

DEMOSPRUDENCE ON TRIAL: ETHICS FOR MOVEMENT LAWYERS, IN FERGUSON AND BEYOND

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*We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.*¹

INTRODUCTION

A complex, dynamic, and creative tension endures between law and social movements. Not only can law affect and even help form social movements, but social movements can affect and even help form law. In “Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements,” Professors Lani Guinier and Gerald Torres describe how Justice Ruth Bader Ginsburg engaged the law in the fight for equal pay for women.² For nineteen years, Lilly Ledbetter, a seventy-year-old grandmother, put on her overalls and went to work as a supervisor at a Goodyear Tire and Rubber plant in Alabama.³ She did this even though she made up to 40 percent less than her male counterparts. When she later sued, a trial court awarded her millions in punitive damages and back pay. However, in 2007 the U.S. Supreme Court overruled the damage award on a technicality.⁴ Ginsburg read her dissent from the bench. The dissent

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1. *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).
2. See generally Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740 (2014).
3. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 *B.U. L. REV.* 539, 540 (2009).
4. *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 99-C-3137-E, 2003 WL 25507253, at *1 (N.D. Ala. Sept. 24, 2003), *rev’d*, 421 F.3d 1169 (11th Cir. 2005), *aff’d*, 550 U.S. 618

legitimized the claims made by the movement for women's rights, inspiring them to press forward even in the face of this Supreme Court loss. The ongoing, determined activism of the women's rights movement resulted in the passage of the Lilly Ledbetter Fair Pay Act two years later.⁵ The Act eliminated the technicality that denied Ledbetter her damage award.⁶

In her dissent in *Utah v. Strieff*,⁷ I believe that Justice Sotomayor sought to similarly legitimize and inspire the Black Lives Matter movement. For at least three years, the movement has thrust narratives of race and the law to the forefront of American democratic debate. Most are familiar with the tragic death narratives of Trayvon Martin, Tamir Rice, Mike Brown, Freddie Gray, Sandra Bland, and Aiyana Jones. However, fewer people know that prosecutorial discretion,⁸ racial profiling,⁹ and use of force¹⁰ jurisprudence has provided the legal infrastructure that allows for the violence to go unpunished. To this day, no national legal victory has pierced a hole in this structure; even attacking the problem in structural terms has been outlawed.¹¹

Reform has seemed imminent only in a closely related legal regime involving money bail and debtors' prisons. A white paper from the Saint Louis based ArchCity Defenders helped to focus the nation's attention on the harsh ticketing racket through which municipal governments meet their budget goals via ultraenforcement of minor quality of life laws and escalating fees.¹² The Department of Justice's investigation of the Ferguson Police Department also demonstrated that the ultraenforcement targeted the least powerful and marginalized communities that lack the social and political capital necessary to consistently defend themselves¹³—Black and poor communities like the section of Ferguson where Mike Brown lived.¹⁴ This dynamic played a role in the community outrage that led everyday people to stand up to the physical death brought upon Mike Brown, which then sparked the movement.

(2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

5. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5.

6. *Id.*

7. 136 S. Ct. 2056 (2016).

8. *See generally* *Armstrong v. United States*, 517 U.S. 45 (1996).

9. *See generally* *Whren v. United States*, 517 U.S. 806 (1996).

10. *See generally* *Tennessee v. Garner*, 471 U.S. 1 (1985).

11. *See generally* *McCleskey v. Kemp*, 481 U.S. 279 (1987).

12. THOMAS HARVEY ET AL., ARCHCITY DEFENDERS, MUNICIPAL COURTS WHITE PAPER (2014), <http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/TV2C-M95W>].

13. Press Release, U.S. Dep't of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> [<https://perma.cc/F66N-CZMS>].

14. As with the names for other cultures, ethnicities, and groups of people, I capitalize "Black" when referring to people of the African diaspora. *See generally* Lori L. Tharps, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html?_r=1&mtref=undefined&gwh=7AD7329BFC203096C1DEF919B960F508&gwt=pay&assetType=opinion [<https://perma.cc/A85N-9E4Q>].

Consider the story of Qiana Williams, a thirty-seven-year-old single mother and long-time resident of St. Louis.¹⁵ She got her first ticket for driving without a license when she was nineteen. She went to jail because she could not afford to pay the \$250 bond.¹⁶ Since then, she has suffered the reoccurring nightmare of the jail carousel, trapped in a spiral of unpaid tickets, warrants, and ever-increasing fines. She could not pay these debts because of her low income. She wanted to go to college and lift herself out of this spiral, but she was arrested for unpaid traffic tickets just twelve credits shy of obtaining her degree.¹⁷ On one occasion, she was assaulted by an ex-boyfriend, and when the officers arrived, they asked her to step outside to identify the perpetrator. Once outside, she was arrested on an outstanding warrant stemming from parking tickets.¹⁸ The man who assaulted her was released. She was (wrongly) told that she could not press charges with an outstanding warrant.

Although the state has yet to kill Qiana Williams physically, the type of social death that she experiences limits her capacity to experience the full measure of American citizenship and arguably has roots in the social stigma of race that arose from the period of enslavement that her ancestors endured.¹⁹ The lifelong stigma of criminalization that the state has visited upon her on relatively trivial grounds could affect her prospects for employment, housing, voting rights, health care, and, as demonstrated above, even her capacity to assert her rights to her own bodily integrity became jeopardized. In *The New Jim Crow*, Michelle Alexander describes how in the aftermath of enslavement, the rebirth of caste emerged when criminal status took root as a surrogate method of creating second class citizenship.²⁰ Williams's story demonstrates how racialized targeting and hyperenforcement of minor infractions can devastate communities. Municipal governments use the profits from the tickets to get rich, at the expense of everyday people.

This *Fordham Law Review* colloquium addresses the question of how civil litigation ethics should respond in a time of vanishing trials. For those of us deeply interested in the potential of social movements to create change and create law, certain questions predominate: How does the vanishing trial affect social movements? How does the movement lawyer adapt?

15. Whitney Bennis & Blake Strode, *Debtors' Prison in 21st Century America*, ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/> [<https://perma.cc/EQ64-XMYJ>].

16. Campbell Robertson, Shaila Dewan & Matt Apuzzo, *Ferguson Became Symbol, but Bias Knows No Border*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2015/03/08/us/ferguson-became-symbol-but-bias-knows-no-border.html> [<https://perma.cc/LCM5-YNMJ>].

17. *Id.*

18. *Id.*

19. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH (1982).

20. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 21–30 (2010) (discussing the end of enslavement and the creation of “black codes” to ensure the maintenance of social control over Blacks in the nineteenth century).

How will it affect our ability to help Qiana Williams or get justice for Mike Brown?

This Article suggests that although civil litigation remains a viable tool, the vanishing trial has limited impact on movement lawyers because we can use the law to promote social change outside of the courtroom. The demosprudence framework helps us to understand this process.²¹ By applying this framework to the movement lawyering context, movement lawyers can adapt to the void in voice created by the vanishing trial in civil litigation and still help the movement.

