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# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



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## editor's preface

In “Humans, Hierarchy, and Human Rights” Harold McDougall seeks to understand why so many social justice movements form, burn brightly, then either fade or are transformed away from their original mission. His exploration is interdisciplinary, using biological, anthropological, psychological, and sociological research to explain the causes which bring humans to band together in search of justice. It goes on to explain how hierarchies emerge within these groups. These hierarchies “other” outsiders, foster fears and prejudices, change their missions, and ultimately lead to the groups’ undoing. This tendency toward forming hierarchies has limited the lifespans of countless organizations and movements that might have otherwise lived on to battle some of humanity’s worst social ills and inspire future generations.

As long as there have been criminal prosecutions there have been prosecutors willing to hide exculpatory—even exonerating—evidence from those they seek to punish. The temptation to make their own work easier is too great, the drive to win in the competitive enterprise of criminal litigation is too strong, and the intoxication that comes with being an official public avenger is too euphoric. Not all prosecutors skirt the law and cut corners to win cases. But many do—and a certain minimum quantum always will.<sup>1</sup>

This fact has been proven true repeatedly since the Court declared in *Brady v. Maryland*<sup>2</sup> that failing to disclose exculpatory evidence violates a defendant’s constitutional right to due process. The “Brady rule” was a necessary first step toward fixing a horribly biased litigation process and checking the dangerous, but predictable, instincts of prosecutors. However, since *Brady* legislatures and courts have moved in the wrong direction. They have generally been unwilling to vigorously enforce *Brady*’s core holding and have protected prosecutors from punishment with sweeping grants of immunity and narrow interpretations of statutes designed to vindicate those wrongfully convicted due to prosecutorial misconduct. When the *Brady* rule was announced there was a realistic

*Continued inside the back cover*

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## Harold McDougall

### HUMANS, HIERARCHY, AND HUMAN RIGHTS

#### I. Hierarchy: A stubborn problem

My experiences in the Civil Rights Movement of the 1960s, and with various social and intellectual movements in the African Diaspora in the years that followed, acquainted me with the energy and camaraderie of intimate, small groups of people critiquing and challenging an established, oppressive social order. As one after another of these movements dissipated, were co-opted or destroyed, I began to wonder what was going wrong, not only because I sensed there was much more work to be done, but because I missed the energy and camaraderie of the groups themselves.

My first inquiries in this area led me to write *Black Baltimore: A New Theory of Community*,<sup>1</sup> which began as a work of intellectual exploration and became a piece of cultural anthropology. I became immersed in the study of small groups struggling for survival, meaning, and joy in the hard-hit urban neighborhoods of Baltimore's West Side. It was only then that I realized that it was the small groups themselves that had the answers I was looking for.

These small groups turn out to be the best way to engage people in social movements, because they become part of social life, and can thus be sustained. Moreover, they keep ownership of the movement from migrating to an elite group that disengages the rest, creating a top-down, hierarchical structure that gives orders, but not connection or community.

But they rarely prevail. According to Marilyn French, author of *From Eve to Dawn, a History of Women in the World*, “working] on [a] small scale... all new burgeoning belief systems... Christianity, Islam... socialism... began with small ‘cells...’”<sup>2</sup> [but soon developed top-down, hierarchical structures.] Our failure to create a humane, just, or egalitarian society is a result of our almost universal faith in domination, government from above.”<sup>3</sup>

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## II. Hierarchy: Origins and development

### A. The transition from hunting and gathering to sedentary agriculture

*Homo sapiens* is genetically engineered to empathize only with small groups of other humans, no larger than approximately twenty persons. However, as Jared Diamond points out, the transition from hunting and gathering to “food production” during the Agricultural Revolution required the managing of the large groups of people who participated in the process.<sup>4</sup>

Paul Shepard, in *Coming Home to the Pleistocene*, shows that our own species, *homo sapiens*, has lived in small groups—nomadic, hunting and gathering—since our emergence 200,000 years ago.<sup>5</sup> It was only 15,000 years ago that things began to change. As agriculture developed and humans began a sedentary lifestyle based on the domestication of plants and animals rather than roaming<sup>6</sup> and foraging,<sup>7</sup> groupings got larger.

We are born with empathic soft-wiring—“mirror neurons” that cause us to experience the plight of our fellow humans as our own, and even to empathize with plants and animals.<sup>8</sup> These mirror neurons encourage a natural solidarity and cooperativeness among us that is the central aspiration of most of the world’s religions,<sup>9</sup> and orients us to preserve our environment as well as to respect one another.

However, we were not designed to empathize with groups of humans any larger than the hunting and gathering band, about twenty people, and only the plants and animals we directly encounter. Jeremy Rifkin believes our brains have changed in the last 15,000 years, via evolution, to permit us to empathize with more and more people. Thus, we can “cohere in larger social units,”<sup>10</sup> first religions, “then the nation state, then even larger entities.”<sup>11</sup>

But Shepard would point out that 15,000 years is not enough time for such a significant evolutionary change to take place.<sup>12</sup> Instead, Yuval Harari shows that “imagined realities”<sup>13</sup> were invented to knit large groupings together and manage them. An imagined reality creates the illusion that we are connected to a larger group, creating a kind of “virtual” empathic connection which has an intersubjective rather than a biological underpinning.

### B. The emergence of “imagined realities”

An *actual* genetic mutation, occurring 70,000 years ago (not 15,000), changed the inner wiring of the *homo sapiens* brain to allow us to use language in a special way. We were enabled not only to communicate what was immediately before us, but also to gossip about others, and soon, transmit information collectively about things that we imagined. This spurred a

“Cognitive Revolution,” by which human behavior could change without “natural” mutations stemming from changes in our genetic makeup or our surrounding environment.<sup>14</sup> This developmental change is sometimes called the “Tree of Knowledge” mutation.<sup>15</sup>

Over the next 50,000 years, we developed tribes, our first imagined reality. Tribes were agglomerations of several families and bands bound together by gossip, connecting about one hundred fifty people. Tribal leaders were those with useful skills. Eventually, larger and more centralized chiefdoms emerged, in which leadership was hereditary. Finally, at the transition to sedentary agriculture 15,000 years ago (called the Agricultural Revolution) we developed bureaucratic states. Along the way, we created legends, myths, gods, and eventually religions, imagined realities that gave these larger social units coherence, binding people in them together with virtual empathic connections.<sup>16</sup>

These imagined realities changed the basis for human cooperation and interaction, from what they knew of their environment and their kinship mates to what they believed, and what they were told. An imagined reality coalesces as a set of beliefs, discourses, institutions and practices that explain and support the social order<sup>17</sup> and cause it to cohere, providing human beings with an inter-subjective understanding of their objective conditions of existence. The imagined reality tells its subjects what exists, what is good, and what is possible.<sup>18</sup>

The function of an imagined reality is to orient individuals and classes to the social structures of society so that they can act in “appropriate” ways.<sup>19</sup> Such an orientation allows the subjects of the imagined reality to be managed, from a distance, by leaders, elites, in a hierarchical arrangement.

### **C. Hierarchy in imagined realities**

Hierarchy is introduced as various social relations, social institutions and social practices inform the subject that there is inherent inequality between groups; that the hegemony of the dominant group is right; and that equality between superior and inferior groupings is impossible. Thus, a hierarchical imagined reality works to “constitute” subjects at all levels of the hierarchy, to create personalities that think and act as they are directed.

These hierarchies are sustained by what Rifkin calls “utilitarian ideologies.” Utilitarian ideologies are imagined realities that suppress the empathic impulses that would draw us back from the exploitation of nature and humanity necessary for “bigger and better.” To be successful, these ideologies must be ingrained deep in our family life and in all the social constructs in which we live and have our being.<sup>20</sup>

Elites use utilitarian ideologies to suppress and redirect the empathic impulses of their subjects, facilitating their subordination and control, enabling the elites to maintain the social order and their privileges within it. The suppression, distortion, and misdirection of our empathic instincts involved in imagined realities has fomented alienation, violence and aggression since the emergence of the first states and empires.<sup>21</sup> The bullying, physical punishment, threats, incentives granted and withheld that humans developed in order to train and control animals, were now turned on other humans.<sup>22</sup>

#### **D. “Othering” in hierarchical imagined realities**

To foment solidarity among subjects, and teach them to submit to hierarchy, subordination and control, utilitarian ideologies depend upon an “other” with whom the subject does not empathize. According to Marilyn French, the first group “othered” were human females, who were subordinated to men in the new social order that developed along with sedentary agriculture.<sup>23</sup> In this regard, original sin seems to have been committed by males, rather than females, reversing the Creation myth. Indeed, early religions emerging as the transition from hunter-gatherer to sedentary agriculture took place featured titanic struggles between masculine and feminine forces.<sup>24</sup>

The question of male subordination of females is a specialized area in literature. None of the authors I relied upon had much to say about it. Diamond, Shepard,<sup>25</sup> Harari and Rifkin, (referenced in notes 4, 5, and 8, respectively) all focus on the organization of production rather than the organization of reproduction. Only Engels was explicit about it, in *The Origins of The Family, Private Property, and the State*.<sup>26</sup> Yet it is a central part of the story, one too extensive for more than cursory discussion here. For now, we will only sketch the analysis, giving the reader the tools to dig deeper.

Marilyn French’s study fills four volumes. Her first volume, *Origins*, tracks the transition from hunter-gatherer society to sedentary agriculture and the emergence of states, the period of primary interest to us here. According to French, hunter-gatherer society was matrilineal. Children were identified as descended from their mothers, paternity being rather difficult to establish.<sup>27</sup> But as animal domestication commenced, and the link between coitus and childbirth came to be understood,<sup>28</sup> men began to seek control of women’s reproductive processes just as they had learned to control that of their animals.<sup>29</sup>

Facing resistance from the women in the increasingly sedentary communities in which they lived, men began to raid settlements to capture their “own” women, placing them under surveillance and control to ensure that offspring produced were “theirs.”<sup>30</sup> Removed from their own settlements, the women became slaves.<sup>31</sup>

Women and children came to be viewed as men's property.<sup>32</sup> Women were expected to show deference to men at every turn. Girls stayed with their mothers until they reached an age when they could be bartered off to men in other settlements, often in exchanges of female for female.

Boys were separated from their mothers at puberty and passed through rigorous and symbolic, and often cruel initiation rites designed to disrupt their empathy towards women and cement them into the male fraternity.<sup>33</sup> Boys were taught to reject "female" qualities of softness, love, nurturing and compassion,<sup>34</sup> and adopt "male" virtues of "hardness, self-denial, obedience, and deference to 'superior' males" instead.<sup>35</sup>

With the emergence of larger kingdoms and structured religions, women's subordination became more expansive and complex.<sup>36</sup> The first laws establishing female subordination appeared in the state of Sumer.<sup>37</sup> Within most early states women were forbidden to act independently,<sup>38</sup> restricted in their movements, often denied education, and forbidden to abort pregnancies.<sup>39</sup> Female adultery was a capital offense.<sup>40</sup>

Even under these constraints, individual women learned to resist passively, securing some sanctuary from their subjection<sup>41</sup> by "binding their male masters, husbands, or owners with sexual affection."<sup>42</sup> Their children, whom their fathers needed to "own," also provided the mothers with a source of status, strength, and leverage. But even those upper-status women who occasionally engaged in combat, led battles, or rose to rule never challenged the patriarchy itself, seeking instead to succeed within it.<sup>43</sup>

These early patriarchal structures gave all men power over women of their class and rank.<sup>44</sup> It is very important to note, however, that these structures also gave an elite class of men power over *everyone*. French links the rise of the state to men's jockeying for position seeking permanent "alpha" male status within the imagined reality of the male fraternity.<sup>45</sup> States and empires became grounded in the idea that some men were inherently superior to others, "according to divine will,"<sup>46</sup> and were therefore "entitled to more status, resources, and power than others."<sup>47</sup> These betters have the authority to direct others, suppress dissent, make war, and even take the lives of their own subjects.<sup>48</sup>

As French states,

The assertion of female inferiority prepares the ground for men's subordination, because the principle of superiority *ramifies endlessly*. . . . If men can be superior to women, some men can be superior to other men. . . . Male superiority is the psychological core of patriarchy but its political and economic purpose is the subordination of other men.<sup>49</sup>

Further, "[c]ontrol over a woman is the only form of dominance most men possess," their reward for their obedience and subordination to more powerful men.<sup>50</sup>

## **E. A legacy of hierarchy, subordination and violence**

Believing in imagined realities has allowed us to cooperate in larger numbers than we could before. But the larger the group, the further empathy must be stretched, the more virtual it becomes, and the more selective. We empathize with those inside the group, but our empathy with those outside it must be suppressed if the project is to succeed. Rifkin observes as an aside, that when empathy is suppressed, narcissistic and violent tendencies emerge. Even our empathy for those in our group can lose its balance.

Further, every subordination in a hierarchy involves a ranking of the subordinators as well as of those subordinated. Just as patriarchy also ranks men within the patriarchy, subordinating some to others in a “pecking” order, so also with later subordinations using categories of race, class, and religion. Indeed, the whole point of subordination of a “scapegoat” caste, an “other,” is to allow leaders to subordinate and dominate their own followers.<sup>51</sup>

Patriarchal arrangements were the first of many that drained the empathy reservoirs of human beings. They were solidified and rendered more complex as social structures and hierarchies expanded.<sup>52</sup> As states and empires grew more powerful, “othering” grew more extensive, managing the primary group’s relations with an ever-widening array of new subjects.<sup>53</sup>

With such extensive internal subordination and social control, a group’s leaders can easily appropriate the wealth and power of the entire group to their own ends, a theft ingrained in all hierarchical societies, making them “kleptocracies” in the words of anthropologist Jared Diamond.<sup>54</sup> In these emerging societies, the higher-ups used their positions to enhance their own quality of life, typically at the expense of those lower down the food chain.<sup>55</sup> We will see those “kleptocratic” tendencies repeated and amplified throughout human history.

Subordination of one human being by or to another continues to stain human society, and, until they are discredited, power cliques will always emerge, insisting that some people are better than others.<sup>56</sup> Such false claims are regularly challenged but countered with propaganda aimed at convincing subjects that these lies are the “real” truth.<sup>57</sup> This propaganda is resisted in turn, in a never-ending cycle, eroding empathic connections even further.

## **III. Looking for a way out**

Hierarchies are inherently unstable because members must rely on the tolerance of those above, and the obedience of those below.<sup>58</sup> From top to bottom, hierarchies are riven by “discontent, subversion and rebellion” from below and by fear and paranoia from above.



Elites consolidate their positions with “propaganda, bribery and force,” and subvert rebellions with “massacre, dispersal, or co-optation.”<sup>59</sup> But resistance renews. There have been revolts and uprisings by women, slaves, serfs,<sup>60</sup> nobles, industrial workers, colonial elites and later by minority groups and colonized peoples. These have usually failed, at best wresting some concessions, at worst replicating or even reinforcing the existing kleptocratic order.

I believe there is a central, human, anthropological reason for this. We are still engineered to operate in small groups. To challenge a larger, established order, insurgents have always attempted to create another imagined reality to replace the one of which they complain, or more modestly, to tweak the one in place.<sup>61</sup> They begin the project in a small group, or cell, where they experience camaraderie, energy, and solidarity. But when they try to expand their numbers using an imagined reality, even a modified one, they can only sustain themselves by using a top-down, command and control, hierarchical approach.

### **A. “Reform” from the middle**

Uphaval from the lower elites of the social order has aimed to increase their power within the existing imagined reality. Where successful they hyper-exploit those below them in the social order. Feudal nobles won rights against their king,<sup>62</sup> but continued to exploit those below them. Colonial elites in North and South America won economic as well as political independence, but enslaved and exploited those below them as well.<sup>63</sup> “Third world” colonial elites won political, but not economic, independence and in some cases aided, abetted, and profited from continued exploitation of their own people by former colonizers.<sup>64</sup>

### **B. Resistance and rebellion from below.**

Resistance and rebellion from the lower classes of the social order has aimed to replace the imagined reality with a new one, either failing to do so or creating a new social order that is as exploitative as the one replaced. Slaves were emancipated, but not compensated for their stolen labor. Freed serfs became landless peasants.<sup>65</sup> Industrial workers gained the right to unionize, but not to own the means of production. “Utopian” socialists called for “off the grid” co-ops owned and operated by workers themselves,<sup>66</sup> but elite and government backlash against unionization and utopian socialism splintered these movements.<sup>67</sup> Women gained the right to vote, but remained subordinated in the economy and at home.

Slave and peasant rebellions and uprisings were typically led by a single charismatic leader or a small vanguard group.<sup>68</sup> To gain recruits in the larger population, these leaders created their own fictions, their own imagined

realities,<sup>69</sup> which were ultimately crushed by the established order<sup>70</sup> or at best (or worst?) simply replaced it, replete with pre-existing kleptocratic tendencies.<sup>71</sup> A similar fate befell later movements, such as worker's uprisings, and movements for minority rights, women's rights, and anti-colonial national liberation.

The French Revolution was the first struggle against a sitting government that was not engineered by the upper classes.<sup>72</sup> Instead, ordinary people began to believe they had the right to control their own lives and voice their concerns in society at large.<sup>73</sup> The Haitian Revolution, fomented by slaves, began immediately after.<sup>74</sup> The floodgates then opened, and the next 150 years saw many attempts to effect radical change—utopian communities, political parties seeking structural social change, and uprisings and rebellions the world over.<sup>75</sup>

Even these ultimately failed, were co-opted or destroyed. The cause of their failure? Ironically, like most previous efforts at resistance to the structural subordination and oppression of “civilization,” they were centered in small groups that didn't know how to grow larger without sacrificing the intimacy upon which they were based.

### **C. The human rights project**

The historic struggle for human rights (the “human rights project”) has surfaced many common human values that are arguably based in the Pleistocene era, “hunter-gatherer” values that I discuss in section C2, below. (Dr. Sabine O'Hara lists these as place, context, participation, limits, and temporality.<sup>76</sup>) Using these values, it has attempted to respond to some of the concerns of the lower classes, but has done so employing bourgeois discourse. As a result, though some concessions have been made, they are very fragile, partly because the human rights project is beholden to bourgeois institutions. Let's see how this works.

#### **1. The human rights project emanates from “natural law.”**

The Romans believed there was a “natural” law (*ius natural*), certain principles recognized by all peoples regardless of their own unique customs (*ius gentium*) or their own laws (*ius civile*). Christian theorists of the Middle Ages later embellished these notions with canon law.<sup>77</sup> These two projects together, issuing from and designed for the top of the social hierarchy, intersect with the bottom-up resistance and uprisings I described earlier, building a “human rights” discourse based, first of all, in natural law.

