NAPABA 2020 Virtual Experience

Friday, Nov. 6, 2020
12:30 PM – 1:30 PM ET

Session 502 | Lawyers Changing the World Inside and Outside the Courtroom

In a world that has had its many existing inequalities laid bare by the COVID-19 pandemic and the recent Black Lives Matter protests, the need for changes to our existing political, economic, and judicial systems has never been clearer. While images of impact litigators before the U.S. Supreme Court may be the current popular image of lawyers making change, many lawyers are change agents in less public ways, whether working within existing systems or using external tools to build pressure on decision-makers towards a more equitable society. Join our distinguished panel to learn about lawyers working as "agents of change," from within government and the judiciary, to externally through philanthropy and grassroots organizing.

Moderator:

Karin Wang, *Executive Director and Professor from Practice, David J. Epstein Program in Public Interest Law and Policy, UCLA School of Law*

Speakers:

Khin Mai Aung, *Executive Director and Assistant Counsel, Office of Bilingual Education & World Languages, New York State Education Department**
Hon. Dolly Gee, *United States District Court Judge, United States Courts, Central District of California*
Andres Kwon, *Policy Counsel and Senior Organizer, ACLU of Southern California*
Chris Punongbayan, *Executive Director, California ChangeLawyers*

**Title for identification purposes only; speaking in personal capacity*

Lawyers Changing the World Inside and Outside the Courtroom

Many aspiring (and current) lawyers want to change the world, and for many decades, that has meant focusing on impact litigation, or seeking systemic change through individual cases with broad significance or class action cases on behalf of large groups (e.g., *Brown v. Board of Education; Obergefell v. Hodges).* But for those seeking racial justice or economic equity, courts may not always be the best venue for delivering justice or equity. Lawyers can still be critical agents of change but must think more broadly and creatively about how to effect change – "changemaker" lawyers are entrepreneurs within the legal system, pushing both for change from within institutions and the legal system itself as well as from the outside.

For this panel which explores how four lawyers have advocated for change in their respective roles, the following readings help unpack what a "changemaker" lawyer looks like and ways in which lawyers are currently creating lasting impact outside of traditional litigation.

- *"The Changemaker Lawyer: Innovating the Legal Profession for Social Change,"* by David Nahmias, California Law Review, Vol. 106, No. 4 (2018), pp. 1335-1378 – explores concept of a "changemaker lawyer," defined as one who uses new and creative approaches to solving problems and often challenges traditional frameworks and expectations of lawyering

- *"Is There a Higher Calling For America's Lawyers?"* in *Forbes,* May 29, 2020 – interview with Purvi Shah, the founder of Movement Law Lab, who champions a vision of lawyers who work within larger movements, strategically deploying the law as one (but not the only or even the main) tool to change "culture, systems, and power"

- *"Enforcing Labor Laws: Wage Theft, the Myth of Neutrality, and Agency Transformation,"* by Julie A. Su, Berkeley Journal of Employment and Labor Law, Vol. 37, No. 1, (2016), pp. 143-156 – challenges idea of government agencies as "neutral" institutions ("We must be impartial in our adjudication and unbiased in our investigations but we are not neutral about what fundamental protections must exist in the workplace.") and rethinks how government agencies can and should engage with their stakeholders and constituents to achieve their legal enforcement mission

The panelists will also share examples of how they have worked towards social change both from within the existing legal and government systems as well as through external channels. The following documents are examples of some of that work.

- Conviction And Sentence Alternatives (CASA) Program overview – describes innovative rehabilitative services program (post-guilty plea diversion to avoid incarceration) in the United States District Court for the Central District of California

- Loan Modification Mediation Program sample order – describes an alternative dispute resolution program in the United States District Court for the Central District of California

allowing certain homeowners who face foreclosure to negotiate a loan modification with their lenders to avoid home foreclosure

- *Executive Summary of Defend LA: Transforming Public Defense in the Era of Mass Deportation* by Andres Kwon and ACLU of Southern California (full report available here) – report documenting and addressing the need for significant reform in the Los Angeles County Public Defender's office in order to adequately represent immigrant criminal defendants

- *8.31.20 Letter Urging Board Motion Ending Warrantless ICE Transfers* – coalition advocacy letter that helped end 15-year practice by Los Angeles County Sheriff's Department of transferring immigrants to ICE, at greater rate than any other state in the nation except Texas

The Changemaker Lawyer: Innovating the Legal Profession for Social Change

David Nahmias*

ABSTRACT

As lawyers today confront existential challenges to their profession, from globalization to technological change, they face demands to innovate. In a world of rapid change, individuals must have certain skills to succeed; they must be "changemakers." Changemakers are individuals who harness innovation to solve social challenges, a notion arising from the global movement of social entrepreneurship that has captured the attention of sectors spanning international development and the business world. This Note argues that through their innovative work, "changemaker lawyers" present a new set of skills and concepts to support a struggling legal profession. They can serve as exemplars and guides for lawyers in an evolving profession, and the principles that undergird their work can provide significant advantages to the profession as a whole. Starting from the proposition that these changemaker lawyers exist, I conducted interviews with ten attorneys whose unconventional work or expertise embodies changemaker lawyering. Drawing on my interviews, I identify three key themes that changemaker lawyers appear to have in common: (1) they seek to overcome long-standing norms in the legal profession; (2) they design novel organizational structures that reflect their values, and (3) they create trans-disciplinary practices that bridge legal fields and sectors. I then suggest challenges that handicap changemaker lawyers. By proposing the idea of changemaker lawyers, this Note seeks to help create a new identity, unite a diverse community of advocates, and trigger a new movement in the legal profession.

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INTRODUCTION

The early days of the Trump Administration unleashed a cataclysm in the legal profession. Long the subject of popular jokes, disdain, and resentment, lawyers suddenly were in vogue, especially as advocates for positive social change. Amid chants of "let the lawyers in" during the demonstrations in airports in January 2017 against Trump's first travel ban (later enjoined), lawyers received great popular acclaim for rushing to counsel detained migrants.[1] As lawyers have made the news for taking on executive actions that restrict immigration, ban transgender military recruits, and roll back environmental regulations, applications to law school have risen.[2] Lawyers have become allies in the resistance to Trump's conservative agenda. Confronted with increasing challenges to the rule of law principles that lawyers hold dear, lawyers have an

at Ashoka provided valuable assistance in framing the theories of changemaking: Sachin Malhan, Reem Rahman, Megan Strickland, and Anamaria Schindler. I also wish to thank Marice Ashe, Ann Southworth, and Tirien Steinbach for their helpful comments. Lastly, I am grateful to the ten changemaker lawyers who opened up to me about their work and whose stories form the backbone of this Note.

1. *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html [https://perma.cc/G7PB-PSP3]; Dahlia Lithwick, *The Lawyers Showed Up*, SLATE (Jan. 28, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/lawyers_take_on_donald_trump_s_muslim_ban.html [https://perma.cc/4VVA-J2BH].

2. *See* Sara Randazzo, *Law School is Hot Again as Politics Piques Interest*, WALL STREET JOURNAL (Dec. 15, 2017), https://www.wsj.com/articles/law-school-is-hot-again-as-politics-piques-interest-1513333801 [https://perma.cc/363K-2GQ2].

enormous opportunity to innovate and advance positive social change.[3] To best devise its growth strategy, fueled by an unprecedented $24 million fundraising haul in the weekend following the President's announcement of the travel ban, the American Civil Liberties Union (ACLU) enrolled in Y Combinator, the renowned startup incubator that produced AirBnB and Dropbox.[4] Calling Y Combinator and its president "true pioneers in innovation," ACLU Executive Director Anthony Romero indicated that entrepreneurialism and innovation, especially when channeled toward positive societal change, are fundamental for the legal profession today.[5]

Innovation seems to be on other lawyers' minds too, especially as the legal profession faces significant challenges to how it has long operated.[6] Today's historical moment figures into a wider pattern for lawyers, particularly for public interest attorneys who sought to use the law as a tool to achieve social justice. Demands for greater innovation and entrepreneurship among the legal profession are commonplace considering lawyers face a shrinking job market and low levels of job satisfaction.[7] In its 2016 Recommendations on the Legal Profession, the American Bar Association (ABA) declared that today's lawyers "will have to be entrepreneurs rather than employees"[8] and that "lawyers who learn entrepreneurial skills can help solve the justice gap."[9] The ABA recommended establishing a Center of Innovation that "would be responsible for proactively and comprehensively encouraging, supporting, and driving innovation in the

3. *See generally* Shirin Sinnar, *Human Rights, National Security, and the Role of Lawyers in the Resistance*, 13 STAN. J. C.R. & C.L. 37, 44–46 (2017) (offering suggestions for lawyers and law students in the "resistance" to the Trump Administration, based on experiences from human rights advocacy).

4. Casey Newton, *How the ACLU became Silicon Valley's favorite startup*, VERGE (Feb. 6, 2017), http://www.theverge.com/2017/2/6/14523466/aclu-y-combinator-trump-silicon-valley-donations [https://perma.cc/6H6D-2V3D]. Y Combinator has since helped the ACLU—one of a "select number of nonprofits" the incubator has worked with—to revamp its tech infrastructure and data security. Ariel Schwartz, *The world's hottest startup factory is transforming the ACLU in powerful ways*, BUS. INSIDER (May 10, 2017), http://www.businessinsider.com/y-combinator-transforming-the-aclu-2017-5 [https://perma.cc/7YMQ-QU7S].

5. Matt Drange, *After $24 Million Anti-Trump Windfall, ACLU Heads to Silicon Valley for Startup Lessons*, FORBES (Jan. 31, 2017), http://www.forbes.com/sites/mattdrange/2017/01/31/aclu-flush-with-24m-in-wake-of-trump-immigration-orders-partners-with-tech-incubator-y-combinator/#7ee8d9657c1d [https://perma.cc/JU9N-E8A2].

6. *See infra* Part I.

7. *See, e.g.*, DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 147–49 (2015) [hereinafter RHODE, TROUBLE WITH LAWYERS]; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 23–48 (2000) [hereinafter RHODE, INTERESTS OF JUSTICE] (evaluating studies about attorneys' discontent with their profession).

8. AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 49 (2016), http://abafuturesreport.com/2016-fls-report-web.pdf [https://perma.cc/D9CF-3VDW] (quoting Richard S. Granat & Stephanie Kimbro, *The Teaching of Law Practice Management and Technology in Law Schools: A New Paradigm*, 88 CHI.-KENT L. REV. 757, 762 (2013)).

9. AM. BAR ASS'N, *supra* note 8, at 48–49 (2016).

legal profession and justice system" and "partner[ing] with other disciplines and the public for insights about innovating the delivery of legal services."[10]

Amid the context of widespread change and a movement in the law for social change, this Note recommends a solution: the promotion of "changemaker lawyers." Changemaker lawyers are, broadly speaking, lawyers who put forth innovative, creative legal solutions that achieve a social end.[11] This Note argues that changemaker lawyers represent an emerging trend of innovators who reframe existing legal practices in ways that offer solutions to the technological, economic, and societal challenges that the wider legal profession faces.[12] The notion of lawyers innovating for social good serves to give a new meaning and identity to those attorneys whose vision and practice for social justice distinguishes them from their colleagues in more conventional public interest practices.[13] My objective is not to determine whether their strategies are "new" compared to those of traditional public interest lawyers. Rather, I seek to define and analyze changemaker lawyers to help provide these lawyers with a unifying identity, which can enable them to feel a sense of purpose and integration within a larger community.[14] I also seek to show that the insights we can draw from their work generate value for the legal profession as a whole.

To assess the work of changemaker lawyering, I draw out three themes that seem common to the practice: (1) that through their work, changemaker lawyers are reenvisioning and subverting long-standing norms in the legal profession; (2) that they are organizing themselves and their practices in novel ways premised on their values and missions; and (3) that they are crafting "trans-disciplinary practices" that break down silos, incorporate experiences from across legal areas,

10. *Id.* at 48–50.

11. While the term does not appear in Merriam-Webster, the Oxford English Dictionary defines *change-maker* as "a person who works actively to effect positive social change." *See Changemaker*, MERRIAM WEBSTER (2018), https://www.merriam-webster.com/dictionary/changemaker [https://perma.cc/4U5X-GFSZ]; *Change-maker*, OXFORD ENGLISH DICTIONARY (2018), https://en.oxforddictionaries.com/definition/change-maker [https://perma.cc/SP5T-69EP] (noting that while this is the second definition for *change-maker* (hyphenated in original), this is "now the usual sense"). As discussed *infra* Part I, the definition of *changemaker* as involving creativity and innovation is largely accepted albeit with some differentiation at the margins. *See, e.g.*, REEM RAHMAN ET AL., ASHOKA CHANGEMAKERS, MORE THAN SIMPLY "DOING GOOD": A DEFINITION OF CHANGEMAKER: WHAT CHILDREN, TRUCKERS, AND SUPERHEROES ALL HAVE IN COMMON 2 (2016), https://issuu.com/ashokachangemakers/docs/more_than_simply_doing_good_definin [https://perma.cc/HMP9-NLCQ] [hereinafter MORE THAN SIMPLY "DOING GOOD"]; *see also* Reem Rahman et al., *What Is A Changemaker?* FAST COMPANY (Aug. 4, 2016), https://www.fastcoexist.com/3062483/what-is-a-changemaker [https://perma.cc/246X-WSUC]. (elaborating on certain qualities common to changemakers).

12. For greater discussion of these challenges, see *infra* Part I.

13. *See, e.g.*, J. KIM WRIGHT, LAWYERS AS CHANGEMAKERS: THE GLOBAL INTEGRATIVE LAW MOVEMENT 5–9 (2016) (attempting to craft a definition of a relatively synonymous term, "integrative lawyers," and showing how it helped to provide a sense of identity to those attorneys it describes). For a discussion of the difference between changemaker lawyers and traditional public interest lawyers, see *infra* Part II.

14. *See infra* Part I.

and collaborate with non-legal professions to provide comprehensive change to their clients. I arrive at these themes through personal interviews I conducted with ten attorneys whose unconventional work or expertise amounts to changemaker lawyering as we might broadly define it.[15] These individuals are diverse in their legal practices, ranging from founders of non-profit organizations to corporate lawyers, yet they all share a common commitment to using the law to advance positive social change.

This Note proceeds as follows. In Part I, I briefly present the challenges that the legal profession faces and then offer a theoretical definition of changemaking, which I rely on as a framework to appraise changemaker lawyers. In Part II, I trace the changing public interest law field to show its evolution and current state, as it represents the principal context where changemaker lawyers work now (although not exclusively). After explaining my methodology in Part III, I divide the bulk of my analysis into the three themes of changemaker lawyers I mentioned above in Part IV. In Part V, I discuss how certain professional rules erect barriers for changemaker lawyers to flourish, as my interviews suggested. In Part VI, I recommend further areas of research, and, in Part VII, I conclude.

I.
DEFINING CHANGEMAKING IN AN EVOLVING LEGAL PROFESSION

It is not news to members of the bar that the legal profession is confronting a critical, almost existential, juncture. The former chair of the ABA's standing committee of professionalism recently declared that "[w]hat the legal profession is experiencing is not just change, but disruptive change," which "leaves us with an inescapable choice: adapt, and seize our future; or resist, and settle for lost relevant in the world around us."[16] This disruptive change means that lawyers must reconcile their traditional practices with a variety of new technological, social, and economic phenomena. These include technologies that have increased access to quick and more comprehensive legal advice for anyone seeking it, while rendering certain rote legal tasks obsolete.[17] Also, an

15. As acknowledged *infra* Part III, the number of interviews undertaken is too small to permit drawing overarching conclusions, correlations, or statistical evaluations about changemaker lawyers. What the interviews do offer is qualitative data that in turn furnishes a concrete, empirical foundation from which to draw common themes and potentially frame future quantitative research, which I address in Part VI.

16. Frederic S. Ury, *Saving Atticus Finch: The Lawyer and the Legal Services Revolution*, *in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION 3, 5 (Paul A. Haskins ed., 2015).

17. *See* Stephen Gillers, *The Legal Industry of Tomorrow Arrived Yesterday: How Lawyers Must Respond*, *in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION, *supra* note 16, at 13, 16–20; *see also* Carolyn B. Lamm & Hugh Verrier, *Large Law Firms: A Business Model, a Service Ethic*, *in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION, *supra* note 16, at 103, 104–08 (naming four forces that are reshaping Big Law firms: persistent cost pressure, accelerating globalization, the rising importance of technology, and the proliferation of new entrants). Advances in artificial intelligence and the outsourcing of rote tasks like document review are some examples of structural change. *See, e.g.*, Jason Koebler, *Rise of the*

increasingly global economy and society has uprooted lawyers with state and local expertise and forced an internationalization of legal services.[18] Meanwhile, there is an increasing consciousness of the profession's lack of diversity (especially among women, people of color, LGBT people, and people from economically disadvantaged backgrounds), and the law's reliance on rigid, elitist, and patriarchal frameworks.[19] Amid these profound changes and realizations, access to justice is still unequal, as over 80 percent of low-income Americans still do not receive adequate legal help because it is too expensive or inadequate.[20] This disparity is growing; while economic instability, especially after the Great Recession, has tested the strength and security of multimillion dollar law firms at the top of the economic pyramid, legal services for the bottom of the pyramid have shrunk.[21] As the former ABA official quoted above warned, "[w]e cannot afford to stand still and think that if we just wait long enough, business will return to the way it was conducted ten years ago."[22]

The dynamics of a changing legal profession are a microcosm of the changing global economy. Few can dispute that the world is undergoing rapid change and that archaic, hierarchical, and repetitive institutions have given way

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Robolawyers: How legal representation could come to resemble TurboTax, THE ATLANTIC (Apr. 2017), https://www.theatlantic.com/magazine/archive/2017/04/rise-of-the-robolawyers/517794/ [https://perma.cc/2LBS-JU5M]; Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html?_r=0 [https://perma.cc/DE8X-DEDZ].

18. *See* Gillers, *supra* note 17, at 17.

19. *See, e.g.*, Arin N. Reeves, *Diversity and Inclusion as Filters for Envisioning the Future, in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION, *supra* note 16, at 67, 70–71, 75–76; Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 316–19 (2014); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483, 2483–86 (2014); Edward Williams, *Diversity, the Legal Profession, and the American Education Crisis: Why the Failure to Adequately Educate American Minorities is an Ethical Concern for the Legal Profession*, 26 GEO. J. LEGAL ETHICS 1107, 1108–13 (2013); Monique R. Payne-Pikus, John Hagan & Robert L. Nelson, *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC. REV. 553, 576–78 (2010); Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 250–53 (2000).

20. Richard S. Granat & Stephanie Kimbro, *The Future of Virtual Law Practice*, *in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION, *supra* note 16, at 83, 96.

21. *See* Eli Wald, *The Economic Downturn and the Legal Profession, Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2061 (2010) (arguing that the Great Recession transformed "not only the practice realities, the organization, and the structure of large law firms, but also their professional ideologies"); LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/MS3D-8LCY] (declaring that the "justice gap—the difference between the civil legal needs of low-income Americans and the resources available to meet those needs—has stretched into a gulf"); Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 57 (2016) (observing that "as a result of the economic downturn, more and more people began falling into poverty. This, in turn, had led to a significant increase in the number of Americans who cannot afford to pay for the legal assistance that they need").

22. Ury, *supra* note 16, at 5.

to evolving, changing systems.[23] Communities and nations are deeply interconnected through globalized industries, communications, and financial systems; the 2008 financial crisis showed that economic setback in one country can trigger global chaos.[24] Changemakers are the people equipped with the skills to survive and compete in this new world of rapid change. The term "changemaker" is a relative neologism that has quickly entered the American lexicon as a person using innovative, creative means to effect social change (albeit not universally accepted as such).[25] The origin of the term is unclear, but it is closely associated with the global non-profit organization Ashoka and its founder, Bill Drayton.[26] Ashoka is a pioneer in identifying and catalyzing the worldwide movement of social entrepreneurs—individuals with fundamentally new, highly creative, and systemic solutions to intractable social problems.[27]

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23. *See, e.g.*, THOMAS L. FRIEDMAN, THANK YOU FOR BEING LATE: AN OPTIMIST'S GUIDE TO THRIVING IN THE AGE OF ACCELERATIONS 33 (2016) ("[E]ven though human beings and societies have steadily adapted to change, on average, the rate of technological change is now accelerating so fast that it has risen above the average age at which most people can absorb all these changes. Many of us cannot keep pace anymore.").

24. *See id.* at 129 (describing how globalization and "digital global flows" are "making the world so much more interdependent in financial terms, so every country is now more vulnerable to every other country's economy").

25. *See supra* note 11 (defining *changemaker*). References to *changemakers* have appeared in liberal and conservative political discourse, business publications, social activism, etc. *See, e.g.*, Leigh Ann Caldwell, *Bill on Hillary Clinton: 'The Best Darn Change-Maker I've Ever Met,'* NBC NEWS (July 27, 2017), https://www.nbcnews.com/storyline/2016-conventions/bill-hillary-clinton-best-darn-change-maker-i-ve-ever-n617581 [https://perma.cc/ANA8-A7NJ] (describing former President Bill Clinton praising his wife and former presidential candidate Secretary Hillary Clinton at the 2016 Democratic National Convention before an adoring crowd waving signs displaying the word); Michael Barone, *What does 'Change Maker' Mean?*, WASH. EXAM'R (July 27, 2016), http://www.washingtonexaminer.com/what-does-change-maker-mean/article/2597910 [https://perma.cc/B8VJ-8J4P] (commenting on the same episode described but from the perspective of a conservative columnist); Paula Goldman, *How a New Generation of Business Leaders Views Philanthropy*, HARV. BUS. REV. (Feb. 29, 2015), https://hbr.org/2016/02/how-a-new-generation-of-business-leaders-views-philanthropy [https://perma.cc/4QYK-KB6H] ("The opportunities to harness the power of markets for social good is enormous—especially for the next generation of change-makers who can build on these ideas."); Renee Lertzman, *What Kind of Change Maker Are You?*, SUSTAINABLE BRANDS (May 5, 2015), http://www.sustainablebrands.com/news_and_views/stakeholder_trends_insights/renee_lertzman/what_kind_change_agent_are_you [https://perma.cc/B5SC-CXFX] (suggesting theories on how to promote sustainability in organizations and promote change in branding and business); *Who We Are*, UNDER 30 CHANGEMAKERS, https://www.under30changemakers.com/about-us/ [https://perma.cc/6NTW-CDSR] (establishing a "community organization that provides emotional and professional support to young social innovators").

26. At this stage, I must disclose that I worked for Ashoka for five years before law school. My experiences there informed and shaped my understanding of changemaking and social entrepreneurship, and I unabashedly admit that the intersection of law and changemaking that I engaged with at Ashoka motivated me to go to law school and to write this article. I do not intend any references to theories and literature by my former Ashoka colleagues as a paean to their continuing work; rather, I must be practical in accepting that Ashoka is one of the few institutions that has written extensively about changemaking.