Part I of this Article outlines the scholarly debate surrounding the capacity of civil litigation to produce social change. Tradition suggests that litigation-based strategies for social change represent a “hollow hope.” A more optimistic line of argument has recently suggested that we should consider the positive indirect impact that movement lawyers can have on social movements and democratic debate. Demosprudence provides an alternative entry point to the more optimistic line. Part II seeks to glean ethical principles from the demosprudence framework. It asks, “What ethical and professional principles may help movement lawyers avoid the ethical pitfalls that await movement lawyers who seek to promote demosprudence in their movements?” Analyzing Guinier and Torres’s work from an ethical lens, I offer a simple three-part framework for ethical demosprudential lawyering in social movements. In Part III, I explore how the demosprudential movement lawyering work done in Ferguson by civil litigators on the debtors’ prisons issue shows how, even in the time of vanishing trials, social movement lawyers can engage in work that meets our highest professional ideals.

The movement will be led by the inspiration of the grassroots, and knowledge workers like lawyers will often play a follower’s role. That can involve different tasks. Sometimes lawyers can do more for the movement than guide activists through the quotidian tinctures of legal procedure. Sometimes lawyers can engage in conceptualizing how the movement itself can change the theory and content of the law, expanding “the horizon of the possible and sustainable.”²² Sometimes the tasks turn inward, and engaging in self-reflection on how to best support the movement in light of changing realities in the profession becomes movement work. This Article hopes to support self-reflection for movement lawyers so that they can become better.

In light of recent electoral realities, it seems that now more than ever, activists will turn away from lobbying federal executive and legislative branch officials for racial reform, leaving civil litigation as one of the last

21. Demosprudence is “the study of the dynamic equilibrium of power between lawmaking and social movements”; it “focuses on the legitimating effects of democratic action to produce social, legal, and cultural change.” Guinier & Torres, *supra* note 2, at 2749.

22. *Id.* at 2752.

bastions of possibility—an avenue which has had some success.²³ I hope this short Article can make a contribution in the effort to accomplish the movement's objectives, the vanishing trial notwithstanding.

I. SCHOLARLY DEBATES ON LAWYERING FOR SOCIAL CHANGE

Part I.A addresses the nature of the link between civil litigation and social movements as either causation or a conversation. Part I.B then addresses another approach to lawyering for social change: the lawyer's role as a promoter of demosprudence.

A. *Causation or Conversation?*

The debate has endured for decades and could constitute an entire field of study itself. How can lawyers best promote social movements? Does civil litigation promote social change? The civil litigation campaign that culminated in *Brown v. Board of Education*,²⁴ has served as the launching site for this argument. Legal historians note that because of interposition and nullification by southern lawmakers, *Brown* had almost no immediate direct impact on desegregation and indeed provoked immediate backlash.²⁵ During the first decade, only 2.3 percent of Black children attended integrated public schools.²⁶ Significant integration followed only after the grassroots activism that culminated with the civil rights movement, forcing lawmakers to seek to fulfill the promises of *Brown*.²⁷

In the shadow of *Brown* and the subsequent half century of debate, legal scholars have formulated a number of arguments that support either the pessimistic view or the optimistic view of the role of the courts in social change. The arguments range from the practical to the theoretical to the institutional to the jurisprudential.²⁸ On the pessimistic side, scholars have expressed both pragmatic and ideological concerns. For instance, some

23. See, e.g., Sunita Patel, Democratic Police Reform and Public Law Injunctions (Nov. 15, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877762 [<https://perma.cc/K4KR-Q9MU>].

24. 347 U.S. 483 (1954).

25. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 84 (1994).

26. GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE 10 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/CQZ9-58PE>]; see also Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008).

27. ORFIELD & FRANKENBERG, *supra* note 26, at 10 (demonstrating that after hitting a peak in 1988, the percentage of Black students in majority white schools has been cut nearly in half, from a high of 44 percent to 23 percent today).

28. See Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 64-68 (2011) (presenting a visual representation of these arguments).

have argued that civil litigation (1) is slow and difficult to enforce²⁹ and (2) drains a movement's financial resources for uncertain results.³⁰ Others argue that civil litigation (1) frames movement demands to identify with claims of inherently liberal rights that fit within the universe of existing jurisprudence and (2) is limited by the conservative judicial temperament that hesitates to depart from stare decisis, breeding fidelity to the very status quo being challenged. The most prominent of these theories emerged from the scholarship of political scientist Gerald Rosenberg, who wrote *The Hollow Hope: Can Courts Bring About Social Change?*³¹

Other scholars take a more expansive view of the role of civil litigation in social change.³² They note that civil litigation has (1) attracted financial resources from those who want to donate to the legal effort, (2) provided legitimization for the movement's agenda, and (3) opened up new claims and cultivated friendly venues and good precedent for future litigation.³³ For example, during the 1990s, civil litigators unleashed a largely successful offense against the harmful effects of tobacco.³⁴ The tobacco litigation at the trial level did not shift precedent at the appellate level. But by providing new analogies and applying facts to doctrine in new ways, the creativity of the trial lawyers in the tobacco litigation led to social change by shrinking the social space occupied by big tobacco.³⁵

Both the *Brown* and the tobacco litigation campaigns sought to create social change through civil litigation.³⁶ They had varying measures of success. Although *Brown* may not have had significant direct effects on desegregation prior to the direct action that motivated integration and busing, the decision laid the groundwork for the civil rights movement and contributed to an eventual shift in the hearts and minds of citizens around the country, stoking the groundswell of support needed to create the movement's infrastructure.³⁷ Taking a second look at *Brown* through the lens of demosprudence theory suggests that, like the tobacco litigation, provoking "mass conversation" can, in turn, lead to mass change.³⁸ In this

29. See generally Epperson, *supra* note 26.

30. See generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

31. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

32. See Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992) (providing a rigorous analysis and rebuttal to ROSENBERG, *supra* note 31); see also Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897 (1998) (arguing that tobacco litigation contributed to the agenda of social change by providing new ways of defining the problem of tobacco and the policy alternatives, political mobilization, new legal norms, and new political and legal resources for opponents of big tobacco).

33. See generally McCann, *supra* note 32.

34. See generally Mather, *supra* note 32.

35. See *id.* at 929.

36. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Mather, *supra* note 32, at 899.

37. Douglass NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 954 (2011) (discussing how *Brown* "fuel[ed] a powerful social movement by raising consciousness, driving fundraising, legitimizing a cause, and influencing other state actors").

38. Guinier, *supra* note 3, at 558.

case, the bracing effect on the nascent civil rights activists of the *Brown* decision would set in motion circumstances that made the country immeasurably better.

Demosprudence represents a philosophical commitment to the lawmaking force of meaningful participatory democracy.³⁹ According to Guinier, we should not limit our focus to how law affects social movements directly, as reflected in the issuance of a judicial order or a direct line of *causation*, but we should remember the power of social movements to make law, interpret law, and change law indirectly through sparking *conversation*. The persuasive rulings of lower courts and international human rights courts, for example, work in this manner. By interpreting the law in new ways, movements can then perform functions similar to the functions that any of these persuasive authorities would perform.⁴⁰

Guinier “envisions law and politics as continuously in dialogue. Law inspires and provokes the claims of politically engaged agents, as it simultaneously emerges from these claims.”⁴¹ For Guinier, “[i]t is not essential . . . that courts ‘cause’ changes in public opinion. It is only essential that courts are one voice within the national discussion.”⁴²

Demosprudence moves us away from the question of whether civil litigation causes good or bad legal precedent for social movements and shifts us away from a focus on judicial rulings. Demosprudence mobilizes law in a way that improves the quality of our dialogue. The complex notions of justice that people in grassroots communities articulate, often without the burden of academic or legalistic jargon, can be enriched by the conversation begun by civil litigation conducted with an eye toward demosprudence. One scholar describes Guinier’s position in this manner: “Most persons would think it odd to say that the only important aspects of conversations with friends are those that result in quantifiable changes in measurable opinions. . . . [W]hat matters is the texture and substance of dialogue.”⁴³ In other words, the legitimizing effect of a lawsuit, successful or unsuccessful,⁴⁴ may not bring any more of an immediate tangible result than a statement of support from a Nobel Peace Prize winner would in

39. *Id.* at 553 n.97.

