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Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age

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HUNGER, POVERTY, AND THE CRIMINALIZATION OF FOOD SHARING IN THE NEW GILDED AGE

MARC-TIZOC GONZÁLEZ*

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INTRODUCTION

Hunger may be difficult to understand for those who have not experienced it. Indeed, the global scale of human hunger is immense: despite having decreased substantially since 1990-92,¹ the United Nations estimates that around 842 million people, twelve percent of the global population, were “unable to meet their dietary energy requirements in 2011-13[.]”² In the United States, hunger, officially cognized as “food insecurity,”³ increased substantially in the years leading to, during, and following the Great Recession (December 2007 to June 2009).⁴ For example, from 2006 through 2012, approximately thirteen million more people in the United States became food insecure, and about ten million more people became impoverished.⁵ Thus in 2012 approximately forty-nine

1. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS ET AL., THE STATE OF FOOD INSECURITY IN THE WORLD: THE MULTIPLE DIMENSIONS OF FOOD SECURITY ii (2013) [hereinafter FAO] (“The total number of undernourished has fallen by 17 percent since 1990-92.”).

2. FAO, *supra* note 1, at 8.

3. ALISHA COLEMAN-JENSEN ET AL., U.S.D.A., HOUSEHOLD FOOD SECURITY IN THE U.S. IN 2012 v (2013) (“Food-insecure households (those with low and very low food security) had difficulty at some time during the year providing enough food for all their members due to a lack of resources.”); *see also id.* at 2-4 (discussing the methodology used to determine household food security and food insecurity).

4. *Id.* at 21; *see also* CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INS. COVERAGE IN THE U.S.: 2012 31 (2013) (“Business cycle peaks and troughs used to delineate the beginning and end of recessions . . . are determined by the National Bureau of Economic Research, a private research organization.”). Beginning in December 2007 (“peak month”) and ending in June 2009 (“trough month”), this eighteen-month period constitutes the Great Recession, the longest of the eleven recessions on record since 1948. *Id.* The second longest recession was the seventeen-month period from November 1973 until March 1975. *Id.*

5. COLEMAN-JENSEN, ET AL., *supra* note 3, at 6-8 (reporting 35.5 million food insecure people in 2006, as compared with 50.1 million in 2011, and 48.9 million in 2012); DENAVAS-WALT ET AL., *supra* note 4, at 13, 52 (showing 36.46 million people in the United States living below the poverty threshold in 2006, as compared to 46.49 million in 2012).

million people lived in food insecure households.⁶

In this Article, I take the opportunity presented by law students in the nation's capital, who organized the April 2, 2014 law review symposium, "Poverty in the New Gilded Age," to reflect on how United States law and society cognizes hunger and poverty by highlighting an important but understudied split in the circuits of the United States Courts of Appeals over the constitutionality of cities' efforts to criminalize, and otherwise regulate, people who provide food to hungry people within city-owned public places like parks, sidewalks, and streets.⁷ Adopting the terms preferred by some of the politically motivated social activists who have litigated against their criminalization for sharing food with hungry people, yet who expressly eschew the label of charity, I call such laws the anti-food sharing ordinances, and their sociolegal challenges, the food sharing cases.⁸

Before discussing the circuit split over the food sharing cases, however, I critique the symposium framing of the present sociolegal situation of the United States—the idea of a "New Gilded Age." Part I starts with three critiques of the image chosen to frame the symposium, which foregrounded a solitary, apparently homeless middle-aged, and racially White man. After explaining my concerns that the symposium image unduly conflates homelessness with other situations of poverty, obscures the current demographics of impoverished people in the United States, and fails to train our gaze upon the power elite,⁹ who are arguably responsible for creating the sociolegal situation of the New Gilded Age, I then ask what law students and critical sociolegal scholars might mean by "the New Gilded Age" and suggest answers through an exploration of how we might understand the United States' first Gilded Age. I argue that the notion of a Gilded Age implies critical questions about "What has been gilt?" or otherwise obscured under garish cover, and address them by

6. COLEMAN-JENSEN ET AL., *supra* note 3, at 6; *see also* FEEDING AMERICA, MAP THE MEAL GAP: HIGHLIGHTS OF FINDINGS FOR OVERALL AND CHILD FOOD INSECURITY 4-10 (2013) (discussing the need to understand food insecurity at the local level and suggesting approaches for doing so).

7. *See infra* notes 148-263 and accompanying text.

8. *See, e.g.*, KEITH MCHENRY, HUNGRY FOR PEACE: HOW YOU CAN HELP END POVERTY AND WAR WITH FOOD NOT BOMBS 17 (2012) (discussing the goal of Food Not Bombs under the slogan, "Solidarity Not Charity"); C.T. LAWRENCE BUTLER & KEITH MCHENRY, FOOD NOT BOMBS 17 (2000) (same).

9. *See* C. WRIGHT MILLS, THE POWER ELITE 3-4 (new ed. 2000) ("The power elite is composed of men [sic] whose positions enable them to transcend the ordinary environments of ordinary men and women; they are in positions to make decisions having major consequences. . . . For they are in command of the major hierarchies and organizations of modern society."). *Cf. The Richest People in America*, FORBES, at <http://www.forbes.com/forbes-400/> (last visited Nov. 22, 2014).

contextualizing the periodization of the first Gilded Age within radical Reconstruction, interracial labor Populism, the Jim Crow era, American anti-Asian exclusion and imperialism, and French “revanchism.”

In Part II, I describe the circuit split in the United States Courts of Appeals, which emerged in 2011, when the Eleventh Circuit *en banc* upheld the constitutionality of the City of Orlando’s complicated permitting requirements against the religious and social activists who sought to share food with hungry people in public parks within a two-mile radius of city hall.¹⁰ I discuss *First Vagabonds Church of God v. City of Orlando* in detail and contrast its reasoning and result with a 2006 Ninth Circuit case, *Santa Monica Food Not Bombs v. City of Santa Monica*, which held unconstitutional a municipal events ordinance that regulated uses of public property, including food sharing, for not being narrowly tailored, as required by First Amendment freedom of speech jurisprudence.¹¹ Contrasting these cases traces the contours of the circuit split and enables me to summarize what their jurisprudence suggests as to the state of the law regarding the municipal regulation of food sharing in publicly-owned places. I then critique this jurisprudence and explain why other circuits that may consider challenges to an anti-food sharing ordinance should *not* follow the Eleventh Circuit opinion in *First Vagabonds Church of God*.

In the Conclusion, I re-contextualize the food sharing cases within the symposium theme of the New Gilded Age, drawing upon my earlier arguments to assert that the food sharing cases are well cognized under the concept of “revanchism,” developed by the critical geographer Neil Smith

10. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 758-59 (11th Cir. 2011) (*en banc*) (upholding a municipal ordinance “as a reasonable time, place, or manner restriction and as a reasonable regulation of expressive conduct” that required a permit to conduct a “large group feeding,” within public parks located in a two-mile radius of city hall, with no more than two permits available per year to a permittee for any particular park, and where “large group feeding” was defined as, “an event intended to attract, attracting, or likely to attract twenty-five (25) or more people . . . for the delivery or service of food.”) (citation omitted), *rev’g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008).

11. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1040, 1043 (9th Cir. 2006) (holding, “that a narrowly tailored permit requirement must maintain a close relationship between the size of the event and its likelihood of implicating government interests[.]” and finding that a city department’s instruction undermined an ordinance’s narrow tailoring where it mandated, “that ‘any activity or event which the applicant intends to advertise in advance via radio, television, and/or widely-distributed print media shall be deemed to be an activity or event of 150 or more persons.’”) (citation omitted). In contrast to the mandatory administrative instruction, the ordinance on its face applied only to groups of at least 150 persons. *Id.* at 1048. Thus, the court found that the mandatory instruction made the law unconstitutional. For further discussion, see *infra* notes 211-41 and accompanying text.

(1954-2012), when he applied the concept to the late twentieth century gentrification of New York City, London, and other cities.¹² While revanchism may initially seem inapposite, I build upon arguments advanced in Part I as to the first Gilded Age and conclude that the concept of revanchism indeed applies well to explain the sociolegal significance of the food sharing cases in the New Gilded Age, for the food sharing cases demonstrate profound and disturbing continuities and differences between the United States' old and New Gilded Ages, viz., in past centuries neither the power elite, nor the state *generally* sought to criminalize feeding hungry people; to the contrary, charity was often understood as a social good that should be privately provisioned to the deserving poor though not indiscriminately nor to excess.¹³ At times of crisis, however, providing food to certain disfavored segments of "the poor" was indeed socially disfavored or even legally proscribed, for example during a labor strike or another moment of active social struggle.¹⁴ In seeming contrast, today, those who are already wealthy, those who aspire to join their rarified lot, and the local governments that seem to be acting exclusively in their interests, in part by promulgating anti-food sharing ordinances, have apparently determined that the time is ripe to criminalize charitable food sharing directly and in general, in apparent disregard that federal or state courts might intervene against the anti-poor animus that arguably festoons

12. NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* 44-47 (1996) (discussing "the emergence of what we can think of as the *revanchist city*") (emphasis in original). *See also* Don Mitchell, *Neil Smith Obituary*, *THE GUARDIAN* (Oct. 23, 2012), <http://www.theguardian.com/environment/2012/oct/23/neil-smith>.

13. *See* JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 18-19 (1995) (discussing how private charity was favored over outdoor relief in the nineteenth century United States with the example of the New York Association for Improving the Condition of the Poor in the 1840s); *see also* WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 88-92 (6th ed. 1999) (discussing tensions between the provision of public welfare and private charity, including the influence of nineteenth century Social Darwinism and the rise of "scientific charity" in the 1870s). *But see* MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 9 (updated ed. 2008) (critiquing the simplistic public-private distinction and asserting instead that the American welfare state combines public assistance, social insurance, and taxation in complex ways with private charities, social services, and employee benefits).

14. *See, e.g.*, Devra Anne Weber, Raiz Fuerte, *Oral History and Mexicana Farmworkers*, in *UNEQUAL SISTERS: AN INCLUSIVE READER IN US WOMEN'S HISTORY* 417, 419-21 (Vicki L. Ruiz & Ellen Carol DuBois, eds., 4th ed. 2007) (highlighting the importance and difficulty of providing food to striking workers through an oral history of the varied roles of Mexican women, as strikers and food preparers, in a 1933 cotton picker strike in California's San Joaquin Valley).

the legislative history and/or public discourse around these laws.¹⁵ In so doing, these sociolegal actors advance the revanchist law and society of the New Gilded Age, threatening to return United States law and society back to the “Old Deal”¹⁶ in ways redolent not only of the widely discredited *Lochner* era,¹⁷ but also of the English Statute of Laborers (1349), understood by poverty law scholars to be the first law that regulated the poor in the Anglo-American common law tradition.¹⁸ The original “Poor Law” held:

Because that many valiant beggars, as long as they may live of begging, do refuse to labor, giving themselves to idleness and vice, and sometimes to theft and other abominations; none upon said pain of imprisonment, shall under the color of pity or alms, give anything to such, which may labor, or presume to favor them towards their desires, *so that thereby they may be compelled to labor for their necessary living.*¹⁹

I. A NEW GILDED AGE?

The idea of a New Gilded Age feels intellectually exciting to me because it provokes a host of questions about “critical ethnic legal histories,” a subject about which I have recently written with a focus on the buried pasts of Filipina/o American farm workers and agricultural labor organizers.²⁰ Forgotten, or never learned, by many, Filipina/o American farm workers catalyzed interracial labor solidarity in several historically important

15. See *infra* notes 172-203 and accompanying text. See generally Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 901 (2013).

16. Cf. Francisco Valdes, “*We Are Now of the View*”: *Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 *SETON HALL L. REV.* 1407, 1432 (2005) (“The backlash project of today is to bring back a return of the old deal—the status quo that framed North American society before the lawmaking eras ushered by the New Deal in the mid-1930s and built upon since then during the Civil Rights period of the 1960s.”).

17. See, e.g., Cass R. Sunstein, *Lochner’s Legacy*, 87 *COLUM. L. REV.* 873, 874 (1987) (“The received wisdom is that *Lochner* was wrong because it involved “judicial activism”: an illegitimate intrusion by the courts into a realm properly reserved for the political branches of government.”).

18. HANDLER, *supra* note 13, at 10; accord William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 *STAN. L. & POL’Y REV.* 101, 102 (1998) (listing the earliest English Poor Laws).

19. HANDLER, *supra* note 13, at 10 (emphasis added); see also Quigley, *supra* note 19, at 102-03 (overviewing the English Poor Laws).

20. See Marc-Tizoc González, *Critical Ethnic Legal Histories: Unearthing the Interracial Justice of Filipino American Agricultural Labor Organizing*, 3 *U.C. IRVINE L. REV.* 991, 992 (2013).

moments, including in Hawai'i in 1920 with Japanese Americans, which led to the founding of the Hawai'i Laborers' Association, and in California in 1965 with Mexican American farmworkers, which led to the founding of the United Farm Workers Organizing Committee.²¹ Also, researching the historical incorporation of *las islas Filipinas* by the United States at the turn from the nineteenth into the twentieth century reminded me that the United States did not obtain its insular territories through a simple "gentlemen's war" with Spain:²² while the 1898 Treaty of Paris may have surrendered Spain's claims to the entities we now cognize as Puerto Rico, the Philippines, Guam, Cuba, etc., the United States incorporated each of these territories, and the peoples who therein resided, under substantially different circumstances, which were nonetheless all related to American imperialism.²³

In the case of the Philippines this process featured the three-year Philippine-American War, sometimes called the Philippine Insurrection.²⁴ I find this history relevant to the present inquiry about hunger in the New Gilded Age in part because my research into Filipina/o American history identified a letter written by Samuel Clemens to protest the genocidal character of the Philippine-American War.²⁵ Clemens, better known by his *nom de plum*, Mark Twain, authored many famous novels that have become part of the canon of United States literature.²⁶ Foundational to the present symposium theme, three years before he published *The Adventures of Tom Sawyer* (1876), Twain co-wrote *The Gilded Age: A Tale of Today* (1873).²⁷

In this Part, I begin by critiquing the image used to promote and thereby frame the symposium. I then ask and suggest answers to a set of questions

21. *Id.* at 992-97, 1035-53.

22. *Id.* at 1015-16.

23. See, e.g., DIONICIO NODÍN VALDÉS, ORGANIZED AGRICULTURE AND THE LABOR MOVEMENT BEFORE THE UFW: PUERTO RICO, HAWAI'I, CALIFORNIA 1, 13-23 (2011).

24. González, *supra* note 20, at 1015-17, 1065 (discussing the 1899-1902 Philippine-American War).

25. *Id.* at 1016-17 n.69 (citing Samuel Clemens, *Comments on the Moro Massacre (Mar. 12, 1906)*, in HOWARD ZINN & ANTHONY ARNOVE, VOICES OF A PEOPLE'S HISTORY OF THE UNITED STATES 248-51 (2004)).

26. E.g., MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN (TOM SAWYER'S COMRADE) 2 (1885), available at <http://www.gutenberg.org/files/76/old/orig76-h/main.htm>; MARK TWAIN, THE ADVENTURES OF TOM SAWYER (1884), available at <http://www.gutenberg.org/files/74/old/orig74-h/main.htm>.

27. MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TODAY (1874), available at <http://www.gutenberg.org/files/3178/old/orig3178-h/main.htm>.

regarding what we might mean by “the New Gilded Age” through an exploration of the United States’ first Gilded Age. I argue that the notion of a Gilded Age implies critical questions about what has been gilt, or otherwise obscured and garishly covered, and address them by comparing the periodization of the first Gilded Age with the white supremacy of the late-nineteenth century Jim Crow era, which also featured anti-Asian exclusion and American imperialism, as well as French “revanchism.” I end the Part by addressing the concept of a New Gilded Age directly, arguing to contextualize this periodization within what Smith described as the competing late twentieth century ideologies of gentrification and revanchism.

A. *Critiquing the Imagery of “Poverty in the New Gilded Age: Inequality in America”*

The image selected by the symposium organizers to promote and thereby frame the event depicts an apparently homeless man standing in the right foreground, looking to his left.²⁸ He arguably looks homeless because of his grizzled beard, woolen cap, and the five or six layers of coats, jackets, sweatshirts, and other clothing visible on his torso. Behind him, out of focus in the photograph’s mid-ground, sits a shopping cart, apparently filled with personal property and topped by a full black garbage bag. Also in the mid-ground, to the left of the image and also not in focus, stands the image of another person, garbed bulkily in dark tones, and possibly standing with another shopping cart. The background comprises a city skyline.

I find the photograph striking. Its formal composition is measured, its black-gray-white tones appear well balanced, and its primary subject is presented in a way that seems likely staged but does not feel exploitative. One can imagine the photographer meeting, and asking the man, and perhaps his companion, for permission to take their photograph. At the same time, the image could be critiqued for evoking stereotypes about “the homeless;”²⁹ thus in this section I explicate three critiques of the symposium image, scrutinizing this aspect of the symposium theme in order to lay the groundwork for my substantive engagement with its

28. See *Poverty in the New Gilded Age: Inequality in America*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW SPECIAL EVENTS & CONTINUING LEGAL EDUCATION (Apr. 2, 2014), <http://www.wcl.american.edu/secle/founders/2014/20140402.cfm>.

29. Cf. Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV. 1, 5-6 (1996) (“Some stereotypes depict homeless people as single, white male alcoholics. While this characterization may have had a basis in the past, the homeless population is now demographically diverse.”) (citations omitted).

important framing of the contemporary situation as a New Gilded Age.

While an arresting image, I find fault with its deployment as the sole symposium image for three primary reasons. First, it presents an arguably stereotypical image of an apparently racially White, middle-aged, homeless man with a shopping cart, which conflates homelessness with other situations of poverty.³⁰ Second, by prioritizing a stereotypical image, the photograph obscures the current demographics of impoverished people in the United States today, which are substantially diverse in race, ethnicity, gender, and age.³¹ Finally, by focusing on homeless people, the image fails to train our gaze upon the power elite, those wealthy and otherwise powerful men and women whose political projects have created the sociolegal conditions that the symposium calls us to recognize as a New Gilded Age.³² I elaborate these points below in order to provide critical feedback to the symposium organizers, and also to argue for a relational and contextual understanding of sociolegal inequality in the United States, e.g., that the New Gilded Age relies on, reflects, and reproduces impoverishment and dramatically unequal income and wealth,³³ in light of some of the insights of critical outsider jurisprudence.³⁴

My first critique is that poverty should not be conflated with homelessness. In 2012, the United States Census counted fifteen percent of the population, almost 46.5 million people as poor, i.e., with incomes below the relevant poverty threshold for the size of their household.³⁵ In contrast, in 2012 the United States Interagency Council on Homeless estimated that 649,917 people “were without a place to call home on any given night and more than 1.59 million spent at least one night in emergency shelter or transitional housing over the past year.”³⁶ Others put

30. *See id.*; *see also infra* notes 35-38 and accompanying text.

31. *See infra* notes 38-50 and accompanying text.

32. *See infra* notes 51-58 and accompanying text.

33. *Compare* PETER EDELMAN, SO RICH, SO POOR: WHY IT’S SO HARD TO END POVERTY IN AMERICA 33 (2012) (discussing the staggering increase, from 1979 to 2007, in personal income of the top one percent and top twenty percent of Americans in contrast to the middle and bottom income quintiles of the populace, and noting that by 2007 the top one percent held a larger share of the national income than it had since 1928), *with* Symposium, *Rising Wealth Inequality: Why We Should Care*, 15 GEO. J. POVERTY L. & POL’Y 437, 447 (2008) (discussing the 2004 Survey of Consumer Finance, which showed that the top five percent of households owned 60 percent of all the wealth in the United States) (citation omitted).

34. *See* González, *supra* note 20, at 1006-09 (discussing critical outsider jurisprudence, and its several subgenres, and citing to numerous exemplars).

35. DE-NAVAS-WALT ET AL., *supra* note 4, at 13, 52.

36. UNITED STATES INTERAGENCY COUNCIL ON HOMELESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF

the second figure substantially higher at 3.5 million, which is still a relatively small percentage, 3.5% to 7.5%, of the population of poor people in the United States.³⁷ My point is not to argue that relatively small numbers make people experiencing homelessness sociolegally unimportant. Rather, my concern is that representing “the poor” by reference to an arguably stereotypical image of an apparently middle-aged, racially White, homeless man standing beside a shopping cart conflates and obscures the forty-plus million more people who were living in poverty in 2012, and this point leads to my second critique.

The population of poor people in the United States is demographically diverse, and the same is true for the population of homeless people.³⁸ For example, of the 46.5 million poor people in the United States in 2012, approximately 33.2 million lived in families, less than 1 million lived in unrelated subfamilies, and 12.6 million lived as unrelated individuals.³⁹ In terms of race and/or ethnicity, of the 46.5 million poor people, some 18.9 million were racially “White, not Hispanic,” 10.9 million were racially Black, 1.9 million were racially Asian, and 13.6 million were “Hispanic (any race).”⁴⁰ As to sex, 20.6 million men and 25.8 million women were poor. As to age, about 16.1 million poor people were below age 18, 26.5 million were aged 18 to 64, and 3.9 million were aged 65 and older.⁴¹ One

HOMELESSNESS 7 (2012).

37. See Amy Melissa Donley, *The Perception of Homeless People: Important Factors in Determining Perceptions of the Homeless as Dangerous* 3 (2008) (unpublished Ph.D. dissertation, University of Central Florida), available at http://etd.fcla.edu/CF/CFE0002261/Donley_Amy_M_200808_PhD.pdf (estimating that 2.3 to 3.5 million people experience homelessness annually, based on figures produced by the National Law Center on Homelessness and Poverty, but noting that the true number could be twice that estimate, and discussing the different definitions of homelessness, e.g., under the McKinney-Vento Homeless Assistance Act); Sarah Finnane Hanafin, Student Work, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 439 (2011) (“Approximately 3.5 million Americans will experience homelessness in any given year.”) (citing Nat’l Coal. for the Homeless, *How Many People Experience Homelessness?* (2009), available at http://www.nationalhomeless.org/factsheets/How_Many.html). See also Foscarinis, *supra* note 30, at 5 (discussing estimates from the 1980s and 1990s).

38. See DE-NAVAS-WALT ET AL., *supra* note 4, at 13-17 (presenting the demographics of poor people in the United States); Donley, *supra* note 38, at 4-9 (discussing the demographics of homeless people in the United States); Hanafin, *supra* note 38, at 439-44 (same). See also Foscarinis, *supra* note 30, at 6-7 (discussing demographics of homeless people in the 1990s).

39. DE-NAVAS-WALT ET AL., *supra* note 4, at 14-15.

40. *Id.* at 13-15.

41. *Id.* at 14-15.

could also discuss demographics regarding region of residence (highest number of poor people, 19.1 million, in the South of the United States' four regions), urban, suburban, or rural (slightly more poor people inside than outside principal cities, with a substantially smaller, but not insignificant, number living outside of metropolitan statistical areas), work or disability status, etc.⁴²

As to people contending with homelessness, a recent Ph.D. dissertation in Sociology reported on a 2001 survey of 1,788 currently homeless people, which found that “41% were white, non-Hispanic, 40% were black, 12% were Hispanic while 9% identified as ‘other.’”⁴³ That same dissertation reported on a 2004 United States Conference of Mayors survey of twenty-seven cities, which found “that the homeless population was 49% Black/African-American, 35% White, non-Hispanic, 3% Hispanic/Latino, 2% Native American, and 1% Asian.”⁴⁴ As to gender, the dissertation discussed a 2007 Department of Housing and Urban Development report finding that “47% of all sheltered homeless people in America are single adult men.”⁴⁵ Also, “According to the National Coalition for the Homeless (2007), members of homeless families comprise approximately 30% of the total homeless population. Another 17% are single women, while 53% are single adult men.”⁴⁶ Finally, studies of homelessness amongst veterans estimate that veterans comprise nearly one-third of the homeless population and that approximately 40% of homeless men are veterans.⁴⁷

One of my purposes in specifying these demographics is to establish that people living in and struggling under poverty and homelessness in the United States are demographically diverse, and to argue against conflating them into the image of a solitary, middle-aged, and racially White man. Of course, the symposium image might have been selected precisely to stimulate critical thinking about how old imagery of “the homeless” is out-of-touch with the contemporary situation in the United States, particularly in the wake of the Great Recession. If that was the case, then I hope my reflections contribute meaningfully to explicating how the symposium

42. *See id.* at 14, 16.

43. Donley, *supra* note 37, at 7; *see also* Hanafin, *supra* note 37, at 441 (discussing a 2007 Public Broadcasting Service study showing African Americans as 40% of the homeless population, Hispanics as 11%, and Native Americans as 8%).

44. Donley, *supra* note 37, at 8.

45. *Id.* at 9.

46. *Id.*; *accord* Hanafin, *supra* note 37, at 440 (“Families with children are among the fastest-growing segments of the homeless population, comprising between 23% and 41% of the homeless population.”) (citation omitted).

47. Hanafin, *supra* note 37, at 441; *accord* Donley, *supra* note 37, at 9 (“It is estimated that 40% of homeless men are veterans.”).

image may be regarded as a useful foil against which to appreciate the demographic diversity of homeless and otherwise impoverished people in the United States today. Indeed, we might imagine a set of complementary photographs and other images that could depict the meaningful social diversity of people living in the United States under sociolegal conditions of impoverishment and/or homelessness. Alternatively, we might rely on the work of socially-engaged artists across the decades, some of whom organized or otherwise participated in the 2009-12 touring exhibition, *From Hobos to Street People: Artists' Responses to Homelessness from the New Deal to the Present*, which artist Art Hazelwood curated in part to critique the “strikingly consistent blindness [that] dominates the discourse about poor and homeless people.”⁴⁸ Hazelwood elaborates:

The image of homelessness planted in the mind of everyone living in America today is either a sad-faced man with a beard on a charity appeal or someone pushing a shopping cart overflowing with bags. But there is another image that still lingers in the collective memory. That image is of a migrant mother looking tired but proud, poor but noble, surrounded by her dirty faced children. She looks into the camera lens, a camera wielded by Dorothea Lange, and she says to all who see her . . . “I am you.”⁴⁹

In accord with Hazelwood’s insights, my first and second critiques of the symposium image are not merely about undue conflation of the poor and the homeless, nor reducing their demographic diversity to a worn stereotype. Rather, my deeper concern is that by reinscribing old stereotypes, the guiding symposium imagery might dull its participants’ and readers’ imaginations as to how the American power elite have pursued a host of political, and sociolegal, projects over the past forty-or-so years, which have substantially increased inequality, in income and wealth, with concomitant stagnation of median and lower incomes,⁵⁰ and (especially

48. ART HAZELWOOD, *HOBOS TO STREET PEOPLE: ARTISTS’ RESPONSES TO HOMELESSNESS FROM THE NEW DEAL TO THE PRESENT* 6 (2011).

49. *Id.*

50. *Accord* IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 2 (2014) (“[O]ver the last half-century conservatives have used racial pandering to win support from white voters for policies that principally favor the extremely wealthy and wreck the middle class.”); PAUL KRUGMAN, *END THIS DEPRESSION NOW!* 60-64, 81-83, 85-89 (2012) (discussing the deregulation of finance from 1980 to 1999 and concluding that “changes in the political climate after 1980 may have cleared the way for what amounts to the raw exercise of power to claim high incomes”); STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* 1

during and after the Great Recession) substantial increases in poverty, homelessness, and hunger.

My third critique is essentially a reiteration of the eminent anthropologist Laura Nader's now forty-year old admonition to "study up."⁵¹ As she then remarked:

[T]here is a certain urgency to the kind of anthropology that is concerned with power . . . for the quality of life and our lives themselves may depend upon the extent to which citizens understand those who shape attitudes and actually control institutional structures. The study of man [sic] is confronted with an unprecedented situation: never before have so few, by their actions and inactions, had the power of life and death over so many members of the species.⁵²

For some readers, a mid-twentieth century concept like "the power elite," or recalling a forty-plus year imperative to "study up" might seem antiquated. To me, however, these and similar concepts, illuminate the missing figures in the symposium image. While the distant buildings in the photograph's background could be interpreted to stand in for them, understanding "Poverty in the New Gilded Age" and "Inequality in America" benefits substantially from scrutinizing the power elite themselves, along with their politico and other professional class agents (servants),⁵³ and understanding their sociolegal (class) relations to people

(2013) ("Pervasive legal failure to control economic power and align the interests of corporate and financial elites with the interests of economic growth and stability caused the crisis."); ROBERT B. REICH, *AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S FUTURE 50-60* (2010) (discussing the reversal of the "Great Prosperity," 1947 to 1975, the period when America as a whole benefited from the growing national economy, after which the median wage flattened, and income and wealth became concentrated in fewer hands, which sought to remake the rules to further benefit themselves); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010) (discussing the origins of the Great Recession and arguing to reform economics and government). *See also* González, *supra* note 20, at 1003, n.25 (discussing critical sociolegal scholarship on global neoliberalism).

51. Laura Nader, *Up the Anthropologist: Perspectives Gained from Studying Up*, in *REINVENTING ANTHROPOLOGY* 284, 284 (Dell Hymes ed. 1972), available at <http://www.dourish.com/classes/readings/Nader-StudyingUp.pdf>. *Cf.* KRUGMAN, *supra* note 50, at 77 ("until quite recently there was a sense among many economists that the incomes of the very rich weren't a proper subject for study").

