborhoods like Englewood, Woodlawn, Auburn Gresham, Roseland and Greater Grand Crossing.

Some communities are blaming the influx of former project residents for an increase in violence and crime. Charlene Jones, a former Ida B. Wells home resident and mother of three, resented that sentiment, stating, “There are a lot of stereotypes. They say people from public housing are messing up the community, but I believe most public housing residents know how to live and want a better life for their children so they teach them the right thing. Not everyone is a troublemaker.”

WHAT DOES THE FUTURE HOLD FOR WOODLAWN PARK?

Call me overly optimistic, but I think that Woodlawn Park will be a successful mixed-income housing development. The project’s inherent structural support should prevent it from encountering, to the same degree, issues that other mixed housing communities have faced.

Woodlawn Park has a strong group of local community leaders who have pledged their support. Community members have supported the project. Local aldermen have garnered the support of Woodlawn residents and served as community liaison to City Hall. The late Bishop Arthur M. Brazier, a pillar of the community and former head of the Apostolic Church of God, was critical to preserving affordable housing in the area.

Moreover, the University of Chicago is committed to programs that will revitalize the surrounding communities of Washington Park and Woodlawn. In addition to detailing its campus police to the area, the University has contributed funding and leadership to Woodlawn Park’s education and health initiatives. Because of its implicit incentive to have stronger communities around
its own campus borders, the University will likely be a lasting partner in these redevelopment efforts.

Woodlawn Park’s location may also contribute to its viability as a mixed-income success. Woodlawn may draw market-value households in the form of University of Chicago academics as well as progressives that may already be drawn to the existing racial and socioeconomic diversity of the Hyde Park area. At the same time, the commitment to retain current low-income residents may eliminate territorial tensions arising from cross-city pollination of former CHA residents.

WHAT ROLE CAN ATTORNEYS PLAY IN THIS COLLABORATIVE EFFORT?

Just as any community’s economic development is not contingent on any single social area, people of all professions, including attorneys, can contribute their skills to the effort by assisting entrepreneurs and nonprofit organizations as well as direct affordable housing efforts.75

First, attorneys can help small business owners not only navigate economic and legal channels, but also do it in a way that suits their financial capacities. For example, an attorney can help a new business acquire a tax-delinquent property at a below-market rate and then obtain a favorable loan to cover start-up expenses.

Once businesses are established, attorneys are still needed. Entrepreneurs must ensure that their businesses comply with relevant municipal laws so as to avoid fines and fees for code violations. Entrepreneurs also need advice and direction for obtaining crucial operating necessities like insurance, grants, investors and city contracts.

Attorneys also help clients create standard recordkeeping procedures. Attorneys can draft contracts with vendors and also provide later counseling should their clients need to seek enforcement of these contractual obligations. Other areas for legal minds include petitions for zoning changes, liens on suppliers and organization for tax purposes.

Outside of the business scope, for example, a youth organization may want to expand its programs for inner city youth, but it fears liability for the actions of
its employees. An attorney can counsel the organization on employment practices and policies that may limit its exposure. Attorneys can also lend their time to local expungement seminars to help ex-offenders understand their legal rights and complete their paperwork for qualifying offenses.

In terms of direct assistance for housing efforts, attorneys can help tenant organizations apply for housing grants, as well as help them qualify for loans under local government programs. These grant funds may be the only money that backs housing rehabilitation in low-income neighborhoods that are mostly comprised of renters who have no collateral to secure a rehabilitation loan.

For those homeowners who are facing foreclosure, an attorney can step in to halt foreclosure procedures. This legal action will help the homeowners, but it will also help the community by stopping the increase in abandoned properties in low-income neighborhoods.

For example, one real-life attorney was instrumental in helping a local organization develop a program to provide emergency loans and support services to homeowners. The attorney assisted the organization in persuading lenders to establish a pool of funds from which borrowers could withdraw. The attorney then helped the organization appoint a board to oversee the loan program and establish eligibility criteria and loan terms. Additionally, the attorney negotiated an agreement with the City of Chicago to provide continuing housing counseling.

