



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty Scholarship

3-30-2020

Lumping, Fairness, and Single People

Michael C. Pollack

Benjamin N. Cardozo School of Law, michael.pollack@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Michael C. Pollack, *Lumping, Fairness, and Single People*, 2020 U. Chi. L. Rev. Online 27 (2020).
<https://larc.cardozo.yu.edu/faculty-articles/519>

This Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

LUMPING, FAIRNESS, AND SINGLE PEOPLE

by Michael C. Pollack

A popular tweet (popular to a certain segment of folks roughly 250,000 strong, at least) chants, “Who are we? Single young professionals. What do we want? For perishable groceries to be sold in smaller portion sizes.” I cannot count the number of times I have stood in front of a wall of bagged salad greens at the market wishing one of three things: that lettuce lasted longer before it spoiled, that I had people at home with whom I could share such a large quantity of lettuce, or that the purveyors of lettuce sold their product in smaller quantities.

Each of the single young professionals with whom I regularly speak has told me some version of the same story. Many of the older single people I’ve asked echo the sentiment. Some of us have considered establishing a salad-sharing startup (Uber but for arugula?) but somehow have never gotten around to it.

Of course, the nation’s lettuce packagers are not *trying* to exclude or demean single people, let alone make them feel like their groceries are sending them a not-so-subtle message. Rather, it is likely more efficient to sell bagged salad greens in a fixed, small number of quantities, and it is only natural for the packager to choose those quantities which will sell the best. The packaging necessary for single-serve greens would also no doubt be quite wasteful (though the reduction in food waste might offer some degree of mitigation). In the language of Lee Fennell’s thoughtful and eye-opening book, *Slices and Lumps*, market forces like these prompt sellers to standardize the lumps of goods they sell, and here the market has evidently revealed that salad is best sold in lumps larger than what a single person might prefer or might be able to consume himself.

But, of course, just because a certain set of lumps is efficient does not mean that nobody’s welfare could be improved with a different or additional arrangement. It just means that that improvement would come at a cost to someone else. Choosing efficiency—and choosing among various efficient outcomes where multiple equilibria exist—means choosing whose costs to take into account and whose costs to ignore. Sometimes it even means choosing to recognize certain costs as costs and to ignore others.

This essay explores the distributional impact that three forms of lumping have on single people without children: seat-assignment and seat-bargaining on public transportation, work-hour allocation, and single-family zoning. The first two involve lumps pursued by individuals outside of any legal regime; the last involves lumping by law. In all three, I submit, we tend to choose to devalue—or perhaps do not even perceive—the costs faced by the single person, and to assign relatively juiced-up

value to the costs faced by those with families. The result in these arenas is that both society and law routinely externalize (hidden) costs onto single people and call the outcome both efficient and just when it might in fact be anything but.

But things need not be this way. After using the helpful language of lumping and slicing to frame the phenomenon and the efficiency that (arguably) might call for shifting costs to the single person in these three contexts, this essay draws on some of the slicing lessons in Fennell's book to propose solutions that could achieve both true efficiency and greater fairness for the singleton. And while the distributional inequities faced by single people might not be the most urgent in our society today, they touch the lives of many Americans and ought to prompt further reflection and creativity about how to accommodate all those who bear the burdens of society's efficiencies.

I. Non-Legal Lumping and Single People

Imagine a long-distance train with two seats on either side of a center aisle. Adam is sitting in the left-side window seat. The aisle seat next to him is empty. Across the aisle, Brenda is sitting in the right-side window seat. The aisle seat next to her is empty. Adam and Brenda have each settled into their seat areas with their laptops, iPads, books, lunches, and the like. Each is single and childless, and each is traveling alone.

About two hours into the trip, Clara and her five-year-old daughter Diane board the train at an intermediate stop. As they walk the aisle, they see a number of empty seats but none that are paired as a set of two on the same side of the aisle. By the time they get to Adam and Brenda, they've concluded that their search is hopeless. So Clara turns to Brenda and asks if she would please move next to Adam so that Clara and Diane can sit together as a family.