#### **2. Natural law and hunter-gatherer values**

In her article “Valuing Socio-diversity,” Sabine O'Hara describes a value matrix common to all cultures, emerging from everyday human existence

in a recognizable, though volatile, environment, full of surprises.<sup>78</sup> I believe this matrix emanates from the hunter-gatherer past that all humans share.

Our sense of *place* grounds us and makes us aware of the unique ecological balance of the particular location we occupy.<sup>79</sup> The sense of *context* identifies the community in which our life functions are carried on, the matrix that provides our primary support and point of reference.<sup>80</sup> (Today, that means giving our allegiance to that community rather than to “imaginary” institutions created by kleptocrats.)

Our sense of *participation* reminds us that each member of the community should be included in both common efforts and common benefits.<sup>81</sup> A sense of *limits* gives human beings an appreciation of the world’s finiteness.<sup>82</sup> (Today, it can enable us to challenge the idea that more is better, and to resist the ever-increasing consumption which neoliberal consumerism presses upon us.<sup>83</sup>)

Finally, linked to limits, is the sense of *temporality*, our sense of time.<sup>84</sup> At our empathic human core time is an experience to be cherished rather than a commodity to be rationed, regulated, bought or sold. We take our time to observe, learn, reflect, and bond with others.

### **3. Losing our way**

As we transitioned from small groups that were egalitarian and roughly democratic, to larger, hierarchical, exploitative social structures that eventually became states and empires, we lost sight of many of these natural values.<sup>85</sup> Diamond calls these new social forms “kleptocracies.”<sup>86</sup> This transition is probably the most important change in human history and in human existence thus far.<sup>87</sup>

Farmers carved their croplands from the surrounding wilds, penned up their animals, and expended large amounts of energy to keep nature at bay from both.<sup>88</sup> In the process, humans developed stronger attachments to their homes and farms than to their neighbors. Violence increased as people felt a need to defend their lands, permanent villages and granaries to the death instead of simply moving on to new territory when faced with intrusions, as had their hunter-gather ancestors. This period thus marks the beginning of war.<sup>89</sup> Humans cast off what was left of their symbiosis with nature and sprinted towards greed and alienation.<sup>90</sup>

Human evolution, our biological engineering, our DNA, has still not had time to catch up to this new lifestyle, or even to the diet.<sup>91</sup> This has implications not only for our physical and mental health, but also for how we treat one another. Shepard focused on the daily damage done to our muscles, bones, and digestive tracts from our departure from hunting and gathering—the lack of exercise and consumption of processed food.<sup>92</sup> But I am much more

interested in the probable damage done to our social or cultural DNA,<sup>93</sup> and our psyches, from trying to operate in large, hierarchical social structures.

#### 4. Can the human rights project revive natural values?

Two years after his “Four Freedoms” State of the Union address in 1941<sup>94</sup> (considered the foundation of the Universal Declaration of Human Rights), Franklin Roosevelt drafted a Bill of Socio-Economic Rights.<sup>95</sup> While the Four Freedoms included a “freedom from want,” guaranteeing a healthy peacetime life for all humans, the Socio-Economic Rights draft was more specific. It is interesting to compare these with the value system Sabine O’Hara unearthed.

Most of the rights Roosevelt advanced were connected to the value of *participation*, revealing this as the human value most compromised by the top-down, kleptocratic social structures Jared Diamond identified. Roosevelt’s list includes<sup>96</sup> a right to “the necessities and amenities of life in exchange for work, ideas, thrift and other socially valuable services”; to “adequate food, clothing, shelter and medical care;” to “freedom from fear of old age, want, dependency, sickness, unemployment and accident”; and the “right to education, for work, for citizenship and for personal growth and happiness.” One entry on the list speaks to *temporality*: “The right to rest, recreation and adventure, the opportunity to enjoy life and take part in advancing civilization.”

These generally belong to the “second generation” of human rights—social, economic and cultural rights—and are focused on individual rights vis-à-vis the community. (The “first generation” of human rights—political and civil—focuses on individual rights vis-à-vis the government, and issues from the struggles of economic elites to move up the political food chain.)

The other values, which speak to community and ecology, have surfaced elsewhere. *Context*, whose empathic foundations have been stretched and distorted by the emergence of states, the growth of cities, the shocks of industrialization,<sup>97</sup> and the illusions of global consumer culture, remains elusive, on the fringes. It will have to be rebuilt by small groups creating social capital off the grid, as discussed later.<sup>98</sup> *Place* and *limits* are being grounded and developed in the movements for peace, environmental balance, and sustainable development, the so-called “collective” human rights of the “third generation.”

However, the human rights project has been limited by its failure to look beyond the “imagined reality” strategies used by previous efforts to resist subordination and kleptocracy. It has succeeded only in generating law and custom-based concessions generally issued from the top. It has barely grazed the surface of the “natural” values O’Hara describes, and only barely shaken the existing hierarchical, kleptocratic order.

Today, we live in a global, neoliberal empire<sup>99</sup> that still manifests the hierarchy and stratification that has bedeviled us since our “fall from Paradise.” Consumerism dims our vision, encouraging us to imagine that millions of strangers belong to our consumer “tribe,” that we all have a common past and a common future.<sup>100</sup> Mass media and advertising give us unreasonable expectations of what happiness is like, such as having a flawless body,<sup>101</sup> in order to sell us these attributes at a price.<sup>102</sup> At the same time, feckless consumption upends the value of shared human prosperity and destroys the ecology we occupy with the world’s other inhabitants.

The consequent decline in family and community has greatly impacted human happiness.<sup>103</sup> Improvements in material conditions over the last two centuries that accompanied, and in many instances caused this decline<sup>104</sup> have not truly absorbed the shock.<sup>105</sup> We have lost sight of a grounding principle our ancestors understood: that happiness is not the surplus of pleasant over unpleasant moments, but rather being able to see one’s life as meaningful and worthwhile.<sup>106</sup> Even though we have mastered our surroundings, increased food production, built cities and established empires, time and again, massive increases in human power have not uniformly improved individual well-being. At the same time, our ceaseless quest for more comfort and amusement, never satisfied,<sup>107</sup> continues to wreak havoc on our planetary cohabitants and the environment in which we all must live.<sup>108</sup>

Progressive forces today face a worldwide counterrevolutionary movement. A right-wing party controls all three branches of government in the United States. Capitalism in China and Russia, and fundamentalism in the Middle East, threaten human rights in those regions as well.<sup>109</sup> Human Rights Watch, in its 2017 World Report, warning of the rise of populist leaders exploiting “rising public discontent over the status quo,” sees a grave danger to the future of democracy.

To succeed, the human rights project must nurture a set of social conditions conducive to the beliefs it seeks to engender. It must promote a set of customs and patterns of practice, as well as a network of organizations to reinforce those practices. There is not much time.

#### **IV. A new approach**

To “save our species and save our planet,” Rifkin says we must be able to extend our empathy to all life on the planet, human and otherwise. He thinks this can be done virtually, with global communications, but Malcom Gladwell questions whether empathy generated without human interaction is strong enough to do the trick.<sup>110</sup> To take an example: the global empathic response to the earthquake in Haiti, which Rifkin describes, was generated by social

media but implemented through institutions of our imagined reality—nations and NGOs—which all had their own agendas. The result? Very few of the resources generated found their way to the victims of the disaster.<sup>111</sup> The people who actually came and worked on the ground, however, made a real difference.<sup>112</sup>

Modern social media-based movements have figured out how to gain adherents without replicating hierarchy or subordination, but they have lost the intimacy of face-to-face, “real-time” communication and relationship building. Gladwell shows that social change cannot succeed without the intimate personal connection people need if they are to take risks for one another. Personal risk is necessary if the established order is to be challenged, but the personal connections enabling risk are even more important for the erection of a new, more just order in its place.<sup>113</sup>

Under these conditions, to what extent can the human rights project be successful in the face of the “imagined realities” that govern our lives today? What is the role of civil society in that process?<sup>114</sup> True empathy and human rights are inextricably intertwined, entrenched in the advice to treat others as you would like to be treated yourself, a maxim found in all the world’s major religions and encapsulating many of the natural human values Sabine O’Hara identified.

### **A. The “vernacularization” project**

Vernacularization is a strategy emanating from the women’s movement. It seeks to incorporate the principles of women’s human rights into common discourse at the community level, building such a familiarity with, and understanding of women’s human rights that the corresponding norms become part of everyday speech.<sup>115</sup> Thus, the vernacularization project seeks to make human rights discourse part of the language and folkways of the broad base of the population, enlisting them in the project and building power from below.

The “vernacular,” a Roman term meaning “native to a place,” refers not only to language, however, but to an entire way of life. I have described this elsewhere as the “cultural DNA” of a people or a community, their way of solving problems and the customs and artifacts they create along the way.<sup>116</sup> The synthesis of human rights vernacularization and cultural DNA could be profound and game-changing, surfacing, strengthening and celebrating intrinsic human values now caged behind walls of neoliberalism and hierarchy.

### **B. The Citizen’s Assembly: A vehicle for vernacularization**

The re-emergence of “natural” human values can only occur if “natural” empathy revives as well. As opposed to the virtual empathy that characterizes

imagined realities, natural empathy requires face-to-face contact. We need a face-to-face forum in which to practice and promote human rights at the vernacular level. The project's impact could be greatly amplified if power was built using naturally sized human groupings

One of Thomas Jefferson's black descendants shared an idea with me that Jefferson once proposed that could answer these needs.<sup>117</sup> Jefferson's idea, borrowed from Native Americans, was to aggregate small groups in concentric circles, bound together by dialogue, without utilizing bureaucracy, hierarchy or subordination. Ideas, direction, and accountability flow from the bottom up (or rather, from the outside in) rather than from the top down. Jefferson called these small groups "ward republics."<sup>118</sup> They were to select Members of Congress in a series of caucuses, and would continue to meet during the Member's term, to give the Member instruction and hold him accountable.

An updated version of this idea would see local ward republics as an informal system, operating in the community, not seeking formal political or economic power but rather to create solidarity, self-help, and cooperative options. Examples of self-help, and cooperative approaches include home schooling, community mediation, cooperative child care and housekeeping, small energy and agricultural cooperatives.

These ward republics would be linked by democratic dialogue into larger associations, called Assemblies, which would still operate without hierarchy or kleptocracy. These larger bodies could promote and protect human rights in the larger community without the need for top-down intervention of any kind. Ward republics are thus the likeliest venue for the "vernacularization" of human rights, grounded in democratic dialogue at the grass-roots level.

## **V. Next steps**

Media and politicians must join to defend democracy, but Human Rights Watch Executive Director Kenneth Roth calls on ordinary citizens to step up, cautioning that rights by their nature are indivisible. "We should never underestimate the tendency of demagogues who sacrifice the rights of others in our name today to jettison our rights tomorrow when their real priority—retaining power—is in jeopardy," he writes.<sup>119</sup>

"You may not like your neighbors," he says, "but if you sacrifice their rights today, you weaken your own tomorrow, because ultimately rights are grounded on the reciprocal duty to treat others as you would want to be treated yourself." That advice is as old, and perhaps older, than civilization itself. A poster on view in the United Nations main lobby presents a picture of more than a dozen religions, including all the major ones, each articulating this same Golden Rule.<sup>120</sup>



But I do not believe the human rights movement can succeed as an imagined reality, even when expressed as simply as this, unless it is communicated and implemented through a structure that transcends hierarchy in execution as well as in conception. Instead, I believe human rights must be based in small groups of humans intimately connected with one another, such groups in turn linked to one another by personal contact, dialogue, and exchange.

This is the answer for which I have been searching most of my life, the answer to the question I posed at the beginning of this article. My journey through social movements and cultural anthropology brings me here. A People's assembly, an "Assembly of Sapiens,"<sup>121</sup> if you will, that could aggregate those small groups into something extraordinary.

Such an assembly could grow community, countering hierarchy and kleptocracy. Such an assembly could not only renovate the basic human values that support and undergird the Golden Rule, but surpass it, as those values evoke empathy not just for our fellow human beings but for all the inhabitants of the natural world.

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#### NOTES

1. HAROLD MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* (Temple University Press, First Paperback ed., 1993).
2. IV MARILYN FRENCH, *FROM EVE TO DAWN, A HISTORY OF WOMEN IN THE WORLD: REVOLUTIONS AND THE STRUGGLES FOR JUSTICE IN THE 20TH CENTURY* 492 (2008) [hereinafter *REVOLUTIONS*].
3. *Id.* at 346.
4. JARED M. DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 264-65 (W. W. Norton, 1997).
5. PAUL SHEPARD, *COMING HOME TO THE PLEISTOCENE* 155 (1998); *see also* YUVAL NOAH HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* 8-9 (2011).
6. HARARI, *supra* note 5, at 51-52.
7. DIAMOND, *supra* note 4, at 260.
8. *See* JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* (2009). *See, e.g.,* *RSAnimate, Jeremy Rifkin: The Empathic Civilization*, YOUTUBE (May 6, 2010), <https://www.youtube.com/watch?v=17AWnfRc7g> [hereinafter *The Empathic Civilization*].
9. <https://cart.pflaum.com/product.php?productid=42>
10. *The Empathic Civilization*, *supra* note 8.
11. *Id.*
12. SHEPARD, *supra* note 5, at 154-59.
13. This term is Harari's. *See* HARARI, *supra* note 5, at 22-36.
14. *Id.* at 37-39 (marking a significant difference between our evolution and that of all other species on the planet).
15. *Id.* at 21-22; *see also* *The Tree of Knowledge*, ERENOW, <http://erenow.com/common/sapiensbriefhistory/7.html> (last visited Feb. 16, 2018).



16. See Arthur Munk, *Major Ancient Revolutions*, 53 Soc. Sci. 237, 237-42 (1977).
17. Compare Paul Costello, *Racism and Black Oppression in the United States: A Beginning Analysis*, 24 THEORETICAL REVIEW 11 (1981) (discussing the social construction of “ideology”).
18. *Id.*
19. *Id.*
20. HARARI, *supra* note 5, at 113-18.
21. See *id.* at 102, 104, & 112-18; DIAMOND, *supra* note 4, at 52-53.
22. *Id.* at 91-94.
23. Friedrich Engels made this point as well. See FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE (1884).
24. I MARILYN FRENCH, FROM EVE TO DAWN, A HISTORY OF WOMEN IN THE WORLD: ORIGINS: FROM PREHISTORY TO THE FIRST MILLENNIUM 71 (2008) [hereinafter ORIGINS].
25. But see SHEPARD, *supra* note 5, at 96-97 (“From the beginning, men have always suspected that women knew something that they did not.”).
26. ENGELS, *supra* note 23.
27. ORIGINS, *supra* note 24, at xi, 6. But see HARARI, *supra* note 5, at 42-43.
28. See Hilary Mantel, *The War Against Women*, THE GUARDIAN (Apr. 17, 2009, 7:01 PM), <https://www.theguardian.com/books/2009/apr/18/eve-dawn-history-women-french>; ORIGINS, *supra* note 24, at 24 (speculates the male role in procreation may have been discovered as much as 15–20,000 years ago, where the oldest cave paintings depict a connection between the male role in sex and consequent pregnancy appeared 7,000 years ago and also depict animals copulating in the spring and females pregnant in the summer).
29. ORIGINS, *supra* note 24, at 19-20.
30. *Id.* at 10.
31. *Id.*
32. *Id.* at xi.
33. *Id.* at 11; see also *id.* at 54-55 (for the suggestion that male fraternity may have evolved from the primarily male hunt for big game).
34. ORIGINS, *supra* note 24, at 56.
35. *Id.* at 56.
36. *Id.* at xii.
37. *Id.* at 181 (these laws outlawed adultery as committed by women and legalized prostitution, almost simultaneously, at once restricting women’s sexuality and also commercializing it).
38. See generally ORIGINS, *supra* note 24, at 67-189.
39. *Id.* at 182-83.
40. *Id.* at 10.
41. See *id.* at 184.
42. *Id.* at 115.
43. See generally ORIGINS, *supra* note 24, at 67-189.
44. *Id.* at 66, 114.
45. *Id.* at 65-66.
46. *Id.* at 177; DIAMOND, *supra* note 4, at 267. See also DAVID B. GRUSKY, SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 9 (2001).

47. ORIGINS, *supra* note 24, at 177-78.
48. *Id.* at 178.
49. *Id.* at 179 (emphasis added).
50. II MARILYN FRENCH, FROM EVE TO DAWN, A HISTORY OF WOMEN IN THE WORLD: THE MASCULINE MYSTIQUE: FROM FEUDALISM TO THE FRENCH REVOLUTION 4 [hereinafter MYSTIQUE].
51. DIAMOND, *supra* note 4, at 266.
52. ORIGINS, *supra* note 24, at 180-88.
53. DIAMOND, *supra* note 4, at 270.
54. *Id.* at 265.
55. *Id.*
56. See MYSTIQUE, *supra* note 50; DIAMOND, *supra* note 4, at 49.
57. ORIGINS, *supra* note 24, at 178.
58. *Id.* at 188; DIAMOND, *supra* note 4, at 265.
59. ORIGINS, *supra* note 24, at 186.
60. ALASTAIR DUNN, THE GREAT RISING OF 1381: THE PEASANTS' REVOLT AND ENGLAND'S FAILED REVOLUTION 22-23 (2002).
61. HARARI, *supra* note 5, at 116-18.
62. DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 256-58 (2004); SEAN MCGLYNN, BLOOD CRIES AFAR: THE FORGOTTEN INVASION OF ENGLAND 1216 137 (2013).
63. Compare III MARILYN FRENCH, FROM EVE TO DAWN, A HISTORY OF WOMEN IN THE WORLD: INFERNOS AND PARADISES: THE TRIUMPH OF CAPITALISM IN THE 19TH CENTURY 110 (2008) [hereinafter INFERNOS] ("The American ruling class declared the revolution complete, ignoring the nation's vast inequities, privilege, poverty, and conspicuous injustice."); see also REVOLUTIONS, *supra* note 2, at 151, 191.
64. See REVOLUTIONS, *supra* note 2, at 346-47.
65. MARC BLOCH, FEUDAL SOCIETY: THE GROWTH OF THE TIES OF DEPENDENCE (1989).
66. See INFERNOS, *supra* note 63, at 93 ("Such workshops were established in Paris during the 1848 Revolution." *Id.*).
67. *Id.* at 107-09.
68. See APPIAN, CIVIL WARS, book 1, pg. 116; FLORUS, EPITOME, book 2, chp. 8; Abraham Bishop, "The Rights of Black Men" and the American Reaction to the Haitian Revolution, 67 J. OF NEGRO HISTORY 148 (1982); see also REVOLUTIONS, *supra* note 2, at 156 ff. (discussing Toussaint L'Ouverture); JONATHAN SUMPTION, THE HUNDRED YEARS WAR III: DIVIDED HOUSES 491 (2009) (An account of Wat Tyler's peasant rebellion in England).
69. See, e.g., Rosamond Faith, *The 'Great Rumour' of 1377 and Peasant Ideology*, in THE ENGLISH RISING OF 1381 43-73 (R.H. Hilton & T.H. Aston eds. 1987) (discussing Wat Tyler's peasant uprising).
70. APPIAN, CIVIL WARS, book 1, pg. 120, available at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Appian/Civil\\_Wars/1\\*.html#120](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Appian/Civil_Wars/1*.html#120) (After the death of Spartacus and the defeat of his armies by Crassus, 6,000 captured slaves were crucified along the route from Rome to Capua.).
71. See INFERNOS, *supra* note 63, at 310 (Before groups can revolt, "they must forge self-consciousness.").
72. MYSTIQUE, *supra* note 50, at 402.