**CONCLUSION**

It is only through a collaborative effort that we can revitalize Chicago. Mixed-income developments are a viable, collaborative tool for economic development. In addition to traditional community outreach professionals, legal minds can be involved in the development process. As professionals trained in issue-spotting, advocacy and conflict resolution, attorneys can bring the “intentionality” to these projects that will both cultivate and sustain the socioeconomic development that is lacking in our urban communities.
NOTES

1 Daina Stasiunas is a student at the Loyola University Chicago School of Law, Class of 2013. She earned her B.A. in Government from Dartmouth College in 2010.
3 Id.
4 Alex Schwartz & K. Tajkakhsh, K., Mixed-Income Housing: Unanswered Questions, 3 (2) CITYSCAPE 73 (1997).
5 Id.
6 "ABLA" is an acronym referring to four major public housing developments once operated by the Chicago Housing Authority. They have either been demolished or redeveloped as part of Roosevelt Square, a mixed-income community development. ABLA consisted of the Jane Addams Homes (A), the Robert Brooks Homes (B), Loomis Courts (L) and the Grace Abbott Homes (A). See ABLA, Wikipedia, http://en.wikipedia.org/wiki/ABLA.
10 The purpose of Promise Neighborhoods is to significantly improve the educational and developmental outcomes of children and youth in our most distressed communities, and to transform those communities through a variety of school and community partnerships. Promise Neighborhoods: Program Description, U.S. Department of Education, http://www2.ed.gov/programs/promiseneighborhoods/index.html.
12 Id.
17 Id.
19 Id.
20 Id. at 4.
21 Id.
23 Id.
24 Id.
25 Vision for People, supra note 14, at 5.
26 Id. at 6.
27 Vision for Neighborhood, supra note 22, at 1.
28 Id.
29 Vision for People, supra note 14, at 3.
30 Id. at 10–12.
31 Id. at 12.
32 Id.
33 Id.
34 Id. at 8.
35 Vision for Neighborhood, supra note 22, at 1.
36 Vision for People, supra note 14, at 13.
37 Id.
39 Interview with Felicia Dawson, Director of Community Engagement – Chicago Area, Preservation of Affordable Housing, Inc. (Apr. 3, 2012).
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Dawson, supra note 39.
54 Id.
55 Olkon, supra note 46.
56 Id.
58 Dawson, supra note 39.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Glanton & Corner, supra note 45.
70 Id.
71 Id.
73 Id.
76 Southworth, supra note 75, at 1135.
77 Id.
78 Id.
79 Id.
"STEP BY STEP THE LONGEST MARCH CAN BE WON": THE STRUGGLE TO DEFINE HOUSING AS A HUMAN RIGHT

by JOHN BARTLETT

The hope of a secure and liveable world lies with disciplined nonconformists who are dedicated to justice, peace and brotherhood.
— Martin Luther King, Jr.

The housing crisis of the past few years has revealed glaring social inequities that have thrown the lives of millions of people into turmoil. Tens of thousands have been displaced from their homes.
In the United States there is no guarantee or right to housing. The lack of a guarantee means nearly 750,000 Americans\textsuperscript{9} live either on the streets or in a shelter, and thousands more live in unsafe, unhealthy situations in fear of losing their home. This crisis calls for innovative tactics, strategies and interdisciplinary collaborations to make housing a positive right, one to which everyone is entitled.

Everyone needs a home. Without housing it is nearly impossible find a job, get a good education or enjoy many of the privileges protected in the Constitution. Promoting and developing laws and a consciousness that housing is a human right offers a framework for creating a social movement and legal precedents to institutionalize the fulfillment of this basic need.

**The Case for Making Housing a Human Right**

Many people have articulated that housing is or needs to be a human right. For instance, in his 1944 State of the Union address, Franklin Delano Roosevelt spoke of a Second Bill of Rights, "under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.\textsuperscript{7}=" Included in the Second Bill of Rights was "The right of every family to a decent home."\textsuperscript{8} The former president recognized that without a home individuals could not have genuine security or reach their full potential.

