CLAREMONT JOURNAL
OF LAW AND PUBLIC POLICY

Letter From The Editor

Dear Readers,

Welcome to the first print edition of the Claremont Journal of Law and Public Policy. Our organization started in September 2013 as the Claremont Law Journal, the brainchild of Editor-in-Chief emeritus Byron Cohen, a collective of contributors and editors dedicated to the discussion and debate of the most pressing legal issues facing our society today. After a year of focusing solely on issues of law, our Executive Board decided that the students of our five consorted colleges have a great deal to say about public policy issues that extend beyond purly legal issues. We decided it was necessary to change our name and our organizational charter to reflect this reality. So the Claremont Law Journal has become the Claremont Journal of Law and Public Policy. Our focus has expanded but our product remains, at its heart, the same – thought and debate-provoking articles on pressing social, legal, and governmental issues.

I'd like to extend thanks to those who give the Journal their time, effort, and talent. The lifeblood of our organization is our staff writers – this issue features fantastic work from April Xiaoyi Xu, Nico Banks, Bailey Yellen, and Daniel Hirsch. Our Senior Editors also make invaluable contributions behind the scenes. Jessica Laird, Sofi Cullen, Brandon Granaada, and Maddy Stein all did excellent work editing our writers' content. Martin Sicilian, our Chief Operating Officer, has managed the day-to-day operations of the Journal with hard-to-match energy and competence. Without him, this print issue would have been impossible. Our Webmaster and Publisher, Jessica Azerad, has spearheaded an excellent redesign of our website (5clpp.com) and played an integral role in getting this issue to print. I'd like to thank our Business, Recruiting and Marketing Directors, the aforementioned Bailey Yellen along with Nicky Blumm, Julie Kim, and Alexander Reeser. Further thanks go out to the Salvatori Center for its financial backing.

On a final note, I'd like to extend an invitation to students of all 5Cs to contribute to our publication. The Journal of Law and Public Policy is always seeking new contributors. If you have something to say about an issue of public or legal importance, please email info.5clpp@gmail.com with a brief proposal.

With Regards,
Henry Appel
Editor-in-Chief

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Modern Day "One Country, Two Systems" —Implications of the Hong Kong Basic Law

By: April Xiaoyi Xu, PO'18

"Mind The Gap, Please."

It is another busy day. Commuters take the stairs up, line up, receive an expressionless nod from the immigration officers, and walk across the yellow line, indicating that they have crossed the border. Again.

"Please mind the gap." The broadcast echoes over and over again, first in English, followed closely by Cantonese, and finally Mandarin Chinese. People walk hastily around the Mass Transit Railway station, carrying the latest copy of the South China Morning Post, which bears the headline "Beijing to 2017 Candidates: You Don't Have to Love Us – But You Can't Oppose Us."

The routine of the businessmen, schoolchildren, and other commuters from Shenzhen, China to Hong Kong seems mundane. According to statistics from China Opitx, more than 40.5 million mainlanders visited Hong Kong in 2013. Yet this yellow line separates two completely different places, marking the boundary between the "Two Systems" of "One Country." Not only is it a boundary between two systems of politics and legislature, it is a boundary between two radically different ways of living.

Hong Kong's geopolitics is fascinating. With a population of 7 million, a small but self-contained government, and no military of its own, Hong Kong is situated right next to Mainland China, an increasing-

ly powerful economy with strong military aspirations for the surrounding region.

If one stands precisely on this yellow line and steps to the right, into Hong Kong, he or she has access to information via the New York Times, YouTube, Facebook, Twitter, and Google. If he or she takes a step to the left, the Great Firewall of Mainland China blocks all that access, and arguably, political rights. On this basis alone, not to mention the multitude of other differences between the "Two Systems" in "One Country," including the Hongkongnese cuisine and language ("Bai Hua", which differs slightly from the Cantonese that is spoken in Guangdong Province), we see much more freedom in the daily lives of the people of Hong Kong.

The Hong Kong Dream for Democracy

It has been seventeen years since the British released Hong Kong from their rule in July 1997, relinquishing Hong Kong to its original. That year, the Basic Law of Hong Kong went into effect. The Basic Law is governed by one fundamental principle: "One Country, Two Systems," which was designed by former Chinese leader Deng Xiaoping, the man behind fundamental economic reforms (which were literally translated as "reform and open up") in China. Under this principle, mainland China grants Hong Kong a large degree of political autonomy, along with the right to maintain its capitalist economy. Meanwhile, mainland China's one-party government does not tolerate dissent, and state corporations have significant involvement in the economy.

According to Encyclopedia Britannica, The Basic Law "vests executive authority in a chief executive, who is under the jurisdiction of the central government in Beijing and serves a five-year term." Legislative authority rests with a Legislative Council (LegCo), whose 70 members each serve a four-year term. The Elections Committee currently consists of more than 1,200 members who represent diverse business and professional sectors, but pro-Beijing citizens, ensuring a majority that is obedient to the Communist Party, dominate it.

"Hong Kong is a mixed picture with a limited level of democracy," said Claremont McKenna Professor of Government Minxin Pei, an expert on governance in the People's Republic of China and U.S.-Asia Relations. "The judiciary remains independent, but the media is decreasingly independent since July 1997. Under the British, the media was much more free. The underground mafia attack on the editor of Ming Pao [a Chinese-language newspaper published in Hong Kong] is very troubling."

When asked about his view on "One Country, Two Systems," Professor Pei opined that the accurate phrasing should be "One Country, One System" because Beijing wants Hong Kong to adopt the mainland's political system.

"China once said that it cannot have democracy because it is too poor, the peasant population is too large, people are not well-educated and civilized enough… but these excuses certainly do not apply to Hong Kong," he said. "I do not see any reason why Hong Kong cannot have democracy."

In 2007, Mainland China promised that the people of Hong Kong would be given the liberty to directly elect their executive in 2017 and their legisla-

tors by 2020. This summer, China's National People's Congress Standing Committee decided that the Hong Kong Special Administrative Region (HKSAR) will be granted universal suffrage in the selection of its Chief Executive on the basis of nomination by a "broadly representative committee" similar in composition to the current Elections Committee. The Chinese Central Government will pre-screen candidates for the position and limit the number of final candidates to two or three. According to Yale Global, Hong Kong is to have an election "with Chinese characteristics," an election in which candidates are first screened by the Communist Party.

This decision has caused the people of Hong Kong to mourn their dream of democracy. Additionally, it has attracted great international attention on the credibility of China, the world's second largest economy which ambitiously wishes to balance capitalistic democracy and socialism "with Chinese characteristics." However, the decision may not be entirely outrageous. Fundamentally, the Basic Law leaves the final say to Beijing. Therefore, although the Law itself does not place any direct constraints on achieving universal suffrage, Beijing may not desire it for Hong Kong.