40. See generally Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (discussing the power of legal interpretation).

41. Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 581 (2009).

42. *Id.* at 584–85.

43. *Id.* at 585.

44. NeJaime, *supra* note 37, at 969 (describing that a movement can benefit from “two internal movement effects of litigation loss: (1) [l]oss may help a specific organization stake out an identity in a competitive social movement by committing itself to a meaningful issue susceptible to judicial rejection; and (2) loss may contribute to mobilization and fundraising by inspiring outrage and signaling the need for continued activism in light of courts’ failure to act,” as well as “two external effects of litigation loss: (1) [l]oss may prompt advocates to shift more attention and resources to other law-making institutions, but it may do so in a way that allows advocates to carve out a specific need for action by other state actors; and (2) advocates may use loss to appeal to the public by encouraging citizens to rein in an ‘activist,’ countermajoritarian judiciary”).

terms of immediate concrete gains for the movement. Even so, such a statement would embolden movement activists and provide a sense of gravitas to the political debate.

B. Demosprudence Through Narrative

The demosprudential approach emphasizes public dialogue and conversation. Consequently, it shifts the focus from the lawyers and the laws to the issues and ideas being debated.⁴⁵ According to Guinier, “Demosprudents examine the collective expressions of resistance (whether through counter-narratives or paradigm-shifting mobilizations) that test the democratic content of the formal institutions of lawmaking.”⁴⁶ Paradigm-shifting mobilizations are not under the lawyers’ purview, but lawyers can contribute to the production of counternarratives as expressions of resistance.⁴⁷

Narratives provide the lifeblood of the law, as well as the lifeblood of social movements. Clients construct narratives to share what happened in their lives to trial lawyers in order to prepare the case. Trial lawyers tell their clients stories about the law in order to inform them of their rights. Litigators then tell stories through pretrial submissions to the judge and again in opening statements and testimony to juries. Judges and jurors retell stories to themselves and each other through jury instructions and deliberations and certify one or another narrative through the issuance of a verdict or a judicial opinion. Journalists tell the story of what happened to the public.⁴⁸ A trial is a competition of stories, and the best story wins.⁴⁹

The phenomenon of the vanishing trial does not portend the end of stories in the law. In some ways, a trial introduces barriers to the presentation of narrative that the vanishing trial will eliminate. At trial, any witness’s narrative will have to face cross-examination. Narratives provided by one side will usually be contradicted by opposing counsel during cross-examination. Narratives crafted for trial are often winnowed down to the essentials for the purpose of surviving objections. Elements of the story that are perhaps not legally important, but important for other reasons, disappear from the retelling. Court-focused narrative must be designed to survive objections and cross-examination, not to move the public.

Outside of the courtroom, stories lawyers tell continue to have legal impact. Lawyers tell stories during settlement negotiation with opposing counsel. In the social movement context, the story told to the public that allows them to identify with the case may determine whether the settlement

45. Guinier & Torres, *supra* note 2, at 2753 (describing demosprudential lawyering practice as “a transformative process [that] depends upon a participatory, power-sharing process”).

46. *Id.* at 2755.

47. *Id.*

48. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 117 (2000).

49. See generally David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989) (discussing how storytelling influences legal outcomes).

benefits from outside pressure from activists. The story told to the public allows them to identify the case as a movement story.

Broader cultural narratives also migrate into the legal environment and may influence outcomes. One scholar has surmised that, during the half century between *Plessy v. Ferguson*⁵⁰ and *Brown*, the changing societal narrative about race in the country benefitted from the proliferation of narratives about Black life during the Harlem Renaissance.⁵¹ The literary masterpieces of Zora Neale Hurston,⁵² Langston Hughes,⁵³ Richard Wright,⁵⁴ Ann Petry,⁵⁵ Claude McKay,⁵⁶ and others helped to redefine the narrative about Black people in at least the elite liberal imagination, perhaps affecting the sympathies of the Supreme Court Justices in *Brown*.⁵⁷

Critical race theory scholars have contributed greatly to legal discourse by being among the first to privilege stories, particularly noting the power of outsider narratives.⁵⁸ Richard Delgado explained that we all have “stock narratives” in our minds.⁵⁹ Many of those stories include the stereotype of the Black male as criminal, or the Latino as illegal immigrant, or the Muslim as terrorist. Often the data do not back up the stereotypes.⁶⁰ Still, these narratives greatly impact the law and its application.

Well-crafted stories suspend our disbelief, pulling us into the drama. Narratives help facilitate communication when people want listeners to see the world from the standpoint of the oppressed.⁶¹ These stories that contradict stock narratives are called “counternarratives.” They speak to more than just an incident, they teach listeners lessons about society. According to scholars, telling these stories works as a cure for silencing by helping an outsider find his or her voice, as a way to combat embedded preconceptions that marginalize outsiders and allocate suspicion, or as a way to mobilize social movements.⁶² Some have asserted that it can engender empathy in listeners.⁶³ It is difficult to measure when a narrative

50. 163 U.S. 537 (1896).

51. JEROME BRUNER, MAKING STORIES 55 (2002).

52. See, e.g., ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD (1937).

53. See, e.g., LANGSTON HUGHES, NOT WITHOUT LAUGHTER (1930).

54. See, e.g., RICHARD WRIGHT, BLACK BOY (1945).

55. See, e.g., ANN PETRY, THE STREET (1946).

56. See, e.g., CLAUDE MCKAY, HOME TO HARLEM (1928).

57. But see, e.g., Derrick Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21 (2004).

58. See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

59. *Id.* at 2418 (defining stock narratives as the bundle of presuppositions, received wisdoms, and shared understandings against a background of which our legal and political discourse takes place).

60. See ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 94 (1993). For example, somewhere under 2 percent of the Black population will commit violent crimes, making the likelihood that one meets a violent Black person very low.

61. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989).

62. See generally Delgado, *supra* note 58.

63. But see DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (arguing that narratives cut off discussion instead of promoting discussion).

will engender empathy, but from the perspective of storytellers, I can say that I have seen it engender dignity. When I provided representation for the parents of Mike Brown and Ferguson protesters as they testified before the United Nations during the periodic review of the Convention Against Torture,⁶⁴ I saw firsthand how the story of Mike Brown's mother, forced to stand outside in the sun and watch her child's body lie on the ground for over four hours, left officials from around the world visibly shaken. More than any legal arguments, her narrative persuaded officials to note in their concluding observations that racialized police violence in the United States deserved to be noted as a possible violation of the convention.⁶⁵

II. PRINCIPLES OF PROFESSIONAL DEMOSPRUDENTIAL LAWYERING

In "Changing the Wind," Guinier and Torres demonstrate that a lawyer can engage in either effective or ineffective, professional or unprofessional demosprudential lawyering.⁶⁶ They demonstrate this by giving examples of both in the context of the civil rights movement. In this part, I try to glean a framework from these examples, supplemented by my own experiences, leading me to conclude that, to fulfill the ethical ideals of professionalism, a demosprudential movement lawyer should aspire to maintain fidelity to core movement principles, stay accountable to movement actors, and promote client stories that function as public narrative.