Four years later in 1948, the United Nations General Assembly passed the Universal Declaration of Human Rights (UDHR) by a vote of 48 to 0.\textsuperscript{9} Article 25 states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."\textsuperscript{10} Thus the U.N. has acknowledged housing as a basic human need to which everyone has a right and that all nations have a responsibility to ensure.

To further expand on the protections and rights of the UDHR, the United Nations in 1966 adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{11} The document is a treaty that commits parties to work toward the granting of economic, social and cultural rights to individuals. Article 11(1) reads, "The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself [or herself]
and his [or her] family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.12

To date, 160 nations have ratified the treaty.13 The United States is a signatory to the treaty but is one of a handful of countries that has refused to ratify it.14

The U.S. failure to pass the ICESCR is indicative of its current movement away from a human rights perspective and counter to world opinion. For a short time, the U.S. appeared to be moving toward making housing a human right. In 1949, Congress passed landmark housing legislation.15 In the preamble to the 1949 Housing Act, Congress called for "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation."16 The Housing Act of 1949 included sweeping expansion of the federal role in mortgage insurance and the construction of public housing.

But since then, wars and changed national economic priorities have meant that ensuring an individual's right to housing is no longer a primary concern. The Housing Act of 1949 called for building more than 800,000 public housing units by 1955.17 The U.S. fell far short of this goal, building only 463,000 between 1949 and 1967.18

The failure to move toward housing as a human right can be seen in many depressing statistics. Over the course of a year, between 2.3 million and 3.5 million people will live either on the streets or in an emergency shelter.19 The National Center on Family Homelessness estimates that more than 1.5 million children each year will experience homelessness in America — that is, one child out of every 50.20

Many families and individuals who have a home are struggling or living in substandard housing. According to the Joint Center for Housing Studies at Harvard University, "In 2009, 19.4 million households paid more than half their income for housing, including 9.3 million owners and 10.1 million renters."21

In Chicago, the Rehab Network estimates that 117,000 households are paying more than 50 percent of their income for housing.22 The threat of eviction
looms over these households. Eviction court is a part of the problem. A study conducted by the Chicago-based Lawyers' Committee for Better Housing found that the average eviction court case takes 1 minute and 44 seconds. All these statistics and figures point to the fact that the housing market in the United States is broken and in need of fundamental change.

CREATING A RIGHT TO HOUSING

Given the dire situation faced by many Americans, a right-to-housing framework offers community groups and public interest attorneys an outline to understand the underlying causes of the housing crisis and a mechanism to build upon the current housing laws.

Some laws exist that can be used to bolster an individual's right to housing. For instance, most states have laws that ensure tenants or homeowners have a court hearing before their home can be taken from them. In Chicago, the Municipal Code's Residential Landlords and Tenants Ordinance states, "It is unlawful for any landlord or person acting at his discretion knowingly to oust or dispossess any tenant from a dwelling unit without authority of law." The warranty of habitability, which is likewise law in many states, is an example of a legal guarantee that protects renters from living in unsafe or unsuitable conditions. These are laws already in place in the United States that can be built upon to create a right to housing legal framework.

A right to housing is far different from current government subsidy programs. The current programs provide recipients with few guarantees. For instance, in Chicago 13.3 percent of voucher tenants move every year. Secondly, these housing subsidies do not reach very many people. Nationwide, an estimated 15.5 million households are eligible for tenant-based housing subsidies, yet only one in four receives them. A right to housing is a positive right that guarantees the availability and affordability of safe, decent and accessible housing for all.

For guidance, the United States should look to other nations that treat housing as a right. Australia, for example, is a signatory to the ICESCR. The Australian Human Rights Commission states that "the right to housing is more than simply a right to shelter. It is a right to have somewhere to live that is adequate." When determining what the right to housing means, the commission
looks at a range of factors, including legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, accessibility, habitability, location and cultural adequacy. Australia's human rights framework provides an avenue for advocating equitable housing for everyone and is one that should be adopted here.