73. *Id.*
74. For connections between the French and Haitian Revolutions, see Laurent Dubois, *Two Revolutions in the Atlantic World: Connections Between the American Revolution and the Haitian Revolution*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <http://oa.gilderlehrman.org/history-by-era/global-history-and-us-foreign-policy/essays/two-revolutions-atlantic-world-connection> (last visited Feb. 17, 2018).
75. MYSTIQUE, *supra* note 51, at 402.
76. See Sabine U. O'Hara, *Valuing Socio-diversity*, 22 INT'L J. OF SOC. ECON. 31 (1995).
77. Ken Pennington, *The History of Natural Law: Key Elements of Natural Law and Natural Rights in Jurisprudence*, available at <http://legalhistorysources.com/Canon%20Law/HistoryCanonLaw.html> (last visited Feb. 17, 2018).
78. O'Hara, *Valuing Socio-diversity*, *supra* note 76.
79. *Id.* at 37.
80. *Id.* at 34.
81. *Id.* at 36.
82. *Id.* at 39.
83. HARARI, *supra* note 5, at 350-51.
84. O'Hara, *supra* note 76, at 40.
85. DIAMOND, *supra* note 4, at 266-67, 269.
86. *Id.* at 265.
87. *Id.* at 255 ff; see also Harari, *supra* note 5, at 79; cf. Engels, *supra* note 23.
88. HARARI, *supra* note 5, at 98-99.
89. ORIGINS, *supra* note 24, at 47-48; see also HARARI, *supra* note 5, at 81.
90. DIAMOND, *supra* note 4, at 273-74, 279-80.
91. See, e.g., Timothy M. Ryan & Colin N. Shaw, *Gracility of the Modern Homo Sapiens Skeleton is the Result of Decreased Biomechanical Loading*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 372, 374-75 (2015), available at <http://www.pnas.org/content/112/2/372.full.pdf>; E. Dounias & A. Froment, *When Forest-Based Hunter-Gatherers Become Sedentary: Consequences for Diet and Health*, FAO, available at <http://www.fao.org/docrep/009/a0789e/a0789e07.htm> (last visited on Feb. 17, 2018).
92. SHEPARD, *supra* note 5, at 98-102; see also HARARI, *supra* note 5, at 79-81.
93. See note 111, *infra*, and accompanying text.
94. <https://www.youtube.com/watch?v=QnrZUHcpoNA>; <http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/>.
95. See generally, Winston P. Nagan, *Human Rights, Liberty & Socio-Economic Justice: Economic Theory and The Ascent of Private Property Values*, CADMUS, Volume I, No. 2, April 2011, 35-54.
96. *Id.* at 38.
97. HARARI, *supra* note 5, at 355 (The Industrial Revolution upended the family and the local community, replacing them with the market and the state. *Id.* at 356); see also INFERNOS, *supra* note 63, at 87 and 106.
98. The women's and environmental movements of the late 20th century developed useful models. Danish co-housing provides another.
99. HARARI, *supra* note 5, at 374.
100. *Id.* at 363.
101. *Id.* at 384.

102. *Id.* at 403.
103. *Id.* at 358-60.
104. HARARI, *supra* note 5, at 382.
105. *Id.* at 382-83.
106. *Id.* at 391.
107. *Id.* at 416.
108. *Id.* at 415.
109. MYSTIQUE, *supra* note 50, at 2, 14, 15.
110. Malcom Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER (Oct. 4, 2010), <http://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell>.
111. Alan Yuhas, *American Red Cross Squandered Aid After Haiti Earthquake, Report Alleges*, THE GUARDIAN (June 3, 2015 3:11 PM), <http://www.theguardian.com/world/2015/jun/03/american-red-cross-squandered-aid-haiti-earthquake-report-alleges>.
112. Anastasia Moloney, *Volunteer Network Helps Haiti Cope With Disasters Year After Year*, HUFFPOST (Jan. 10, 2015, 12:52 PM), [http://www.huffingtonpost.com/2015/01/12/haiti-volunteers-earthquakes\\_n\\_6448618.html](http://www.huffingtonpost.com/2015/01/12/haiti-volunteers-earthquakes_n_6448618.html).
113. See Gladwell, *supra* note 110.
114. Harold A. McDougall, *The Citizen's Assembly: A Civic Infrastructure for Progressive Social Change*, HUFFPOST (June 29, 2012, 10:49 AM), [http://www.huffingtonpost.com/harold-a-mcdougall/civic-engagement\\_b\\_1637398.html](http://www.huffingtonpost.com/harold-a-mcdougall/civic-engagement_b_1637398.html).
115. See generally SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); see also Sally Engle Murray, *Unpacking the Vernacularization Process*, YOUTUBE (Aug. 16, 2010), [https://www.youtube.com/watch?v=9iECQNSR\\_ak](https://www.youtube.com/watch?v=9iECQNSR_ak).
116. See Harold A. McDougall, *Reconstructing African American Cultural DNA: An Action Research Agenda for Howard University*, 55 HOW. L.J. 63, 64-69 (2011).
117. See Don Anderson, Letter to the Editor, *Assemblies That Help the Southern Poor Help Themselves*, N.Y. TIMES (July 3, 1984), <http://www.nytimes.com/1984/07/03/opinion/l-assemblies-that-help-the-southern-poor-help-themselves-040490.html>.
118. See, e.g., Ward Republic, WIKIPEDIA, [https://en.wikipedia.org/wiki/Ward\\_republic](https://en.wikipedia.org/wiki/Ward_republic) (last visited Feb. 17, 2018).
119. HUMAN RIGHTS WATCH WORLD REPORT 2017 viii-ix (2017), available at [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2017-web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf).
120. <https://cart.pflaum.com/product.php?productid=42>.
121. See Harold A. McDougall, *The Citizen's Assembly: A Civic Infrastructure for Progressive Social Change*, HUFFPOST (June 29, 2012, 10:49 AM), [http://www.huffingtonpost.com/harold-a-mcdougall/civic-engagement\\_b\\_1637398.html](http://www.huffingtonpost.com/harold-a-mcdougall/civic-engagement_b_1637398.html).



**Daniel Kelly**

**ROSARIO, VILARDI, AND THEIR PROGENY:  
DO THEY HOLD ROGUE PROSECUTORS  
ACCOUNTABLE AND BRING JUSTICE  
TO THE WRONGFULLY CONVICTED?**

The Supreme Court of the United States has boldly declared that, although “there is no general constitutional right to discovery in a criminal case,”<sup>1</sup> the Due Process Clauses in the Fifth and Fourteenth Amendment to the U.S. Constitution do provide the criminally accused with the right to a certain kind of evidence within the state’s possession.<sup>2</sup> In the landmark decision of *Brady v. Maryland*,<sup>3</sup> the Court stated that “the suppression by the prosecution of evidence favorable to the accused . . . violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution.”<sup>4</sup> While it is true that, over the years, the Court has broadened both the kind of evidence the state must turn over to the defense and the scope of its responsibility to do so, the requirement that evidence be “material” has given certain Justices a vehicle (or a pretext) to limit *Brady’s* scope.<sup>5</sup> This article will discuss the federal Constitutional requirements that govern *all prosecutors*—state and federal—with respect to disclosure of exculpatory evidence and examine how those requirements have largely not lived up to the lofty rhetoric of *Brady* itself.

All is not lost, however. Because the Supreme Court sets the floor—and not the ceiling—of individual constitutional rights, the states are free to provide the accused with a broader right to discovery in a state criminal proceeding. New York has done just that. Contrasting the New York standard against the federal one will show that the former affords, at least in theory, more meaningful protection to the accused. However, rules without enforcement are empty platitudes. This standard only matters if it provides defendants more discovery rights in practice and imposes meaningful consequences when those rights are violated.

**The federal standard: federal constitutional requirements**

In *Brady*, John L. Brady and his codefendant, Donald Boblit, were tried for capital murder.<sup>6</sup> Brady conceded that he acted in concert with Boblit in

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the commission of the crime, but testified that Boblit had done the actual killing.<sup>7</sup> Brady pled with the jury to spare his life during the sentencing stage, but to no avail.<sup>8</sup> After the jury voted for capital murder, Brady found out the prosecution possessed a statement by Boblit admitting that he pulled the trigger.<sup>9</sup> Brady's attorney had previously requested to inspect any statements Boblit made, but the prosecution withheld them. The Supreme Court held that Brady was, under these circumstances, entitled to a new trial on the issue of punishment.<sup>10</sup> And, since that landmark ruling, the Court has extended the disclosure requirements imposed on the prosecution to any exculpatory evidence that is within the police's possession, regardless of the prosecutors actual knowledge of the evidence's existence.<sup>11</sup>

In a series of subsequent holdings, the Court has delineated three elements of a true *Brady* violation: (1) the suppressed evidence must be favorable to the accused, (2) it must, in some way, have been suppressed by the state, and (3) the evidence must have been material, in the sense that the defendant was prejudiced by its suppression.<sup>12</sup>

As to the first element, the *Brady* court made clear that directly exculpatory evidence must be disclosed.<sup>13</sup> In *Giglio v. United States* the court went further.<sup>14</sup> In *Giglio*, the prosecution's star witness was promised immunity in exchange for his testimony against the defendant at trial.<sup>15</sup> The Court overturned the defendant's conviction, holding that "nondisclosure of evidence affecting credibility" is a violation of due process and must also such evidence be disclosed to the defense. In other words, impeachment material is *Brady* material.<sup>16</sup>

As to the second element, the Court has held that state "suppression" of evidence exists regardless of whether the defendant makes a request for *Brady* material itself, makes only a generalized request, or makes a specific demand for a particular piece of evidence within the state's possession.<sup>17</sup> While emphasizing the prosecutor's dual role as an advocate and minister of justice,<sup>18</sup> the Court stated that some evidence may be "obviously of such substantial value to the defense that elementary fairness" mandates that the accused receive it whether they make a request or not.<sup>19</sup>

As to the final element, the Court has reasoned that, since the defendant's right to certain exculpatory evidence is grounded in his or her constitutional due process right to a fair trial, there is no breach of the prosecutor's duty to disclose the evidence unless that nondisclosure did in fact deny the defendant a fair trial.<sup>20</sup> In a criminal proceeding, a fair trial requires that the state prove the defendant is guilty of the offense beyond a reasonable doubt. Accordingly, the non-disclosure of evidence denies the accused a fair trial if it "creates a reasonable doubt that did not otherwise exist."<sup>21</sup>

Two leading scholars in criminal jurisprudence have asserted that, in *United States v. Bagley*,

the Court defined the test [for materiality] as follows: “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”<sup>22</sup>

Even though *Bagley* was only a plurality opinion, its influence on the Court’s subsequent materiality jurisprudence is undeniable.

The Court has never tried to attach a numeric percentage on the meaning of “reasonable probability,” but respected commentators have asserted that the defendant need not show by a preponderance of the evidence that he would get acquitted had the evidence not be suppressed. While the defendant’s burden may be unclear, it is clear that the prosecution need not show that the error was harmless beyond a reasonable doubt.<sup>23</sup>

Likewise, when it comes to the state’s obligation to preserve potentially crucial evidence (as opposed to suppressing evidence the state already has in its possession), even where the burden to preserve the evidence would be light, the Supreme Court has imposed a crippling burden on the accused to show a *Brady* violation: “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute denial of due process of law.”<sup>24</sup>

It is true that the Supreme Court has articulated rules to govern discovery in the federal courts under its supervisory powers and, similarly, Congress has enacted the Federal Rules of Criminal Procedure.<sup>25</sup> However, neither set of rules imposes inexorable constitutional commands binding upon all fifty states as the case law does. Indeed, discovery rules are subject to amendment or outright repeal should it be politically expedient to do so. *Brady* and its progeny have spawned a great deal of scholarly comment and criticism over the years and serve as the key point of comparison for purposes of this discussion. For that reason, and for the sake of analytical clarity, this article omits any discussion of the federal statutory discovery requirements.

### **Critique of *Brady* and its progeny**

The Supreme Court’s jurisprudence concerning a criminal defendant’s constitutional right to discovery has been persuasively criticized by legal scholars, practitioners, and members of the Court themselves. To start with this last category, Justice Thurgood Marshall, with a thundering dissent in *United States v. Bagley*, criticized the “reasonable probability” standard as one that will lead prosecutors to suppress favorable evidence and let them disregard “as irrelevant or unpersuasive evidence that draws [the prosecutors]

own judgment into question.”<sup>26</sup> One commentator has openly questioned whether an upright district attorney would ever have legitimate *Brady* material, because, by hypothesis, the evidence would have to have such a tendency to exculpate the accused “that it would make [the prosecutor] question the reliability of the guilty verdict.”<sup>27</sup>

Professor Richard Rosen, nearly thirty years ago, sounded the alarm on a problem he believed was anything but trivial: “There are . . . enough reported cases containing strong evidence of intentional prosecutorial withholding of exculpatory evidence and presentation of false evidence to demonstrate that this kind of misconduct occurs frequently enough to generate considerable concern about devising an effective remedy.”<sup>28</sup> In recent years, even DNA evidence *that conclusively exonerated* convicted individuals has been scoffed at by some tunnel-visioned prosecutors.<sup>29</sup> These are extreme and anecdotal exceptions perhaps, but they occur frequently enough to raise legitimate concern about the standard by which prosecutors determine whether they must disclose exculpatory evidence.

Professor Daniel Medwed, drawing on his extensive experience as a public defender with the Legal Aid Society in New York City, decried the Court’s approach as one that requires even good faith prosecutors to “engage in an artificial, prospective assessment about how particular items of evidence fit within the jigsaw puzzle of a possible trial.”<sup>30</sup> Medwed considered a way to make this materiality standard more protective of the accused: by changing the test from a reasonable probability to a reasonable *possibility* that the trial would have had a different result.<sup>31</sup> He believes that such a standard would make it tougher for prosecutors to withhold exculpatory evidence that is borderline *Brady* material.<sup>32</sup> “New York has taken this approach in certain situations. Where a defendant in state court makes a specific request for a piece of favorable evidence, nondisclosure of that item will satisfy materiality so long as its presence would have created only a reasonable possibility of a different result.”<sup>33</sup> Can such a standard help fix the *Brady* problem?

### **New York’s constitutional requirements**

In the landmark case of *People v. Vilardi*,<sup>34</sup> the New York Court of Appeals announced a sharp break from the United States Supreme Court’s materiality standard.<sup>35</sup> The Court of Appeals directly confronted the question: “More particularly, we must decide whether the standard of *United States v. Bagley* . . . should be adopted as a matter of State law.”<sup>36</sup>

Before Vilardi’s case ever began, the Kings County (Brooklyn) District Attorney’s Office had charged brothers Ronnie and William Bernacet with arson in the first degree.<sup>37</sup> In that case, Officer Daniel Kiely of the Bomb



Squad unit of the New York City Police Department (NYPD) prepared a report that concluded that there was no evidence of an explosion, and property damage arising out of such an explosion was a necessary element of the arson offense.<sup>38</sup> In summation, defense counsel urged that there was insufficient evidence of an explosion based on Officer Kiely's report, and both Ronnie and William Bernacet were acquitted.<sup>39</sup> After the verdicts, the District Attorney decided to charge another individual, Antonio Vilardi, with first degree arson—the *same charge* in the *same incident* on which the Bernacet brothers had just been tried and acquitted.<sup>40</sup> Vilardi's lawyer made a specific discovery request for all reports "by ballistics, firearm, and explosive experts" arising out of the incident, but this time the prosecution failed to disclose Officer Kiely's report.<sup>41</sup>

The Court of Appeals stated that a "showing of a 'reasonable possibility' that the failure to disclose the exculpatory report contributed to [Vilardi's conviction] remains the appropriate standard to measure materiality, where the prosecutor was made aware by a specific discovery request that defendant considered the material important to the defense."<sup>42</sup> In this regard, the Court of Appeals emphatically rejected what it characterized as a less protective federal standard.<sup>43</sup>

The Court reasoned that a failure to disclose evidence in the face of a specific defense request posed an unacceptable risk of denying the defendant a fair trial.<sup>44</sup> Further, viewing the strength of the state's case with the distorted vision of hindsight, post-conviction, would provide less incentive for prosecutors to diligently search files for exculpatory evidence and disclose it to the defense in close cases.<sup>45</sup> The Court chastised the "reasonable probability" standard articulated by the Supreme Court as unclear and asserted that such a standard "remits the impact of the exculpatory evidence to appellate hindsight, thus significantly diminishing the vital interest this court has long recognized in a decision rendered by a jury whose ability to render that decision is unimpaired by failure to disclose important evidence."<sup>46</sup> Thus, the Court held there was a reasonable probability that defense counsel's trial strategy would have been altered, and may have resulted in a different outcome, when the prosecution withheld the initial explosive report.<sup>47</sup> Indeed, the Court noted that the doubts raised by Officer Kiely's report seemed to play a considerable role in the Bernacet brothers' acquittal.<sup>48</sup>

Years before *Vilardi* was decided, the New York Court of Appeals laid down an initial bright-line, state constitutional rule. In *People v. Rosario*,<sup>49</sup> the defendant, Luis Rosario, was convicted of first degree murder for shooting a store clerk in the course of a robbery.<sup>50</sup> The Court believed there was no doubt about his guilt and, indeed, Rosario did not challenge the sufficiency

of the evidence.<sup>51</sup> Rather, he claimed that the trial court committed reversible error when it refused to order the prosecution to turn over prior recorded statements by the prosecution's witnesses.<sup>52</sup>

Procedurally, the state conducted direct examination of each of three witnesses during its case-in-chief.<sup>53</sup> Before his cross examination, defense counsel asked to see the witnesses' statements *in full* to determine whether or not they would be useful.<sup>54</sup> The trial court only allowed the defense to learn of "variances" between the statements and each witness's trial testimony,<sup>55</sup> and prevented defense counsel from viewing the whole statement and determining what might be useful during cross examination.<sup>56</sup>

The Court of Appeals rejected the trial judge's ruling in no uncertain terms:

The procedure to be followed turns largely on policy considerations, and upon further study and reflection this court is persuaded that a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination.<sup>57</sup>

The Court noted several methods by which a prior statement could be usefully employed by defense counsel at trial, even if it was largely consistent with the witness's trial testimony.<sup>58</sup> Such statements could help demonstrate bias or help neutralize unfavorable testimony.<sup>59</sup> Moreover, any additions, subtractions, or omissions between the prior statement and the trial testimony may put the trial testimony in an entirely different context before the jury.<sup>60</sup> Finally, the Court noted that a partisan lawyer for the defendant would be in a superior position to consider the potential impeachment value of the prior statement that would not be as apparent to the trial judge sitting as a neutral arbiter between the state and the accused.<sup>61</sup> For these reasons, the Court concluded the statements should have been disclosed in their entirety to defense counsel.<sup>62</sup> The Court affirmed the conviction in any event, being quite certain *Rosario* was not prejudiced by the nondisclosure.<sup>63</sup> Still, the decree had been made. The case proved to be such a significant landmark that some members of the New York bar colloquially dubbed prior recorded statements that had to be turned over to the defense as "Rosario material."<sup>64</sup>

Taken together, *Vilardi* and *Rosario* are the crux of a New York defendant's *state constitutional right* to discovery to prepare his defense for trial. Does it make a difference?