On the other hand, we should consider another question: how would Hong Kong's dream for democracy and its current struggles shape China, politically speaking? Although Hong Kong is not very politically influential on a global scale, an interviewee from Hong Kong who wishes to remain anonymous pointed out that Hong Kong's democracy movement could potentially influence China, but maybe not at its current stage. After all, he stated, Sun Yat-Sen chose to come to Hong Kong to be educated, and Hong Kong was responsible for introducing the first batch of foreign direct investment and capital China decided to open up. Historical examples show that political influence for Hong Kong is possible.

Relevance in Claremont

Although we do not have any events that are directly related to Hong Kong's Universal Suffrage movements here in Claremont, we do have many students and faculty members alike who follow the news and study this topic in great depth.

Professor Pei suggested that the issue of universal suffrage in Hong Kong is relevant in several ways. Apart from the interest of those members of our community who are from the regions involved in the news story, the US has a very strong interest in democracy, and the relationship between Beijing, Hong Kong, and London is definitely an issue that is under the international spotlight.

Clara Engle, PO '15, studies Politics and Asian Studies and lived in Hong Kong for four years. In summer 2013, she researched for Pomona College Trustee and alumnus Barnard Chan on election reforms in Hong Kong and wrote position papers on the topic.

From her research, Clara found that the people of Hong Kong do not directly elect their Chief Executive. "Many of the representatives in the Committee were elected by businesses, such as the insurance companies and Chinese traditional medicine firms," she said. During the period when she worked for Mr. Chan, Clara wrote a proposal arguing that Hong Kong should keep the elections committee, but instead of

focusing on business interests, the Committee should promote proportional local interests as well.

Clara thinks that the Occupy Central Movement (a proposed nonviolent protest for universal suffrage to paralyze the heart of Hong Kong's business district, known as Central) is not very intelligent, for it aims in part to shut down the economic center of Hong Kong, which is a worrying means of affecting change to many. A five-day boycott of classes by university students protesting against Beijing's proposal that started on September 22 led to the commencement of Occupy Central on September 28. Protesters clashed with riot police, with reports that the police used pepper spray and tear gas before backing down. The protesters, numbering in the tens of thousands, want chief executive CY Leung to step down and demand a greater say in their next chief executive. The New York Times has reported that the Hong Kong government intends to wait out the protests as they expect economic concerns and the loss of energy and momentum to kick in shortly.

"If I'm Not Chinese, Then…Who Am I?": The Gap in Identity

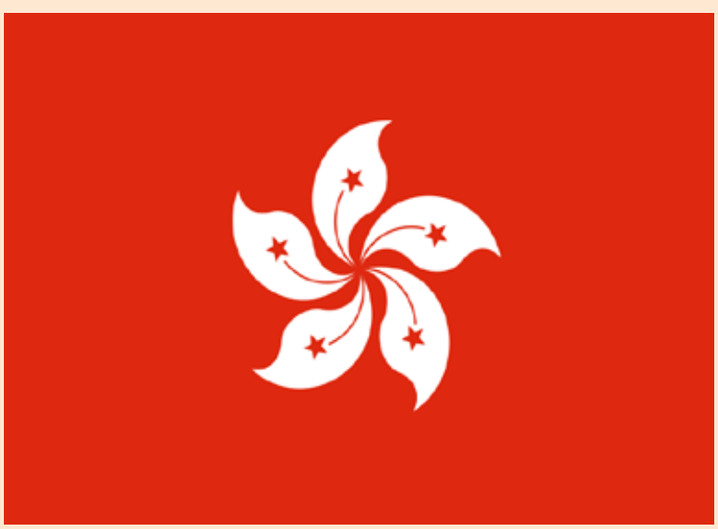
"Please mind the gap." "Please mind the gap…" The broadcast continues echoing in three languages as the Hong Kongers hastily walk around the MTR station. As Hong Kong's struggle for democracy continues, we may as well shift our attention from politics and law to the social and human aspects of the issue. Let us ponder for a minute the fundamental cultural identity of those who live in Hong Kong: who are Hong Kongers? How do they see themselves?

Isabelle Ng PZ '17's father grew up in Hong Kong and her mother was raised in Indonesia and Singapore. "I lived in Hong Kong my whole life," she said. She identifies herself as Chinese, Cantonese and Singaporean.

Victor Chan CM '16, an economics and history double major and President of the Hong Kong Students' Association, commented: "I identify as American-Chinese. Born in Hong Kong to a Chinese father and American mother, I wouldn't consider myself fully Chinese. People from Hong Kong generally have the perception that they are different from their mainland counterparts."

A Hong Kong undergraduate student who does not wish to be named raised a thought-provoking point: "When I introduce myself, I say 'I am from Hong Kong', but I do identify myself as Chinese. Otherwise, what am I? Who am I? After all, Hong Kong is part of China." His response indicates an established sentiment — that Hong Kong should be able to retain its unique identity while still being a part of China. "A significant number of people, however, won't go so far as to strive for an independent Hong Kong. But at the same time, they don't identify themselves as 'Chinese' as in a citizen of the P.R.C.," he said.

Some may label Hong Kong as a long-time colony: first a colony of the United Kingdom and now of China. Hong Kong is currently very divided on the issue of universal suffrage. The Hong Kong dream of universal suffrage–and therefore political democracy–is complicated by legal, political, and demographic factors. If the people of Hong Kong fundamentally hold fragmented views on their own cultural identity due to the "One Country, Two Systems" politics and law, there is certainly a gap between the mainlanders and the Hong Kongers themselves. We should cautiously mind the gap, then, in order to keep pursuing the dream of democracy.



Gay Marriage in the Courts: Where Are We Now, and Where Are We Headed?

By: Nico Banks, CMC '17

On Monday, May 19, 2014 the U.S. District Court for the District of Oregon held that Oregon's ban on same-sex marriage was unconstitutional. The ruling was issued in response to a 2004 Oregon ballot initiative that amended the state constitution to define marriage as between "one man and one woman." U.S. District Judge Michael McShane for the District of Oregon held that the state's marriage restrictions were in violation of the equal protection clause of the United States Constitution's Fourteenth Amendment. The court's decision marked the thirteenth legal victory for gay marriage advocates since the Supreme Court struck down part of the Defense Of Marriage Act in 2013. The decision will make Oregon the eighteenth state to legalize same-sex marriage.