27. For a history of Ashoka and the movement of social entrepreneurship, see generally DAVID BORNSTEIN, HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURS AND THE POWER OF NEW IDEAS (2004) [hereinafter BORNSTEIN, HOW TO CHANGE THE WORLD]; DAVID BORNSTEIN & SUSAN

Over the course of its work, Ashoka began to recognize communities of local changemakers, people who are creatively taking action to solve social problems around them, and dubbed them "changemakers."[28] Changemakers are intentionally motivated to tackle a social problem for the greater good with the courage and ingenuity to act differently from the status quo.[29] Not every person with a positive social intention counts either; changemakers drive change because they are empathic leaders who work in teams and "teams of teams" to mobilize entire communities toward positive social good.[30] Yet adapting to and

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DAVIS, SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW 7–20 (2010). As the field of social entrepreneurship has grown, so have increasing academic and popular studies seeking to define, analyze, and critique it. The movement has spawned numerous terms and concepts, including social entrepreneurship, social enterprise, and changemaking. *See, e.g.*, BORNSTEIN & DAVIS, *supra*, at xviii–xix, 1; RYSZARD PRASZKIER & ANDRZEJ NOWAK, SOCIAL ENTREPRENEURSHIP: THEORY AND PRACTICE 9 (2012); BOB DOHERTY ET AL., MANAGEMENT FOR SOCIAL ENTERPRISE 33 (2009); Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, 5 STAN. SOC. INNOVATION REV. 29, 35 (2007); PAUL C. LIGHT, THE SEARCH FOR SOCIAL ENTREPRENEURSHIP 4–5 (2008); Noga Leviner, Leslie R. Crutchfield & Diana Wells, *Understanding the Impact of Social Entrepreneurs: Ashoka's Answer to the Challenge of Measuring Effectiveness*, *in* RESEARCH ON SOCIAL ENTREPRENEURSHIP: UNDERSTANDING AND CONTRIBUTING TO AN EMERGING FIELD 89, 93 (Rachel Mosher-Williams ed., 2006). Some definitions of social entrepreneurship are intertwined or conflated with social enterprise. This phenomenon encompassed profit-seeking businesses that engage in socially beneficial activities (for example, corporate social responsibility), hybrid social businesses that seek profit and a social objective, and non-profit organizations that generate revenue. In other words, the common feature of social enterprises is that they are entities using earned income strategies to generate revenue. This article does not seek to engage in the ongoing debate about social entrepreneurship versus social enterprise. For more information on social enterprises, see Janelle A. Kerlin, *Social Enterprise in the United States and Abroad: Learning from Our Differences*, *in* RESEARCH ON SOCIAL ENTREPRENEURSHIP: UNDERSTANDING AND CONTRIBUTING TO AN EMERGING FIELD, *supra*, at 105, 105–106; Björn Schmitz, *Social Entrepreneurship, Social Innovation, and Social Mission Organizations: Toward a Conceptualization*, *in* CASES IN INNOVATIVE NONPROFITS: ORGANIZATIONS THAT MAKE A DIFFERENCE 17, 18–31 (Ram A. Cnaan & Diane Vinokur-Kaplan eds., 2015); LIGHT, *supra*, at 5 ("Whereas social entrepreneurship seeks tipping points for innovation and change, social enterprise seeks profits for reinvestment and growth."); J. GREGORY DEES ET AL., ENTERPRISING NON-PROFITS: A TOOLKIT FOR SOCIAL ENTREPRENEURS 9, 14–18 (2001); *see also* BOB DOHERTY ET AL., *supra*, at 26 (noting that in the United Kingdom, "social enterprise" similarly refers to a "business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community rather than . . . to maximize profit").

28. *See* David Brooks, *Everyone a Changemaker*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/opinion/changemaker-social-entrepreneur.html [https://perma.cc/SEB5-H6AW] (interviewing Bill Drayton and summarizing the vision of changemaking that Ashoka espouses); William Drayton, *Everyone a Changemaker: Social Entrepreneurship's Ultimate Goal*, 1 INNOVATIONS 80, 82–84 (2006); *see also supra* note 11. Changemakers are not necessarily social entrepreneurs who are distinguished by their commitment to innovation that sparks systems-wide or "pattern-breaking" change. *See, e.g.*, LIGHT, *supra* note 27, at 12; Leviner et al., *supra* note 27, at 92–93.

29. MORE THAN SIMPLY "DOING GOOD," *supra* note 11, at 2–3, 9; Brooks, *supra* note 28 (defining changemakers as "people who can see the patterns around them, identify the problems in any situation, figure out ways to solve the problem, organize fluid teams, lead collective action and then continually adapt as situations change").

30. *See* Henry F. De Sio, Jr., *Everything You Change Changes Everything*, LINKEDIN (Aug. 28, 2014), https://www.linkedin.com/pulse/20140828155710-3694871-everything-you-change-changes-everything [https://perma.cc/K534-U9AD] (relating how the author, the Chief Operating Officer of

managing change as a changemaker requires a commitment to social benefit. As Drayton says, amid systems and institutions "bumping one another" in a changing environment, "[t]here has to be a powerful force constantly pulling society back to the center."[31] Changemaking is attractive because it naturally implies a positive social mission.

Drayton observes that changemakers have mastered the following four critical skills: empathy; horizontal and collaborative leadership; an ability to work across fluid teams; and positive, action-oriented problem solving to drive change.[32] Equipped with these skills, changemakers are prepared to act and contribute in a rapidly evolving world. "[I]n this world you cannot afford to have anyone on your team who is not a changemaker . . . [or] to have anyone without the skills to spot and help develop change opportunities."[33]

If changemakers act creatively to solve a social challenge, then by extension changemaker lawyers are lawyers who use their legal skills creatively for social ends.[34] All lawyers who are committed to positive change in society through creative means, whether or not they identify as *public interest* lawyers, can thus be changemaker lawyers. In the context of the changing legal profession, the growing phenomenon of changemaker lawyers offers a novel solution. Just as businesses continue to seek "double" and "triple bottom lines" that emphasize environmental sustainability and social impact in tandem with profit,[35] even the ABA believes that all lawyers, not just those in the public interest, will likely need to become more socially engaged and contribute to societal benefit.[36] Changemaker lawyers are at the forefront of this new direction for the profession.

At this definitional stage, it is also critical to emphasize that using new technology is a prerequisite for changemakers, including changemaker lawyers. Innovation, especially in the popular Silicon Valley context, often connotes

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President Barack Obama's 2008 presidential campaign, came to understand the importance of changemaking).

31. Bill Drayton, *A Team of Teams World*, 11 STAN. SOC. INNOVATION REV. 32, 34 (2013).

32. Bill Drayton & Valeria Budinich, *Get Ready to Be a Changemaker*, HARV. BUS. REV. (Feb. 2, 2010), https://hbr.org/2010/02/are-you-ready-to-be-a-changema [https://perma.cc/A4XP-FPTJ].

33. Drayton, *supra* note 31, at 34.

34. Attorney and motivational speaker J. Kim Wright presents a vision of changemaker lawyers in her study of "integrative law" that is similar to my own. Distilling the insights from dozens of interviews and her compilation of a hundred contributions from practitioners worldwide, she argues that integrative lawyers are "reflective professionals" with a "systemic view of the world" who are "guided by purpose and values . . . the harbingers of a new cultural consciousness and . . . [the] leaders in social evolution." WRIGHT, *supra* note 13, at 6–7. Whether "changemaker," "integrative," or another term altogether becomes a fixture in the legal lexicon matters less than if its principles take root and serve to influence the direction of the profession.

35. *See, e.g.*, SHEILA BONINI & STEVEN SWARTZ, MCKINSEY & CO., PROFITS WITH PURPOSE: HOW ORGANIZING FOR SUSTAINABILITY CAN BENEFIT THE BOTTOM LINE (2014), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Sustainability%20and%20Resource%20Productivity/Our%20Insights/Profits%20with%20purpose/Profits%20with%20Purpose.ashx [https://perma.cc/6TJH-XXQG].

36. *See* Lamm & Verrier, *supra* note 17, at 111–12.

technology, but it far exceeds this interpretation. For example, over the past eight years, the ABA has profiled 134 so-called "Legal Rebels," whom it describes in a way that is reminiscent of the changemaker lawyer described here.

> The legal profession is undergoing a structural break with the past. The profession that emerges will be different in fundamental ways. More and more lawyers aren't waiting for change: They're remaking their corners of the profession. These mavericks are finding new ways to practice law, represent their clients, adjudicate cases and train the next generation of lawyers. Most are leveraging the power of the Internet to help them work better, faster and different.[37]

A review of the profiles, however, indicates that many of the Legal Rebels use technology, such as apps, to make lawyering more efficient and accessible.[38] Yet the key to changemaker lawyering is its use of new and creative approaches to solve a challenge; the phenomenon is not incumbent on using technology, which is a *mechanism,* not an *end*, for these approaches. The Legal Rebels represent a piece of this larger changemaking movement that I seek to critique.

As I will describe in greater detail in Part IV, most of the lawyers I spoke with did not refer to themselves as "changemaker lawyers"; indeed, unless they personally were associated or affiliated with groups in the ecosystem of social entrepreneurship, "changemaking" itself was a foreign term of art. Yet instinctively, they all understood the term's meaning and could perceive themselves as changemakers. Creating a sense of identity unifies individuals with a common purpose and gives each one a sense of being a part of something larger than themselves.[39] It is this Note's hope that "changemaker lawyer" can provide a similar sense of purpose, identity, and network unification to these legal innovators for social change.

II.
THE CHANGING PROFESSION OF LAW FOR SOCIAL CHANGE

A. Public Interest Law Organizations

In order to understand and position changemaker lawyers within the legal field, it is necessary to compare and distinguish them from groups of lawyers who are more widely considered among the legal community as committed to social good and social change. Social entrepreneurship and changemaking, two

37. Legal Rebels, *Who's a Legal Rebel?* AM. BAR ASS'N, *available at* http://www.abajournal.com/legalrebels/about/ [https://perma.cc/X6NX-MYLD].

38. *See* Legal Rebels, *The Rebels: 134 Legal Rebels profiles and counting.*, AM. BAR ASS'N, http://www.abajournal.com/legalrebels/profiles [https://perma.cc/VEH7-CG8P].

39. Likewise, the social entrepreneurs that Ashoka supported felt an enormous sense of personal satisfaction and connection to a wider community through the creation of a label and identity. Ashoka Fellow Vera Cordeiro said it was essential for her to be able to identify as a social entrepreneur and have "the vote of confidence and the connection to a network of like-minded people" like Ashoka's. *See* BORNSTEIN, HOW TO CHANGE THE WORLD, *supra* note 27, at 142–43.

theories that are closely intertwined with social impact today in contexts as diverse as business, healthcare, academia, and philanthropy,[40] are relatively untouched in legal professions research. The most commonly identified conceptions of law for social good—public interest law and social enterprise or entrepreneurial law—nonetheless fail to encapsulate fully what constitutes changemaker lawyering. In this Part, I provide a short history of these two subsets of law that converge around changemaker lawyering, starting with public interest law.

Public interest law generally focuses on providing access to justice and advocacy for the most marginalized groups.[41] Significant literature has argued that public interest law is undergoing major transformation as it has grown and institutionalized.[42] A comprehensive history of movement is outside the scope of this essay; here, I seek only to highlight the evolutions of the movement. Albiston and Nielsen have described three eras of public interest law, starting with the pre-1965 "Emergent Era" in which legal aid largely remained the purview of private pro bono practice.[43] During this time, the ACLU and the NAACP Legal Defense Fund arose as the pioneers of social impact litigation,

40. *See* Chris Steyaert & Daniel Hjorth, *Introduction: what is social in social entrepreneurship*, *in* ENTREPRENEURSHIP AS SOCIAL CHANGE: A THIRD MOVEMENTS IN ENTREPRENEURSHIP BOOK 1, 4–7 (Chris Steyaert & Daniel Hjorth eds., 2006).

41. The definition of public interest law is itself the subject of scholarly debate. *See, e.g.*, ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 6–8 (2013); Ann Southworth, *What is Public Interest Law? Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 495; Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2057 (2008); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1601–03 (2006) [hereinafter Nielsen & Albiston, *Organization of Public Interest Practice*]; Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 12 WASH. U. J.L. & POL'Y 33, 35 (2003). For the purpose of this paper, I will assume Chen and Cumming's conception of public interest law as the "broad and contested range of activities that includes legal advocacy focused on the representation of individuals shut out of the private market for legal services as well as lawyering to advance the collective interests of defined groups or constituencies (liberal and conservative)." *See* CHEN & CUMMINGS, *supra*, at 7.

42. *See, e.g.*, Catherine Albiston, Su Li & Laura Beth Nielsen, *Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States*, 42 LAW & SOC. INQUIRY 990, 991 (2017) [hereinafter Albiston & Nielsen, *Two-Tier System of Access*] (offering a comprehensive analysis of public interest law original survey data that "examines the modern state of the [public interest law organizations] field, considers how the field came to look the way it does, and explores how patters of [public interest law organizations] development shaped access to justice in the United States"); CHEN & CUMMINGS, *supra* note 41, at 41–93 (providing a "historical overview of public interest lawyering" that reveals "a dynamic set of institutions and practices that have deep historical roots in promoting the basic rule of law, but also have responded to and been shaped by crucial social and political ferment of the times"); Rhode, *supra* note 41, at 2032 (finding that "size" was the "most obvious change" in public interest law and that "the number, scale, and diversity of public interest legal organizations has markedly increased"); Southworth, *supra* note 41, at 498 (noting that public interest legal organizations have experienced "tremendous expansion of the types of [their] political missions espoused" and "grow[th] in terms of the strategies employed by such organizations and the geographic reach of their agendas").

43. *See* Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62, 63–64 (2014) [hereinafter Albiston & Nielsen, *Funding the Cause*].

the latter designing and implementing the litigation strategy that culminated in *Brown v. Board of Education*.[44] The public interest movement then accelerated during the "Expansion Era" of the 1960s and 1970s as an arm of the War on Poverty to provide representation to traditionally unrepresented or underrepresented classes, particularly the poor and indigent, with limited or no access to legal system.[45] The support of the federal Legal Services Corporation (LSC) to finance public interest legal organizations furthered the proliferation of public interest practices.[46] Then, during the "Embattled Era," the 1980s to the present, the movement faced reactionary pushback from an increasingly hostile political and judicial system.[47] Since the Reagan Administration, conservative lawmakers and courts have sought to hamstring many public interest law organizations, such as imposing significant restrictions on recipients of LSC funding in 1996.[48] Throughout these three eras, public interest organizations have diversified in scope and practice area,[49] political agenda,[50] financing,[51] and even ideology.[52]

Another significant dimension of change among public interest law organizations includes their strategies for social impact. Organizations initially relied on litigation, but for decades public interest lawyers argued that litigation alone cannot achieve the social objectives of public interest law.[53] Even the

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44. *See id*.; Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209, 217 (1976).

45. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 64–66; *see also* CHEN & CUMMINGS, *supra* note 41 at 6–7; Rabin, *supra* note 44, at 230.

46. For a history of federally funded legal aid, including the creation of the LSC, see CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES 4–16 (1992).

47. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 66–69. Such reactionary restrictions include Congressional constraints on LSC grantees' ability to engage in impact litigation or represent certain clients and judicial limits on fee-shifting statutes that served to incentivize private litigation for civil rights violations. *See, e.g.*, ROWLEY, *supra* note 46, at 82; CHEN & CUMMINGS, *supra* note 41, at 128–31; Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1092 (2007) [hereinafter Albiston & Nielsen, *Procedural Attack on Civil Rights*].

48. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 66–67.

49. *See* Nielsen & Albiston, *Organization of Public Interest Practice*, *supra* note 41, at 1598; CHEN & CUMMINGS, *supra* note 41, at 77.

50. *See, e.g.*, CHEN & CUMMINGS, *supra* note 41, at 100–15; Rhode, *supra* note 41, at 2036.

51. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 88–89.

52. Conservative public interest law organizations emerged in the 1980s as a counterweight to the more progressive organizations that dominated the public interest community and as an advocate for rightwing causes. *See, e.g.*, Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223 (2005).

53. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 155–57 (1991) (arguing in a seminal work that litigation may be a futile strategy to effect social change by finding "no evidence that [*Brown v. Board of Education*'s] influence was widespread or of much importance to the battle for civil rights. The evidence suggests that *Brown*'s major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it."); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of*

pioneer organizations like the ACLU and NAACP diversified their portfolio of strategies beyond impact litigation to employ popular mobilization, policy influence, and educational outreach.[54] Now, many organizations employ multidisciplinary strategies in addition to litigation, including direct services, legislative and policy advocacy, coalition building, public education, and communications and media outreach.[55] Some public interest lawyers even engage in transactional practices for community economic development.[56]

Notwithstanding its diversity and complexity, today's public interest field faces internal challenges and external pressures. On a strategic, internal dimension, some critics argue that current public interest lawyers are not fully equipped to ensure effective advocacy for their constituencies, forge coalitions with legal and non-legal allies, and cope with diminished funding streams.[57] Moreover, external pressures like a hostile conservative political climate and globalization of public interest issues (e.g., immigration law) are forcing public interest lawyers to reframe their strategies, and even their organizations.[58] Public interest lawyers increasingly need to innovate how they deliver legal services and develop new, groundbreaking strategies to affect social change so that they can energize and sustain their work.[59] The following themes from changemaker lawyers[60] may serve in this endeavor.

B. Social Enterprise and Legal Entrepreneurs

Advancing positive social change through law, as the public interest law movement epitomized, is but one avenue for creating social good. Another conception often considered is social enterprise law—the law of socially

Winning by Losing, 33 LAW & SOC'Y REV. 869, 869–70 (1999) (citing several law and society works that assess the capacity of the law to produce social change).

54. CHEN & CUMMINGS, *supra* note 41, at 232–72; Rhode, *supra* note 41, at 2046–49; Rabin, *supra* note 44, at 218.

55. *See* CHEN & CUMMINGS, *supra* note 41, at 232; Rhode, *supra* note 41, at 2056.

56. *See, e.g.*, Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 304–08 (Austin Sarat & Stuart A. Scheingold eds., 2006).

57. *See* CHEN & CUMMINGS, *supra* note 41, at 511–34; Albiston & Nielsen, *Funding the Cause*, *supra* note 43, 91–92; Rhode, *supra* note 41, at 2075–77.

58. *See generally* Scott L. Cummings, *The Future of Public Interest Law*, 33 U. ARK. LITTLE ROCK L. REV. 355, 355–56 (2011) ("[I]dentifying four critical developments in the field—professionalization, privatization, conservatism, and globalization—and suggesting the challenges they pose for the future of public interest law."). The current administration's policy is showing itself to be especially hostile to the ideals and objectives of public interest law; President Trump's first draft budget included elimination altogether of the Legal Services Corporation. Sharon LaFraniere and Alan Rappeport, *Popular Domestic Programs Face Ax Under First Trump Budget*, N.Y. TIMES (Feb. 17, 2017), https://www.nytimes.com/2017/02/17/us/politics/trump-program-eliminations-white-house-budget-office.html?_r=0 [https://perma.cc/WPM9-WYJG].

59. *See* DEBORAH L. RHODE, LAWYERS AS LEADERS 56–60 (2013) (arguing that leadership in the legal profession requires fostering innovation yet that the "leaders of the American legal profession have fiercely resisted such innovation").

60. *See infra* Part IV.

responsible businesses—and legal entrepreneurship, or lawyers acting like entrepreneurs themselves. These fields, though, do not completely approximate changemaker lawyering because at the core, changemaking obligates a social objective.[61] I will touch on social enterprise lawyers and entrepreneurial lawyers to the extent that they effect a social end, but these fields do not squarely dovetail with changemaker lawyering due to their lack of a fundamental social motivation.

First, social enterprise law refers to the provision of legal services on matters such as business formation, financial and investment regulations, tax compliance, and intellectual property to legitimize, enable, and grow social entrepreneurs' organizations.[62] Lawyers have helped design and lobby for new legal entities such as the B Corporation, flexible purpose benefit corporations, or low-profit limited liability corporations (L3C's), which are designed to help hold entities accountable to their social missions.[63] Now, social enterprise law has become a field of law with distinct theories and practitioners. Law schools, including U.C. Berkeley, teach social enterprise law and host transactional legal clinics that support early-stage social enterprises.[64] Social enterprise law nonetheless situates the lawyer in a somewhat conventional professional position, employing their transactional business, financial, and corporate expertise for social enterprise clients. The lawyer is not the social entrepreneur, but rather operates in service of the social entrepreneur. However, to the extent that they operate for a social end, a social enterprise lawyer might be considered a changemaker lawyer.

Second is research on lawyers as entrepreneurs. These analyses characterize the lawyer as an entrepreneur seeking new opportunities to earn profits and tap new markets of previously underserved clients.[65] Daniels and

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61. *See supra* Part I.

62. Brendan Conley, *Law Collectives*, *in* JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 43, 53–56 (2012).

63. *See, e.g.*, Allen R. Bromberger, *A New Type of Hybrid*, 9 STAN. SOC. INNOVATION REV. 49, 50–52 (2011); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86–97 (2010). For a discussion and evaluation of the L3C entity, see J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 22–51 (2011). For a discussion of new applications of traditional business entities, new types of entities (such as L3C's, Benefit Corporations, and Flexible Purpose Corporations), cooperatives, and non-profits, see Jenny Kassan & Janelle Orsi, *New Kinds of Organizations*, *in* ORSI, *supra* note 62, at 151, 151–237.

64. *See, e.g.*, Deborah Burand et al., *Clinical Collaborations: Going Global to Advance Social Entrepreneurship*, 20 INT'L J. CLINICAL LEGAL EDUC. 299 (2014); *Social Enterprise Law*, UNIV. OF CAL., BERKELEY, LAW SCH., https://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=18498&termCode=B&termYear=2017 [https://perma.cc/CBN9-SXYV] (description for social enterprise law course).

65. *See, e.g.*, Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 469, 487–88 (2000) (studying in-housel counsels and naming the so-called "entrepreneurial" attorneys as the most successful at advocating for their corporate employers' interests); Carrie Menkel-Meadow, *Culture*

Martin observe that "[t]he literature focusing on lawyers typically equates entrepreneurship with commercialism . . . [and] strips out of the concept of 'entrepreneur' the idea that animates it, innovation."[66] They argue that lawyer-entrepreneurs focus on "innovation in the provision of legal services," while adhering to a "minimum requirement" of profit seeking.[67] Much of the criticism that urges the legal profession to embrace innovation and entrepreneurship emerges from this literature.[68]

Third, as noted above,[69] the public interest law community has long represented the category of attorneys driven by social missions. Yet not all public interest lawyers are changemaker lawyers—many organizations rely on traditional and non-innovative strategies and structures.[70] And not all changemaker lawyers are public interest lawyers—many of them, including some that I interviewed, are private firm attorneys who use their legal prowess in innovative and social ways that standard public interest lawyers might find unusual.[71]

Rather than carve out these types of categories, my perception of changemaker lawyers is more capacious, encompassing all lawyers with novel and creative solutions to social challenges and the skills that they employ. While these categories are certainly valuable to the legal world and provide important critiques to conventional lawyering, this "umbrella" understanding of changemaker lawyers serves several objectives. The challenges facing the legal profession today are great and almost existential, requiring solutions and innovations with a social purpose that match the scale of the problem. Also, creating subsets of "social enterprise lawyers" or "lawyer-entrepreneurs" could produce rigid boxes that define who counts and who does not. The concept I propose of changemaker lawyers is broader, more intricate and more multifaceted, offering a unifying characterization for all types of lawyers. Notably, none of the lawyers I interviewed self-identified as changemaker

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Clash in the Quality of Life in the Law: Changes in the Economics, Diversification, and Organization of Lawyering, *in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 99, 102–03 (Susan D. Carle ed., 2005) (calling the "real innovation in the profession" the rise of "entrepreneurial lawyers" who have "'revolution[ized]' . . . client-getting techniques" and "how law is practiced").

66. Stephen Daniels & Joanne Martin, *"We Live on the Edge of Extinction All the Time:" Entrepreneurs, Innovation and the Plaintiffs' Bar in the Wake of Tort Reform*, *in* LEGAL PROFESSIONS: WORK, STRUCTURE AND ORGANIZATION 149, 152–53 (Jerry Van Hoy ed., 2001) (arguing that "the concepts of entrepreneur and innovation can provide a useful framework for understanding" the practices of plaintiff-side lawyers in Texas).

67. Daniels & Martin, *supra* note 66, at 152–53.

68. *See, e.g.*, Stephanie Dangel & Michael J. Madison, *Innovators, Esq.: Training the Next Generation of Lawyer Social Entrepreneurs*, 83 UMKC L. REV. 967, 967 (2015); RHODE, *supra* note 59, at 57.

69. *See supra* Part II.A.

70. *See infra* notes 100–06.

71. *See infra* Part IV.

lawyers, yet the ends, means, and style of their work can characterize them as such.