This scenario should be familiar to anyone who has traveled by train, plane, or bus. Clara and Diane do not simply want two seats—there are plenty of empty seats on the train—but they want two seats *together*. In the language of Fennell's book, their demand is lumpy: two single seats alone are almost as worthless to them as no seats at all. But the train operator does not provide the option of purchasing that lump as a lump. Instead, it sells slices of single seats and leaves it to customers to assemble the lumps they need when they board.

Clara and Diane are thus in a very real bind. After all, like the single person who cannot buy lettuce in the quantity he desires because of the seller's chunky menu, Clara and Diane cannot purchase the ticket block they want because of the seller's sliced menu.

But what happens next? Brenda will almost certainly accede to Clara's request and move, for a few reasons. First, doing so results in a purportedly efficient seat

allocation. On the surface, at least, it seems that Brenda should be indifferent between staying in the seat in which she is already seated—now with Clara or Diane next to her—or moving to the aisle seat next to Adam. Viewed in isolation, moving thus would not reduce her utility at all. Meanwhile, Clara and Diane’s utilities would be increased substantially by Brenda ceding the territory and permitting them to assemble the lump they want. Moving therefore seems at most Pareto efficient or at least Kaldor-Hicks efficient. Second, social pressure reinforces this apparent efficiency. As Brenda weighs her options, she is likely to see the judgmental stares of other passengers, to say nothing of young Diane’s silently pleading face. (There is in fact social-science research suggesting that single people are the targets of underappreciated negative stereotypes and “are assumed to be immature, maladjusted, and self-centered,” so those judgmental stares are not unlikely.) It would take an exceptionally hard heart—or exceptional fortitude, depending on your perspective—for her to stand firm, knowing that doing so would earn her the scorn of fellow passengers and that she wouldn’t even be able to defend herself with an argument from efficiency.

So all is well, it seems. An efficient seat allocation is reached and a lump is assembled by Clara and Diane without much outside intervention. But we’ve ignored some facts about Brenda. First, she was hard at work with all of her devices and documents set up where she needed them. Perhaps Brenda chose that window seat because she likes window seats more than aisle seats. Perhaps she finds Adam to be an unwelcome prospective seat partner for any number of reasons. The point is that perhaps Brenda is not truly indifferent between the two seats—just in ways that may not be readily apparent to those around her. Or perhaps she was once indifferent when she boarded the train but is not indifferent any longer because she has invested, so to speak, in the seat she selected initially. (One might say she assembled her own lump of resources and that Clara and Diane are now asking her to slice that lump, find replacement parts, and reassemble it elsewhere—and to incur the costs of doing so.) Either way, moving *does* impose a cost on her, albeit one that Clara and Diane and the other passengers are unlikely to perceive or to rank as especially meaningful.

Second, imagine that Brenda—being single and childless—is not only traveling alone on this trip but is a frequent solitary train traveler, traveling once a week for a number of assorted reasons. And each and every time, the same scenario occurs. By the tenth or twelfth time, Brenda is probably getting fed up being the accommodator. (Let me say from experience: She is.) That is, although people with families also travel alone from time to time, they at least find themselves on the other end of the bargain, too. A single person like Brenda, by contrast, only ever finds herself on the accommodating side—at least within any reasonable time horizon. So the emotional cost of moving likely rises for Brenda each time as her

sense of being put upon without reciprocation grows. At some point, it might even outweigh the cost to Clara and Diane of having to sit across the aisle from one another.

Of course, if Brenda encountered the same Clara and Diane each time, perhaps they could work out some sort of mutually beneficial arrangement. But one week it's Clara and Diane, and the next it's Mark and Tim, and the next it's Elaine and Jeff, and so on. So from the perspective of the family and the other passengers, each time they encounter Brenda is the first and only time. The argument that they should account for Brenda's past experiences—experiences in which they had no hand—is accordingly weaker. Moreover, Brenda's resistance will thus appear to them less like that of someone whose goodwill has been eroded after repeated requests and instead like simple insensitivity and needless rigidity.