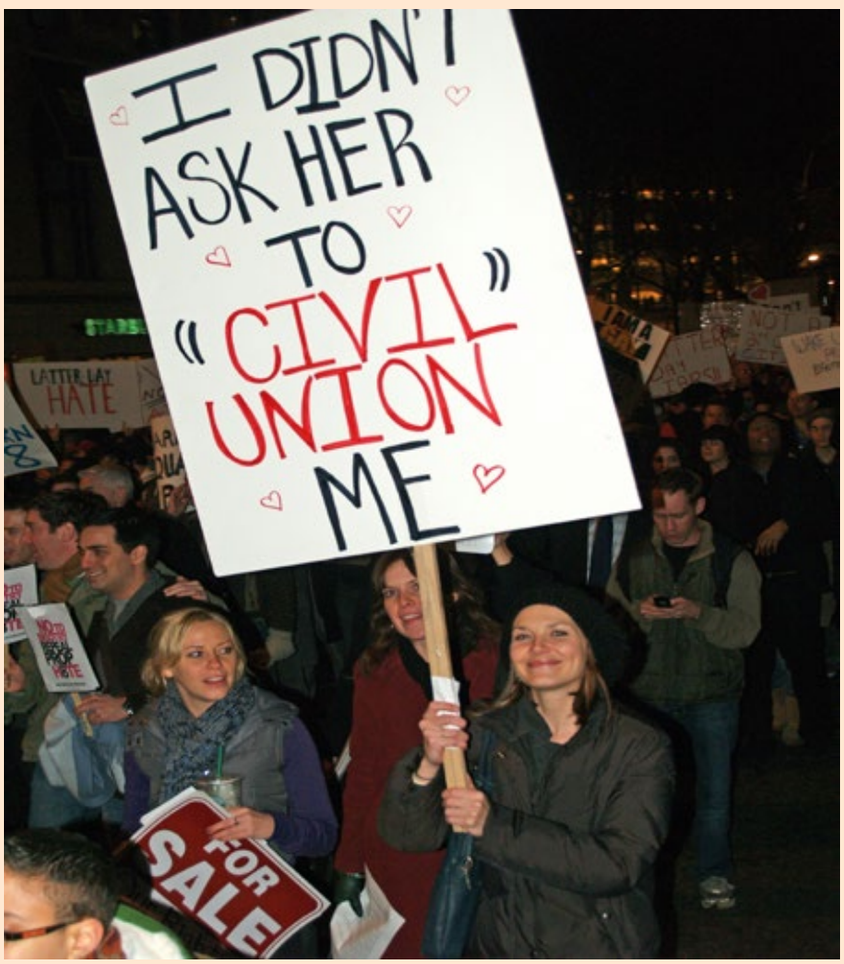
The defendants in the case, including the governor and the attorney general of Oregon, made no attempt to defend Oregon's marriage laws in trial. They conceded that the laws were indefensible, but stated that they were legally obligated to enforce the laws until the court declared them unconstitutional.

Judge McShane issued an unusually personal opinion highlighting the inequity of the discriminatory marriage laws. "[Homosexual partners] pay taxes. They volunteer. They foster and adopt children who have been neglected and abused," wrote Judge McShane. He stated that,

"Oregon... affords the same set of rights and priv-

ileges to Tristan and Isolde that it affords to a Hollywood celebrity waking up in Las Vegas with a blurry memory and a ringed finger. It does not, however, afford these very same rights to gay and lesbian couples who wish to marry within the confines of our geographic borders."

Judge McShane also ruled that laws that discriminate based on sexual orientation are unconstitutional under the Fourteenth Amendment's equal protection clause unless they can pass the "strict scrutiny" test. In order for laws to pass the strict scrutiny test, the government must demonstrate that the classifications are "narrowly tailored to further a compelling government interest."



Interestingly, not even the plaintiffs had suggested that marriage discrimination laws should be subject to the strict scrutiny test. The plaintiffs argued that discrimination based on sexual orientation was gender discrimination, and should therefore be subject to the "heightened scrutiny" test. For a law to pass the "heightened scrutiny" test, the government must prove that the law is "substantially related to a sufficiently important government interest," which is slightly less burdensome than the strict scrutiny test. Judge McShane opined that the heightened scrutiny test would not be appropriate because the discriminatory marriage law "does not treat genders differently at all. Men and women are prohibited from doing the exact same thing." Discriminating based on sexual orientation, Judge McShane held, is different from discriminating based on gender.

Judge McShane recognized that, "For the past quarter century, laws discriminating on the basis of sexual orientation received rational basis review." Rational basis is the least burdensome standard that a law can be subjected to when being tested for constitutionality under the equal protection clause. But Judge McShane held that, under the modern understanding of homosexual marriage rights, the rational basis test is no longer appropriate. To support his holding he cited the 2013 Supreme Court case United States v. Winsdor, which struck down the federal Defense of Marriage Act. He asserted that although the Winsdor decision applied to federal law as opposed to a state law, "Such differences will not detract from the underlying principle shared in common by that case and the one before [him]."

The judge also opined that even if discrimination based on sexual orientation was only subject to rational basis review, it should still be held unconstitutional. Under rational basis review, a law may be deemed constitutional if "there is a plausible policy reason for the classification... and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." According to Judge McShane, there are two justifications for Oregon's discriminatory marriage policy. The first is "protecting traditional definitions of

marriage." He argued, however, that although the traditional definition of marriage may reflect personal religious and moral beliefs, allowing some people to break that tradition will not infringe on anyone's ability to exercise their private religion. The second argument for discriminatory marriage laws is "protecting children and encouraging stable families." In disputing this argument, Judge McShane noted that the plaintiffs were exceptionally qualified to raise children of their own, and were in fact "a source of stability (emphasis added)." Thus, Oregon's marriage laws did not pass the rational basis test, much less the strict scrutiny test.

Before Judge McShane issued his ruling, the National Organization for Marriage attempted to intervene in the case and defend Oregon's marriage laws but was denied its request. The National Organization for Marriage (NOM) appealed Judge McShane's refusal to allow intervention, and filed a motion to stop Court proceedings. Hours before Judge McShane issued his opinion, the U.S. Court of Appeals for the 9th Circuit Court denied the motion to stay. The NOM filed another petition asking the Supreme Court to halt same-sex marriage in Oregon. On June 4, 2014, the Supreme Court denied the request. With the denial of this motion, gay rights advocates celebrated a decisive victory in Oregon.

On October 6, 2014, the Supreme Court denied writs of certiorari from Indiana, Oklahoma, Utah, Virginia, and Wisconsin appealing federal circuit court decisions that overturned gay marriage bans. Immediately following the denials, the rulings legalizing gay marriages took effect, and couples began marrying. Later in the week, the Court also lifted a temporary stay on the decision of the U.S. Court of Appeals for the 9th Circuit to strike down Idaho and Nevada's ban on gay marriages. As a result, the states' bans on gay marriage were immediately made unenforceable.

Gay marriage opponents argue that the federal court should not interfere with state level marriage laws. "There is no mention of the word marriage or homosexuality in the federal Constitution, so it should be left exclusively to the states," said Bryan Fischer, a director of issue analysis at the American Family Association. But the states' rights argument has not been successful in preserving gay marriage bans. So far in October, gay marriage has become legal in thirteen states. If this trend continues, same-sex marriage will likely become legal across the country.

On January 16, the Supreme Court announced that in the spring term, it will hear arguments in a case on the question of whether laws banning gay marriage should be struck down nationwide as unconstitutional.

