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The Impossible Bind:

UNINTENDED CONSEQUENCES OF CONSENT DECREES AND INJUNCTIONS IN PUBLIC IMPACT LITIGATION

1. Introduction
2. Forms of Relief
3. Redressability & Federalism
4. Strategies for Municipal Lawyers
5. Case Studies

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Topics for Discussion



- Why is there growing reliance on the judiciary to resolve complex intractable, social problems?
- What should consent decrees and injunctions look like in institutional reform litigation? When and how should they end?
- How can unavoidable litigation be leveraged to avoid unintended consequences?

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Institutional Reform Litigation





- Results in a privatization of policymaking that transfers decision-making power over policy issues from traditional political mechanisms to national advocacy organizations and litigating parties
- Creates a pattern of similar lawsuits across jurisdictions in the U.S.
- First endorsed by the Supreme Court in *Brown v. Board*, institutional injunctions now commonly arise in areas including prisons, mental institutions, foster care systems, and homelessness – with Circuit splits on many of these issues

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Key Challenges



- **Opportunistic plaintiffs' counsel** seek enormous fees
  - Counsel in *L.A. Alliance v. City of Los Angeles* demanded $100,000 *per week* in sanctions for alleged violation of settlement agreement



- **Overreach by judges** to try to solve broad social issues
  - Judge in the same case *twice* rejected proposed settlement agreements he deemed insufficient; previous orders struck down by Ninth Circuit

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Government-Level Considerations

- Diverging interests between local and state actors
- Unlike states, municipalities are not shielded by sovereign immunity under the Eleventh Amendment

Howlett v. Rose, 496 U.S. 356, 376 (1990)

- Claims may be brought against municipal employees in their official capacities, raising the stakes

Patterson v. Cty. of Oneida, N.Y., 375 F.3d 206, 226 (2d Cir. 2004)



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Consent Decrees

- A settlement agreement subject to continued judicial policing
- Essential characteristics:
  - "[A]rrived at through **mutual agreement of the parties**"
  - Decree "**looks like and is entered as a judgment**"
  - Noncompliance is "enforceable by citation for **contempt of court**"
  - Court "retains the **power to modify**" in some circumstances "**over the objection of a signatory**"

Local No. 93, Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 528-29 (1986)

Consent Decrees – cont.



- Approval/rejection is discretionary but unless "unfair, inadequate, or unreasonable, it ought to be approved."
  S.E.C. v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984)
- Consent decree is not "the achievement of the optimal outcome for all parties," and need not be "in the public's best interest" if otherwise reasonable.
  U.S. v. State of Or., 913 F.2d 576, 580 (9th Cir. 1990)
- Courts "pay deference" to government agencies that negotiate/submit a proposed decree. *Randolph*, 736 F.2d at 529.
  Randolph, 736 F.2d at 529

Preliminary & Permanent Injunctions

- Adversarial, not by agreement
- Used to remedy past violations of law; not designed to ensure future compliance

  Alexander v. Britt, 89 F.3d 194, 200 (4th Cir. 1996)

- **Preliminary injunction**: balancing test requires showing of likelihood of success on merits

  Winter v. NDIC, 555 U.S. 7 (2008)

- **Permanent injunction**: determination on merits must prove actual harm

  eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006)



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Private Settlement Agreements



- Courts generally lack jurisdiction to enforce terms of a private settlement agreement.

  Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 378 (1994)

- If parties stipulate to jurisdiction of federal court to resolve disputes, may be the functional equivalent of consent decree.

  Id. at 380.

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Redressability

- Generalized criticisms of local governments are insufficient to confer Article III standing

  U.S. v. Hays, 515 U.S. 737, 743-44 (1995)

- District courts must recognize the wide latitude local governments have in the dispatch of their internal affairs

  Rizzo v. Goode, 423 U.S. 362, 378-79 (1976)

- It is not the role of the court to shape government institutions to comply with laws and the Constitution

  Lewis v. Casey, 518 U.S. 343, 349 (1996)



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Federalism Concerns

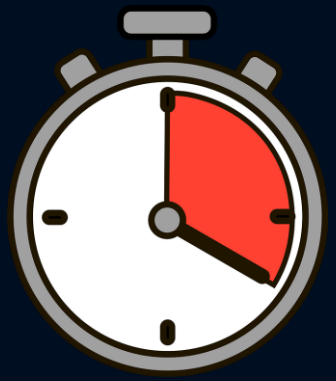
- Federal courts dictating budget priorities or binding officials to predecessors' policy preferences prevents municipalities from prioritizing constituent concerns

  Horne v. Flores, 557 U.S. 433, 448 (2009)



- Institutional injunctions should be *temporary* solutions; federal courts should not continue oversight "absent an ongoing violation of federal law"

  Frew v. Hawkins, 540 U.S. 431, 441 (2004)



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Modify or Vacate



- Rule 60(b)(5) motion to modify or vacate calls for a "flexible approach":

  Horne, 557 U.S. at 447

  - Has there been compliance with the specific federal law violations the consent decree is based on?