The point is that Clara and Diane—and every other family that comes after them—want to assemble a lump of seats, and they can point to efficiency and social norms in support of their request. But assembling that lump is not without costs, and many of those costs are naturally hidden or underappreciated (both because of convention and because of the absence of bilateral iteration between the parties). As a result, it is difficult to confidently say that assembling the lump is in fact always efficient. In addition, it is almost always going to be the solitary traveler—particularly, for the reasons discussed above, the one who is single and childless—rather than the family who bears those costs.

Fortunately, it would not be too difficult to allow the family to achieve the seat assembly they need while making them internalize the costs of that lumpy need, rather than allowing them to externalize all of those costs onto the single person (or momentarily solitary traveler, for that matter). Like other scenarios explored in Fennell's book, the solution lies in the familiar practice of eminent domain. When government needs to assemble multiple pieces of land in order for a public project to succeed, it can break the power of holdouts by coercively taking the necessary pieces of land, so long as it pays the owners just compensation for the land taken. The idea here would be to enable Clara and Diane to exercise a modified form of eminent domain with respect to Brenda's seat.

Here's how it would work. When a customer buys multiple train tickets, she would be asked at that time if she would like to purchase an additional "lumping right": For an extra fee paid to the train operator, the customer's ticket would come with a "lumping card." That card would entitle the customer to displace without any negotiation anyone riding alone if doing so enabled the necessary seat assembly and if there were other single seats available for the single rider to move to. The displaced singleton, in turn, would be able to take that lumping card to the café car, where she could redeem it for a free drink. In essence, the displacing family would

be coercively taking the seat while compensating the singleton for her loss. And the train operator would serve the role of the background legal system that empowers the taker and facilitates the taking. To borrow from Guido Calabresi and Douglas Melamed, the regime would transform the singleton's seat right from one protected by a (nonabsolute) property rule to one protected by a liability rule, which permits efficient breach of the singleton's entitlement.

Of course, any family can already volunteer to buy the singleton a drink without this regime in place. And any singleton can demand the drink in exchange for yielding the seat. But there are significant transaction costs under that ad hoc approach: norms, pressure, power imbalance, lack of repeat play, and more all make that bargain unlikely to occur in a way that leaves everyone satisfied with much frequency in the absence of the formal regime I've laid out. Moreover, this regime brings additional benefits. First, by putting a fixed price on the lumping right ex ante, it avoids the need for haggling in the moment and instead prompts the family to more carefully consider in advance just how much it values its lumpy need. Perhaps the price would lead some families to conclude that they can risk sitting apart after all. Second, it would communicate that there are, in fact, costs to the singleton that one may not perceive. It would thus make the singleton feel more acknowledged. Third, the existence of the regime would alleviate at least some of the social pressure on the singleton in a case where the family requests the seat without having purchased a lumping card—which, of course, may continue to happen for some time. Thus empowered, more singletons might say no, which would funnel more families into participating in the system next time around and contribute to solidifying a new norm.

Such a system would also be superior to a few alternative methods of addressing this distributional problem. One might be to mark off a dedicated “family-free” car on the train. Many trains already have “quiet” cars which, in addition to prohibiting loud conversations in general, effectively serve this function already because few families with children are interested in this particular amenity. The problem with a “family-free” car is that it is, ironically, too lumpy a solution. Any mismatch between the number of singletons seeking that protection and the number of seats in the “family-free” car means there will either be singletons left to the uncompensated status quo in the other cars, or an excess supply of seats in the “family-free” car left inefficiently unused. Another option would be for the train operator to automatically lump seats bought together, or at least to do so with respect to those where the purchaser indicates the seats will be occupied by a family wishing to sit together. This is likewise too lumpy a solution—particularly on long-distance trains where the same seats are not occupied by the same people for the entire journey. Yet again, seats would remain inefficiently unused, say, between Stop 1 and Stop 4 if a family had claimed a lump starting at Stop 5 and a handful of

singletons needed seats between Stop 1 and Stop 7. Moreover, the costs of accommodating would continue to fall on the singletons who have to navigate around claimed lumps of seats (even empty ones) in order to find a seat they can occupy. One final option would be to offer the singleton the right to buy, at the time of booking, an absolute property entitlement to her seat. The problem with this solution is that the singleton *already* has a superior claim on the seat she occupies simply by virtue of having been there first. Remember that this scenario only arises where a family attempts to displace a singleton already in her seat. Requiring the singleton to pay extra to protect that entitlement therefore adds insult to injury and only deepens the distributional problem at issue here.