The Scourge of Police Abuse in Chicago

By: Bailey Yellen, CMC '16

On October 2, 2014, ex-police commander Jon Burge was released one year earlier from federal prison than his four and a half year sentence dictated. Burge oversaw the torture of more than 100 black men in the City of Chicago's police custody, for which he was never prosecuted. The 66-year-old is now free to live the remainder of his life with a $4,000-a-month pension, while as many as 20 of his torture victims remain incarcerated. The inability to prosecute Burge for his use of torture represents a greater failure within our legal system- the use of police torture in the United States is not a federal crime. Instead, individual states have different policies regarding police brutality, which leaves room for perpetrators, such as Burge, to escape justice for their crimes. Federalizing police brutality crimes would ensure geater police accountability and give victims the ability to bring perpetrators to justice.

Chicago's complicated relationship with police brutality began before Burge's entrance to the police force. On August 28, 1968, the Democratic National Convention met in Chicago to select a presidential nominee. Tens of thousands of men and women flocked to the city not to participate in the convention, but to protest the Vietnam war. With the recent assassinations of Martin Luther King Jr. and Robert Kennedy, Chicago's mayor, Richard Daley, knew there was a possibility of violence,

so he deployed 12,000 Chicago police officers and 15,000 state and federal officers to maintain order. The peaceful protest soon turned violent; cameras captured police officers beating, gassing, and dragging protesters through the streets while demonstrators yelled, "The whole world is watching!" This riot became known as "The Battle of Michigan Avenue" and is still viewed as one of the most shocking displays of police brutality in the United States.

Since the Democratic convention in 1968, the Chicago has developed an even more notorious reputation for police misconduct that has cost taxpayers $521 million dollars in brutality-related lawsuits, including $84.6 million that was paid in 2013 alone. As the financial awards Chicago pays to those illegally imprisoned continues to rise with no immediate sign of slowing down, it is becoming clear that the city's police practices are unsustainable and in need of reform. The psychological and physical damage sustained by these victims of torture cannot be solely attributed to the abuse of power by a handful of officers, but instead represents a problem deeply ingrained within the city's police culture.

At the heart of these scandals in Chicago is former police Commander Jon Burge who, along with his "Midnight Crew" of detectives, is responsible for about 15 percent of the city's total loss in settlements, legal fees, and other expenses. Burge and his men used extreme measures to torture and coerce confessions from suspects in the South Side of Chicago between the years of 1972 and 1984. After hundreds of allegations about Burge's sadistic methods, the Chicago Police Department was forced to conduct an internal investigation, which ultimately validated many of these claims of police brutality.

Burge joined the Chicago Police Department in 1970 at the age of 22 after several years of military service in South Korea and Vietnam, and was assigned to detective and reassigned to Area Two Robbery two years later. In the early 1970s, Area Two, a territory expanding across 60 square miles in the South Side of Chicago that included Burge's high school and parent's home, was experiencing a dramatic demographic change and subsequent social and racial tensions. Segregation of African American communities led to poverty and an increase of violence due to the poor school systems, lack of resources, and an absence of economic opportunities. As a member of this neighborhood, Burge witnessed these changes and probably felt an inherent need to protect his community, an urge that may have driven him to use excessive police measures to do so.

Although allegations of Burge's use of torture date back to the early 1970's, the most infamous example occurred on February 9, 1982. Burge, now the commanding officer of Area Two Violent Crimes, investigated the murder of two police officers, Richard O'Brien and William Fahey. Eyewitnesses claimed that the two men responsible for this crime were black, so Burge led a frantic manhunt to find the killers of these two officers. Police officers zealously kicked down doors, arrested young black men on the streets, and used excessive force with individuals who had no connection to the shooting in order to find the murderers. Chicago became a war zone as the police attempted to question and intimidate as many African American men as they could find thinking that they would eventually discover the guilty parties.

Following up on several leads, Burge and his officers arrested brothers Andrew and Jackie Wilson

on February 14, and brought them to an Area Two station for questioning. The brothers confessed to killing O'Brien and Fahey and were found guilty after a trial in 1983. Andrew Wilson was sentenced to death, while his brother received a life sentence. Both of these convictions were eventually overturned, and Andrew Wilson was reconvicted in 1988. The jury could not agree whether Wilson should receive the death penalty, so by law, life in prison was his only possible sentence.

What seemed like a victorious end to the unjust murder of two officers soon became known as a "dark period in Chicago's history" when Andrew Wilson filed a $10 million civil suit against four detectives from Area Two, a former Police Superintendent named Richard Brzeczek, and the city itself in 1986. According to Wilson, Burge and his subordinates tortured him in order to obtain a confession; other Area Two officers allowed the torture to happen and did not mention it in their reports; and the City of Chicago purposefully ignored evidence of the police's ill treatment of people suspected of killing officers. The decision of this suit would not affect Wilson's previous criminal conviction.

The trial began in February 1989 and the case did not look promising for Wilson from the opening arguments: Wilson, a convicted killer, was accusing a decorated military veteran of unfathomable violence. It seemed impossible to believe an agent of the state could participate in such abhorrent practices.

Public opinion began to change, however, when Wilson took the stand seven days into the trial and began to testify about the events that occurred in 1982. According to Wilson, he was arrested upon leaving an apartment building on November 14, and was immediately taken to a small room in Area Two for questioning. Wilson claimed that Burge told him his reputation was at stake, so he needed a confession for the murders. Burge and his officers then began to torture Wilson. The suspect was beaten, nearly suffocated with a plastic bag, and subjected to electric shocks in his genitals, nose, ears, and fingers by two different devices. During the duration of his testimony, Wilson almost lost control of his emotions when his attorneys asked him about Burge's electroshock tactics. "I wasn't paying no attention [to the radiator], but it burned me still. But I didn't even feel it… That radiator… it wouldn't have mattered. That box… took over. That's what was happening. The heat radiator didn't even exist then. The box existed."

Wilson confessed to the murders of officers O'Hara and Fahey after 13 hours in Burge's custody, after which he was taken to a nearby hospital because of his physical state. A doctor and nurse who were working at the hospital later testified that officers brought Wilson to the emergency and warned him against accepting treatment by threatening him at gunpoint. Wilson refused treatment and was then escorted to lockup. The following morning, Wilson was arraigned and admitted to Cook County Jail where his injuries were well documented. These images later presented in court became some of the most incriminating evidence against Burge. The pictures showed severe burn marks on Wilson's chest and thigh, as well a mysterious u-shaped scab on his ear that supported Wilson's testimony about electrocution.

During their investigation, Wilson's lawyers also discovered more than 20 other individuals who claimed to have been tortured by police officers in Area Two. The accounts were eerily similar to Wilson's: these men alleged to have been beaten, threatened with mock executions, and subject to electric shocks. Wilson and 12 of

these individuals reported this mistreatment to the Chicago Police Department's Office of Professional Standards (OPS), the body responsible for investigating complaints against the police, but they were all dismissed as "not sustained" despite an alarming amount of evidence.

The defense's response to Wilson's testimony was to call Burge to the stand as their first witness. While Wilson appeared soft spoken and nervous during his testimony, Burge confidently denied all of Wilson's claims of abuse and insisted that he did not witness any other officers participating in such misconduct. Following Burge's testimony, charges against Sergeant Thomas McKenna, Detectives John Yucaitis, and Patrick O`Hara were dropped in March 1989; the jury, however, was unable to reach a decision regarding Burge. One juror was sure that "something happened to [Wilson]," but the jury seemed reluctant to award the 'cop killer' any money for his injuries, which the same juror stated may have been self inflicted. U.S. District Judge Brian Duff eventually declared a mistrial and ordered a retrial for Burge and the city.

