

# CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

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Scholarship for Social Justice

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City University of New York School of Law  
2 Court Square  
Long Island City, New York 11101

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## COLLABORATING ACROSS THE WALLS: A COMMUNITY APPROACH TO PAROLE JUSTICE

*Michelle Lewin and Nora Carroll*†

“In developing a close friendship with a [parole] applicant incarcerated for more than 25 years, I have felt my heart expand, my notions of empathy stretched, and my understanding of the idea of fairness completely shift.”

—Aseem Mehta

Parole Preparation Project volunteer

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† Michelle Lewin is a recent graduate of CUNY School of Law and a newly admitted attorney in New York State. Born and raised in Atlanta, Michelle has been active in prison abolition and racial justice work since 2005. Prior to law school, she worked for the Fortune Society in their Alternatives to Incarceration program, and during her first year of law school, she co-founded the Parole Preparation Project of the National Lawyers Guild. She is now the first and only full-time staff person of the Project, training hundreds of volunteers and working alongside people serving life sentences in New York State prisons in their struggle for parole release. Michelle believes strongly in movements for collective liberation that prioritize collaboration and grassroots leadership.

Nora Carroll is a public defender, National Lawyers Guild member and co-founder of the Parole Preparation Project. Nora is a 2009 graduate of Northeastern University School of Law in Boston and she worked for over three years defending accused parole violators at the Rikers Island jail complex as part of The Legal Aid Society's Parole Revocation Defense Unit. Since then she has been working at Legal Aid's trial office in Brooklyn. Nora participated in the convening of the Mass Incarceration Committee of the National Lawyers Guild following the 2012 NLG Convention in Philadelphia, and worked on the pilot project that became the Parole Preparation Project in 2013-2014.

The authors wish to acknowledge the following people for their input and deeply-valued feedback on this article: Andrea Yacka-Bible, Mujahid Farid, Laura Whitehorn, David Putland, Chas Ransom, members of the Otisville Correctional Facility Lifers and Longtermers Organization, Alan Rosenthal, and Scott Paltrowitz. We also wish to thank the New York City Chapter of the National Lawyers Guild for their on-going institutional support; the North Star Fund and Sparkplug Foundation for funding our work; all of our Parole Preparation Project volunteers because, without them, this work would not exist; the Law Office of Rankin & Taylor for their support and resources; Andrea Yacka-Bible for her endless contributions and expertise; Liz Gewirtz, who reads and responds fully to every single letter requesting assistance that we receive; the Otisville Lifers and Longtermers Organization for their inspiration, urging, and leadership; our Advisory Board for their guidance and mentorship, including Joe Robinson, Sheila Rule, Anthony Dixon, and Ish Igartua; Kathy Boudin for sharing her wisdom; Mark Shervington for being our daily source of feedback and humor; Parole Justice New York and Challenging Incarceration for being the home of our organizing; the Release Aging People in Prison Campaign (RAPP), for their partnership and leadership; and, lastly, to all of the Parole Preparation Project applicants

“I was able to let down my guard and become vulnerable to them, and they [weren’t] judging me. It was at a human level.”

—Anthony Dixon  
former parole applicant  
released after working with Parole Preparation Project volunteers

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#### INTRODUCTION

Eddie Lopez<sup>1</sup> was born in Colón, Panama in 1960. At age 15, he immigrated to New York City. After leaving behind the majority of his family, friends, and community, Eddie sought acceptance and support from other young people in his neighborhood. He turned to drugs and gambling for comfort, and to help him cope with his own desperation. Part of gaining the approval of his peers meant carrying a gun and participating in robberies to support their habits.

In 1979, Eddie accompanied his friends on a late-night robbery of a local corner store. As they approached the front of the store and demanded money, the store owner fired shots into the

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and their families, for opening their hearts to us and working alongside us. We’re so grateful.

<sup>1</sup> Name and identifying details have been changed.

aisles. Eddie and his friends fired back and then ran out. A man in the back of the store was killed in the crossfire. Eddie didn't know he had died until Eddie was arrested weeks later.

Later that month, Eddie again entered a local store with his friends, in hopes of getting money from the register. As Eddie was approaching the counter, a young girl in the back of the store began to cry. Eddie remembers a loud noise and the girl suddenly going quiet. He found out in the car afterwards that his co-defendant had shot and killed her.

For his participation in two robberies in which two people were killed, Eddie was convicted of murder and sentenced to 25 years to life in prison. Although he did not fire the bullets that ultimately killed either victim, in New York State, people who participate in crimes in which a person is killed are sentenced as if they were the principal actor.<sup>2</sup>

Since his incarceration, Eddie has completed a multitude of programs, both therapeutic and vocational. He proudly serves as a facilitator for the Alternatives to Violence Project, which teaches techniques for problem-solving and conflict resolution. Eddie is a member of and a contributor to the Lifers and Longtermers Organization at the prison where he resides, and has been part of several Inmate Liaison Committees. He has also found community in his church, where he is a leader in the congregation.

One of Eddie's greatest passions and skills is crochet. He is an exceptional craftsman, making blankets and stuffed animals that he often donates to local charities. He also teaches a weekly crochet course to over 20 incarcerated men, a local favorite at the prison. Eddie is a trained electrician and has qualifications in legal research. Employers in New York City, recognizing his skills and capabilities, have written several letters of reasonable assurance offering Eddie employment upon his release.

Eddie also has the support of many members of the prison staff, some of whom submitted letters to the Board of Parole on his behalf. Eddie has extensive support from his family, including his sisters and brothers, as well as his daughter and niece, who visit Eddie whenever they are able. Eddie carries around a picture of his only grandchild in his back pocket, and shows it to everyone he meets.

Undoubtedly, Eddie has undergone a profound personal transformation during his time in prison. He is highly critical of his

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<sup>2</sup> N.Y. PENAL LAW § 125.25(3) (McKinney 2006).

younger self, a person capable of robbing stores at gunpoint. His participation in the Lifers Organization has allowed him to access his own authentic feelings of remorse and responsibility, and to generate his own moral compass. While Eddie lives with the reality of his participation in these crimes every day, he seeks redemption through mentoring and supporting others in prison in their own processes of self-discovery, whether through his role as a teacher, facilitator, mentor or friend.

In 2005, at age 45, Eddie first became eligible for parole. By that time, he had already attained significant work experience and was deeply invested in living a more peaceful and gracious life. However, despite these accomplishments, the New York State Board of Parole (“the Board”), an administrative body of the Department of Corrections and Community Supervision (“DOCCS”), denied Eddie release, citing the nature of his crimes as the reason for their denial. Eddie has since appeared before the Board eight times and has been denied parole each time on the same grounds, despite the fact that Eddie will be deported immediately to Panama should he be released. Eddie is now 56 years old and has spent 37 years—far more than half of his life—in prison. Eddie’s co-defendants were released in 2002 and 2012.

Eddie’s story is unique, but his experience with the Board is not. In January 2016, there were nearly 22,000 people serving indeterminate sentences in New York State prisons,<sup>3</sup> and every year, thousands of these individuals appear before the Board in an attempt to secure their release. Due to policies and complex political factors that result in exceptionally low release rates,<sup>4</sup> the vast major-

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<sup>3</sup> KIM DWORAKOWSKI, N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION AS OF JANUARY 1, 2016 23 (2016), [http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody\\_Report\\_2016.pdf](http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf) [<https://perma.cc/4W9Q-4Y3H>]. An indeterminate sentence is a prison term imposed by a sentencing court that does not specify the exact number of years an individual will be incarcerated. *See* N.Y. PENAL LAW § 70.00 (McKinney 2009). Such sentences vary widely, and can range from a sentence of one to three years of incarceration to a sentence of 25 years to life, depending on the crime. PENAL LAW § 70.00(2), (3). For those serving indeterminate sentences, once they have reached their minimum number of years of imprisonment, they become eligible for parole. PENAL LAW § 70.40(1)(a)(i). A person serving an indeterminate sentence that does not have “life” listed as the maximum will be released after serving the maximum number of years in their sentence, if they are not granted parole. *See* PENAL LAW § 70.00(2).

<sup>4</sup> The Board’s overall release rate for 2015 for all those serving indeterminate sentences was 23%. N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, PAROLE BOARD AND PRESUMPTIVE RELEASE DISPOSITIONS: CALENDAR YEAR 2015 (PRELIMINARY DATA) 1 (2016), [http://www.doccs.ny.gov/Research/Reports/2016/Parole\\_Board\\_Dispositions\\_2015.pdf](http://www.doccs.ny.gov/Research/Reports/2016/Parole_Board_Dispositions_2015.pdf) [<https://perma.cc/QJ7K-Z7GW>]. Compared to the past several de-

ity of those individuals will be denied parole and must wait up to two years before their next Board interview.<sup>5</sup> The reality in New York State is that discretionary release<sup>6</sup> is exceptionally difficult to obtain, and parole decisions are often arbitrary,<sup>7</sup> highly subjective, and frequently unlawful.<sup>8</sup>

Current parole policy has an especially harsh and dramatic impact on people serving indeterminate life sentences,<sup>9</sup> as parole is generally the only way to obtain release for this population.<sup>10</sup>

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cedes, the overall release rate is actually relatively high. The Correctional Association of New York reported that in 2011 the release rate for individuals appearing before the Board for the first time was 15.3%, and the rate of release for people making reappearances was only 17.2%. Scott Paltrowitz, Assoc. Dir., Prison Visiting Project of the Corr. Ass'n of N.Y., Testimony Before the N.Y. State Assembly Corrections Committee 3 (Dec. 4, 2013), <http://www.correctionalassociation.org/wp-content/uploads/2013/12/CA-Parole-Testimony-12-4-13-Hearing-FINAL.pdf> [<https://perma.cc/5DFX-KQ2E>].

<sup>5</sup> N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 2016). Technically, the Board may hold an individual for any length of time *up to* 24 months. On rare occasions Parole Preparation Project applicants are given 12- or 18-month holds, but two years is most typical.

<sup>6</sup> The Board may grant discretionary release “after considering if there is a reasonable probability that, if [a parole applicant] is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.” *Id.* § 259-i(2)(c)(A).