    John B. v. Emkes, 710 F.3d 394, 413 (6th Cir. 2013)

  - Is there a better method to ensure compliance?

    Horne, 557 U.S. at 439

  - Will compliance continue in the absence of judicial supervision?

    Frew, 540 U.S. at 442, 447-48

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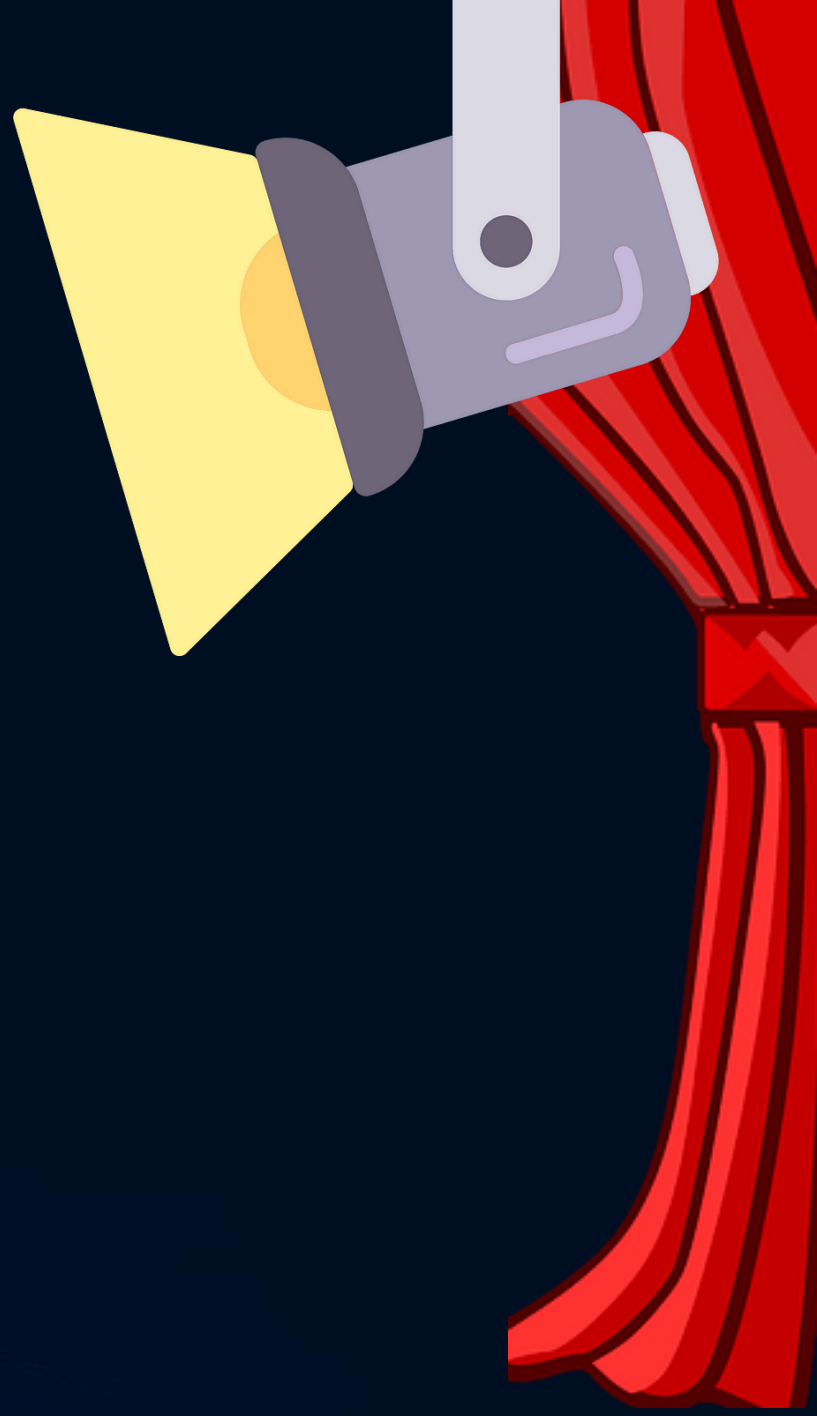
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Set the Stage