As the second trial began, the jury was instructed to answer three questions in order to decide whether the city had a policy of torturing suspects, which all had to be answered affirmatively for Wilson to prevail. In response to the first two questions, the jury answered yes- Wilson's constitutional rights were violated on the day of his arrest and the City of Chicago did have a de facto policy in 1982 that allowed policemen to abuse suspects of killing policemen. The jury found, however, that Wilson was not subjected to excessive force because of this policy. Burge and the city were once again cleared.

The result of this second trial seemed contradictory, the jury acknowledged that the city's policy condoned the use of torture on people suspected of killing police officers, and recognized that Wilson's constitutional rights had been violated in some way during the interrogation, but there seemed to be disagreement about the source of this abuse. In an interview after the second trial, 28-year-old juror Alan Gall stated that the jury was at a deadlock over whether they believed Wilson was tortured by Burge and his men: "We believe that he did sustain these injuries from the police, some of the injuries, but there wasn't enough evidence to show that he got all of the injuries from the police. As to whether or not he was actually tortured, there is not enough evidence either."

Burge's second trial ignited further investigation into Wilson and other's claims of torture, and caused many individuals to petition for disciplinary actions against the Chicago Police Department. In 1990, the human rights organization Amnesty International released a report that called for the investigation into the claims of police brutality by 200 black men in the South Side of Chicago. The evidence against Burge was becoming overwhelming with these new revelations and Burge was eventually fired in 1993.

For many anti-torture advocates, the biggest dis-

appointment came after Cook County Special Prosecutors Edward Egan and Robert Boyle issued a report in 2007 that confirmed Burge's use of torture. This report should have been the definitive proof needed to convict Burge, but Egan and Boyle's findings were released after the statute of limitations had expired. Even though Burge's crimes were now being publically acknowledged, he could not be prosecuted for the physical and psychological damage he inflicted on hundreds of individuals. The public was outraged and calls for Burge's prosecution grew louder, leading to his arrest in 2008 for lying under oath about torture allegations during civil lawsuit in 2003. He is currently serving four and a half years in federal prison for perjury and obstruction of justice. The cases involving Burge continue to psychologically scar those involved and financially cost the city $70 million in legal fees and settlements, and yet the citizens of Chicago are required to continue to pay $3,000 a month for his pension.

Following the inability to prosecute Burge for torture after the release of the Special Prosecutors' report, the Illinois Torture Inquiry and Relief Commission (TIRC) was signed into law on 2009 to respond to the numerous claims of torture. The intention of this state agency was noble, but ultimately ineffective, due to underfunding and a lack of legislative support. Under the TIRC Act, all claims of torture had to be filed by August 10, 2014, after which the TIRC could no longer accept new cases. Although they will continue to investigate the cases that were filed before that date, the organization's future is unclear once they have completed these pending cases. There are currently no plans to create a state sponsored entity to handle the remaining claims of police torture.

With the recent events in Ferguson, Missouri, it is clear that the relationship between the police and many communities- especially minorities- is broken. How the City of Chicago chooses to respond to the continual onslaught of torture claims related to Burge could be used as a turning point to improve the relationship between the police and racial minorities in this country, or continue to allow minorities to be tortured, wrongfully imprisoned, and even killed. Retroactively compensating victims of police torture does nothing to change the factors that permitted and possibly encouraged the abuse. Police officers are the men and women our society trusts to uphold our justice system, and should therefore be held to the highest possible standards. Recently, Chicago Mayor Rahm Emanuel made substantial efforts to compensate Burge victims by paying 94 men who could not sue because of the expiring statute of limitations. With this development, Mayor Emanuel acknowledged that the city was not doing enough to compensate victims, and allowed for the possibility for greater future action.

Burge and his actions represent a pressing issues in Chicago and our nation as a whole, but his crimes also present the city with an opportunity for tremendous growth. This is an opportunity for Chicago to lead a national effort to comprehensively fund programs that provide financial relief, health care, education, job opportunities, psychological counseling for the victims of police brutality, and possibly most importantly, to establish an independent entity whose sole purpose is to investigate and handle these types of claims. Prosecutors are too reliant on state and local police departments to objectively pursue these types of cases. An independent entity charged with the responsibility of ensuring police accountability would not have these same allegiances and, therefore, could be much more effective in bringing corrupt officers to justice.

There are still hundreds of men currently in prison who may have been wrongfully placed there by Burge and his men who deserve the right to have their cases investigated and their voices heard. Only when Chicago has appropriately handled the remaining Burge cases, properly compensated the survivors of police mistreatment, and eliminated the practice of police torture can the city truly clear its conscience and heal.

This Land is Your Land, and Now It's My Land: Private-to-Private Takings before and after *Berman v. Parker*

By: Daniel Hirsch, PO'15

The Fifth Amendment to the United States Constitution mandates that "private property" not "be taken for public use, without just compensation." This phrase in the Bill of Rights legally enables the power of eminent domain, whereby a government agency may acquire land owned by a private entity, provided the condemnation serves a sufficiently public function and gives adequate recompense to the condemned party. Throughout American history, eminent domain has often consisted of "private-to-public takings," in which private parties relinquish their property to a governmental entity that manages the land for a public purpose. Early in the 20th-century, a second type of taking became popular, involving government transfer of property from one private owner to another private owner. These "private-to-private takings" empower the second private entity, rather than a public agency, to operate properties in ways that constitute a "public use." The 1954 U.S. Supreme Court case *Berman v. Parker* was seminal in this respect, since it clarified the judiciary's attitude toward this form of takings and set a precedent for future rulings. This paper assesses the economic implications of the Court's ruling.

Early 20th-century eminent domain practices developed alongside a growing interest in "urban renewal." Advocates of the progressive movement, hoping to improve the working and living conditions of the country's most disadvantaged groups, singled out cities as sites of slums and vast inequalities that confined the poor to unhealthy areas and hazardous jobs. Using eminent domain, the ad-

vocates argued, governments could acquire and redevelop metropolitan slums, transforming "blighted" properties into aesthetically pleasing and economically productive regions that would benefit all the city's residents. Although public agencies would oversee these urban renewal efforts, many government officials thought that private corporations could more efficiently redevelop the condemned areas. It was in this context that private-to-private takings became increasingly common. Starting in the 1930s, many states allowed the transfer of property to private entities that would alleviate "slum-like" conditions in cities. By mid-century dozens of cities had accepted these urban renewal takings as a necessary strategy for eliminating metropolitan blight. Though these takings raised fears over whether private groups could be trusted to manage properties for public uses, most state and appellate courts approved private-to-private takings, arguing that the programs' predicted benefits outweighed other concerns.