52. Nader, *supra* note 51, at 284.

53. *See* MILLS, *supra* note 9, at 4 ("The power elite are not solitary rulers. Advisers and consultants, spokesmen and opinion-makers are often the captains of their higher thought and decision. Immediately below the elite are the professional politicians of the middle levels of power, in the Congress, and in the pressure groups, as well as among

experiencing homelessness, other impoverished people, and even the middle classes; further, such analyses should be critically race conscious.⁵⁴

I end this Part by reaffirming that the idea of a New Gilded Age should neither be regarded as a natural phenomenon, nor as a cyclical or teleological historical era. To the contrary, as critical sociolegal scholars, and others, have argued for several decades, what the symposium calls the New Gilded Age has been produced strategically by a set of “racial projects” that have had “retrogressively synergistic consequences of kulturkampf on law and on society.”⁵⁵ As Francisco Valdes, a founder and influential theorist of the subgenre of critical outsider jurisprudence known as Latina & Latino Critical Legal Theory (“LatCrit Theory”), elaborates, “social retrenchment through backlash jurisprudence, especially as elaborated by the five justices presently in control of the federal judicial power, is a key part of these culture wars and their stated aims: the ‘take back’ of civil rights and social multiculturalism by mandate of formal Law.”⁵⁶ As I elaborate below, understanding the New Gilded Age critically benefits from multidimensional analyses of the complexly interacting and mutually reinforcing sociolegal projects that structure and animate United States’ law, society, and political economy through *inter alia* race, class, gender, sexuality, and other salient dimensions of power and identity,⁵⁷

the new and old upper classes of town and city and region.”). See also JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA 4 (1996).

54. Accord HANEY LÓPEZ, *supra* note 50, *passim* (theorizing how the Republican Party devised and deployed facially neutral rhetoric to seize political power and to promote and defend policies that principally favor the extremely wealthy at the expense of the middle class); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U.L. REV. 329, 378 (2006) (discussing the emergence and evolution of Critical Race Theory as well as the need to develop a systemic program of “analyses of the class system in U.S. society and the ways in which race, gender, and other forms of oppression mutually construct and are constructed by it”) (citation omitted); john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 358 (2007) (“One of my assertions is that racial practices in the United States help define the meaning and development of our understanding, and the practices of class. The story of the fight for states’ rights, unions, our electoral system, and limited federal government is radically incomplete without being informed by race.”) (citation omitted).

55. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 80-82 (1986) (discussing their conceptualization of racial movements and related political projects as part of their theory of racial formation); Valdes, *supra* note 17, at 1409 (citations omitted) (discussing *kulturkampf* and backlash jurisprudence).

56. Valdes, *supra* note 16, at 1412 (citation omitted).

57. Accord Mutua, *supra* note 54, at 331, 378, 381, 388-93; powell, *supra* note 54,

with a particular focus on the individuals, organizations, and networks that strategically seek to manipulate these systems.⁵⁸

B. What was Gilt? – The White Supremacy and Imperialism of the First Gilded Age

The phrase, “Gilded Age,” immediately reminds me of a decades-old conversation with a friend, where I used the antiquated epithet “robber barons” and was met with incredulity as to the phrase’s provenance. My friend asserted that I made up the term,⁵⁹ and I felt surprised that it could be unfamiliar, as I recalled learning the phrase some time before college. Today, however, when I imagine the Gilded Age, I find myself envisioning images and recalling texts that upon reflection actually derive from the so-called Roaring Twenties.⁶⁰ For me, and perhaps for others, the Gilded Age bespeaks an obscure history, buried by more recent pasts, e.g., the Roaring Twenties and Great Depression, or possibly forgotten amongst more important moments, e.g., the Civil War and Reconstruction. Therefore, in this section I ask repeatedly, “What was gilt?” and suggest some answers by tracing a counter-memory⁶¹ of the first Gilded Age from critical ethnic

at 356 (arguing for the development of a socially-inclusive agenda that accounts for race, class, and their interrelationship). *See generally* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005, 2d ed. 2010); Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 *BUFFALO L. REV.* 859 (2008); CLASSCRITS: TOWARD A CRITICAL LEGAL ANALYSIS OF ECONOMIC INEQUALITY, <http://classcrits.wordpress.com> (last visited Aug. 11, 2014).

58. *Accord* HANEY LÓPEZ, *supra* note 50, at 46 (“*Strategic racism refers to purposeful efforts to use racial animus as leverage to gain material wealth, political power, or heightened social standing.*”) (emphasis in original) (citation omitted); STEFANCIC & DELGADO, *supra* note 53, *passim* (discussing the rise of conservative foundations and think tanks and their role in late twentieth century social change).

59. *But see* MATHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901* (1934, 1962 ed.).

60. *See, e.g.*, F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925), *available at* <http://gutenberg.net.au/ebooks02/0200041h.html>; *see also* *The Great Gatsby* (Baz Lurhmann dir. 2013); *but see* EDITH WHARTON, *THE AGE OF INNOCENCE* (1920) (depicting Gilded Age society in 1870s New York City), *available at* <http://www.gutenberg.org/files/541/541-h/541-h.htm>; *The Age of Innocence* (Martin Scorsese dir. 1993).

61. “Counter-memory” names a concept that I have adopted from the American Studies scholars George Lipsitz, who defined it as “a way of remembering and forgetting that starts with the local, the immediate, and the personal. . . . [looking] to the past for the hidden histories excluded from dominant narratives. . . . [to] reframe and refocus dominant narratives purporting to represent universal experience[.]” GEORGE LIPSITZ, *TIME PASSAGES: COLLECTIVE MEMORY AND AMERICAN POPULAR CULTURE* 213-14, 228-31 (1990). *Cf.* González, *supra* note 21, at 1007-09 (discussing

legal histories regarding overlapping decades and proximate years,⁶² as well as a sample of recent publications that use the phrase,⁶³ and two books that I deem foundational to the subject.⁶⁴ Ultimately, I argue that understanding the first Gilded Age implicates racially significant political projects today: if we contextualize the first Gilded Age within the end of radical Reconstruction, the exclusion of immigrants from various countries of Asia, the expansion of American imperialism in the Caribbean and the Pacific, revanchism in France, and the rise of Jim Crow, we will be substantially better positioned to appreciate the salient racial dimensions of today's New Gilded Age.

Two recently published books title themselves as historical dictionaries of the Gilded Age.⁶⁵ Considering their overviews of the period establishes a basis that I then critique with my question, "What was gilt?" Published in 2003, the first book asserts that the Gilded Age originally meant the years of the presidency of Ulysses S. Grant (1869-1877) but that subsequently its meaning "was expanded to include the period from the end of Reconstruction to the end of the nineteenth century."⁶⁶ The same work also remarks that historical revision shifted from viewing the period as "a transitional era between Reconstruction and the Progressive Movement to one of the beginnings of modern America."⁶⁷ Taking its name from the eponymous 1873 novel by Mark Twain and Charles Dudley,⁶⁸ the contemporary view was that "the Gilded Age was basically acquisitive and

counter-memory and related concepts like "counter-storytelling" and "racialized legal narrative").

62. *E.g.*, powell, *supra* note 54, at 371-82 (discussing the intersection of race and class from Reconstruction through Populism).

63. *See* LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); *HISTORICAL DICTIONARY OF THE GILDED AGE* (Leonard C. Schulp & James Gilbert Ryan eds., (2003) [hereinafter *HISTORICAL DICTIONARY*]; T. ADAMS UPCHURCH, *HISTORICAL DICTIONARY OF THE GILDED AGE* (2009). *See also* JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865-1900* (2007); RICHARD FRANKLIN BENDEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION 1877-1900* (2000); KRUGMAN, *supra* note 50, at 71-90 ("Chapter Five: The Second Gilded Age"); *THE NEW GILDED AGE: THE NEW YORKER LOOKS AT THE CULTURE OF AFFLUENCE* (David Remnick ed., 2000); Steve Fraser, *Two Gilded Ages*, 29 *RARITAN Q.* 18 (2009) (reviewing five books on the first and second Gilded Ages).

64. *See* MATHEW JOSEPHSON, *THE POLITICOS, 1865-1896* (1938, 1963); *and* JOSEPHSON, *supra* note 60.

65. *HISTORICAL DICTIONARY*, *supra* note 63; UPCHURCH, *supra* note 63.

66. Vincent P. De Santis, *Foreword* to *HISTORICAL DICTIONARY*, *supra* note 63.

67. *Id.*

68. TWAIN & DUDLEY, *supra* note 27.

corrupt, with little cultural depth.”⁶⁹ In contrast, the book’s foreword asserts that in recent years, “historians and other writers have taken a closer look at the Gilded Age and have uncovered its cultural, literary, and technological attainments long overshadowed by the attention given to its political and economic life. . . . They also presented a more-balanced picture of Gilded Age businessmen.”⁷⁰ The foreword then extolls this view, asserting, “The Gilded Age was one of the most remarkable generations in American history” and supports its conclusion by referencing the period’s scientific and technological advances and its extraordinary industrial expansion and population growth.⁷¹ Finally, this view suggests that the period’s increased productivity paved the way for opportunities for great wealth, justified under theories of Social Darwinism and laissez faire though counterbalanced by industrial workers’ wretched living conditions, which were putatively shaped by “hordes of European immigrants” and the urbanization of America.⁷²

In my view, the 2003 book’s foreword uncritically valorizes the first Gilded Age, seemingly unaware that its exuberance over American industrialization might be read as a simplistic counter to the critical view that it ascribes to contemporaries like Mark Twain.⁷³ As I have written elsewhere, “Writers of critical ethnic legal histories should neither romanticize, nor make heroes of their subjects[.]”⁷⁴ A logical complement to that position is not to demonize the subject of one’s research. At the same time, scholars must be aware that history itself is a politically contested subject.⁷⁵ Thus, I interpret the 2003 *Historical Dictionary of the Gilded Age* foreword as in opposition to the symposium organizers, who invited discourse about how today’s inequality constitutes a New Gilded Age. The symposium organizers, however, did not specify what they meant

69. De Santis, *Foreword* to HISTORICAL DICTIONARY, *supra* note 63, at ix..

70. *Id.* at x.

71. *Id.*

72. *See id.* at xi-xii.

73. *See id.* at ix-xiii.

74. González, *supra* note 20, at 1041.

75. *E.g.*, MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 3-4 (1995) (“[W]hat makes some narratives rather than others powerful enough to pass as accepted history if not historicity itself? If history is merely the story told by those who won, how did they win in the first place? And why don’t all winners tell the same story?”); accord Max Hastings, *History as Written by the Victor*, THE TELEGRAPH (Nov. 2, 2004), <http://www.telegraph.co.uk/culture/books/3626376/History-as-written-by-the-victor.html> (reviewing a book-length critique of Winston Churchill’s six-volume history of World War II, published from 1948-54, which “came to dominate Western thinking about the conflict for a generation.”).

by the phrase, and I thus urge us to ask, “What was guilt?” critically and iteratively in order to avoid unduly simplifying our inquiries and to prevent reaching unwarranted conclusions. On this point, Matthew Josephson, the author of *The Robber Barons* (1934) contributes an important insight from the 1962 foreword to that book:

Of late years, however, a group of academic historians have constituted themselves what may be called a revisionist school, which reacts against the critical spirit of the 1930's To the revisionists of our history our old-time moneylords “were not robber barons but architects of material progress,” and, in some wise “saviors of our country. They have proposed rewriting parts of America’s history so that the image of the old-school capitalists should be retouched and restored, like rare pieces of antique furniture.”⁷⁶

Josephson then suggests a critical resource for rebutting undue revisionism: “It was not I, but the embattled farmers of Kansas, who, in one of their anti-monopoly pamphlets of 1880, first applied the nomenclature of Robber Barons to the masters of railway systems.”⁷⁷ In the discussion that follows, therefore, I propose not merely to adopt contemporary or revisionist usages, but rather to contextualize them critically and reflexively in the manner that historian and historiographer, Robert F. Berkhofer, Jr. termed “reflexive (con)textualization.”⁷⁸

In 2009, a different “Historical Dictionary of the Gilded Age” was published as part of a series on eras of United States history.⁷⁹ Dating the Gilded Age from 1869-1899, the series editor’s foreword notes the era’s association with “the rise of the so-called Robber Barons, the growing gap between rich and poor, and the wretched conditions in which many lived and worked;”⁸⁰ intriguingly, it also mentions “the emergence of jingoism and empire building” and asserts that racism and civil rights were “a crucial

76. JOSEPHSON, *supra* note 59, at vi.

77. *Id.*

78. ROBERT J. BERKHOFER, JR., BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE 243, 281 (1995) (“Achieving new forms of historicization depends upon new ways of reading and reviewing historical texts as discursive practices. . . . The active reader and critical reviewer make a historical text a collaborative effort through their reading and reviewing, even to the extent of creating a countertext. . . . [C]ritical reading and reviewing can foster reflexive contextualization and multicultural ideals as they (re)construct and (re)construe what a textualization achieved and how.”).

79. UPCHURCH, *supra* note 63.

80. Jon Woronoff, *Editor’s Foreword* to UPCHURCH, *supra* note 63, at vii.

issue for the Gilded Age[.]”⁸¹ Also, the book’s author, T. Adams Upchurch, a historian based at East Georgia College,⁸² discusses the periodization at greater length, which merits substantive engagement.

Upchurch first treats Mark Twain’s characterization of the period as “describing the United States as a nation with a beautiful, shiny exterior hiding decadent, filthy insides.”⁸³ Next, he argues that the period’s name endured because the period lacked “an easily understandable historical package,” and that “no such defining events can be found for the era from 1870 to 1900.”⁸⁴ Upchurch then reviews other historians’ views on the era, noting that some package the Gilded Age “between the end of the Civil War in 1865 and the beginning of the Spanish-American War in 1898.”⁸⁵ Others “say it runs from the assassination of Abraham Lincoln in 1865 to the assassination of William McKinley in 1901. . . . Still other historians say it does not really begin until the end of Reconstruction, in 1877[.]”⁸⁶ After critiquing these approaches, Upchurch notes, “eras of history are artificial creations, and one set of dates to frame the Gilded Age is just about as valid as the next.”⁸⁷ He justifies his ultimate choice, “4 March 1869 through 31 December 1899” because “1869 marks a symbolic turning point in the history of Reconstruction[.]” five nationally significant developments occurred in that year (the swearing in of President Grant, the completion of the transcontinental railroad, the foundation of the American Woman Suffrage Association, the formation of the Knights of Labor, and the start of professional baseball), and his conclusion that by 1899 “most features which characterized the Gilded Age seem to have largely run their course[.]”⁸⁸

I find much of Upchurch’s reasoning persuasive, particularly his admission of various reasonable ways to define the period, and his reasons for choosing 1869-1899. At the same time, in the treatment below I emphasize particular sociolegal struggles, which lead me to a different conclusion as to what he calls the “real zeitgeist of Gilded Age America (the late 1800s)[.]”⁸⁹ For Upchurch the Gilded Age’s spirit of the times:

81. *Id.* at vii-viii.

82. *Id.* at viii.

83. UPCHURCH, *supra* note 63, at xxvi.

84. *Id.* at xxvii.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at xxviii.

89. *Id.* at xxviii.

was its thrust to achieve true nationalism—that is, the quest for a national consensus on black-white relations; the quest to reconcile the North and the South into a unified whole; the quest for a transcontinental communication and transportation network; the quest for a homogenous, nationwide economic system that blended agriculture and industry; the quest to subdue the indigenous Native Americans once and for all; the quest to preserve and defend the post-Civil War American “nation” through a truly “national” military policy; the quest for a national consensus on morality and religion; and the quest to extend the American way of life overseas to subservient peoples.⁹⁰

In my view, while focusing on the evolution of “true nationalism” in the United States has some explanatory value, by failing to name white supremacy, it elides the racial character of the “nation” that diverse people’s social struggles, and their resolutions, (re)constituted from 1869-1899. To elaborate, below I continue asking, “What was guilt?” and suggest some answers by reference to the ending of radical Reconstruction, exclusion of Asian immigrants under color of law, expansion of American imperialism in the Caribbean and the Pacific, rise of revanchism in France, and establishment of Jim Crow in the United States.