<sup>7</sup> Numerous court decisions have taken the Board of Parole to task for unlawful parole denials. *See, e.g., In re Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22, 27 (1st Dep’t 2016); *In re Hawthorne v. Stanford*, 135 A.D.3d 1036, 1041-42 (3d Dep’t 2016) (affirming that the Board acted irrationally and reversing other components of the decision); *In re Ciaprazi v. Evans*, No. 0910/2016, 2016 WL 4016495, at \*3-4 (N.Y. Sup. Ct. July 26, 2016); *Platten v. N.Y. State Bd. of Parole*, 47 Misc. 3d 1059, 1064 (N.Y. Sup. Ct. 2015); *In re Rabenbauer v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 46 Misc. 3d 603, 611-12 (2014); *In re Bruetsch v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, No. 0230-14, 2014 WL 1910238, at \*3 (N.Y. Sup. Ct. May 11, 2014); *In re McBride v. Evans*, No. 4483/2013, 2014 WL 815247, at \*3 (N.Y. Sup. Ct. Jan. 13, 2014); *In re Thwaites v. N.Y. State Bd. of Parole*, 34 Misc. 3d 694, 697-98 (N.Y. Sup. Ct. 2011).

<sup>8</sup> Editorial, *New York’s Broken Parole System*, N.Y. TIMES (Feb. 16, 2014), <https://www.nytimes.com/2014/02/17/opinion/new-yorks-broken-parole-system.html> [<https://perma.cc/WTF4-7ZC3>] (“[T]he parole board rarely seem [sic] to consider [the statutory] factors in any meaningful way, denying parole even to low-risk inmates with exemplary records in prison.”).

<sup>9</sup> A life sentence in New York State is an indeterminate sentence in which there is a minimum term of years (15 or 25 years are relatively common) and a maximum term of “life.” After an individual has served the minimum term, they become eligible for parole release. However, since there is technically no “maximum” period at which the person would be automatically released without Parole Board action, each person serving a life sentence must be approved for release by the Board of Parole in order to return to the community. *See* N.Y. PENAL LAW § 70.00(2) (McKinney 2009).

<sup>10</sup> Technically, there are other means by which people serving life sentences can obtain release, such as on appeal, through a motion to vacate judgment, *see* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2016), or by executive clemency, *see* N.Y. EXEC. LAW § 15 (McKinney 1971), although these are exceedingly rare.

Nearly 9,300 people (representing almost 18% of the prison population)<sup>11</sup> are currently serving a sentence with a maximum of life in New York State. The Board's high rates of parole denial leave this group subject to potentially indefinite confinement.<sup>12</sup> Because of these repeated denials, many people have lost hope of ever obtaining freedom. Many believe they will die in prison, and in reality, some will.<sup>13</sup>

Like Eddie, many people serving life sentences and appearing before the Board have accepted responsibility for their crimes, completed required and voluntary programming, undergone deep personal transformations, obtained low risk scores on an evidence-based risk assessment, and developed strong release plans. However, when the Board denies release, its written decision almost always cites the nature of the crime and the facts of the underlying case as the primary reason for denial. The Board largely disregards the many accomplishments of the applicant and their often categorically low risk for recidivism,<sup>14</sup> and in most cases bases the per-

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<sup>11</sup> There were 9,262 people serving life with the possibility of parole as of Jan. 1, 2016. DWORAKOWSKI, *supra* note 3, at 15. New York has the country's second largest population of parole-eligible people serving life sentences. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES 24 (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/01/Delaying-a-Second-Chance.pdf> [<https://perma.cc/99BE-2T6V>].

<sup>12</sup> One individual who currently serves an advisor to the Project was held for 33 years on a sentence of 15 years to life, or more than double his minimum term. Such stories are not uncommon.

<sup>13</sup> According to the most recent *Inmate Mortality Report* published by DOCCS, between 2009 and 2012 a total of 501 people died while incarcerated—of these, 81% died of natural causes (the average age of people who died of natural causes was 57 years old) and 11% committed suicide (the average age of this group was 40 years old). KIM DWORAKOWSKI & DAN BERNSTEIN, N.Y. STATE CORR. & CMTY. SUPERVISION, INMATE MORTALITY REPORT: 2009-2012 2-3 (2013), [http://www.doccs.ny.gov/Research/Reports/2013/Inmate\\_Mortality\\_Report\\_2009-2012.pdf](http://www.doccs.ny.gov/Research/Reports/2013/Inmate_Mortality_Report_2009-2012.pdf) [<https://perma.cc/3VZE-UZYQ>].

<sup>14</sup> According to DOCCS's own statistics, people age 50 and over have low rates of recidivism, and those age 65 and over have exceedingly low rates of returning to prison for new crimes, 6.6% and 3.8% respectively for releases between 1985 and 2011. See KIMBERLY KEYSER, N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, 2011 INMATE RELEASES: THREE YEAR POST-RELEASE FOLLOW-UP 16 (2015) [http://www.doccs.ny.gov/Research/Reports/2016/2011\\_releases\\_3yr\\_out.pdf](http://www.doccs.ny.gov/Research/Reports/2016/2011_releases_3yr_out.pdf) [<https://perma.cc/RVR5-K9MM>]. In New York State in 2010, 0.4% of people convicted of murder came back to prison because of a new offense (as opposed to a technical parole violation). RYANG HUI KIM, N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, 2010 INMATE RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 10 (2014), [http://www.doccs.ny.gov/Research/Reports/2014/2010\\_releases\\_3yr\\_out.pdf](http://www.doccs.ny.gov/Research/Reports/2014/2010_releases_3yr_out.pdf) [<https://perma.cc/XJN5-K4KX>].

son's freedom on a single, unchanging moment that occurred decades ago.

As a result, many applicants appear before the Board numerous times, often on nine or ten occasions, before they are granted release,<sup>15</sup> forcing them to languish in prison for many years longer than their minimum sentence. Although the Board does not legally have the power to impose new sentences, it effectively serves as a re-sentencing body, doling out longer punishments than the courts perhaps ever intended, and doing so in a manner largely hidden from the view of the criminal legal system that originally arrested, convicted, and sentenced the applicant.

The Board's practices exemplify nationwide criminal justice policies that are rooted in retribution and racism and result in extreme punishment. As with the criminal legal system at large, people of color, and more specifically Black men, are profoundly and disproportionately impacted by parole policy.<sup>16</sup> Women, immigrants, people with disabilities and mental illness, queer, transgender, and gender non-conforming people, Muslims, and people who practice religions other than Christianity also face unique difficulties with the Board.<sup>17</sup>

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<sup>15</sup> One Project applicant has been in prison for over 43 years and has been before the Board 12 times, despite his impeccable disciplinary record, two graduate degrees, and repeated acceptance of responsibility for his crime.

<sup>16</sup> As a December 2016 New York Times investigation showed, the prison and parole systems in New York State are demonstrably racially discriminatory. Michael Schwirtz et al., *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), <http://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html> [<https://perma.cc/BAT8-WUGA>]; Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), <http://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html> [<https://perma.cc/GM9M-8A8C>]. Women are the fastest growing group in prisons. "Between 1980 and 2014, the number of incarcerated women increased by more than 700% . . ." THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1 (2015), <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/58PQ-H7DQ>]. The authors are not intentionally ignoring this phenomenon or excluding Black women; the fact is that, in New York State, Black men make up the vast majority of the prison population. See DWORAKOWSKI, *supra* note 3, at ii (reporting that, as of January 1, 2016, 95.3% of people in custody are male, while 4.7% of people in custody are female; 48.5% of the overall population in DOCCS custody is African American).

<sup>17</sup> While this information comes from anecdotal experience of people in prison and those who have come home, recent research and reporting has been done on these issues. See, e.g., Winerip et al., *supra* note 16; see also JASON LYDON ET AL., BLACK & PINK, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY 27 (ver. 2 2015), <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets-Black-and-Pink-October-21-2015.pdf> [<https://perma.cc/2CPC-MJMZ>] (finding that 41% of respondents "felt discriminated against by the parole board").

The Board's practices also systematically deny release to aging and elderly people. Many parole-eligible people serving life sentences are over the age of 50, with some entering their 60s and 70s.<sup>18</sup> In 2006, to cope with its rapidly aging population, Fishkill Correctional Facility opened a 30-bed unit for the cognitively impaired to house people diagnosed with dementia, often related to Alzheimer's disease or AIDS.<sup>19</sup> Prison personnel have reported that many people on the unit do not even remember their own crimes.<sup>20</sup>

Even for this demographic, the release rate remains intractably low despite the statistical fact that criminal conduct decreases substantially with age and infirmity,<sup>21</sup> and that the re-incarceration rates for those convicted of the most serious crimes are substantially lower than for those convicted of crimes carrying shorter sentences.<sup>22</sup> The prolonged incarceration of this aging and often infirm population means that many communities are deprived of their elders while the state continues to confine people who pose

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<sup>18</sup> The Project works with close to ten people who are over the age of 60 and has corresponded with many others in that age range. Rates of release for people over 60 are lower than the overall average rates of release for both people appearing for the first time before the Board and people reappearing. See Prison Action Network, *March 2017, BUILDING BRIDGES* (Mar. 6, 2017), <http://prisonaction.blogspot.com/2017/03/march-2017.html> [<https://perma.cc/EW3D-VTD4>]. This is true despite the fact that, according to DOCCS's own statistics, people age 50 and over have low rates of recidivism, and those age 65 and over have exceedingly low rates of returning to prison for new crimes—DOCCS reports that out of all people released between 1985 and 2011, 3.8% of people over age 65 returned to DOCCS custody for a new crime. KEYSER, *supra* note 14, at 16. The prison population of people aged 50 and over also increased by 46% from 2007 to 2016, even as the New York State prison population decreased by 17.3% over the same period. OFFICE OF THE N.Y. STATE COMPTROLLER, *NEW YORK STATE'S AGING PRISON POPULATION 1* (2017), <https://www.osc.state.ny.us/reports/aging-inmates.pdf> [<https://perma.cc/2ZJA-C83R>].

<sup>19</sup> Maura Ewing, *When Prisons Need to Be More Like Nursing Homes*, MARSHALL PROJECT (Aug. 27, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/08/27/when-prisons-need-to-be-more-like-nursing-homes> [<https://perma.cc/E2QA-5FTD>]; Michael Hill, *New York Prison Creates Dementia Unit*, WASH. POST (May 29, 2007, 11:57 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900208.html> [<https://perma.cc/DM65-LQBH>].

<sup>20</sup> Hill, *supra* note 19.