### **New York v. federal standard: conviction reversals**

At the outset of the forthcoming analysis, intellectual honesty and academic integrity demand a concession that what the Supreme Court might do in a

given case and what the New York Court of Appeals might do in that same case inevitably involves some speculation. Perhaps the most sensible way to proceed is to first consider cases in New York where discovery violations resulted in post-conviction relief, including reversing those convictions. Then we may consider if discovery violations *would* be found and convictions reversed had the federal standard been applied, instead of the more nominally protecting New York standard.

In *People v. Cwikla*,<sup>65</sup> Tommy Cox, a participant in an alleged homicide who had already pled guilty to manslaughter, testified against the defendant Roger Cwikla, who had been charged with first degree murder in connection with the killing.<sup>66</sup> Cox asserted on direct examination that he was not promised anything from the prosecutor in exchange for his testimony against Cwikla.<sup>67</sup> On cross, however, Cox admitted that he asked the District Attorney's office to write to the Parole Board on his behalf, but maintained that the District Attorney's office never promised it would do so.<sup>68</sup> Thereafter, defense counsel moved to have the prosecutor produce any correspondence between its office and the Parole Board.<sup>69</sup> As the Court described, "It was defense counsel's position that such material, if it existed, *might* be exculpatory as tending to show a motivation to lie on the part of the prosecution's chief witness."<sup>70</sup> The prosecution rebuked the request to produce any such correspondence or even to say whether it existed.<sup>71</sup> The trial court agreed to issue a subpoena to the Parole Board for the materials, but refused to order disclosure from the prosecution.<sup>72</sup>

On appeal, the defense received what it asked for: letters from Tommy Cox's mother to the prosecutor asking him to intervene in Cox's imminent parole eligibility hearing, an extensive letter from the prosecutor to the Parole Board praising Cox for his cooperation and urging the Board to consider his cooperation in its decision, and the Parole Board's acknowledgement of, and thanks to, the District Attorney's Office for the information concerning Cox's cooperation.<sup>73</sup> The New York Court of Appeals seemed to find this nondisclosure particularly troubling:

The materials sought by defense counsel here—correspondence between the office of the District Attorney and the Parole Board relating to the witness Tommy Cox—were of such a nature that the jury could have found that, despite the witness' protestations to the contrary, there was indeed a tacit understanding between the witness and the prosecution, or at least so the witness hoped. We have on a previous occasion noted that the existence of such an agreement "might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony." Consequently, in view of the significance which the jury might have attached to this evidence and in keeping with the principles enunciated in *Brady v Maryland*, and its

progeny, we hold that the nondisclosure of this evidence denied defendant his right to a fair trial.<sup>74</sup>

The Court of Appeals used a mixture of federal *Brady* principles and its own state constitutional law to find that the defense had a right to the prior recorded statements at trial. Note that *Cwikla* came after *Rosario* was decided by the Court of Appeals, but before *Vilardi* was handed down. This emphasizes the importance of *reading these cases together* and understanding how the Court of Appeals may have used them in its legal reasoning. *Cwikla* still remains good law in New York, and certainly the *spirit of disclosure* emphasized in *Rosario* seemed to play a role in the Court's holding.<sup>75</sup> Yet, on the facts of *Cwikla*, would the Supreme Court, applying solely *Brady* principles, reach the same conclusion?

There is at least a colorable claim that the prosecution's conduct in *Cwikla* would not require reversal on federal constitutional grounds. The Court of Appeals characterized the defense's position as a hope that if the correspondence did exist, that it "might" tend to expose a motive to lie on behalf of the prosecution's chief witness.<sup>76</sup> The Court said that the jury considering such statements could have found that there was an agreement between the prosecution and Cox, or at least the jury would believe that Cox hoped such an agreement was in place.<sup>77</sup>

If all of these factors appear highly speculative, consider the current Supreme Court applying its *Brady* "reasonable probability" standard.<sup>78</sup> Can it be said that these statements, if disclosed, would have provided a reasonable probability that the result of the proceeding would have been different? Perhaps so. The New York Court of Appeals does not detail what other evidence in the case linked the defendant to the crime. Still, this appears to be a very thin reed to rely upon under a reasonable probability standard. At a minimum, it appears to be a close case under federal case law. Indeed, the Court in *Cwikla* did not exclusively rely on federal law to support its holding—state law principles were relied upon too. In any event, the Supreme Court has never gone as far as the *Cwikla* court did at the very outset of its opinion:

A prosecutor is under a duty to disclose to defense counsel correspondence between the office of the District Attorney and the Parole Board advising of the co-operation of a principal prosecution witness in the trial of the witness' accomplices and expressing the hope that such co-operation will be taken into account when the witness is considered for parole.<sup>79</sup>

*Cwikla* thus sets yet another bright-line, constitutional rule that demands strict compliance from state prosecutors. Neither *Brady* nor its progeny issues this kind of inexorable command. *Cwikla* accordingly indicates that the accused has considerably more protection under state constitutional law.

In *People v. Bond*,<sup>80</sup> the Court of Appeals handed down another decision that put to rest any lingering doubt that the accused has a better chance of winning reversal under *Rosario* and *Vilardi* than under *Brady*. In *Bond*, the defendant Brian Bond was tried and convicted of depraved indifference murder.<sup>81</sup> The *mens rea* for this offense is recklessness, not intent.<sup>82</sup> The prosecution's case included the testimony of Leonara Moore and Ricardo Williams,<sup>83</sup> who both claimed to have seen the accused and another man, Jabar Washington, point similar looking firearms toward the victim.<sup>84</sup> Both witnesses also claimed they heard multiple shots fired but did not actually see the shooting.<sup>85</sup> Finally, each witness also identified a number of other individuals who were present at the scene.<sup>86</sup> Moore's aunt, Carmen Green, was not among them.<sup>87</sup> At trial, a defense witness, and the defendant himself, would also testify that Carmen Green was not at the scene.<sup>88</sup>

Over a week into Bond's trial, the state requested a continuance to secure additional witnesses.<sup>89</sup> After the continuance, the state called Carmen Green to the stand.<sup>90</sup> Green claimed to have seen the defendant pull out a firearm, point it at the victim, and pull the trigger.<sup>91</sup> Green admitted she was addicted to crack cocaine.<sup>92</sup> More critically, she testified that detectives from NYPD questioned her niece, Moore, in Green's apartment the very night of the shooting<sup>93</sup> but did not question her<sup>94</sup>

In its summation, the defense asserted that the evidence of who pulled the trigger was ambiguous and that the state's "star witness," Green, was a crack addict whose testimony at the eleventh hour was not credible.<sup>95</sup> Bond was subsequently convicted and, a year later, the trial court granted his request for a rehearing to determine if Green had made any prior inconsistent statements or if the police had made her any promises.<sup>96</sup>

At the hearing, Green testified about a question the police had posed to her the night of the shooting: "They asked me did I see anything and I told them no."<sup>97</sup> In response, the court found:

This was in direct contradiction to her trial testimony. Other hearing witnesses established that during the trial, two detectives went to Carmen Green's apartment in search of her son Lamont to interview him about the shooting. At that time—three years after her initial denial—Carmen Green told the investigators that although her son was not at the apartment, she was an eyewitness to the shooting and was willing to cooperate. Leonora and her brother, Derrick Moore, both testified at the hearing that they were present<sup>98</sup>

The trial court conceded that Green's prior inconsistent statement went to the heart of her testimony, but nonetheless refused to reverse Bond's conviction.<sup>99</sup> The court reasoned that there was no reasonable possibility that disclosing the prior inconsistent statement would affect the verdict, because Bond had

already impeached Green on her drug habit and coming forward only at the last moment.<sup>100</sup> Critically, the court believed that because Bond was convicted of murder based on his depraved indifference to the value of human life, the jury “may not” have relied on Green’s testimony at all.<sup>101</sup> Essentially, the trial court said that Green’s testimony that Bond acted with intent would have no bearing whatsoever on whether the defendant acted *recklessly*.<sup>102</sup>

After the Appellate Division<sup>103</sup> affirmed the trial court’s ruling, the New York Court of Appeals granted Bond leave to appeal.<sup>104</sup> There, the prosecution conceded that Green’s previous denial of having seen the actual shooting was *Brady* material and that Bond had made a specific request for that material.<sup>105</sup> The Court, invoking *Vilardi*, noted: “reversal of the defendant’s conviction is required if there is a ‘reasonable possibility’ that, had the material been disclosed, the result would have been different.”<sup>106</sup>

The Court observed that Green’s testimony could support a conclusion that the defendant acted intentionally, as opposed to recklessly, but that consideration alone was not dispositive in determining the materiality of the state’s breach of its obligation to disclose the prior inconsistent statement.<sup>107</sup> The Court noted that Green was the sole witness for the prosecution who provided direct evidence that the accused personally fired the fatal shot himself.<sup>108</sup> Green’s testimony was thus essential to the state’s theory that Bond acted alone in shooting and killing the victim, in spite of the fact that there was evidence indicating that Mr. Washington shot the victim too.<sup>109</sup> The Court also noted that although Bond had the ability to attack Green’s credibility based on her drug addiction, he did not have the ability to expose her as a liar before the jury.<sup>110</sup> For these reasons, the Court of Appeals reversed the defendant’s conviction and granted him a new trial.<sup>111</sup> The Court believed there was a reasonable possibility that had the prosecution disclosed the prior inconsistent statement the result of the proceeding may have been different. As if to emphasize the point, the Court’s ruling was unanimous.<sup>112</sup>

Can it be said that the federal *Brady* standard would have required reversal in the *Bond* case? It is hard to imagine how. The evidence of guilt in *Bond* was hardly conclusive, but is it conceivable that the state’s nondisclosure here would have provided a reasonable *probability* that the result of a proceeding would have been different? That is, would the evidence have the potential to “corrupt the truth seeking function of the trial process”<sup>113</sup> such that the verdict simply cannot be counted on as reliable?

In *Bond*, the defense was free to impeach Green on the stand about her drug habit in general and to imply that the word of an addicted crack addict ought not to be given dispositive weight in a murder prosecution. The defense did

just that.<sup>114</sup> The defense was also free to put before the jury Green's failure to come forward initially after the shooting and did so only after trial began. Again, the defense did precisely that.<sup>115</sup> Under these circumstances, evidence of a prior inconsistent statement, while certainly helpful to the defense, simply adds another theory of impeachment to Green's already thoroughly impeached testimony. Ultimately, the jury seemed to have done precisely what defense counsel implored them not to: given Green's testimony dispositive weight. *Brady* and its progeny do not seem to mandate reversal in this context. At the very least, no reasonable jurist would, on these facts, be willing to guarantee that the Supreme Court would reverse this conviction.

In the fall of 2009, the New York State Bar Association's Task Force on Wrongful Convictions put out a 187-page report for the State Bar's House of Delegates to consider.<sup>116</sup> The report concluded that the New York *Rosario/Vilardi* cases and their progeny provide a better chance for the accused to get his or her conviction reversed for the state's nondisclosure of exculpatory evidence than the federal *Brady* protections standing alone. In pertinent part, the report cites a long list of authoritative holdings and makes bold findings based upon them:

All types of information fall within the types of evidence which must be disclosed to the defense: e.g., (1) promises to a witness, actual or implied on any reading of the information (People v. Steadman, 82 N.Y. 2d 1); (2) prior criminal record or bad acts of the witnesses; (3) prior inconsistent statements of a witness (People v. Bond, 95 N.Y. 2d 840 (2000); People v. Gantt, 13 A.D. 3d 204 (1st Dep't 2004), appeal denied, 4 N.Y. 3d. 798 (2005)); (4) information derived from any investigation made by an agency of the state working on the case including police reports and the results of interviews (People v. Harris, 35 A.D. 3d. 1197); (5) physical evidence including human body parts (People v. Bryce, 88 N.Y. 2d 124) and body fluid samples; (6) evidence obtained through forensic testing; (7) photographs; (8) investigative communications with other branches of government (People v. Wright, 86 N.Y. 2de 591); ... (10) a failure to correct false testimony (People v. Steadman, 82 N.Y. 2d, 1; People v. Novoa, 70 N.Y. 2d 490; People v. Ross, 43 A.D. 3d. 567 (3d Dep't 2007), appeal denied 9 N.Y. 3d 964 (2007)); (11) recantation of a statement by a witness (see People v. Baxley, 84 N.Y. 2d 208); (12) a failure to disclose the conduct of a complainant that would impeach credibility (People v. Hunter 11 N.Y. 3d 1)<sup>117</sup>

There is nothing in *Brady* or its progeny that requires disclosure of mere prior bad acts of witnesses unless they rise to a materiality level, which the *Rosario/Vilardi* line of cases hold to be inadequate to protect the accused under state law. There is nothing in the *Brady* jurisprudence that creates a mandatory disclosure rule for any information derived from an investigation, not just by the police, *but any state agency*. The Supreme Court also has not especially (or at all, to be frank) highlighted the importance of disclosing



police reports and witness interviews. Perhaps most notably, the Supreme Court certainly has not required the prosecution to turn over all body fluid samples. And, in *Arizona v. Youngblood*, the Supreme Court expressly rejected the invitation to require police to preserve certain body fluid samples that might ultimately be favorable to the accused.<sup>118</sup>

The above analysis makes it evident that a defendant has a considerably greater chance of getting his conviction reversed in New York based on nondisclosure of exculpatory evidence than under *Brady*. Indeed, *Rosario* and *Vilardi* provide concrete disclosure standards. When those two cases are coupled with the New York Court of Appeals subsequent jurisprudence, state prosecutors should be on notice that more is demanded of them than mere compliance with *Brady*'s universal mandate. What remains uncertain is whether the *Rosario* and *Vilardi* standards have a meaningful effect on prosecutors' behavior.

### **Attorney discipline in New York and Rule 3.8**

The New York Court of Appeals has declared that “[a] disciplinary proceeding is concerned with fitness to practice law, not punishment. . . . The primary concern of a disciplinary proceeding is the protection of the public in its reliance on the integrity and responsibility of the legal profession.”<sup>119</sup>

In the New York, discipline is handled by the Courts—specifically, the Appellate Division of the Supreme Court—not the private bar.<sup>120</sup> The Appellate Division is divided into four “departments” that each have jurisdiction over separate parts of New York state.<sup>121</sup> The First Department covers New York County and the Bronx, while the Second Department covers Brooklyn (Kings County), Queens, and Staten Island (Richmond County). Accordingly, the first two departments are collectively responsible for the discipline of all lawyers practicing in New York City,<sup>122</sup> home to some of the largest prosecution offices in the country.<sup>123</sup>

New York Rule of Professional Conduct 3.8(b) provides:

A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.<sup>124</sup>

The operative language seems to impose a heavier burden on prosecutors than the New York Court of Appeals case law does: it may mean that *anything* tending to negate the guilt of the accused must be disclosed.<sup>125</sup> There is nothing in the rule's language indicating that the evidence or information



needs to be of the type that would, if not disclosed at trial, provide a “reasonable possibility” that the result of the proceeding would have been different. Comparatively, Rule 3.8(c), (d), and (e) pertain to what a prosecutor should do when he or she learns of evidence *after* a defendant is convicted that creates a reasonable likelihood that the defendant did not commit the offense.<sup>126</sup> This article focuses on 3.8(b).

While mandates that seek to secure a wrongfully convicted defendant’s release from prison are certainly of crucial importance, Rule 3.8(b)’s thrust—at least, theoretically—could prevent a wrongful conviction in the first instance. It is impossible to know for certain how much the Rule actually makes prosecutors disclose evidence that *Brady* and even the *Rosario/Vilardi* progeny would not mandate revealing. If the rule’s language has any tendency to increase proper disclosure, it should be celebrated. For example, a 2006 survey indicated that for the Brooklyn District Attorney’s Office, “Discovery by Stipulation,” what is also known as “open file discovery,” is the norm in misdemeanor cases.<sup>127</sup> Rule 3.8(b) has not led to the same culture of disclosure in other offices, however. In Queens, prosecutors generally follow early open file discovery but only if the defense waives certain pre-trial hearings.<sup>128</sup> In the Manhattan District Attorney’s Office, early discovery only proceeded via a defense motion and a Voluntary Disclosure Form (“VDF”) in response.<sup>129</sup> Finally, in the Bronx, the discovery policy was a “scattershot” that varied between both individual prosecutors and the bureaus in the District Attorney’s Office where they were assigned.<sup>130</sup>

Besides Rule 3.8(b)’s varying effect on both individual prosecutors and different district attorney’s offices in general, there is a far greater cause for concern.

