Impact Litigation:

Strategy, Structure and Process

Berkeley Law School

Professor Berzon Spring 2023

Professor Neuborne

Syllabus

 The seminar will focus on litigation designed to alter the legal, social, and economic *status quo*. Most litigation appeals to the legal *status quo.* Litigators usually seek to apply existing legal rules to the facts of a case (as hammered out in the adversary process). While litigators will often disagree over the substantive content of the governing rules, and almost always disagree over the facts, ordinarily, each side agrees that under existing legal rules and accurate facts, their side should win. Indeed, it’s usually deemed a confession of weakness to admit that the law must be changed for your side to win.

 In a relatively small but important category of cases, though, the purpose of litigating is to alter the legal, social, and/or economic *status quo* – the use of what we call “impact litigation” to change the law; or to significantly alter the way existing law is administered, thereby altering the legal ground rules under which people live.

A note of caution – while changing formal legal rules is an important step in changing the way people live, changing the formal law does not guarantee social and/or economic change. The seminar will consider the gap between formal legal change and actual social and economic change. A second note of caution - impact litigation is neither the property of the progressive left, nor the conservative right. Although progressive goals have often been advanced by impact litigation, several highly successful impact litigation campaigns have advanced profoundly conservative values. A third note of caution – impact litigation may fail, potentially strengthening the *status quo*. The seminar will consider the subtle balancing of risks and benefits that is part of the strategic process in any impact litigation.

The very idea of “impact litigation” raises difficult political, ethical, professional, and tactical questions. For example, in a democracy, when, if ever, is it appropriate to seek to make new law through non-democratic processes like litigation, especially in legal systems where lawyers and judges are substantially insulated from the political process? Will reliance on impact litigation to make new law inevitably politicize the judiciary? Politicize the bar? Can self-appointed lawyers (or their institutional clients) be trusted to exercise lawmaking power wisely, especially on behalf of politically powerless categories of clients? What are the ethical duties of lawyers involved in impact litigation - towards their clients; their opponents; the courts; and the greater society? What is the relationship between an “impact” lawyer in a class action and the individual-client? What role should funders play in the process? What are the strategic calculations and judgments that best lead to effective remedies? What is the relationship between in-court legal activity and out-of-court political activity? What role can media play? What role do amicus briefs play? Which relief is more effective: damages or injunctive relief? What is the role of forum shopping? Judge shopping? Is there a principled role for *stare decisis* in the process? What is the role of representative mass litigation, like class actions or litigation brought by organizations on behalf of their members? What remedies are available to a judge to force recognition of new law? Can litigation drive legislative change? What are the limits and risks of impact litigation?

After a brief survey of the history of impact litigation, we propose to raise and discuss many of these questions the context of actual cases in which we have participated.

***Introduction***

**Weeks 1 and 2**

(Profs. Berzon and Neuborne)

**The History of Impact Litigation**

**Ancient Greece:**

**Where It Begins**

Aeschylus…………….. *The Eumenides*

Sophocles…………………... *Antigone*

I.F. Stone

*The Trial of Socrates* (1968)

This reading is optional. But do yourselves a favor. Do it.

Know where you come from.

In *The* *Eumenides,* when Athena submits the dispute between Orestes

and the Furies for resolution by the people of Athens,

the idea of human-generated law as an instrument of governance begins.

In *Antigone,* when Creon, the tyrant, sentences Antigone to death for refusing to

betray her conscience, the need for law as an antidote to individual tyranny is born.

In Plato’s dialogues, when the people of Athens sentence Socrates

to death for undermining the *status quo*, the need for law as an antidote

to majoritarian tyranny is born.

**Impact Litigation and Slavery:**

**Triumph and Tragic Failure**

*Somerset’s Case,* 98 ER 499 (1772)

(The Most Successful Impact Litigation Ever Decided)

D. Hulsebosch, *“Nothing But Liberty:”*

*Somerset’s Case and the British Empire,*

24 Law & History Review 647 (2006)

Alfred Blumrosen, *The Profound Influence in America of*

*Lord Mansfield’s Decision in Somerset v. Stuart,*

13 Texas Wesleyan Law Review 645 (2007)

*Prigg v. Pennsylvania*, 41 U.S. 539 (1842)

(invalidating anti-kidnapping law as violation of Fugitive Slave Clause)

*Dred Scott v. Sanford*, 60 U.S. 393 (1856)