<sup>21</sup> See AM. CIVIL LIBERTIES UNION, *AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 21* (2012), [https://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf) [<https://perma.cc/SF9F-GHFF>]; see also Samuel K. Roberts & Lisa K. Sangoi, *Reducing Incarceration and Endless Punishment, and Moving Toward Release and Successful Reentry*, in *AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY XI* (Samuel K. Roberts ed., 2015), [http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison\\_FINAL\\_web.pdf](http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf) [<https://perma.cc/G7HY-AVY6>] (discussing the inverse relationship between age and crime).

<sup>22</sup> KIM, *supra* note 14, at 9-10.

little, if any, risk to public safety at great expense.<sup>23</sup> Further, the Board's practices and its almost-exclusive focus on the nature of the crime thwarts the very purpose of parole: to release people who have served their minimum sentences, demonstrate a readiness for release, and pose little to no risk of recidivism.<sup>24</sup>

Despite these realities, much of the attention in the realm of criminal legal system reform has focused on policing, disparities in sentencing, and re-entry; parole is very rarely addressed or discussed as a significant contributing factor in the rise of mass incarceration. Part of the reason for this exclusion is the persistent and deep reluctance to address the needs of and advocate for individuals serving long sentences and those convicted of violent crimes. Often only people convicted of drug offenses and non-violent crimes are politically palatable enough to capture the attention of the media, policymakers, and even those offering direct assistance to people in prison.

However, deep systemic change—of the sort that many now believe is necessary to dramatically reduce the prison population—will require not only a reimagining of how violent crime is defined,<sup>25</sup> but recognition that people serving time for violent crimes

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<sup>23</sup> See Roberts & Sangoi, *supra* note 21, at XIV-XV (“Taking into account the increase in medical conditions experienced by people as they age and the need for longer and more frequent hospitalizations; the correctional environment itself which is not designed to house and care for aging populations (and thus exacerbates the effects of aging); and transport off site to receive medical care, [William] Bunting [an economist with the American Civil Liberties Union] arrives at the conservative nationwide estimate of \$16 billion per year to incarcerate elderly prisoners.”).

<sup>24</sup> See N.Y. EXEC. LAW § 259-i(2)(c)(A).

<sup>25</sup> Scholars, policymakers, activists, and the media have recently begun to explore the question of violence and its definitions. Some authors have suggested that the majority of criminal statutes mischaracterize certain behavior as “violent” for the purposes of prosecution. Others have argued that rigid distinctions between so-called “victims” and “offenders” are false, as both often come from the same communities, and even the same families. See, e.g., JUSTICE POLICY INST., *DEFINING VIOLENCE: REDUCING INCARCERATION BY RETHINKING AMERICA’S APPROACH TO VIOLENCE* 3-5 (2016), [http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi\\_definingviolence\\_final\\_report.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report.pdf) [<https://perma.cc/M4UW-98XX>]; Keith Humphreys, Opinion, *What We Get Wrong About Mass Imprisonment in America*, WASH. POST: WONKBLOG (Feb. 8, 2017) <https://www.washingtonpost.com/news/wonk/wp/2017/02/08/what-we-get-wrong-about-mass-imprisonment-in-america/> [<https://perma.cc/CPX9-6HBW>]; Bill Keller, *Is Prison the Answer to Violence?*, MARSHALL PROJECT (Feb. 16, 2017, 5:00 AM), <https://www.themarshallproject.org/2017/02/16/is-prison-the-answer-to-violence> [<https://perma.cc/V7LC-QKSR>]; Leon Neyfakh, *OK, So Who Gets to Go Free?*, SLATE (Mar. 4, 2015, 3:47 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/03/prison\\_reform\\_releasing\\_only\\_nonviolent\\_offenders\\_won\\_t\\_get\\_you\\_very\\_far.html](http://www.slate.com/articles/news_and_politics/crime/2015/03/prison_reform_releasing_only_nonviolent_offenders_won_t_get_you_very_far.html) [<https://perma.cc/8L5D-LLXV>]; David Scharfenberg, *Why We Should Free Violent Criminals*, BOS. GLOBE: IDEAS (Feb. 5, 2017), <https://www.bostonglobe.com/ideas/2017/02/05/why-should-free-violent-criminals/HK8zo5OMtsMjhh>

are capable of transformation and are worthy of compassion, support, advocacy, and a meaningful opportunity to return to their families and communities.<sup>26</sup> Such recognition is also required if we wish to heal our communities from the deep and long-term effects of crime, violence, and incarceration.

For decades, community organizations and many formerly incarcerated people have worked tirelessly to advocate for the decarceration of elders, fairer Parole Board practices, and legislative reform of the Executive Law that governs parole. Recently, those efforts have borne fruit, as the media and policymakers have begun to acknowledge the issues faced by people serving long sentences and call for the reform of parole policy and procedures.

In 2013, as part of these statewide grassroots efforts, members of the New York City Chapter of the National Lawyers Guild formed the Parole Preparation Project (“the Project” or “PPP”). The Project trains community volunteers to work alongside and assist parole-eligible people in New York State as they prepare for their upcoming interviews with the Board of Parole.

By altering the relationship traditionally present between at-

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QuXySuDM/story.html [https://perma.cc/Q6X2-PREW]. Additionally, the annual Beyond the Bars conference, held in March 2017, explicitly focused on transcending the punishment paradigm and challenging our assumptions about violence. *Beyond the Bars: Transcending the Punishment Paradigm*, CTR. FOR JUST. COLUM. U., <http://centerforjustice.columbia.edu/education/beyondthebarsconference/beyond-bars-2017/> [https://perma.cc/KD4H-UU99]; see also *Panel: The Myth of the Dangerous Panel, The Riverside Church*, CTR. FOR JUST. COLUM. U., <http://centerforjustice.columbia.edu/event/panel-the-myth-of-the-dangerous-panel-the-riverside-church/> [https://perma.cc/5AAN-ZS9Z].

<sup>26</sup> See Gilad Edelman, *The Real Answer to Mass Incarceration*, NEW YORKER (July 17, 2015), <http://www.newyorker.com/news/news-desk/the-real-answer-to-mass-incarceration> [https://perma.cc/Q8BM-U8PF] (“[E]mphasizing the division between harmless, nonviolent drug offenders and violent criminals who ‘need’ to be imprisoned risks demonizing the latter group and making more fundamental change even more difficult in the future.”); see also Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent> [https://perma.cc/MBE5-AB23] (“Glenn Martin, founder of Just Leadership USA, believes the public will only embrace the [campaign to reduce the prison population by 50%] if [incarcerated people] and their families are humanized.”). In New York State, people in prison convicted of violent crimes make up 64% of the prison population. DWORAKOWSKI, *supra* note 3, at 16. Nationally, recidivism rates are lowest for people convicted of violent crime. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005-2010 8 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [https://perma.cc/VL9A-LPAJ]. As cited above, in New York State in 2010, only 0.4% of people convicted of murder came back to prison because of a new offense (as opposed to a technical parole violation). Kim, *supra* note 14, at 10.

torneys and clients, and by educating and training volunteers and parole-eligible applicants in parole-related issues, the Project strives to: secure the release of parole-eligible people; bring the next generation of young attorneys and other community members into the movement to abolish prisons and dramatically reframe crime and punishment in our society; cultivate transformative relationships of solidarity between people who are incarcerated and volunteer supporters outside prison; provide support to the currently and formerly incarcerated leaders of the prison and parole reform movements; and educate and increase public awareness of the problems of punitive parole policies and support parole reform advocates working for systemic and legislative change.

#### SUMMARY AND OVERVIEW

Much of the analysis in this article will focus on a critique of the New York State Board of Parole based upon current policies and practices, grounded in the experiences of people who have direct experience with parole. Even taking the Board of Parole on its own terms—as a body designed to ensure public safety and administer justice—there are deep flaws. These problems include: (1) a system built on racist, retributive, and vengeful principles, (2) politically motivated practices and appointments, (3) procedurally and substantively unfavorable laws and policies, (4) lack of access to meaningful judicial review, and (5) lack of oversight.

This article begins with an introduction to the bureaucratic banality that confronts individuals seeking release on parole in New York State. It explores how a host of political, procedural, and substantive legal obstacles enable the Board to deny thousands of parole-ready people their freedom. The section also includes a brief overview of the past decade of parole reform advocacy and litigation strategies that advocates and incarcerated litigants have employed in attempts to shift current parole practices.

Next, we discuss the history of the Parole Preparation Project, describe our approach and how it differs from traditional legal work, and analyze our role within the broader movement for parole reform.

The remainder of the article is comprised of transcripts of interviews conducted with participants in the Parole Preparation Project, including former volunteers and applicants. We include these transcripts because we wish to center and amplify the voices of those who are formerly incarcerated. It is their stories, experiences,

and expertise that drive our work and confirm for us the resiliency of the human spirit. We also wish to provide deeper insight into the impact the Project has on its volunteers.

The article concludes with hopes for the Project's future, as well as for the futures of people serving life sentences in New York State and others facing judgment in the U.S. criminal legal system.

#### A NOTE ON LANGUAGE

This article will use certain language with intention. Individuals behind bars will be referred to as "people," such as "incarcerated people," "people inside," or "people behind bars," not "inmates," "prisoners," or "offenders." The purpose of using such terminology is to recognize and reaffirm the humanity of those who are incarcerated.<sup>27</sup>

"Applicant" or "parole applicant" will also be used to describe people in prison seeking parole release and working with the Project. "Applicant" is deliberately chosen because it is distinct from the term "client," as no attorney-client relationship is established between applicants and Parole Preparation Project volunteers. Additionally, people serving indeterminate sentences must physically apply for parole release. "Volunteer" is the term used for non-incarcerated Project participants. "Interview" will be used to describe the process by which the Board of Parole interviews parole-eligible applicants. "Hearing" is a commonly-used misnomer for this interaction, as a Board appearance is in no way an adversarial proceeding before a neutral magistrate. There is no attorney to represent the applicant and no witnesses are called; the term interview is more accurate.<sup>28</sup> Lastly, the term "criminal legal system" will be used to refer to what is often denominated the criminal "justice" system, in order to highlight the lack of justice therein.

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<sup>27</sup> *The Language Letter Campaign: An Open Letter to Our Friends on the Question of Language*, CTR. FOR NULEADERSHIP ON URB. SOLUTIONS, <http://centerforleadership.org/current-projects/the-language-letter-campaign/> [<https://perma.cc/JE5L-VUPZ>] ("It follows then, that calling me inmate, convict, prisoner, felon, or offender indicates a lack of understanding of who I am, but more importantly what I can be.").