- Defeat litigation at the pleading stage through a successful **motion to dismiss**
  - Argue redressability, abstention
  - Explain systems and limitations
  - Craft narrative and marshal data
  - Utilize experts



Direct the Narrative



- If a decree/injunction will be awarded:
  - Ensure sunset provisions to limit temporal scope
  - Move to modify or vacate as soon as appropriate

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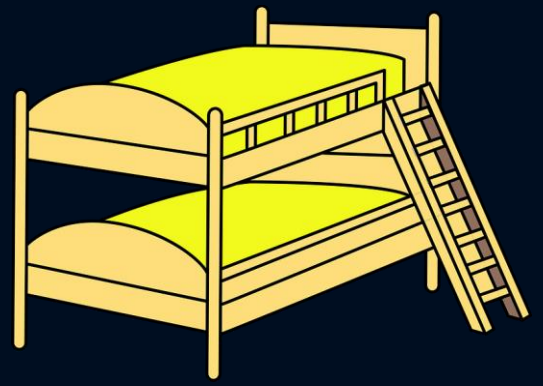
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Foster Care: *Katie A. v. Bonta* (C.D. Cal.)

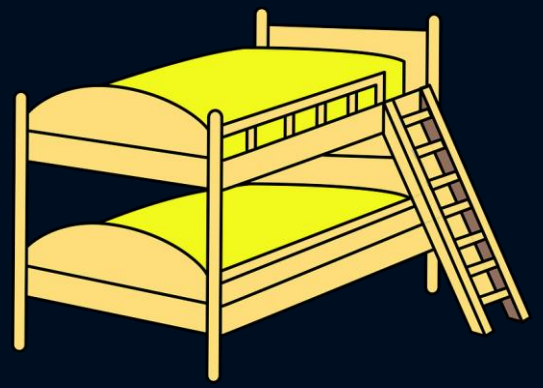
- In 2002, Complaint filed against in L.A. County alleging children in foster care with mental health needs were not receiving appropriate services
- In 2003, Parties entered into consent decree
- In 2019, Defendants moved to vacate pursuant to Rule 60(b)(5) following a decade of compliance
- In 2020, Parties reached a settlement agreement superseding and vacating consent decree
- In 2023, Court approved settlement agreement



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Foster Care – *Connor B. v. Patrick* (D. Mass.)

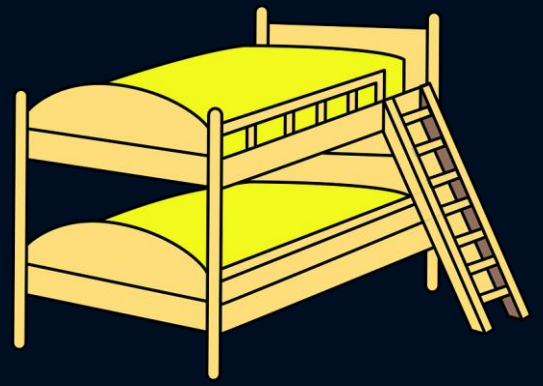
- In 2010, Complaint filed against MA foster care system alleging abuse and neglect within the system
- In 2011, Court denied Defendants' motion to dismiss for lack of subject matter jurisdiction
- In 2013, Court entered judgment for Defendants finding that "financial and administrative constraints," not Defendants' actions, were responsible for harms
- In 2014, First Circuit affirmed and noted "[t]he problems are now for the Governor and legislature of Massachusetts to resolve"



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Foster Care – *M.D. v. Abbott* (S.D. Tex.)

- In 2011, a New York-based advocacy group filed Complaint alleging TX foster care system was exposing children to "unreasonable risk of harm"
- In 2015, Court ruled for Plaintiffs and ordered TX to make targeted changes to its foster care system
- In 2018, Court issued permanent injunction following implementation plan drawn by special masters
- Since 2019, litigation on the implementation plan has traveled between the District Court and Fifth Circuit, including pending contempt proceedings



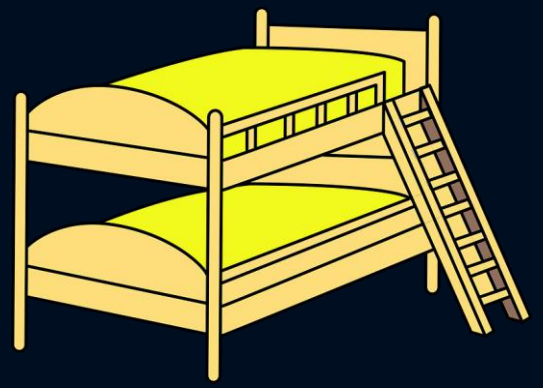
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Foster Care – *Gary G.* and *Ocean S.* (C.D. Cal.)