III.
METHODOLOGY

My research seeks to evaluate my proposed definition of changemaker lawyers by assessing three key themes that appear to be common to them: (A) a commitment to overcoming long-standing norms in the legal profession, such as in the attorney-client dynamic, (B) novel constructions of their organizations, and (C) an attempt to create more trans-disciplinary practices. I present these themes as trends I found through analysis of existing literature in addition to ten personal interviews. While my themes are not meant as categorical elements that must all be present to define someone as a changemaker lawyer, I intend them as aspects that might be helpful in distinguishing such work, stimulating specific and more-in depth research, and inspiring future changemaker lawyers to develop innovative practices of their own.[72] Forging a common definition and identity could help spark a unifying purpose for all types of lawyers who are innovating for social change.[73]

Changemaker lawyers could represent examples or guideposts for how the legal profession may cope in a changing world. To evaluate changemaker lawyers' practices, I conducted personal, semi-structured interviews with ten lawyers with "unconventional practices"; that is, that their work might differ from the norm in their field.[74] As noted above, I adopted broad definitions of public interest law and changemaking to avoid presupposing any specific qualities or traits of changemaker lawyers. All of the interviewees are lawyers whose work has a social mission or vision. To ensure a broad spectrum of opinions and experiences, I sought variation in the types of professional sectors represented. The subjects include founders, executive directors, and legal directors of non-profit organizations; attorneys in private firms whose practices

72. In her study of integrative lawyers, J. Kim Wright explores different elements that comprise this group and proffers a similar caveat: "I am not claiming that all integrative lawyers practice with all of these elements, but I have seen that it is common for integrative lawyers to adopt several elements in their practices." *See* WRIGHT, *supra* note 13, at 14.

73. *See supra* note 41. I have purposely foregone analysis of other themes that emerged from this research. For instance, many of the attorneys employed diverse, multidisciplinary approaches beyond litigation. While this is a useful insight, it is already well documented that public interest lawyers rely on multiple strategies, and it likely does not represent a distinctive characteristic of changemaker lawyers. *See, e.g.*, Nielsen & Albiston, *Organization of Public Interest Practice*, *supra* note 41, at 1611–12. Also, I did not address resources and financing mechanisms because the interviews failed to indicate any novel themes or strategies that have not been explored already. For a comprehensive empirical study of public interest funding, see Albiston & Nielsen, *Funding the Cause*, *supra* note 43.

74. The University of California, Berkeley Committee for Protection of Human Subjects approved this research (Protocol ID 2016-11-9311). Pursuant to Institutional Review Board requirements, I have maintained the confidentiality of the identities of these interview subjects.

are not standard to typical private practice; solo practitioners; and attorneys in academia and the public sector.[75]

I identified these interview subjects through personal recommendations, preexisting contacts, and the Berkeley Law alumni network. I do not purport to represent this group as an empirical sample of lawyers. No systematic database of changemaker lawyers exists. In this regard, this research faces many of the same problems that confront other academic researchers in this area, namely the relative absence of systematic studies in the field and a lack of a public database of public interest organizations.[76] I attempt to add modestly to the existing stock of empirical information by providing some demographic information about each subject in Appendix II of this Note.

To protect the interview subjects' privacy and assure their comfort in discussing their practice's inner operations, I kept them anonymous by removing all identifying information from the notes and recordings and providing pseudonyms. During the interview, which lasted between forty-five minutes to one hour, I asked subjects to describe the nature of their practice, their strategies, how they developed these strategies, and the skills and expertise that they employ. I also asked about their organizational models (such as size and leadership style), financing schemes, and external partners. I further asked them for their interpretation of other lawyers' and non-lawyers' opinions of their work, what insights they drew from legal and non-legal fields, and what differentiated their practices from other lawyers' practices. I asked about their relationships with their clients, but I did not ask them to describe individual clients to avoid any breach of client confidentiality. In reproducing their comments below, all remarks are unedited except where needed to achieve concision.

Despite having widely disparate practices, certain themes are common to them all, from the more traditional to the more "radical." Most obvious were commonalities in practice type and organizational strategy. Less obvious but more valuable to my research were the subjects' discussions about the nature of their relationships to other parties, such as clients, lawyers, non-lawyers, and strategic partners. Subjects frequently offered insights into the position of their organizations and approaches within the larger legal profession.

Finally, I relied on theoretical aspects of changemaking to inform and guide some of my larger conclusions, although I was careful to let my data direct me to the relevant theories and not the reverse. This is especially relevant given that none of these lawyers in their interviews self-identified as changemaker lawyers. Yet significantly, they are each chipping away at the monolithic conventions of the legal profession and presenting examples of innovative legal advocacy.

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75. The interview subjects from academia and the public sector are better described as expert lawyers who may not be practicing as changemaker lawyers but who are nonetheless knowledgeable about the field.

76. *See* Rhode, *supra* note 41, at 2028–29.

IV.
COMMON THEMES IN CHANGEMAKER LAWYERING

A. Subverting Power Dynamics and Norms in the Legal Profession

One of the most important contributions that changemaker lawyers offer is on the shape of the legal profession itself by dismantling some of the hierarchical structures and rigid protections that lawyers have adopted to preserve their elite status in society. Changemaker lawyers acknowledge that their practice might be subtly subversive, they alter relationships of power with their clients in part by demystifying legal concepts, and ultimately, they extend greater agency and autonomy to clients in their decision making.

The professional monopoly that lawyers enjoy has contributed to the high cost and low supply of legal services, rendering complete access to justice unattainable for lower income communities.[77] Lawyers have constructed their profession by establishing licensing requirements, prioritizing certain bodies of technical knowledge, and upholding rules of ethics that elevate lawyers to a privileged position in society and "exacerbate power differentials between professional[s] and client[s]."[78] Public interest lawyers are not immune from this power dynamic; their elite training and use of more institutionalized advocacy mechanisms like litigation can sometimes conflict with the grassroots nature of their causes and clients.[79] This can generate an asymmetrical relationship between public interest attorneys and their more marginalized clients.[80] By extending access to justice to disadvantaged groups, public interest law seeks to expand the market of individuals who can claim legal services.[81] However, this reinforces the market's traditional norms and framework without fundamentally transforming the market itself. In other words, the growth and consolidation of public interest legal organizations over the past few decades has not meant any change as such to the underlying power structures of the legal profession and legal system.[82]

But as the public interest field has changed and grown more complex, new theories and models of lawyering have arisen with the potential to alter certain conventions that structure how lawyers operate. Concepts like client-centered practice have sought to change the oft-problematic lawyer-client relationship by

77. CHEN & CUMMINGS, *supra* note 41, at 343.

78. COREY S. SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE 21 (2009); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules*, *in* LAWYERS' ETHICS AND THE PURSUIT OF JUSTICE: A CRITICAL READER, *supra* note 65, at 18, 21–22 (noting that promulgating ethical rules is a natural upshot of lawyers' attempts to regulate their profession and control the market for attorneys).

79. *See* Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 56, at 164, 166.

80. *Id.*

81. *See, e.g.*, NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 3 (1989); Rabin, *supra* note 44, at 227.

82. *See* Nielsen & Albiston, *Organization of Public Interest Practice*, *supra* note 41, at 1619.

identifying challenges from the client's perspective and actively involving the client in designing comprehensive solutions.[83] Similarly, the concept of client autonomy—granting more agency to clients—has taken root. Social change strategies often recognize the centrality of "legal empowerment," which "seek[s] to cultivate the agency and power of the people with whom they work . . . [by saying for instance] 'I will work with you to solve this problem, and give you the tools with which to better face such problems in the future.'"[84] The field of grassroots lawyering has often sought a relationship of client empowerment that "avoids the rigidity of traditional lawyer-client interactions" and instead attempts to develop "solidaristic bonds" between them.[85] Lawyers in the field strive to allow clients to make their own decisions autonomously as an "expression and affirmation of the belief that clients and lawyers are equals."[86] Their work also values the diverse perspectives that embracing a wide array of stakeholders can bring.[87]

Changemaker lawyering demonstrates a natural evolution of this trend toward reconceiving professional norms in the profession, especially norms of hierarchy and power.[88] First, the changemaker lawyers I interviewed showed recognition that their work might run counter to traditional professional norms. "Carmen" is an attorney who founded a non-profit that uses insights from alternative dispute resolution, restorative justice, and mediation to support youth involved in the juvenile justice system. Staff members and collaborators with the organization are stationed inside courthouses and engage directly with young people facing detention to offer legal help. Then, they facilitate group dialogues and leadership trainings with the young people to help them overcome their personal challenges and set positive life goals. Carmen said:

> Traditionally, [juvenile defense attorneys] seek to get their clients off on technical grounds. They are not looking from a broader picture or viewpoint of the client; they aren't equipped to do anything

83. DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 19–23 (1991).

84. Vivek Maru, *Allies Unknown: Social Accountability & Legal Empowerment*, 12 HEALTH AND HUM. RTS. J. 83, 85 (2010).

85. *See* Thomas M. Hilbink, *You Know the Type. . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 688–89 (2004).

86. SHDAIMAH, *supra* note 78, at 68.

87. WRIGHT, *supra* note 13, at 295.

88. Of course, racial and economic justice critiques have often described oppressive hierarchical paradigms in the law and urged a more diverse, "anti-essentialist" approach to challenge these norms in all their forms. *See, e.g.*, Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY (2012); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER, *supra* note 65, at 230, 230–37; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Changemaker lawyers are not the first to promote this concept, but they represent a group of advocates putting the concept into practice.

> more. . . . They are instead trained to be circumscribed, limited in their ability to do what is necessary for the child's long-term interest. . . . The legal profession never saw itself as a helping profession . . . and what we want to have is a broader conversation of what the justice system means.

Carmen saw her work as challenging the norms of the adversarial criminal justice system, in particular how attorneys and courts conceive of their young clients. Her goal was to develop positive, long-term solutions for clients in the criminal justice system.

"Alexis" founded a non-profit organization supporting community economic development by counseling small-scale entrepreneurs and cooperatives and devising policy solutions to promote grassroots economic sustainability. She celebrated the organization's work as a redefinition of notions of wealth and equality through law.

> We are challenging conventional notions around business and the concept of the American dream . . . [and] we are challenging the boundaries of the legal profession itself by empowering people to help each other. We see lawyers not as service providers, but as individuals working within the communities to create a different world. This reconceives the role of lawyers.

Alexis noted that her organization often collaborates with private firm attorneys who offer pro bono counsel in transactional business development to their clients. However, their traditional training in corporate law sometimes paralyzed the pro bono attorneys from offering more novel, creative legal solutions and therefore hindered the organization's goals.

> Lawyers are sometimes the choke point for our movement. We in fact would like to work with more non-lawyer professionals, or at the very least activists or educators who are using the law in similar ways [as we are] . . . . There is a lack of recognition that all law should be public interest law; instead, legal workers are stuck in their old hierarchies and are not empowered to make change.

Two private sector attorneys made the same point, remarking that their work frequently ran up against the standard professional norms of public interest law. "Donna," an attorney at a corporate law firm who specializes in social enterprise development, observed that most private firm lawyers conceive of legal work with a social mission through the typical public interest framework. In contrast, she was committed to a large-scale transformation of the legal and financial industry frameworks around social enterprise.

> Few people get [my work] in Big Law. I know them all [the ones that do understand], but most don't see it . . . they see entrepreneurship as tech-centered. They are still focused only on getting on boards, non-profit organizations and pro bono work. What I am talking about is the corporate form and capital markets altogether.

While Donna is using traditional legal skills as a transactional Big Law partner, her objectives are wholly different than most similarly-situated lawyers driven by an innovative, social mission. She is dedicated to using her private sector skills to wholesale disrupt economic systems.

Another attorney, "Gary," with legal experience in the non-profit and corporate transactional sectors, offered the same judgment of a somewhat narrow-minded private legal field. Although he now works in the public sector, Gary had served as an adjunct professor on social enterprise and had coordinated activities with different social enterprise legal clinics. He argued that his perspective, the belief in "law as a means to create positive change for the good of all," was the product of a generational difference among private lawyers. Younger lawyers like himself instinctively recognized that lawyers could use their skills to create social impact outside public interest fields.

> Millennial lawyers are more on the same page as me. We don't have to define "blended value" to them. They see that we need more positive change in the law, and they have a tendency to self-identify as changemaker lawyers. They don't see things so rigid. The older generation of lawyers is more confused with these labels and definitions. They say, "stick to what you know; stick to your sector." They are very rigid and see that doing social good is only something for a pro bono practice.

Gary observed that older generations of lawyers were also less likely to know how to apply their day-to-day legal expertise to advance a social cause.

The interviewees all acknowledged intuitively that their practice as changemaker lawyers was distinct and might conflict with traditional notions of the legal profession, including of public interest law itself. Their insights indicated that lawyering for social change today might seek to shift whole paradigms of practice, far more fundamentally than the original public interest lawyer sought to do. The changemaker lawyers described here, in their own small way, all recognized the failure of certain norms in the frameworks within which they worked, and they are devising new legal notions and ideas that challenged those frameworks. Although their ultimate objectives might not extend to full-scale societal change, they nonetheless are committed to questioning norms and engineering new legal solutions to effect change.

So-called "radical lawyers" call for similar redefinitions of the legal system, "even if they chose to play by its rules" to achieve their goals.[89] The attorneys I interviewed are *themselves* playing by the rules; i.e., the laws of the criminal justice, economic, and financial systems, respectively. But their creative mechanisms that harness the law for a different social purpose render their work both radical and innovative.

89. *See* Corey S. Shdaimah, *Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 56, at 220, 230.

By undermining lawyers' elite status as a profession and demystifying the legal profession's jargon, changemaker lawyers restructure the attorney-client relationship. For example, "Erica," the executive director of a prominent legal aid organization, shared that in providing direct services to lower-income clients, she is firm that their advocacy must be clear and understandable to the client. She paraphrased a quote she attributed to Van Jones, the civil rights lawyer and former Obama Administration official:

> You can take simple things and make them complicated to benefit yourself, or you can take complicated things and make them simple to benefit others.

She described the first clause of the quote as the philosophy of most attorneys and the norm in the profession. Alternatively, the contrasting client-centered and equalizing notion served as Erica's guidepost in her leadership practice and her organization's mission.

"Jessica" is another attorney who studies other practices and coaches attorneys to develop more values-based legal practices. She described examples that she found among other lawyers, first drawing attention to contract law as an area where lawyers can create a more equitable relationship with their clients. By creating "conscious contracts," lawyers write their documents in plain and understandable language for all parties to interpret, and to establish a relationship and partnership between the parties. She offered a different example that came from studying legal innovations in other countries, such as South Africa:[90]

> One exciting development I've seen in the law is the use of cartoon contracts. These are creative and innovative methods that are visual and accessible for every person, even people who are illiterate.

Alexis, who worked in community economic development, also recommended the use of images to share information and create small business and cooperative agreements that were nonetheless legally binding.

> Most lawyers try to make their work harder by obscuring information or skills [from their clients]. That's not me. I want to make it super easy to share legal documents.

Many interview subjects stressed that enhanced client agency and positions of equal standing were central to their practices. "Benjamin" is a private attorney who has a solo practice that counsels small businesses and public entities to develop sustainable and collaborative infrastructure-type projects that inherently engage the wider community in their formation. He also advises governments on policies that promote these collaborative development projects. Benjamin affirmed that he enters into relationships with his clients seeking an equitable playing field.

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90. For more information about conscious contracts as an approach for changemaker lawyers, see Christopher Halburd, *Doing the Deal: Contracts for Conscious Capitalists*, *in* WRIGHT, *supra* note 13, 148, 148–50.

> [As a lawyer] you want to try to cultivate a peer relationship. It can't be one completely because you're serving them and working with them to advance their goals. This is not an equal partnership of course . . . and I have to always be careful not to import my own policy goals into the equation. The basic "lawyer set-up" of the relationship does help protect this.

Organizations that pursue social change through impact litigation or policy may have a more distant relationship with their clients, yet they are no less committed to equality in the relationship. "Helen," the legal director of a small non-profit conducting civil rights impact litigation, described the organization's community-centered approach. In her case, she identified that the objectives to traditional impact litigation sometimes conflict with the client's interests, and that the lawyers, despite their desired socially beneficial outcomes, largely remove themselves from the clients. Helen emphasized that her organization sought to counter this norm.

> We have less of a relationship with individual clients than a standard legal aid agency might. Many of them are wary of legal organizations that came in to support their work but later abandoned them. We are looking to the clients to figure out the remedies and how they achieve what they want. We identify as community lawyers. We want them to lead. They are the ones responsible for carrying it out after we leave.

For example, in one significant civil rights case against a public entity, Helen's organization and their co-counsel engaged community organizations in addition to specific individuals as plaintiffs to help ensure greater buy-in from groups that are in touch with the needs of the community. These organizations can then mobilize community members who may not even be directly involved in the lawsuit around the issues in the case and equip them with the knowledge and skills to monitor the public agency's actions after the suit concludes.

These changemaker lawyers intuit the possible contradictions within so-called "mandatory autonomy" that "represents a paternalistic or 'best interest' view that forces even reluctant clients . . . to make decisions that they might not want to make."[91] They recognize that their clients come to them for their legal counsel, which inherently generates a relationship of the knowledgeable service provider counseling the passive recipient. Their experiences might represent a more "relational" version of autonomy that acknowledges the values that each party in the relationship brings, and that "the marshalling of resources . . . is an exercise of agency and self-determination that further enables clients to retain or regain control of their lives."[92]

By shifting power dynamics, changemaker lawyers pave the way for a natural evolution within legal practice, or at least within the subset of public interest or social justice lawyers. During the 1990s, many public interest law

91. SHDAIMAH, *supra* note 78, at 68.
92. *Id.* at 97.

organizations steered away from professional legal strategies like litigation and formal legal norms and toward "lay lawyering" that "decisively rejected established narratives about the centrality of the public interest lawyer in movements for social change."[93] This dynamic has played out in diverse organizational settings, from more grassroots-type entities to more impact litigation-focused groups like Helen's. Downplaying the lawyer and elevating the client has, in many social movements, served as a more effective tool for collective action,[94] and the evidence here suggests that this dynamic is also manifest in other legal settings. Empowering clients to contribute their voices and stories can enhance the changemaker lawyer's larger strategy.[95]

B. Reenvisioning a Values-Driven Organization

A second critical theme among changemaker lawyers is their rejection of conventional management schemes in favor of constructing their teams and organizations to reflect their social values. Generally, the legal profession has specialized into niche legal practice areas, centralized power and decision making in the practice area and within the firm, and formalized policies and procedures.[96] The largest firms typically feature rigid, hierarchical decision making and corporate, rather than entrepreneurial, values.[97] Smaller firms tend to be more entrepreneurial, make their decisions ad hoc, and are driven by the values—and the ultimate power—of their founders.[98] Trained in the law, not in organizational management, many law firm partners and other high-level attorneys frequently lack the day-to-day leadership and operational skills to run a successful business and manage their staff.[99]

While traditional public interest law organizations generally "do not resemble the business-like model of modern private law offices,"[100] they have nevertheless adopted at least some of the cultural and organizational aspects of

93. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1906–07 (2007).

94. *See id.* at 1907.

95. Simone Campbell, *Lawyer as Agent of Change*, *in* WRIGHT, *supra* note 13, at 311, 311–13. Indeed, a "strategic alliance or partnership" model might even better suit traditional private law firms and their corporate clients. *See* David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2070 (2010).

96. *See* DAVID J. PARNELL, THE FAILING LAW FIRM: SYMPTOMS AND REMEDIES 71–77 (2014).

97. *Id.* at 88–90. Large firms' increasing adoption of traditional corporate management structures could risk challenging some of the basic principles of professionalism that lawyers ascribe to, like commitment to the rule of law and access to justice. *See* Jayne R. Reardon, *Professionalism as Survival Strategy*, *in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION, *supra* note 16, at 255, 256.

98. *See* PARNELL, *supra* note 96, at 82–83. While top-down management styles might still pervade these smaller firms, they are more likely than larger firms to encourage collaboration in management decisions. *Id.*

99. Rhode, *supra* note 41, at 2064–65.

100. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 63.

their private sector peers. Many lawyers in public interest law organizations may bring experiences from hierarchical firm backgrounds. At the very least, they all experienced a law school pedagogical model that emphasizes hierarchy and precedence over creativity.[101] Over time, public interest organizations underwent a relative standardization and professionalization of their management structures.[102] As new public interest law organizations emerged, they began to adopt relatively uniform organizational models irrespective of their practice or political positions. [103] Funding also influenced organizational approaches, including limiting the types of cases and work in which the organizations could engage.[104] To achieve prominence, sustainability, and effectiveness, public interest organizations sought a seemingly elite status through their own professionalization, often at the expense of their structural malleability and grassroots culture.[105] Within the organizational environment of larger social cause coalitions and movements, the most bureaucratic or "professionalized" organizations (as defined based on their staffing, funding, and strategy decisions) tended to gain more legitimacy with the other institutions, like courts and private firms, with which they needed to cooperate to achieve their legal objectives.[106]

In contrast with these general characterizations, changemaker lawyers' organizations establish new institutional models that derive from the values they espouse. These lawyers face organizational hurdles akin to the problems that traditional public interest lawyers experience, but the internal structures of their organizations may afford them greater flexibility, opportunities to build tools for consensus, and action. Their leadership deliberately designed these internal policies and structures to reflect their mission, further enable their teams to achieve these goals and serve a demonstrative function that might help shift legal practice more broadly.

Changemaker lawyers articulated this theme of a values-driven organization in different ways. "Jessica," who coaches attorneys to integrate their values into their work and structure it around innovation and collaboration, described how conventional lawyers separate their values from their practices. Lawyers with values-driven practices underlie her conception of changemaker lawyers.

> Most of us fall into the silos we are given by law school and the culture of law. Yet when people suddenly align their law practices based on what they love, what their values are, and what is the difference they

101. *See, e.g.*, *id.*; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL ED. 591, 602–03 (1982).

102. Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 70.

103. *Id.*

104. *Id.* at 88–89.

105. *See* Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 56, at 145, 148; Rhode, *supra* note 41, at 2064–65.

106. *Id.*

> want to make [in order] to make value in the world, they have given themselves permission to break out of the silos.

When attorneys adopt this kind of integrated orientation toward their practice, Jessica said, they organize themselves and their work differently too.

> They learn how to manage their time based on their values. They have a different relationship with their staff—it becomes a really positive place to work with lots of respect. There is a division of labor based on skills and what [each person] likes to do.

Coming from a wholly different practice, Donna is a Big Law attorney who advocates for creative forms of social enterprise development, around which she dreams of redesigning the entire financial system. She recognized that her social enterprise clients' organizations were their distinguishing factors, and not necessarily their social missions. Much of her work, then, centered on advising her clients to craft sustainable organizations that might attract investment and increase their impact.

> The uniqueness is in the business model, not the end product. It is *how* they are doing their work as a way to promote positive change.

Implicit in her remark is an understanding that the organizational mechanism (the "how") is critical to accomplishing the social mission (the "what"). While Donna's practice differs from those of public interest lawyers, she also understood the importance of an organizational model to achieve the social mission and prioritized her legal advice toward that objective.

Creating an organizational model that reflects the lawyers' values depends on certain factors. First, organizations have purposely designed flat or non-hierarchical structures that oppose the traditional hierarchies of other entities. The organization achieves its purpose better and maximizes limited resources by enabling a greater number of stakeholders to make decisions, share information, and gain access to the organization's outcomes.[107]

Alexis described how the community economic development non-profit organization she co-founded implemented an internal structure that modeled the values it aspires. The organization advocates for more cooperative and collective ownership, and the internal makeup of the organization reflects this mission. Alexis said that this serves a demonstrative role to other organizations.

> We have created a unique structure of governance. We are made up of unique, semi-autonomous circles, not shaped by a mastermind, but by people on the ground. We use consensus-based decision-making to maximize everyone's leadership potential without a hierarchy. This is more powerful and makes changemaking more effective. As a result, we have more empowered people too, with more equitable work and a diversity of voices. Now based on our model, we are helping other non-profits to restructure themselves in a similar way.

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107. ORSI, *supra* note 62, at 152–53.

She further explained that the innovation of her practice is in how they address their mission, as other groups focus on similar thematic goals. They incubate new organizations and contribute their own personal experience of leadership and decision making to grow the wider field of collaborative and cooperative organizations. Alexis indicated that organizational role modeling might serve as a key tactic for public interest lawyers to advocate their values.

It is more difficult to create a values-driven organizational model when the culture and preexisting structure is rooted in more traditional expectations of organizational hierarchy. "Erica," who leads a free and low-cost legal services organization, lamented the tension that she and her team face between attaining the radical, revolutionary change they aspire to and the inherent restrictions of the legal profession.

> We have to have opportunities to get up close and personal with inequality—to be proximate to understand what we as lawyers need to do differently . . . . This requires us to be creative and less risk averse . . . . Yet we are operating within set structures and power dynamics. Our work must be then creative within those narrow confines.