<sup>28</sup> DOCCS itself most commonly uses the term "interview." See generally *New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision*, N.Y. ST. DEP'T CORRECTIONS & COMMUNITY SUPERVISION [hereinafter *Parole Handbook*], [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) [<https://perma.cc/V2GM-B4S9>]; *Board of Parole*, N.Y. ST. DEP'T CORRECTIONS & COMMUNITY SUPERVISION, <http://www.doccs.ny.gov/ParoleBoard.html> [<https://perma.cc/LUT9-GXKV>].

## I. POLITICS AND PAROLE BOARDS

Parole is a system of discretionary release for people serving indeterminate sentences. An indeterminate sentence is a prison term imposed by a sentencing court that does not specify the exact number of years an individual will be incarcerated.<sup>29</sup> For those serving indeterminate sentences, once they have reached their minimum number of years of imprisonment, they become eligible for parole.<sup>30</sup> The Board of Parole is tasked with determining who may be released on parole and the conditions of their supervision.<sup>31</sup>

Commissioners are appointed by the Governor and confirmed by the New York State Senate for six-year terms.<sup>32</sup> Although the Executive Law that governs the composition of the Parole Board states that up to 19 Commissioners may serve on the Board of Parole, there are currently only 12 seated Commissioners.<sup>33</sup> Purportedly due to budgetary concerns, the Governor has elected to leave seven seats unfilled.<sup>34</sup> Historically, governors often award Parole Board seats to campaign contributors or political allies and candi-

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<sup>29</sup> See N.Y. PENAL LAW § 70.00 (McKinney 2009).

<sup>30</sup> N.Y. PENAL LAW § 70.40(1)(a)(iii) (McKinney 2011).

<sup>31</sup> N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 2016).

<sup>32</sup> *Board of Parole*, *supra* note 28.

<sup>33</sup> N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 8600, BOARD OF PAROLE 1 (2015), <http://www.doocs.ny.gov/pdf/Board-of-Parole-Directive.pdf> [<https://perma.cc/KQ7G-QRB3>]; *Parole Board Members*, N.Y. ST. DEP'T CORRECTIONS & COMMUNITY SUPERVISION, <http://www.doocs.ny.gov/ParoleBoardMembers.html> [<https://perma.cc/U78U-LT6T>] (listing the 12 current Commissioners).

<sup>34</sup> See James M. Odató, *Pataki Appointees Dominate State Parole Board with 5 Vacancies*, TIMES UNION (Sept. 17, 2012, 10:38 AM), <http://www.timesunion.com/local/article/Pataki-appointees-dominate-state-parole-board-3870152.php> [<https://perma.cc/K5YM-253A>]. Additionally, two Commissioners, both known by applicants and advocates for having slightly higher release rates and greater compassion for incarcerated people than their colleagues, have recently left the Board. See Russ Buettner, *Brooke Astor's Son Is Paroled*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/nyregion/brooke-astors-son-to-be-paroled.html> [<https://perma.cc/S72W-ENLH>]. Christina Hernandez is now the Director of Re-Entry Services for DOCCS. See *DOCCS Celebrates National Hispanic Heritage Month*, N.Y. ST. DEP'T CORRECTIONS & COMMUNITY SUPERVISION: DOCCS NEWS (Oct. 14, 2016), [http://www.doocs.ny.gov/DoocsNews/2016/Hispanic\\_Heritage\\_Month\\_16.pdf](http://www.doocs.ny.gov/DoocsNews/2016/Hispanic_Heritage_Month_16.pdf) [<https://perma.cc/8Y75-HR5A>]. The Project learned that Gail Hallerdin died unexpectedly in December 2016. The Governor has said in recent meetings that he intends to fill all 19 seats; however, no formal process has been initiated for confirmation of new Commissioners (although several individuals have been interviewed for the position). *Understanding Judy Clark: From Chair of the NYS Parole Board*, NYACK NEWS & VIEWS (Mar. 5, 2017), <http://www.nyacknewsandviews.com/2017/03/judy-clark-dennison-parole/> [<https://perma.cc/2VTD-S23F>] (“There are six vacancies on the parole board. They are supposedly going to fill them in the spring.”).

dates with deep ties to the law enforcement community.<sup>35</sup> As the selections are negotiated long before the confirmation process, prospective Commissioners spend little time discussing their qualifications during Senate confirmation hearings.<sup>36</sup> However, Commissioners who deviate from a culture and status quo of denying parole to the majority of applicants risk losing their reappointments.<sup>37</sup>

After serving a term of six years,<sup>38</sup> Commissioner reappointments are nearly guaranteed for those who act consistently with the policies and principles set forth by the presiding gubernatorial administration.<sup>39</sup> Four of the 12 Commissioners currently serving on the Board, Walter William Smith, James Ferguson, Kevin Ludlow, and Lisa Elovich, were appointed more than 10 years ago by former Governor George E. Pataki.<sup>40</sup> They remain on the Board de-

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<sup>35</sup> “If there is one factor that drives the selection of commissioners, it is politics. Spots on the board are prime patronage gifts. Many board members have given generously to campaigns.” Winerip et al., *supra* note 16. “These hearings sometimes sound like reunions of upstate law enforcement veterans. At the 2012 hearing, State Senator Patrick M. Gallivan, then a Republican member of the corrections committee and a former sheriff of Erie County, backed the appointment of Marc Coppola, his former deputy sheriff.” *Id.*

<sup>36</sup> *Id.* (“Selections are typically worked out ahead of time, and at the confirmation hearings nominees usually spend only a few minutes describing their credentials before being approved.”).

<sup>37</sup> Beth Schwartzapfel, *A Parole Hearing in New York, With a Governor’s Blessing This Time*, MARSHALL PROJECT (Jan. 5, 2017, 10:01 PM), <https://www.themarshallproject.org/2017/01/05/a-parole-hearing-in-new-york-with-a-governor-s-blessing-this-time> [<https://perma.cc/U6TX-5BNB>]. Barbara Treen, who served for 12 years as a New York State Parole Board member, is quoted as writing, “It’s always safer to deny than to parole; it takes no courage and is the safest route to job security . . . .” *Id.* Vernon Manley, a former Commissioner who granted release to an individual in a high profile case, remembered saying to his colleague, “if we release her, it’s highly likely we might not get reappointed. . . .” *Id.* Manley was not reappointed to the board following this decision. *Id.*

<sup>38</sup> N.Y. EXEC. LAW § 259-b(1) (McKinney 2013).

<sup>39</sup> Schwartzapfel, *supra* note 37 (“[S]everal former board members say that those on the board are always acutely aware of what the governor would want when they make decisions in high-profile cases. That’s because they were appointed to their six-year terms by the governor himself.”); see also John Sullivan, *In New York and Nation, Chances for Early Parole Shrink*, N.Y. TIMES (Apr. 23, 2000), <http://www.nytimes.com/2000/04/23/nyregion/in-new-york-and-nation-chances-for-early-parole-shrink.html> [<https://perma.cc/RHR8-GK8V>] (“Gov. George E. Pataki, a Republican, has said he would like to join other states in doing away with early parole for all felons. And while his legislation to do so has been blocked in the Democratic-controlled Assembly, Mr. Pataki has used his appointment powers to put people on the State Parole Board who believe in greater scrutiny of felony offenders . . . . Since 1995, . . . the governor has named 15 of the board’s 16 members. ‘Those are people that share that philosophy,’ said Katherine N. Lapp, the governor’s chief adviser on criminal justice.”).

<sup>40</sup> The DOCCS website lists which Commissioners were appointed by whom. *Parole Board Members*, *supra* note 33. Tom Grant, a former Parole Commissioner, has sug-

spite the fact that they continue to embody a Pataki-era approach of reflexively denying release on the basis of the nature of the crime, particularly for those convicted of the most serious crimes.<sup>41</sup>

Whether they are campaign contributors or not, the majority of Commissioners are former prosecutors, parole officers, law enforcement agents, victims' advocates, and those involved in correctional or community supervision work.<sup>42</sup> Given the structure and theoretical perspectives of the organizations from which the majority of Commissioners come, their approach towards parole is more likely to be retributive and punitive. Further, their ties to law enforcement and district attorney's offices make them highly susceptible to influence by organizations such as the Patrolmen's Benevolent Association ("PBA"), the union that represents police officers in New York City, and that encourages the public to submit opposition letters each time someone convicted of a police-related crime comes before the Board.<sup>43</sup>

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gested that instituting a one-term limit would relieve Commissioners of their political obligations to suppress release rates and increase the autonomy of sympathetic candidates. John Caher, *Q&A: Tom Grant*, N.Y. L.J. (Sept. 21, 2012) ("There should be a one-term limitation for parole board commissioners. The commissioner would, on the day of confirmation, know exactly when his term would end. This would reduce, if not eliminate, any perceived 'outside influences' on the parole decision making process.").

<sup>41</sup> See Sullivan, *supra* note 39. The Pataki years are remembered as a time of such extraordinarily low release rates that a federal class action was unsuccessfully brought claiming the state had a de facto policy of denying parole to people convicted of violent crimes. *Graziano v. Pataki*, No. 06 Cv. 480 (CLB), 2007 WL 4302483, at \*2-4 (S.D.N.Y. Dec. 5, 2007); see also Edward R. Hammock & James F. Seelandt, *New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards' Discretion*, 13 ST. JOHN'S J. LEGAL COMMENT. 527, 563 (1999).

<sup>42</sup> *Release of Aging People in Prison Campaign (RAPP)*, QUEENSCHURCHES.ORG, <http://www.queenschurches.org/Advocacy/Issues/CANY-RAPP.htm> [<https://perma.cc/XM8E-JZ6D>] (follow "Parole Commissioners Bios" hyperlink); Prison Action Network, *March 2016*, BUILDING BRIDGES (Mar. 5, 2016), [http://prisonaction.blogspot.com/2016\\_03\\_01\\_archive.html](http://prisonaction.blogspot.com/2016_03_01_archive.html) [<https://perma.cc/F9AY-KTR6>]; Prison Action Network, *April 2012*, BUILDING BRIDGES (Apr. 15, 2012), <http://prisonaction.blogspot.com/2012/04/april-2012.html> [<https://perma.cc/Z8K5-BDUX>]. See, e.g., John Caher, *Advocates Recite Shortcomings of N.Y. Parole Review Process*, N.Y. L.J. (Dec. 5, 2013) (noting that Tina M. Stanford, Chairwoman of the Board of Parole, "previously ran the state Office of Victim Services"); Robert Gebeloff et al., *A Parole Decision in Minutes*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/interactive/2016/12/04/nyregion/new-york-parole-decision-in-minutes.html> [<https://perma.cc/EPG2-2NPM>].