This compensation-based approach could also be adapted to another context in which single and childless people often feel put-upon by the lumpy allocational demands of their family-minded coworkers: the workplace. And this is an area in which, unlike the train seats, the solitary travelers with families elsewhere are not even temporarily similarly situated to the single people. I should say at the start that there are a number of reasons why applying such a solution here might raise more normative and distributional concerns than on the train, but it is worth playing out. Begin with the premise that it is not uncommon for managers and coworkers to assign greater value to the personal life and personal time of an employee with a family and children than to that of the single employee who, say, wishes to leave work early to attend his favorite band's concert (as opposed to his child's recital). For example, Ed Rendell, then-Governor of Pennsylvania, once famously said that Janet Napolitano was a "perfect" choice to be President Obama's Secretary of Homeland Security because she had "no family," and therefore "no life," and could accordingly be expected to devote "19-20 hours a day" to her job. But a single person need not even have an employer with that attitude to be treated differently than his colleagues with families. Some crucial workplace benefits—family leave, for example, or education reimbursements for employees' children—*inherently* privilege employees with families because they are, by definition, unavailable to single employees.

When work needs to be done, then, it can often fall to the single person to cover for the employee with a family. (Mary Anne Case makes the compelling argument that there is also a gender imbalance at play here and that it is often the *female* single person who is most burdened.) Put in the language of Fennell's book, the employee with a family is often able to assemble or reallocate lumps of personal time with more employer cooperation than the single person is, and the single person often bears at least some of the costs of that reallocating. This generates resentment and strife, and fails to acknowledge the full personhood and autonomy of the singleton.

The solution would be for the employer to shift back to the employee with a family the cost of reallocating the single person's time off (the time here being the analogy

to the seat in the train example). How? By taking at least some portion of the *requesting employee's* wages and using it to pay the single person for some or all of the inconvenience associated with reallocating her work time. (A Japanese company has evidently pursued a spin on this idea, though in concert with a number of other policies about which I remain somewhat skeptical.) Just as with the train example, the initial problem could be framed as arising from the fact that the employee with a family perceives his interests (here, in particular lumps of time) to be more valuable than those of the singleton, so it strikes the former as efficient to have the singleton yield and thereby enable him to satisfy his lumpy need. Other employees and the employer itself might be inclined to agree. But interests of the employee with a family are not necessarily weightier than the singleton's, so what appears to others to be efficient is instead the externalizing of costs onto the single person without any accounting for those costs. Requiring the employee with the family to instead internalize that cost by paying the singleton for her flexibility is efficient, it disciplines that employee from making an inefficiently large number of demands for time reallocations, and it communicates greater respect for the singleton's life.

More generously, one might say that the employee with a family is not advancing his own selfish interests, but those of his child in having his or her parents be present and available caregivers. Framed in those terms, one might feel that the singleton's interests truly are worth less than the parent and child's combined interests. But even so, the parent and child are still generating burdens for the single employee. Satisfying their demands may be efficient, but it is in precisely that context where a liability rule requiring compensation can do the most good: recognize the singleton's entitlement, but permit efficient breach of that entitlement with appropriate compensation for the harm imposed.

II. Legal Lumping and Single People

From time to time, the law *itself* makes lumpy demands that disproportionately impose costs on single people. One example is zoning rules that impose minimum lot sizes and maximum densities. These are common throughout the country, and their combined effect is to require that any residence simultaneously not occupy too *little* space and not house too *many* people. So, a four-bedroom, four-bathroom single-family home on a half-acre of land will be permitted. A small one-bedroom, one-bathroom home on an eighth of an acre of land will not be permitted; the lot is too small. And a four-unit condominium development on a half-acre of land will also not be permitted; it is too dense. The result is a typical suburb: white picket fences, manicured lawns, a family with two children and a dog, and so on. But these zoning rules are not only the province of the Pleasantvilles of the country. In cities like Minneapolis, Los Angeles, Portland, Seattle, and Charlotte, upwards of 70 percent of land is zoned for detached single-family homes. As the New York Times

estimates, “[i]t is illegal on 75 percent of the residential land in many American cities to build anything other than a detached single-family home.”