1. What was Gilt? – The Ending of Radical Reconstruction, Destruction of Interracial Labor Populism, and Rise of Jim Crow

Remembering the famous assertion by W.E.B. Du Bois that “the problem of the twentieth century is the problem of the color-line,” john a. powell (spelled without capital letters) begins his *The Race and Class Nexus: An Intersectional Perspective* by commenting, “A century later, and a generation removed from the struggles of the Civil Rights era, many now suggest that class, not race, is the greatest cleavage in American society.”⁹¹ As noted above, I agree with powell, and other scholars, that critical sociolegal scholarship must attend to the interrelationship between the “several socially salient dimensions of power, privilege and identity [that] exist, e.g., race and color; sex, gender, and sexual orientation; national origin, language, accent, and citizenship; and religion, class, age and dis/ability.”⁹² As powell explains:

90. *Id.* at xxix-xxx.

91. powell, *supra* note 54, at 355.

92. Marc-Tizoc González, *Latina & Latino Critical Legal (“LatCrit”) Theory, Multi-dimensional Analysis and the Elimination of Bias in the Legal Profession* (Apr. 11, 2014) (unpublished handout) (on file with author).

racial practices in the United States help define the meaning and development of our understanding, and the practices of class. . . . I am not asserting that race is more important than class, but I am rejecting the notion that class explains race. Instead I am asserting that race and class are distinct and at the same time mutually constitutive, recursive processes in the United States that render race and class radically incoherent without understanding their interactive nature.⁹³

powell supports his argument by surveying American history with a focus on “the heavy footprint race has left on the development and meaning of class in the United States” from the American Revolution through early industrialization, and Reconstruction through the New Deal, to the post-World War II rise of the middle class.⁹⁴ While countless scholars have treated this lengthy period, I find powell’s treatment highly useful for its focus on the sociolegal interaction between race and class, in particular his treatment of Reconstruction, Populism, and the rise of Jim Crow.⁹⁵

For example, powell contrasts the sociolegal reaction against the Freedmen’s Bureau versus the social acceptance of the “generous aid to Northern [sic] veterans of the Civil War and their widows and children[.]”⁹⁶ Whereas both programs were nationally unprecedented consequences following from the Civil War, the former “was criticized by President Andrew Johnson and the Democrats . . . as likely to make Blacks lazy, dependent, and prone to live off of ‘handouts.’”⁹⁷ Moreover, while Black Union veterans and their widows were formally eligible for pensions, practically they were disadvantaged in obtaining their benefits from “difficulty in providing proof of their services—given requirements for marriage licenses, birth certificates, and so forth.”⁹⁸ In powell’s view, this different sociolegal treatment had the effect of “obscuring the common interests of poor Whites and Blacks.”⁹⁹

Unfortunately, in powell’s view, the post-Civil War decades were precisely when the re-emerging nation had great potential to cement its nascent interracial justice into a solid foundation for class-based justice, because as the Union army “‘encountered the full reality of plantation slavery, soldiers became imbued with abolitionist sentiment[.]’”¹⁰⁰ Also,

93. powell, *supra* note 54, at 358.

94. *Id.* at 358; *see also id.* at 361-96.

95. *Id.* at 371-82.

96. *Id.* at 372.

97. *Id.* at 371.

98. *Id.* at 372.

99. *Id.*

100. *Id.* at 373.

“News of violence against the freedmen and the passage of the Black Codes . . . helped mobilize northern public opinion in favor of the Radical Republican agenda of ensuring full freedom for Blacks.”¹⁰¹ Moreover, “Republican militants swept the midterm elections of 1866, united on the issue of Black equality in the face of the most virulently racist Democratic campaign ever.”¹⁰² Finally, workers “became a social force as the number of production workers rose dramatically in the aftermath of the Civil War . . . [and the] trade union movement inspired the multiracial Knights of Labor.”¹⁰³ Together with new Farmers Alliance and Greenback-Labor political parties, these new social movements “found united expression in the broad based Populist movement.”¹⁰⁴ The Knights of Labor, in particular, organized racially Black and White workers in the South in the 1880s and 1890s, extending and stimulating other efforts to dismantle white supremacy.¹⁰⁵ powell notes that Black electoral participation during Reconstruction “sometimes reached as high as ninety percent” and he suggests that Black voters helped elect Reconstruction legislatures with ““a strong class notion of the role of an activist’s government.””¹⁰⁶ Unfortunately, “these revolutionary seeds were smothered by the Hayes-Tilden compromise of 1877 with the withdrawal of federal troops from the South.”¹⁰⁷ Following the withdrawal of federal protection, “Tacitly sanctioned violence was a critical component of the repression that followed the end of Reconstruction.”¹⁰⁸

I have quoted and referenced powell’s depiction of this history and emplotted it after several relatively conventional views of the first Gilded Age in order to contextualize the era within its express white supremacy and to suggest an answer to my question, “What was gilt?” The first Gilded Age was festooned with white supremacy in one of its most recognizable forms, the public lynching of Black people by White people, as a practice of sociolegal terror that aimed first at contesting and then at burying all hope for radical Reconstruction.¹⁰⁹ Similarly, this was a moment when the

101. *Id.* at 374.

102. *Id.*

103. *Id.*

104. *Id.* at 375.

105. *Id.*

106. *Id.*; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 29 (2010, 2012) (“In 1867, at the dawn of the Reconstruction Era, no black man held political office in the South, yet three years later, at least 15 percent of all Southern elected officials were black.”).

107. powell, *supra* note 54, at 376.

108. *Id.*

109. See *id.* at 376.

“Ku Klux Klan assassinated both Black and White Republican leaders, including at least one congressman.”¹¹⁰ Against such rabid campaigns of violence, unconstrained by the rule of law, Black political activists were compelled to retreat in hopes of survival, and in turn the loss of Black political activism contributed “to the crushing of the Populist movement in the South and the eventual establishment of the system of 1896 [Jim Crow].”¹¹¹ Also, it should be remembered that a decade before the fateful year when the United State Supreme Court validated the Jim Crow regime in *Plessy v. Ferguson*,¹¹² organized labor in the North was also checked by the deployment of state-sanctioned violence, e.g., “the Haymarket affair on May 4, 1886.”¹¹³ With both Southern and Northern interracial labor Populism on the defensive or in retreat, the imposition of Jim Crow laws, particularly disenfranchisement under state statutes and/or constitutional conventions that established poll taxes, literary tests, etc., remade the rules of American democracy in order to banish the possibility of interracial labor solidarity.¹¹⁴ As powell concludes:

The failure to dismantle our race structures, characterized by racial separation and control has had critical consequences for our class arrangements. . . . [T]he radical Republican impulse to dismantle the structures of White privilege mutated into the new class politics of the gilded age, which were hostile to Northern labor and a socially active state, yet vigorously supportive of an active federal role in subsidizing and promoting economic expansion.¹¹⁵

For some, the differences between Upchurch’s treatment of the Gilded Age (1869-1899) and powell’s treatment of Reconstruction and Populism (1865-1896) might not seem worthy of remark, but for me emplotting these views sequentially feels deeply generative and critical, for the “true nationalism” that Upchurch found most legible for the Gilded Age’s zeitgeist has an unremarked, yet undeniable, color. In the late nineteenth century, the Gilded Age was not merely about the creation and exercise of extreme wealth and power; in North and South, the Gilded Age was also expressly racially White. By asking, “What was gilt?” in that era, we can benefit today by obtaining not a simple conclusion but rather a counter-

110. *Id.*

111. *Id.*; *see also id.* at 378.

112. 163 U.S. 537, 544 (1896).

113. powell, *supra* note 54, at 377.

114. *See id.* at 378-79.

115. *Id.* at 381.

memory of how race and class (along with other sociolegally salient dimensions of power and identity) interacted in reciprocally constitutive ways. With this knowledge in mind, rather than buried or forgotten, we may pose similar questions and obtain other insightful answers as to the New Gilded Age. If we stopped at the national borders of the United States, however, I believe we would commit serious error. Thus, in the following section, I briefly answer, “What was guilt?” with a consideration of the late nineteenth century exclusion of immigrants from various Asian countries, American imperialism in the Caribbean and the Pacific, and a brief treatment of revanchism in France.

2. What was Gilt? – American Anti-Asian Exclusion, Imperialism, and Anti-Imperialism

As mentioned above, I come to the present inquiry fresh from an investigation into the buried histories of Filipina/o American farm workers and the historic interracial solidarity that their agricultural labor organizing posed in Hawai’i in 1920 and California in 1965.¹¹⁶ In both instances, in historically different situations that my research revealed were nonetheless materially related, other differentially racialized ethnic groups, predominantly Japanese Americans in Hawai’i and predominantly Mexican Americans in California, responded to the opportunity posed by striking Filipina/o American workers.¹¹⁷ In so doing, these groups transcended their particular racialized labor situations and amplified the transformative potential of their labor insurrections.¹¹⁸ In both instances, the nascent interracial solidarity gave birth to new multi-racial labor organizations, and in both instances, the planters (Hawai’i) or growers (California) responded with backlash campaigns of intimidation and bribery until they either prevailed (Hawai’i in 1920)¹¹⁹ or suffered an unprecedented defeat (California in 1970).¹²⁰

The first instance, however, indirectly gave rise to the second, because a significant number of Filipina/o American farm workers and labor organizers, whom Hawaiian growers had blacklisted, were compelled to seek work in the mainland United States, and their distinctive legal status as “American nationals,” i.e., as subjects of an insular territory of the United States, rather than being immigrant or non-immigrant aliens, enabled them to move relatively freely from the territory of Hawai’i to

116. See González, *supra* note 20, at 1035-36.

117. See *id.* at 1045-50.

118. See *id.* at 1046.

119. See *id.* at 1046-47.

120. *Id.* at 1068.

mainland states like California and Washington,¹²¹ where substantial numbers of other Filipina/o Americans had already been laboring and organizing. In turn, these new transplants brought substantial labor organizing experience, imbued with distinctive experiences of the promise of interracial solidarity.¹²² While both histories are likely obscure to many readers, I suspect that more people may know of the 1965-70 international grape boycott that originated from the Great Delano Grape Strike of 1965 because the interracial labor solidarity sparked by Filipina/o American farm workers gave rise to the United Farm Workers Organizing Committee (1966-1972), which in turn evolved into the famed United Farm Workers of America (1972-present), the subject of a recent Hollywood film.¹²³

I mention these histories because the incorporation of Filipina/o Americans into the United States derives from historically significant, yet oft-forgotten, wars at the end of the first Gilded Age, *viz.*, the Spanish American War (1898) and the Philippine-American War (1899-1902).¹²⁴ Moreover, as mentioned above, the self-same person, Samuel Clemens, who as Mark Twain co-wrote *The Gilded Age: A Tale of Our Times*, actively protested the genocidal fury of the United States as it warred to conquer *las islas Filipinas* and to incorporate them into the Philippines.¹²⁵ While some might find this merely coincidental, or of slight but insufficient interest to warrant further consideration, Clemens's protest is significant for a critical consideration of the first Gilded Age.

Several historians and scholars of ethnic studies have remarked on the peculiar "imperial amnesia" that surrounds the rise of American imperialism.¹²⁶ Others have noted that every conquest has both political and economic dimensions.¹²⁷ In accord with their insights, I assert that another critical aspect of United States law and society that was gilt was its turn of the century imperialism, which occurred within the era of Asian exclusion, *viz.*, the late nineteenth and early twentieth century decades when federal and state law colored anti-Asian animus against first Chinese immigrants

121. González, *supra* note 20, at 1017 fn.70 (citing to numerous texts regarding the status of Filipina/o American nationals).

122. *Id.* at 1049.

123. *See id.* at 1053; *see also* CESAR CHAVEZ (Canana Films 2014); DELANO MANONGS: FORGOTTEN HEROES OF THE UNITED FARM WORKERS (Media Factory 2014).

124. *See* González, *supra* note 20, at 1065.

125. *See id.* at 1016 n.69 (citing to Clemens's March 12, 1906 "Comments on the Moro Massacre" which scathingly criticized the "slaughter" of 900 people, including women and children of a "tribe of Moros" by the United States Army).

126. *Id.*

127. VALDÉS, *supra* note 23, at 1-2.

and later Japanese immigrants, among others.¹²⁸ While an extended explication of this history is beyond the scope of this Article, it bears mention that the closing of the American Frontier, as Frederick Jackson Turner famously termed it,¹²⁹ suggested to some the need to seek further territories to subjugate and from which to extract natural, human, and other resources. In turn, the decision to war for greater territory and the ramifications of what to do with the “native” populations ostensibly incorporated by the 1898 Treaty of Paris sparked a significant social movement in the United States, anti-imperialism. The Clemens who protested the United States Army’s massacre of a “tribe of Moros” in the Philippines was amongst the people who felt deeply disturbed by their country’s emulation of European colonialism, and he was not alone. Indeed, Clemens was a member, and served as an officer, of several of the anti-imperialist organizations that ardently protested the occupation of the Philippines.¹³⁰

Above, I characterized as intriguing a mention of “the emergence of jingoism and empire building” within the first Gilded Age,¹³¹ yet it seems to me that more often than not, treatments of the period either ignore or elide the imperialism that their periodization of this history often serves to gild. At the same time these works often do discuss the tariff protectionism of the period.¹³² For example, discussing his effort “to construct a political

128. See, e.g., González, *supra* note 20, at 1017 n.70 and accompanying text (discussing and citing to sources regarding the relative ease with which Filipina/o American nationals were enabled to travel to territories and states of the United States in the era of Asian exclusion). See also *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (upholding the federal government’s right to exclude a Chinese immigrant laborer, under 1888 amendments to the Chinese Exclusion Act of 1882, despite the petitioner possessing a customs certificate stipulating his right to re-enter the United States, which was granted prior to the statute’s amendment). See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990*, at 23–33 (1993) (discussing the United States policy of Asian exclusion from the Chinese Exclusion Act of 1882, Scott Act of 1888, and Geary Act of 1892, and the Supreme Court cases which upheld and supported them, through “the so-called Gentleman’s Agreement reached in 1907 and 1908, [in which] the Japanese government refrained from issuing travel documents to laborers destined for the United States” as well as the Immigration Act of 1924, under which the only Asians not affected were Filipina/o Americans, who remained exempt as American nationals (citations omitted)).