<sup>43</sup> See Robert J. Boyle et al., *Opinion, Parole Board Drags its Feet on COMPAS*, N.Y. L.J. (Jan. 21, 2016) ("To enforce their hold on any Board of Parole decisions, the PBA has a link on their website. With one mouse-click, form letters are sent to the board opposing the release-ever-of anyone so convicted, no matter how old or sick, how insightful and changed, and no matter the likelihood that they will ever commit another crime."). Senator Patrick Gallivan, the Chair of the Committee on Crime Victims, Crime & Correction of the New York State Senate, posted a link to a petition

Aside from making release decisions involving high-profile cases,<sup>44</sup> Commissioners perform their work mostly in secret, outside the public view. Their internal policies and procedures are generally unknown and inaccessible to advocates, applicants, and other invested parties.<sup>45</sup> If a Commissioner does come into public light, it is often when an individual who was granted release commits a crime or otherwise receives media attention.<sup>46</sup> Such media

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opposing the parole release of Judith Clark on his official Senate homepage. *Members*, N.Y. ST. SENATE: CRIME VICTIMS, CRIME & CORRECTION STANDING COMMITTEE, <https://www.nysenate.gov/committees/crime-victims-crime-and-correction> [https://perma.cc/726Q-QZK4]; *Sign the Petition Calling for No Parole for Judith Clark*, N.Y. ST. SENATE: N.Y. ST. SENATOR PATRICK M. GALLIVAN, <https://www.nysenate.gov/newsroom/in-the-news/patrick-m-gallivan/sign-petition-calling-no-parole-judith-clark> [https://perma.cc/WCH3-RYKV]. Judith Clark was convicted of 75 years to life for her role in the 1981 Brinks Robbery. Eli Rosenberg, *Cuomo Commutes Sentence of Judith Clark, Driver in Deadly Brink's Robbery*, N.Y. TIMES (Dec. 30, 2016), <https://www.nytimes.com/2016/12/30/nyregion/cuomo-commutes-sentence-of-judith-clark-driver-in-deadly-brinks-robbery.html> [https://perma.cc/E748-T8NY]. In 2016 Governor Cuomo commuted her sentence, making her immediately eligible for parole. *Id.* In April 2017, the Board once again denied parole. Marc Santora, *Judith Clark, Getaway Driver in Deadly Brink's Heist, is Denied Parole*, N.Y. TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/nyregion/judith-clark-brinks-robbery-parole.html> [https://perma.cc/N2CQ-SNT8] (“While parole board hearings are not public and transcripts are not yet available, a summary explaining their decision was released late Friday. It focused on the unique nature of her case and the message her release would send to law enforcement. ‘We do find that your release at this time is incompatible with the welfare of society as expressed by relevant officials and thousands of its members,’ the board wrote.”).

<sup>44</sup> See, e.g., Pete Donohue, *New York Woman Imprisoned for Shooting Husband Two Decades Ago Loses Parole Bid*, N.Y. DAILY NEWS (Aug. 14, 2013, 2:30 AM), <http://www.nydailynews.com/new-york/nyc-woman-shot-husband-loses-parole-bid-article-1.1426123> [https://perma.cc/A75Y-UXSC]; Larry McShane, *Convict in 1991 Manhattan Cop Killing Denied Parole for Fifth Time*, N.Y. DAILY NEWS (Jan. 12, 2017, 11:08 AM), <http://www.nydailynews.com/new-york/nyc-crime/convict-1991-killing-denied-parole-time-article-1.2944601> [https://perma.cc/G28H-JHFP]; James Ridgeway & Katie Rose Quandt, *Adam Hall Tried to Kill Himself in Prison. And Got Six More Years.*, VILLAGE VOICE (Apr. 5, 2017, 7:45 AM), <http://www.villagevoice.com/news/adam-hall-tried-to-kill-himself-in-prison-that-got-him-six-more-years-9852972> [https://perma.cc/3XS6-86YZ]; Denis Slattery, *Parole Denied for Upstate Killer Likened to ‘Fatal Attraction’ Character During Murder Trial of Lover’s Wife*, N.Y. DAILY NEWS (Jan. 17, 2017, 10:22 PM), <http://www.nydailynews.com/news/crime/parole-denied-n-y-killer-likened-fatal-attraction-role-article-1.2948957> [https://perma.cc/5LAF-L92Q]; Press Release, N.Y. State Senator Patrick M. Gallivan, *Senator Gallivan Presents Petition Calling on NYS Board of Parole to Deny Release of Judith Clark* (Mar. 29, 2017), <https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-presents-petition-calling-nys-board> [https://perma.cc/X9UA-ZCHU].

<sup>45</sup> See Winerip, *supra* note 16. While the Board has made recent attempts to increase transparency, particularly by publishing videos of their meetings online, the inner workings of their agency remain in relative obscurity. See, e.g., *Parole Board Business Meeting Videos*, N.Y. ST. DEP’T CORRECTIONS & COMMUNITY SUPERVISION, <http://www.doccs.ny.gov/parole-board-videos.html> [https://perma.cc/JE22-4GAR].

<sup>46</sup> See, e.g., Editorial, *Kathy Boudin’s Time*, NATION (Aug. 28, 2003), <https://www>

cases create a phenomenon where Commissioners are incentivized to deny release but rarely to grant parole—this attitude has been openly discussed by former Commissioners.<sup>47</sup> Unfortunately, a lawful, rational, fair decision to release someone rarely, if ever, makes the news.

The identities and experiences of Parole Board Commissioners also do not reflect the demographics of the individuals who appear before them. Although the population of New York State prisons is approximately 75% people of color,<sup>48</sup> the Board of Parole is composed almost entirely of white people.<sup>49</sup> Further, while over 75% of people in prison come from the five boroughs of New York City and the surrounding suburbs, as well as other urban areas, most of the Commissioners are from upstate.<sup>50</sup>

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.thenation.com/article/kathy-boudins-time/ [https://perma.cc/CAN9-GEFL]; Brian Bernbaum, *'60s Radical Boudin Goes Free*, CBS NEWS (Sept. 17, 2003, 3:53 PM), <http://www.cbsnews.com/news/60s-radical-boudin-goes-free/> [https://perma.cc/4ULD-LA48]. After granting release to Kathy Boudin, who was convicted of 25 years to life for her role in the 1981 Brinks Robbery, thus garnering media attention, two commissioners were fired by Governor Pataki. Schwartzapfel, *supra* note 37.

<sup>47</sup> Josh Swartz, *Nature of the Crime*, YOUTUBE (Apr. 20, 2015), <https://www.youtube.com/watch?v=hWdfyTiORjQ> [https://perma.cc/WKH3-SKN7] (featuring former Parole Board Commissioner Ed Hammock); Hammock & Seelandt, *supra* note 41, at 545; John Caher, *Inmates Find Unlikely Advocate in Former Parole Board Chair*, N.Y. L.J. (Sept. 16, 2013); *see also* Bill Hughes, *Even Model NYS Inmates Face Steep Barriers to Parole*, CITY LIMITS (Sept. 17, 2014), <http://citylimits.org/2014/09/17/even-model-nys-inmates-face-steep-barriers-to-parole/> [https://perma.cc/96DG-6SMJ] (quoting Robert Dennison, former Parole Board Chairman and Commissioner, as saying, “[e]very board member knows, if you let someone out and it’s going to draw media attention, you’re not going to be re-appointed”).

<sup>48</sup> Peter Wagner & Joshua Aiken, *Racial and Ethnic Disparities in Prisons and Jails in New York*, PRISON POL’Y INITIATIVE (Dec. 2016), [https://www.prisonpolicy.org/graphs/disparities2010/NY\\_racial\\_disparities\\_2010.html](https://www.prisonpolicy.org/graphs/disparities2010/NY_racial_disparities_2010.html) [https://perma.cc/N96K-QCQ9]; *see also* DWORAKOWSKI, *supra* note 3, at 5.

<sup>49</sup> Winerip et al., *supra* note 16 (“Board members are mainly from upstate [and] earn more than \$100,000 annually . . . . Most are white; there is currently only one black man, and there are no Latino men.”). Tina M. Stanford, the current Chairwoman of the Board, is also a Black woman. *Biography of Tina M. Stanford, Esq.*, N.Y. ST. DEP’T CORRECTIONS & COMMUNITY SUPERVISION, <http://www.doccs.ny.gov/Chairwomanbio.html> [https://perma.cc/B38G-SHKP].

<sup>50</sup> Winerip et al., *supra* note 16. Over 50% of people in prison come from New York City and its suburbs. DWORAKOWSKI, *supra* note 3, at 6. Another 25-30% of people in prison come from other upstate urban areas such as Buffalo, Albany, and Rochester. *Id.* Notably, one study conducted found that in 2003, “it cost \$1.1 billion . . . to incarcerate more than 13,200 residents” of the five boroughs, with residents from the Bronx incarcerated at a cost of approximately \$228 million. SPATIAL INFO. DESIGN LAB, THE PATTERN 37 (2008), [http://www.spatialinformationdesignlab.org/sites/default/files/publication\\_pdfs/ThePattern.pdf](http://www.spatialinformationdesignlab.org/sites/default/files/publication_pdfs/ThePattern.pdf) [https://perma.cc/7H36-DZA9]; *see also* Michael Schwirtz et al., *Governor Cuomo Orders Investigation of Racial Bias in N.Y. State Prisons*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/nyregion/>

## II. PROCEDURAL BARRIERS TO FAIRNESS

Myriad legal problems, both procedural and substantive, frustrate the administration of justice in the context of the parole release interview. To determine which parole-eligible people are community-ready, the Board of Parole conducts interviews with every eligible applicant. Almost all interviews are conducted by videoconference, utilizing technology that is often unfamiliar to applicants, some of whom have been in prison since the 1980s.<sup>51</sup> Commissioners conduct dozens of interviews in one day, each lasting only a few minutes.<sup>52</sup> Some advocates have calculated that the average interview time may be as low as four minutes.<sup>53</sup> There is also no right to counsel at parole interviews, nor is counsel permitted in the room during the proceeding.<sup>54</sup> The only individuals present are Parole Board Commissioners (two or three depending on the schedule and rotation of the Board), at least one Offender Rehabilitation Counselor (a member of DOCCS staff, whose role is simply to provide information to the Board and who does not advocate for the applicant), an interpreter (if needed), a stenographer, and the applicant.<sup>55</sup> Not only does this leave applicants without guidance as they field difficult and detailed questions, but without counsel, applicants who are unfamiliar with the judicial process may unintentionally waive issues that could be raised on appeal by not raising them during the actual interview.