An obstacle to adopting such a far-reaching perspective is posed by the libertarian and pro-business views of many legislators, organizations and businesses. They view housing as a privilege, and if an individual does not have housing it is the fault of the individual or government programs to help the poor. This is a strong and powerful influence on the American psyche and one that seeks to maintain the status quo.

But there is hope. Take, for instance, the civil rights movement of the post-World War II era. America became a different place after Brown v. Board of Education. This precedent-setting case furthered a process of chipping away at firmly entrenched Jim Crow laws. The civil rights movement had to create laws to protect black people where there were none. It challenged ingrained philosophies of white supremacy and a belief in “separate but equal”. In the end, the civil rights movement helped to enact laws that improved people's lives and led to a change of consciousness so that overt discrimination is no longer an accepted norm. The same type of movement can arise to change America by making housing a human right.

**Applying the Framework: An Innovative Legal Challenge in Westchester County**

A 2009 out-of-court settlement involving Westchester County in New York provides an example of how a creative legal strategy can expand housing rights in this country. In this case, the New York City-based Anti-Discrimination Center (ADC) sued Westchester County for falsely claiming on its U.S. Department of Housing and Urban Development (HUD)-managed grants that it was affirmatively furthering fair housing.

The basis for this requirement and the lawsuit was the Fair Housing Act of 1968. The act states, "The Secretary shall administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." There is no statutory definition of
the term "affirmatively furthering fair housing." HUD is charged with defining and enforcing the policy. HUD interprets the affirmatively furthering fair housing provision as requiring a grantee to:

1. Conduct an analysis to identify impediments to fair housing within the jurisdiction.
2. Take appropriate actions to overcome the effects of any impediments identified through the analysis.
3. Maintain records reflecting the analysis and the actions taken in this regard.34

Even though Westchester County signed an affidavit stating that it was affirmatively furthering fair housing, none of the reports the county submitted to HUD made any mention of housing discrimination or housing segregation.35 While the county was developing affordable housing, it was doing so in areas that for the most part already had high concentrations of poverty and already had many affordable units; in other words, the county was not trying to expand the reach of affordable housing into new areas. In 20 municipalities36 that received CDBG money through the county, not one unit of affordable housing was developed. Many municipalities were spending money without any consciousness about its obligation to expand housing opportunity. The county was doing nothing to enforce the requirement on these municipalities.37

ADC's Executive Director Craig Gurian sued under the federal False Claims Act, which offered two advantages for a plaintiff. First, the statute allows a private citizen to act as a private attorney general to bring a suit against a false claim.38 The other advantage was that the ADC did not have to find a "smoking gun" that the county was discriminating; rather, the county had to document that it actually performed its duty to affirmatively further fair housing.39

The county could not meet its burden. In response to a Freedom of Information Act request, Westchester County Department of Planning Deputy Director Norma Drummond admitted she could not find any documentation.40 This and other evidence and testimony demonstrated that the county was not fulfilling its obligations. The U.S. government eventually joined the lawsuit, and the Westchester County agreed to settle the case in August 2009.41

As a result of the agreement, the county put aside more than $50 million for the development of affordable housing.42 A minimum of 750 units of afford-
ble housing would have to be built in mixed-income, low-poverty neighborhoods; 20 percent of those units would have to be affordable to households making at or below 50 percent of the area median income. The county also agreed to implement policies that would affirmatively further fair housing, including legislation to ban "source-of-income" discrimination.

**Proving Social Change Through Lawyer-Housing Activist Partnerships**

The effect of the agreement is much larger than the $50 million the county committed to spend on affordable housing. The case is important because of its social justice implications.

On a national level, hundreds of entities receiving HUD funding must now document that they are affirmatively furthering fair housing. Working with attorneys, community organizations can use the prospect of a lawsuit to get jurisdictions to take action on much-needed legislation. Currently in Illinois, the Metropolitan Tenants Organization and a coalition of other groups are working to pass a ban on source-of-income discrimination in Cook County.