129. See FREDERICK J. TURNER, *THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* 199 (1966).

130. E. BERKELEY TOMPKINS, *ANTI-IMPERIALISM IN THE UNITED STATES: THE GREAT DEBATE, 1890-1920*, at 243 (1970).

131. See Woronoff, *supra* notes 80-81 and accompanying text.

132. E.g., BENSEL, *supra* note 63, at xviii-xix.

economic model of American industrialization that is both internally comprehensive, and when compared with other national cases, suggests parallels and differences[.]”¹³³ historian Richard Franklin Bense theorizes what he calls a “tariff policy complex” that “became the most important source of side payments within the Republican program, providing revenue for a vast system of pensions for Union veterans who had served in the Civil War and protection for wool-producing farmers throughout the nation.”¹³⁴ In his view, “The primary role of the tariff in American industrialization was thus to build a popular coalition for the Republican party, not to facilitate economic development.”¹³⁵

In highlighting American imperialism and anti-imperialism, and noting that some scholars, like Upchurch and Bense, elide it by focusing instead on the formation of the nation, I aim to complicate our understanding of the first Gilded Age within a larger context, what Latin American liberation philosophers like Anibal Quijano have theorized as “the coloniality of power.”¹³⁶ This shift, from a relatively colorblind national focus to a critically race conscious global contextualization grows from my dozen-plus years of engagement with critical outsider jurisprudence, especially LatCrit Theory, as well as my years of studying and teaching comparative ethnic studies.¹³⁷ In the Conclusion, I explicate why I think this shift is of substantial benefit for understanding the New Gilded Age. Before ending this Part, however, I will present another critical comparative context—late nineteenth revanchism in France.

C. French Revanchism

In the mid-1990s, the late critical geographer Neil Smith applied the concept of “revanchism” to the late twentieth century gentrification of New York City.¹³⁸ “*Revanche* in French means revenge, and the revanchists

133. *Id.* at xxii.

134. *Id.* at xix.

135. *Id.*

136. Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM SOUTH 533, 533, 540 (2000).

137. See González, *supra* note 20, at 1006-07 (noting several subgenres of and citing to numerous texts of critical outsider jurisprudence). See also *id.* at 1012-13 nn.61-62, 1025-29, 1033-34 (discussing comparative ethnic studies; the pedagogy of the course, “Interracial Justice at Law: Researching the Histories of San Francisco Bay Area Advocacy Organizations” that I taught for the University of California, Berkeley Department of Ethnic Studies; and my graduate studies in comparative ethnic studies and interdisciplinary social science at San Francisco State University).

138. See SMITH, *supra* note 12, at 44-47 (1996) (discussing the late nineteenth century revanchists in France and the late twentieth century emergence of what he terms the revanchist city in the United States).

comprised a political movement that formed in France in the last three decades of the nineteenth century.”¹³⁹ As Smith represented the French revanchists:

Angered by the increased liberalism of the Second Republic, the ignominious defeat to Bismarck, and the last straw – the Paris Commune (1870–1871) . . . the revanchists organized a movement of revenge and reaction against both the working class and the discredited royalty. Organized around Paul Déroulède and the Ligue des Patriotes, this movement was as militarist as it was nationalist, but also made a wide appeal to “traditional values.” . . . It was a right-wing movement built on populist nationalism and devoted to a vengeful and reactionary retaking of the country.¹⁴⁰

While cautioning against overdrawing the parallels between France in the late nineteenth century and the United States in the late twentieth century, Smith, nonetheless asserts:

In the US especially, the public culture and official politics are increasingly an expression of a new creeping revanchism. The Gingrich Congress elected in 1994, the rise of white supremacist militias, the vicious anti-corporatist right-wing populism of Patrick Buchanan, the intense emotion around anti-immigrant campaigns and the call for revenge against beneficiaries of affirmative action all point in this direction.¹⁴¹

With that historical reference and assertion of a valid parallel, Smith then introduces his conceptualization of “the revanchist city” as a competing ideology to “gentrification.”

According to Smith, gentrification originally “was coined by the eminent sociologist Ruth Glass, in London in 1964.”¹⁴² In her formulation, gentrification meant the invasion of the working-class quarters of London by “the middle classes – upper and lower . . . until all or most of the original working-class occupiers are displaced and the whole social character of the district is changed.”¹⁴³ Of course, the term gentrification, like other socially powerful concepts, e.g., the Gilded Age, has become highly contested since Glass first conceptualized it some fifty years ago,

139. *Id.* at 45.

140. *Id.*

141. *Id.*

142. *Id.* at 33 (citing RUTH GLASS, LONDON: ASPECTS OF CHANGE xviii (1964)).

143. *Id.* at 33 (quoting GLASS, *supra* note 142, at xviii).

and Smith traces its intellectual history at a level of detail beyond what is useful for the present inquiry.¹⁴⁴ I believe, however, that it is worth mentioning Smith's assertion that the Real Estate Board of New York, Inc. sought to redefine gentrification with a full-page advertisement in the *New York Times* at the end of 1985, asking "Is Gentrification a Dirty Word?"¹⁴⁵ Moreover, Smith notes that, "to the extent that 'gentrification' is generalized to stand for the 'eternal' inevitability of modern renewal, the renovation of the past, the sharply contested class and race politics of contemporary gentrification are dulled."¹⁴⁶

I highlight Smith's efforts to contextualize his use of the gentrification and revanchism concepts both to persuade the reader that he theorized them adequately to justify my adopting them, and also to buttress my prior discussion of the Gilded Age. Believing that the phrase, "the Gilded Age," has substantial rhetorical power, I believe its potential goes beyond use as a slogan.¹⁴⁷ Although slogans can help organize people, e.g., Occupy Wall Street's "We are the 99%," asserting that today's situation resembles the late nineteenth century offers substantial explanatory opportunities to one willing to explore what contemporaries originally meant by the phrase, the Gilded Age, as well as to evaluate how subsequent generations of scholars reinterpreted the phrase and evolved its meaning, e.g., Josephson in the 1930s, Bensel at the turn of the twenty-first century, and Upchurch a few years ago. Also, by repeatedly asking, "What was gilt?" the critical racial dimensions of the first Gilded Age's project of "true nationalism" become increasingly visible—as one identifies and highlights its relationship to the ending of radical Reconstruction, the brief promise and premature destruction of interracial labor Populism, and the rise of Jim Crow, as well as the inauguration of American imperialism (and American anti-imperialists) within the era of Asian exclusion.

Finally, in this Part, I have raised Neil Smith's reinterpretation of late nineteenth century French revanchism as a basis for his conceptualization of late twentieth century gentrification and the emergence of the revanchist city, a subject to which I will return in this Article's Conclusion.

II. THE CRIMINALIZATION OF FOOD SHARING IN THE NEW GILDED AGE

As noted in the Introduction, the past decade featured the emergence of a

144. *See id.* at 34-40.

145. *See id.* at 30-31.

146. *Id.* at 34.

147. *See* Marc-Tizoc González, *Latina/o (Public / Legal) Intellectuals, Social Crises, and Contemporary Social Movements*, 18 AM. U. J. GENDER SOC. POL'Y & L. 787, 796 (2010) (discussing the importance of slogans for social movements).

circuit split amongst the United States Courts of Appeal regarding the constitutionality of municipal anti-food sharing ordinances.¹⁴⁸ Until now, however, no law review commentators have remarked on the significance of the circuit split over the constitutionality of municipal anti-food sharing ordinances.¹⁴⁹ As to the Eleventh Circuit's *First Vagabonds Church of God* (2011), I have identified only three articles that discuss the case substantively,¹⁵⁰ with three others citing and briefly discussing how it pertains to various aspects of First Amendment jurisprudence.¹⁵¹ As to *Santa Monica Food Not Bombs* (2006), no law review article discusses the case at length, and seven others only briefly discuss how it pertains to various aspects of First Amendment jurisprudence, e.g., forum closure.¹⁵²

148. See *supra* notes 10-11 and accompanying text.

149. On July 20, 2014 I replicated prior searches in Westlaw Next and found only seven (7) law review publications that cite to *First Vagabonds Church of God* and only eight (8) such publications that cite to *Santa Monica Food Not Bombs*. Of them, as noted below, most only briefly gloss on the jurisprudence at issue in a particular case, sometimes merely in a string citation. Beyond this database, my research team has located only one additional law review article that substantively discusses the right to give away food. Nate Vogel, *The Fundraisers, the Beggars, and the Hungry: The First Amendment Rights to Solicit Donations, to Beg for Money, and to Share Food*, 15 U. PA. J. L. & SOC. CHANGE 537 (2012). Vogel, a legislative counsel at the New York Civil Liberties Union at the time he published his article, devotes one portion to discussing several of the food sharing cases, which he cognizes under the section heading, "The Right to Give Away Food." See *id.* at 550-63. He apparently missed *Santa Monica Food Not Bombs* although he identified a topically relevant, though unpublished, earlier Ninth Circuit case, *McHenry v. Agnos*, 983 F.2d 1076, 1993 WL 8728 (1993). See Vogel, *supra*, at 537, 556-58.

150. See *Eleventh Circuit: Survey of Recent Decisions*, 42 CUMB. L. REV. 615, 664-67 (2012); and Fay O. Pappas, Comment, *Wrong Means to an Unjust End?: The Eleventh Circuit's Decision in First Vagabonds Church of God*, 64 FLA. L. REV. 1125, *passim* (2012); Vogel, *supra* note 149, at 550-56.

151. See Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 220 n.168 (2012) (noting the case's different interpretations on whether "providing food to the homeless in a city park" was, or could be assumed to be "truly communicative"); Timothy Zick, *Book Review, Liberty's Refuge: The Forgotten Freedom of Assembly by John D. Inazu*, 91 TEX. L. REV. 375, 399 n.121 (2012) (asserting that the Assembly Clause would circumvent the need for a court to find a publicly discernible particularized message in order to constitutionally protect individuals who "gathered in a public park for the purpose of feeding the homeless . . . under the Free Speech Clause or the expressive association doctrine"); and Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 B.Y.U. L. REV. 2203, 2236-37 n.149 (2010) (discussing whether "feeding the homeless in public parks" adequately conveys a discernible message in order to properly raise a "Free Speech Clause issue").

152. See Edan Burkett, Comment, *Coordination or Mere Registration? Single-Speaker Permits in Berger v. City of Seattle*, 2010 BYU L. REV. 931, 931 n.2, 938

Similarly, very few law review Comments or Notes discuss any of the federal district court cases regarding the criminalization of food sharing.¹⁵³ Thus, at present, it appears that no law review commentary has conceptualized the food sharing cases as constituting a circuit split and only one has begun to theorize their broader jurisprudential and sociolegal significance.¹⁵⁴

In contrast, popular media has taken note of the anti-food sharing ordinances.¹⁵⁵ Also, two national organizations have included anti-food

n.37, 947 n.94, 952 nn.120, 122, 961 n.156 (2010); Stephen R. Elzinga, *Retaliatory Forum Closure*, 54 ARIZ. L. REV. 497, 517 n.154 (2012); Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 DRAKE L. REV. 381, 410 n.154, 411 n.160 (2008); Kerry L. Monroe, *Purpose and Effects: Viewpoint-Discriminatory Closure of A Designated Public Forum*, 44 U. MICH. J.L. REFORM 985, 998-99 nn.84-87 (2011); Jordan E. Pratt, Note, *An Open and Shut Case: Why (and How) the Eleventh Circuit Should Restrain the Government's Forum Closure Power*, 63 FLA. L. REV. 1487, 1499-1500 n.88 (2011); R. George Wright, *What Counts As "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1245-46 n.161 (2010); R. George Wright, *Homelessness and the Missing Constitutional Dimension of Fraternity*, 46 U. LOUISVILLE L. REV. 437, 463 n.145 (2008).

153. See D. Matthew Lay, *Do Not Feed the Homeless: One of the Meanest Cities for the Homeless Unconstitutionally Punishes the So-Called "Enablers"*, 8 NEV. L.J. 740 *passim* (2008); Pappas, *supra* note 150.

154. See Vogel, *supra* note 149, at 550, 554 (asserting that the application of First Amendment doctrine as to food sharing is unsettled and that *First Vagabond Church of God's* circuitous procedural history "highlights the salience of the food sharing question to the current state of First Amendment law").

155. E.g., Randal C. Archibold, *Las Vegas Makes It Illegal to Feed Homeless in Parks*, N.Y. TIMES (July 28, 2006), available at http://www.nytimes.com/2006/07/28/us/28homeless.html?_r=2&; Yamiche Alcindor, *Cities' Homeless Crackdown: Could it be Compassion Fatigue?*, USA TODAY (June 12, 2012), available at <http://usatoday30.usatoday.com/news/nation/story/2012-06-10/cities-crack-down-on-homeless/55479912/1>; Stephanie Armour, *Philadelphia Regulates Brotherly Love to Curb Homeless Picnics*, BLOOMBERG (Mar. 22, 2012), available at <http://www.bloomberg.com/news/2012-03-22/philadelphia-regulates-brotherly-love-to-curb-homeless-picnics.html>; Sarah Anne Hughes, *Food Not Bombs Group Arrested for Feeding Homeless, Violating Orlando Ordinance*, WASH. POST (June 3, 2011), available at http://www.washingtonpost.com/blogs/worldviews/post/food-not-bombs-group-arrested-for-feeding-homeless-violating-orlando-ordinance/2011/06/03/AGufUBIH_blog.html; Adam Nagourney, *As Homeless Line Up for Food, Los Angeles Weighs Restrictions*, N.Y. TIMES (Nov. 25, 2013), available at http://www.nytimes.com/2013/11/26/us/as-homeless-line-up-for-food-los-angeles-weighs-restrictions.html?pagewanted=all&_r=0; see also Alicia Lozano, *Hope Lingers: Santa Monica's Continuous Struggle with Homelessness* (Dec. 2008) (unpublished M.A. thesis, University of Southern California), available at <http://digitalibrary.usc.edu/cdm/ref/collection/p15799coll127/id/128155>.

sharing ordinances in their ongoing reports on the criminalization of homelessness.¹⁵⁶ In this Part, I analyze the circuit split in the United States Courts of Appeals, which emerged in 2011 when the Eleventh Circuit, *en banc*, upheld the constitutionality of the City of Orlando's complicated permitting requirements for people who sought to share food with hungry people in public parks located within a two-mile radius of city hall.¹⁵⁷ I discuss *First Vagabonds Church of God v. City of Orlando* in detail in order to contrast its result with that reached by a Ninth Circuit panel in the 2006 case of *Santa Monica Food Not Bombs v. City of Santa Monica*, which held unconstitutional a municipal events ordinance that regulated uses of public property, including food sharing, for not being narrowly tailored, as required by First Amendment freedom of speech jurisprudence.¹⁵⁸

156. See, e.g., NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS 10-14 (2010) [hereinafter A PLACE AT THE TABLE], available at http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf (discussing municipal laws in twelve United States cities that, "at some point limited the use of public parks for sharing food with homeless people"); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, FEEDING INTOLERANCE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS 2 (2007) [hereinafter FEEDING INTOLERANCE], available at http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf ("The criminalization of homelessness in the United States remains a severe problem. . . . In the past several years, many cities have adopted a new tactic – one that targets not only homeless persons but also individual citizens and groups who attempt to share food with them."); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8, 24-25 (2014) [hereinafter NO SAFE PLACE], available at http://nlchp.org/documents/No_Safe_Place (discussing restrictions on food sharing); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: ADVOCACY MANUAL 132-42 (2011), [hereinafter CRIMINALIZING CRISIS], available at http://www.nlchp.org/documents/Criminalizing_Crisis_Advocacy_Manual (summarizing twelve published federal judicial opinions regarding such laws from 1993 until 2011, with seven of them being from 2006 until 2011).

157. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 758-59 (11th Cir. 2011) (*en banc*) (upholding a municipal ordinance "as a reasonable time, place, or manner restriction and as a reasonable regulation of expressive conduct" that required a permit to conduct a "large group feeding," within public parks located in a two-mile radius of city hall, with no more than two permits available per year to a permittee for any particular park, and where "large group feeding" was defined as, "an event intended to attract, attracting, or likely to attract twenty-five (25) or more people . . . for the delivery or service of food").

158. *Santa Monica Food Not Bombs v. City of Santa Monica*, 405 F.3d 1022, 1040, 1043 (9th Cir. 2006) (holding "that a narrowly tailored permit requirement must

Contrasting these cases traces the contours of the circuit split and enables me to summarize what their jurisprudence suggests as to the state of the law regarding the municipal regulation (criminalization) of food sharing in publicly owned places. I then critique this jurisprudence and explain why other circuits that may consider challenges to an anti-food sharing ordinance should *not* follow the Eleventh Circuit opinion in *First Vagabonds Church of God*.

A. *First Vagabonds Church of God v. City of Orlando*

On April 12, 2011, the United States Court of Appeals, Eleventh Circuit, sitting *en banc*, affirmed in part and reversed in part the district court judgment in *First Vagabonds Church of God*.¹⁵⁹ The Eleventh Circuit also vacated the district court's permanent injunction against the defendant City of Orlando's enforcement of its anti-food sharing ordinance and reinstated a portion of the earlier Eleventh Circuit panel's opinion.¹⁶⁰ As limited by the Eleventh Circuit, the appeal presented "the question whether a municipal ordinance that limits the number of feedings of large groups that any person or political organization can sponsor in centrally located parks violates the First Amendment."¹⁶¹ According to the *en banc* opinion, the "City of Orlando enacted the ordinance to spread the burden that feedings of large groups have on parks and their surrounding neighborhoods."¹⁶² The plaintiffs thought differently. The Eleventh Circuit described the plaintiffs as a "political organization, Orlando Food Not Bombs," which argued that the ordinance restricted "the frequency of its feedings of homeless persons in any park within a two-mile radius of the City Hall of Orlando[.]"¹⁶³ According to the Eleventh Circuit, "Orlando Food Not Bombs argues that it has a right under the First Amendment to conduct

maintain a close relationship between the size of the event and its likelihood of implicating government interests[.]" and finding that a city department's instruction undermined an ordinance's narrow tailoring where it mandated, "that 'any activity or event which the applicant intends to advertise in advance via radio, television, and/or widely-distributed print media shall be deemed to be an activity or event of 150 or more persons'" (citation omitted). In contrast to the mandatory administrative instruction, the ordinance on its face applied only to groups of at least 150 persons. *Id.* at 1027. Thus, the court found that the mandatory instruction made the law unconstitutional.

159. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 763 (11th Cir. 2011) (*en banc*).

160. *Id.* at 763.

161. *Id.* at 758.

162. *Id.*

163. *Id.*

feedings of large groups in any park as often as it likes.”¹⁶⁴ The Eleventh Circuit disagreed, opining:

We assume, without deciding, that the feeding of homeless persons by Orlando Food Not Bombs is expressive conduct protected by the First Amendment, but we uphold the ordinance . . . both as a reasonable time, place, or manner restriction of speech and as a reasonable regulation of expressive conduct.¹⁶⁵

On its face, this holding might make *First Vagabonds Church of God* seem not worthy of deep consideration but merely an iteration of established First Amendment doctrines. The importance of the case, however, transcends the eight-page length of its *en banc* opinion. Understanding its importance requires delving into the case’s procedural history and factual background, and contextualizing it within earlier cases adjudicating the constitutionality of anti-food sharing ordinances, as well as the evolution of the political economy of the United States in the historical period when the case was litigated, *viz.*, the housing market bubble, its collapse, and the Great Recession that it inaugurated. Understanding the sociolegal importance of *First Vagabonds Church of God* also benefits from contextualizing the case within theories and concepts promulgated by critical sociolegal scholars, in particular those advancing the insights of critical outsider jurisprudence, as well as critical geography.¹⁶⁶

According to the Eleventh Circuit, sitting *en banc*, the story of the case started in 2005, when Orlando Food Not Bombs, “a group of political activists dedicated to the idea that food is a fundamental human right, began distributing free food at Lake Eola Park every Wednesday at 5:00 p.m., and First Vagabonds Church of God, a religious organization of about 40 members, most of whom are homeless, began conducting weekly services that included group feedings at Lake Eola Park.”¹⁶⁷ Unspecified by the Eleventh Circuit but noted by an early district court opinion (ruling on defendant’s motion for summary judgment), on Easter of 2006, First Vagabonds Church of God “moved its services to Langford Park, which is also in the Greater Downtown Park District.”¹⁶⁸

164. *Id.*

165. *Id.*

166. While a comprehensive understanding of the case may be beyond the scope of this Article, below I sketch the contours along the dimensions noted in the preceding paragraph. *See also infra* note 242 and accompanying text.

167. *First Vagabonds Church of God*, 638 F.3d at 758.

168. *Id.* at 758; *see also* *First Vagabonds Church of God v. City of Orlando*, No. 6:06-cv-1583-Orl-31KRS, 2008 WL 899029 (M.D. Fla. Mar. 31, 2008), at *1.

The plaintiffs alleged in their amended complaint that they and others “had been sharing food inside the picnic area of Lake Eola for more than a year,” during which time none of them had “received any warning or citations for violating any city ordinances.”¹⁶⁹ According to the district court, however, “the City [of Orlando] began receiving complaints from individuals who lived or worked near Lake Eola Park.”¹⁷⁰ In turn, the Orlando City Council scheduled a meeting for June 19, 2006 to consider adopting a new ordinance regulating large group feedings.¹⁷¹ Prior to the June 19th meeting, however, the district court noted that, “[o]n June 12, 2006, [City Commissioner Patty] Sheehan’s Assistant, Charles Smith, sent an email to eight constituents who had made complaints, informing them that an ordinance had been drafted and would be presented to the public at” the June 19th meeting.¹⁷² Plaintiffs’ complaint and the district court agreed that the “email stated that ‘the intent of this ordinance is to try to move the large groups of homeless out of downtown and create less of a ‘situation’ for the residents, business, etc. in the Lake Eola/Thornton Park neighborhoods when these groups disperse after feedings occur.”¹⁷³

At the June 19th meeting, the City of Orlando mayor, Buddy Dyer, asked Commissioner Sheehan to provide background on the ordinance, and the City Council then heard public comment in opposition and support of it.¹⁷⁴ Twenty-one people appeared in opposition, and eight people appeared in support.¹⁷⁵ Three additional people appeared “for information only.”¹⁷⁶ Nevertheless, the council voted 5-2 to approve the ordinance at its first reading.¹⁷⁷ Its second reading was scheduled for July 7, 2006, but was postponed because the ordinance “was being redrafted.”¹⁷⁸

On July 21, 2006, the Orlando City Commissioner for District 3, Robert F. Stuart, wrote Mayor Dyer a two-page letter, copying all the other commissioners and the city’s chief administrative officer, expressing his

169. Amended Complaint, at 7, *First Vagabonds Church of God v. City of Orlando*, No. 6:06-cv-1583-Orl-31KRS, 2006 WL 3916070 (M.D. Fla. 2006).

170. *First Vagabonds Church of God v. City of Orlando*, 578 F. Supp. 2d 1353, 1356 (M.D. Fla. 2008).

171. *See* Amended Complaint, *supra* note 169, at 8.

172. *First Vagabonds Church of God*, 578 F. Supp. 2d at 1356-57 n.5.

173. *Id.*

174. *See* City of Orlando, City Council Minutes June 19, 2006, at 15, *available at* <http://edocs.ci.orlando.fl.us/asv/paperlessagenda.nsf/fsetMinutes?OpenFrameSet> [hereinafter June City Council Minutes].

175. *See id.*

176. *Id.*

177. *See id.*

178. Amended Complaint, *supra* note 169, at 8.

views against enacting the proposed ordinance.¹⁷⁹ Commissioner Stuart mentioned a Mayor's Working Committee on Homelessness that had been working for more than fourteen months and had already developed twenty-three recommendations for a plan to end homelessness in the area by the end of 2014.¹⁸⁰ Commissioner Stuart also mentioned the lack of follow up on this plan, in particular its proposed educational programs.¹⁸¹ He also referenced the static or decreasing city appropriation for social services during the past four years, which he characterized as a time of "dynamic growth" for the city, a period when he asserted, "there has been a rising need for local services for our homeless and impoverished, especially in the downtown corridor, so in short, they have to do more with less."¹⁸²

After presenting this local history as background, Commissioner Dyer then argued in earnest against the ordinance. First, he stated, "the rapid increase of the population in the downtown area has created a chasm between the 'haves' and 'have nots,' placing public policy at a crossroads between defending the stakeholders of downtown against those without an effective voice."¹⁸³ He then noted, "this ordinance appears to criminalize the good-hearted behavior of thousands in our community who have supported those that our city has either ignored or disregarded. It also identifies our at-risk population as lawbreakers."¹⁸⁴ Later he elaborated this point, "[i]f this ordinance passes, and helping others becomes a crime, then we will have violators all over the city whose only offense is working to alleviate poverty from our shared community."¹⁸⁵ Stuart also addressed the likely effectiveness of the proposed ordinance, asking, "what quantitative data do we have which shows that this [ordinance] will decrease the number of instances where park visitors are approached by people who appear homeless?"¹⁸⁶ He also questioned how the policy would be perceived by surrounding jurisdictions and might make cooperation between nearby cities and counties more difficult.¹⁸⁷ Finally, he predicted,

179. Letter from Robert F. Stuart, City of Orlando Commissioner, to Buddy Dyer, City of Orlando Mayor (July 21, 2006), *available at* [http://edocs.ci.orlando.fl.us/asv/paperlessagenda.nsf/5884cfa50a2eba0d85256b9600410926/fd87583cc95b6809852571b7005800dc/\\$FILE/Feeding.Ordinance.ltr.doc](http://edocs.ci.orlando.fl.us/asv/paperlessagenda.nsf/5884cfa50a2eba0d85256b9600410926/fd87583cc95b6809852571b7005800dc/$FILE/Feeding.Ordinance.ltr.doc) [hereinafter Stuart Letter].

180. *See id.* at 1.

181. *See id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 2.

186. *Id.* at 1.

187. *See id.* at 1-2.

“[i]f people don’t get food, it will create an atmosphere of more aggressive panhandling and scatter those in search of food throughout our entire downtown community.”¹⁸⁸ He concluded, “[i]n my opinion, it will be counter-productive and may exacerbate an already difficult situation[.] . . . I’m not convinced that the City has done everything reasonably possible to solve this issue, nor am I convinced that public feeding has become effectively unmanageable to the point where it warrants an ordinance.”¹⁸⁹

Despite Commissioner Stuart’s advocacy and the forty-three members of the public who spoke in opposition to the ordinance at its second reading (in contrast to the nine who spoke in its favor),¹⁹⁰ on July 24, 2006, the Orlando City Council again voted 5-2 to enact its “Large Group Feeding Ordinance.”¹⁹¹ (An appendix to the 2010 Eleventh Circuit panel opinion includes a copy of the ordinance.¹⁹²) Section 18A.09-2 made it “unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park or park facility owned or controlled by the City of Orlando within the boundary of the Greater Downtown Park District [“GDPD”] without a large Group Feeding Permit[.]”¹⁹³ The ordinance defined the GDPD “as an area within the limits of the City of Orlando, Florida, extending out a two (2) mile radius in all directions from City Hall[.]”¹⁹⁴ an area that included “approximately forty-two public parks[.]”¹⁹⁵ The ordinance defined large group feedings “as an event

188. *Id.* at 2.

189. *Id.*

190. See Amended Complaint, *supra* note 169, at 18 n.8.

191. June City Council Minutes, *supra* note 174, at 15; see also Amended Complaint, *supra* note 169, at 8. Inexplicably, the district court repeatedly misstated the date of the ordinance’s passage as June 24, 2006. See *First Vagabonds Church of God v. City of Orlando*, No. 6:06-cv-1583-Orl-31KRS, 2008 WL 2646603, at *1 (M.D. Fla. June 26, 2008); *First Vagabonds Church of God v. City of Orlando*, 578 F. Supp. 2d 1353, 1357 (M.D. Fla. 2008). Curiously, the Eleventh Circuit never mentioned the date when the City of Orlando enacted the ordinance. Nevertheless, the website for the Orlando, Florida Code of Ordinances dates the law’s enactment as July 24, 2006. See Code of the City of Orlando tit. II § 18A.09-2, MUNICODE, available at <https://library.municode.com/index.aspx?clientId=13349> (scroll down to “Title II – City Code”, click on “Chapter 18A Parks and Outdoor Public Assemblies”, then click on “Sec. 18A.09-2. Large Group Feeding in Parks and Park Facilities Owned or Controlled by the City in the Greater Downtown Park District (GDPD)”).

192. *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1292-93 (11th Cir. 2010).

193. *Id.* at 1292 (presenting Code of the City of Orlando tit. II § 18A.09-2(a)).

194. *Id.* (presenting Code of the City of Orlando tit. II § 18A.01(24)).

195. *First Vagabonds Church of God v. City of Orlando*, No. 6:06-cv-1583-Orl-31KRS, 2008 WL 899029 (M.D. Fla. Mar. 31, 2008), at *1.

intended to attract, attracting, or likely to attract twenty-five (25) or more people, including distributors and servers, in a park or park facility owned or controlled by the City, including adjacent sidewalks and rights-of-way in the GDPD, for the delivery or service of goods.”¹⁹⁶ Finally, the ordinance provided that, “Not more than two (2) Large Group Feeding Permits shall be issued to the same person, group, or organization for large group feedings for the same park in the GDPD in a twelve (12) consecutive month period.”¹⁹⁷

I have detailed the events leading up to the passage of the ordinance because reviewing the matter closely, it seems clear to me that the office of Commissioner Sheehan, as evidenced by her assistant’s email, sponsored the Large Group Feeding Ordinance while bearing a cognizable animus or other form of discriminatory intent against “the large groups of homeless” whom the email specifically notes as being targeted for removal out of downtown.¹⁹⁸ Also, both Commissioner Stuart’s July 21, 2006 letter and the July 24, 2006 meeting minutes further contextualize the ordinance’s legislative history. For example, the City Council minutes note that Commissioner Sheehan explained that the proposed ordinance would amend section 18A regarding permits for public assembly by adding a new section 18A regulating large group feedings.¹⁹⁹ They also note that Commissioner Stuart read his July 21 letter at the July 24 meeting, followed by “much discussion among Council members and appearances from the public[.]”²⁰⁰ As noted above, Commissioner Stuart characterized the preceding four years (2002-06) as one of dynamic growth that had rapidly increased the downtown population in such a manner as to create a chasm between “the haves and the have nots.”²⁰¹ As discussed in Part I.C. above, scholars have long recognized this sociolegal phenomenon under the concept of gentrification, which was originally formulated to explain the sociolegal phenomenon of a middle class invasion into a formerly working class neighborhood, which ultimately changes its character.²⁰² While additional empirical research is needed to specify the change in property values and residents’ incomes in the relevant period within

196. § 18A.01(23).

197. § 18A.09-2(c).

198. *First Vagabonds Church of God v. City of Orlando*, 578 F. Supp. 2d 1353, 1356-57 n.5 (M.D. Fla. 2008).