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governor-cuomo-orders-investigation-of-racial-bias-in-ny-state-prisons.html [https://perma.cc/4FS7-H6C9].

<sup>51</sup> Gebeloff, *supra* note 42.

<sup>52</sup> *Id.*; Winerip et al., *supra* note 16 (“[Applicants] typically get less than 10 minutes to plead their cases before they are sent back to their cells.”).

<sup>53</sup> Mujahid Farid, Dir., Release Aging People in Prison (RAPP), Testimony Submitted to the N.Y. State Assembly Standing Committee on Correction (Nov. 29, 2013), <http://www.correctionalassociation.org/wp-content/uploads/2013/12/RAPP-AssemblyTestimonyFinal.pdf> [https://perma.cc/2ESA-RAG7] (noting in Exhibit A that given the 1,333 hearings conducted in October 2013, the total number of commissioners, and the total hours worked in a day, the average hearing was 4.2 minutes).

<sup>54</sup> *Parole Handbook*, *supra* note 28, at sec. 2.6. However, some states do allow counsel to be present during the parole interview. While counsel may not be appointed if applicants are unable to afford such representation, their presence is recommended by experts. GHANDNOOSH, *supra* note 11, at 35-36. Undoubtedly, the presence of counsel would have an impact on parole proceedings.

<sup>55</sup> *Parole Handbook*, *supra* note 28, at sec. 2.5-2.6 (“Discretionary interviews are conducted by a panel of two or three members of the Parole Board; Facility Division staff and a hearing reporter will also be present. The hearing reporter will record what is said during the interview. . . . Counsel may not be present during discretionary release interviews.”). Project Coordinators have heard of one instance where an advocate for an applicant with severe cognitive disabilities was permitted in the room. *See also* COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER’S MANUAL 875 (9th ed. 2011).

Although at least two, and often three, Commissioners are present for the interview, one Commissioner takes the lead in questioning the applicant. Many applicants report that the other Commissioners are often reviewing the file of the next person scheduled to appear, and rarely ask additional questions.<sup>56</sup> This practice has led many incarcerated people and their advocates to conclude that decisions are predetermined.<sup>57</sup>

Commissioners may also expect parole applicants to expertly convey feelings of remorse. For some applicants, the last time they discussed their crime was with their defense attorney during the original trial or plea negotiation process, at a time when the accused was ostensibly presumed innocent and had a right to remain silent, and when the prosecution carried the burden to prove facts to support a conviction. There it was not in the person's legal interest to extensively discuss the incident, let alone how they may have felt about the crime. After conviction, people may spend decades without ever discussing their crime again. Then, when they become eligible for parole, they are suddenly asked to talk in detail about the incident, often in a way that differs significantly from how they talked about the case while awaiting trial or sentencing.

Additionally, due to past trauma, histories of addiction, mental health conditions, race and class dynamics, and the ways in which those who are socialized as men are discouraged from expressing their feelings, many people involved in the criminal legal system may, at the time of the parole interview, already struggle to access their own emotions.<sup>58</sup> Further, in the closed, regimented prison environment, there are very few, if any, opportunities to explore feelings in a structured and safe therapeutic setting—individual mental health counseling is scarce, and often only available to those with severe mental illness.<sup>59</sup> Many applicants also fear that information they do share in a therapeutic environment will some-

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<sup>56</sup> Winerip et al., *supra* note 16.

<sup>57</sup> See *Duffy v. Evans*, No. 11 Civ. 7605, 2013 WL 3491119, at \*2 (S.D.N.Y. July 12, 2013) (describing a pre-printed form titled “New York State—Board of Parole—Commissioner’s Worksheet,” the handwritten portions of which were “nearly identical” to the text of the Worksheet). There is evidence that the Worksheet is sometimes partially or completely pre-typed. See Winerip et al., *supra* note 16 (“There are commissioners who come prepared with four or five decisions that they modify slightly to fit particular cases . . .”).

<sup>58</sup> See generally Mika’il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257 (2013).

<sup>59</sup> See Dustin DeMoss, *The Nightmare of Prison for Individuals with Mental Illness*, HUFFINGTON POST: THE BLOG (Mar. 25, 2015, 6:21 PM), [http://www.huffingtonpost.com/dustin-demoss/prison-mental-illness\\_b\\_6867988.html](http://www.huffingtonpost.com/dustin-demoss/prison-mental-illness_b_6867988.html) [https://perma.cc/NZR3-5PUZ].

how be used against them in future proceedings<sup>60</sup> or Parole Board interviews. While many people in prison turn to each other for care and support, those relationships may not be sufficient preparation for the parole interview.

Ultimately, experiences in the criminal legal system, especially during the initial trial or plea negotiation phase, often leave applicants with unprocessed emotions regarding their crimes that are difficult to re-examine in the harsh setting of prison. Further, extensive research shows that experiences of trauma and other socialized realities can lead to difficulty in identifying, expressing, and organizing emotions.<sup>61</sup> The Board's expectation that people convey deep and well-articulated feelings of remorse is an unrealistic and harmful one.

### III. HIGHLY DISCRETIONARY LEGAL FRAMEWORK

In addition to significant procedural barriers, a loose and differential legal framework creates little accountability for the Board. The legal standard governing parole release—and the way courts throughout the state have interpreted it—is highly discretionary.<sup>62</sup> In reaching a determination on whether someone should be released, the Board is tasked with applying the following standard:

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such [applicant] is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.<sup>63</sup>

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<sup>60</sup> Many people fear that material they share in a therapeutic setting could be used against them in a future civil commitment proceeding outlined in Article 10 of the Mental Hygiene Law. *See, e.g.*, N.Y. MENTAL HYG. LAW, § 10.17 (McKinney 2007). Civil commitment is a legal process by which people convicted of certain sex-based crimes may be subject to involuntary commitment after completing their sentence in prison.

<sup>61</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., (SMA) 14-4816, DEP'T OF HEALTH & HUMAN SERVS., TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES: TREATMENT IMPROVEMENT PROTOCOL 59-64 (2014), [https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf\\_NBK207201.pdf](https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf) [<https://perma.cc/E7Q6-PPP3>].

<sup>62</sup> New York's law of parole release has been subjected to review and critique elsewhere in this journal. Amy Robinson-Oost, Note, *Evaluation As the Proper Function of the Parole Board: An Analysis of New York State's Proposed Safe Parole Act*, 16 CUNY L. REV. 129, 146-49 (2012) (arguing that the current laws are too vague and unwieldy to produce fair decisions and therefore permit the Board to continue giving outsize weight to the crime of conviction).

<sup>63</sup> N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2016).

In applying this standard, the Board is required to consider a list of factors, including consideration of the individual's institutional record, release plans, recommendations of the defense attorney, district attorney, and sentencing judge, as well as any victim impact statement.<sup>64</sup> The seriousness of the offense, as well as "risk and needs assessments,"<sup>65</sup> are also factors to be considered.<sup>66</sup>

Even within this framework, courts are permissive, granting the Board wide latitude. Although the Board is required to *consider* every factor, they need not create a record—either in the oral interview or the written decision—that they have done so.<sup>67</sup> In other words, the Board need not discuss every factor in the interview, mention every factor in the written decision, or give every factor equal or assigned weight.<sup>68</sup>

Due to this flexibility in the ways in which the enumerated factors can be weighed, Commissioners focus heavily and often exclusively on the nature of the person's crime.<sup>69</sup> A person's

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<sup>64</sup> These factors are enumerated in N.Y. EXEC. LAW § 259-i (McKinney 2016) and the regulations implementing that statute, codified at N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.3 (2014). As discussed below, recent proposed changes to the regulations have been issued by the Board, and following a successful public comment period, advocates and others are awaiting the publication of the finalized version.

<sup>65</sup> § 8002.3(a)(11). The chosen method for the "risk and needs assessment" is an evaluation called Correctional Offender Management Profiling for Alternative Sanction, known as COMPAS, which assigns a risk level to applicants based on a proprietary system, discussed *infra* Part V. N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 8500, COMPAS ASSESSMENTS/CASE PLAN 6 (2015) [hereinafter DIRECTIVE 8500], <http://www.doccs.ny.gov/Directives/8500.pdf> [<https://perma.cc/P5U7-CGQG>].

<sup>66</sup> § 259-i(2)(c)(A); § 8002.3(a)(11).

<sup>67</sup> See *In re LeGeros v. N.Y. State Bd. of Parole*, 139 A.D.3d 1068, 1069 (2d Dep't 2016); *In re Fraser v. Evans*, 109 A.D.3d 913, 914-15 (2d Dep't 2013); *In re Shark v. N.Y. State Div. of Parole Chair*, 110 A.D.3d 1134, 1134-35 (3d Dep't 2013).

<sup>68</sup> *In re Wade v. Stanford*, No. 522949, 2017 WL 1167761, at \*1 (N.Y. App. Div. 3d Dep't Mar. 30, 2017); *In re Mullins v. N.Y. State Bd. of Parole*, 136 A.D.3d 1141, 1142 (3d Dep't 2016); *In re Santos v. Evans*, 81 A.D.3d 1059, 1060 (3d Dep't 2011).