In August of 1964, the Mississippi Freedom Democratic Party (MFDP) challenged the right of the all-white segregationist Mississippi Democratic Party (MDP) to represent the state of Mississippi at the Democratic National Convention.⁶⁷ The MDP would not allow Blacks to register, locking the doors or moving to different locations when Blacks tried to attend the precinct meetings.⁶⁸ So the MFDP held its own convention with nearly 2,500 attendees.⁶⁹ It elected Lawrence Guyot as the chair, and Fannie Lou Hamer as the vice chair.⁷⁰ The activists then decided to go to the Democratic National Convention.⁷¹ The activists were determined to challenge the idea that a segregationist Democratic Party could represent their interests without their participation.⁷²

Most importantly, the MFDP made it clear that they did not just want a seat on the floor of the convention. They wanted to "dispute the very

64. Christian Coleman, *Michael Brown's Parents to Speak to U.N. Committee*, USA TODAY (Nov. 10, 2014), <http://www.usatoday.com/story/news/nation/2014/11/10/michael-brown-parents-testimony-switzerland/18799049/> [https://perma.cc/UZ8G-QDFV].

65. Comm. Against Torture, Report on Its Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/3-5, (Dec. 19, 2014).

66. See generally Guinier & Torres, *supra* note 2.

67. See *id.* at 2762.

68. See *id.*

69. See *id.* at 2763.

70. See *id.*

71. See *id.*

72. See *id.*

legitimacy by which the seats were allocated.”⁷³ This point was a nonnegotiable core movement principle for the MFDP. As Bob Moses, field secretary of the Student Nonviolent Coordinating Committee and a key organizer of the MFDP, said at the time, “We’re not here to bring politics to our morality but to bring morality to our politics.”⁷⁴

A. *Principle One: Fidelity to Core Movement Values*

The MFDP lawyer, Joseph Rauh, was a Democratic Party insider who did not clearly understand the principles of the MFDP.⁷⁵ He was himself a party delegate from the District of Columbia and assured the members of the MFDP that the chances for being seated were excellent.⁷⁶ He composed a thorough, professional legal brief which cited twenty-six “credentials contests” dating back to 1836, all of which had been resolved by negotiation and splitting the difference.⁷⁷ Although the MFDP asked Rauh to take an uncompromising position, he came back and expressed enthusiasm for a compromise: two seats instead of a full, equal representation.⁷⁸ Rauh said, “[W]e’ve got a great deal out of this. I think to call this a loss is a bad . . . is a bad mistake . . . [y]ou always talk ‘no compromise’ in a Convention until you get the best you can then you quit.”⁷⁹ As Guinier tells it, Rauh valued “bargaining rather than justice, law, and the rights of Black Mississippians to participate,” failing to realize that, for the activists, “[t]he challenge was not about getting the best deal; the challenge was not to abandon fundamental values.”⁸⁰

Social movements gain their energy from hope and idealism, not the prospect of backroom deals. Even though perhaps prone to negotiation by traditions of professional practice, a movement lawyer must understand what principles hold pride of place in the movement and never compromise those. Social movements attain their broad following through the moral force of a brighter vision for a local, state, or national community of identity. The force of that vision, that group narrative, pushes the movement forward. It is what social movement scholar Marshall Ganz describes as “the transformation of thousands of individual stories into a shared story.”⁸¹ Because compromise means losing their identity, their shared story, activists will scoff at the lawyer’s inclination to compromise. When the compromise deal was announced, Moses shrieked, “[Y]ou

73. *Id.* at 2768.

74. *Id.* at 2769; *see also* TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–1965, at 474 (1998).

75. *See* Guinier & Torres, *supra* note 2, at 2769.

76. *See id.*

77. *See id.*

78. *See id.* at 2770–71.

79. *Id.* at 2770 (first omission in original).

80. *Id.* at 2769–71.

81. Marshall Ganz, *The Power of Story in Social Movements* 8 (Aug. 2001) (unpublished manuscript), https://dash.harvard.edu/bitstream/handle/1/27306251/Power_of_Story-in-Social-Movements.pdf?sequence=1 [<https://perma.cc/FP4R-TVVL>].

cheated!”⁸² By betraying the trust of the client in this high-stakes social movement context, the lawyer did more than simply lose the trust of an individual client. The story of betrayals like this spread quickly. Indeed, perhaps activist distrust of lawyers endures to this day in part due an ongoing perceived mendacity of lawyers, inspired by an accumulation of incidents like these.⁸³

After seeking to persuade the MFDP to accept the compromise, and failing to do so, Rauh did as he was told. He returned the unused delegate credentials issued under the terms of the compromise to the convention leaders.⁸⁴ He fulfilled the client’s wishes sufficiently to satisfy ethical standards that, if violated, would expose him to bar discipline. But he had already violated the spirit of trust between the lawyer and client. According to Guinier, “[H]e shed tears of regret. He was troubled, not so much by falling short of the goal of representation for his clients, as by losing the trust of Moses, which would haunt him for years.”⁸⁵ Ethical norms do more than protect clients, as we see here—they also can protect lawyers themselves from years of regret.

B. Principle Two: Accountability to Movement Activists

In the classic law review article “Serving Two Masters,” Derrick Bell Jr. described the ethical dilemma that arises when a lawyer, working in the public interest or in connection with a social movement, feels compelled to weigh multiple considerations in determining litigation goals.⁸⁶ When the NAACP Legal Defense Fund lawyers seeking to implement *Brown* failed to realize that the children involved may have gained a better education from better quality schools instead of integration at all costs, it created an ethical crisis.⁸⁷ The lawyers, committed to the cause of integration and focused on moving the jurisprudence forward, rejected efforts by their clients (the parents) to embrace arguments for school quality that failed to correspond with integration-based arguments. Bell blames the lawyers’ unwillingness to recognize the increasing futility of “total desegregation” on three factors: (1) the civil rights lawyers’ own ideological belief in racial balance as a symbol of progress, (2) the civil rights lawyers’ fundraising concerns and the impact those concerns had on the selection of cases, and (3) the civil rights lawyers’ perhaps subconscious desire for the “narcissistic gratification” that comes from winning a judgment that affects a large segment of a community.⁸⁸ Ultimately, these factors led to a breakdown in

82. Guinier & Torres, *supra* note 2, at 2771.

83. See Jim Freeman, *Supporting Social Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191 (2015) (discussing the “long history of would-be movement lawyers that inadvertently inhibit[ed] or destabilize[d] movement-building efforts”).

84. See Guinier & Torres, *supra* note 2, at 2771.

85. *Id.*

86. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

87. See *id.* at 492–93.

88. See *id.* at 490–94.

accountability, as lawyers considered the factors above, in addition to or alongside their client's wishes, creating an ethical quandary for them.⁸⁹

We do not know if Rauh had an ideology that drove him toward seeking compromise. Rauh was based in Washington, D.C., and was also legal counsel for the United Auto Workers.⁹⁰ When he lost the trust of Bob Moses, it would haunt him for years. However, in terms of accountability, it is difficult to determine whether there were any immediate professional or financial consequences for him. He clearly supported the MFDP cause.⁹¹ Although he apparently also lacked a deep investment in the MFDP vision of an uncompromising demand for an immediate, fully inclusive conception of American democracy, it is clear that Rauh lost the intangible benefits that a successful representation would have provided in this case.