Therefore, the radical notion Erica and her organization espouses is a "holistic and multimodal" approach to legal services that contemplates the distinct yet deeply interconnected legal and non-legal challenges their clients face. This recognition arose directly from the close exposure to the community that the organization sought. Yet implementing a holistic approach brought her into some internal conflict. For instance, when Erica championed a new practice area that combined elements from civil legal aid and criminal law to provide services to formerly incarcerated individuals, she faced skepticism from other attorneys in the office.

> Our resources and [general legal] narratives create silos, and we are taught, "Don't bend or mess with the silos" . . . but people are not in the same silos. This was hard even for the attorneys to understand and to buy into a different narrative. It made some people uncomfortable.

Erica also described an interdisciplinary project at the organization to expand affordable housing. The project joined its housing and economic rights departments to develop short term (e.g., eviction defense) and long-term (e.g., affordable housing policy) solutions. This cross-team partnership encompassed regular accountability measures and routine team discussions about incorporating new strategies for fair housing policy such as cooperative or land trust development. Facilitating interdisciplinary practice collaboration within the organization allowed the organization to reify its mission of promoting holistic legal services. Erica connected the inter-organizational plan with a larger narrative of challenging traditional norms of the legal profession.

> Creative lawyers making change must be brilliant at breaking narratives . . . and challenging existing structures. By working within these structures, we [the organization] were losing opportunities.

Erica recognized that to achieve the organization's mission, it was imperative to think creatively and confront many of the structural conventions that define legal organizations.

Another way changemaker lawyers embed their mission and values into their structures is through intentional staffing of boards and leadership. "Francis" founded a non-profit several years after working independently as an advocate for a particularly marginalized social group. Hers is the first and only organization working directly to promote the rights of this group, which she admits is a relatively small and largely invisible community. Despite founding the organization, she later stepped down from the executive director role and replaced herself with an individual who identified as a member of the target community.

> Because we work on a unique issue, we function more in an advisory role to the community. We have made sure that our staff and board members come from within the . . . community. We also don't have lawyers defining the legal strategy. We go to the clients and say, "Here are the arguments we want to make; what do *you* think of them?"

For Francis, the organizational strategy and makeup must reflect the identity and values of her client base. The narrowness of her legal issue facilitates this approach. If the organization were to amplify its mission, it could possibly dilute the uniform cultural identity of the organization. Changemaker lawyers with a more diverse target community or practice area may have difficulties in following this subject's organizational model.

These attorneys altogether underscore the importance of integrating their values into their organizational models. Creating a values-driven and values-reflective organization is a popular phenomenon in the business world, epitomized by such theories as "conscious capitalism."[108] Frederic Laloux, a prominent management consultant and organizational theorist, describes a new type of organizational model that embraces three elements.[109] First is "self-management" that relies on "a system based on peer relationships."[110] Second is "wholeness," referring to a "consistent set of practices that invite us to reclaim our inner wholeness and bring all of who we are to work."[111] Last is "evolutionary purpose," in which "members of the organization are invited to listen in and understand what the organization wants to become, [and] what

108. *See, e.g.*, R. EDWARD FREEMAN & ELLEN R. AUSTER, BRIDGING THE VALUES GAP: HOW AUTHENTIC ORGANIZATIONS BRING VALUES TO LIFE (2015); RICHARD BARRETT, BUILDING A VALUES-DRIVEN ORGANIZATION: A WHOLE SYSTEM APPROACH TO CULTURAL TRANSFORMATION (2006); Sherry Hakimi, *Why Purpose-Driven Companies Are Often More Successful*, FAST CO. (July 21, 2015), https://www.fastcompany.com/3048197/hit-the-ground-running/why-purpose-driven-companies-are-often-more-successful [https://perma.cc/65JD-RTQR].

109. FREDERIC LALOUX, REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS 56 (2014).

110. *Id.*

111. *Id.*

purpose it wants to serve."[112] Paramount to these new organizations is teamwork, self-management, and less hierarchical decision making.[113] Zappos, the online shoe retailer, ventured into this new paradigm when it transitioned to a "holocracy," a theory based on a fully egalitarian organizational structure. While the restructuring has been rocky, Zappos's leadership team remains committed to the principle of a flat organization that draws from, and reinforces, its idiosyncratic and fun company culture; they also believe that its tribulations are the expected growing pains of injecting a radically new and innovative structure into their workforce.[114]

Additionally, one of the defining characteristics of for-profit social enterprises is that they "embed" their core social mission into their organizational model and legal requirement to generate profit.[115] The ideal structure "enhance[s] the entity's ability and prospects for identifying, fostering, and expanding a sustainable, embedded social technology to achieve a desirable social mission."[116] The structure should be flexible, pragmatic, and attractive to potential donors, investors, employees, and other aspiring social entrepreneurs who might want to replicate the model.[117] These characteristics, if properly enacted, enable the organization to achieve its larger objectives and aspire to its values.[118]

While values-based organizational structures are thus more accepted in the business space, they may be more novel in the law. The "alternative law collectives" trend that arose in the 1960s and 1970s, in which a group of lawyers structured their legal practice around cooperative arrangements with common ideological commitments and salary parity, generally disappeared in the 1980s.[119] They are only now returning as a possible model for legal practices.[120] Other models that consider "less hierarchy and more consensual decision-making" are recognized but given scant attention.[121] Changemaker lawyers

112. *Id.*

113. *See id.* at 61–83, 99–107.

114. *See* Zack Guzman, *Zappos CEO Tony Hsieh on getting rid of managers: What I wish I'd done differently*, CNBC (Sept. 13, 2016), http://www.cnbc.com/2016/09/13/zappos-ceo-tony-hsieh-the-thing-i-regret-about-getting-rid-of-managers.html [https://perma.cc/4AG9-396T]; Jennifer Reingold, *How a Radical Shift "to Self-Management" Left Zappos Reeling*, FORTUNE (Mar. 4, 2016), http://fortune.com/zappos-tony-hsieh-holacracy/ [https://perma.cc/UK7D-GK82].

115. Katz & Page, *supra* note 63, at 90.

116. *Id.* at 92.

117. *Id.* at 92–93.

118. *See id.* at 102.

119. *See* Menkel-Meadow, *supra* note 65, at 103; Conley, *supra* note 62, at 43–44; John Montgomery, *A Law Firm Based on Love*, *in* WRIGHT, *supra* note 13, at 267, 270 (recommending that changemaker lawyers demonstrate their core values of "integrity, respect, teamwork, and quality" by converting their law firms into certified B corporations with social responsibility as a core measure of achievement).

120. *See* Menkel-Meadow, *supra* note 65, at 103; Conley, *supra* note 62, at 43–44; Montgomery, *supra* note 119, at 267, 270.

121. *See* Menkel-Meadow, *supra* note 65, at 103. Pangea Legal Services, a non-profit organization based in San Francisco that represents immigrants in detention and advocates for

might offer insight to the larger legal field in how they embed their outward values inward. Changemaker lawyers want to "practice what they preach" by creating organizations that emblemize these concepts through flatter and more autonomous decision making, cross-practice collaboration, and teams that are reflective of their constituencies. As collaboration and teamwork becomes more critical in the economy, too, lawyers will face the imperative of constructing organizations that catalyze these values.[122]

C. Crossing Silos and the Trans-Disciplinary Practice

Despite the law's intertwined relationship with other social institutions and elements, the legal profession prides itself on its independence. Yet this in part gives rise to a profession that traditionally guards against allowing lawyers to fully collaborate and cooperate with other professionals, like social workers, doctors, or accountants, to make decisions affecting clients.[123] Many of the changemaker lawyers with whom I spoke criticized the "silo-ization" of the legal profession—its rejection of partnership and contributions from non-legal fields in the pursuit of resolving clients' challenges. They discussed fomenting trans-disciplinary "holistic" practices to confront both the legal and the non-legal dimensions of the challenges their clients face. These entailed adopting different roles as an individual advisor, incorporating non-lawyers into their organizations, and forming coalitions with non-lawyers.

Changemaking collaborations present numerous significant advantages to legal advocacy. They come in different forms: as "in-house collaborations" whereby legal organizations integrate different legal and non-legal practices to address clients' challenges holistically and as coalitions of diverse groups advocating for comprehensive social change. Lawyers with broader exposure and diversified areas of expertise can proffer more useful and comprehensive advice in service of a more integrated society.[124] While demands for interdisciplinary practices have frequently arisen in the corporate context, such as fomenting greater partnership between lawyers and accountants,[125] Big

immigration policy, developed a model in this regard. They have "adopted a shared leadership structure to distribute ownership and accountability horizontally throughout the organization" that practically entails "[e]qual salaries," "[t]ask redistribution" to be "better able to see and freely propose new projects where needed," and "[i]ndividual autonomy and collective responsibility" that ensures the "efficiency of our structured system and shared decision-making policies." *Horizontal Structure*, PANGEA LEGAL SERVS., http://www.pangealegal.org/horizontal-structure/ [https://perma.cc/V28M-7UAG]. Organizational structures like theirs merit additional attention.

122. *See* Reardon, *supra* note 97, at 265.

123. *See* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 11 (AM. BAR ASS'N 2016). For a history of this notion of an independent legal profession that disapproves of so-called "multidisciplinary practices," see L. Harold Levinson, *Collaboration between Lawyers and Others: Coping with the ABA Model Rules after Resolution 10F*, 36 WAKE FOREST L. REV. 133, 137–43 (2001).

124. Reardon, *supra* note 97, at 261.

125. *See* RHODE, INTERESTS OF JUSTICE, *supra* note 7, at 138; *see also* Levinson, *supra* note 123, at 146–62 (providing hypothetical examples of lawyer and non-lawyer relationships, all pertaining to business-related partnerships).

Business would not solely benefit from in-house collaborations. Partnerships with non-lawyers might "increase access to cost-effective assistance" for low-income communities who "need assistance cutting across occupational boundaries."[126] Meanwhile, building coalitions with different external stakeholders enables greater exchange of information and forms the basis for innovative, systems-changing advocacy.[127] It also ensures inclusivity of all marginalized groups and intersectionality, a key objective for achieving greater access to justice, and a focus on the cross-cutting, systemic challenge at the root of a problem.[128]

While advocacy through networks is relatively common, in-house collaborations and trans-disciplinary practices are more novel for changemaker lawyers, despite professional responsibility rules that largely circumscribe these tactics.[129] Changemaker lawyers have crafted creative ways to pursue more holistic practices without violating ethics rules. My interview subjects described an "advocate of many hats" phenomenon whereby they rely on skills from non-legal fields in advising their clients. For instance, Benjamin defined his work as a solo practitioner as blending legal and policy skills. The nature of the client, typically either a public entity's legal department or the project manager of a community based organization, determined which set of skills he would employ.

> I work with a lawyer and consultant hat on. How much of my work could be done with a lawyer or a non-lawyer hat depends on the type of project I am consulting on and the client I'm working with. . . . If a law office of the public entity comes in, I work as a lawyer. This entails a full slate of lawyer privileges, like [attorney-client] privilege, malpractice insurance, and working with their in-house lawyers. . . . Other times, when project managers bring me in as a consultant, I don't have the professional responsibilities of a lawyer, but the actual work is very similar. I still prepare a draft document written in a "lawyerly way." I don't have the responsibility of being legally sound, but I must show though that it *is* legally sound. . . . My consultant hat is not legal work technically speaking, but what feels like legal work on "transactional matters" comes down to what responsibilities I'm taking on.

The so-called hat that this changemaker lawyer wears does not necessarily establish a distinct work product, but rather affects *how* he presents himself and his work. He has incorporated different experiences and skills from distinct disciplines under the guise of one practice area.

Another way that changemaker lawyers involve non-legal work is through staffing their organizations with non-lawyers. Some legal services organizations

126. RHODE, INTERESTS OF JUSTICE, *supra* note 7, at 138.

127. Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law*," 2005 WIS. L. REV. 455, 462–63 (2005).

128. *See* WRIGHT, *supra* note 13, at 295.

129. For a discussion on these rules, see *infra* Part IV.

depend on non-lawyer volunteers to conduct certain tasks like interviewing, researching, and engaging in non-legal advocacy that are nonetheless crucial components of client representation and that might be narrowly perceived as the unauthorized practice of law.[130] Carmen, the lawyer working on juvenile justice reform, incorporates skills and techniques from mediation, counseling, and social work into her organization. Volunteers working within courthouses interact with juvenile defendants, conduct initial intake interviews, organize them into small peer groups, and facilitate dialogue and discussion circles that challenge young people to reflect on their personal values and goals. Carmen did not equivocate as to the value of involving insights from other disciplines.

> Most of our volunteers are not lawyers. Lawyers often can't predictably be available for these kids because of their schedules, and we have them meet at least one night a week. So we are always looking from other disciplines, communities, and professions to help. Psychology and psychiatry are two examples.

Erica, the director of the legal aid organization, explained that their pursuit of holistic advocacy involves professional students from other disciplines as interns in their juvenile justice and housing practices.

> We currently have three social work students working in our practice. We want people from social work practices who have a different understanding and approach to social welfare to inform our work. We are always looking for collaborations with other service providers . . . but we have to think about how our resources will allow us to do this.

Erica's remark calls attention to two important considerations. First, some of the first forays into interdisciplinary collaborations for lawyers incorporated social work in the legal aid context, and this changemaker lawyer hints at why. Social workers provide a different understanding of clients' needs and can offer distinct services. However, because social workers have different ethical rules, such as those regarding confidentiality, a changemaker lawyer leading an organization blending attorneys and social workers must be careful not to blur their roles too much.[131]

Erica also observed that resources may limit collaborations. Tactically, changemaker lawyers' resources may affect their strategies for change.[132] Likely the funding organizations and foundations ascribe to the traditional notion of lawyers' independence, and this informs their giving policies. They may thus feel uncomfortable or uncertain about funding an organization's innovative,

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130. *See* Haney Keith, *supra* note 21, at 88. For potential ethics violations related to the unauthorized practice of law that arise from lawyers' collaboration with non-lawyers, *see infra* note 141.

131. *See* Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism, and Mandated Reporting*, 13 CLINICAL L. REV. 659, 664–78 (2007) (distinguishing between the ethical and professional obligations of lawyers and social workers in the context of an interdisciplinary practice involving both).

132. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 89.

trans-disciplinary strategies with non-lawyers. Erica alluded to this point, observing that in fundraising for the holistic programs that involve multiple programmatic areas within her organization, she sometimes had trouble convincing her usual funders of the value of such transversal work. Further research, including interviews with philanthropists, would be helpful to better understand this point.

While in-house collaborations can offer distinct advantages to their organizations, interview subjects advised that professional responsibility rules can somewhat inhibit them. Benjamin, the solo practitioner, said that he has to self-regulate to ensure his ethical conduct and not overly blend his legal and non-legal policy practices.[133] Insofar as he tries to synthesize these skills, some separation is required because of the rules governing his strictly legal work.

> You have to be responsive to your clients in a practice. It's up to you to maintain lines and be clear if you're acting as a lawyer or not. If you are, then you have to abide by professional responsibility rules; if you aren't, then you don't have to. I learned this by being responsive to my clients with the framework of the professional responsibility guidelines.

In a sense, Benjamin here implies that he stays faithful in his transdisciplinary practice as a consequence of his own personal sense of integrity and obedience to the spirit of the rules. Similarly, Alexis reported that fidelity to other ethical rules becomes complicated in a transdisciplinary practice.

> Because we are creating a seamless experience between lawyers and non-lawyers, we sometimes face a blurriness around attorney-client privilege.

In Alexis's conception, a client who communicates the same matter to her (an attorney) and a non-lawyer collaborating with her (like a business advisor) within the same organization could not invoke the attorney-client privilege, even if the two professionals are working together toward the same end on behalf of the client. For sensitive matters, the possible repudiation of the powerful privilege rules might disincentivize lawyers and potential clients from entering into a transdisciplinary, holistic engagement, even if that would suit the matter. Benjamin and Alexis both suggest that fidelity to the rules is more complicated for unconventional practices, and that changemaker lawyers must tread lightly around this issue.

The figure of the independent, siloed attorney that the ethics rules embody does not seem to reflect a twenty-first century notion of changemaker lawyering that encompasses approaches premised on mediation, collaboration, a more comprehensive "whole-person" view of one's client, and community

133. Note that the Model Rules themselves expect such self-regulation: "Compliance with the Rules . . . depends primarily upon understanding and voluntary compliance." *See* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 16 (AM. BAR ASS'N 2016).

advocacy.[134] Yet nonetheless, the rules today still inhibit changemaker lawyers from forming in-house collaborations with non-lawyers.[135] On the other hand, coalition building enables them to broaden their scope while retaining their more traditional strategic models. Francis evaluated how she works with her traditional adversaries to push her agenda. Her non-profit organization advocates novel constitutional and tort law arguments on behalf of patient autonomy in medical decisions that physicians generally make without the patient's consent. A typical case might be brought on behalf of the patient against doctors and hospitals, which would naturally trigger their mistrust toward Francis's organization.

> I knew it would be hard to find plaintiffs for our cases to establish precedent, so I had to go directly to the medical community, which knew these patients. We are now educating them, for instance by attending medical conferences. At first they [doctors] were afraid of us, but as a result [of this fear], they are inviting us to their conferences and to consult with their ethics and treatment teams at hospitals to protect themselves. . . . Now, we have many closet doctor allies.

Francis saw cross-disciplinary coalitions with doctors—even clandestinely—as a shrewd mechanism to achieve her goals, despite the "distrust" she described among the doctors. Now, the organization is trying to establish greater trust and legitimacy by inviting doctors into their strategy. While Francis's organization does not formally involve medical professionals in the day-to-day strategy, such as by employing doctors to give medical advice to clients or educate hospitals, they consider partnerships as a critical element for the strategy.

> We involve medical and therapist skills in our work and with clients. We have even had doctors on our board. You have to have compassion for doctors.

Helen, the legal director of another civil rights advocacy organization, also indicated that their unique strategy required that they collaborate with non-lawyers. To boost the effectiveness of their litigation and policy strategies, Helen's organization seeks to change individual consciousness around social issues. They rely on social science data to buttress and substantiate legal arguments and the arts to confront implicit biases. Helen emphasized her organization's role in communicating information and creating a platform to engage a diversity of actors around their mission.

> The academics and social scientists feel excited that their work has an impact beyond academia. We are trying to engage with folks, lawyers and non-lawyers . . . by borrowing their skills and data and putting them

134. *See* Robert Rubinson, *The Model Rules of Professional Conduct and Serving the Non-Legal Needs of Clients: Professional Regulation in a Time of Change*, 2008 J. PROF. LAW. SYMP. ISSUES 119, 121–27 (2008). The "whole person" lawyering or "holistic advocacy" approach seeks to provide more comprehensive answers to clients' issues that might involve wellness, psychological, and economic counseling, beyond just legal advice. *See id.* at 124–25.

135. *See* MODEL RULES OF PROF'L CONDUCT r. 5.4(b) (AM. BAR ASS'N 2016). Part V, *infra*, discusses this rule in the context of changemaker lawyering.

> to use. . . . The challenge of creating a "grand alliance" is pushing beyond our silos to create the community that we want.

Like Francis's organization, Helen's does not directly employ non-lawyers on their staff, but they share non-lawyer information and knowledge to create lasting partnerships. Because their practices are more impact-driven, they can avoid running afoul of rules that bar in-house collaborations that often constrain organizations with direct client services.

Such a strategy also lends itself to more coalition building. Public interest lawyers have long relied on coalitions, and the law and social movement research has demonstrated that diverse interest groups can sometimes comprise these coalitions.[136] The coalition members often include community groups, other public interest and advocacy organizations, and private firms and pro bono partners.[137] What may distinguish the lawyers I interviewed, however, are their intentional partnerships in their day-to-day operations with non-legal professionals and even possible adversaries.

In an age of greater diversity and complexity among advocacy coalitions, establishing diverse collaborations with non-lawyers is an intriguing tactic for changemaker lawyers. This tactic is especially pronounced as social change strategies diversify and incorporate more non-traditional and non-legal tactics like education, media campaigns, and public outreach.[138] Social innovators largely work together to build new patterns for cooperation and networks of often seemingly different stakeholders to produce a more comprehensive solution.[139] Bill Drayton says that changemakers work in "fluid, open teams of teams" comprised of interdisciplinary groups that can rapidly coalesce, coordinate, and collaborate on specific complex issues as they arise.[140] Changemaker lawyers are working with teams of non-lawyers, even traditional adversaries (like the doctors, noted above), to tackle specific issues and more effectively advocate for their clients. They may be less likely to remain tied to strict, long-standing and

136. *See, e.g.*, Rhode, *supra* note 41, at 2064–65 (finding that public interest lawyers found grassroots collaboration "critical in securing sustainable social change"); Ashar, *supra* note 93, at 1917 (retelling the experiences of an immigrant restaurant workers' movement that found that the labor organizers and the workers themselves played more of the protagonist role while public interest lawyers supported their efforts); Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 56, at 249, 265–68 (finding that lawyers in a municipal movement advocating for a living wage had a secondary role, acting more as volunteers and less formally as lawyers).

137. *See* Rhode, *supra* note 42, at 2064–75.

138. *See* CHEN & CUMMINGS, *supra* note 41, at 515–24, 529–32. Working through partnerships and coalitions also allows for more efficient use of scarce resources to provide more sustainable social impact. Haney Keith, *supra* note 21, at 92–94.

139. *See* RAHMAN ET AL., *supra* note 11, at 4–5; BORNSTEIN, HOW TO CHANGE THE WORLD, *supra* note 27, at 241–42; LIGHT, *supra* note 27, at 113; Martin & Osberg, *supra* note 27, at 35 (in the context of social entrepreneurship).

140. *See* Drayton, *supra* note 31.

restricted coalitions, opting instead to work more fluidly and on an ad hoc basis with other disciplines.

V.
ETHICAL CHALLENGES FACING CHANGEMAKER LAWYERING

Many interviewees referred, sometimes obliquely, to challenges that changemaker lawyers face. Some of these were expected, such as scarce financial resources, high cost of legal education forcing aspiring changemaker lawyers to pursue more conventional routes, etc. Others dealt with the ethical rules that govern the legal profession itself. The current framework for lawyers discourages innovation, creativity, and collaboration—the fundamental elements that characterize changemaker lawyers. In this section, I will briefly consider two of the challenges that interview subjects raised and explore the literature on those subjects: first, the prohibition on partnership and fee-sharing with non-lawyers; and second, on lawyers acting simultaneously as "third party neutrals." I then offer suggestions to change this professional framework.[141]

While serving ostensibly august ends by promoting high-quality and independent legal judgment, lawyers' regulatory model rules preserved a professional monopoly on legal services. Yet this model, constructed in part through the ethical rules to which lawyers abide, severely restricts the supply of lawyers and militates against innovation.[142] Key contributing factors are the

141. While these rules were most commonly mentioned, other longstanding professional rules or norms that the interview subjects mentioned are also somewhat problematic for changemaker lawyering. First, rigid prohibitions on the unauthorized practice of law, ostensibly in place to protect the public from charlatans, reduce changemakers' ability to provide comprehensive advocacy and involve non-lawyers. Scholars and practitioners have also called for reforming those prohibitions to encourage innovation, especially since past complaints have arisen by lawyers and have not caused significant harm to clients. For greater analysis and some examples of state-led reforms to unauthorized practice of law rules, see, for example, RHODE, INTERESTS OF JUSTICE, *supra* note 7, at 135–37 (recommending greater involvement of non-lawyers in legal services as "many nonlawyer specialists are equally or more qualified than lawyers to provide assistance on routine matters"); Richard Zorza & David Udell, *New Roles of Non-Lawyers To Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1287–98 (re-envisioning what constitutes the unauthorized practice of law after assessing roles in which non-profit and for-profit lawyers can engage non-lawyers in their practices). Second, interview subjects decried revenue and compensation models, such as the "billable hour," as disincentivizing creativity or innovation and prohibiting sustainable law practices. *See* Montgomery, *supra* note 119, at 271–72; Menkel-Meadow, *supra* note 65, at 102; ORSI, *supra* note 62, at 63–79; PARNELL, *supra* note 96, at 219–59. Both of these standards are deeply entrenched in legal practice, and further analysis could help determine how innovating in those areas would help changemaker lawyering and benefit the legal profession more generally.

142. *See, e.g.*, Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1194–95 (2016); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1690–93, 1720 ("Professional regulation effectively blocks the inventive activities that might transform legal markets both directly and, probably more importantly, indirectly."); Abel, *supra* note 78, at 22–24.