- Complaints filed in 2023 against San Bernardino and L.A. County foster care systems
- Both cases in pleading stages; legal strategy focused on highlighting federalism concerns:
  - Claims for systemic relief not redressable

    Connor B., 774 F.3d at 48
  - Under *Younger* abstention there is "a strong federal policy against federal-court interference with pending state judicial proceedings"

    Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)



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Homelessness – *LA Alliance for Human Rights v. City and County of L.A.* (C.D. Cal.)

- In 2020, organization representing business owners and homeowners filed Complaint for failure to address homeless encampments
- In 2020, Judge Carter issued preliminary injunction *sua sponte* ordering Defendants to provide housing options
- In 2021, Judge Carter granted Plaintiffs' motion for preliminary injunction and denied Defendants' motion to dismiss



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Homelessness – *LA Alliance for Human Rights v. City and County of L.A.* (C.D. Cal.) – cont.

- In 2021, Ninth Circuit vacated the injunction for lack of standing and remanded to District Court
- In 2022, Parties came to settlement agreements that were twice rejected by District Court (J. Carter)
- In 2023, Judge Carter signed off on settlement agreement once edited to reflect his own wording and changes



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Homelessness – *Coalition on Homelessness v. City of SF* (N.D. Cal.)

- In 2022, Complaint and motion for preliminary injunction filed against City of San Francisco for criminalizing sitting, lying, or sleeping on public property
- In 2022, District Court issued preliminary injunction prohibiting enforcement of laws against involuntarily homeless persons
- In 2024, Ninth Circuit upheld preliminary injunction



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Homelessness – *Butler v. City of N.Y.* (S.D.N.Y.)

- In 2015, Complaint filed against New York City for failure to accommodate homeless persons with disabilities
- In 2017, Parties reached a settlement agreement approved by the court
- In 2021, Plaintiffs moved for a preliminary injunction to enforce settlement agreement which court granted
- One month later, Parties agreed to a new settlement agreement approved by the court



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Questions?



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Thank you!



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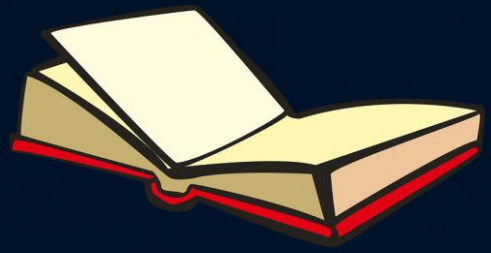
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Bibliography



- *Alexander v. Britt*, 89 F.3d 194, 200 (4th Cir. 1996)
- *Coalition on Homelessness v. Cty. and Co. of San Francisco*, No. 22-cv-05502-DMR (N.D. Cal.)
- *Connor B. v. Patrick*, No. 10-cv-30073-MAP (D. Mass.)
- *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)
- *Gary G. v. Newsom*, No. 5:23-cv-00947-MEMF-BFM (C.D. Cal.)
- *Horne v. Flores*, 557 U.S. 433, 448 (2009)
- *Howlett v. Rose*, 496 U.S. 356, 376 (1990)
- *Katie A. v. Bonta*, No. 02-cv-5662-AHM (C.D. Cal.)
- *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994)
- *L.A. Alliance for Human Rights v. Cty. and Co. of Los Angeles*, No. 2:20-cv-02291-DOC-KES (C.D. Cal.)
- *Lewis v. Casey*, 518 U.S. 343 (1996)
- *Local No. 93, Int'l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 528-29 (1986)
- *M.D. v. Abbott*, No. 2:11-cv-84-POS (S.D. Tex.)
- *Ocean S. v. Los Angeles Co.*, No. 2:23-cv-06921-JAK-E (C.D. Cal.)
- *Patterson v. Cty. of Oneida, N.Y.*, 375 F.3d 206, 226 (2d Cir. 2004)
- *Rizzo v. Goode*, 423 U.S. 362 (1976)
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- *U.S. v. State of Or.*, 913 F.2d 576, 580 (9th Cir. 1990)
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