In stark contrast is the story of the legendary Fred Gray, lawyer for the Montgomery Improvement Association (MIA).⁹² Only one year out of law school, Gray found himself in Montgomery, Alabama, during the time when Rosa Parks and Dr. Martin Luther King Jr. launched the Montgomery bus boycott that forever altered American history.⁹³ Gray had long wanted to challenge the city's segregation laws, but he "waited to file his case until the MIA leadership voted to grant him that authority."⁹⁴ Gray did not have much choice. The MIA structure manufactured accountability.⁹⁵ The funding for Gray's work came from local sources, either the church, local NAACP branches, or other networks based in Montgomery.⁹⁶ Although the MIA had weekly leadership meetings with the lawyers to plot out strategy, it was made clear that "the forum for change was not the courtroom or the law office conference room, but the mass meeting."⁹⁷ Even though Fred Gray eventually prevailed at the Supreme Court, serving as the capstone of the MIA victory, the movement had already won its victory by then in the streets.

The juxtaposition of these two examples demonstrates the potential benefits of accountability mechanisms. Rauh, based in Washington and with an assumedly steady stream of income from the representation of a major client, had limited accountability to his clients, following their directives only out of his own internal compass and sense of responsibility. The activists did not pay his paycheck. Social movements do not often have budgets to pay their lawyers like the MIA did—often, movement lawyers work on a pro bono basis or their time is funded by an outside organization. But Gray's relatively ethically straightforward representation

89. Some may say that the lawyers should have simply followed the dictums of their clients. To be clear, the answer here was never that simple because, in the context of mass representation, different clients may have different desires and goals.

90. See Guinier & Torres, *supra* note 2, at 2771.

91. See *id.* at 2770–71.

92. See *id.* at 2778.

93. See *id.*

94. *Id.*

95. See *id.* at 2779.

96. See *id.*

97. *Id.* at 2782.

could be used as an example to suggest that, when possible, lawyers should seek to create financial structures that give financial control to the activists.

C. Principle Three: Competence in Public Narrative

Storytelling isn't magic. Since narrative serves as a primary vehicle for communication in social movements, an important but rarely recognized skill for movement lawyers is the ability to identify, cultivate, and disseminate public narratives that support movement mobilization.⁹⁸ Social movement scholar Marshall Ganz has used the term "public narrative" to describe this type of storytelling.⁹⁹ He believes that it is a leadership practice.¹⁰⁰ It translates values into action, shapes a shared identity, and motivates communities to take action.¹⁰¹ Ganz conceptualizes public narrative as an answer to three questions: Why am I (the storyteller) called to this movement? Why are we (the community) called to this movement? And why are we called to act now? Ganz describes this triad that constitutes public narrative as the story of self, story of us, and story of now.¹⁰² A public narrative will consist of each of these three elements. The framework has ancient roots, according to Ganz, grounded in the questions posed by the first century Jerusalem sage, Rabbi Hillel: "If I am not for myself, who will be for me? When I am for myself alone, what am I? If not now, when?"¹⁰³

In 1961, a young lawyer named Gerald Stern joined the Civil Rights Division of the U.S. Department of Justice and received the assignment to investigate voter discrimination in Mississippi.¹⁰⁴ While travelling the back roads of Mississippi, he met an elderly Black man named Mose McGee who was plowing his fields behind a mule. When approached, McGee immediately unhitched himself, went to his house, cleaned up, and then returned to talk. He explained to Stern, "It's not right for anyone to be seen as an animal. I want you to see me as a human being."¹⁰⁵ McGee articulately communicated a story of self to Stern. "A story is like a poem. A poem moves not by how long it is, nor by how eloquent or complicated. A story or poem moves by evoking an experience or moment through which we grasp the feeling or insight the poet communicates."¹⁰⁶ Immediately upon meeting Stern, McGee managed to communicate his core value of dignity, a principle that clearly animates him deeply enough to move him to interrupt his work schedule to fulfill what appears to be his

98. See generally Ganz, *supra* note 81.

99. See *id.*

100. See *id.*

101. See *id.* at 2; see also Marshall Ganz, *Public Narrative, Collective Action, and Power*, in ACCOUNTABILITY THROUGH PUBLIC OPINION: FROM INERTIA TO PUBLIC ACTION 273 (Sina Odugbemi & Taeku Lee eds., 2011).

102. *Id.*

103. *Id.* at 274.

104. See Guinier & Torres, *supra* note 2, at 2764.

105. Gerald M. Stern, *Mississippi*, in OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA 153, 164 (Susan Richards Shreve & Porter Shreve eds., 1997).

106. Ganz, *supra* note 101, at 283.

idea of what constitutes self-respect. Many people have difficulty even identifying their core values, let alone the presence to honor one of them in the punctilious manner that McGee did. This core value of dignity speaks to the way that McGee moves through life, and it represents McGee's identity: how he sees himself in the world when he is his best self.¹⁰⁷

McGee believed voting rights would serve as leverage, forcing the county to pave the roads surrounding the Black community's homes like they paved the roads to white people's homes or else face a challenge in mobilizing Black voters for reelection.¹⁰⁸ As it stood, when it rained, the dirt roads became impassable. In one instance, a Black baby who fell ill died because no doctor could reach him over those roads. McGee told the story of how, although "[h]e carried the baby in his arms for miles over the hills to get to town[,] . . . [t]he baby died in his arms before he could get there."¹⁰⁹

Here, McGee communicated a story of us and a story of now. A public story intersects with the broader experiences of the community.¹¹⁰ A storyteller can become part of this larger story simply by embedding his larger experiences within a framework that includes fragments of other stories drawn from the culture. Further, McGee described the problems that the denial of the right to vote created for the Black community.¹¹¹ Because of the high concentration of Blacks in Mississippi,¹¹² it is likely that Blacks could exert enough influence to have basic necessities provided for if they could vote. McGee embedded a story that speaks to communal needs, and he serves as an effective spokesman for his community through his story of us.¹¹³

The stakes could not be higher for McGee. Like most stories of now, McGee chose to frame a narrative around an issue that spoke to core values.¹¹⁴ The tragic story that McGee relates about the death of the child touches on a value all of us share: the importance of protecting not only the sanctity of all life but especially newborn life that holds all of our possibilities for the future in the palms of their tiny hands. Apathy or inertia might have blocked us from seeing the fierce urgency of now as related to the question of voting rights prior to McGee's narrative. Now, the moral outrage created by the story of the lost baby motivates action. Ganz explains that moral outrage "often grows out of experience of a contrast between *the world as it is* and *the world as it ought to be*, how we

107. See Guinier & Torres, *supra* note 2, at 2764.

108. *Id.*

109. *Id.*

110. See Ganz, *supra* note 101, at 285 ("A public story is not only an account of the speaker's personal experience.").

111. See Guinier & Torres, *supra* note 2, at 2764.

112. See *Quick Facts: Mississippi*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/dashboard/RHI125215/28> (last visited Mar. 25, 2017) (specifying that Mississippi as a state has a 37 percent African American population) [<https://perma.cc/W83H-GAGA>].