In *Berman v. Parker*, the first U.S. Supreme Court case to consider private-to-private takings, two Washington, D.C. shop-owners objected to a blight removal project that planned to condemn their properties and transfer them to a private redevelopment agency. Although the project intended to convert dangerous and economically distressed areas in Southwest Washington, D.C. into more hospitable sites, the two businesspeople argued that the government could not obtain their non-blighted land as part of a larger blight-removal project, and that transferring their property to a private entity amounted to "a taking from one businessman for the benefit of another businessman," violating the Fifth Amendment's "public use" requirement. The Court ruled unanimously against the shop-owners. The National Capitol Planning Commission (NCPC), which oversaw the redevelopment initiative, decided that condemnation of their non-blighted property was needed for an integrated redevelopment plan to combat blight, and it was not within the Court's bounds to question the legislative calculation. Justice William Douglas affirmed the trend of judicial deference to legislative private-to-private takings decisions, writing: "the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." He explained that "[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly." Projects designed to improve aesthetic and environmental conditions fulfill a "public purpose," so properties condemned for those projects are considered "taken for public use." That a private redevelopment corporation may manage the initiative does not erase its welfare-enhancing value. If a local government agency makes a considered judgment that employing the services of a for-profit company is the best way to enable urban renewal, the judiciary should not challenge that decision. In Justice Douglas' famous words, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."

With approval from the nation's highest court, the NCPC resumed the project. The results have been, at best, ambiguous. The project did remove most of the blight, and attracted higher income residents who contributed to the city's tax base. In 1959, President Eisenhower showed the neighborhood to Nikita Khrushchev as an example of urban renewal's success. The Southwest redevelopment project received awards in 1965 and 2003 for, respectively, its architectural excellence and historical importance. Amy Lavine summarizes the area's contemporary appealing qualities: "it is quiet and provides river access, there are small parks and plenty of open areas, it is located close to the National Mall and various federal buildings, and

there is ample parking."

However, blight removal came at a cost. In the early stages of development, homeowners and business owners complained that the government's assessments of their property values were unfairly low. They pointed to subjective factors, such as the emotional turmoil of leaving their homes and the loss of business goodwill, as important eminent domain effects for which the government's compensation packages did not account. Although the District of Columbia Court of Appeals demanded in 1956 that the inappropriate property appraisal techniques stop, the criticisms continued. Moreover, the commercial component of the project failed. Shops along Fourth Street, including those at issue in *Berman*, were destroyed to create space for a mall, originally envisioned as a hundred-store complex with rooftop restaurant terraces. No more than 26 stores materialized, and the mall was eventually demolished. By 1970, the socioeconomic characteristics of Southwest Washington, D.C. had drastically changed. Wealthy people moved into the properties that the region's former residents could no longer afford, and the racial composition went from nearly all black to mostly white. While the government provided housing relocation assistance for the displaced, not-for-profit observers claimed that thousands of former residents struggled to resume their lives. In total, more than 20,000 residents and 1,500 businesses needed to leave the Southwest area.

The project's scope complicates any attempt to evaluate the urban renewal initiative in purely economic terms. However, the outcomes provide useful evidence for assessing economic arguments for and against eminent domain. The NCPC clearly overcame the "hold-out" problem, which exists when projects stall because property owners refuse to relinquish their property, since it received judicial permission to condemn all the properties deemed necessary for the integrated redevelopment plan. Residents protested against the condemnation procedures, but beyond filing lawsuits against the takings, they had few means to interrupt the project. Since the NCPC could acquire blighted as well as non-blighted properties, it also mitigated the "free-rider problem" of certain economic agents enjoying the advantages of a process without bearing the associated costs. Owners of good land within the larger blighted area were not immune to eminent domain, and thus could not reap the benefits of urban renewal while avoiding the costs. Most importantly, the project succeeded in improving the slum-like areas that originally inspired the initiative. Southwest Washington, D.C. has become a better place to work and live. To the extent that mid-century blighted conditions caused economic harms that residents could not eradicate, eminent domain allowed the government to remove these "negative externalities" in ways that benefit all the area's current residents.

Not all of the area's former residents benefited, however, and their challenges reveal the project's economic harms. As mentioned above, compensation was problematic. Many citizens affected by the condemnations argued that they were undercompensated for objective as well as subjective reasons: they claimed that the government's property appraisal scheme was inadequate, producing values below those that the housing market would generate; and that the government should attempt to monetize the intangible damage of the takings. The latter issue seems especially relevant to at least one *Berman* plaintiff, Goldie Schneider, whose family had owned a hardware store for decades. Mr. Schneider may have had an especially strong sentimental attachment to the property, forcible separation from which could have caused much suffering. These details are important, since they represent an undetermined amount of harm that reduced the net advantages of the urban renewal project. Urban renewal is economically desirable only if it increases overall utility, and the negative utility not

addressed in compensation packages offsets, in part or in whole, the positive utility of blight removal.