(refusing to apply *Somerset’s Case*)

*Abelman v. Booth,* 62 U.S. 506 (1859)

(state resistance to enforcement of Fugitive Slave Act)

**Successful Impact Litigation in the Modern Era:**

**Resistance to Racial Apartheid:**

Constance Baker Mottley, *Brown v. Board of Education and Its Legacy:*

*A Tribute to Justice Thurgood Marshall*, 61 Fordham L. Rev. 9 (1992)

**Overthrowing Gender Stereotyping:**

Ruth Bader Ginsburg and Amanda Tyler

JUSTICE, JUSTICE THOU SHALT PURSUE (2021)

Derrick A. Bell Jr.*, Serving Two Masters: Integration Ideals And Client Interests In School Desegregation Litigation*, 85 Yale L.J. 470 (1976)

**Week 3**

(Prof. Neuborne)

**The Political Question Doctrine**

**(Challenging the Vietnam War in Court)**

*Berk v. Laird*, 317 F. Supp. 715 (EDNY 1970), aff’d sub nom.

*Orlando v. Laird*, 443 F.2d 1039) (2nd Cir. 1971)

*DaCosta v. Laird*, 448 F.2d 1368 (2nd Cir. 1973) (DaCosta II)

*DaCosta v. Laird* 1146 (2nd Cir 1973) (DaCosta III)

*Holtzman v. Schlessinger,* 361 F. Supp. 544 (June 13, 1973),

(denying motion to dismiss; adding plaintiffs),

opinion supplemented, 553 (July 25, 1973) (granting injunction),

2nd Cir. stay granted (July 27, 1973),

motion to vacate stay denied, 414 U.S. 1304 (Aug 1, 1973) (per Marshall, J.)

stay vacated, 414 U.S. 1316 (Aug. 4, 1973) (per Douglass, J.),

stay reinstated, 414 U.S. 1321 (Aug 4, 1973) (per Marshall, J., Douglas, J. dissenting)

*en banc* review denied by Second Circuit,

District Court judgment rev’d, 484 F.2d (2nd Cir. Aug. 8, 1973) (Oakes, J. dissenting),

 cert. den. 416 U.S. 936 (April 15, 1974)

**Partisan Gerrymandering**

*Rucho v. Common Cause*, 588 U.S. \_\_ (2019).

**Week 4**

(Prof. Berzon)

**Economic Justice Litigation**

**(Making Unemployment Insurance and Medicaid Serve Their Intended Purpose)**

**Unemployment Insurance:**

*California Dept. of Human Resources Development v. Java*, 402 US 121 (1971)

(Continued benefits pending employer appeal)

*Gilles v. Department of Human Resources Development*, 11 Cal.3d 313 (1974)

(Waiving recoupment if employer successful on appeal)

California Code of Regulations, Title 22, Section 1375-1

(Recovery and waiver of overpayments)

*Crow v. California Dept. of Human Resources Development*, 490 F.2d 580 (9th Cir. 1973)

(Rejection of continued benefits pending employee appeal)

*AFL-CIO v. Employment Development Department,* 88 Cal.App.3d 811 (1979)

(Requiring continued benefits pending employee appeal)

*UAW v. Kiddoo*, No.\_\_\_\_\_(E.D. Cal.1984)

(Ordering immediate restoration of benefits during budget impasse)

*AFL-CIO v. Marshall*, 494 F. Supp. 971 (D.D.C. 1980)

(Nationwide extended unemployment benefits)

*Appeal dismissed,* No. \_\_\_\_\_\_ (D.C. Cir. 1968).

*International Union, UAW v. Donovan*, 568 F. Supp. 1047 (D.D.C. 1983)

(Trade Act unemployment benefits)

*Rev’d,* 746, F.2d 839 (D.C. Cir. 1984)

*Rev’d sub nom, International Union, UAW v. Brock*, 477 U.S. 274 (1986),

(Assn. standing),

*On remand*, 816 F.2d 761 (D.C. Cir. 1987)

**Week 5**

(Prof. Berzon)

**Medicaid – Home Care**

**$2.00/Hour Wage Cut to Low Wage Home Care Workers**

*Martinez v. Schwarzenegger*, 2009 WL 1844989 (N.D. Cal. June 26, 2009)