### **Discipline for breach, or the lack thereof**

If the New York Court of Appeals was correct when it stated that the goal of attorney discipline is not to punish,<sup>131</sup> the results of an examination by Joel Rudin, an attorney who has represented wrongfully convicted individuals in civil lawsuits, can hardly be surprising.<sup>132</sup> Rudin informed the New York Bar Association’s Task Force on Wrongful Convictions that he had obtained the personnel records of prosecutors in several counties between the late 1970s and 2003.<sup>133</sup> In the 200 cases Rudin obtained, courts found that the prosecutors involved engaged in general discovery violations as well as more blatant offenses, such as the use of false or misleading testimony and employing improper arguments in summation.<sup>134</sup> Rudin found *only two* prosecutors involved with those approximately 200 cases who were subjected to formal internal discipline in their own offices.<sup>135</sup> Even if Rudin’s review is merely anecdotal and not a representative sample—though it may well be the latter

considering the roughly twenty-five-year time period and results from offices across the state—it indicates that there may be a staggeringly low percentage of prosecutors who are internally disciplined *even after the judiciary made a formal finding of prosecutorial misconduct*.<sup>136</sup>

Each Appellate Division has within its court a disciplinary committee with attorneys and staff to investigate and prosecute complaints of ethical violations.<sup>137</sup> Each Division also has specific procedures for doing so.<sup>138</sup> Investigations are initiated by the filing of a formal complaint by the disciplinary committee *sua sponte*.<sup>139</sup>

Initially, the committee seeks to determine if the attorney's alleged misconduct is serious enough to merit bringing a disciplinary proceeding.<sup>140</sup> If not, the investigation is closed and complaint is dismissed.<sup>141</sup> However, if the case warrants disciplinary action, the attorney's conduct may be brought before the court with the potential for a formal adversarial hearing.<sup>142</sup> Only the Appellate Division judges or their designated subcommittees have the power to issue a public censure, a suspension, or outright disbarment.<sup>143</sup>

If the investigation reveals “clear and convincing evidence” that the attorney has committed misconduct but it is not serious enough to warrant formal charges before the court, the disciplinary committee itself may privately reprimand the attorney, caution the attorney, or recommend continuing education without formal leave from Appellate Division Judges or a designated subcommittee.<sup>144</sup> Certainly there is reason to believe that such a considerable investment of resources is more likely to keep prosecutors alert and lean toward disclosure in close cases, with at least a theoretical threat from a vast disciplinary authority backed by the formal judiciary.

Because the Appellate Division's disciplinary proceedings are made public only when formal findings of certain types of attorney misconduct are made,<sup>145</sup> it is impossible to know for certain how aggressively allegations of prosecutorial misconduct are being investigated, even if the charges turn out to be baseless. Furthermore, a private reprimand—as opposed to public censure, suspension, or disbarment—is never disclosed to the public.<sup>146</sup> Rather, it is simply a professional embarrassment (albeit a considerable one that perhaps could subject any future complaints against the attorney to additional scrutiny by disciplinary authorities). The general citizenry would not ordinarily learn of it. In addition, the disciplinary process is a long and highly complex one. Thus, the proceedings do not usually result in attorney discipline. However, because these proceedings are often outside of public scrutiny (unless particularly harsh discipline, such as public censure, suspension or disbarment, is imposed), it is hard to discern how

much political courage disciplinary committee attorneys have to confront prosecutors for misconduct.

There is another problem in the enforcement process. Conversations with lawyers at the disciplinary committees across the state revealed that they often only come across potential violations of the Rules of Professional Conduct through newspaper articles, insider knowledge of committee members, word of mouth, judicial decisions and orders, or the filing of a complaint by a former client, adverse party, another lawyer, or a member of the public.<sup>147</sup> Although the judicial rulings are a source of information about prosecutors breaching their discovery obligations, there is no standardized procedure for the Appellate Division to send cases to the disciplinary committees.<sup>148</sup> In other words, law clerks for Appellate Division judges simply have no duty to notify the disciplinary committees of judicial opinions regarding prosecutorial misconduct.

It is difficult to determine how many *Rosario/Vilardi* violations are overlooked without any formalized reporting system between Appellate Division, who uncover prosecutorial misconduct, and disciplinary committee staff attorneys charged with enforcing the rules that bind prosecutors. This lack of communication only looms larger when one considers that disciplinary committees are charged with disciplining not just prosecutors who breach their duties, but are collectively responsible for sanctioning any member of the bar when appropriate.

### **Closing thoughts**

Those wrongfully convicted in New York due to a prosecutor's breach of his or her obligations to disclose exculpatory evidence have a better chance of having their convictions reversed under the *Rosario/Vilardi* line of cases than under the bare *Brady* protections that bind prosecutors nationally. But the New York Court of Appeals' meaningful rejection of *Brady's* materiality standard may only provide cold comfort to those who are wrongfully convicted<sup>149</sup> and languishing behind bars, only to be released years later when the violations are revealed.

Further, there is at least some empirical research suggesting that prosecutor's offices across the state are unwilling to sanction their own prosecutors when they cross ethical lines. Although Rule 3.8(b)'s operative language has considerable force, and the disciplinary committees are staffed by experienced attorneys, the procedural maze and gaps in communication may hamper efforts to deter prosecutors from breaching their discovery obligations while the case is still ongoing. To be sure, New York has taken a step in the right direction. Still, the gaps in discipline ought to be closed and the

process made more transparent. If not, there remains a significant danger that people will be wrongfully convicted because prosecutors breach their discovery obligations. There must be the dual threat of retrial for the accused *and* a serious, credible, and imminent threat of professional sanction for the prosecutor.

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NOTES

1. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).
2. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 2: ADJUDICATION 143 (4th ed. 2014).
3. 373 U.S. 83 (1963).
4. *Id.* at 87.
5. See DRESSLER & MICHAELS, *supra* note 2.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. DRESSLER & MICHAELS, *supra* note 2 (citing Kyles v. Whitley, 514 U.S. 419, 437 (1995)).
12. See *id.* at § 7.02 Elements of the Brady Rule (citing Banks v. Dreke, 540 U.S. 668, 691 (2004) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999))).
13. *Brady*, 373 U.S. at 88.
14. 405 U.S. 150 (1972).
15. *Id.*
16. *Id.* Strangely enough, the Court has held that in the plea bargaining context, the accused is not entitled to impeachment material, although they are still entitled to evidence that directly exculpates them. See *United States v. Ruiz*, 536 U.S. 622, 630-32 (2002). Since a discussion of plea bargaining only adds to an already complex U.S. Supreme Court jurisprudence in this area, I omit it for clarity's sake.
17. *United States v. Agurs*, 427 U.S. 97, 111 (1976).
18. *Id.* at 111.
19. *Id.* at 110.
20. See DRESSLER & MICHAELS, *supra* note 2, at 146 (particularly § 7.02 Elements of the Brady Rule).
21. *Agurs*, 427 U.S. at 113.
22. DRESSLER & MICHAELS, *supra* note 2, at 147 (quoting from *United States v. Bagley*, 473 U.S. 667, 682 (1985)); see also *id.* at 146. During their discussion on Constitutional Discovery, Dressler and Michaels seem to take the *Bagley* test as a given. They label it a holding, even though this part of the opinion may only be a plurality. In any event, the prominence it is given by these two highly respected scholars is reason enough to emphasize its language in this paper.
23. See DRESSLER & MICHAELS, *supra* note 2, at 148 (particularly § 7.02 Elements of the Brady Rule).
24. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).
25. See DRESSLER & MICHAELS, *supra* note 2, at 146 (particularly §§ 7.05, 7.06).

26. *Bagley*, 473 U.S. at 702 (Marshall, J., dissenting).
27. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 652 (2002).
28. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987).
29. Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES MAGAZINE (Nov. 25, 2011), <http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html>.
30. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 46 (2012).
31. *Id.* at page 43.
32. *Id.*
33. *Id.*
34. 76 N.Y.2d 67 (N.Y. 1990).
35. *Id.*
36. *Id.* at 69.
37. *Id.* at 70.
38. *Id.*
39. *People v. Vilardi*, 76 N.Y.2d 67, 70 (N.Y. 1990).
40. *Id.*
41. *Id.*
42. *Id.* at 77.
43. *Id.* at 76-77.
44. *People v. Vilardi*, 76 N.Y.2d 67, 77 (N.Y. 1990).
45. *Id.*
46. *Id.* at 77-78.
47. *Id.*
48. *Id.*
49. 9 N.Y.2d 286 (N.Y. 1961).
50. *Id.* at 287-88.
51. *Id.* at 288.
52. *Id.*
53. *Id.*
54. *Id.*
55. *People v. Rosario*, 9 N.Y.2d 286, 288 (N.Y. 1961).
56. *Id.*
57. *Id.* at 289.
58. *Id.*
59. *Id.*
60. *Id.*
61. *People v. Rosario*, 9 N.Y.2d 286, 290 (1961).
62. *Id.*
63. *Id.* at 290-91.
64. See "*Rosario Material*" in *DWI Law*, XAVIER DWI DEFENSE, <https://www.nysdwi.com/rosario-material-in-dwi-law> (last visited Feb. 20, 2018). A simple Google search for

“Rosario Material” yielded over 34 million results in less than half a second on multiple occasions. Many of these articles are the self-serving work of criminal defense lawyers buffering their own pedigrees, but the persistence of the term’s use is striking. Still, other results are law review articles or similar scholarly work. In any event, again, this notation doesn’t seek to vouch for the merits of each writer’s take of what Rosario material is; just to recognize its prominence as a colloquial term.

65. 46 N.Y.2d 434 (N.Y. 1979).
66. *Id.* at 439.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* (emphasis added).
71. *People v. Cwikla*, 46 N.Y.2d 434, 439 (N.Y. 1979).
72. *Id.* at 439-40.
73. *Id.* (internal citations omitted)
74. *Id.* (internal citations omitted).
75. *Id.*
76. *People v. Cwikla*, 46 N.Y.2d 434, 439 (N.Y. 1979).
77. *Id.* at 440.
78. *See* DRESSLER & MICHAELS, *supra* note 2.
79. *People v. Cwikla*, 46 N.Y.2d 434, 438 (N.Y. 1979).
80. 95 N.Y.2d 840 (N.Y. 2000).
81. *Id.* at 842.
82. *See* N.Y. Penal Law § 125.25(2) (2006).
83. *People v. Bond*, 95 N.Y.2d 840, 842 (N.Y. 2000).
84. *Id.* at 841.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *People v. Bond*, 95 N.Y.2d 840, 842 (N.Y. 2000).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *People v. Bond*, 95 N.Y.2d 840, 842 (N.Y. 2000).
96. *Id.*
97. *Id.*
98. *Id.* at 842-43.
99. *People v. Bond*, 95 N.Y.2d 840, 843 (N.Y. 2000).
100. *Id.*
101. *Id.*

102. *Id.*
103. *Id.* The Appellate Division is the intermediate state appellate court in New York. It is composed of four “departments.” The Court does not say so explicitly in this passage, but since this conviction was in Brooklyn, and the 2nd Department has jurisdiction over Brooklyn, Queens and some suburban counties in the New York tri-state area, it is in all likelihood the 2nd Department affirmed the trial court’s conclusion. *See Appellate Divisions*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/appellatedivision.shtml> (last visited Feb. 20, 2018).
104. *People v. Bond*, 95 N.Y.2d 840, 843 (N.Y. 2000).
105. *Id.*
106. *Id.* (citing *People v. Vilardi*, 76 N.Y.2d 67, 77 (N.Y. 1990)).
107. *People v. Bond*, 95 N.Y.2d 840, 843 (N.Y. 2000).
108. *Id.*
109. *Id.*
110. *Id.*
111. *People v. Bond*, 95 N.Y.2d 840, 843 (N.Y. 2000).
112. *Id.*
113. *Agurs*, 427 U.S. at 104. This is part of the majority opinion delivered in this case by Justice Stevens, joined by Chief Justice Burger and Justices Stewart, White, Blackmun, Powell and Rehnquist.
114. *Id.* at 103-04.
115. *Id.*
116. NEW YORK STATE BAR ASSOCIATION, TASK FORCE ON WRONGFUL CONVICTIONS (Apr. 4, 2009), available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663> [hereinafter WRONGFUL CONVICTIONS].
117. *Id.* at 24.
118. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).
119. *In re Rowe*, 80 N.Y.2d 336, 342 (N.Y. 1992) (citing *Matter of Levy*, 37 N.Y.2d 279, 282 (N.Y. 1975); *Matter of Kahn*, 38 A.D.2d 115, 124, *aff’d* 31 N.Y.S.2d 752 (N.Y. App. Div. 1972)).
120. *Attorney Matters: How to Make a Complaint against a Lawyer*, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, [http://www.nycourts.gov/courts/ad2/attorney-matters\\_ComplaintAboutaLawyer.shtml#\\_Professional\\_Discipline](http://www.nycourts.gov/courts/ad2/attorney-matters_ComplaintAboutaLawyer.shtml#_Professional_Discipline) (last visited Sept. 24, 2017).
121. *See Appellate Divisions*, *supra* note 103.
122. *Id.*
123. The Kings County District Attorney’s Office serves a population of over 2.5 million people. The Brooklyn DA claims to be one of the largest prosecution offices in the country on its website. *See Legal Recruiting*, KINGS COUNTY DISTRICT ATTORNEY’S OFFICE, <http://www.brooklynda.org/legal-recruiting/> (last visited Sept. 24, 2017). Queens has a population well over 2 million; the Bronx is approaching 1.5 million, and Manhattan’s population is well over 1.5 million. *See Current and Projected Populations: Current Estimates of New York City’s Population for July 2016*, NYC DEPARTMENT CITY PLANNING, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited Sept. 24, 2017).
124. PART 1200 RULES OF PROFESSIONAL CONDUCT R. 3.8(b) (2017), available at <http://www.nycourts.gov/RULES/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>.

125. *Id.* (emphasis added).
126. THE NEW YORK COUNTY LAWYERS' ASSOCIATION, DISCOVERY IN NEW YORK CRIMINAL COURTS: SURVEY REPORT & RECOMMENDATIONS (2006), *available at* [https://www.nycla.org/siteFiles/Publications/Publications227\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications227_0.pdf) (where the Brooklyn DA's practice is under Kings County. *See id.* at 8).
127. *Id.* at 9.
128. *Id.*
129. *Id.* at 10.
130. *See In re Rowe, supra* note 119.
131. *See* WRONGFUL CONVICTIONS, *supra* note 116, at 31.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *See* WRONGFUL CONVICTIONS, *supra* note 116, at 34.
137. *Id.* (internal citations omitted).
138. *Id.* (internal citations omitted).
139. *Id.* (internal citations omitted).
140. *See* WRONGFUL CONVICTIONS, *supra* note 116, at 34 (internal citations omitted).
141. *Id.* (internal citations omitted).
142. *Id.* (internal citations omitted).
143. *Id.* (internal citations omitted).
144. *Id.*
145. *See id.* (internal citations omitted).
146. *See id.* at 33 (internal citations omitted).
147. *Id.*
148. *See* Wrongful Convictions, *supra* note 116, at 34-35.
149. Whether or not they are factually innocent, if the prosecution obtains a conviction in a trial during which they breach their discovery obligations, the defendant has been wrongfully convicted in the legal sense, being denied something—exculpatory evidence as defined in the *Rosario/Vilardi* line of cases—that they have a legal right to in New York State.





**Jerold D. Friedman**

**THE DANGER OF BEING WRONG  
ABOUT ANIMAL RIGHTS: A SOCIAL  
JUSTICE ATTORNEY'S VIEW**

*Because I am a civil rights activist, I am also an animal rights activist. Animals and humans suffer and die alike. Violence causes the same pain, the same spilling of blood, the same stench of death, the same arrogant, cruel and brutal taking of life. We don't have to be a part of it. —Dick Gregory*

Dogs and suitcases are personal property under the law. For the most part, that enables humans to use, neglect, and abuse them indiscriminately. Dogs and other nonhumans<sup>1</sup> have been property at least since the invention of money as suggested by the common etymologies of “chattel,” “cattle,” and “capital.” The status of nonhumans as property is so ingrained that humans reflexively don't consider whether nonhumans should be emancipated and distinguished from luggage. Animal rights theory says they need to be because property has no opportunity for legal redress. Legal persons (humans) can seek damages for past injuries, injunctions for future injuries, and enjoy full protection by the state, but personal property (nonhumans and luggage) cannot. Presently, slicing a hen's throat is not murder, boiling a lobster is not torture, taking a calf is not kidnapping, caging a chimpanzee is not false imprisonment, and killing billions of fishes<sup>2</sup> is not genocide. Yet the neglect, abuse, and terror that nonhumans routinely suffer are no less than humans similarly situated.

The animal rights movement seeks to emancipate nonhumans by having their legal status changed from “property” to “person” and to let them be free to live their lives as they wish. Animal rights draw from the same ethical tradition as human rights and ask the same types of questions: Can an individual's market value outweigh their moral value? When is owning, using, or exploiting another considered slavery? Is slavery always wrong? Is it immoral to exploit or otherwise use another even if it isn't technically slavery? What qualities do humans have that make slavery wrong and do nonhumans have the same qualities? If using humans in a certain way is slavery, is using nonhumans in a similar way also slavery? Is it wrong to keep a slave if the individual doesn't know he or she is enslaved? What if they were conditioned to accept it, benefit from it, or seem to enjoy it? Should

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nonhuman emancipation be opposed because of the drastic changes it will cause to human culture, economics, or politics?<sup>3</sup> Should all nonhumans be emancipated or only certain classes like apes (since they are genetically most similar to humans) or dogs and cats (as quasi-family members)?

Animal rights and human rights<sup>4</sup> reject genetic tests because genes are irrelevant and oppression is found where genes are said to be relevant. Animal rights disregard “species” for the same reason human rights disregard so-called “race.” Rather than genes, animal rights consider what qualities one should have to be a legal person. If one individual is a person and a second individual has the same relevant qualities, then the second individual should also be a person—period. This merit-driven analysis concludes that nonhumans should be legal persons because the qualities that give rise to human personhood also exist in nonhumans: a mind, a will to live, and a capacity to suffer. Humans and nonhumans are living, thinking, feeling beings, and these qualities entitle all of us to the rights to life and liberty.<sup>5</sup>

Our property laws are no better than a genetic test on the question of moral rights. Take for example an episode of *Judge Judy*.<sup>6</sup> In a widely reported episode, the plaintiff alleged that his young poodle, Baby Boy, was stolen and sold to the defendant.<sup>7</sup> Judge Judy told the defendant to set Baby Boy on the ground who then ran to the plaintiff and began jumping on the plaintiff’s leg while vigorously wagging his tail. “Take him home,” Judge Judy told the plaintiff.

Judge Judy opted for reason rather than law. She treated Baby Boy as a legal person. She let him testify, albeit through body language, because she recognized that Baby Boy’s interest in his future was primary. She recognized that Baby Boy had a mind capable of love and that he would suffer if that love was denied. The fact that a television entertainer reached justice through moral reasoning while proper judges who follow property law might have awarded Baby Boy to the wrong party is one small example of what property law brings when it’s used to decide the fate of living beings.