There is much about single-family zoning that is problematic. Perhaps most significantly, minimum lot sizes ensure that each lot has a minimum price, and maximum density rules ensure that the purchaser will not be able to slice that lot and share it (and the cost) with other people. Together, these rules thus impose a de facto entrance fee for membership in a community and exclude those who cannot afford to buy the lot without sharing it. In so doing, they contribute to the lack of affordable housing nationwide, deepen residential segregation (along racial lines where race and wealth are intertwined), exacerbate differences in educational attainment (because school districts are typically drawn spatially), create sprawl which hastens climate change (by, among other things, lengthening commutes), and more. These are among the reasons why states like Oregon and cities like Minneapolis have recently ended the practice, and why other states like California are considering doing so too.

And while we shouldn’t need more reasons to limit these rules, here’s another one: single-family zoning burdens individuals who do not live with a family in order to protect and privilege the lifestyles of those who do. These laws require that homes be sold in lumps made for, say, four people—and they sometimes expressly prohibit slicing that lump among unrelated people—so someone who wants to buy just one-fourth of a lot to build a house one-fourth the size cannot do it. Just like the bags of lettuce, there is no option on offer that is right-sized for a single person. The single person therefore faces the Hobson’s choice of buying a house that is too big and therefore more expensive than necessary to meet their needs, or not buying a house at all in that area. The former creates a windfall for the seller but drains the buyer’s money from all other productive uses, and it wastes resources (think of the energy needed to heat three unused bedrooms) for which the buyer will have to pay. The latter denies the single person a measure of autonomy, excludes her from a community in which she wishes to live, contributes to overcrowding in the handful of areas where right-sized options do exist, and, because most of the right-sized options are likely to be rentals, relegates her to a status that is treated less favorably by the federal tax code and that deprives her of access to a valuable investment vehicle. (Of course, some people prefer to rent, but ending single-family zoning would increase density and thus expand the supply of rental housing too.)

To be sure, this set of costs is offset by some benefits. There are absolutely people who benefit from the menu being limited: the Claras and Dianes of the world. They get a quieter street on which to live, a less burdened school system to attend, and higher property values for the home that is already the optimal size for them—all values to which the Supreme Court has gestured when upholding zoning ordinances that restrict the number of unrelated people who can live together in a single-family

home. Perhaps one might consider, in line with my proposals in the travel and workplace contexts, requiring those beneficiaries to account for those benefits, either by subsidizing Brenda when she wishes to buy a house but is limited to homes too large for her or by subsidizing Brenda's housing in a different neighborhood entirely. But here, doing so would simply pile legal regime atop legal regime when the simpler answer would be to recognize this dynamic and remove the artificial legal lumping rules that distort the market in the first place. That is, in contrast to the lettuce and the train and the workplace, here, it's the law rather than market forces or circumstances that makes the lumpy demand. Satisfying that demand is therefore even less likely to be efficient, and it is distributionally unsound to boot.

Conclusion

Whether assembling a lump leads to some efficiency or not, lumps invariably come with costs, and the incidence of those costs cannot be overlooked. When they are internalized by the assembler, the expectation is that he will only create the lump when its benefits outweigh those costs. But when those costs are borne by others, or shifted to others, the assembler will create the lump too frequently and too cavalierly. This piece has shed light on a few areas of law and life in which assembling a lump consistently imposes underappreciated costs on single people without children. Where law is to blame, law should get out of the way. And where society and norms are at fault, we might consider private economic regimes modeled along the lines of eminent domain that would shift the costs of lumping to those making the lumpy demands.

Michael C. Pollack is an Assistant Professor of Law at the Benjamin N. Cardozo School of Law. The author wishes to thank Christopher Buccafusco, Marie-Amélie George, Hiba Hafiz, Michael Herz, Stewart Sterk, Lior Strahilevitz, Samuel Weinstein, and all of the participants at the Slices & Lumps Symposium for engaging comments and conversations.