199. *See* June City Council Minutes, *supra* note 174, at 14.

200. City of Orlando, City Council Minutes (July 24, 2006), at 15, *available at* <http://edocs.ci.orlando.fl.us/asv/paperlessagenda.nsf/fsetMinutes?OpenFrameSet> [hereinafter July City Council Minutes].

201. Stuart Letter, *supra* note 179, at 1.

202. *See supra*, Part I.C.

Orlando's downtown census tracts, the concept of gentrification seems helpful to explain the phenomena that Commissioner Stuart described. Also, the second reading minutes record a telling comment by the mayor, who "stated that there are many difficult issues regarding the homeless, that the homeless should be considered a 'regional' issue, and that the Orlando Chamber of Commerce recognizes that the homeless is a regional issue."²⁰³ At the risk of sounding naïve, it seems curious that a city mayor would speak at a city council meeting as if he represented the local chamber of commerce rather than acting in his capacity as the elected representative of all Orlando residents. At the very least, Mayor Dyer's comment suggests that additional research is needed to determine his relationship with the Orlando Chamber of Commerce, as well as its role in sponsoring or otherwise supporting the anti-food sharing ordinance.

At this point, having sketched a story of the events leading up to the passage of the Orlando anti-food sharing ordinance, as well as describing the contours of the conduct that it regulated and criminalized, I will shift to the earlier case of *Santa Monica Food Not Bombs*. First, however, it may be useful to summarize that in 2006, about a year and a half before the start of the Great Recession (December 2007),²⁰⁴ and about a year after Orlando Food Not Bombs and the First Vagabonds Church of God had each been conducting weekly food sharing events, the City of Orlando enacted a facially neutral ordinance that established a two-mile radius Greater Downtown Park District, centered on city hall.²⁰⁵ In that zone, which included approximately forty-two parks,²⁰⁶ a person wishing to share food with hungry people must obtain a permit in order to feed a putatively large group of people in a city park and adjacent sidewalks and rights-of-way, with the city defining a large food gathering as one "intended to attract, attracting, or likely to attract twenty-five" or more people, including distributors and servers.²⁰⁷ Failure to comply with the ordinance could result in "a fine not to exceed \$500.00 and/or a term of imprisonment not to exceed sixty (60) days."²⁰⁸ Finally, the ordinance proscribed issuing more than two such permits "to the same person, group, or organization for large group feedings for the same park in the GDPD in a twelve (12) consecutive

203. July City Council Minutes, *supra* note 200, at 14.

204. DE-NAVAS-WALT ET AL., *supra* note 4, at 31.

205. *See supra*, notes 157, 193-94 and accompanying text.

206. *See supra*, note 195 and accompanying text.

207. *See supra*, notes 157, 196 and accompanying text.

208. Amended Complaint, *supra* note 169 at 11 (citing Code of the City of Orlando § 1.08).

month period.”²⁰⁹ These events transpired in the years preceding the start of the Great Recession, at a time remarked on by a contemporary (Commissioner Stuart) as one of dynamic growth, which substantially increased the downtown population, apparently in a process of gentrification. Before the bursting of the housing mortgage market bubble, in the years that the symposium and other commentators have labeled the New Gilded Age,²¹⁰ the City of Orlando regulated, under threat of criminal conviction, the sharing of food with hungry people in its city parks and adjacent sidewalks and rights of way.

B. Santa Monica Food Not Bombs v. City of Santa Monica

At almost the same time that the City of Orlando enacted its anti-food sharing ordinance, the United States Court of Appeals for the Ninth Circuit published its panel opinion in *Santa Monica Food Not Bombs v. City of Santa Monica*.²¹¹ The case involved facial challenges to three kinds of city ordinances, regulating street banners, community events in general, and food distribution in public parks and on public streets and sidewalks.²¹² The Ninth Circuit held “that Santa Monica’s Community Events Ordinance is, save a single provision, a content-neutral time, place, and manner restriction that does not violate the First Amendment.”²¹³ It noted, “[o]ne provision of Santa Monica’s administrative interpretation of the ordinance, however, is not constitutionally sound and cannot be enforced. Additionally, the facial challenges to other ordinances either are moot or fail on the merits.”²¹⁴

While other commentators on this case have discussed it briefly in terms of forum closure doctrines,²¹⁵ the present inquiry focuses on the other ordinances, framing them in order to draw a stark contrast with the City of Orlando’s large group feeding ordinance. The Santa Monica City Council adopted its community events ordinance, Santa Monica Municipal Code § 4.68.010, on May 8, 2001, establishing “a permitting process for community events held in public spaces including parks, streets, and

209. *See supra*, note 197 and accompanying text.

210. *E.g.*, BARTELS, *supra* note 63, at 1-28; KRUGMAN, *supra* note 50, at 71-90 (“Chapter Five: The Second Gilded Age”); FRASER, *supra* note 63, at 18-41 (reviewing five books on the first and second Gilded Ages).

211. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006).

212. *See id.* at 1026.

213. *Id.* at 1025.

214. *Id.*

215. *See supra*, note 152.

sidewalks.”²¹⁶ The council amended the ordinance on November 13, 2001, and again on April 22, 2003, with the most recent amendment occurring after the plaintiff-appellants had filed their appeal.²¹⁷ Section 4.68.010 mandated the promulgation of administrative regulations to implement its purposes, and on June 7, 2001, the Santa Monica City Manager issued a mandatory administrative instruction, which was amended three times (twice in 2003 and once in 2005) prior to the Ninth Circuit’s consideration of the appeal.²¹⁸

By itself, the ordinance requires permits for three kinds of community events:

(a) A parade, procession, march or assembly . . . which is to assemble or travel in unison on any public street . . . or other City-designated public way and which either (1) may impede, obstruct, impair or interfere with free use of such . . . or (2) does not comply with normal or usual traffic regulation or controls;

(b) **Any activity or event involving one hundred fifty or more persons** on City owned, controlled, or maintained property not subject to the requirements of subsection (a) of this Section;

(c) Any activity or event on public property which requires the placement of a tent, canopy, or other temporary structure if that placement requires a permit from the City Fire Department or Building and Safety Division.²¹⁹

Subsection (b) is of greatest relevant to food sharing practices, which typically occur within a park because of its existing amenities and/or its space for setting up to and distributing food, sitting, eating and otherwise sharing a meal, cleaning up, etc.²²⁰ Although food sharing also may occur out of the back of an automobile on city streets, or on a city sidewalk, and therefore could implicate subsection (a), this was not the case in Santa Monica.²²¹ The plaintiffs in this case also did not implicate subsection (c), as their food sharing practices did not feature the relevant kind of

216. *Santa Monica Food Not Bombs*, 450 F.3d at 1026.

217. *Id.*

218. *See id.* at 1026-27.

219. *Id.* at 1027 (quoting and citing Santa Monica Municipal Code § 4.68.040) (emphasis added).

220. *See id.* at 1030-31 (describing food sharing practices at issue in Santa Monica); *see also* BUTLER & MCHENRY, *supra* note 8, at 6-24, 36-42 (discussing best practices for food sharing in the view of the founders of Food Not Bombs); MCHENRY, *supra* note 8, at 33-59, 73-82, 117-20 (same).

221. *See Santa Monica Food Not Bombs*, 450 F.3d at 1030.

temporary structures.²²²

The administrative instruction for subsection (b) provided that “any activity or event which the applicant intends to advertise in advance via radio, television and/or widely-distributed print media **shall** be deemed to be an activity or event of 150 or more persons.”²²³ Further, the administrative instruction assigned events to one of three categories, “Category 1, which encompasses non-expressive events, and Categories 2 and 3, which include all expressive events.”²²⁴ As to the different categories, the administrative instruction required different periods of advance application, ranging from two to three business days.²²⁵ Also, the ordinance provided a “spontaneous event exception” for events that “are occasioned by news or affairs coming into public knowledge less than forty-eight hours prior to such event” so long as “such events are conducted on the lawn of City Hall.”²²⁶ Of relevance to this Article, the administrative instruction categorizes “food-related events (e.g., barbecues, cook-offs, picnics, food distribution, food festivals)” within a list of putatively non-expressive Category 1 events.²²⁷

As noted above, the City of Santa Monica’s community events ordinance applies to, “**Any activity or event involving one hundred fifty or more persons** on City owned, controlled, or maintained property not subject to the requirements of subsection (a)[.]”²²⁸ Thus, because most food sharing events would not be subject to subsection (a), the City of Santa Monica would not require a community events permit for a food sharing event involving less than one-hundred fifty (150) people. This numerical threshold is one of the stark contrasts I draw with the City of Orlando’s anti-food sharing ordinance. The Eleventh Circuit *en banc* held constitutional a municipal ordinance requiring a permit for a food sharing event “intended to attract, attracting, or likely to attract twenty-five” or more people, including distributors and servers.²²⁹ In contrast, the Ninth Circuit found a mandatory municipal administrative instruction that pushed below the ordinance’s 150-person threshold not constitutionally sound.²³⁰

222. *Id.*

223. *Id.* at 1027 (citation omitted) (emphasis added).

224. *Id.* (citation omitted).

225. *Id.* at 1027-28.

226. *Id.* at 1028 (citing Santa Monica Municipal Code § 4.68.040(g)).

227. *Id.* at 1027 n.4 (citation omitted).

228. *Id.* at 1027 (quoting and citing Santa Monica Municipal Code § 4.68.040) (emphasis added).

229. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 759, 763 (11th Cir. 2011).

230. *Santa Monica Food Not Bombs*, 450 F.3d at 1025; *see also id.* at 1035-45

Specifically, the court held “that, standing alone, the subsection (b) permit requirement, applicable only to groups of 150 or more, is narrowly tailored to Santa Monica’s governmental interest in allocating use of Santa Monica’s public open space among competing groups of citizens.”²³¹ The court continued, “[t]he related Instruction, however, fatally undermines this narrow tailoring by mandating that ‘any activity or event which the applicant intends to advertise in advance via radio, television and/or widely-distributed print media shall be deemed to be an activity or event of 150 or more persons.’”²³² The Ninth Circuit emphasized, “The ‘shall be deemed’ language of the Instruction, however, precludes reading it as advisory. Instead, the language creates a per se rule, rendering any advertised event a qualifying one *whether or not* 150 or more people actually attend.”²³³ The court concluded, “the Instruction detaches the Events Ordinance from the asserted interest of the City in allocating use of public open space by large groups.”²³⁴ Thus, the mandatory administrative instruction was “not a narrowly tailored time, place, and manner restriction and cannot be enforced.”²³⁵

The Ninth Circuit elaborated the reasoning underlying its holding, in its discussion of subsection (a) of the ordinance, *viz.*, “a narrow tailoring permit requirement must maintain a close relationship between the size of the event and its likelihood of implicating government interests.”²³⁶ Here, the Ninth Circuit agreed with the reasoning of the Sixth Circuit in a 2005 case involving a special events ordinance that regulated conduct on public streets and other public rights of way.²³⁷ There, the special events ordinance applied to all events regardless of size, and the Ninth Circuit approvingly quoted the Sixth Circuit’s observation that “[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring.”²³⁸ It’s important to note that the Ninth Circuit did not determine whether “150 people is the outside limit for a permitting requirement[,]”²³⁹ but it did “caution that a substantially lower

(discussing the court’s reasoning).

231. *Id.* at 1043 (citation omitted).

232. *Id.* (citation omitted).

233. *Id.* (emphasis in original).

234. *Id.* (citation omitted).

235. *Id.*

236. *Id.* at 1040.

237. *See id.* (citing *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005)).

238. *Id.* (citing *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 608).

239. *Id.* at 1043 n.17.

number may well not comport comfortably with the limited government interests at play in public parks and open spaces.”²⁴⁰ As the court explained:

Without a provision limiting the permitting requirements to larger groups, or some other provision tailoring the regulation to events that realistically present *serious* traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks, a permitting ordinance is insufficiently narrowly tailored to withstand time, place, and manner scrutiny.²⁴¹

C. *Food Sharing in the New Gilded Age*

This then, is the state of the food sharing cases. In this Article, I do not delve deeply into their jurisprudence, reserving detailed doctrinal analysis for a subsequent article on this subject.²⁴² Rather, here I merely highlight the different approaches promulgated by two circuits of the United States Courts of Appeals, in hopes that subsequent courts confronted with litigation of an anti-food sharing ordinance will consider both approaches carefully and then eschew the Eleventh Circuit’s view of the matter.

Regarding the size of an assembly, including a food sharing event, which may be lawfully regulated by a municipality, the Ninth Circuit carefully scrutinized the City of Santa Monica’s community events ordinance and found it constitutionally firm and even facially narrowly tailored in regulating events in public parks that involved 150 or more people. Constitutionally infirm because not narrowly tailored, however, was the mandatory administrative instruction, which would require a permit for an event, where the applicant intended to advertise it in advance, irrespective of the actual number of people who attended. While the Ninth Circuit did not determine the constitutionality of a municipal attempt to regulate a gathering of less than 150 people, it agreed with the Sixth Circuit that narrow tailoring under time, place, or manner analysis “must maintain a close relationship between the size of the event and its likelihood of implicating government interests.”²⁴³

240. *Id.*

241. *Id.* at 1039; *see also id.* at 1038 (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (“Some type of permit requirement *may* be justified in the case of large groups, where the burden placed on park facilities and the possibility of interference with other park users is more substantial.”) (emphasis in original).

242. Marc-Tizoc González, *Criminalizing Charity: The Food Sharing Cases* (unpublished manuscript) (on file with author).

243. *Santa Monica*, 450 F.3d at 1040; *see also Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005).

In stark contrast, the Eleventh Circuit *en banc* upheld a municipal ordinance purporting to regulate large group feedings “intended to attract, attracting, or likely to attract twenty-five” or more people, including distributors and servers.²⁴⁴ Beyond the substantial practical difference respecting the size of an assembly within a public park that may constitutionally be regulated by a municipality, a troublingly different reasoning appears to exist, with the Ninth Circuit drawing not only on its own precedent, but also considering seriously the views of the Sixth Circuit. In contrast, the Eleventh Circuit completely failed to consider the views of sister circuits that had deliberated on the critical question of how small of an assembly a city may lawfully regulate. Instead, the Eleventh Circuit putatively relied on two United States Supreme Court cases, *Clark v. Community for Creative Non-Violence* (1984),²⁴⁵ and *United States v. O’Brien* (1968),²⁴⁶ but its analysis under these cases was limited at best.

For the Eleventh Circuit, the City of Orlando’s large group feeding “ordinance, as applied to Orlando Food Not Bombs, [was] a reasonable time, place, or manner restriction” because “Orlando Food Not Bombs can obtain two permits a year for each of the 42 parks in the Greater Downtown Parks District” and the “ordinance places no restrictions on the number of large group feedings Orlando Food Not Bombs can sponsor at any of the other 66 parks located outside the Greater Downtown Parks District.”²⁴⁷ Under the court’s view, Orlando Food Not Bombs did not contend that the ordinance was content based, and it left open ample channels of communication in that Orlando Food Not Bombs was free to conduct other expressive activities at Lake Eola Park, so long as they did not involve food sharing.²⁴⁸ Moreover, the ordinance “also narrowly furthers the substantial interest of the City in managing its parks and ‘being fair to individual neighborhoods’ by spreading the burden of the large group feedings.”²⁴⁹ Finally, despite asserting that it assumed that food sharing constitutes expressive conduct, the Eleventh Circuit held that the ordinance was “a valid regulation of expressive conduct that satisfies all four requirements of O’Brien[.]”²⁵⁰ As noted, I reserve detailed analysis for the Eleventh Circuit’s jurisprudence for a subsequent article, but here I remark that the

244. *See supra* note 157 and accompanying text.