U.S. society grappled with these same legal and moral issues in the decades leading to its civil war. The presumed supremacy of property law was upended in *U.S. v. Schooner Amistad*<sup>8</sup> after a heated legal battle over the fate of a number of enslaved African people. The presiding judge defied the rule of law and enormous political pressure and set the slaves free. “Let justice be done though the heavens fall,” he said. Animal rights calls for the same justice.

I raise Baby Boy and *Amistad* to separate a lawyer’s instinctive reliance on traditional property constructs from the question of rights. Moral rights—the

rights to life and liberty, and to be free from suffering—exist independently of law. The founders of the U.S. government preserved this idea in the Declaration of Independence. Moral rights are directly protected by the Fifth, Thirteenth, and Fourteenth Amendments, among other laws, but laws do not create moral rights, they protect and enforce them. The aforementioned constitutional amendments were enacted to prohibit the government and public from violating moral rights valued by the amendments' framers and ratifiers. Moral rights are also inalienable. They must be inalienable because they would be fleeting if they depended on government. Imagine if the president and legislature decriminalized marital rape, forced weddings, and genital mutilation because the public elected misogynists or lobbyists paid politicians the right price. We don't lose a moral right to life because a tyrant is elected although we may lose the legal protection of it.

Altogether, the principles of animal rights are identical to human rights: (1) Moral rights are discovered through philosophy. (2) Governments should create legal rights that protect and ensure moral rights. (3) Governments cannot defend their failure to protect moral rights by claiming the law creates morality. Finally, (4) moral rights should be fairly evaluated and cannot exist within a system of hierarchy and oppression. Male legislators should not control women's rights, white registrars should not be the gatekeepers of black voters, and humans who use, consume, or profit from nonhumans should not decide their liberty.

### **The perils nonhumans face**

The sparks that initiate social justice movements come from witnessing injustice. So, while comparing dogs and suitcases helps to make a point, it hides the perils nonhumans face. I recommend that you watch the documentary *Earthlings* (2005) to witness the breadth and depth of human-caused nonhuman suffering. And, for scale, Noam Mohr calculated 63 billion nonhumans were killed for food in the U.S. market in 2011.<sup>9</sup>

An example typical of nonhuman suffering was caught on video and later described by Michael Shermer, president of the Skeptic's Society:

Appropriately entitled "saddest slaughterhouse footage ever," the clip shows a bull waiting in line to die. He hears his mates in front of him being killed, backs up into the rear wall of the metal chute, and turns his head around seeking an escape. He looks scared. A worker then zaps him with a cattle prod. The bull shuffles forward far enough for the final death wall to come down behind him. His rear legs try one last time to exit the trap and then... Thug! ... down he goes in a heap. Dead. Am I projecting human emotions into a head of cattle? Maybe, but as one meat plant worker told an undercover USDA inspector, who inquired about the waste stench: "They're scared. They don't want to die."<sup>10</sup>

Shermer begins to dismantle the idea that it is anthropomorphic (the wrongful assignment of human qualities to nonhumans) to claim the bull understood and feared death, but he doesn't finish the analysis. All animals, including humans, evolved under "survival of the fittest" rules. Animals who care about their lives are more likely to survive because they will flee or attack predators. They are more "fit" and are more likely to reproduce than animals who ignore predators. They pass their fight or flight genes to their children. Thus, it's anthropocentric (the wrongful belief of humans as singularly important) to believe that nonhumans don't care about their lives because every extant animal, including the bull, is the product of millions of ancestors who wanted to live. That and the bull's behavior establish that he wanted to live, knew his death was imminent, and tried to save his own life. His life mattered but he was killed intentionally and maliciously: he was murdered.

### **Why nonhumans have moral rights: Innate moral interests create moral rights**

Expanding human rights from "all [wealthy, white] men are created equal" to "all humans are created equal" has been slow because unequal rights benefit those in power and those who benefit most are deft at sabotaging liberation movements. For example, the political majority incites minorities to attack each other. The animal rights movement resists these types of sabotage because it focuses on the *qualities* that compel moral rights more than simply getting its own members into the majority. This approach means that animal rights necessarily include human rights. Rather than argue that it's immoral to conduct medical experiments without informed consent only for a class, the animal rights perspective means that informed consent, as a general moral principle with universal application, is necessary for everyone.

Moral rights start with having an interest in something of moral value, like Shermer's bull having an interest in his own life. Interests come from an active, functioning mind. Minds come from a nervous system, and nervous systems come from nerves. Animals have nerves.<sup>11</sup> Therefore, the idea that animals have moral rights makes a great deal of sense. Those with minds are called "sentient" because they can sense their environment and interpret those sensations. Plants, fungi, bacteria and other microorganisms have no nerves—and therefore no brain, mind, sentience, nor moral rights.

How interests actually translate into moral rights has been argued *ad nauseam*. These arguments typically focus on human rights that describe how evolution miraculously resulted in a human brain that can think and feel. The arguments typically overlook that nonhumans operate with a neurology that is functionally identical to humans. We all evolved from the same

primordial ancestors who wanted to live and be free, and who avoided pain and suffering. We are all sentient. There has yet to be any sound scientific or philosophical reason to believe that humans experience thoughts and feelings differently than nonhumans in a morally meaningful way. Charles Darwin explained this when he said humans had no unique qualities in the animal kingdom.<sup>12</sup> Some biologists like Richard Dawkins suggest that some nonhumans may have a greater capacity to suffer.<sup>13</sup> Altogether, if human rights derive from biological qualities (sentience, fear, suffering, etc.), and if nonhumans have those same biological qualities, then nonhumans must have their moral rights recognized.

Further, when recognizing who has moral rights we should err on the side of inclusion because there is no margin for error. Life cannot be restored once wrongfully taken. Time and enjoyment of life lost in captivity cannot be returned. Pain and suffering cannot be undone. This precautionary principle simply means that we should assume others' lives matter. There would be no hate crimes, genocide, nor anything in between if inclusion and precaution were the norm.

### **Nonhumans are denied rights with the same techniques used against humans**

The animal rights movement matured in the 1970s when more humans began to critically question the power disparity between humans and nonhumans. Arguments were then fashioned to comfort those who opposed the disparity—"Cows must be killed because humans must eat meat." "Rats must be killed to cure cancer." "Minks must be killed for fashion or warmth." These arguments are no different than any other type of genetic supremacy ideology by inflaming the fears of ardent supporters and seducing the undecided to oppose animal rights.

Common themes to delegitimize minorities are sometimes elusive but suddenly obvious when they're revealed. For example, René Descartes infamously nailed dogs and cats to boards to dissect them alive. He reasoned that their screams were not the result of meaningful pain or suffering<sup>14</sup> because their reaction was like a machine or clock that chimed a bell. Not coincidentally, J. Marion Sims, who is regarded as the father of modern gynecology, managed to preempt objections to his painful experiments on black women by convincing the public that they don't feel pain. The capacity of nonhumans and black women to suffer was inconvenient to those who wanted to profit from cutting them. The capacity of nonhumans to suffer is still denied today by those who want to profit from their bodies and the same mindless arguments are offered to deaden objections. Consider what the U.S.

pig killing industry suggests, “Forget the pig is an animal. Treat him just like a machine in a factory.”<sup>15</sup>

Such themes are known to social justice advocates. We know that oppressors control the narrative by explaining how the dominated need to be oppressed for their own good, like cutting the beaks off hens so they don’t peck each other or bombing Iraq into democracy. These narratives are more potent when they provide a gift to the listener, like promising to cure lung cancer by forcing beagles to inhale smoke or banning Muslims to stop terrorism. Advocates must recognize these themes not only for their individual falsehood but to understand the patterns behind such propaganda. Even if Iraq could be bombed into democracy, that does not entitle the U.S. to commit mass murder. Even if lung cancer could be cured by torturing beagles to death, vivisectioners are not entitled to commit mass murder. Iraqis and beagles have a right to live that cannot be trumped for another’s profit or pleasure.

### **All arguments to deny nonhumans moral rights are logical fallacies**

Themes of oppression spawn individual arguments. One can master the philosophy of animal rights by swapping each instance of “human” with “nonhuman” in arguments for and against human rights. For example, a pro-human-slavery argument might claim that the ability to force a human to labor justifies doing so. This is of course absurd because might does not make right. This argument is just as absurd when applied against nonhumans because strength does not become the measure of morality by changing species. The ability to force a bird into a cage, a dolphin into an aquarium, a dog in front of a sled, or a rat into a medical experiment does not make any of these things moral.

All arguments against animal rights fit into a few categories and each category commits a logical fallacy, such as the appeal to force fallacy of “might makes right.” Learning logical fallacies is useful because they help us to quickly dispense with bad arguments.

Human exceptionalism has been the source of the most popular arguments against animal rights such as, “Humans are on top of the food chain; therefore, humans have a right to eat others.” I’ll use this argument to walk you through its fallacies.

- (1) It is an *appeal to force* when it means: whoever is on top of the food chain has a right to kill others because they have the power to kill others.
- (2) It is also an *appeal to tradition*, which means: we have a right to kill others because our ancestors did. We shouldn’t base morality on what our ancestors did. Chances are that murder and rape are in everyone’s

family tree. Similarly, we shouldn't argue that enslaving horses is moral because horses have been enslaved for millennia any more than we can make the same argument to enslave humans. Traditions should not continue for tradition's sake but because the tradition is moral.

- (3) It is also an *appeal to evolution*, which means: we have a right to kill others because evolution gave us the ability to kill others. This argument is irrational because evolution has given us the ability to do many things (again, murder and rape) but that does not make those things moral. Humans who make this argument confuse themselves with real predators, like sharks, who will actually die without eating prey.

Apart from its logical failures, it's a popular myth that humans evolved to eat nonhumans. Here is a quick human evolution timeline: Mammals who lived around 70 million years ago ate insects. Some of them colonized trees in pursuit of those insects. Over time, these arboreal mammals adapted to a flower and fruit diet. These mammals were our ancestors who evolved into primates. The earliest evidence of meat-eating by our primate ancestors comes from around 3.4 million years ago in the form of carved bones. A cache of carved bones and stone tools discovered in the Olduvai Gorge and dated to around 1.8 million years ago fueled the belief that pre-humans were hunters. The cache provided no data as to how the meat was acquired nor how much meat the pre-humans ate. (Imagine trying to determine the diet of college students by examining petrified cafeteria trash and not knowing the student population.) Evidence shows only scarce and opportunistic meat eating until 50,000 years ago when hunting became feasible but low technology ensured that these humans were not particularly successful. Meat is still not a significant part of the human diet except for some in wealthy nations. This timeline means humans have only eaten meat out of tradition and not evolution.

- (4) It is also an *appeal to intellect*, which is a variant appeal to evolution. Rapid scientific discoveries around the 1900s coincided with enormous egalitarian pressures. White patriarchs composed the political and scientific majority worldwide and predictably white scientists used their disciplines to aid white men to stay in power. In the U.S., black people had recently been emancipated and women demanded the vote. One response from the science community was that white men were smarter and selected by evolution to rule because women had smaller brains than men<sup>16</sup> and black people had smaller brains than white people.<sup>17</sup> Even if white males had larger brains, it should go without saying that that does not impute white males with a greater intellect or the right to rule. Similarly, the typically large brain of humans compared with non-



humans does not impute us with greater intellect (we have a penchant for electing dictators, waging war, and threatening our own extinction) nor a right to rule.<sup>18</sup>

The appeal to intellect can also be viewed as a variant appeal to force. Aristotle pushed this idea with his Nature's Ladder argument. He claimed that the most rational beings are higher on the Ladder and have a right to dominate those beneath: the less rational. Thus, divine beings dominate natural beings. Conveniently, philosophers like Aristotle were next in line. He considered all men more rational than women and all humans more rational than nonhumans. Yet neither mental strength nor physical strength provide a moral basis for harming others. Brain size should not be confused with intelligence, nor intelligence with wisdom, nor any of these with a right to rule.

These several fallacies are also undone by their apparent hypocrisy. Imagine any scenario where extraterrestrials were in the seat of power. What if the Earth was colonized by Kanamits, as it was in the famous episode of the *The Twilight Zone*? Fans of the show know that this big-brained species is much stronger and smarter than even the most exceptional humans. If humans would not immediately surrender to Kanamits or to any other physically and intellectually superior alien race obedient to Nature's Ladder, then clearly the reasoning many of us use to dominate nonhumans is dishonest and selfish. The king says whoever wears the crown shall rule until the crown is taken from him! It is as unjust for "superiors" to enslave us as it is for us to enslave "inferiors."

### **Social justice includes animal rights**

Social justice is called for when individuals of a class are denied moral rights or the laws that protect those moral rights. For example, SeaWorld imprisons orcas (a class) and denies them their moral right to liberty. Tilikum, the tragic star of the *Blackfish* documentary,<sup>19</sup> was captured in 1983 and died at SeaWorld in 2017. He was a slave for thirty-four years to generate profits for his owners. All orcas and other prisoners of euphemistic "marine parks," whether born in captivity or captured, want to be free. As sentient beings, they deserve to be free. Tilikum and others like him deserve freedom through social justice.

The National Lawyers Guild made a large step forward by recognizing animal rights as a social justice issue when it adopted its Food Justice Guidelines (2015). The Guidelines include the following language, "Whereas the Guild has begun to recognize and include animals and animal rights within our larger anti-oppression and anti-violence framework..." Animal rights is a social justice issue no less than any other.

Many social justice luminaries recognize that oppression is not limited to humans alone. Dick Gregory and Cesar Chavez included veganism<sup>20</sup> in their advocacy because they identified suffering per se as the moral wrong, not just human suffering. I authored dozens of micro-biographies in the *Cultural Encyclopedia of Vegetarianism*<sup>21</sup> that included numerous human rights advocates who also pursued animal rights, but they are few compared to the many less famous social justice advocates today who also don't distinguish human rights as different or superior to animal rights.

Philosopher Steven Best wrote extensively on total liberation to unite all of the oppressed rather than to allow divisions between each oppressed class.<sup>22</sup> This approach is vital. Nature's Ladder is tribal, hierarchal, and seductive. Fighting against tribalism one rung of the ladder at a time is contrary to the NLG's policy of universal justice and would ignore the identical structural injustice of each battle. Tribalism is the enemy of egalitarianism. In this way, feminists should also fight for the environment, environmentalists should also fight for animal rights, and animal advocates should also fight for feminism. Each of us can and should support and help all other progressive movements.

Nonhumans are an extreme political minority because they are thinking and feeling beings whose moral rights are ignored. Many live in misery and die horribly. Their suffering is made invisible by the society who claims to love animals but still wants to benefit from their exploitation. They are victims without end because few humans recognize their suffering and fewer do anything about it. Women and other minorities have made significant gains with legal rights due to social justice activism and because they are the same species as the political majority. Nonhumans have the anatomy to suffer but they don't look like us so they have a long way to go before they receive due empathy and activism.

Nonhumans and their advocates need lawyers. At a minimum, animal rights activists need help on both sides of civil litigation and occasionally in criminal defense. Remarkably, at the time of this writing, the FBI is searching for two baby pigs who were taken by animal advocates when they were newborn and near death at a feedlot.<sup>23</sup> How could a compassionate act, which at worst should be charged as larceny, be considered domestic terrorism? Answer: 18 U.S.C. § 43 labels interstate economic harm to an animal enterprise as terrorism. Nonhumans also need lawyers to push the legal envelope toward their emancipation. Steven Wise heads the Nonhuman Rights Project with the mission to achieve nonhuman personhood for the great apes. Recently, NhRP petitioned for habeas corpus on behalf of two chimpanzees: Hercules and Leo.<sup>24</sup> Some attorneys have dedicated

their entire law practice to reducing the suffering of nonhumans and supporting their advocates like Christine Garcia (California) and Adam Karp (Washington). I administer an e-mail list for nearly one hundred attorneys who litigate at least part-time for nonhumans or their advocates.

In the U.S., attorneys like Steven Wise,<sup>25</sup> Christine Garcia, and Adam Karp are vanguards. Attorneys in Brazil were granted habeas corpus for Suíça, a chimpanzee,<sup>26</sup> while in Argentina attorneys secured “basic rights” for an orangutan named Sandra.<sup>27</sup> Zurich, Switzerland appointed attorney Antoine Goetschel specifically to prosecute animal cruelty cases. And legal advocacy is not limited to the courtroom. In 2013, the Indian Ministry of the Environment and Forests declared dolphins to be “nonhuman persons” to end their private and public exhibition throughout the country.<sup>28</sup> This declaration was made one year after scientists passed the Declaration of [Moral] Rights for Cetaceans.<sup>29</sup> Mexico City has banned dolphin exhibitions as of January 2018.<sup>30</sup> Nonhumans need more advocates of all types to help in and out of court to end their nightmare. I hope that this article helps to inspire you to consider becoming one of their defenders.

### **What animal emancipation may look like**

I ate cows during the 1970s and '80s, but not whales. I reasoned that eating a whale was eating a person because they were smart and formed families. In the late '80s, I first understood that cows were smart and had families too. They were people by my “whale” definition but culture had taught me to eat cows and not whales. Without intending it, I created a fictional world where cows were dumb and solitary so I could justify eating them. Now I believe that every form of oppression is caused by individuals creating a fictional world to justify hurting others. Learning about animal rights convinced me whales, cows, and all other nonhumans have moral rights because they all want to live and be free, and don't want to suffer. I no longer believe only humans are persons. All sentient members of the animal kingdom are persons.

As surprising or shocking as my change of values may sound, living without violence against nonhumans has brought enormous peace to me in the last twenty-five years as well as to the nonhumans I would have consumed. The average person in the U.S. eats 4,925 nonhumans in twenty-five years.<sup>31</sup>

I recognize that paradigm shifts sometimes cause panic. You may feel panic if you imagine no longer eating, wearing, or otherwise consuming or using nonhumans. Fear of change is no reason not to change. It was once unimaginable that human slavery would end. Now human slavery is illegal worldwide and its practice has vastly diminished. Human economies and behaviors must change again for animal rights and all of us will be better for it.

I also recognize that animal rights seeks unprecedented change that will take time to normalize. Animal rights will end the meat and dairy industries. It will end leather, wool, fur, and silk. Even the pet trade will end. Every industry and practice that uses nonhumans will end when nonhumans are no longer treated as chattel but as persons. This revolution is necessary today but these industries and practices will be replaced gradually as entrepreneurs find substitutes. Mechanized labor helped accelerate the end of slavery for economic reasons. The end of nonhuman slavery is also accelerating on these economic grounds. The public continues to learn that plants are overall superior and less expensive sources of nutrition compared to any nonhuman flesh. New foods are finding customers such as plant milks (derived from soy, rice, almonds, etc.) are less expensive, less perishable, more healthful, and use less land, water, and other resources than animal milks. Medical research, once inseparable from vivisection, has spawned more accurate non-animal research.