Model Rules of Professional Conduct, which states have adopted wholly or in part to govern legal practice in their jurisdictions.[143]

Particularly challenging to innovation in the legal profession is Rule 5.4. This rule proscribes lawyers from sharing fees or forming partnerships with non-lawyers "if any of the activities of the partnership consist of the practice of law."[144] While purportedly seeking to "protect the lawyer's professional independence of judgment" from interference by non-legal professionals,[145] as Alexis and Benjamin alluded to, the rule ultimately bars lawyers from interacting with other professionals and providing multidisciplinary, comprehensive advice to their client.[146] It may also serve to preserve the "core values of the legal profession" from any "irreversible change[]" or dilution caused by establishing partnerships with non-lawyers.[147] Any lawyer who might wish to collaborate with a non-lawyer risks disciplinary action, fee forfeiture, or disqualification for running afoul of fee-sharing or joint ownership rules.[148] Hence, this rule constrains changemaker lawyers from embarking on the trans-disciplinary collaborations discussed above.[149]

None other than Supreme Court Justice Neil Gorsuch has suggested that Rule 5.4 hinders access to civil legal services. "With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels," unlike in other professions, where "consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart."[150] He notes that in the United Kingdom, where multidisciplinary law services are allowed as "alternative business structures" these structures have met the needs of the poor and middle class and have reached consumers online at higher rates than

143. *See* MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 14, 16 (AM. BAR ASS'N 2016) (declaring that the Model Rules "provide a framework for the ethical practice of law" by "defin[ing] proper conduct for purposes of professional discipline" and "the nature of relationships between the lawyer and others").

144. *See id.* r. 5.4(b). For a history of Rule 5.4 and the ABA's justification of it, see Emil Sadykhov, Comment, *Nonlawyer Equity Ownership of Law Practices: A Free Market Approach to Increasing Access to Courts*, 55 HOUS. L. REV. 225, 229–42 (2017).

145. MODEL RULES OF PROF'L CONDUCT r. 5.4(b) cmt .1 (AM. BAR ASS'N 2016).

146. *See supra* p. 133.

147. *See* Levinson, *supra* note 123, at 144.

148. *See id.* at 134; MODEL RULES OF PROF'L CONDUCT r. 5.4 cmt. 1 (AM. BAR ASS'N 2016); *see also* Jacoby & Meyers, LLP v. Presiding JJ. of the First, Second, Third & Fourth Dep'ts, 852 F.3d 178 (2d Cir. 2017) (upholding the constitutionality of New York's application of Rule 5.4 preventing non-lawyer investment in private firms). The court intimated, however, that non-profit "advocacy group[s] like the ACLU or NAACP" have a First Amendment right to associate with their clients that might militate against a rigid application of this rule. *See* Jacoby & Meyers, 852 F.3d at 186–89. Whether this exception might sanction a non-profit changemaker lawyer's establishment of a transdisciplinary practice with a non-lawyer remains a question for further analysis.

149. *See supra* Part IV.C.

150. Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 JUDICATURE 46, 49 (2016).

traditional firms.[151] Remarking that other rules tailor but not altogether forbid a lawyer's specific behavior to ensure her independent judgment, Gorsuch recommends revision of this rule to lower the cost of legal services.[152]

While liberalizing Rule 5.4 may appear at first glance to help mainly business-focused firms seeking to provide, say, legal and tax advice or to raise capital for litigation costs,[153] it could present major advantages to changemaking in the law more generally.[154] Lawyers' closer engagement with non-lawyers could continue to energize the field by bringing new ideas.[155] Involving non-lawyer expertise (and capital) with legal practices could serve efficiency goals, and providing basic legal services within businesses could expand the legal services market to underserved communities.[156] Non-lawyer involvement could also help re-shift the narrative of power between the lawyer and the client. A non-lawyer like a social worker or therapist collaborating with an attorney might be able to support clients in a way that a lawyer might not. Finally, lawyers might be able to better align their organizational structures with their values, the common theme discussed above,[157] were they to allow the non-lawyers in their organization actual stakeholder rights to make decisions, currently prohibited by Rule 5.4.[158] The legal profession could conceivably create new regulatory schemes to govern lawyer and non-lawyer engagements, such as through licensing regimes, to safeguard the quality of these relationships, ensure independent judgment, and adhere to other ethical rules.[159] Because non-lawyers may have different ethical rules to follow than the lawyers, lawyers collaborating in a multidisciplinary practice with non-lawyers will have to think carefully about how they will best serve their clients' interests while remaining faithful to their respective ethical standards.[160]

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151. *Id.* at 50.

152. *Id.*

153. *See* Sadykhov, *supra* note 144, at 242–46.

154. *See* Hadfield, *supra* note 142, at 1727; RHODE, INTERESTS OF JUSTICE, *supra* note 7, at 138.

155. "[S]ignificant innovation most often comes through interaction between those in different fields and networks. The legal profession would benefit from more cross-disciplinary alliances, and its leaders need to become more engaged in efforts to permit them." *See* RHODE, *supra* note 59, at 60.

156. *See* Zorza & Udell, *supra* note 141, at 1268–67.

157. *See supra* Part IV.B.

158. Lucille A. Jewel, *Indie Lawyering*, *in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION, *supra* note 16, at 113, 125.

159. *See* Hadfield & Rhode, *supra* note 142, at 1216–22.

160. *See* Ury, *supra* note 16, at 10 (suggesting that, in a multidisciplinary practice, all members including non-lawyers must "live up to the high standards of the Rules of Professional Conduct, because all legal service provider entities will continue to be regulated"); Reardon, *supra* note 97, at 261 (noting that "nonlawyers are not subject to the same ethical and professional obligations as lawyers" and that lawyers must "ensure that subordinates in their organization conduct themselves in a way that is compatible with the lawyer's professional obligations" and "be proactive about educating others with whom they collaborate."). Consider this conundrum facing social workers and lawyers collaborating:

> From the lawyer's perspective, it appears possible, and perhaps even likely, that an attorney working in tandem with a social worker will tend to offer legal services which are less zealous than those offered by a 'solo' lawyer, because social workers see disputes and problems with

The Model Rules of Ethnical Conduct also bar lawyers acting as so-called "third party neutrals"—which the rulemakers narrowly define as mediators or arbitrators involved in alternative dispute resolution—from providing legal advice or representation, even when the mediator or arbitrator is the advocate herself acting in a strictly non-legal capacity.[161] In such circumstances, typical rules governing the attorney-client relationship do not apply, such as attorney-client privilege, and that later legal representation by the advocate could trigger conflicts of interest.[162]

Adherence to this "third party neutral" rule complicates changemaker lawyers with multifaceted "many hats" practices, like Benjamin contemplated,[163] or those whose "client" consists of multiple parties, and they must represent only one to avoid conflicts of interest. The rule forces changemaker lawyers into some linguistic and ethical gymnastics to provide "legal information" rather than "advice" on a certain matter, refer clients to a different attorney to represent them on that issue, or obtain the parties' consent to switch roles from lawyer to mediator, for instance.[164] In cases such as Benjamin described, the lawyer must carefully emphasize to the client which "hat" predominates to avoid conflicts and deception.[165] A changemaker lawyer can protect herself by informing her clients when the privilege does and does not apply, or, in jurisdictions that permit it, design collaborative law arrangements that allow for multiple client and lawyer representation.[166]

Amid an evolving legal world, the profession will need to evaluate the effectiveness and applicability of these long-standing rules further. There is some indication that courts and ethics committees are open to considering them. The D.C. professional rules permit lay partners or non-lawyer shareholders as long as "all individuals commit in writing to following the same ethics rules which bind lawyers,"[167] and the ABA recently affirmed that collaborative law practice does not break ethical rules.[168] Even the former chair of the ABA standing committee on professionalism is now calling for multidisciplinary practice reforms to encourage innovation in the face of "disruptive change" in the

> a more inclusive perspective, and care more about a broader audience, than do lawyers. It also seems possible, and perhaps even likely, that the lawyer collaborating with a social worker, and influenced by the social worker's best interests-focused orientation, will tend to be more paternalistic than the 'solo' lawyer.

See Anderson et al., *supra* note 131, at 664. Ultimately, the authors conclude that this concern is "unfounded" and "overblown," although "ultimately not without substance," and that it is therefore important to consider these "potential sources of interdisciplinary tension." *See id.* at 664–65.

161. *See* MODEL RULES OF PROF'L CONDUCT r. 2.4 cmt. 1 (AM. BAR ASS'N 2016).

162. *Id.* cmts. 3–4.

163. *See supra* p. 131.

164. *See* ORSI, *supra* note 62, at 89–93.

165. *See id.* at 51–52.

166. *See id.* at 88.

167. JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 11.11 (2d ed. 2001).

168. Rubinson, *supra* note 134, at 132–33.

profession.[169] Yet, in other instances recently, the ABA rejected such proposals and reaffirmed its conviction that non-lawyer participation threatens lawyers' judgment.[170] Justice Gorsuch argues that "the road to change" for reforming civil legal aid "should begin by asking first what we can do on our own and without expense to the public fisc" by reconsidering how lawyers' self-imposed regulations constrain them.[171] The profession would do well to adapt its own framework for behavior to better address the challenges facing the legal profession more broadly and the opportunities that changemaker lawyers provide.[172]

VI.
AREAS FOR FURTHER STUDY

This research only scratches the surface of changemaker lawyering, and, in many cases, it raises questions for additional research. While studies have examined organizational change among non-profit organizations, social enterprises, and private law firms, minimal research exists on legal entities with a social mission (primarily public interest non-profit organizations or small private firms). Much of the pertinent studies evaluate changes in size, budget, and strategies and focus less on the organization's structure and leadership models.[173] As this changemaker lawyer research indicates, more targeted evaluations of organizational models and leadership could provide insight by reviewing how evolving organizational management styles for non-profit and social change-driven entities operate. This could also inform a study of leadership among public interest legal organizations that may provide recommendations for other practitioners and aspiring changemaker lawyers.

Second, in evaluating the data, I also discerned a fourth noteworthy common theme among changemaker lawyers: that these attorneys might foment and mobilize social capital as a resource that sustains the larger community. Social capital comprises the "networks, norms, and trust" that permeate a society and "enable participants to act together more effectively." Changemaker lawyers might harness social capital by creating longer-term bonds within their client communities that likely lasts after their legal interventions. My interviews did not present sufficient qualitative information to present a greater evaluation of this hypothesis. Therefore, further research directed at social capital building might validate and explain a key mechanism by which changemaker lawyers interact with their client base.

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169. Ury, *supra* note 16, at 7–11.

170. RHODE, INTERESTS OF JUSTICE, *supra* note 7, at 138.

171. Gorsuch, *supra* note 150, at 151.

172. *See also* Hadfield, *supra* note 142, at 1732 ("Truly innovative lawyering for the new economy, however, needs a far less restrictive and myopic regulatory model.").

173. *See, e.g.*, CHEN & CUMMINGS, *supra* note 41, at 142–46; RHODE, TROUBLE WITH LAWYERS, *supra* note 7, at 176–84; Rhode, *supra* note 41, at 2049–53; Nielsen & Albiston, *Organization of Public Interest Practice*, *supra* note 41, at 1606–15.

Third, while I have avoided discussion of ideology, many people popularly associate "changemaking" with a more progressive leaning. Yet, public interest law organizations advocating for conservative causes also occupy a sizeable share of this sector and are the subject of significant research.[174] Social enterprise and changemaking has also captured conservatives' imagination.[175] Different political ideologies view social change differently, but changemaker lawyering no doubt exists on the right as conservative political organizations seek to creatively influence policies that further their notions of social change. The themes presented here common to changemaker lawyers may very well apply for conservative changemakers, and further evaluation of them may provide greater insights into the wider field.

Fourth, the current literature on public interest organizations analyzes their funding models and the influence of financing on their strategies. In their survey of public interest organizations, Albiston and Nielsen found that funding structures were similar despite variations in practice area and that funding patterns shifted toward public sector funding, although conservative organizations depended more on private sources of funding.[176] My research does not identify any new or different trend among changemaker lawyers regarding their financial models, but this absence does not mean that the trend is not occurring. Those who operated private firms earned income through client fees, while those in non-profits relied on traditional philanthropic giving. Yet a theoretical application of entrepreneurship and innovation to these legal practices could raise research questions about their financial model, given the popular—albeit incomplete—understanding of entrepreneurs as profit-driven.[177] The literature on public interest through private or "low bono" practice is relatively robust,[178] and alternative financial models were not a subject of my inquiry. Whether such models are arising and how is an area for a more targeted study.

Finally, due to the small number of lawyers I interviewed, I do not intend to pose specific normative recommendations for the legal profession. Rather, the utility of the study lies in unearthing some principles that might provide salutary

174. *See, e.g.*, CHEN & CUMMINGS, *supra* note 41, at 100–15; Southworth, *supra* note 52; Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883 (2007); John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5 (2003).

175. *See, e.g.*, Barone, *supra* note 25 (offering a conservative columnist's perspective); James A. Phills, Jr., *Q&A: David Gergen*, 6 STAN. SOC. INNOVATION REV. 19, 20 (2008) (interviewing former Nixon, Ford, Reagan, and Clinton advisor and regulator political commentator David Gergen and noting that social entrepreneurs' solutions are attractive to conservatives who have "long believed that problems are best solved by people outside the governmental sphere").

176. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 88.

177. This is an assumption, for example, that Daniels and Martin make in their research of entrepreneurial plaintiffs' lawyers. *See* Daniels & Martin, *supra* note 66, at 153.

178. *See, e.g.*, Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1 (2012).

effects for a changing profession.[179] Further research could also concentrate on more extensive empirical study of organizations using more rigorous sampling techniques.[180]

CONCLUSION

Scholars and commentators across the legal field argue that leadership in today's legal profession requires innovation and entrepreneurship.[181] Lawyers advocating for social good confront similar challenges in this respect as their private sector peers. The most effective social change lawyers "anticipate and address the sources of resistance . . . work in multiple settings with multiple constituencies . . . [and have] deep knowledge of the communities affected and a willingness to consult widely on goals and strategies."[182] These are the hallmarks of changemakers who innovate to reframe social inequalities, develop new organizational models and networks, and work with a broad community of stakeholders.[183] And their contributions to society seem to be catching wider attention; recently, the California Bar Foundation changed its name to California Changelawyers, recognizing that "[l]egal changemakers—we call them changelawyers—are the ones who work every day to right historical wrongs in our courtrooms, classrooms, and beyond."[184]

Changemaker lawyers may apply different bodies of legal knowledge, employ a variety of strategies and skills, and depend on disparate resource models, but common among them are certain characteristics and traits in *how* they pursue innovations for the public interest. First, they challenge longstanding norms in the legal profession, notably the power dynamics of the attorney-client relationship. Second, they construct organizational models that reflect their values and missions. Third, they establish novel, trans-disciplinary partnerships that bridge silos within the legal profession and between lawyers and non-lawyers. These are the qualities of changemakers, irrespective of their fields of work.

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179. *See supra* Part I for elaboration on this change.

180. For examples of empirical studies of public interest organizations and their methodologies, see Albiston et al., *Two-Tier System of Access*, *supra* note 42, at 999–1002; Albiston & Nielsen, *Funding the Cause*, *supra* note 43, at 72–74; Rhode, *supra* note 41, at 2029–32; Nielsen & Albiston, *Organization of Public Interest Practice*, *supra* note 41, at 1601–05; Albiston & Nielsen, *Procedural Attack on Civil Rights*, *supra* note 47, at 1116–18; *see also* Southworth, *supra* note 41, at 501–02 (evaluating definitions of public interest law through organizational self-reporting in Supreme Court amicus briefs and newspaper coverage).

181. *See* RHODE, *supra* note 59, at 57.

182. *See id.* at 202.

183. *See* Patrick Valéau, *Social entrepreneurs in non-profit organizations: innovation and dilemmas*, *in* HANDBOOK OF RESEARCH ON SOCIAL ENTREPRENEURSHIP 205, 225–26 (Alain Fayolle & Harry Matlay eds., 2010).

184. Sonia Gonzales, *Why We Changed Our Name*, CALIFORNIA CHANGELAWYERS https://www.changelawyers.org/why-we-changed-our-name.html [https://perma.cc/4RBM-H76L].

Preparing a new generation of changemaker lawyers requires transforming the professional paradigm of how we educate them. Lawyers, professional organizations like the ABA, and law schools (and their accreditors) must begin to demand lawyers with these skills to innovate to the same extent as they demand research, writing, and analytical abilities. Through greater emphasis on practical and clinical training, the legal academy has recognized this insight, and the ABA's recent publications and efforts to embrace innovation demonstrate an institutional commitment toward change.[185] Changemaker lawyers are the pioneers of this movement.

Changemaker lawyers may not represent a wholly new community. Yet, they are the product of a dynamic legal profession, and they demonstrate that attorneys too can innovate for social change. As the profession continues to grapple with what innovation might mean for them, changemaker lawyers can offer their example of how to challenge norms, create bold ideas, and promote powerful social change.

185. *See, e.g.*, Andrew Cohen, *Who Says You Can't Teach Experience?*, TRANSCRIPT MAG. (2016), https://www.law.berkeley.edu/news/transcript-magazine/says-cant-teach-experience/ [https://perma.cc/UH56-CGAU] (interviewing Professor Ty Alper, who leads Berkeley Law's Experiential Education Task Force, and who notes that "[t]o thrive in today's legal domain, new lawyers need to enter practice with a broader and nimbler skill set across a wider range of disciplines"); Trubek, *supra* note 127, at 467–72; Dangel & Madison, *supra* note 68, at 971–83; Burand et al., *supra* note 64.

APPENDIX. INTERVIEW SUBJECT INFORMATION

Pseudonym	**Field of Work**	**Role in Organization**	**Type of Organization**	**Organizational Staff Size**	**Years in Practice**
Alexis	Community economic development	Founder & Executive Director	Non-profit organization	<20	<10
Benjamin	Community economic development	Founder & attorney	Private law office	1	>20
Carmen	Juvenile justice; criminal defense	Founder & Executive Director	Non-profit organization	<20	>20
Donna	Social enterprise development	Partner	Private law firm	>100	>20
Erica	Free and low-cost legal services	Executive Director	Non-profit organization	<50	<20
Francis	Civil rights advocacy	Founder & Executive Director	Non-profit organization	<10	<10
Gary	Social enterprise development*	Staff attorney	Public agency	>100	<10
Helen	Civil rights advocacy	Legal Director	Non-profit agency	<10	<15
Iris	Social enterprise development*	Clinical Director	Private university	>100	>20
Jessica	Legal profession*	Coach & attorney	Private practice	1	>20

* *Note*. These attorneys no longer practice in these fields, but they have significant experience in the field and can speak as experts about them.

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Is There A Higher Calling For America's Lawyers?

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Ashoka Fellow Purvi Shah, founder of Movement Law Lab. MOVEMENT LAW LAB

Purvi Shah, founder of the Movement Law Lab, learned from years of experience representing powerful movements for change that a legal system is only as good as its ability to ensure a world that is better for the people and the planet. Now, as Covid-19 tests America's economic vitality and social cohesion, Purvi points not only to the need for more social justice lawyers, but new tactics and alliances to protect fairness

and human dignity. Ashoka's Lorena García Durán sat down with her to learn more.

Purvi, how did this all start for you?

As a first-generation American, I witnessed the injustice of America up close—in my home, school, and city. I grew up keenly aware of how opportunity is not meted out equally and how "making it" depends on your zip code, the color of your skin, where you were born, how well you speak English. I went on to study politics, law and policy and became deeply moved by the stories of ordinary people who did extraordinarily courageous things that changed the course of history. Later, my most powerful lessons came from being a community organizer, working alongside low-wage workers, families of people in prison, and young people living on the margins. These experiences showed me that the people closest to the problems often have the best ideas for solving them.

And as a lawyer, what were some of your early lessons?

When I first started as a legal services attorney in my hometown of Miami, I learned to get out of the office and meet my clients in their homes and workplaces, at taxi stands, restaurant kitchens, in housing projects. Why? To have more candid conversations and directly understand the problems my clients faced, as well as their vision of the solutions. I learned how to weave litigation, education, media, policy and protest into coordinated campaigns and accomplished far more than I could have ever achieved alone in the courtroom. I got hooked on this new style of lawyering. It helped me better diagnose issues, see how they are connected, and identify strategic opportunities for solutions. I've spent the last decade teaching other lawyers how to incorporate these approaches and work in partnership with

community leaders and community movements to create social change.

Is this what you mean by movement lawyering?

Yes. Rather than simply winning cases, movement lawyers deploy law strategically to change culture, systems, and power. We see ourselves as long-term partners to grassroots leaders and broader movements for change. Let me give you an example. In 2014, when Michael Brown was killed in Ferguson, Missouri, the failings of our criminal justice system were exposed, and the crises of mass incarceration, racialized police violence, and police brutality gained renewed attention in the public eye. At the time, I went to Ferguson on behalf of a national civil rights legal organization. We saw that #BlackLivesMatter required mobilizing lawyers across the country to work alongside community activists, so we organized a gathering called Law For Black Lives. We thought a few hundred lawyers might attend. Nearly 1000 joined, we trended on Twitter, and ended up deploying over 3500 volunteer lawyers and law students to support the Movement for Black Lives with a range of legal work.

This led you to start Movement Law Lab, correct?

Yes, a crisis like Ferguson can activate lawyers, but the reality is that the vast majority of our profession sits on the sidelines of social change. Only 3% of America's 1.3 million lawyers work on issues of

justice and poverty. This means the majority of the legal profession represents the interests of the powerful versus the powerless. Our profession is in a crisis of leadership, culture and values.

Movement Law Lab is reversing this. We are supporting a new generation of lawyers and legal organizations to work alongside progressive movements for change. I believe that lawyers can be huge assets to social change—but we need to transform the way we think, work, and collaborate. The reality is that most lawyers don't come from backgrounds where they have lived these problems firsthand and they have a lot to learn. As a result, MLL intentionally invests in lawyers that come from marginalized communities, who see their role as supporting movements for justice, and who are a part of the communities they work in. We see these lawyers as the true legal visionaries for the 21st century. But we also think there is a role for every lawyer. We train lawyers on the nuts and bolts of how to partner and collaborate with social movements. We train legal organizations on how to adapt their models to partner with movements and we incubate new legal organizations with social change in their DNA.

Why is now an important moment for your work?

The pandemic has made the need for movement lawyers acute. Over 35 million Americans have filed for unemployment assistance. A tidal wave of millions of evictions is steadily approaching. Just this month three more unarmed Black people were killed by police. Marginalized communities of color are being disproportionately impacted by both ongoing crises and emerging crises. We need lawyers willing to work alongside community movements in every area—housing, climate, police violence, workers' rights. Some say that the pandemic has disrupted normal life but I say it's brought to the surface precisely what is wrong with normal life for millions of Americans. Now that we

see how interconnected we all are, we have an opportunity to transform our broader culture and create a society based on principles of fairness and dignity. I believe this can be an unprecedented time to think big and forge new collaborations between people with a range of expertise—business, social justice, technology, law, culture—to work together to design a new kind of economic system and society that preserves human life and dignity.

Purvi Shah is a 2020 Ashoka Fellow. Read more about her and her work here and follow her on Twitter at @purvishahesq

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DAVID E. FELLER MEMORIAL LABOR LAW LECTURE

April 14, 2015

Enforcing Labor Laws: Wage Theft, the Myth of Neutrality, and Agency Transformation

Julie A. Su†

Thank you very much for having me here. I am really excited to finally come to Berkeley Law. One reason why I said no to David Rosenfeld in the past is that I realized early on as Labor Commissioner that I could easily spend all my time accepting invitations to speak about what I want to do, and not actually get any of it done. I did not want that to be my legacy. But I am glad to finally be here tonight. I came from Sacramento yesterday, and when I arrived I saw a poster at the BART station that said, "Minimum wage $9.00 per hour," and then, "Median CEO hourly wage $5,048 per hour." I took a picture of the poster and sent it to my daughters and said, "I love Berkeley."

I want to start by saying something about David Feller. I never met him, but I do know and have learned a great deal from many of his students and disciples. What most impresses me about David Feller is the way he set

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out to shape a body of law and was able to accomplish that goal, without a roadmap at that time and despite different setbacks. His lesson to all of us is that you can shape an entire body of law with the choices you make as a lawyer. Often in law school, at least in my education, it seemed that the law had evolved in a way that was inevitable, as if the laws that were passed and the cases we were taught were bound to come out that way. But as I have learned in my career, that is not at all true. As lawyers and as people in the legal system, we are constantly shaping, reshaping and making the law.