(Preliminary injunction),

2009 WL 2079718 (N.D. Cal. July 13, 2009),

(Order clarifying injunction and denying contempt),

2009 WL 2356151 (N.D. Cal. July 24, 2009),

(Order further clarifying injunction)

*Aff’d,* *Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. March 3, 2010),

(Same case, new lead plaintiff)

270 F.R.D. 477 (N.D. Cal. June 8, 2010)

(Class certification)

2010 WL 2673715 (N.D. Cal. July 2, 2010),

(Preliminary injunction/temporary restraining order against Fresno County),

**Reduction of Home Care Hours in California**

**(Change of Eligibility Criteria to Reduce or Eliminate Services)**

*V.L. v. Wagner*, 669 F. Supp.2d 1106 (N.D. Cal. Oct. 23, 2009)

(Preliminary injunction),

2009 WL 4282079 (N.D. Cal. Nov. 25, 2009)

(Civil contempt)

*Appeal dismissed, Oster v. Lightbourne*, 504 Fed. Appx. 555 (9th Cir. 2013),

(Same case, new lead Plaintiff and new State Defendant)

(Moot due to legislative suspension of cuts pending final judgment in case)

**20% Across the Board Reduction in Hours**

*Oster v. Lightbourne*, 2012 WL 691833 (N.D. Cal. March 2, 2012)

(Preliminary injunction)

2012 WL 685808 (N.D. Cal. March 2, 2012)

(Class certification)

2012 WL 1595102 (May 4, 2012)

(Correction of class cert. order)

**Reduction of Home Care Hours in Washington**

*M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011),

(Preliminary injunction enjoining cuts to individual named Plaintiff home care hours, but requiring class certification prior to class preliminary injunction)

*Amended on denial of petition for rehearing en banc,* 697 F.3d 706 (9th Cir. 2013),

*Reversing* 767 F.Supp.2d 1149 (W.D. WA. 2011)

*Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015),

(No claim for injunctive relief under Supremacy Clause or, in Medicaid cases, under Article III Equity Power)

**Weeks 6-7**

(Prof. Neuborne)

**The Holocaust Cases**

**(The Use of Mass Litigation Techniques)**

**The Swiss Bank Cases**

**(Rule 23 Class Actions)**

*In re Holocaust Victims Asset Litigation*, 105 F. Supp 2d 139 (EDNY 2000),

*aff’d* 225 F3d 191 (Sept 21, 2000) (affirming class definition)

2000 WL 332441660 (EDNY Nov. 22, 2000) (affirming plan of allocation,

*aff’d* 14 Fed Appx132 (2nd Cir, July 26, 2001), reported as 413 F3d 183 (2nd Cir. July 1, 2005) (affirming allocation formula); 424 F.3d 132 (2nd Cir 2005) (affirming administration of settlement); 424 F3d F.3d 150 (2nd Cir 2005) (affirming fee denial to Samuel Dubbin); 424 F.3d 158 (424 F.3d 158 (2nd Cir 2005) (affirming administration of *cy pres* funds).

*In re Holocaust Victims Asset Litigation*, casetext.com/case/in-re-holocaust-victim-assets-litigation-67 (Magistrate Orenstein – approving reduced fee award) (award approved by District Court) (a cautionary tale)

**The German Slave Labor Cases**

**Non-Judicial Mass Techniques)**

*Iwanowa v. Ford Motor Co.,* 67 F. Supp.2d 424 (D.N.J. 1999) (dismissing cplt, app. dismissed as moot after settlement)

*In re Austrian and German Litig.*, 250 F.3d 156 (2nd Cir. 2001) (granting mandamus)

*In re Nazi Era Cases Against German Defendants Litig.*, 198 FRD 429 (D.N.J 2000) (approving settlement)

*In re Austrian and German Litig.,* 317 F.3d91 (2nd Cir. 2003) (approving fees)

**Week 8**

(Prof. Berzon)

**Political and Election Cases**

**The Hanging Chad Case**

*Common Cause v. Jones*, 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002)

(Punch card voting in urban counties)

213 F. Supp. 2d 1110 (C.D. Cal. April 26, 2002)

(Order denying reconsideration)

235 F. Supp. 1076 (C.D. CA 2002) (Attorneys’ fees)

*Bush v. Gore*, 531 U.S. 98, 109 (2000)

 (“Our consideration is limited to the present circumstances”)