113. See Guinier & Torres, *supra* note 2, at 2764.

114. Ganz, *supra* note 101, at 286 ("articulates an urgent challenge—or threat—to the values that we share that demands action now.").

feel when our moral order has been violated.”¹¹⁵ Well-crafted stories can communicate the emotional content of a predicament more effectively than logical argument or rhetorical flourish alone can. McGee’s story should outrage the reader (it outraged this author) and should serve as a motivator for action.

As trials vanish, civil litigators like Stern will have more difficulty in relating a narrative of a person like Mose McGee to the court. This cannot stand in the way of relating these narratives to the public. Had Stern not been engaged in voting rights litigation, perhaps Stern would not have asked McGee about his story. Yet he did. If civil litigation avenues had become available to McGee, perhaps Stern could have helped McGee to bring a wrongful death action on behalf of the parents of the young child against the municipality that refused to pave the roads. It would likely have been a difficult case to win in Mississippi in 1961. Faced with societal constraints, Stern penned a memoir, which he used to record and disseminate McGee’s story.¹¹⁶ Uplifting McGee’s public narrative was an act of advocacy that would fulfill the professionalism requirement for a movement lawyer. Although it is difficult to know how many read McGee’s story in Stern’s book, Stern demonstrated professionalism by identifying this story and retelling it without losing its capacity to outrage. All movement lawyers should hope for as important an accomplishment for their clients. And Stern did not have to step into a courtroom to accomplish the goals of professional representation.

III. A CONTEMPORARY EXAMPLE OF DEMOSPRUDENTIAL MOVEMENT LAWYERING

“Keilee Fant is a 37-year-old African-American mother of nine who has been working as a certified Nurse’s Assistant for twenty (20) years.”¹¹⁷ Over those twenty years, she served time in jail on seven occasions due to traffic charges in Ferguson and other nearby municipalities.¹¹⁸ “Every time Fant was pulled over she was issued multiple citations in a single stop.”¹¹⁹ She received “numerous warrants for ‘Failure to Pay’ or ‘Failure to Appear’ in Municipal Court in response to a ticket.”¹²⁰ Often her absence was involuntary, caused by schedule conflicts between municipalities.¹²¹ Fant had to choose which court appearance to attend, resulting in a warrant from the other court for “Failure to Appear.” In some instances, Fant did not appear, because of fear that if she appeared and could not pay a ticket in

115. *Id.* at 278.

116. *See* Stern, *supra* note 105, at 164.

117. Class Action Complaint at 48, *Thomas v. City of St. Ann*, No. 4:16-cv-01302 (E.D. Mo. Aug. 9, 2016).

118. *Id.*

119. *Id.* at 49.

120. *Id.*

121. *Id.*

full, she would be arrested.¹²² Fant did not have access to a lawyer to advise her.¹²³

On one occasion, the day after Fant's father passed away, a Ferguson officer and another officer from a nearby municipality arrested her from her mother's home.¹²⁴ "Ms. Fant pleaded with the officers to allow her to make funeral arrangements. They refused."¹²⁵ Instead, they arrested her and took her to the Ferguson jail. Her bond was set at \$4,300.¹²⁶ Fant's mother could only "scare up \$4,200, which she attempted to pay the Ferguson authorities so that Ms. Fant could attend her father's funeral. They rejected the offer. She missed her father's funeral because she could not pay the full amount of the bond Ferguson arbitrarily set."¹²⁷ She "spent fifty eight days in jail. The guards would not allow her to shower nor did the jail provide any hygiene products. Later, when she was transferred to the Florissant jail, officers harassed Ms. Fant about how she smelled."¹²⁸

As we filled the street adjacent to the Canefield apartment complex where Mike Brown lost his life in August of 2014, I remember that, from the beginning, we grasped for explanations. Why here? Why now? Of all places, why was Ferguson the place where people finally decided to take to the streets? The answer lies somewhere at the intersection not only between the Canefield housing development where Mike Brown lived and West Florissant Avenue where the protests took place. Also, it lies at the intersection between the cumulative effect of the psychology of a community that had been beaten down for generations, the recent furor over the killing of Trayvon Martin, and the spectacle of leaving Mike Brown's body in open view on the hot asphalt under the red August sun for four hours—all of these contributed. This last fact especially traumatized the Black community, which still bears the psychological scars of southern lynching: one could even go so far to suggest that, in the mind of the community, the Mike Brown killing invoked the same dynamic, only they left blood on the asphalt instead of blood on the leaves.¹²⁹ In addition to all of this, the collective humiliation of the debtors' prison system created a collective identity of a people under siege by the law.

The debtors' prison narrative took hold for a complicated set of reasons. Perhaps some commentators, still smitten by the prospect of postracialism in the aftermath of the election of President Obama, felt discomfort with a narrative of widespread, bald racial oppression in twenty-first century America.¹³⁰ If so, the debtors' prison narrative alleviated that discomfort by replacing race with an economics-driven narrative. The reality of what created Ferguson lies perhaps in an amalgamation of those narratives. In

122. *See id.*

123. *See id.*

124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* BILLIE HOLIDAY, *STRANGE FRUIT* (Commodore Records 1939).

130. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1591–93 (2009).

any event, the debtors' prison narrative fortuitously shined the light on a core truth, enlarging our understanding of mass incarceration and the functioning of the modern carceral state as not only driven by the War on Drugs, or private prisons, but also by municipal greed.

On the two-year anniversary of the death of Mike Brown, the ArchCity Defenders, Equal Justice Under Law, and the Saint Louis University (SLU) Law School Clinic filed a number of lawsuits that alleged Ferguson and surrounding municipalities illegally operated a debtors' prison system, seeking damages in excess of \$20 million.¹³¹ Significantly, the pleadings included a number of public narratives, including the narrative above from Keilee Fant.¹³²

This was not the first lawsuit that the ArchCity Defenders had filed on the issue.¹³³ Even before civil litigation, the narratives were proliferated not through trial, initially, but through a "white paper" that the attorneys began producing before the Ferguson protests began.¹³⁴ The narrative of the debtors' prison advocacy demonstrates that the mutually constitutive relationship among law, litigation, and social movements does not have to vitiate in light of the specter of the vanishing trial. Part III.A analyzes the example under a core movement principles fidelity rubric. Next, Part III.B assesses the example with respect to accountability to movement activists. Finally, Part III.C analyzes the example as to competence in mobilizing public narrative.

A. Fidelity to Core Movement Principles

Along with intersectionality,¹³⁵ a defining feature of the broader Black Lives Matter movement that became actuated in Ferguson is the rejection of the idea of "respectability politics."¹³⁶ The essential premise of respectability politics emerged from early twentieth-century strategies for civil rights advancement that suggested that if Black Americans adopted the customs and habits of white Americans, they would be treated equally.¹³⁷

131. Stephen Deere, *Suit Seeks \$20 Million, Alleging Wrongful Arrests, Prosecutions in Ferguson*, ST. LOUIS POST-DISPATCH (Aug. 9, 2016), http://www.stltoday.com/news/local/crime-and-courts/suit-seeks-million-alleging-wrongful-arrests-prosecutions-in-ferguson/article_be51dc4a-0f99-5a5d-a512-7aae4cac94ec.html [https://perma.cc/K4VP-EQZU].