So tonight I want to talk a little about my journey doing that. It has required some faith and persistence, a great deal of patience, and finding good people to work with. Before I was appointed Labor Commissioner, I worked for seventeen years at a nonprofit civil rights organization in Southern California that is now called Asian Americans Advancing Justice. I went to law school because I had grown up translating for my parents, who were immigrants, and I learned early on that the law is a language and those who speak it get to decide who gets what in our society, who gets protected and who does not, who is defined in a way that is demeaning versus uplifting, and whose rights are respected and whose are not. I went to law school to become a translator in the language of the law for people who were disenfranchised, discriminated against, and exploited.

When I got to my first job at Asian Americans Advancing Justice, I represented a group of garment workers who were trafficked to the United States from Thailand and forced to work behind barbed wire and under armed guard in an apartment complex. In that case I realized that the law often does not just reflect our society's values, it also shapes those values. What the law is tells people what is right and good.

In this particular case,[1] the garment workers were undocumented because their traffickers lured them from their homes and brought them to this country using false passports. As soon as the workers escaped their imprisonment from the traffickers, they were thrown into federal immigration detention and were told they would be deported. The federal government's position was that this was the law and the government had the right to deport these workers. But as advocates, we argued that it did not matter if the law allowed their deportation; deporting them was just not the right thing to do and we were not going to let it happen. Ultimately we won that argument, and the workers were able to leave detention and stay in the country.[2]

The next task was to figure out how to address the wrongs these workers had experienced. The traffickers had imprisoned the workers for on

1. The case, *Bureerong v. Uvawas*, resulted in two published opinions: 922 F. Supp. 1450 (C.D. Cal. 1996) and 959 F. Supp. 1231 (C.D. Cal. 1997).

2. They were all designated material witnesses in the criminal case brought against their captors. United States v. Manasurangkun, No. CR 95-714(A) ABC (C.D. Cal. filed Nov. 9, 1995).

average two to three years. The workers were locked behind barbed wire and forced to sew garments for eighteen hours a day— until their fingers were raw and they could not see clearly anymore. And at the end of each day they dragged their tired bodies upstairs to sleep in this guarded apartment complex.

The sweatshop property owners responsible for the workers' mistreatment were taken to prison. However, the companies the workers were ultimately sewing for completely escaped responsibility. And so our challenge was to figure out how to hold those companies accountable, how to find a legal argument that the court would accept for why these companies were responsible. We ended up arguing that those companies were the joint employers of the workers, along with the sweatshop operators. It was the first federal lawsuit of its kind and we won back a significant amount of wages for the workers using that legal theory. But initially, the law on its face did not appear to hold the right parties accountable. We had to find a way to push the boundaries of the law to make that happen.

The garment-worker case was significant not only for its legal precedent and the wages recovered, but also because it demonstrated how getting workers engaged in a lawsuit really makes a difference. In that case we named all of the workers individually as plaintiffs. We did not bring a class action, and we did not rely on the government. Instead, we filed a lawsuit on behalf of 102 individual workers. That turned out to be a critical decision in terms of the outcome of the case. Through our effort of struggling and working together, and having the workers become decision-makers—about whether to agree to a settlement, whether to attend a court hearing or a mediation, or whether to picket a retail store—we ended up building a cohesive force. The workers were able to engage in the lawsuit and remain active in it for a four-year period. Their growing sense of their own power was exhilarating to witness. And without that cohesive force, we never would have achieved the same outcomes.

As for me, this case was defining, giving me a sense of the power that individuals working together have to actually change the law and to make the law so it embodies an inclusive vision of justice. This whole idea that the law is just, that it reflects what we as a society believe is right and wrong, brings me back to the billboard I saw when I arrived in Berkeley. The billboard forces us to consider what it says about us as a society that the disparity between a minimum wage worker making $9.00 an hour and the average CEO making $5,000 an hour is perfectly legal. What does that say about how much we value the contributions of low-wage workers, when what they earn working full-time, year-round in one year is the same as what that CEO can make in less than five hours? I pose this question because a lot of what has informed my work as a lawyer and advocate is

trying to figure out how to make existing legal protections meaningful and real, and how we can shape the law so that it actually reflects our vision of a more just society.

I was appointed four years ago by Governor Brown to serve as Labor Commissioner, and it was the first time I had ever worked inside government. Many people told me when I started that, because of the state of the economy, the budget problems in California, and the many problems that plagued the agency, modest aspirations were in order. I should not set my sights too high, they said, or raise expectations, or touch anything too controversial. But my career representing low-wage workers for nearly two decades taught me that working people deserve much more than modest aspirations.

One of the primary duties of the Labor Commissioner's Office is the adjudication of wage claims under California Labor Code 98(a), often called "Berman" wage claims.[3] In my previous job, I represented workers in Berman wage claims, so I had seen both the power and the flaws of that system from the outside. And I had spent countless hours, along with other advocates, meeting with Labor Commissioners—my predecessors—and their deputies; we documented problems, made demands, and explained why language access was important, hostility towards undocumented workers unprofessional, and countless inexplicable delays unacceptable. We discussed how the culture of dividing workers, rather than realizing efficiencies and benefits by uniting them on their claims, was not what the government should be doing, and how inaccurate application of the law was embarrassing for the agency. I had done all of that work from the outside. Now, as Labor Commissioner, I had an extraordinary opportunity to be on the inside and figure out whether I could actually make those changes.

The name of my talk is "Wage Theft, The Myth of Neutrality, and Agency Transformation," so let me just talk for a moment about wage theft.[4] Wage theft occurs any time a worker is paid less than she earned, and it takes many, many forms. For example, my office recently handled an investigation involving ten buffet restaurants where we found $16 million had been stolen from over 600 workers.[5] We found servers who were paid on average about $1.15 per hour for seventy-two-hour workweeks.[6] That is a clear example of wage theft. In another case, a San Diego restaurant hired

3. Cal. Lab. Code § 98(a) (West 2015); *see also Policies and Procedures for Wage Claim Processing*, CAL. DEP'T OF INDUS. RELATIONS (June 2012), http://www.dir.ca.gov/dlse/policies.htm.

4. In 2014, the California Labor Commissioner's Office launched a public awareness campaign about wage theft, which included the creation of a website to educate workers about wage theft and workplace rights: http://www.wagetheftisacrime.com.

5. *Labor Commissioner Cites Ten Northern California Buffet Restaurants $16 Million for Wage Theft*, CAL. DEP'T OF INDUS. RELATIONS (Nov. 25, 2014), http://www.dir.ca.gov/DIRNews/2014/2014-109.pdf.

6. *Id.*

college students and told them they were not entitled to the minimum wage.[7] When the workers finally realized that the company's claim did not seem right, they spoke up about it and were fired.

Wage theft also occurs with "off the clock work," where a worker comes in at 7:00 a.m. but does not clock in until 8:00 a.m., or where a worker clocks out at 5:00 p.m. but keeps on working until 6:00 p.m. or 7:00 p.m., for example. We see this often in retail stores, where workers have to come in early and get the store ready—put up the signs, fold clothes—but they are not actually on the clock until a customer comes in the door. My office also recently had a case involving residential care homes, where we assessed over $3 million in stolen wages because workers were told they had to come in the night before their shift began.[8] The workers were told they could just sleep on a sofa bed in the garage.[9] However, if a patient needed them, the workers had to get up and work, even though they were still not actually on the clock until the next morning.[10] We had another case involving a warehouse that employed over 300 workers but only provided three timecard machines.[11] As a result, the workers had to line up and cut their breaks short just to clock in.[12] The workers had to come back early from a thirty-minute lunch break so they could clock in on time to get back to work.[13]

In addition to off-the-clock time worked, there are also off-the-clock *workers*, which are employees who do not show up anywhere on the payroll even though they actually do the work. We see janitorial cases where employers hire a husband and wife to work together, but only one is on the payroll and only one of them gets paid. The company tells the workers to share. That is wage theft.

Wage theft also occurs when workers are given their paycheck and told to pay a portion of it back or when workers are paid with a check and then told they are required to pay their employer to cash the check.

Piece-rate payment systems are another common way that wage theft occurs. Piece rate is when you pay by production levels. Workers routinely

7. *California Labor Commissioner Investigation Leads to Criminal Indictment of Restaurant Owners for Wage Theft*, CAL. DEP'T OF INDUS. RELATIONS (Apr. 9, 2013), https://www.dir.ca.gov/DIRNews/2013/IR2013-19.pdf.

8. *Labor Commissioner Cites Four Bay Area Assisted Living Providers More Than $3 Million for Labor Violations*, CAL. DEP'T OF INDUS. RELATIONS (Oct. 30, 2014), https://www.dir.ca.gov/DIRNews/2014/2014-101.pdf.

9. *Id.*

10. *See id.*

11. *Labor Commissioner Cites Southern California Warehouse over $1 Million for Wage Theft*, CAL. DEP'T OF INDUS. RELATIONS (Jan. 28, 2013), https://www.dir.ca.gov/DIRNews/2013/IR2013-05.html.

12. *See id.*

13. *See id.*

do not realize that even if they are paid by piece rate they still have to be guaranteed at least the minimum wage. Piece rate is often a way that workers are taught to blame themselves for not making enough money.

These are all cases that we have seen in the four years since I have been in office as Labor Commissioner. For many years, the Labor Commissioner's Office did not prioritize wage investigations. Workers' compensation or employer registration cases are easier paper violations. Under Governor Brown's administration, we set out to devote the resources to uncovering wage theft cases because getting wages back in workers' pockets should be our most important mission, even though citations for other violations are often easier to find.

Wage theft has tremendous costs not only in terms of individual workers' incomes, but also for their families and entire communities. Often we see workers who are working two or three jobs because their one job does not pay enough to get by. However, when I first began to talk about wage theft as Labor Commissioner, some said, "What is that? Where do you see that?" There was a lack of understanding about wage theft and its prevalence.

Moreover, some people said that we should not use the term "wage theft." It is too aggressive, they said, or too hostile. And some people said maybe the term is appropriate for an advocate, but not really appropriate for the California Labor Commissioner to use.[14]

This brings me to my second point, which is the Myth of Neutrality. What struck me the most when I started this job is how problematic and deeply rooted this idea of government neutrality actually is. The idea is premised on two flawed ways of thinking. One is that the status quo is neutral in some way, that the way things are occurring has a neutrality to it that should not be disrupted. This way of thinking holds that when we do anything to change the status quo, somehow we have displayed a lack of neutrality that is unseemly for a government agency. This plays out in really troublesome ways inside government agencies. Workers filing claims is considered disruptive. Our entering workplaces to conduct investigations is disruptive. So we should control how many claims are filed and limit the depth of our investigations. But in underground-economy industries where wage theft and worker exploitation are the norm, the status quo is not neutral. Our job should be to disrupt the dynamic where workers feel they have to go to work each day and put up with not being paid what they have earned and not being treated the way a human being should be treated.

14. Instead of using the term "wage theft," the U.S. Department of Labor often uses terms such as "owed wages" or "unpaid wages" to describe the problem of employees not being paid for their work. *See, e.g.*, *Workers Owed Wage (WOW) System*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR, http://www.dol.gov/whd/wow/WOW-flyer.pdf (last visited Sept. 24, 2015).

The second premise of government neutrality is the assumption that government is not supposed to take sides. But we are an enforcement agency and are on the side of the law. As Labor Commissioner, I have said repeatedly that we are not a neutral agency. We must be impartial in our adjudication and unbiased in our investigations but we are not neutral about what fundamental protections must exist in the workplace. We are on the side of the law. What does this mean? It means we are on the side of employers who play by the rules; we are on the side of employees whose rights have been violated. We need to always act fairly, but if you break the law, you are going to view our enforcement as biased. Many employers who are caught engaging in unlawful practices are quick to charge us as acting unfairly—they are going to say that we are not on their side. But we are not supposed to be.

To give an example of this, I want to talk about some cases that were filed with my office involving port truck drivers. Truck drivers working out of the Port of Long Beach have filed over 520 Berman wage claims with my office.[15] These drivers work long days taking cargo from the Port to warehouses, from warehouses to stores, and back again. They often work seventy-hour weeks. And they are told that they are independent contractors, which means they are forced to pay all of their own business expenses. The drivers pay for gas, truck maintenance, and for their own insurance.

The drivers have filed Labor Code section 2802 claims for reimbursement of the business expenses they have paid.[16] The companies argue that the drivers are independent contractors and therefore are responsible for their own business expenses. We have adjudicated several dozen of these cases now, and we have consistently found misclassification. We evaluate each claim on a case-by-case basis, conducting an individualized, fact-based analysis of each case applying the California *Borello* factors[17] to assess whether someone is an employee or an independent contractor.

The response from the trucking industry has been a full attack on not just the individual case results but on our very authority to adjudicate these

15. By November 2015, the total number of wage claims filed by port truck drivers rose to over 720.

16. California law requires employers to compensate employees for all "necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Cal. Labor Code § 2802(a) (West 2015). The port drivers were not compensated for business expenses because the trucking companies claimed the drivers were independent contractors, who are not covered by section 2802.

17. To determine whether a worker is an employee or independent contractor, California courts apply a multi-factor test drawn from *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). The most significant of the "*Borello* factors" is whether the person to whom service is rendered controls, or has the right to control, the worker both as to the work done and the manner and means in which it is performed. *Id.* at 350.

claims at all. We have been sued in state and federal court challenging our jurisdiction. We have been pushed politically to foreclose access to these drivers and been told that our decision to accept these claims runs contrary to prior administrations' policies. One argument goes: misclassification is too complicated for the Labor Commissioner's administrative process, and such cases should be pushed to the courts. The basis for all of these arguments—sometimes explicit and sometimes implicit—is that accepting these cases evinces bias and deciding these cases routinely in favor of drivers confirms that bias. These companies argue that we are not being fair because if we were fair, more (about half, one suggestion goes) of these claims would come out in favor of the companies. This mentality is part of the problem. Government neutrality is routinely equated with fairness. But in fact, they are not the same thing. We must aspire to be fair in all of our work, but we are not neutral about the outcome of cases. We seek to fulfill our mandate to enforce the law. In industries where there are systemic and rampant violations, the fair outcome may very well be decisions that all go one way in favor of workers whose rights are violated, because this is what the law demands.

In these kinds of misclassification cases, many companies also argue that the claims should be in arbitration, rather than in the Berman wage-claim process before the Labor Commissioner. This is because there is an arbitration clause in many of the independent contractor agreements the drivers have signed. (And remember, the existence of a contract agreement is not itself the primary or determinative factor in deciding whether someone is actually an employee; there are multiple factors the courts will look at, including right to exercise control by the putative employer.[18]) The trucking companies have therefore argued that these cases should be in arbitration and not adjudicated by the Labor Commissioner's Office.

In 2011, the California Supreme Court held in *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*)[19] that an arbitration clause that categorically denies workers the right to go through the Berman process is illegal and cannot be enforced. However, in 2013, on remand from the U.S. Supreme Court, the California Supreme Court in *Sonic II*[20] revised its position to hold that such an arbitration clause is not categorically illegal unless the arbitration clause itself is unconscionable. When that decision came down, some breathed a sigh of relief. This meant, they thought, that we did not have to take all these cases. Well, instead we set out to apply *Sonic II* and to prove in the right situations that some of these arbitration clauses were actually blatantly unconscionable, procedurally and substantively. Our record has been mixed

18. *See id.* at 351.

19. 51 Cal. 4th 659, 682-84 (2011), *cert. granted, judgment vacated,* 132 S. Ct. 496 (2011).

20. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1146 (2013).

in different industries, but in the port trucking industry we have consistently won cases arguing that the arbitration clauses should not be applied.

I talk about these cases because they show how the Berman process, although a forum for individual cases, can have much broader impact, and also how the choices that are made by the Labor Commissioner's Office make a really big difference. When we are told that prior administrations would never have taken these cases, I think we should be proud of that. Rather than running away from the difficult or complex cases, we should be doing that much more to get them right. The decisions we make as the Labor Commissioner's Office have an impact, everything from whether we choose to apply *Sonic II* and fight arbitration clauses or take a resource-saving option and let the cases go, to whether we accept jurisdiction over these cases at all and give drivers their day in a Berman hearing or keep them out. In government, the impact of decisions made about who gets access and where to prioritize limited resources is far from neutral.

This brings me to the third part of my talk, which is Agency Transformation. What we accomplished by hearing the port truck drivers' cases and many others involving garment workers and carwasheros, farmworkers, restaurant, residential care, and hotel workers, and so many more, reflects what I hope will be a revitalization of our commitment to truly being an effective law enforcement agency. To that end, one of the major things we have done at the agency is revamp the way we do our investigations. My office has the statutory right to enter any workplace and conduct an investigation.[21] That is incredibly powerful. We can walk into any workplace and say, "We're here to investigate you," and employers and employees are supposed to cooperate and comply.

However, from both my career before becoming Labor Commissioner and from my observations while out in the field with my deputies when I first started, I knew that it is not enough to have access to the workplace. Just because you are allowed to talk to workers does not mean that they want to talk to you. Effective investigations should involve far more than just on-site inspections. Now we do off-site interviews with workers, in advance of our inspection whenever possible, relying heavily on community partners to make that happen.

We also do surveillance before inspections, and it tells us so many things. It was not done before, but now we do surveillance so we can find out what time the business opens, what time it closes, how many workers come in and out, who the supervisors are, where the different exits are, and so forth. We do all this surveillance so that when we actually conduct an inspection we can be much more effective and be armed with more information than if we just walked in cold, without adequate preparation.

21. Cal. Labor Code § 1174(b) (West 2015).

These strategies have helped us uncover and cite for far more stolen wages than at any other time in the history of the Labor Commissioner's Office. In 2014, the amount of wages that we found owed to California workers was seven times the amount that was found in 2010, the year before Governor Brown was elected.

In the past, investigations and inspections were conducted and no wage violations found, but we know why that was the case. On-site interviews with workers who are being watched by their employer are not going to tell you exactly what goes on in that workplace. The perversity of the old approach was that workers would later come forward and say, "I could not tell you then what was going on, but I want to tell you now." The Labor Commissioner's Office, however, would tell those workers they were no longer credible, so now they could not build a case. But the investigation created that problem in the first place. The odd thing about the way it was done before was that if you did X number of inspections and never found any wage violations, that result was used to support the idea that we were doing pretty well in California, and that there was no real problem of wage theft. But now we have started to turn the massive tide on recognizing wage theft problems. We are finally uncovering them, attacking them, and getting those workers their wages back.

Another major issue related to our field enforcement investigations is the need for better technology inside the office. When I first started and spent time taking a really hard look at every single process, every single manual, every form, and everything else we were using, I realized that most of it needed a dramatic overhaul. And so we set out to rewrite everything, including our citations, which were incredibly cumbersome. The citation forms were outdated and did not reflect a whole bunch of laws that had been passed and the resulting violations that could be cited. We rewrote the citation form to make it easier to use and reflective of the full panoply of laws on the books.

Even with the updated citations, however, deputies had to write each section by hand when they went out and conducted investigations. It was very, very tedious. For many deputies it became a morale issue that we were asking them to take on more work without the tools to do it efficiently. Starting this year, my field deputies are going to be equipped with computer tablets in the field. Now deputies will have an electronic version of the citation showing the Labor Code sections, and they just have to click boxes to indicate which violations they are citing. That information will go directly into our database, saving the deputies the hassle of the old way, which involved writing each section by hand, coming back to the office and entering it in a database, and then taking the same information and manually entering it into an Excel document. It was crazy. Now we are changing all of that so our office can be much more efficient and accurate in

what we do. I call that whole process our "dream database" because when I first said I wanted to create a holistic and integrated database so information was accurate and shared across the Division, people said, "Oh, that's a pipe dream."

Now, I want to return for a minute to talking about the importance of community partners. Another part of the mythology of government neutrality is the idea that the Labor Commissioner's Office should not work with community-based organizations, unions, or other groups on the outside, because somehow that is evidence of bias. I respond by analogizing community partnerships to a model which is already well-accepted in law enforcement: community policing. Cops work with community groups on the ground all the time because those groups know the communities and have their trust. That kind of partnership is what we are doing much more of. That is how we get the off-site worker interviews. That is how we learn where the violations are taking place, so we are not doing randomized sweeps.

When I first started as Labor Commissioner, I asked my deputies how we find targets, and they said, "We open the Yellow Pages." Another common way was to just do an internet search for "car wash." That is the least strategic and efficient way to find labor law violations in California. Instead, one of the best ways we have established for finding violations is to work with community-based organizations who already have the trust of workers, speak the language of workers, understand how violations occur and are often masked, and are willing to collaborate with us by giving us leads and helping to bridge the trust gap between workers and law enforcement. As a result of these partnerships, we have been able to find violations in warehouses in the Inland Empire,[22] on construction sites in Eureka and on farms in Salinas, and we have been able to enforce in the janitorial industry across the State.[23]

The janitorial industry is especially challenging because most of that work takes place outside of regular business hours, in the middle of the night, and often in small teams. When I first said we should address wage theft in the janitorial industry many deputies said, "We were told not to do that because it's way too hard." We should be running towards the hard problems, not away from them, because in those circumstances the workers are even more vulnerable. Because of our partnerships with groups that

22. *Labor Commissioner Cites Southern California Warehouse over $1 Million for Wage Theft*, *supra* note 11.

23. *California Labor Commissioner Cites Two Janitorial Companies More Than $1.5 Million for Multiple Wage Theft Violations*, CAL. DEP'T OF INDUS. RELATIONS (May 8, 2014), https://www.dir.ca.gov/DIRNews/2014/2014-42.pdf.

work with janitors, we have been able to find violations and get wages back to janitorial workers, even though it is a difficult industry to enforce in.[24]

We have also aligned and spent a lot of time working with employer organizations. We tell employers that they can be our partners too. They know who the unfair competitors are because they are the ones winning bids by underbidding every contract, making it impossible for those who play by the rules to get a fair shot. Employers, however, are much more reluctant to speak out about what they know. They do not want to be seen as snitches. Perhaps, at times, they are nervous about shining any light on violations, in case they become the target or their industry is viewed in a bad light. But just as we have found a way to be more effective at combating wage theft than ever through partnerships with our worker-advocate friends, we continue to try to build trusted avenues of communication and collaboration with our employer-advocate friends, to help us identify the worst offenders and the most strategic targets to change industry practices and to incentivize good behavior.

In the janitorial and other industries we are also now doing more off-hour inspections. We arrive at warehouses at 6:00 a.m. and nightclubs after 6:00 p.m. One janitorial company told us they did not have any work in California, so we did our surveillance, worked with our community partners, and conducted an inspection at midnight to find that they were cleaning restaurants in San Diego. In all, we have made many changes to our investigation process that have allowed us to be much more effective. And that is just on our field enforcement side.

On the Berman hearing side, we have made important changes too. I am very happy that we have so many students in this room who are actually working right now with clinics that we set up in our offices where law students come in and help claimants to complete their wage claim forms and understand the process better.[25] We have students who are helping in San Francisco and Oakland and we have expanded that model to other offices as well. I also created a video about the wage claim process. When I first started my job as Labor Commissioner, I went to several of my offices and sat in the waiting room to see what that experience was like. It gave me many ideas for what we could do better. We are still working to create a more supportive and welcoming environment, but I realized there is a captive audience there that could be educated about what to expect in the process and what they could do to prepare, so we created a video explaining

24. One of the most valued partners in our work is the Maintenance Cooperation Trust Fund, headed by Lilia Garcia-Brower, who has pioneered effective community-government partnerships from her position for over a decade.

25. The Wage Claim Clinics were established in partnership with the Legal Aid Society–Employment Law Center. *See Wage Claim Clinic Launched in Oakland and San Francisco*, LEGAL AID SOCIETY–EMPLOYMENT LAW CENTER (Jan. 10, 2014), https://las-elc.org/news/wage-claim-clinic-launched-in-oakland-and-san-francisco.

that and it is shown in our waiting rooms now.[26] We are working with Consulate offices to show it in their offices as well.