245. 468 U.S. 288 (1984).

246. 391 U.S. 367 (1968).

247. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 761 (11th Cir. 2011).

248. *See id.* at 762.

249. *Id.* (no citation).

250. *Id.* (citation omitted).

court's analysis of these factors comprised only the remainder of the single paragraph in which it asserted its conclusion.²⁵¹ Moreover, despite invoking the constitutional fact doctrine in order to invoke *de novo* review power of "the core constitutional facts" in contrast to "historical facts, which are measured only for clear error[.]"²⁵² the Eleventh Circuit cited to no evidence of record in its analysis of the *O'Brien* factors.²⁵³ Indeed, one of the three law review commentaries to substantively address *First Vagabonds Church of God*, focuses its analysis on the Eleventh Circuit's "misuse of the constitutional fact doctrine."²⁵⁴ Under Pappas's critique, "the Eleventh Circuit decided for itself, without explanation, that ameliorating overuse in this manner [by enacting the large group feeding ordinance] constituted a substantial interest of the City."²⁵⁵ In marked contrast, "the district court . . . found that the facially content-neutral regulation, which placed a burden on free speech, failed to serve a single interest asserted by the city."²⁵⁶ Thus, Pappas concludes that the "Eleventh Circuit's contradictory finding—that the Ordinance's purported interest in ameliorating overuse of the park system was indeed substantial—was totally outcome-determinative;"²⁵⁷ further, it was without a basis in record evidence.

The result reached by the Eleventh Circuit is particularly troubling because beyond the relatively small size of a public assembly that it allowed to be regulated (criminalized) under the color of the United States Constitution, the contrast with *Santa Monica Food Not Bombs* is even more stark because the Ninth Circuit did not even consider whether food sharing constitutes expressive conduct.²⁵⁸ Rather, because *Santa Monica Food Not Bombs* constituted a facial challenge to the City of Santa Monica ordinances, the court accepted the administrative instruction's categorization of food distribution and other food-related events as non-expressive although it did note that this result might well be different in an as applied challenge.²⁵⁹ In contrast, the Eleventh Circuit assumed, "without

251. *See id.*

252. *Id.* at 760.

253. *See id.* at 762. *See also* Pappas, *supra* note 150, at 1127-34 (critiquing the Eleventh Circuit's application of the constitutional-fact doctrine).

254. Pappas, *supra* note 150, at 1127.

255. *Id.* at 1134 (citation omitted).

256. *Id.* (citation omitted).

257. *Id.* at 1134-35.

258. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006) ("Food Not Bombs does not argue that food distribution is on its face an expressive activity.") (citation omitted).

259. *Id.* ("Whether food distribution can be expressive activity protected by the First

deciding, that this conduct [food sharing] is expressive and entitled to some protection under the first amendment.”²⁶⁰ As explained above, however, “some protection” turned out to be none, under the Eleventh Circuit’s “creative” application of the constitutional-fact doctrine and its conclusory analysis under the *O’Brien* test, which lacked any identified basis in the record evidence, despite rejecting the District Court’s actual findings of fact.²⁶¹

This then is the state of food sharing under color of law in the New Gilded Age. Seemingly heedless, yet actually quite conscious, of the evolving political economy, e.g., the City of Orlando’s dynamic growth and substantial demographic change in its downtown population, United States cities are enacting ordinances that regulate, under threat of criminal punishment, sharing food with hungry people in public properties, like parks, sidewalks, and streets. Jurisprudence on the anti-food sharing ordinances, however, is not settled.²⁶² In the Ninth Circuit, *Santa Monica Food Not Bombs* provides that food sharing may, or may not, constitute expressive conduct, but to determine so requires an as applied challenge. Even if not expressive conduct, however, where people conduct food sharing within a traditional public forum like a city park, sidewalk, or street, time, place, manner restrictions must still be narrowly tailored to the significant governmental interest asserted by a municipality as its reason for requiring a system of advance permitting. Moreover, the Ninth Circuit agrees with the Sixth Circuit that narrow tailoring requires a “close relationship” between the ordinance and the size of the assembly to be regulated, in order to justify a governmental entity’s time, place, or manner restriction beyond “ordinary” use of such publicly owned property. In the Eleventh Circuit, however, despite being assumed to constitute expressive conduct and hence entitled to some First Amendment protection, for now cities may regulate groups as small as twenty-five people, in parks located within a two-mile radius zone around city hall, and cities may limit permits to any particular person, group, or organization to no more than two permits per individual, group, or organization, per park, within a twelve month period.

Amendment under particular circumstances is a question to be decided in an as-applied challenged, should one be brought.”) (citations omitted).

260. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 760 (11th Cir. 2011) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

261. *See supra* notes 250-57 and accompanying text. Due to limitations of time and space, I will forego for now discussion of subsequent food sharing cases that have been adjudicated by various federal district courts. *But see* González, *supra* note 242.

262. *Accord* Vogel, *supra* note 149, at 550.

Future litigation will demonstrate which view will prevail, and in light of subsequent district court litigation, as well as recent news reports about other cities' new promulgation or enforcement of anti-food sharing ordinances,²⁶³ the coming decade could very well demonstrate whether constitutional protections will abet or check hunger in the New Gilded Age.

CONCLUSION

In this Article, I have discussed sociolegal issues of hunger, poverty, and the criminalization of food sharing in the years leading up to, during, and after the Great Recession, a period that the symposium organizers ask us to recognize as the New Gilded Age. In Part I, I took seriously the symposium framing, first by critiquing the symposium image that foregrounded a racially White, apparently middle-aged and homeless man. I asked symposium readers to beware the conflation of impoverished people today with the arguably stereotypical image of a homeless White man standing near a shopping cart. I also urged an appreciation for the demographic diversity of homeless people in the United States, as well as that of other people who contend with poverty in America today. Finally, I argued that sociolegal scholars, and others interested in the symposium theme, should "study up," looking for the power elite and their politico agents (servants) who arguably bear most responsibility for strategically creating the sociolegal conditions theorized by critical sociolegal scholars under concepts of *kulturkampf* for the "Old Deal."

Next, I asked repeatedly, "What was gilt?" of the first Gilded Age, suggesting answers from a review of the contests between radical Reconstruction and white supremacy, the struggles to promote and to destroy interracial labor Populism, and the anti-Asian exclusion and imperialism that undergirded the late nineteenth century industrialization and nationalism of the United States, which some recent revisionist histories of the first Gilded Age arguably elide or obscure. I asked these questions both to contextualize the first Gilded Age in a multidimensional analysis, as well as to suggest how such questions may prove critical to understanding the New Gilded Age. I ended Part I by introducing Neil Smith's interpretation of late nineteenth century revanchism in France, as a basis for his theorizing gentrification in late twentieth century United States

263. See, e.g., NAT'L COAL. FOR THE HOMELESSNESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE (2014), available at <http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf> [hereinafter SHARE NO MORE]; Lizette Alvarez & Frances Robles, *Florida Finds Tricky Balance Over Feeding of the Homeless*, N.Y. TIMES (Nov. 14, 2014), available at <http://www.nytimes.com/2014/11/13/us/florida-finds-tricky-balance-over-feeding-of-the-homeless.html>.

cities, in particular how the ideologies of gentrification evolved into what he called the revanchist city.

In Part II, I introduced the split between two circuits of the United States Courts of Appeals regarding what I call the food sharing cases, detailing the salient facts of *First Vagabonds Church of God* and *Santa Monica Food Not Bombs*, and glossing some of their jurisprudence. Drawing upon the limited scholarly commentary on these cases, I summarized the practical, as well doctrinal, differences of their reasoning and results.

In this Conclusion, I braid together my earlier arguments to explain why I conclude that the food sharing cases should be understood within the context of the New Gilded Age, as well as Smith's conceptualization of the revanchist city. First, as to the idea of a New Gilded Age, other commentators have detailed the extraordinary growth in income and wealth inequality in the United States over the past forty-or-so years.²⁶⁴ In the Introduction, I noted the growth of poverty and hunger in the United States following the Great Recession of 2007-09 and referenced the social class conceptualized by C. Wright Mills, as the power elite.²⁶⁵ In Part I, I continued to use the sociological concept of the power elite and noted my agreement with Laura Nader's exhortation for anthropology to "study up."²⁶⁶ I also mentioned Francisco Valdes's theorization of *kulturkampf* and the goal of culture warriors to resurrect "the Old Deal."²⁶⁷ I counterpoised these ideas with Matthew Josephson's histories of the "Gilded Age of the Robber Barons and the Politicos"²⁶⁸ and ended that Part by introducing Neil Smith's theorization of revanchism.²⁶⁹

For Smith, "the revanchist city" appeared to be a competing ideology to "gentrification."²⁷⁰ As he compared them, "If gentrification had spearheaded a certain middle-class optimism about the city, the end of the 1980s boom, the crystallized effects of a decade of deregulation, privatization and emerging cuts in welfare and social services budgets rewrote the urban future as one of gloom, not boom."²⁷¹ He elaborated that:

264. See, e.g., KRUGMAN, *supra* note 50, at 73-82 (discussing the changes in mean and median family income from 1947 to 2005, contrasting it with the changes in mean incomes for the top one percent of the population from 1947 to 2005, and explaining why the rich became so much richer).

265. See Mills, *supra* note 10, at 4.

266. See *supra* notes 51-58 and accompanying text.

267. See Valdes, *supra* note 16.

268. See JOSEPHSON, *supra* note 64, at vi.

269. See *supra* notes 138-46 and accompanying text.

270. See SMITH, *supra* note 12, at 45.

271. *Id.* at 44 (citation omitted).

severe economic crisis and governmental retraction were emulsified by a visceral reaction in the public discourse against the liberalism of the post-1960s period and an all-out attack on the social policy structure that emanated from the New Deal and the immediate postwar era. *Revenge against minorities, the working class, women, environmental legislation, gays and lesbians, and immigrants became the increasingly common denominator of public discourse.*²⁷²

Applying this view to the pre-Recession political economy, its crash into the Great Recession, and the aftermath, what most troubles me about the food sharing cases is how they color with law the reactionary politics of the revanchist city.

Recall why the City of Orlando apparently enacted its “large group” feeding ordinance. After four years of what Commissioner Stuart (who wrote a letter opposing and voted against the ordinance) represented as a period of dynamic growth (2002-06), including substantial population growth for downtown Orlando, Commissioner Sheehan, who was elected to represent the downtown district on city council, received an undisclosed number of unverified complaints about the food sharing events that Orlando Food Not Bombs and the First Vagabonds Church of God had started organizing in downtown Orlando parks in 2005. Responding to an apparently small number of complaints, Commissioner Sheehan sponsored Orlando’s anti-food sharing ordinance, which expressly targeted “the large groups of homeless” for removal from downtown Orlando. These were boom years, and the record is unclear as to whether the complaints derived from new residents (the gentry in gentrification), or from long-established downtown property owners. Mayor Dyer, however, noted the apparent influence of the Orlando Chamber of Commerce. Despite overwhelming public opposition to the proposed ordinance (twenty one against, versus eight in favor at its first read, and forty-three opposed, versus nine in favor at the second reading), the council voted 5-2 to enact it.²⁷³

While some readers might find this result to simply reflect the regular rough and tumble of local politics, or perhaps interpret it as a “natural” or “logical” evolution in the preferred uses of downtown parks in a period of “dynamic growth,” for me, contextualizing the anti-food sharing ordinances within the New Gilded Age and in light of ideas about the revanchist city, Orlando’s large group feeding ordinance feels deeply troubling, for it colors with law the enacting of revenge against hungry

272. *Id.* (emphasis added).

273. *See supra* notes 179-91 and accompanying text.

people (whether homeless or otherwise impoverished)²⁷⁴ at a time of boom, indeed in a period comparable to the Roaring Twenties or the first Gilded Age, which Commissioner Stuart characterized as featuring a new “chasm between the ‘haves’ and ‘have nots,’” of downtown Orlando.²⁷⁵

While beyond the scope of this Article, numerous sociolegal scholars have theorized the criminalization of homelessness and other conditions of poverty,²⁷⁶ the privatization of public space,²⁷⁷ and the seemingly new, yet disturbingly old, matrices of laws and law enforcement practices that effectively banish certain groups of people from particular parts of the city.²⁷⁸ As to food sharing, this trend began before the Great Recession, but it has continued, perhaps even accelerating,²⁷⁹ in exactly the period when one might hope that cities would act to help, rather than hinder, residents who are willing and able to organize themselves, and their limited resources, to share food with people who are hungry in city parks and other public spaces of “the urban commons.”²⁸⁰ In a period of rampant hunger,

274. Cf. BUTLER & MCHENRY, *supra* note 8, at 2 (discussing the demographics of the hungry and noting that “less than 15% of the hungry are homeless”).

275. See Stuart Letter, *supra* note 179, at 1.

276. See, e.g., Randall Amster, *Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness*, 30 SOC. JUST. 195 (2003); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Hanafin, *supra* note 38; Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.-L. L. REV. AMICUS *1 (2011); David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL’Y REV. 487 (1994); Loïc Wacquant, *The Penalisation of Poverty and the Rise of Neoliberalism*, 9 EUROPEAN J. CRIM. POL’Y & RESEARCH 401 (2001); and Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991). See generally NICHOLAS BLOMLEY, *RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW* (2011); ANASTASIA LOUKAITOU-SIDERIS & RENIA EHRENFUECHT, *SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE* (2009); JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (2011); and LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

277. E.g., MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* (2004); Audrey G. McFarlane, *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 1 (2003).

278. See KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* (2010). See also Harry Simon, *Towns without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TULANE L. REV. 631 (1994).

279. See SHARE NO MORE, *supra* note 263 at 4 (“In 2013-2014, 12 cities passed food-sharing laws that required individuals or groups to obtain a permit to distribute food on public property.”).

280. See generally Sheila R. Foster, *Collective Action and the Urban Commons*, 87

poverty, and other sociolegal conditions of inequality, the anti-food sharing ordinances criminalize a radical practice of human solidarity—publicly sharing food with people who hunger.

Much scholarly work remains to be done, in terms of doctrinal analysis, as well as theoretically and empirically, in order to understand comprehensively and to intervene effectively against the national proliferation of anti-food sharing ordinances.²⁸¹ This Article provides one of the first efforts to do so within a law review, and I look forward in coming months and years to collaborating with other sociolegal scholars, and activists, who like me are concerned about not only mitigating hunger, poverty, and the criminalization of food sharing in the New Gilded Age, but also in abolishing the sociolegal conditions promised by its Old Deal.

NOTRE DAME L. REV. 57 (2011).

281. See *SHARE NO MORE*, *supra* note at 5 (depicting a map of the United States showing anti-food sharing ordinances in fifty-seven cities across twenty-five states).