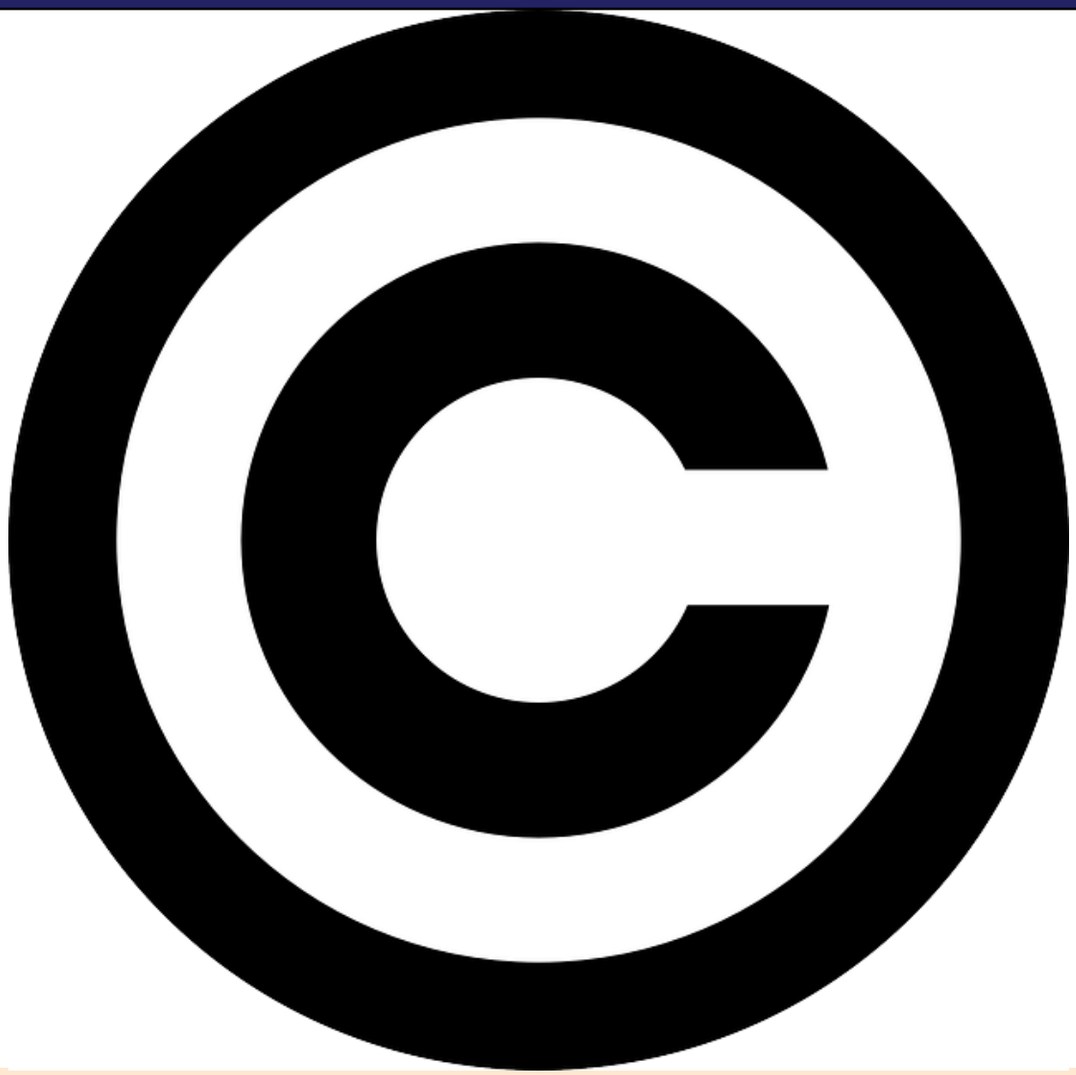
Moreover, the private-to-private takings in Washington, D.C. disproportionately harmed impoverished minority groups, especially African Americans who lacked the financial and political strength to combat the takings and adapt to new livelihoods. Indeed, the redevelopment projects themselves may have been discrete attempts to remove African Americans from certain communities. Whether that allegation is true or false, the damage suffered by minorities is a significant consequence of the takings for which a holistic appraisal must account. In economic terms, their post-takings struggles are an additional source of negative utility that public compensation might not have corrected. One cannot render a verdict on whether the *Berman* urban renewal project was a net societal benefit, because immeasurable variables figure prominently in the analysis. However, it is clear that redevelopment caused much pain as well as gain, and unearthed dimensions of private-to-private takings that urban planning officials may not have fully appreciated.

Private-to-private takings have become a central feature of eminent domain procedures. Supported by a mostly deferential judiciary, public agencies routinely transfer property to private parties that promise to turn the parcels into public assets. Rendering a definitive economic judgment on the practice is difficult. The challenges of measuring key variables, such as the subjective harms of property forfeiture and the projects' overall economic effects, complicate attempts to weigh the pros and cons. However, *Berman* reveals several problematic factors that make judicial lenience troubling. First, "just compensation" may be the Fifth Amendment's most elusive clause. In urban renewal projects, property owners have complained that authorities did not provide adequate recompense for the takings. The aftermath of the *Berman* decision suggests that under-compensation occurs regularly and threatens the economic viability of urban renewal programs. The problem is not inevitable, since several eminent domain projects have used fair property appraisal techniques. But, it happens often enough, and with large enough discrepancies, that the judiciary should more rigorously scrutinize compensation schemes.

Second, the programs enabled by private-to-private takings are not guaranteed to succeed. The *Berman* project's results have been uncertain at best; Southwest, Washington D.C. became economically stronger, but many poor people lost their properties and never fully recovered. Eminent domain is economically defensible only if the outcomes make society better off. That major eminent domain projects have not achieved this goal puts into question the need for the government to use such authority. Assessing the economic viability of the Fifth Amendment is beyond the scope of this paper. The foregoing analysis suggests that, at minimum, public agencies as well as the judiciary should better monitor private-to-private takings. If property owners receive fairer compensation packages, and if the judiciary demands that the projects conform to a stricter understanding of public use that limits space for manipulation, the programs will be more likely to improve the project areas' economic status.

Finally, private-to-private takings are especially susceptible to corporate abuse. Unlike private-to-public takings, private-to-private takings empower private entities, often with little supervision, to manage urban renewal projects. The privilege of overseeing a potentially lucrative initiative with government backing, coupled with judicial support, makes these projects appealing for politically powerful companies. Although these parties can efficiently manage the urban improvement plans, they may abuse their clout in ways that harm public interests. They may receive permission to develop land parcels based solely on their corporate might, and have few incentives to successfully complete the efforts. Without a more active judiciary, the private-to-private takings option seems ripe for manipulation, enabling politically entrenched companies to extract profits from arrangements that harm everyone else.

This need not be the case. Courts could adopt more rigorous eminent domain standards that clearly tie property condemnations to public use outcomes. Taking *Berman* as a representative case study, however, that seems unlikely. The history of private-to-private takings can be read as a history of increasing judicial deference to the legislature. Public agencies have become more powerful, and eminent domain more common, as the meaning of public use continues to broaden. As long as that trend persists, the economic future of private-to-private takings is bleak.



Intellectual Property and the Law: An Interview with Dan Nabel

Biography:

Dan Nabel is a visiting assistant clinical professor of law at USC Gould School of Law as well as the interim director of the USC Intellectual Property & Technology Law Clinic. He served as the editor-in-chief for Greenberg Glusker's award winning Entertainment Lawyer Blog, "Law Law Land." In addition to his clinical work at USC, Professor Nabel has also provided pro bono legal services to clients of the Alliance for Children's Rights and Public Counsel and currently serves as a board member for CASA of Los Angeles – an organization dedicated to improving the lives of neglected and abused foster children with trained volunteer advocates.

Can you talk briefly about how intellectual property protects innovation from the inventor's perspective in the ideal scenario?

There are a lot of great examples that show that if you didn't have any intellectual property laws you wouldn't get innovation. As much as I talk about patent reform, I have to be fair: without patent protection, a lot of the pharmaceuticals that we see coming out on the market wouldn't exist. Patent law gives big pharmaceutical companies an incentive to dump tons and tons of money into research and development for new life saving drugs and treatments. The reason it's a tough debate when it comes to medicine and that sort of thing is that there's a legitimate argument that if there were no patent protection, it would be very difficult for corporations to put time and money into developing new medicines, because as soon as they came out on the market with a new medicine, someone would just copy it and release a generic form at much lower cost, undercut all that investment, and you simply wouldn't see the investment in the first place.

In your opinion, could Roosevelt's method of circumscribing these restrictions by freeing the technology but requiring new producers to pay royalties to the patent-holders be generally applicable and successful?

I think access to medicine in the developing world is a perfect example of where compulsory licensing makes a lot of sense. The question is who is going to administer the system. The government? If we're talking international, is it a bunch of governments? There's a lot of difficult questions to answer there. But I think it's a problem that can be solved in part by compulsory licensing.

What do you think about Elon Musk's recent move, releasing all of Tesla's patents?