**Right Church, Wrong Pew**

Background: *Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 693 (6th Cir. 2016)

2012 WL 1658896 (S.D. Ohio, 2012), (May 11, 2012)

2012 WL 2711393 (S.D. Ohio, 2012), (July 9, 2012)

*SEIU Local 1 v. Husted*, 887 F.Supp.2d 761 (S.D. Ohio Aug. 27, 2012),

(Preliminary injunction requiring the counting of provisional ballots by registered voters at multi-precinct voting locations)

*Aff’d in relevant part, Northeast Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. Oct. 11, 2012)

**Wrong Church, Wrong Pew**

*SEIU Local 1 v. Husted*, 906 F.Supp.2d 745 (S.D. Ohio Oct. 26, 2012),

(Preliminary injunction for registered voters)

*SEIU Local 1 v. Husted,* 698 F.3d 341 (6th Cir. Oct. 31, 2012),

(Emergency stay pending appeal),

*SEIU Local 1 v. Husted*, 531 Fed. Appx. 755 (6th Cir. 2013),

(Appeal dismissed as moot and denying vacatur)

**Spanish Language Ballot Materials In Florida**

**(Section 4(e) of the Voting Rights Act)**

*Rivera Madera v. Detzer*, 325 F.Supp.3d 1269 (N.D. Fla. 2018)

(First preliminary injunction)

***“Here we are again. The clock hits 6:00 a.m. Sonny and Cher’s “I Got You Babe” starts playing. Denizens of and visitors to Punxsutawney, Pennsylvania eagerly await the groundhog’s prediction. And the state of Florida is alleged to violate federal law in its handling of elections.”*** – Phil Connors, portrayed by Bill Murray, experienced a similar phenomenon. Groundhog Day (Columbia Pictures Corp. 1993).

*Rivera Madera v. Lee*, 2019 W.L. 2077037 (N.D. Fla. 2019),

(Second preliminary injunction),

Florida Administrative Code Rules 1S-2.032, 1s-2.034

**Week 9**

(Prof. Berzon)

**Litigation to Drive Legislative or Administrative Reform**

**Food Safety – Enforcement of Delaney Clause Di Minimis Risk**

*Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992)

Food Quality Protection Act of 1996 (FQPA), Pub. L. No. 104-170, 110 Stat. 1489 (1996).

**Closed Door Meetings Between Regulators and Industry Officials Resulting In Industry-Assisted Pesticide Decisions**

*NRDC v. EPA*, No. \_\_\_\_ D.D.C.198\_)

(Settled with new pesticide decisions and regulations requiring transparency)

**Racial Profiling**

*NAACP v. Davis*, *No. \_\_\_\_\_(Cal. Court of Appeal, 200\_).*

Original writ (Settled with legislation)

**Litigation to Require Transportation Funds Be Used to Build Affordable Housing**

*La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971)

**Weeks 10-11**

(Prof. Neuborne)

**Hitting for the Cycle**

**(The Use of 42 USC 1983)**

6am

Eastern Airlines Shuttle to Washington D.C. ($13)

9am

Justice Marshall’s Chambers, U.S. Sup. Ct.

*Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (SDNY), stay issued by Justice Harlan dissolved, and decision summarily aff’d (6-3), 400 U.S. 806 (1970)

2pm

Second Circuit Courtroom

*Long Island Vietnam Moratorium Committee v. Cahn*, 322 F. Supp. 559 (EDNY June 22, 1970), rev’d, 437 F.2d 344 (2nd Cir 1970), summarily aff’d (9-0), 418 U.S. 906 (1974)

5pm

Chief Judge Mishler’s Chambers, EDNY Courthouse

*Rosario v. Rockefeller,* granting relief (unreported), rev’d 458 F2d 649

(2nd Cir 1972), aff’d, 410 U.S. 752 (1973) (5-4)

8pm

Arraignment Part, NYC Criminal Court

*People v. Santerelli* (routine bail application) – granted

**Week 12**

(Prof. Berzon)

**Litigating In State Courts**

**Original Writs In State Appellate Courts**

 **Saving the U.S. Constitution**

*AFL-CIO v.EU*, 36 Cal.3d 687 (1984).

**Redistricting by Initiative**

*Legislature v. Deukmejian*, 34 Cal.3d 850 (1983).