<sup>69</sup> For example, although a risk and needs assessment may objectively score the applicant as low risk for re-arrest, the Board may reject these objective measures and focus solely on the crime. On his COMPAS risk assessment, a Project applicant scored "low risk" in the three main categories of felony violence, re-arrest, and absconding. However, in the subsequent parole decision denying release, the Commissioners wrote that "release at this time would deprecate the seriousness of your violent crimes and undermine respect for the law." Such language, drawn almost entirely from the statute, is commonplace in parole decisions, even for individuals assessed as posing low or no risk to public safety. Robinson-Oost, *supra* note 62, at 129-31; see also Hammock & Seelandt, *supra* note 41, at 535-37; Issa Kohler-Hausmann et al., *Children Sentenced to Life: A Struggle for the NY Board of Parole*, 257 N.Y. L.J. 4 (2017); Scott Paltrowitz, *Parole Review Process Has Serious Shortcomings*, CORRECTIONAL ASS'N N.Y.: NEWS (Dec. 6, 2013), <http://www.correctionalassociationelandtn.org/news/parole-review-process-has-serious-shortcomings> [<https://perma.cc/6YFU-4JAF>]; Paltrowitz,

accomplishments in prison may receive some attention during the parole interview and in the written decision, but the crime of conviction is almost always one of the primary reasons for denial, particularly for people convicted of violent crimes who are serving long sentences.<sup>70</sup> During the interview itself, Commissioners often spend the majority of the time questioning applicants about specific details of the original case. These details are gleaned from documents like the Probation Department's pre-sentence report,<sup>71</sup> which often has prejudicial details that may or may not have been proven at trial or outlined during the plea colloquy. People unwilling to admit to the "facts," as the Board believes them to be true, face the prospect of a parole denial based upon what the Board sees as a lack of remorse or insight.<sup>72</sup>

Once the parole interview is complete, applicants must wait, sometimes for up to two weeks,<sup>73</sup> to receive the written decision of the Board. The decisions the Board issues when they deny parole typically contain boilerplate, conclusory language<sup>74</sup> that tracks the

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*supra* note 4, at 14-15; Michael Wilson, *A Crime's Details Are Rehashed and Parole Is Denied, Again and Again*, N.Y. TIMES (July 3, 2015), <https://www.nytimes.com/2015/07/04/nyregion/a-crime-rehashed-and-parole-denied-again-and-again.html> [https://perma.cc/6G8G-KWK5]; Release Aging People in Prison/RAPP, *New York's Parole System in Need of Repair*, PRISON LEGAL NEWS (Aug. 1, 2016), <https://www.prisonlegalnews.org/news/2016/aug/1/new-yorks-parole-system-need-repair/> [https://perma.cc/MQ9G-QDEB]; "The Nature of the Crime" – A Poor Reason to Keep Elders in Prison, RAPP (May 19, 2015) [hereinafter "The Nature of the Crime"], <http://rappcampaign.com/the-nature-of-the-crime/> [https://perma.cc/XJ5X-DGDL].

<sup>70</sup> See, e.g., Paltrowitz, *supra* note 69; "The Nature of the Crime", *supra* note 69; Hammock & Seelandt, *supra* note 41, at 535-37.

<sup>71</sup> Applicants are entitled to review their own pre-sentence reports. N.Y. CRIM. PROC. LAW § 390.50(2)(a) (McKinney 2010) ("Upon written request, the court shall make a copy of the presentence report, other than a part or parts of the report redacted by the court pursuant to this paragraph, available to the defendant for use before the parole board for release consideration or an appeal of a parole board determination.").

<sup>72</sup> *In re* Rossakis v. N.Y. State Bd. of Parole, 146 A.D.3d 22 (1st Dep't 2016) ("The Board's statement that, '[d]espite your assertions of abuse being rejected by a jury after hearing you testify for eight days, and having no corroboration on record of the abuse, you continue to blame your victim for his death,' disregards petitioner's testimony accepting responsibility and expressing remorse for her actions." (alteration in original)).

<sup>73</sup> "If parole is not granted upon such review, the [applicant] shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole." N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2016).

<sup>74</sup> Boilerplate language denying release based on the "nature of the crime" is so typical that it became the title of a short film created by parole reform advocates to illustrate many of the problems with the NYS Board of Parole. See Swartz, *supra* note 47; see also Hammock & Seelandt, *supra* note 41, at 535; *In re* King v. N.Y. State Div. of Parole, 190 A.D.2d 423 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994); *In re* Deperno v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 2014-1603, 2015 WL 9063711, at \*5

language of the statute and recites the factors Commissioners are required to consider by law. Many applicants have reported that they have received nearly identical decisions from their own parole appearances that were several years apart. Others have received decisions identical to those of their peers.

Ultimately, written decisions leave applicants with little indication of how to better prepare for their next interview, and often the very thing that the Commissioners are fixated on is the one thing applicants can never change—their crime of conviction.

#### IV. BARRIERS TO FAIRNESS IN THE PAROLE APPEALS PROCESS

The path to mounting a successful legal challenge to a parole denial is daunting. Parole applicants must first file an administrative appeal with the Board's internal appeals unit and exhaust their administrative remedies.<sup>75</sup> At the administrative appeal, there is a right to counsel and individuals who cannot afford an attorney may request assigned counsel.<sup>76</sup> Many applicants in New York State prisons have reported that their lawyers do not visit them or arrange for a confidential legal telephone call and often submit similarly boilerplate appeals. This leads to woefully inadequate representation and poorly preserved records.<sup>77</sup>

Many people in prison turn to experienced jailhouse lawyers<sup>78</sup>

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(N.Y. Sup. Ct. Nov. 30, 2015); *In re Williams v. N.Y. State Parole of Bd.*, No. 145418, 2015 WL 5840089, at \*2 (N.Y. Sup. Ct. Sept. 30, 2015) (“Upon review of the May 2014 parole denial determination the Court is struck by the fact that the Parole Board’s conclusions are merely a recitation of portions of the language set forth in Executive Law § 259-i(2)(c)(A).”); *In re Rabenbauer v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 46 Misc. 3d 603, 607 (N.Y. Sup. Ct. 2014); *In re West v. N.Y. State Bd. of Parole*, No. 3069-13, 2013 WL 5657701, at \*2-\*4 (N.Y. Sup. Ct. Sept. 24, 2013); *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661, 668-69 (N.Y. Sup. Ct. 2006).

<sup>75</sup> N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 8360, APPEAL PROCESS – BOARD OF PAROLE DECISIONS AND PAROLE/POST-RELEASE SUPERVISION REVOCATION DECISIONS 1-3 (2015) [hereinafter DIRECTIVE 8360], <http://www.doccs.ny.gov/Directives/8360.pdf> [<https://perma.cc/7QQH-TBQ6>].

<sup>76</sup> *Id.* at 2.

<sup>77</sup> On appeal, in order to raise issues in an Article 78 petition in front of the judiciary, those issues must also be raised during the initial administrative appeal. *In re Khan v. N.Y. State Dep’t of Health*, 96 N.Y.2d 879, 880 (2001) (“Judicial review of administrative determinations pursuant to article 78 is limited to questions of law. Unpreserved issues are not issues of law. Accordingly, the Appellate Division had no discretionary authority or interest of justice jurisdiction in reviewing the agency’s determination of guilt below.” (citations omitted)).

<sup>78</sup> “Jailhouse lawyer” refers to an incarcerated person who provides assistance with legal filings and acts essentially as a lawyer. Beth Schwartzapfel, *For \$12 of Commissary, He Got 10 Years Off His Sentence.: What it Takes to Be a Jailhouse Lawyer.*, MARSHALL PROJECT (Aug. 13, 2015, 3:40 PM), <https://www.themarshallproject.org/2015/08/13/for-12-of-commissary-he-got-10-years-off-his-sentence> [<https://perma.cc/9DML->

for assistance in filing administrative appeals, as they are often-times known for submitting more detailed and skilled briefs than court-appointed counsel. However, utilizing the skills of jailhouse lawyers can have its drawbacks—a lack of formal training often leads the appeals unit to dismiss briefs and the various legal arguments presented.

After an administrative appeal is filed, the Board's appeals unit is tasked with reviewing the appeals of denials made by its own Commissioners, although different Commissioners from those who originally denied release at the interview are required to affirm or deny the appeal.<sup>79</sup> The appeals unit is given four months to grant or deny the appeal.<sup>80</sup> In nearly every case, the appeals unit defers to the recommendations of the original Commissioners, often using poorly-drafted, if heavily-cited, memoranda of law giving reasons why an appeal should be denied.<sup>81</sup>

If the Board declines to reverse the denial, the litigant may then file an Article 78 petition in Supreme Court (the trial-level court in New York State).<sup>82</sup> However, litigants must proceed pro se or hire an attorney, as there is no right to counsel at this stage in the appeals process. The question of where to file the Article 78 petition is also a complicated one. Venue is proper either where the original adverse decision was made or where the offices of the administrative agency are located.<sup>83</sup> Thus, appeals can be filed in the jurisdiction where the prison is located, in the county where the Commissioners made their final determination (which is relevant if the interview was conducted over videoconference), or in Albany.<sup>84</sup> Regardless, although most incarcerated people are from New York City and other urban areas, litigants must present their

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E68H]. “[J]ailhouse lawyers have been at the heart of several key legal victories: the right to an attorney, the right to be protected from abuse by other prisoners and by guards, and the right to free exercise of religion.” *Id.*

<sup>79</sup> DIRECTIVE 8360, *supra* note 75, at 2.

<sup>80</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(d) (1995).

<sup>81</sup> *See* Hammock & Seelandt, *supra* note 41, at 557 (“Reviewing courts rarely second-guess the Appeals Unit of the Division, as long as it renders a finding that the Board reviewed all ‘relevant factors.’”).

<sup>82</sup> N.Y. C.P.L.R. 7804(b) (McKinney 1993).

<sup>83</sup> *Id.*; N.Y. C.P.L.R. 506(b)(1) (McKinney 1992); *see also In re Schwartz v. Dennison*, No. 115789/05, 2006 WL 3932753, at \*2:\*6 (N.Y. Sup. Ct. Apr. 18, 2006) (discussing why venue is also appropriate in the county of conviction).

<sup>84</sup> Some litigants have successfully brought Article 78 suits in New York City jurisdictions on the theory that the original conviction took place there. When this occurs, the burden is on DOCCS to move for a change of venue, which they sometimes do. If not, the suit remains where it was filed. *See, e.g., See, e.g., Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661 (Sup. Ct. 2006).

claims to the judiciary of rural and upstate New York. While there are several judges who have expressed great frustration with the arbitrary and subjective practices of the Board, most applicants are contending with a generally conservative and unsympathetic body that gives the Board great leeway.