132. See generally Class Action Complaint, *supra* note 117.

133. See, e.g., Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson over "Debtors Prisons"*, NPR (Feb. 8, 2015), <http://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons> [https://perma.cc/YZG6-YCJV].

134. HARVEY ET AL., *supra* note 12.

135. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

136. See generally Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541.

137. See Fredrick C. Harris, *The Rise of Respectability Politics*, DISSENT MAG. (2014), <https://www.dissentmagazine.org/article/the-rise-of-respectability-politics> [https://perma.cc/HKV4-M9LP].

Bill Cosby best illustrated the idea during his “Pound Cake” speech, where he suggested that Black Americans would have more material success if they avoided ethnically identifiable names, adopted mainstream dress patterns, and mocked those who failed to do so.¹³⁸ President Obama has also received a great deal of criticism from Black millennials in particular for enthusiastically embracing the politics of respectability during the majority of his presidency.¹³⁹ He famously chastised students at Morehouse College, the nation’s preeminent institution of higher learning for African-American males, as if he was speaking to a group of truants in detention.¹⁴⁰ In response to this thread of condemnation from the older generation, the movement has decried respectability tropes. While other social groups point to structural impediments and call for structural reform to aid their advancement, hemmed in by respectability narratives, Blacks are encouraged to eschew calls for structural reform and instead blame themselves, leading us to believe that unemployment, the education gap, mass incarceration, and other societal ills should be addressed by focusing on a “culture of poverty.” In other words, instead of protesting, the movement should focus on self-uplift, pulling one’s pants up, and “transforming individuals rather than transforming communities.”¹⁴¹

Activists have noted that one of the fundamental points of the Black Lives Matter movement is that Black people’s lives matter whether or not their pants sag and whether or not they conform to middle-class behavior patterns or societal gender norms.¹⁴² Activists also reject suggestions that they should have to protest in a “proper” way for their claims to deserve a fair hearing.¹⁴³ Accordingly, activists rushed to the defense of Mike Brown. When he immediately became labeled as “no angel” in the struggle over his narrative, the movement became even more protective.¹⁴⁴

Civil rights lawyers have historically mobilized respectability politics to enhance their advocacy. For example, an American Civil Liberties Union campaign on racial profiling argued that racial profiling was wrong because it failed to distinguish good Blacks, like Henry Louis Gates, from bad

138. *Id.*

139. See Nia-Malika Henderson, ‘Black Respectability’ Politics Are Increasingly Absent from Obama’s Rhetoric, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/12/03/black-respectability-politics-are-increasingly-absent-from-obamas-rhetoric/?utm_term=.e5461a30a953 [<https://perma.cc/R7FM-W5A2>].

140. *See id.*

141. *See generally* Harris, *supra* note 137.

142. *See, e.g.,* Titilayo Rasaki, *From SNCC to BLM: Lessons in Radicalism, Structure, and Respectability Politics*, HARV. J. AFR. AM. PUB. POL’Y, 2015–2016, at 31.

143. *See* Roberk Koeler, *Broken Windows, Broken Spines*, HUFFINGTON POST (May 8, 2016), http://www.huffingtonpost.com/robert-koehler/broken-windows-broken-spi_b_7243996.html [<https://perma.cc/3CFH-M3ES>].

144. *See* John Eligon, *Michael Brown Spent Last Weeks Grappling with Problems and Promise*, N.Y. TIMES (Aug. 24, 2016), https://www.nytimes.com/2014/08/25/us/michael-brown-spent-last-weeks-grappling-with-lifes-mysteries.html?_r=0 [<https://perma.cc/KD4P-8A3C>].

Blacks who were not respectable.¹⁴⁵ But any progress gained from this discourse comes at too high of a price, eliciting sympathy for a few at the cost of the many.

The debtors' prison narrative has avoided depending on respectability politics. For example, in the narrative above, Fants's family history is not understood to play in role in the type of traffic enforcement that she deserves to experience. The level of human cruelty she faces in the denial of an opportunity to bury her father reflects badly not on her but on the state. The debtors' prison lawyers chose the plaintiffs, and they could have strategically chosen the most "respectable" clients they could find. They might have justified their decision to do so on the premise that judges and jurors have more sympathy for those they identify with and respect, and judges and jurors will instinctively identify with and respect those who have less subordinated identities, helping the lawyers to win the case. This poses another ethical dilemma. In the lawyer's professional judgment, if having a more respectable named plaintiff improves the chances of success in court, doesn't the principle of zealous advocacy charge the lawyer with the ethical responsibility to bring the more respectable litigant in front of the judge?

The ArchCity Defenders, Equal Justice Under Law, and the SLU law clinic did not do so, and I believe that this is to their credit. They honored a core value of the movement. The debtors' prison narrative focuses on minor infractions that everyone has participated in, including failing to buckle one's seat belt, or jay walking. Part of the argument is that people should not face harsh punishment for minor offenses, because everyone has engaged in them—there but for the grace of God go I.¹⁴⁶

Additionally, by adhering to movement principles, the lawyers increased movement participation. Activists may have intuited that, because ArchCity had demonstrated that it had a sense of fidelity to the movement by adhering to movement core principles, it would be less likely to betray the activists in negotiations or in other ways. This in and of itself facilitates more agency and participation of the movement in the legal side of the process of speaking truth to power. As the principle of *demosprudence* asserts, in some cases the impact on the larger discourse can take precedent over the short-term goal of winning or losing the litigation.¹⁴⁷

B. Accountability to Movement Activists

Like the MIA before, the Black Lives Matter movement has had the savvy to rein in its lawyers, ensuring that they do not overtake the movement and turn the movement into a law reform project. To that end,

145. See Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1510 (2013).

146. See HARRY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011).

147. See generally Guinier & Torres, *supra* note 2.

many activists have constructed their own policy platforms independent of lawyer domination.¹⁴⁸

The debtors' prison lawsuits exist in harmony with many of the independent platforms in the movement (including platforms that do not exist in harmony with each other). The harmony was hard won.¹⁴⁹ Some of the activists did not want to engage the movement from the entry point of the debtors' prison narrative. Others did. Because the poor people named in the lawsuit still needed representation, the lawyers would have moved forward with the representation regardless of whether it was coordinated with the movement. But the shared values cultivated through personal relationships ensured ultimate alignment. As a Ferguson activist myself, I can attest that the debtors' prison lawyers have contacted me for advice and coordination, for example before deciding to file lawsuits on the two-year anniversary of Mike Brown's death.

However, it is unclear who has funded the lawsuits. Neither the low-income clients nor the movement activists seem to have the funds to do so. In the most recent class action cases, it appears that local lawyers have partnered with global law firms (e.g., Arnold & Porter) and in all likelihood the law firm has taken on the financial burden.¹⁵⁰ This is less than ideal, as the highest level of accountability comes from ensuring that the movement activists hold the purse strings.

Civil lawsuits that seek to promote social change will continue to exist, even in the face of the vanishing trial. They can help us tell the story, regardless of trial outcome. However, it is best if the movement activists have the ultimate authority over whether to move forward with the litigation, as the MIA did during the Montgomery bus boycott.