The cynical way to look at what Elon Musk is doing is that his business plan is not to be in the car business; it's to be in the car battery business. He wants the other auto makers to start buying the Tesla brand batteries that he's going to be producing for everyone, so by releasing the technology he's trying to get other companies to get into the business model where he can maximize profits. That's the cynical way to look at what he's doing; it has nothing to do with giving patents away because he believes in freeing the economy or helping other folks out.

What parts of intellectual property law do you think everyone could benefit from being familiar with?

Maybe the one thing that is actually really important for people to learn about is the laws which control people, what we call the "inputs" of intellectual property. Even folks who aren't going to be lawyers or have policy jobs are going to encounter contracts when they work at companies. The contracts are going to restrict what they can and can't do with things that they create. So the post-employment trailer clauses, the non-compete agreements, the pre-innovation assignment agreements, the sort of things that we are seeing more and more of and are becoming more and more restrictive, are important to know about. It's important for people to understand what those mean.

Do you think that those input restrictions are in a good place in current US law?

That's a state-by-state question. I think that California and some other states are in a better place than other states. I think there's definitely room for significant improvement in input law particularly when you talk about the sort of things we see happening regarding trade secrets. There was a fellow who worked at Goldman Sachs who was prosecuted criminally based on taking trade secrets from Goldman Sachs. When you start to look at what those trade secrets were, essentially he was taking open source computer code as part of his job at Goldman and repackaging it in a particular way. And Goldman had him sign an agreement saying he agreed all this stuff is trade secret and therefore proprietary to

Goldman. He emailed himself and didn't really see the big deal because it was all open source code for the most part. Yet he was originally sentenced to 10 years in prison. The conviction was ultimately overturned on appeal but the process ruined his life; he got divorced, he lost most of his money. His life was in shambles by the end of it. So that's one of the areas in particular which I think needs a lot of reform.

I understand that, historically, copyright laws changed when Disney's coverage over Mickey Mouse neared an end. Can you talk about how politics or powerful companies play a role in the formation of intellectual property law?

The reason that copyright duration was extended in the United States was due in large parts to lobbying efforts by the Walt Disney Corporation as Mickey Mouse was nearing copyright extinction. He was about to enter the public domain. I believe the first instance of Mickey Mouse that we know about was Steam Boat Willie, I think that was back in the late 20's. So we have the Sonny Bono Copyright Term Extension Act, which extended the life of copyright protection so that Mickey Mouse wouldn't fall into the public domain. There are cynics out there who say that as we near the end of Mickey Mouse's duration we'll again see another extension. I don't think that's politically likely. A lot of economists and legal scholars will tell you that there is no added benefit to having the extra 20 years of copyright protection—that life +50 years is plenty in terms of incentivizing people to create. When you look at the law and economics side of this, is copyright duration too long? There are many people who will say yes.

And that comes down to psychology and people's incentives to innovate?

I think that most of those studies are based when copyright properties generate most of their money. And the vast majority of copyrighted works are making the vast majority of their money within the first 20 years. Beyond 20 years, for most works, I believe those studies are saying that there's not a lot of money to be made, so why do we need to provide much more protection than that? Of course you can point to examples of properties which will continue to do gangbusters year after year for decades and decades, especially Batman, Superman, and things like that. There are of course these mega-properties, and that's true. But the question is, as a society, what do we want to incentivize the most, and how are we going to do it?

There's an evident struggle between protecting innovation and strangling innovation. Where are we on that struggle, on the output side of things?

Right. That's a difficult question because it depends on which type of intellectual property law you're talking about. There's arguments to be made on both sides: over-protecting vs. under-protecting. I think that patent law in particular is in need of the most reform, but there's plenty of dangerous areas in copyright as well. When you start talking about the DMCA, you realize we have these laws which were enacted in the 90's and just aren't keeping pace with technology. The technology simply wasn't around when those laws were enacted and things are moving at such a fast rate that they're really not the best laws that we could have. And patent is the other one because of the explosion in technology. We've got too many patent thickets which are out there. There's too much litigation around patents; the duration [of patents] is too long. There's plenty of room for reform in patent law.

When is something considered fair use and when is it

not?

In all of intellectual property law, that's probably the most difficult thing to answer. Fair use is murky at best. Sometimes it's easy to talk about some outer limits when we're talking about traditional types of parody. But as you start to get into new technology in particular it becomes very difficult to know where the line is between protected speech, fair use, and copyright infringement. The Prince v. Cariou decision is really interesting when you talk about art and how judges are valuing art in fair use decisions. The dissenting judge in the Cariou case had a really interesting statement, which was that judges really shouldn't be in the business of deciding which pieces of art have value and which don't, but yet here we are. Judges in the 2nd circuit court of appeals are deciding that a piece of art is "transformative" and should be fair use.

What problems are you aware of that come about when lawyers and judges are deciding on what seems to be solely artistic matters?

The Prince v. Cariou case is sort of the quintessential decision in this respect. On the one hand, folks are saying that fair use is really moving along in the right direction, that it's progressive, that it's correct. Opponents of that decision say that judges shouldn't be in this business of deciding what art is. There's a question now: should folks be focusing more on that market harm factor, or more on this constantly evolving idea of what is "transformative"? It's a very hard thing to pin down.

Why does an imitative piece being a parody make it legal? Can't it be just as harmful to the original work?

Parody can be very harmful to the original work, and the Supreme Court recognized that and said in a parody it's okay to harm the original market. The Court talked about how important parody is in our culture. Parody has been around since the ancient Greeks, maybe longer. They talked about the Greek word for parody, "a song sung alongside another" as the meaning of the word. They get into the history. Because parody is so entrenched in our culture, it's one of the things that's easy for judges to say "oh, parody is fair use. It's a classic example, it's a paradigm."

What starts to get more interesting is when you talk about transformativeness that's not a parody. One of my favorite examples that I talk about in my class is the Black Lantern's rendition of Kanye West's "Gold Diggers." He takes the music from Gold Diggers and the music video and replaces all the lyrics, and talks about how, in his words, "George Bush doesn't like black people." The song is about hurricane Katrina and the aftermath of what happened. So you have to ask if he's commenting on the original song; is this transformative? It's a tough case where you have a valuable piece of art that this guy's made but it's also using the fame of the original to make money. It raises a lot of interesting questions.

You seem to have a lot of ideas about how intellectual property could be different and what is wrong with it right now. Is there anything that you haven't talked about but that you think really could change intellectual property law for the better?

Network neutrality. It's not an intellectual property issue per se; it's more technology related. All these outputs, how we consume them as a society, how we work with them, and most things these days are done on the internet. It's how innovation happens, how creativity happens, how people get discovered and how new businesses form. So much of it is on the internet. If we don't have strong network neutrality principles, which is an open and free internet for everyone, it won't really matter what the rest of our IP laws are, to some extent. So when it comes to protecting innovation and protecting creativity, network neutrality is at the top of my list for things that I'd like to see happen. I really hope that people like Senator Franken make their voices heard and are recognized when the FCC gets around to making its final decision.

Thank you very much for speaking today.

My pleasure.

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