While the economy changes, those who profit most by using nonhumans as property will attack animal rights exactly as every other social justice movement has been attacked by those who fear their own loss of privilege or income. McDonald's infiltrated a small environmental group and unsuccessfully sued its members for libel.<sup>32</sup> The Center for Consumer Freedom represents several industries that enslave nonhumans and CCF constantly feeds the media with false and misleading stories of sinister animal advocates. And pig rescuers are being hunted as domestic terrorists! It's important to recognize that these attacks are the usual propaganda and backlash waged by unjust industries and government enforcers.

Finally, social justice advocates should welcome animal rights even if they reject egalitarian arguments because animal rights directly helps humans. The meat and dairy industries are notorious abusers of workers who are typically undocumented immigrants and these industries have poor occupational safety (for example, those who kill chickens suffer the most finger amputations). Ending meat and dairy would dramatically improve our environment, since the meat industry is the top cause of climate change,<sup>33</sup> and reverse deforestation. Farmland rededicated from feeding nonhumans to humans can easily end world hunger by not wasting food on nonhumans. Drought would be less threatening as a vast amount of water is lost to grow nonhumans. Wars ultimately caused by food and water shortages will be averted. A plant diet lowers the risk of almost all diseases, especially the top killers (cancer, heart disease, stroke, diabetes, etc.) and many current and potential pandemics originate from using nonhumans for food (avian flu, swine flu, Ebola from bats, etc.). Meat and dairy industries receive enormous tax subsidies that

should be stopped or at least used for public services. Every industry that uses nonhuman animals does so at the cost of humans, not only meat and dairy. The fur industry, for example, wastes land and other resources, and poisons the environment with concentrated nonhuman waste and fur preservatives.

For further reading, please choose *The Dreaded Comparison*,<sup>34</sup> about human and nonhuman slavery; *The Sexual Politics of Meat*,<sup>35</sup> about patriarchy's offenses against women and nonhumans; *Rattling the Cage*,<sup>36</sup> about nonhuman personhood; and *The Politics of Total Liberation*,<sup>37</sup> about uniting social justice movements.

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#### NOTES

1. "Humans and nonhumans" is the correct dichotomy, not "humans and animals," because humans are animals. Compare "Drugs and alcohol," which wrongfully implies that alcohol is not a drug. Thus, I use "nonhumans" to refer to nonhuman animals. However, I preserve "animal" in "animal rights" because it's an established term.
2. Animal rights theory recognizes individuals, so all group-names are pluralized, e.g., fishes, deers, sheeps, etc.
3. This question prompts a discussion on the differences between human and animal rights, which is outside the scope of the article.
4. Collectively, "human rights" and "animal rights" are referred to as "moral rights."
5. Animal rights philosophy can be found throughout history. It was developed into a cogent philosophy in the mid-1900s. See RUTH HARRISON, *ANIMAL MACHINES* (1964).
6. Judge Judy is a retired judge who presides over a popular arbitration-based reality court television show.
7. Oliver Gettell, *Watch Judge Judy Set a Dog Loose in Court to Determine its True Owner*, ENTERTAINMENT WEEKLY (Aug. 15, 2017, 6:37 PM), <http://ew.com/tv/2017/08/15/judge-judy-dog-finds-owner-court-video>.
8. 40 U.S. 518 (1841).
9. Noam Mohr, *How Many Animals Die to Feed Americans?* ANIMAL DEATH COUNT (May 2014), <http://animaldeathcount.webnode.com/all-animals-2011>. This titanic number is dwarfed by counting the nonhumans killed for other reasons, in other countries, and those who are oppressed but not killed.
10. Michael Shermer, *Confessions of a Speciesist: Where Do Nonhuman Mammals Fit in Our Moral Hierarchy?*, SCIENTIFIC AMERICAN (Jan. 2014), available at <https://michaelshermer.com/2014/01/confessions-of-a-speciesist>.
11. Sea sponges and five other animal species have no nerves and are excluded.
12. See CHARLES DARWIN, *THE DESCENT OF MAN* (1871) ("There is no fundamental difference between man and the higher mammals in their mental faculties [and all the differences are] of degree, not of kind.").
13. See Richard Dawkins, *Is Animal Cruelty the New Slavery?*, BIG THINK (Sept. 2, 2017), <http://bigthink.com/videos/richard-dawkins-is-animal-cruelty-the-new-slavery>.
14. Descartes admitted that dogs and cats felt pain but he said their pain was different than human pain and unimportant.
15. JOHN BYRNES, *HOG FARM MANAGEMENT* (Sept. 1976).

16. See, e.g., Leigh van Valen, *Brain Size and Intelligence in Man*, 40 AM. J. OF PHYSICAL ANTHROPOLOGY 417 (1974).
17. See, e.g., Urmee Khan, *Scientists Claim Black People are Less Intelligent than Whites in Channel 4 Show*, The Telegraph (Oct. 15, 2009, 7:00 AM), <http://www.telegraph.co.uk/culture/tvandradio/6327171/Scientists-claim-black-people-less-intelligent-than-whites-in-Channel-4-show.html>.
18. Some nonhumans have a larger brain (e.g., whales, elephants, etc.) and a proportionately larger brain (e.g., shrews, Peters' elephantnose fish) than humans.
19. BLACKFISH (Magnolia Pictures 2013).
20. Vegans do not use or consume nonhumans.
21. CULTURAL ENCYCLOPEDIA OF VEGETARIANISM (Margaret Puskar-Pasewicz ed., 2010).
22. See STEVEN BEST, *THE POLITICS OF TOTAL LIBERATION: REVOLUTION FOR THE 21ST CENTURY* (2014).
23. See Justin Wm. Moyer, *FBI Raids Animal Shelters, Searching For Piglets Rescued From Factory Farm, Activists Say*, WASH. POST (Sept. 14, 2017), [www.washingtonpost.com/news/animalia/wp/2017/09/14/fbi-raids-animal-shelters-searching-for-piglets-rescued-from-factory-farm-activists-say/](http://www.washingtonpost.com/news/animalia/wp/2017/09/14/fbi-raids-animal-shelters-searching-for-piglets-rescued-from-factory-farm-activists-say/).
24. See *Two Former Lab Chimpanzees Exploited For Scientific Research, Waiting To Be Released To Sanctuary*. NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/hercules-leo> (last visited Feb. 4, 2018).
25. Brigit Katz, *Lawsuit Seeks "Personhood" for Three Connecticut Elephants*, SMITHSONIAN.COM (Nov. 16, 2017), <https://www.smithsonianmag.com/smart-news/lawsuit-contends-three-elephants-are-legal-persons-180967240/>.
26. See Introduction to the Petition for a Writ of Habeas Corpus, 9th Salvador Crim. No. 833085-3, 2005 (Salvador, Bahia, Braz.) (“[Petitioners] bring action under Art. 5º, LXVIII, Brazil Constitution and Art. 647, Code of Criminal Procedure. The Petitioners seek the Great Writ on Behalf of Suíça, Chimpanzee who is a prisoner at the Zoo Getúlio Vargas, to relief from illegal and abusive acts perpetrated by the director of the government Secretariat for Biodiversity, Environment, and Water Resources.”).
27. See Helen Regan, *In Argentina, a Court Grants Sandra the Orangutan Basic Rights*, TIME (Dec. 22, 2014), <http://time.com/3643541/argentina-sandra-orangutan-basic-rights/>.
28. Venus Upadhayaya, *India Calls Dolphins 'Non-Human Persons', Bans In-Captivity Shows*, EPOCH TIMES (May 24, 2013, 9:26 AM), <http://www.theepochtimes.com/n3/73290-india-calls-dolphins-non-human-persons-bans-in-captivity-shows/>.
29. *Dolphins Deserve Same Rights As Humans, Say Scientists*, BBC NEWS (Feb. 21, 2012), <http://www.bbc.com/news/world-17116882>.
30. Emily Green, *Mexico City Is Banning Dolphin Shows, Taking A Lead On Animal Rights*, PRI (Aug. 25, 2017, 12:30 PM). <https://www.pri.org/stories/2017-08-25/mexico-city-banning-dolphin-shows-taking-lead-animal-rights>.
31. See Mohr, *supra* note 9 (using Noam Mohr's 63 billion total for 2011).
32. See *McLibel Case*, WIKIPEDIA, [https://en.wikipedia.org/wiki/McLibel\\_case](https://en.wikipedia.org/wiki/McLibel_case) (last visited Feb. 4, 2018).
33. See *The World's Leading Driver of Climate Change: Animal Agriculture*, NEW HARVEST (Jan. 18, 2015), [http://www.new-harvest.org/the\\_world\\_s\\_leading\\_driver\\_of\\_climate\\_change\\_animal\\_agriculture](http://www.new-harvest.org/the_world_s_leading_driver_of_climate_change_animal_agriculture) (The U.N. Food and Agricultural Organization published “Livestock's Long Shadow” that concluded the meat and dairy industries contributed 18 percent of greenhouse gases. Experts at the World Bank published “Livestock and Climate

- Change” that re-analyzed the FAO report and concluded the industries contributed 51 percent of greenhouse gases.).
34. MARJORIE SPEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* (3d ed. 2014).
  35. CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* (Anniversary ed. 2015).
  36. STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (1st ed. 2000).
  37. BEST, *supra* note 22.



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**Sascha Bollag**

**ACTIVISM AS A LEGAL STRATEGY:  
PROMOTING ENVIRONMENTAL  
AND SOCIAL JUSTICE**

While “activist” may not be the first word most attorneys and others who work within the legal realm would choose to self-identify, activism is a crucial component of any movement for social justice, and especially critical in environmental justice issues. Therefore, attorneys and legal workers who hope to engage on such matters must embrace the role of activist, as wholly different from and in addition to client-advocate.

Perhaps the most important aspect of activism is that for maximum success in the long term, there must be a sustained, multifaceted effort, not just a ramp up at political or social high and low points, or solely as a response to disappointing outcomes. Activism needs to happen *all the time*. This can be for the purpose of actually winning a desired outcome in the near term—or to make enough noise about a particular issue to raise public awareness over time for future action.

Successful activism encompasses local, state, regional and national levels and includes four key components—litigation/legal representation, policy advocacy, legislative advocacy, and organizing/media. At the same time, any one of these strategies individually can be very effective for discrete issues, depending on the nature of the matter and specific goals.

Commonly, litigation and formal legal representation, such as in mediation or arbitration, are the most familiar approaches to legal advocacy, and they are certainly key elements of legal activism. These may be used either as a defensive strategy or an affirmative approach. Litigation/legal representation may take place on the local, state, or federal level. While engaging in litigation/legal representation is most often responsive, as when something occurs that prompts a lawsuit to be filed, it can be used proactively as well.

A currently pending lawsuit<sup>1</sup> alleging the government must address climate change uses litigation as an offense. The suit seeks to require the government to make sweeping visionary changes in management, including proper regula-

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tion of fossil fuels and affirmative steps to address and slow climate change. In this instance, the suit is a means to call attention to an issue, encourage media attention and raise public awareness too. Ultimately, the hope is to make actual changes in law and policies as a result of the suit. However, this may or may not occur through the outcome of the actual case. However, the suit functions in an additional manner—it sets up the possibility of achieving the goals later as well, though other forms of community activism by making the public aware of the issues.

There are countless examples of important defensive/responsive activist litigation and legal representation. For example, in the Dakota Access Pipeline fight, various suits were filed in an attempt to stop the pipeline construction, and a legal collective developed to provide legal support, representation, and defense to pipeline activists.<sup>2</sup> Similarly, a currently pending case is the final step in a more than decade-long battle against federal laws permitting fish farms in the Gulf of Mexico.<sup>3</sup> Activism on this issue is an example of a multi-faceted approach (further explained below). After utilizing many activism tools, a number of nonprofit groups sued the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) to prevent implementation of regulations allowing offshore aquaculture in the Gulf of Mexico, and set up the framework to do the same all around the United States.

One thing to note about litigation and legal representation is that often these can be actions of last resort—when all other avenues such as policy change, legislation, and organizing/media have failed or are perpetually stalled. Often this is because outcomes of litigation and legal representation are uncertain, based on the understanding and interpretation of judges who cannot be specialists on all issues. They may even be damaging to a cause. Bringing cases of first impression on an issue can inadvertently create bad precedent. As such, activism through other avenues first can be a smart approach. There are times, however, that litigation may be the best first strategy—for example on an emergency issue when immediate decision or action is necessary, to send a clear message to an opponent that the topic is one of very serious concern, or to alert media or the public about an important issue.

Policy advocacy is another activism tool, which can have a local, state, regional, or federal focus. Activism on matters of policy comes in many forms, from commenting on proposed agency rules, to initiating local referenda on particular issues. Groups and individuals regularly comment on proposed rules of federal agencies such as the Environmental Protection Agency (EPA), the Department of the Interior, and the U.S. Department of Agriculture (USDA). Often there are also opportunities to comment on rules

under consideration by the state equivalents of these agencies. These rules can relate to a wide range of issues from air quality standards to mountaintop removal mining. The aforementioned ocean fish farming case also involved numerous agency rules and comments, public testimony during agency meetings, and public hearings of various agencies.

Policy advocacy can also include promoting or challenging executive orders—at the state or federal level—such as when activists succeeded in persuading President Clinton to sign an executive order requiring federal agencies to consider environmental justice in all of their policies.<sup>4</sup> While such actions are not limited to lawyers and legal workers, those with a legal background are uniquely situated to be successful in such work. Lawyers and legal workers dedicated enough to master navigation of environmental regulatory agencies' complicated rule-making processes are at a tremendous advantage.

Policy advocacy is not limited to influencing agency rule-making. It can also take other forms. For example, during the community battle in St. Tammany Parish, Louisiana, against a hydraulic fracturing (“fracking”) project, activists employed a number of legal tactics.<sup>5</sup> Public opposition came in the forms of litigation, proposed state legislative changes, community organizing, and generating media coverage—including by leading protests and writing op-eds. These tactics were all in process simultaneously. Lawyers involved in the case also helped to organize a referendum in the parish to require the city council to take action to prevent local fracking. The referendum was essentially a back-up to various other actions, so, if all else failed, there was still a path forward for the public will to be done.

A third component of activism is legislative advocacy. This too, can be carried out at the local, state, and national level. It ranges from commenting on potential new laws or changes to existing laws, including through public testimony, participating in the actual drafting of legislation, or lobbying for or against particular laws. This could involve Congress, a state legislature or a city council. As with policy advocacy, lawyers and legal workers are uniquely positioned to engage in legislative advocacy, thanks to training in statutory construction, design, and interpretation as well as ways to research legislative history and intent. Simply having a firm grasp on the law-making process is a boon. A great many people, even some in the legal field, are not familiar with how statutes are created, enacted, and enforced.

Lawyers and legal workers regularly provide testimony to legislative bodies at all levels on a wide range of prospective legislation, on issues as different as the creation of marine sanctuaries and waste management. Activists also

regularly confer and collaborate with legislative staff to draft and revise bills. Relatedly, opportunities to combine policy and legislative advocacy occur frequently, as when one joins one of the many advisory committees organized to propose policies and statutes. For example, an Environmental Advisory Committee (EAC) has been established to make recommendations to a subcommittee of the New Orleans City Council on specific environmental issues, with an eye toward environmental justice. The EAC crafts proposed ordinances, resolutions, proclamations and the like, as well as offers policy suggestions for future city action. Lawyers, academics, and other legal workers are part of the EAC.

Perhaps the component of activism most often overlooked by lawyers is organizing. Lawyers often think that their time is better spent on other more law-focused activities like crafting legislation rather than working to rally the people to the cause. Organizing is absolutely critical in any push on environmental justice issues. It is organizing that results in floods of public comments to agencies or legislators, or attendees at meetings and hearings, all of which become part of the official administrative record and is required to be considered when decisions are being made. For example, organizing turned out people by the hundreds to public meetings throughout the Gulf to voice their opposition to fishery management plans in the fish farming case. Tens of thousands weighed in with the involved agencies and also with Congress when the latter was considering legislation on the matter. In the wake of overwhelming public opposition, Congress did not pass any law on the issue, despite entreaties from corporations and other powerful interests. Similarly, in the St. Tammany fracking fight, organizing turned out over a hundred community members to express their concern with the proposed project to the lead state agency. Eventually, the power of the people won and the oil company withdrew its proposal, despite already having won the right to move forward with the project through litigation. There were just too many challenges from activists on every front—litigation, policy advocacy, legislation, and organizing/media—for it to be worth the company's time and money to continue as planned.

Finally, successful organizing often generates significant media attention, which can be an essential part of a successful activist outcome. Lawyers and legal workers are often skilled at media work too—because they know how to tell a persuasive story and depict facts in a light most favorable to their client. The key here is to be able to tell enough of your story to raise awareness and get the media to effectively report on your issue while not disclosing so much that you forfeit a future strategy.

Activist lawyers can engage mass media by deploying their forensic skills on radio and TV, on social media, and newspaper op-eds. While lawyers and legal workers cannot do all of the organizing themselves, it is important that they be involved in it. They can often help to reframe complicated matters into more user-friendly language and otherwise assist with messaging.

Activism can seem daunting at first. It needn't be. There are myriad ways to be an activist. Some organizations offer specific training programs for those eager to aid a cause. Becoming involved with local civic groups and nonprofits, from the local level to the national level, can provide an easy entry to activism. Once you feel comfortable as an experienced activist you may start to identify issues that are not being adequately addressed and help lead new efforts.

Social justice lawyers and legal workers should always think about how activism, as distinct from lawyering, can aid in achieving their social and political goals. They should resist the reflexive desire to litigate. Litigation can be an important tactic, but not always the most effective one. Harnessing all of these methods tactically, when situations call for them, will maximize a movement's likelihood of success.