C. Competence in Public Narrative

Even these sources may not track the "staggering" numbers of warrants, "drawers and drawers" full, that many cities issue for traffic violations and ordinance infractions. The county in this case has had a "backlog" of such warrants. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them.¹⁵¹

148. See, e.g., CAMPAIGN ZERO, <https://www.joincampaignzero.org/> (last visited Mar. 25, 2017) [<https://perma.cc/N2SG-937X>]; Platform, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> (last visited Mar. 25, 2017) [<https://perma.cc/RK3C-GBF2>].

149. Interview with Thomas Harvey, Executive Dir. & Founder, ArchCity Defenders, in New Haven, Conn. (Feb. 18, 2017).

150. Press Release, Rebecca L. Gorley, ArchCity Defs., ArchCity Defenders Teams with Arnold & Porter to File Largest Debtors' Prisons Case in History Against 13 Towns Neighboring Ferguson (Aug. 9, 2016), <http://www.archcitydefenders.org/wp-content/uploads/2015/06/PressReleaseSt.Annetal.DebtorsPrisonclassaction.pdf> [<https://perma.cc/NVJ9-B67A>].

151. Utah v. Strieff, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) (quoting CIVIL RIGHTS DIV., U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47, 55 (2015), <https://www.justice.gov/sites/default/files/opa/press-releases/>

The dissent in *Strieff* by Justice Sotomayor certainly signals to the demosprudents that she heard their cry. In constructing her own narrative in her dissent, she cites narratives from James Baldwin, Te-Nehezi Coates, and Lani Guinier.¹⁵² However, even before this national exposure at the level of the Supreme Court, and before the exposure in the investigation of the Ferguson Police Department (another demosprudential project resulting from civil litigation), the debtors' prison narrative had already become an example of "demosprudence" in Missouri.¹⁵³ It led to the passage of state legislation to cap the amount of a municipality's budget that could be raised through traffic ticketing.¹⁵⁴ That legislation was promptly challenged and overturned in court by the mayors of small local municipalities who argued that the measure was a "special law" that targeted them unfairly.¹⁵⁵ In the meantime, the city of St. Louis forgave 220,000 warrants for nonviolent municipal offenses.¹⁵⁶ The city of Ferguson also announced it would withdraw about 10,000 warrants only days after the story broke in August of 2014.¹⁵⁷ So the debtors' prison narrative itself helped to create social change, even before reaching the courtroom.

The narrative around the debtors' prison runs deep in American history. Debtors' prisons were banned under federal law in 1833 and seen as a tyrannical holdover from British rule.¹⁵⁸ Many colonists would find themselves in "the clink" even if they owed as little as sixty cents.¹⁵⁹ The reassertion of a debtors' prison taps deeply into a story of "us" in American

attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/8RJE-NP VF]).

152. *Id.* at 2070.

153. The ArchCity "white paper," local and international news analysis, and the Department of Justice's Ferguson report all helped to create the discourse around Ferguson.

154. See Robert Patrick & Stephen Deere, 'Sweeping' Court Reform Comes as Nixon Signs Bill to Cap Cities' Revenue, End Predatory Habits, ST. LOUIS POST-DISPATCH (July 10, 2015), http://www.stltoday.com/news/local/crime-and-courts/sweeping-court-reform-comes-as-nixon-signs-bill-to-cap/article_cafffb7e-b24d-5292-b7bb-84ef81c6e81d.html [https://perma.cc/3GLM-NR5A].

155. See Jennifer S. Mann & Jeremy Kohler, *Judge Sides with St. Louis County Cities That Claimed Municipal Court Reform Law Is Unfair*, ST. LOUIS POST-DISPATCH (Mar. 28, 2016), www.stltoday.com/news/local/crime-and-courts/judge-sides-with-st-louis-county-cities-that-claimed-municipal/article_b1b75039-4dd9-5325-890f-35535561cafa.html [https://perma.cc/9KYM-4E7G]; Mariah Stewart, *St. Louis County Mayors Still Want to Use Courts as Cash Cows*, HUFFINGTON POST (Nov. 20, 2015), http://www.huffingtonpost.com/entry/st-louis-county-courts-lawsuit_us_564f0114e4b0d4093a573687 [https://perma.cc/6DKJ-NT6R].

156. See Nicholas J.C. Pistor, *St. Louis to Forgive About 220,000 Warrants for Nonviolent Municipal Offenses*, ST. LOUIS POST-DISPATCH (Oct. 1, 2014), http://www.stltoday.com/news/local/crime-and-courts/st-louis-to-forgive-about-warrants-for-nonviolent-municipal-offenses/article_7f9dbef3-7409-5e81-ae28-3c79faa8b147.html [https://perma.cc/3R7T-KCHY].

157. See John Eligon & Mitch Smith, *Ferguson Announces an Amnesty on Warrants*, N.Y. TIMES (Aug. 24, 2015), https://www.nytimes.com/2015/08/25/us/ferguson-announces-an-amnesty-on-warrants.html?_r=0 [https://perma.cc/P7V2-D5VS].

158. See Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq#.RdBnK0Vsk> [https://perma.cc/ZY8X-HDM5].

159. *Id.*

history that touches the core of many who fail to connect with narratives that revolve around issues of policing, race, respectability, or intersectionality. In addition, the lawyers promoted the cause by mobilizing narratives like that of Keilee Fant. Her narrative provokes moral outrage and constructs a story of “now” while also providing a personal window into a story of “self” that allows the community to identify with the shared values they continue to heroically pursue, even in the face of their plight. The proliferation of these narratives demonstrates a high degree of competence in using legal narrative to promote a social movement.

We do not have all of the data concerning how widespread the practice of jailing, exploiting, and targeting people in marginalized groups through minor infraction enforcement actually is today in America.¹⁶⁰ We do know that, even in Ferguson, the term “debtors’ prison” was never uttered by the courts, or by a police officer, or by a law. The lawyers for the ArchCity Defenders, Equal Justice Under Law, and the Saint Louis University Law School Clinic did the demosprudential work of constructing a narrative that would resonate widely. This exemplifies professional demosprudential lawyering in support of a movement to create social change.

CONCLUSION

On December 14, 2016, a federal judge approved a \$4.7 million dollar settlement deal with local municipalities to compensate people who were jailed in debtors’ prisons for inability to pay court fines and fees.¹⁶¹ The ArchCity Defenders, St. Louis University Law School, and Equal Justice Under Law will split \$1.2 million of that amount.¹⁶² The attorneys estimate that individuals might get \$1,500 or more per day in jail, which is within range of similar cases. The hope is that this will result in lawyers using the civil litigation process to further the movement for Black lives by providing an incentive for other attorneys to bring similar suits, causing municipalities to curb the practice proactively in fear of civil litigation.

One of the plaintiffs in the audience for the announcement was Keilee Fant, now 39. She hugged her attorneys at the end of the hearing.¹⁶³ She did not have to testify at a civil trial. But her lawyers provided her with representation that proves, even in the age of the vanishing trial, we can still obtain victories.

160. See ACLU, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS* (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [<https://perma.cc/CGK8-4NKT>].

161. See Robert Patrick, *Judge Approves \$4.7 Million Settlement to Those Jailed for Unpaid Fines in Jennings*, ST. LOUIS POST-DISPATCH (Dec. 14, 2016), http://www.stltoday.com/news/local/crime-and-courts/judge-approves-million-settlement-to-those-jailed-for-unpaid-fines/article_030c999a-00a0-56fb-a006-cda8bb2121b7.html [<https://perma.cc/3KG2-8BT8>].

162. See *id.*

163. See *id.*