When I used to represent workers, I observed that even when I brought in a group of workers, the Labor Commissioner's Office would completely separate all the workers and individually assess each worker's claims. Over the last four years, we have been thinking about how to tap into the potential of workers who are willing to work together. In these cases where workers already came forward in a display of collective action, we have done more group interviews of workers, and we have made it a point to combine the Berman hearings of multiple workers against a single employer. This is good not only for the workers, but for the employers also, since it saves them time and avoids duplicative testimony. It is more efficient for the office too, so many of these changes are actually a win-win for everybody. We also require now that all the deputies, in the very first meeting with the employer and employee, make clear that immigration status is totally irrelevant to the process, that any comment about it will not be tolerated in our offices, and that any retaliation for it is going to be referred immediately to our retaliation unit.

The last agency transformation initiative I want to discuss is our formation of a Criminal Investigation Unit.[27] The unit is made up of sworn peace officers who are basically cops. When we first implemented the unit, newspaper headlines warned of armed Labor Commissioner deputies coming to get employers in California and arrest them for crimes. And, well, we are! If you are stealing wages from your workers, that is a crime. We have filed over a dozen felony wage-theft cases with district attorneys across the state and we have had employers arrested and thrown in jail for the wage theft they committed.

Sometimes when we file felony wage-theft cases, DAs respond that they do not think they should be handling those cases when they have other really big important cases involving "real" crime, such as robberies, rape, and domestic violence. My response is that wage theft *is* like robbery because someone has stolen something from workers by force or fear. Part of this vision is that eventually we will live in a California in which workers who are exploited can choose whether they want to file a claim with the Labor Commissioner or walk into any police department and say, "My employer just stole my wages and I want to file a police report." I think that would start to change the way we look at the value of working people and the importance of paying them wages, and recognize the impact of wage theft on the safety and security of our communities.

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26. *See How to File a Wage Claim*, CAL. DEP'T OF INDUS. RELATIONS, http://www.dir.ca.gov/dlse/howtofilewageclaim.htm (last visited Sept. 24, 2015).

27. *California Labor Commissioner Launches Criminal Investigation*, CAL. DEP'T OF INDUS. RELATIONS (Feb. 27, 2012), https://www.dir.ca.gov/DIRNews/2012/IR2012-09.html.

I will close with two messages. One is to address the question often posed about what is ahead for the next four years with the Labor Commissioner's Office. For me, the question is what else do we want from the agency? What do we want a true, twenty-first century, effective labor law enforcement agency in the eighth- or ninth-largest economy in the world to look like? What do we want it to do? I think part of the answer is in continuing to make these policy and process changes I have discussed and ensuring that they outlast this administration. And part of it is looking at what kind of legislative change is needed to strengthen the Labor Commissioner's Office to give it all the tools that are needed. What kind of resources and what kind of laws would allow the Labor Commissioner's Office to not just address wage theft after it occurs but help prevent it in the first place? Part of the answer is to invest internally in leadership and employee development that will change the culture of the agency. But part of the answer is also to instill a sense of our mission at all levels of the Division, to go from seeing our primary role as processing cases and issuing citations to recognizing that what we do, when we do it well, is to fight against poverty and fight for economic justice.

The last thing I want to say, especially given all the law students in the room, is something that I wish I had known when I was in law school because I could have spent a lot less time second-guessing myself and having a lot of angst about why I chose this particular path. And that is the point I started with: it is very important to remember that the law is not inevitable. The doctrines, the cases, and the laws that were passed were not just meant to be. They are the results of hundreds of thousands of decisions made by individuals, mostly lawyers but not just lawyers. The decisions are made in the legislature; they are made in courtrooms; they are made by advocates in the decisions about who to represent and what claims to pursue, and by organizers about how to exercise their power and the power of the people. They are made by all of us about which laws we want to enforce and whose issues are worthy of our attention.

The law is made in what kind of cases we want to bring, how far we want to push the boundaries of the law, where we want to devote our resources, and where we want to devote our time. The law—and I certainly felt this in law school—has been intransigent and difficult, and it can seem like a machine that is so hard to change. But the law has also been at its best a place where people, against great odds, have changed our society for the better. And, because the law often tells us what is right, all of you are, and can continue to be, part of this process that is creating a society that feels more right to us. I look forward to welcoming you all to that struggle. Thank you.

Conviction **A**nd **S**entence **A**lternatives Program
Central District of California

The U.S. District Court, U.S. Pretrial Services Agency, U.S. Attorney's Office (USAO), and Federal Public Defender's Office (FPDO) have designed the new **C**onviction **A**nd **S**entence **A**lternatives (CASA) Program, which will seek to provide rehabilitative services to selected defendants. The CASA program is a *post-guilty plea diversion program*. Potential participants will be identified by the CASA program team. Participation will be entirely voluntary and must be approved by the judge presiding over the defendant's criminal case (the originating judge).

A defendant who agrees to participate and whose participation is approved by the CASA program team and the assigned judge will have his or her case transferred to one of the judges overseeing the CASA program (the "CASA Judge"). At this point, the defendant will enter a guilty plea pursuant to a Rule 11(c)(1)(C) plea agreement that requires participation in the CASA program and specifies the benefit to be received if the program is successfully completed. After entering a guilty plea, each participant will be subject to intensive pretrial services supervision. The conditions of supervision will include regular appearances before the CASA program team, as well as participation in programs designed by the CASA program team to address the causes of the defendant's criminal conduct (substance abuse and/or mental health treatment programs, employment/education services, etc.). Program participation will last between 12 and 24 months. Each defendant determined by the CASA program team to have successfully completed the program will receive the benefit specified in his or her plea agreement, including either:

(a) dismissal of the charges; or
(b) a sentence reduction to a sentence that does not include a term of imprisonment.

Defendants who fail to successfully complete the program will proceed to sentencing before the CASA Judge on the charges to which they entered guilty pleas.

The court has approved the CASA program to run as a pilot for 24 months in each of the court's three divisions with a limited number of participating defendants. As currently planned:

(a) in Los Angeles, the program will run under the supervision of Judge Pregerson and Judge Gee;
(b) in Riverside, the program will run under the supervision of Judge Phillips; and
(c) in Santa Ana, the program will run under the supervision of Judge Carney.

The CASA program's operations will be overseen by the CASA program team (one team in each division) made up of the supervising CASA Judge and designated representatives from Pretrial Services, the USAO, and the FPDO. The CASA program's operations will include:

(a) regular meetings to review prospective participants and select those who will participate in the program;
(b) design of the programs to be completed by particular participants;
(c) preparation for and attendance at regular court sessions to be conducted as part of the CASA program;
(d) decisions regarding rewards for successes and sanctions for failures while defendants are participating in the CASA program; and
(e) determinations of whether each defendant has successfully completed the CASA program and should receive the benefit specified in the plea agreement, namely, dismissal or a sentence reduction.

There are no fixed criteria for selecting defendants for participation in the program; however, it is anticipated that the most likely candidates will generally fall into one of two different "Tracks":

Track 1 - Candidates with minimal criminal histories for whom the current criminal conduct, though serious enough to warrant a felony charge as opposed to pre-charge diversion, appears to be an aberration that could appropriately be addressed by a period of supervision with terms including:

- restorative penalties such as restitution and community service; and, where appropriate,
- programs intended to address any contributing causes for the aberrational criminal conduct, such as substance abuse, behavioral issues, or lack of education or employment training.

Defendants falling into this Track include those with minimal criminal histories charged with crimes such as:

(a) relatively minor benefit, credit card, or identity fraud offenses;
(b) relatively minor mail thefts; or
(c) other fraud and narcotics offenses in which the defendant played a minor role.

Track 2 - Candidates (even those with more serious criminal histories) whose criminal conduct appears primarily motivated by substance abuse or similar issues, and who may therefore be deterred from future criminal conduct by a period of intensive treatment or services under court supervision.

Defendants falling into this Track include those believed to have committed crimes to feed an underlying substance abuse habit, and charged with:

- committing bank robberies not involving firearms or specific acts of violence;
- mail theft; or
- credit card fraud.

Defendants generally excluded from participation in the CASA program include those:

(a) subject to removal by immigration authorities;
(b) involved in child exploitation offenses, including possession or distribution of child pornography; or
(c) with more than minor involvement in large scale fraud or narcotics distribution or specific acts of violence.

Selection of candidates will be by consensus of the CASA program team. Each agency representative, including the CASA Judge, will have the ability to veto participation. In addition, as noted above, a defendant's participation in the CASA program will also be subject to approval by the judge presiding over the defendant's criminal case (the originating judge).

Footnote: The CASA program is a follow-up to the Central District's **S**ubstance Abuse **T**reatment **A**nd **R**eentry ("STAR") program. The STAR program provides rehabilitative services to offenders with substance abuse issues who have served their custodial sentences and are on supervised release. The U.S. District Court, U.S. Probation Office, United States Attorney's Office and Federal Public Defender's Office have been participating in the STAR program since 2010, and it has been a great success.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV** Date

Title Page 1 of 2

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER AND NOTICE TO ALL PARTIES

Given Plaintiff's allegations, this case is suitable for participation in Loan Modification Mediation through the Alternative Dispute Resolution (ADR) Program for the Central District of California.

The parties shall adhere to the following schedule:

(1) By no later than [date two weeks from today], the parties shall contact the Alternative Dispute Resolution ("ADR") Program for the Central District of California to schedule a Readiness Conference which shall take place by no later than [one month after contact date]. The contact information for the ADR Program is as follows:

ADR Program Office
United States District Court
350 W. First Street
Los Angeles, CA 90012-4565
(213) 894-2993 (tel)
(213) 894-5084 (fax)

The purpose of the Readiness Conference is to ensure that Defendants have received the necessary documents from Plaintiff relevant to a loan modification before the Loan Modification Settlement Conference.

(2) No later than ten (10) days before the Readiness Conference, Defendants shall notify Plaintiff in writing of any and all documents necessary for a loan modification determination that have not been received by Defendants. At least five (5) calendar days before the Readiness Conference, Defendants shall provide notice in writing to the ADR Program whether the Readiness Conference remains necessary or may be vacated. If the Readiness

Conference remains necessary, Defendants shall identify all outstanding documents in the notice to the ADR Program.

(3) At the time of the Readiness Conference, the ADR Program shall assign an Attorney Settlement Officer (ASO) to this case. The assigned ASO will conduct a Loan Modification Settlement Conference with the parties to take place no later than [one month after readiness conference]. All parties, including principals or representatives with settlement authority of all corporate parties, will be required to attend the Loan Modification Settlement Conference with the ASO.

(4) No later than seven (7) days after the Loan Modification Settlement Conference, the parties shall file a Joint Status Report informing the Court whether they have been able to resolve their dispute. If the dispute has not been resolved, the parties shall notify the Court whether consideration of Defendant's pending motion is still necessary and, if so, [propose a new deadline for the filing of Plaintiff's opposition to Defendant's motion] [propose a new date for the hearing on the motion] [propose a new deadline for Defendant's response to the Complaint].

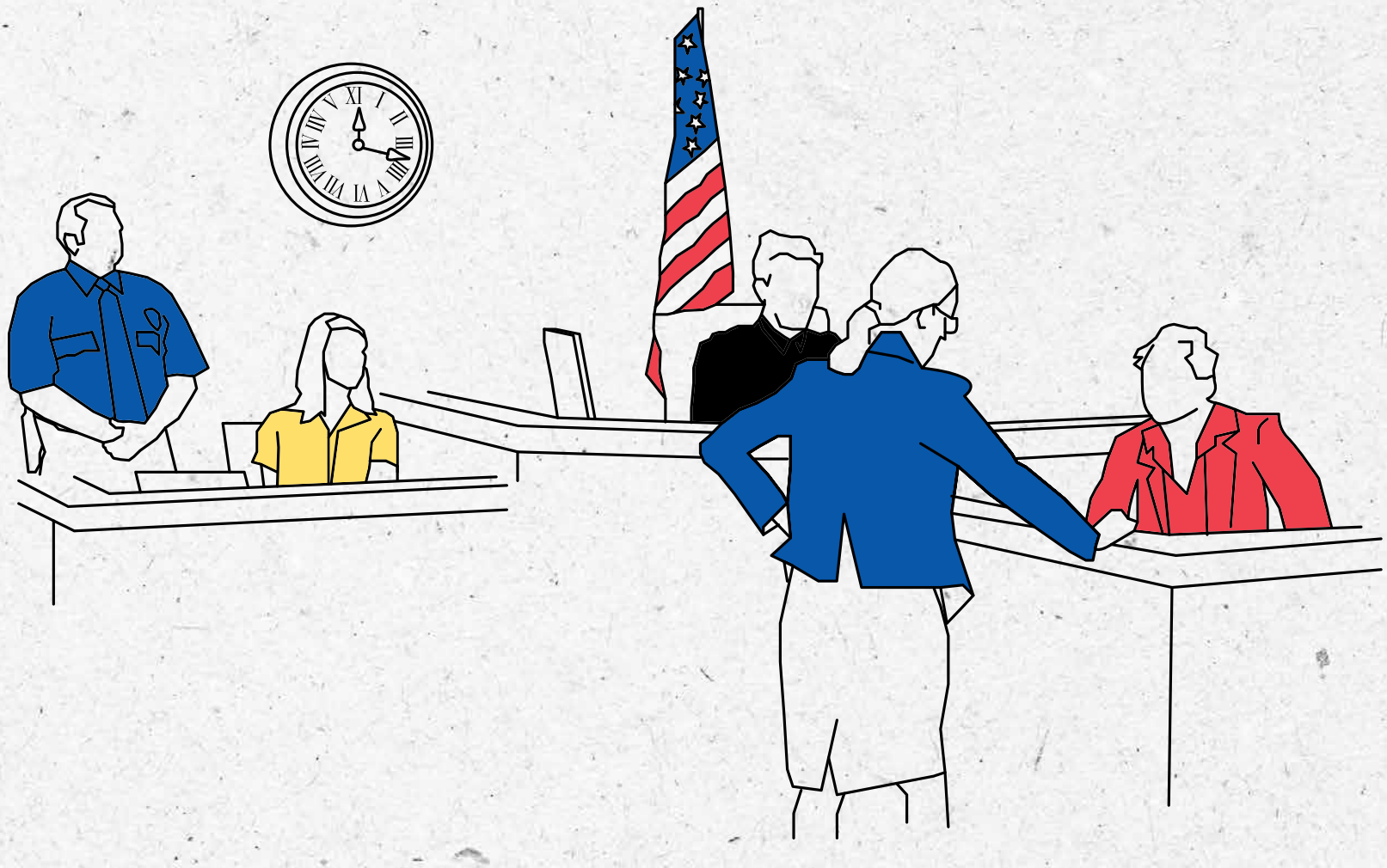
This Order shall not affect any pending motions, which will be stayed until further order of the Court.

IT IS SO ORDERED.

cc: ADR Program

DEFEND L.A.

TRANSFORMING PUBLIC DEFENSE IN THE ERA OF MASS DEPORTATION



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Southern California

Acknowledgments

This report was written by Andrés Dae Keun Kwon, Attorney and Equal Justice Works Emerson Fellow at the ACLU Foundation of Southern California (ACLU SoCal). The report builds on the author's law review piece *Defending Criminal(ized) "Aliens" After* Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034 (2016).

Interviews and research for this report were conducted by Ahilan Arulanantham, Andrés Dae Keun Kwon, Jennie Pasquarella, Devon Porter, and Adrienna Wong of the ACLU SoCal; UCLA School of Law students Katrina Landeta, Kelly Miller, Bernadette Rabuy, and Alex Trantham; Emilou MacLean of the National Day Laborer Organizing Network; and Victor Narro of the UCLA Downtown Labor Center.

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Published May 2018

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Southern California

Methodology

In the fall of 2014, the ACLU SoCal, along with various partner community organizations that work on immigrants' rights and criminal justice reform, began to explore how the Los Angeles County public defender offices could partner with community organizations to better serve the holistic needs of poor noncitizens facing prosecution. Since then, the ACLU SoCal has conducted in-person, telephone, and email interviews with dozens of public defenders—from deputy level I through deputy level IV attorneys, as well as managers. Interviews were also conducted with nonprofit and private immigration and post-conviction relief attorneys. These interviews have been conducted confidentially.

In addition, for the case studies of public defender offices serving large noncitizen populations that have developed more holistic immigration defense practices, the ACLU SoCal conducted interviews with key staff and managers at these offices. These offices include The Bronx Defenders and, in California, the offices in Alameda County, Contra Costa County, and neighboring San Bernardino County. These case studies help shed light on the essential components, structures, and practices of the holistic model of immigration defense.

Part I.
Executive Summary

Los Angeles County has a proud history of providing public defenders to people who cannot afford a lawyer to defend them in criminal court. On January 9, 1914, the county opened the first public defender office in the United States. In addition to being first, this office is the biggest in the nation. The Los Angeles County Public Defender's Office (LACPD) currently employs about 700 public defenders, who handle approximately 300,000 criminal cases a year.

And yet there is a crisis today in our county's public defender system. In particular, LACPD has been grossly under-resourced as measured against recommended staffing ratios and compared to other California public defender offices. As a result, LACPD underserves a large and vital segment of the Los Angeles population: the immigrant community.

This report, ***Defend L.A.***, examines the failures of the county's public defender system and demands legal representation that, at a minimum, meets the standards of the Sixth Amendment to the U.S Constitution for all Los Angeles community members—including immigrants. The report documents many cases in which LACPD's noncitizen clients pleaded to criminal dispositions triggering severe immigration consequences when more immigration-favorable alternative dispositions were available. Uninformed and unaware, LACPD's noncitizen clients have pleaded guilty only to face mandatory deportation and permanent separation from family, community, and home—the loss "of all that makes life worth living."[1]

• • •

Take the real-life case of **Christian P.**, who was brought to the United States in 1992 as a one-year-old and became a lawful permanent resident when he was 15. In 2013, he was charged with driving a vehicle without the owner's consent. Represented by LACPD, he pleaded guilty and accepted a sentence of 365 days in jail, instead of 364 days.

This day count was of monumental importance. The difference of a single day—a sentence of 365 days or more—made the conviction an aggravated felony theft offense. Accordingly, Christian's 365-day sentence subjected him to mandatory deportation, and federal immigration agents initiated removal proceedings against him. If Christian's public defender had been trained and had received adequate immigration law expert support, he could have negotiated a more immigration-favorable sentence of 364 days or less, with dramatically different consequences.

Luckily, a private post-conviction relief attorney familiar with immigration law notified the public defender of the opportunity to seek a one-day reduction in the sentence. With the expert support of LACPD's Immigration Unit, the defender was able to get the sentence reduction, and removal proceedings were halted. Christian is now eligible for citizenship.

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In another case, **Margarita C.** was represented by LACPD in 2012 and pleaded guilty to receiving aid by misrepresentation. She was sentenced to 500 hours of community service and restitution of $49,000 to the Department of Social Services. At the time, Margarita had a work permit and four U.S. citizen children. She had moved to the United States in 1988 when she was 20 years old.

Federal immigration authorities began removal proceedings against Margarita based upon her conviction. It turned out that her conviction was an aggravated felony because the offense involved "fraud or deceit" for which the restitution exceeded $10,000. A simple way for Margarita to have avoided an aggravated felony—and mandatory deportation—would have been a plea to an alternate offense, such as grand theft, with the exact same sentence and restitution.

Prior to filing a habeas petition alleging ineffective assistance of counsel, Margarita's private post-conviction relief attorney contacted LACPD's

Immigration Unit. LACPD's immigration experts successfully moved to withdraw the plea and enter a new plea to grand theft with the prior sentence to remain.

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In yet another case, **Norberto S.** was advised in 2015 by his LACPD attorney to plead guilty to possession for sale of methamphetamine. But that conviction, an aggravated felony under immigration law, subjected Norberto to mandatory deportation. Norberto, who had been diagnosed with a learning disability at an early age, had been a lawful permanent resident since he was 3 years old.

Again, it was a private post-conviction relief attorney who made a crucial difference. The attorney filed a successful motion to allow Norberto to "plead upward" to the more serious offense of transportation. This tactic might seem counterintuitive, but the more serious offense did not amount to an aggravated felony triggering mandatory deportation. As a result, removal proceedings were terminated against Norberto.

• • •

As these cases show, criminal proceedings can have devastating consequences for noncitizens. In addition to incarceration, probation, parole, and civil legal consequences that can flow from criminal convictions, noncitizens can face what for many is the most disastrous outcome of all: deportation. Even minor misdemeanor offenses carrying few criminal penalties and often no actual jail time—offenses such as shoplifting, turnstile jumping, public urination, or possessing a small amount of marijuana for personal use—can trigger deportation.

Thus, quality criminal defense is critically important for noncitizens. In *Padilla v. Kentucky* (2010), the U.S. Supreme Court held that noncitizens' Sixth Amendment right to effective counsel includes receiving affirmative, accurate advice about the immigration consequences of criminal dispositions. The right to effective counsel also includes defense against adverse immigration consequences like deportation through the pursuit of alternative dispositions that avoid or at least minimize such consequences. Defense strategies may include "pleading up" to more serious criminal offenses that have fewer or no immigration consequences.

Such informed legal defense could not be more paramount today, as the Trump Administration expands the federal government's reliance on local criminal justice systems to advance its deportation agenda.

Nevertheless, in the entire LACPD staff of more than 1,100 employees, there are just two attorneys designated as immigration law experts. These two attorneys attempt to provide expert support to about 700 public defenders, who annually handle approximately 51,900 cases involving noncitizen clients. A dramatic staffing expansion is urgently needed, not only because of LACPD's extraordinarily large number of noncitizen cases, but also because of the enormous complexity of the intersection between federal immigration law and state criminal law and increasingly aggressive federal immigration enforcement practices.

LACPD lags far behind many public defender offices in California with respect to the number of in-house immigration experts it employs. With only two immigration experts, LACPD's ratio of immigration experts to public defenders is about 1:350. LACPD's ratio is significantly worse than the ratios of offices in neighboring San Bernardino County (1:96), Contra Costa County (1:75), and Alameda County (1:22), as well as the County of Los Angeles Alternate Public Defender Office (APD) (1:100)—which represents the indigent accused when LACPD has a conflict of interest or is otherwise unavailable.

Importantly, each LACPD immigration expert attempts to support defenders on approximately 25,950 noncitizen cases per year. LACPD's ratio of immigration experts to the annual caseload of noncitizen clients is thus about 1:25,950. Even using outdated standards for public defender offices, LACPD falls far short of the 1:5,000 recommended ratio for offices like LACPD that seek to provide full immigration advice but no direct immigration representation. Indeed, LACPD's resulting ratio is about *five times* the recommended standard. In comparison, APD and each office profiled in this report abide by the recommended standards.

It is not only with respect to in-house staffing and expertise that LACPD lags far behind—it has also maintained deficient institutional practices. Unlike standard practices in other public defender offices, foundational trainings on immigration law and its intersection with criminal law are not required for all defenders, except for new hires. LACPD's basic intake sheet contains no entries on immigration status, and defenders are not required to ask key questions to ascertain immigration status when first meeting with

COMPARISON OF CALIFORNIA PUBLIC DEFENDER OFFICES

Public Defender Office	The Office of the Alameda County Public Defender	The Contra Costa County Office of the Public Defender	The Law Offices of the San Bernardino Country Public Defender	The Los Angeles County Public Defender's Office
Annual Criminal Caseload	38,100	19,000	45,000	300,000
Annual Noncitizen Caseload	5,677	2,451	4,995	51,900
Full Time Equivalent of Public Defenders	108	75	120	700
Full Time Equivalent of Immigration Experts	5	1	1.25	2
Ratio of Immigration Experts to Noncitizen Caseload	1:1,135	1:2,451	1:3,996	1:25,950
Ratio of Immigration Experts to Public Defenders	1:22	1:75	1:96	1:350

their clients. It is impossible to adequately advise about, and defend against, immigration consequences if defenders do not even know their clients' immigration status. Further, defenders are not required to consult with their immigration experts when they are uncertain about the immigration consequences of contemplated dispositions or available immigration-favorable alternative dispositions.

As a result, despite the often-heroic work of individual defenders and the two immigration experts, LACPD defenders have systematically lacked the necessary resources, expert support, and institutional structures and practices to provide constitutionally mandated, quality representation to all their noncitizen clients.