One of the arguments that proponents are making is that such a ban would help Cook County demonstrate that it is affirmatively furthering fair housing, because voucher holders are predominately people of color, the disabled or senior citizens. Passing the law would demonstrate that the county is concerned with discrimination, as this law would allow people to move into previously inaccessible communities and would create more diverse and integrated housing. As previously noted, Westchester County had to adopt source-of-income legislation as part of its false claims settlement.

Are there other opportunities in which lawyers and activists can work together to expand housing rights in this country? Some possibilities are:

- **A national source-of-income campaign**
  This would involve changing the federal Fair Housing law to make it illegal for landlords to discriminate against Section 8 voucher holders. Lawyers can work with community organizations to file lawsuits against counties and municipalities.
• **Campaigns to end lockouts**

Lockouts occur when landlords evict tenants without going to court. Ending lockouts is important because if housing is a human right then no tenant or homeowner should lose his or her home without due process. On the individual level, it is devastating for a tenant to be suddenly ejected from his or her home without warning. Attorneys can sue landlords for illegal evictions or force landlords to reinstate the tenant through court injunctions. Community groups can identify problematic landlords or police officers who fail to enforce laws prohibiting lockouts. And on a broader legal front, lawyers can examine avenues to hold government agencies liable for failing to enforce laws against these extralegal actions.

• **Campaigns for mandatory inspections of all rental housing**

Municipalities and other government agencies need to be responsible for ensuring that all residential properties meet certain codes of health and safety. Attorneys can work with community organizations to create high-profile legal cases against slumlords. The two could work together to get poor housing conditions designated as an impediment to fair housing, which could then trigger the affirmatively-further-fair-housing mandate.

• **Just-cause campaigns**

A property owner should be required to have a justifiable reason to evict a resident. No one should have his or her tenure interrupted because of discrimination, retaliation or any other unfair reason. Lawyers could force "no cause" evictions to trial, thus making them difficult and costly while demonstrating their general injustice.

• **Campaign to limit foreclosures**

In Boston, advocates have created no-eviction zones in communities. Whenever residents are threatened with eviction due to foreclosure, people surround buildings, making it difficult to remove the inhabitants while attorneys work with organizations to make evictions difficult.

All these campaigns could help to further the notion that housing is a human right. The campaigns begin with community organizations meeting with attorneys to make strategic decisions to move forward on broader initiatives, which can lead to a step-by-step process of claiming housing a human right. Making housing into a human right will not happen overnight. But if attorneys and community organizations work together it can happen.
No one, especially children, should have to go without a home. Adopting the housing-as-a-human-right framework is the first step to making sure that everyone has the right to securing safe, decent and accessible housing that is affordable. Defining housing as a human right allows for an expansive outlook that goes beyond viewing housing as merely a roof over one's head or a commodity for sale.

Creative legal action coupled with the people power of community organizations can move society in the direction of housing as a human right. Just as the legal action in Westchester has opened new possibilities, so can other yet-untried legal actions help make housing into a human right. As Martin Luther King, Jr. said: "Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals." 47

NOTES

1. American Miners Association song, 1864.
2. John Bartlett, executive director of the Metropolitan Tenants Organization in Chicago, has been an organizer and advocate for human rights for the past 30 years. He was a panelist at the 2012 Loyola University Chicago Public Interest Law Symposium.
8. Id.
12. Id. at http://www2.obcorth.org/english/law/docs.htm#art11.
14. Id.
17. Id.
29. Ben Fishel, O'Reilly: The homeless "will not support themselves" because "they want to get drunk" and "high," or they're just "too lazy," MEDIA MATTERS, http://mediamatters.org/research/200604210003.
32. Community Development Block Grant (CDBG) and Housing Opportunity Made Equal (HOME). These federal programs are geared to help low and moderate income families.
36 Id. at 73.
37 Id. at 51-66.
38 Stein, supra note 34, at 84.
39 Id. at 88.
40 Id. at 88.
43 Id.
44 "Source-of-income" discrimination means a landlord cannot refuse to accept tenants because they receive public assistance benefits such as Section 8 vouchers, etc.
45 Stein, supra note 34, at 100.