**Governor’s Item Veto of Racial Profiling Funds In State Budget**

*NAACP v. Davis,* No.S266551 *(Cal. Court of Appeal, 200\_).*

**The Ongoing Saga of Prop 22 : Depriving Gig Workers of Employee Status**

*Castellanos v. State of California, California Supreme Court, No. \_\_\_\_\_ (2021).*

*No. RG21088725, (Alameda Superior Court \_\_\_\_ 2021).*

 (Invalidating Prop 22 on State Constitutional Grounds)

*Appeal pending,* No. A163655 (Cal. First District Court of Appeal, \_\_\_\_\_).

**Writs in Lieu of Appeal**

**Saving the Prevailing Wage**

*IBEW Local 595 v. Superior Court*, 54 Cal.App.4th 1291 (1997).

**Using “Referees” in State Trial Court While**

**Preserving Right to Appeal to State Appellate Courts**

California Code of Civil Procedure Sections 638, 644, and 645.

*Air Line Pilots Association International v. United Airlines,* CGC-07-468937 (SF Superior Court, Feb. 23, 2010 and July 28, 2010)

(Referral to Referee, and judgment adopting Referee’s decision)

*Aff’d,* 223 Cal.App. 4th 706 (2014)

(California Kin Care law not preempted by ERISA)

**Week 13**

(Prof. Berzon)

**Litigating to Obtain Short-Term Relief**

**Blocking No-Match Letters Affecting 8 Million Employees**

*AFL-CIO v. Chertoff*, 552 F.Supp.2d 999 (N.D. CA. 2007).

(Preliminary injunction)

“DHS Rescinds ‘No Match’ Rule” – dhs.gov/news/2009/07/08/administrative-commits-e-verify-strengthens-employment-verification (July 8, 2009)

**Blocking Unsafe Mexico-Domiciled Trucks from Operating in the United States**

*Public Citizen v. Department of Transportation*, 316 F.3d 1002 (9th Cir. 2003),

(Blocking trucks), *Rev’d* 541 U.S. 752 (2004).

*Int’l Union of Trustees v. Department of Transportation*, 861 F.3d 944 (9th Cir. 2017)

(Allowance of trucks following pilot program).

**Week 14**

(Prof. Neuborne)

**Defending Legal Services**

**(Dealing with Unconstitutional Conditions)**

*Velazquez v. LSC,* 985 F. Supp. 2d 323 (EDNY 1997) (dismissing cpl’t),

rev’d in part, aff’d in part, 164 F. 3d 757 (2nd Cir 1999),

order denying hearing in banc , \_\_ F. 3d\_\_, aff’d 531 U.S. 533 (2001),

on remand, 349 F. Supp2d 566 (EDNY 2004),

modified, 356 F. Supp, 2d 267 (EDNY 2005), vacated sub nom

*Brooklyn Legal Services v. LSC,* F.3d 219 (2d Cir 2006),

*cert den.* 552 U.S 810 (2007)

Did I win or lose?

**Week 15**

(Prof Berzon)

**Funding Impact Litigation In Furtherance of Social and Economic Justice**

Yale Law School – Preiskel-Silverman Lecture

Stephen P. Berzon, “Fixing Wealth Inequality: How Lawyers Can Be Part of the Solution,” March 30, 2015.

42 U.S.C. 1988

California Code of Civil Procedure Section 1021.5

**Collecting Fees When State Governments Refuse to Pay**

**Federal Court:**

*Gary W. v. State of Louisiana*, 622 F.2d 804 (5th Cir. 1980).

*Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980).

*La Raza Unida v. Volpe,* 545 F. Supp. 36 (N.D. Cal. 1982).

*Spain v. Mountanos,* 690 F.2d 742 (9th Cir. 1982).

 **State Court:**

*California Labor Federation v. Cal. Occupational Health & Safety Standards Board*, 5 Cal.App.4th 985 (1992).

*Mandel v. Myers*, 29 Cal.3d 531 (1981).

**Elimination of Restrictions on “Fees on Fees”**

*Northeast Ohio Coalition for the Homeless v. Husted,* 831 F.3d 686 (6th Cir. 2016).

**Legal Services Funds for Immigrants**

*CRLA v. Legal Services Corporation,* 917 F.2d 1171 (9th Cir. 1990),

(Majority opinion).

937 F.2d 465 (9th Cir. 1991) (Concurring opinion).

*Aff’ing* 727 F. Supp. 553 (N.D. Cal. 1989).