It doesn't have to be this way. Other public defender offices serving large noncitizen populations have pioneered more holistic immigration defense practices that strive to meet the radically changed landscape of criminal defense in the twenty-first century. In particular, the holistic model of immigration defense cultivates a culture and practice of seamless integration of criminal and immigration defense whereby public defenders and embedded immigration experts work closely together to provide high-quality, client-centered criminal-immigration representation. This approach requires an adequate number of in-house immigration experts to correspond to the number of defenders, the noncitizen client caseload, and their overall workload. Further, more holistic offices employ in-house immigration attorneys who provide comprehensive services to meet noncitizen clients' underlying immigration needs—for instance, by ensuring the continued representation of clients who cannot avoid immigration consequences.

First, LACPD can and must be fully equipped and set up to ensure effective representation. To fully comply with *Padilla* and related federal and state law, the office must dramatically expand its Immigration Unit and reform deficient institutional practices. Only then would LACPD public defenders be able to fully defend all their noncitizen clients and prevent, where possible, avoidable criminal convictions that trigger severe immigration consequences.

Further, both LACPD and APD should develop more holistic immigration defense practices. As part of this process, LACPD and APD should build appropriate

in-house capacity to collaborate more closely and systematically with Los Angeles Justice Fund and One California nonprofit providers and thereby complement these innovative programs. If adequately equipped, the immigration units at LACPD and APD could provide nonprofit providers with critical value-added expert support on criminal-immigration legal matters, such as post-conviction relief for noncitizens, in a more systematic way. In addition, LACPD and APD should provide their noncitizen clients with targeted direct immigration representation, starting with particularly vulnerable groups of clients, such as juvenile clients.

Today, as the Los Angeles County Board of Supervisors enters a second year in the search for a qualified, experienced chief public defender for LACPD, it should create a new, bolder, transformative vision for the county's overall provision of indigent defense services. Indeed, the Board of Supervisors has already declared its commitment to create a "holistic, client-based representation model" of public defense.[2] It should make this commitment a reality. As the historic first to create a public defender office, Los Angeles County should lead again.

Key Recommendations

For the Los Angeles County Board of Supervisors

- Dramatically expand LACPD's Immigration Unit to provide adequate immigration expert support to public defenders:
  - Create 15 additional in-house immigration expert budgeted positions. The total additional funding necessary for this expansion would amount to no more than $3 million—about 1/100 of one percent of the total county budget.
- Move LACPD and APD toward a comprehensive service model:
  - Build the capacity of LACPD and APD to collaborate more closely and systematically with Los Angeles Justice Fund and One California nonprofit providers, delivering critical value-added expert support on criminal-immigration legal matters.
  - Fund in-house immigration attorney positions at LACPD and APD dedicated to the continued representation of particularly vulnerable groups of noncitizen clients, such as juveniles clients.

For LACPD's Leadership and Management

- Restructure the Immigration Unit strategically:
  - Create a central supervisorial group of experienced immigration experts.
  - Embed the additional immigration experts focusing on *Padilla* plea consultations strategically across LACPD's branch offices.
- Reform deficient institutional practices:
  - Require and expand foundational criminal-immigration law trainings for all defenders.
  - Institutionalize a comprehensive intake form and establish a policy requiring defenders, when first meeting with clients, to ask key questions to ascertain immigration status and gather critical information.
  - Develop and enforce a protocol to ensure that defenders consult with their immigration experts in cases involving noncitizen clients when they are uncertain about immigration consequences or available alternative dispositions.

For Los Angeles County Prosecutor's Offices

- Fully implement California Penal Code Section 1016.3(b), which created a mandate for all prosecutors to "consider the avoidance of adverse immigration consequences . . . in an effort to reach a just resolution"[3]:
  - In the interest of ensuring a just outcome, actively participate in securing immigration-safe dispositions for noncitizens, including by declining to charge, expanding the use of pre-charge and pre-plea diversion programs, and negotiating pleas that avoid or at least mitigate adverse immigration consequences.
  - Develop formal policies for the meaningful consideration of immigration consequences, pursuant to Section 1016.3(b).

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Southern California

aclusocal.org

August 31, 2020

Los Angeles County Board of Supervisors
500 W. Temple St.
Los Angeles, CA 90012

Sent via email

Dear Supervisors,

As leaders of organizations working at the intersection of immigrants' rights, workers' rights, and criminal legal system reform, we write to urge you to prohibit the expenditure of County resources to facilitate federal immigration authorities' arrest and detention of community members in the custody of the Los Angeles County Sheriff's Department, absent a judicial warrant or judicial probable cause determination. This move would align County policy with the Sheriff's Department's moratorium on transfers to immigration authorities absent a judicial probable cause determination, as well as with policies of other jurisdictions throughout California and the country. It is time for Los Angeles County, as the county with one of the richest and most diverse immigrant communities, to create this necessary layer of protection to safeguard our community members' constitutional rights as well as the County's finances.

Los Angeles County is home to about 3.6 million immigrants, accounting for 36 percent of the county's population.[1] The county's immigrant residents—whether naturalized U.S. citizens, permanent residents, or undocumented—are valued and integral members of our social and economic fabric. Nearly 60 percent of all children born in the county have at least one immigrant parent, and most of the county's noncitizen population—nearly 70 percent—has lived in the United States for more than a decade.[2]

Accordingly, immigration has been one of the County's top priorities.[3] With Supervisor Solis's and your leadership, the County has been committed to serving the needs of immigrant community members and protecting their rights in the face of numerous vulnerabilities and threats. Just in the last few years, the County has established a robust Office of Immigrant Affairs designed to be a "one-stop shop" for immigration services to county residents;[4] has created the Los Angeles Justice Fund ("LAJF") to defend immigrants against immigration detention and deportation;[5] and has strengthened the public defender system's immigration expertise and its capacity to effectively represent noncitizen indigent clients.[6]

In light of the COVID-19 pandemic, instead of working to flatten the curve, U.S. Immigration and Customs Enforcement ("ICE") has directly contributed to the spreading of the virus in California and throughout the country.[7] As of July 14, 2020, ICE's own records showed that there were 3,183 positive cases among 13,562 people tested in its custody nationwide.[8] ICE did not clarify whether the remaining tests were confirmed negative or still pending—meaning that a minimum of 23.5 percent tested positive through July 14, 2020. Worse, new research indicates that ICE has been severely underreporting the prevalence of COVID-19 in its detention facilities; the true infection rate among detained individuals may be 15 times greater than reported by ICE.[9] According to ICE, five individuals in its custody have died of COVID-19 thus

far, but this figure only tracks deaths in custody and not those who contract the virus in detention but then die after release or deportation.[10]

At the Adelanto ICE detention facility, where ICE usually detains immigrant Angelenos, medical care has been wholly inadequate even under normal circumstances.[11] During the pandemic, despite Center for Disease Control guidelines and expert recommendations to limit or suspend new bookings and sharply restrict transfers, ICE has continued to conduct transfers between facilities; indeed, since the pandemic began, transfers from jails and prisons have become the primary source of ICE's new bookings in California.[12] According to LAJF providers, the GEO Group, Inc.—the private corporation contracted to run Adelanto—has not provided hand soap, requiring detained individuals to purchase shampoo to use as hand soap. It has also been impossible for people to practice social distancing as GEO forces them into crowded cells with up to eight people in them, and requires them to eat in the cafeteria in groups of at least 40 people, often only inches away from each other. More recently, GEO has used a chemical agent known as "HDQ Neutral," despite countless reports of the adverse health effects people exposed to it have experienced, including bloody noses, rashes, eye inflammation and irritation, coughing fits, and vomiting.[13] And although ICE has received about 1,900 COVID-19 test kits for Adelanto, it has refused to allow the vast majority of them to be used.[14]

ICE's callous disregard for human lives has been decried even by medical doctors from the U.S. Department of Homeland Security and by federal courts across the country.[15] Federal courts have consistently found ICE's conduct during the pandemic to violate the substantive due process rights of its detainees in all five of its California facilities.[16] At Adelanto, the federal district court in Los Angeles has noted that the conditions of confinement are "inconsistent with contemporary standards of human decency."[17] Recently, the court removed ICE from the custody determination process at Adelanto entirely—an unprecedented move.[18]

ICE's violations of the constitutional rights of people it arrests and detains has been well-established even prior to COVID-19. In September 2019, in *Gonzalez v. ICE*, the federal district court in Los Angeles held that ICE detainer requests to local law enforcement agencies largely violated the Fourth Amendment because they were based on databases too error-ridden and incomplete to be reliable sources of information for probable cause determinations.[19] The court emphasized that ICE's sole dependence on databases resulted in "many U.S. citizens becom[ing] exposed to possible false arrest," and wrongfully detained for ICE.[20] For example, at the request of ICE, the Sheriff's Department detained plaintiff Gerardo Gonzalez, a U.S. citizen born in Pacoima, California.[21] In short, ICE detainer requests need to be supported by a judicial probable cause determination to avoid risking violating the constitutional rights of Angelenos targeted by ICE. This layer of protection is especially important because the County does not collect information about immigration status and is left in the position of having to rely on ICE's information about an individual's immigration status.

In May 2019, the Sheriff's Civilian Oversight Commission ("COC") recommended that the Sheriff's Department should not permit ICE or its private contractors to access any departmental property, including jails, and should not honor ICE requests to cooperate in the transfer of any individual to ICE custody, unless required by law—that is, unless ICE presents a judicial probable cause determination.[22] The COC report also noted that the Sheriff's

Department spends at least $1,378,000 a year in employing custody assistants to carry out duties associated with facilitating ICE transfers.[23] The use of these County resources undermines not only the County's investment of $1.5 million a year in the LAJF, a program designed to provide immigration lawyers to defend families against immigration detention and deportation, but also the County's commitment to protecting immigrants, their families, and co-workers from immigration enforcement overreach. In fact, LAJF providers have had to defend county residents who only ended up in ICE detention and deportation proceedings because they were transferred from Sheriff's Department custody.

We have long asked the Sheriff's Department to stop its entanglement with immigration agents. This practice has destroyed community trust and undermined public safety.[24] It has wasted County taxpayer resources that are all too precious now during this unprecedented public health and economic crisis. It has contributed to thousands of family separations.[25] Importantly, these ICE transfers have led to county residents being detained for prolonged, often indefinite periods in immigration detention while they fight their cases.[26] As a significant number of detained immigrants are workers and often the primary breadwinners in their families, many have lost employment and the ability to provide for their families while detained.[27] In turn, families' financial devastation has increasingly burdened the County's social safety net.[28]

In this context, the sheriff's August 3, 2020 letter making the Sheriff's Department moratorium on ICE transfers "permanent" is a step in the right direction. Nevertheless, despite the letter's description of the moratorium as "permanent," it is not so. Rather, the policy is still temporary, as it is subject to be terminated or reversed at the discretion of the sheriff, whether the current sheriff or his successors.

Therefore, we respectfully urge the Board of Supervisors to take the final step and enshrine the sheriff's policy into County policy. We must ensure, once and for all, that our community members do not end up in the clutches of a rogue agency with no regard for their civil and human rights. As an important statement of the County's values, and to create a necessary and truly permanent layer of protection to safeguard our people's constitutional rights as well as the County's finances, the County should require ICE and federal immigration authorities to obtain a judicial probable cause determination if they seek to arrest and detain immigrant Angelenos in Sheriff's Department custody.

Sincerely,

Ada Briceno Co-president UNITE-HERE Local 11	Hector Villagra Executive Director ACLU of Southern California	Angelica Salas Executive Director CHIRLA
Gilda Valdez Chief of Staff SEIU 721	Cecily Myart-Cruz President UTLA	Martha Arevalo Executive Director CARECEN
Sam Lewis Executive Director Anti-Recidivism Coalition	Alex Sanchez Executive Director Homies Unidos	Alberto Retana Executive Director Community Coalition

Nana Gyamfi
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Ivette Alé
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Black Lives Matter – Los Angeles

National Lawyers Guild – Los Angeles

Freedom for Immigrants

Dignity and Power Now

Homeboy Industries

A New Way of Life Reentry Project

AFSCME Local 148, LA County Public Defenders Union

National Day Laborer Organizing Network

Ground Game LA

Brotherhood Crusade

White People for Black Lives

Endnotes

[1] *State of Immigrants in LA County*, USC DORNSIFE, at 12 (Jan. 2020), https://dornsife.usc.edu/assets/sites/731/docs/SOILA_full_report_v19.pdf.
[2] *Id.* at 12, 21.
[3] Motion by Supervisors Hilda L. Solis and Sheila Kuehl (Sep. 12, 2017) ("We, therefore, move that the Chief Executive Officer recognize immigration as the sixth priority, along with Sheriff's Department reform, Child Welfare System, Health Services Integration, Homelessness, and Environmental Health Oversight and Monitoring, in the County governance.").
[4] *See Press Release from Cnty. of Los Angeles, Chief Exec. Office*, L.A. CNTY. OFFICE OF IMMIGRANT AFFAIRS (Sept. 12, 2017), http://oia.lacounty.gov/los-angeles-county-takes-bold-steps-support-immigrants/.
[5] *See, e.g.*, L.A. CNTY. OFFICE OF IMMIGRANT AFFAIRS, L.A. JUSTICE FUND FAQS (last updated Jan. 17. 2019), https://oia.lacounty.gov/aboutlajf/; Nina Agrawal & Dakota Smith, *L.A. County supervisors OK $3 million to aid legal efforts for immigrants facing deportation*, L.A. TIMES (June 20, 2017), *available at* http://www.latimes.com/local/lanow/la-me-ln-justice-fund-immigrants-20170620-story.html.
[6] *ACLU Statement on Fivefold Expansion of Public Defenders' Immigration Unit*, ACLU SO. CAL. (Oct. 2, 2018), https://www.aclusocal.org/en/press-releases/aclu-statement-fivefold-expansion-la-public-defenders-immigration-unit.
[7] *See, e.g.*, Emily Kassie & Barbara Marcolini, *"It Was Like a Time Bomb": How ICE Helped Spread the Coronavirus*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html.
[8] *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE GUIDANCE ON COVID-19, https://www.ice.gov/covid19 [hereinafter ICE GUIDANCE].
[9] Nina Sulc, *Vera's New Prevalence Model Suggests COVID-19 is Spreading through ICE Detention at Much Higher Rates than Publicized*, VERA INST. OF JUSTICE (June 4, 2020), https://www.vera.org/blog/covid-19-1/veras-new-prevalence-model-suggests-covid-19-is-spreading-through-ice-detention-at-much-higher-rates-than-publicized.

[10] *See* ICE GUIDANCE, *supra* note 8; Dan Glaun, *How ICE Data Undercounts COVID-19 Victims*, PBS (Aug. 11, 2020), https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/.

[11] In 2018, the Office of Inspector General for the U.S. Department of Homeland Security concluded that Adelanto fails to provide timely and adequate medical care to immigrant detainees, identifying "significant health and safety risks at the facility." *Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SECURITY (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf; *see also* Paloma Esquivel & Brittny Mejia, *Nooses in cells, rotting teeth — report details harsh conditions at Adelanto immigration facility*, L.A. TIMES (Oct. 2, 2018), *available at* https://www.latimes.com/local/lanow/la-me- ln-adelanto-oig-20181002-story.html; NGO Letter Concerning Inadequate Medical Care at Adelanto (May 15, 2015), *available at* https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/05/NGO-letter-re-Adelanto-medical-care.pdf; Human Rights Watch, American Civil Liberties Union, et al., Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention (June 2018), *available at* https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration.

[12] *See* Petition for Writ of Mandate in *Cal. Attorneys for Criminal Justice v. Newsom*, S261829, at 22–24, 28–30, 36 (Apr. 24, 2020), *available at* https://www.aclusocal.org/sites/default/files/aclu_socal_cacj_20200424_petition_writ_mandate.pdf; *see also* Rebecca Plevin, *At Adelanto detention center, 6 of 10 people with COVID-19 transferred there from prisons*, PALM SPRINGS DESERT SUN (July 3, 2020), *available at* https://www.desertsun.com/story/news/politics/immigration/2020/07/03/adelanto-detention-center-6-10-covid-19-transferred-there-prisons/5367404002/.

[13] *See* Rebecca Plevin, *Immigrants, advocates, members of Congress decry chemical use at ICE facility in Adelanto*, PALM SPRINGS DESERT SUN (June 28, 2020), *available at* https://www.desertsun.com/story/news/politics/immigration/2020/06/27/immigrants-members-congress-decry-chemical-use-ice-facility-adelanto/3273095001/.

[14] *See, e.g.*, City News Service, *ACLU says ICE secretly bans COVID-19 testing of Adelanto detainees*, PALM SPRINGS DESERT SUN (Aug. 11, 2020), https://www.desertsun.com/story/news/health/2020/08/11/aclu-says-ice-secretly-bans-covid-19-testing-adelanto-detainees/3348431001/.

[15] *See, e.g.*, Catherine Schoichet, *Doctors warn of "tinderbox scenario' if coronavirus spreads in ICE detention*, CNN (Mar. 20, 2020), https://www.cnn.com/2020/03/20/health/%20doctors-ice-detention-coronavirus/index.html; *Hernandez Roman v. Wolf*, No. 5:20-cv-768-TJH, ECF No. 53, at *14-15 (C.D. Cal. April 23, 2020) (finding that ICE is "deliberately indifferent to the potential exposure of [detainees] to COVID-19" and has "acted with callous disregard for [their] safety").

[16] *See, e.g., Xochihua-Jaimes v. Barr*, 962 F.3d 1065, 1066 (9th Cir. Mar. 23, 2020) (ordering, *sua sponte*, the release of a petitioner at Adelanto "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers."); *Bravo Castillo v. Barr*, 20-cv-00605-TJH, 2020 WL 1502864, at *5, *6 (C.D. Cal. Mar. 27, 2020) (finding that "[u]nder the Due Process Clause, a civil detainee cannot be subject to the current conditions of confinement at Adelanto," and ordering the release of two individuals in Adelanto); *Fraihat v. Wolf*, 5:20-cv-590-TJH, ECF No. 18, at *12 (C.D. Cal. Mar. 30, 2020) (ordering the release of detainee because the COVID-19 pandemic rendered his continued detention in Adelanto unconstitutional); *Hernandez Roman*, 5:20-cv-617-TJH, ECF No. 17, at *14–15 (C.D. Cal. Apr. 1, 2020) (same); *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020) (ordering a review process to identify people for release in order to enable social distancing at the Mesa Verda ICE detention center and Yuba County jail); *Ortuño v. Jennings*, No. 20-CV-02064-MMC, 2020 WL 1701724, at *5 (N.D. Cal. Apr. 8, 2020) (ordering the release of four ICE detainees in Mesa Verde and Yuba); *Ixchop Perez v. Wolf*, No. 5:19-cv-5191-EJD, ECF No. 29, at 24 (N.D. Cal. Apr. 14, 2020) (ordering release due to ICE's failure to protect petitioner from harm from COVID-19); *John Doe v. Barr*, No. 3:20-cv-2141-LB, Order Granting Petitioner's Motion For Temporary Restraining Order, ECF No. 27, at 20–21 (N.D. Cal. Apr. 20, 2020) (same); *Bent v. Barr*, No. 5:19-cv-6123-DMR, 2020 WL 1812850, at *8 (N.D. Cal. Apr. 9, 2020) (same); *Alcantara v. Archambeault*, No. 20CV0756 DMS (AHG), 2020 WL 2315777 (S.D. Cal. May 1, 2020) (ordering the release of more than 50 medically vulnerable individuals detained at the Otay Mesa ICE Detention Center).

[17] *Hernandez Roman v. Wolf*, No. EDCV2000768TJHPVCX, 2020 WL 1952656, at *8 (C.D. Cal. Apr. 23, 2020).

[18] U.S. District Court Judge Terry J. Hatter, Jr. took this extraordinary step in the ACLU of Southern California's ongoing litigation in *Hernandez Roman v. Wolf*. *See Hernandez Roman v. Wolf*, No. EDCV2000768TJHPVCX, 2020 WL 3481564, at *2 (C.D. Cal. June 17, 2020).

[19] *Gonzalez v. Immigration & Customs Enf't*, 2019 WL 4734579, at *20 (C.D. Cal. Sept. 27, 2019).
[20] *Id.* For example, from 2006 to 2017, ICE wrongfully detained more than 3,500 U.S. citizens in Texas alone. DAVID BIER, U.S. CITIZENS TARGETED BY ICE: U.S. CITIZENS TARGETED BY IMMIGRATION AND CUSTOMS ENFORCEMENT IN TEXAS, CATO INST. (Aug. 28, 2019), https://www.cato.org/publications/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted. From 2017 to 2019, law enforcement agencies detained 420 citizens in Florida. ACLU OF FL, CITIZENS ON HOLD: A LOOK AT ICE'S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY (Mar. 20, 2019), https://www.aclufl.org/en/publications/citizens-hold-look-ices-flawed-detainer-system-miami-dade-county.
[21] *Gonzalez*, 2019 WL 4734579, at *1.
[22] The Sheriff's Civilian Oversight Commission's May 2019 report includes the following key recommendations:

> Recommendation 9. LASD should not provide ICE, or persons or entities contracted through ICE with access to the Inmate Reception Center (IRC) or other areas within the jail, or other LASD properties such as courthouse lockups and station jails, unless required by federal or state law.
>
> Recommendation 10. LASD should not honor ICE detainers, including requests by ICE to hold, detain, house, or transfer any inmate, unless specifically required by federal or state law.

CNTY. OF L.A. SHERIFF CIVILIAN OVERSIGHT COMM'N, L.A. COUNTY SHERIFF CIVILIAN SHERIFF'S DEPARTMENT COOPERATION WITH IMMIGRATION AND CUSTOMS ENFORCEMENT 5 (May 21, 2019), *available at* http://file.lacounty.gov/SDSInter/bos/commissionpublications/report/1055898_ImmigrationFinalReport-5-21-2019.pdf.
[23] *Id.* at 20, Addendum A.
[24] Notably, in a recent national study, the University of California, Davis, found no correlation between deportations and public safety; in particular, deportations had no effect on violent or property crime, regardless of how aggressive deportations were in a given area. *See, e.g.*, Anna Flagg, *Deportations Reduce Crime? That's Not What the Evidence Shows*, N.Y. TIMES (Sept. 23, 2019), *available at* https://www.nytimes.com/2019/09/23/upshot/deportations-crime-study.html. What is clear, however, is that law enforcement entanglement with ICE has made immigrant community members far more distrusting of law enforcement; in particular, unauthorized immigrants are dramatically less likely to trust that law enforcement will keep their communities safe. *See, e.g.*, Tom K. Wong et al., *How Interior Immigration Enforcement Affects Trust in Law Enforcement*, U.S. IMMIGRATION POL'Y CTR., UC SAN DIEGO (Apr. 3, 2019), *available at* http://usipc.ucsd.edu/publications/usipc-working-paper-2.pdf. For example, in Los Angeles in 2017, reports of domestic violence among the Latinx community dropped by 10 percent and reports of sexual assault by 25 percent, declines that former LAPD Chief Charlie Beck said were due to fear of the federal government. Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation.*, N.Y. TIMES (Apr. 30, 2017), *available at* https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?module(=inline; *see also* Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*., N.Y. TIMES (June 3, 2018), *available at* https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html. In addition, 80 percent of county residents said that contact with a government agency or program increased the risk of deportation. MikeMcPhate, *California Today: Worries Over Deportation*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/us/california-today-worries-over-deportation.html.
[25] In 2018 alone, the Sheriff's Department transferred 945 individuals to ICE. *See, e.g.*, Rebecca Plevin, *L.A. County Sheriff to further restrict transfers of immigrant inmates to ICE custody*, PALM SPRINGS DESERT SUN (Aug. 11, 2020), *available at* https://www.desertsun.com/story/news/politics/immigration/2020/08/11/l-a-county-sheriff-limits-transfers-inmates-ice-custody/3303048001/.
[26] *See, e.g.*, Cecilia D. Wang, *For Immigrants, the Threat of Indefinite Detention*, N.Y. TIMES (Dec. 19, 2016), ttps://www.nytimes.com/2016/12/19/opinion/indefinite-immigrant-detention-opdocs-vr.html ("[T]housands of people [have] been incarcerated for no good reason—leaving their families without financial support, hampering their own ability to defend against the government's deportation case, and suffering from often abominable prison conditions and crushing despair.").
[27] *See generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382–92 (2014).
[28] *See, e.g.*, DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 135–57 (2012); KOBALL ET AL., *supra* note 46; Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents From the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 70–76 (2007).