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#### NOTES

1. *Juliana v. U.S.*, No. 17-71692 (9th Cir. Jan. 4, 2016); *see also Juliana v. U.S.—Climate Lawsuit*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/us/federal-lawsuit/> (last visited Feb. 6, 2018).
2. *See Dakota Access Pipeline Resistance Reading*, POWER SHIFT, <https://powershift.org/sites/default/files/resources/NoDAPLReadingListPDF.pdf> (last visited Feb. 6, 2018).
3. *See Gulf Fishermen's Association v. National Marine Fisheries Service*, No. 16-01271 (E.D. La.).
4. *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994); *see also* Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice*, NRDC (Feb. 10, 2014), <https://www.nrdc.org/experts/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice>.
5. *See* Julie Dermansky, *Citizens Protest Fracking Permit in Louisiana's St. Tammany Parish*, DESMOG (Nov. 14, 2014, 3:46 PM), <https://www.desmogblog.com/2014/11/14/citizens-protest-fracking-permit-louisiana-s-st-tammany-parish>; Robert Rhoden, *Helis Oil Abandons Fracking Project in St. Tammany Parish*, THE TIMES-PICAYUNE (Sept. 20, 2016), [http://www.nola.com/environment/index.ssf/2016/09/helis\\_oil\\_abandons\\_fracking\\_pr.html](http://www.nola.com/environment/index.ssf/2016/09/helis_oil_abandons_fracking_pr.html).



## Joseph Taecker-Wyss

### DEMOCRACY, CAPITALISM, AND THE LAW

The work of Milton Friedman is foundational to contemporary bourgeois economic theory. Friedman's laissez-faire theories on the relationship between economic structure and state formation dominate the contemporary political-economic ideology of most western nations. He claims each economic superstructure can only result in certain political formations because a society's economic and political structures are interdependent. There are two ways, he argues, to organize economic superstructure: a coercive central authority or individual cooperation in organized marketplaces.<sup>1</sup> Friedman calls the first totalitarianism, in which a few individuals in the economy accumulate power, and the latter capitalism, which decentralizes power through the organized marketplace.

According to Friedman, capitalism's dispersed economic power creates economic freedom by allowing individuals to act without the force of a central authority. To him, economic freedom is the prerequisite for political freedom. Capitalism fosters freedom and dispersed economic interdependence between individuals because, under capitalism, economic power is spread among co-reliant individuals, who can each act freely. Capitalism also typically results in a political system that has dispersed power, oftentimes organized by the voting system in order to make adjustments necessary for interdependency. As such, democracy can only result from capitalism (although not all capitalist nations are democratic). Thus, he argues, for a society to have essential political liberties, there must also be the widespread existence of open-market trade.<sup>2</sup>

Friedman's claims appear to follow logically from the sequential development of capitalism and democracy. In England, the shift towards capitalism began with the enclosure movement in the early 15th century and the transition from feudalism to capitalism and lasted through the early 17th century. Work previously performed by serfs, who paid their feudal lord rent in exchange for protection, was later done by laborers who were paid wages for their work by their employers. As Friedman describes it, while serfs worked because

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they feared violence by the feudal lord, laborers worked because it was their only means of material well-being within the economic marketplace. Soon thereafter, in the 18th century, the rise and expansion of democracy occurred in England.

Despite the sequential development of capitalism and democracy, there is no direct causal relationship between capitalism and democracy, as Friedman suggests. And, contrary to Friedman's claims, capitalism disperses neither economic nor political power. Instead, it concentrates economic power within an elite controlling class: the owners of capital who, with time, become an ever-smaller group with ever-increasing power. With the accumulation of economic power by capitalists comes their near total control over the political system, which they use in turn to reinforce their economic power. Thus, capitalism is inherently antagonistic to democracy. It creates unequal access to political representation. It is such an anti-democratic force that throughout history, it has compelled workers to generate massive movements and initiate social upheavals in order to expand democratic institutions.

Capitalism creates economic polarity and highly limited workplace power for workers. Under capitalism, capitalists hire laborers, who are paid in wages, to produce goods or services for the capitalists. In addition, although the capitalists pay constant and variable costs—such as rent, equipment, and raw materials—they also decide how to allocate any profits, either keeping it for themselves or reinvesting it within their businesses.<sup>3</sup> Because capitalists are able to reap all of the business profits in this regard, they accumulate the majority of the wealth within society. In the United States, the richest 10 percent of society—a conglomerate of capitalists—own 90 percent of corporate stock within society.<sup>4</sup> Wealth is held by the few and taken from the masses.

The capitalist–laborer relationship is not just one of inequality in wealth, it is also one of inequality in power. Most wage-workers do not receive sufficient income to become capitalists themselves, as it takes considerable wealth to buy a business or get a loan to start one. Therefore, wealth is retained within a select number of elite families inter-generationally. Fifty-five percent of the top 400 wealthiest people inherited their status directly, or a significant portion of it, while only 31 percent of the top 400 wealthiest people had little to no inherited advantage.<sup>5</sup> Without the opportunity to become capitalists, workers are forced to stay within their lower-class position and continue to labor as their sole means of income. Most laborers may have some decision on where they work, but not whether to work. Additionally, under capitalism, there are always more laborers looking for jobs than there are positions. Therefore, workers are always either desperate to be employed or, when they have a job, to maintain it. Thus, they are easily expendable and exploitable



by the capitalist. As a result, the capitalist dictates the terms of the capitalist–laborer relationship, resulting in low-wages and poor working conditions for workers. Power is not dispersed within a capitalist society as Friedman’s theories describe, but is consolidated in the few owners of the means of production. As will be discussed below, unions and collective bargaining have reduced, but have not altogether eliminated, this unequal relationship.

With capitalists’ asymmetrical economic power relationship with workers, a more egalitarian democracy would ideally help propagate workers’ rights, as Friedman erroneously suggests occurs within capitalist democracies. In reality, “democratic” institutions reinforce inequality of power between laborers and capitalists. Indeed, capitalists translate their economic power into political power. Just 5,778 capitalists own the majority of United States’ industrial and financial assets and private foundations. The same people own two-thirds of the assets of private universities, as well as most of the media, civic, and cultural organizations, and sway the government’s political agenda.<sup>6</sup> Capitalists and their advisors, such as corporate lawyers and financiers, are highly represented in the government, which furthers their business interests. An even greater number of government bureaucrats and politicians grew up alongside capitalists—living in affluent neighborhoods, attending elite private schools and universities, and socializing in exclusive clubs and organizations. In these societies, the people who write and implement policy are indoctrinated with bourgeois political views and are out of touch with society’s laborers.<sup>7</sup> The individuals within government, in turn, are socialized to favor the position of the capitalists.

Corporate institutions also insure the capitalist ideology through lobbying and campaign finance, which are two of the most effective ways to influence the government.<sup>8</sup> Lobbyists serve the putative purpose of allowing the public to inform legislators on policy decisions. Yet, lobbying requires assets to pay for research that affirms the validity of capitalism as well as for actual professional lobbyists to inform bureaucrats of that perspective. Fifty-three percent of all lobbying groups represent business interests, one percent represent labor, and not a *single* lobbying group represents the means-tested poor. Additionally, elections are privately financed in the United States. Therefore, for politicians to be elected, they must either be extremely wealthy themselves or be supported by the super-wealthy. This reaffirms the way in which capitalists are able to personally capture the government: by pricing out any candidate who is not independently wealthy or fails to appeal to the rich.

However, even if the government was accessible to all in an egalitarian manner, it would still reflect the interest of the capitalists. A capitalist democracy will always prefer the wealthy because business is the primary way in which

money is distributed. The government is faced with either adhering to business interests or watching businesses leave for a more financially hospitable nation, which would result in an economic depression and strongly reduce politicians' reelection prospects. Business as the primary distributor of wages in society also means that income-based taxes, which supply the revenue necessary to fund government programs, are dependent on business. If the government does not follow business interests and capitalists outsource the means of production to other countries, not only will it face political backlash, but the state will dissolve due to the inability to fund its policies.<sup>9</sup> Accordingly, even if a politician does not have any political preference toward business, business preference becomes the filter that all policies must pass through.

The preference towards business would not matter if business interests were the same as workers' interests. However, the intersection of capitalism and democracy is significant because the workers and the capitalists have conflicting interests. The goal of capitalists is to enlarge profits as much as possible while maintaining competitive prices for consumers. Capitalists achieve this by reducing workers' wages per unit output. Capitalists have also implemented a series of workplace policies to control worker productivity, such as by subdividing skilled work so it can be done by low-skilled workers who are easily replaceable. They also pay workers poor wages and highly regulate worker's breaks, vacations, and meals in order for these capitalists to maximize each worker's productivity down to the minute.<sup>10</sup> This, of course, is against the interest of laborers who would prefer to have autonomy in their place of work, have better working conditions, and earn higher wages. Put simply, in order to maximize profits, capitalists must reduce their workers' overall wellbeing.

When capitalists cannot further exploit workers within the workplace, they exert their power over the state to continue to reduce workers' rights. Capitalists prefer policies that ensure that workers are desperate for jobs, such as by reducing "the welfare state" and providing few benefits for the unemployed. One common method within the United States is to insist that citizens only receive welfare if they are (1) currently employed or are (2) short-term unemployed and actively looking for work. By coupling welfare and work, these policies insist people on welfare take any jobs available to them, regardless of how menial. As a result, employers can further exert their power and reduce both the pay and quality of jobs.<sup>11</sup> Other anti-worker policies include legislation that reduces union membership in order to limit the collective power of workers. The asymmetry of political power that favors capitalists is in direct opposition to the interest and wellbeing of workers.

Empirical data on legislative policies reflects state preferences towards capitalists. Very high-income constituents have their views more highly

represented within government, while working and middle-class Americans have little to no sway with their representatives. Even the viewpoints of the relatively well-to-do do not influence their policy makers' decisions. Americans up to the 70th percentile for income have almost no effect on their legislators' policies.<sup>12</sup> The state, under a capitalist superstructure, therefore, goes against the pluralist conception of equal democratic access for all. The "democratic" capitalist state we see today is not a genuine democracy at all. It is only a democracy for the bourgeoisie.

The capitalists' usurpation of the political system for their own profit includes the capture of the legal system by corporate business interests. *Citizens United v. Federal Election Commission* exemplifies the unmatched power of capitalists in the legal sphere.<sup>13</sup> In *Citizens United*, speech is transmogrified into capital. It is to be treated as the exchange of goods within the capitalist marketplace—traded between entities according to the magnitude of their financial power. The decision means that only the "most powerful" are deserving of speech heard by the larger society. Indeed, according to *Citizens United*, speech can and, in fact, should be unequal between entities. People lose their democratic rights when speech is equated to capital. Only the most privileged have the right for their speech to be heard and those that do not have access to capital lose such rights. Through cases like *Citizens United*, the democratic state is reconceived as an economic one and, when speech is commoditized, it becomes unequally distributed across society.<sup>14</sup> Once the law is usurped by business in this regard, the ability to freely trade capital is the precursor to all other rights, further strengthening corporate hegemony.

Too frequently this is how the law is implemented. Yet, the law is a tool that can create justice where such inequalities exist, particularly when progressive and revolutionary lawyers, law students, and legal workers work alongside social movements to defend and protect them. The National Lawyers Guild was formed at a time of roiling class conflict. The Great Depression left millions starving and jobless. Capitalism was threatened with revolution around the world. Franklin Roosevelt's New Deal was an attempt to stanch the bleeding. It was a time when reforms benefiting the working class were not only possible, but critical. The Guild was, from its inception, an important force in advancing those reforms to protect the working class. Its members worked to create and enforce the National Labor Relations Act of 1935, legalizing American unions. Guild members also represented those unions, thereby advancing workers' interests and improving their condition. By enforcing laborers' right to unionize, Guild members changed the relationship between the capitalist class and workers. While the relationship was certainly not one of equality, through collective bargaining, workers gained more leverage.

When they work together, workers' voices cannot be ignored and owners can no longer hire and fire employees at will. In turn, wages are raised, working conditions are bettered, and job security is improved.

Later, in the 1960s, Guild work reflected—and helped advance—the political movements that were shaking the country. The Jim Crow system was not only a method of political subordination, but a way to create an economically subordinate class. By taking away the fundamental rights of African-Americans, capitalists were able to super-exploit black laborers and lower their wages to nearly nothing. The National Lawyers Guild's Committee to Assist Southern Lawyers provided critical legal assistance to the burgeoning Civil Rights Movement, winning important victories that helped the movement endure and spread throughout the American south.

As a result of the pressure this movement put on the United States government, Congress passed Title VII of the Civil Rights Act of 1964. Title VII states "It shall be an unlawful employment practice for an employer [...] to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Because New Deal-era federal statutes did not adequately protect against racial discrimination, Jim Crow was able to flourish in the South as a legal system of oppression, and lawyers were unable to enforce racial equality in the courts. The National Lawyers Guild played a crucial role in protecting those who fought to change these unjust laws. Today, through the work of the Civil Rights Movement, it is illegal to use racial discrimination in wages and, for all the high hurdles and tremendous obstacles that still exist, there is a legal framework in which progressive lawyers can seek to enforce the rights of all workers.

More recently, the National Lawyers Guild has continued its involvement in giving workers the agency to protect their own rights and build a strong proportion of power to defend themselves against the capitalist class. During the Occupy Wall Street movement, a time in which many people were resisting the hegemonic dominance of business over government, the Guild protected many protesters from being evicted from the public spaces where they were gathered. The Guild litigated to defend Occupy encampments in cities such as Boston, Los Angeles, San Diego, Fort Myers, and the movement's epicenter—Manhattan's Zuccotti Park.<sup>15</sup> The Guild's work on behalf of social and political movements remains critical. While the law can be used to protect laborers, its current effectiveness is limited by capitalists' effective passage of pro-business legislation, which confines the power of the working class, and their use of financial power to win important legal decisions, such as *Citizens United*. Assisting the work of leftist activists to

overthrow the current economic system is paramount for a more just political and economic future.

Legal work can provide valuable assistance and support to social movements but cannot be a substitute for them. In times of ebb, legal work will be defensive, seeking to protect gains that have been won in the past. In times of flow, legal work can help advance movements and win new victories. But, that work can only be as strong as those for whom it is done. By litigating on behalf of employees oppressed by their corporate higher-ups and by providing protection for activists, the Guild and other progressive legal organizations give power to the agents of democratic, pro-worker change. The Guild's pro-labor advocacy stands at the forefront of the fight for workers' rights, a battle which the Guild continues to fight against all odds. It is this work that can help change the laborer-capitalist power dynamic into a more equitable system and, finally, place people over profits as well as human rights over property interests.

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#### NOTES

1. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 13 (1962).
2. *See Id.* at 8–9.
3. *See* SAMUEL BOWLES, RICHARD EDWARDS & FRANK ROOSEVELT, *UNDERSTANDING CAPITALISM: COMPETITION, COMMAND, AND CHANGE* 143 (Oxford University Press, 3d ed. 2005) (1993).
4. DENNIS GILBERT, *THE AMERICAN CLASS STRUCTURE IN AN AGE OF GROWING INEQUALITY* 173 (SAGE Publications, 9th ed. 2015) (1998).
5. *Id.* at 176.
6. *Id.* at 170.
7. *See id.* at 178.
8. *See* KAY L. SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 126, 319 (2012).
9. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 172–173 (1977).
10. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 49, 62 (1974).
11. JANE L. COLLINS & VICTORIA MAYER, *BOTH HANDS TIED: WELFARE REFORM AND THE RACE TO THE BOTTOM IN THE LOW-WAGE LABOR MARKET* 161 (2010).
12. MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 76–82 (paperback ed. 2014).
13. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
14. WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION* 158–165 (MIT Press, 2015).
15. Press Release, Nathan Tempey, Lawyers Challenge Occupy Evictions (Nov. 21, 2011) (on file with the National Lawyers Guild), available at <https://www.nlg.org/lawyers-challenge-occupy-evictions/>.



hope that such injustices would recede to a lamentable, but sadly acceptable, tiny fraction of cases and that when those cases were discovered prosecutors would be punished and convictions would be overturned. Instead, politicians and judges have allowed the problem to metastasize.

In “*Rosario, Vilardi, and Their Progeny: Do They Hold Rogue Prosecutors Accountable and Bring Justice to the Wrongfully Convicted?*” Daniel Kelly explains how New York has moved in the opposite direction by strengthening rules against recalcitrant and negligent prosecutors. However, he goes on to argue that these measures, however preferable compared to those in other jurisdictions, don’t go nearly far enough.

“The Danger of Being Wrong About Animal Rights: A Social Justice Attorney’s View” by Jerold D. Friedman seeks to answer a fundamental question with which a broadly arrayed progressive and radical legal organization like the Guild should reckon—are animals, who are undeniably made to systematically suffer around the world for the humans who control them, worthy of our activism? Modern research in genetics and evolutionary biology have shown that we have more in common with our animal brethren than previously imagined. To Friedman, animal oppression is still oppression (with all the attendant moral corruption done to the oppressor and injustice done to the oppressed) and animal liberation is still liberation—because, ultimately, we are closer in nature and in our shared need for respectful treatment with other species of the earth than those who would harm them realize.

Sascha Bollag’s “Activism as a Legal Strategy: Promoting Environmental and Social Justice” is a primer on how attorneys can effectively advocate on behalf of radical and progressive ecological causes. It’s no secret that, with the election of Donald J. Trump and the appointment of his science-denying Environmental Protection Agency Administrator, Scott Pruitt, activism on these issues is especially urgent.

In “Democracy, Capitalism, and the Law” Joseph Taecker-Wyss, with the skill of an economist and the knowledge of a legal historian, makes the case for socialism as a remedy for the polarizing wealth inequality in the U.S. This inequality has come in tandem with an organized right-wing effort to further monetize our electoral system, making politicians even more beholden to their funders. The current reactionary Supreme Court has consistently worsened both these mutually reinforcing social problems, as with its notorious *Citizens United v. FEC*<sup>3</sup> ruling. In this essay Taecker-Wyss traces these problems to their origin—a corrupt and exploitive capitalist economic system.

—Nathan Goetting, *Editor-in-Chief*

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1. See Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 686 n.8 (2006) (citing to a number of studies confirming the alarming frequency, over decades, with which wrongful convictions occur due to prosecutors hiding evidence).
  2. 373 U.S. 83 (1963).
  3. 558 U.S. 310 (2010).

# National Lawyers Guild Review

## Submission Guidelines

*National Lawyers Guild Review* is published quarterly by the NLG. Our readership includes lawyers, scholars, legal workers, jailhouse lawyers and activists. With that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

Though we are open to manuscripts of any length, articles typically run about 7,000 words. Pages in issues of *NLGR* generally contain about 425 words.

Submit your manuscript in Microsoft Word format electronically as an attachment to an email. For reference, we use the *Chicago Manual of Style*. Citations should appear as endnotes and follow Bluebook style. Citations should identify sources completely and accurately. Lengthy textual commentary and string cites are discouraged.

Include a short sentence or two describing your professional affiliation, background and area(s) of legal specialization. This description will appear with the article if it is accepted for publication. Please also include a phone number and ground mail address.

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