On appeal, appellants must demonstrate that the Board's denial of parole showed "irrationality bordering on impropriety,"<sup>85</sup> language that is derived from the "arbitrary and capricious" standard, which is used to assess the legality of an administrative agency's action.<sup>86</sup> While the "irrationality bordering on impropriety" standard is now widely quoted and often cited in lower court and appellate rulings, no judge or panel has ever indicated why the Board should be subjected to scrutiny that differs from that applied to other administrative agencies whose actions are subject to Article 78 review, such as the Board of Election or the New York State Bridge Authority.<sup>87</sup> Further, demonstrating that the Board's decision was "irrational[ ] bordering on impropriety," is exceptionally difficult. Even in instances where the court has recognized the extraordinary accomplishments of a petitioner and their apparent suitability for release, the "irrational bordering on impropriety" standard insulates the Board from judicial review.<sup>88</sup>

A successful Article 78 petition also requires precision and excellent timing. When denying parole, the Board most often gives two-year holds,<sup>89</sup> meaning that if an individual is denied release they will not see the Board for another two years. If an individual is able to file their initial administrative appeal and obtain a decision

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<sup>85</sup> *In re Silmon v. Travis*, 95 N.Y.2d 470, 476 (2000); *In re Marino v. Travis*, 289 A.D.2d 493, 493 (2d Dep't 2001).

<sup>86</sup> *See generally In re Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69, 77 (1980) (first promulgating this standard).

<sup>87</sup> This standard appears to originate with the Court of Appeals case *In re Russo v. N.Y. State Bd. of Parole*: "In light of the board's expertise and the fact that responsibility for a difficult and complex function has been committed to it, there would have to be a showing of irrationality bordering on impropriety before intervention would be warranted." *Id.* This language comes from the last full paragraph of the opinion, which focuses on a function that the Board no longer has: the determination of minimum terms of incarceration. Though often cited, the Court of Appeals did not offer any metric for applying this standard, nor does it explain why this standard applies.

<sup>88</sup> *See, e.g., In re Hamilton v. N.Y. State Div. of Parole*, 119 A.D.3d 1268, 1274, 1275 (3d Dep't 2014) ("[T]his Court is persuaded that petitioner's achievements during his incarceration have been extraordinary. . . . Accordingly, inasmuch as the Board has not violated the statutory mandates and its determination does not exhibit irrationality bordering on impropriety under either our precedent or that of the Court of Appeals, its discretion is absolute and beyond review in the courts.") (internal quotations omitted).

<sup>89</sup> Also called "hits."

within a year, and then subsequently file an Article 78 petition, the Attorney General (which defends the Board in these suits) is likely to ask for a filing extension. Then, the courts will often defer writing a decision until the two-year period passes (there is no required timeframe within which a court must rule on a case after it has been fully briefed). If the litigant has already had their subsequent interview with the Board, then the court can deem the suit “moot” because a new hearing—the only remedy the court has at its disposal—has already taken place.<sup>90</sup>

Even if a litigant successfully navigates this difficult appeals process, neither the internal appeals unit nor the courts may grant release as a remedy for a successful appeal.<sup>91</sup> So, a successful Article 78 results only in a new (*de novo*) hearing before a different panel of Commissioners. Many people have experienced the jubilation of a court victory only to be handed another denial and a two-year hit at their *de novo* hearing.

Ultimately, the appeals process is arduous and often deeply unsatisfactory for appellants seeking to challenge their parole denials. Great judicial deference but also insufficient judicial remedies mean that appellants have few, if any, meaningful opportunities for

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<sup>90</sup> As the only remedy permitted in an Article 78 proceeding is the grant of a new hearing, if the Board of Parole interviews a person again before the Article 78 court renders a decision, the matter is considered moot because a new interview was just conducted. *In re Hynes v. Stanford*, 148 A.D.3d 1383, 1383 (3d Dep’t 2017) (“Petitioner commenced this CPLR article 78 proceeding challenging a July 2014 determination of the Board of Parole denying his request for parole release. . . . [P]etitioner reappeared before the Board in January 2017 at which time he was again denied parole release. As such, the appeal is moot and, as the narrow exception to the mootness doctrine is inapplicable, it must be dismissed . . . .”); *see also In re Standley v. N.Y. State Div. of Parole*, 34 A.D.3d 1169, 1170 (3d Dep’t 2006) (noting that “petitioner’s reappearance [before the Board] would normally render this appeal moot,” but for the fact that an exception to the mootness doctrine arose, namely, that “a substantial issue [was] involved which continue[d] to evade review”).

<sup>91</sup> Despite the fact that the only remedy traditionally available on a successful appeal has been a new hearing, several judges have defied this precedent and ordered the Board to release people. Although such decisions are unlikely to hold on appeal, they demonstrate the judiciary’s profound discontent with Parole Board practices. *See, e.g., In re Kellogg v. N.Y. State Bd. of Parole*, No. 160366/2016, 2017 WL 1091762, at \*4 (N.Y. Sup. Ct. Mar. 20, 2017) (where a New York County judge demanded the Board release the petitioner in an Article 78 proceeding); *In re Kellogg v. The N.Y. State Bd. of Parole*, N.Y. L.J. (Apr. 18, 2017). The S.A.F.E. Parole Act, a bill drafted by parole reform advocates that has gained traction in the New York State Assembly, discussed *infra* Part V, includes a provision that would explicitly allow the judiciary to grant release to parole applicants appealing their parole denials. Assemb. 4108, 2013-2014 Leg., Reg. Sess. (N.Y. 2013), <http://legislation.nysenate.gov/pdf/bills/2013/A4108> [<https://perma.cc/26MV-QW38>]; *see also* S. 1128, 2013-2014 Leg., Reg. Sess. (N.Y. 2013), <http://legislation.nysenate.gov/pdf/bills/2013/S1128> [<https://perma.cc/8DVT-4EVK>].

review and the Board continues to deny release to eligible and community-ready individuals with relative impunity.

## V. PAST AND PRESENT LITIGATION

While the regulations governing the practices of the Board are public, as are portions of their monthly meetings, the inner-workings of the Board, how Commissioners are assigned to specific hearing panels, and the process by which they make their release determinations remain unknown. Although the Board operates in relative obscurity, parole reformers have attempted for many years to bring accountability, transparency, consistency, and objectivity to parole release decision-making.

In 2011, the New York State legislature amended the Executive Law governing parole to require the Board to “establish written procedures . . . . incorporat[ing] risk and needs principles . . . .”<sup>92</sup> Prior to this change, use of evidence-based risk and needs tools was discretionary. The amendment required the Board to adopt and utilize an empirically validated risk assessment and to develop procedures for how to use such a tool.

To fulfill the requirement set out by the legislature, the Board selected an evaluative instrument called Correctional Offender Management Profiling for Alternative Sanction (“COMPAS”) developed by Northpointe Institute for Public Management Inc.<sup>93</sup> The COMPAS software was first introduced as a pilot project by New York State in 2001 for use by the Division of Criminal Justice Services’ Office of Probation and Correctional Alternatives without any rigorous testing, and was later adopted for use by all probation departments in New York State (except New York City) by 2010.<sup>94</sup>

After the 2011 reforms, the COMPAS system was adopted by DOCCS to address the legislative changes.<sup>95</sup> COMPAS is administered by a parole applicant’s Offender Rehabilitation Counselor

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<sup>92</sup> See N.Y. EXEC. LAW § 259-c(4) (McKinney 2011).

<sup>93</sup> SHARON LANSING, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE COMPAS-PROBATION RISK AND NEED ASSESSMENT STUDY: EXAMINING THE RECIDIVISM SCALE’S EFFECTIVENESS AND PREDICTIVE ACCURACY I (2012), [http://www.northpointeinc.com/downloads/research/DCJS\\_OPCA\\_COMPAS\\_Probation\\_Validity.pdf](http://www.northpointeinc.com/downloads/research/DCJS_OPCA_COMPAS_Probation_Validity.pdf) [<https://perma.cc/63BG-G2KA>].

<sup>94</sup> Julia Angwin, et al., *Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And It’s Biased Against Blacks.*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/WN9A-ZA9T>].

<sup>95</sup> John Caher, *Effect of Risk Assessment Rule on Parole Decisions is Unclear*, N.Y. L.J. (Apr. 30, 2012).

“ORC”<sup>96</sup> and currently consists of 74 questions.<sup>97</sup> Answers are tallied and applicants are given a final score of low, medium, or high, indicating the level of risk they pose to public safety upon release.<sup>98</sup> Many applicants report that the ORCs who administer the evaluations frequently make mistakes and misreport information, especially regarding an applicant’s prior criminal history, disciplinary record, and family support. As ORCs often only give applicants their COMPAS reports days before their Parole Board interviews, there is little time and no viable process for correcting errors.<sup>99</sup> COMPAS has also been found to be racially biased.<sup>100</sup>

Further, as the purpose of incorporating the risk and needs principles was to “measure the rehabilitation of persons appearing before the board [and] the likelihood of success of such persons upon release,”<sup>101</sup> the Board also instituted a new case management procedure. The amended statute requires that:

[T]he department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the [incarcerated person]. The purpose of such plan shall be to promote the rehabilitation of the [incarcerated person] and their successful and productive reentry and reintegration into society upon release.<sup>102</sup>

When the 2011 law was passed requiring the use of the risk assessment and transitional accountability plans, it was hailed as a

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<sup>96</sup> DIRECTIVE 8500, *supra* note 65, at 6.

<sup>97</sup> Winerip, *supra* note 16; *see also In re Hawthorne v. Stanford*, 135 A.D.3d 1036, 1037-38 (3d Dep’t 2016) (describing the COMPAS assessment). Although used for different purposes and in a different context, the COMPAS-Probation instrument shares some overlap with the COMPAS-Parole instrument, and thus is provided here as an example. *See* LANSING, *supra* note 93, at 21; *see also* NORTHPOINTE, PRACTITIONERS GUIDE TO COMPAS 17 (2012), [http://www.northpointeinc.com/files/technical\\_documents/FieldGuide2\\_081412.pdf](http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf) [<https://perma.cc/4FXT-6U9M>] (“Although we view risk scales separately from need scales in terms of function and purpose, both the need scales and the risks scales should be relevant for probation, prison, reentry, and parole work.”).

<sup>98</sup> Winerip, *supra* note 16. It is unknown how each question is weighed and factored into the final calculation.

<sup>99</sup> People in prison have reported attempting to fix errors in their COMPAS through a formal grievance process, but often to no avail. *See* N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 4040, INMATE GRIEVANCE PROGRAM (2016), <http://www.doccs.ny.gov/Directives/4040.pdf> [<https://perma.cc/A4XQ-5JX3>].

<sup>100</sup> Angwin et al., *supra* note 94. *See also* Adam Liptak, *Sent to Prison by a Software Program’s Secret Algorithms*, N.Y. TIMES (May 1, 2017), [https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html?\\_r=0](https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html?_r=0) [<https://perma.cc/R4FC-QHC9>].

<sup>101</sup> N.Y. EXEC. LAW § 259-c(4) (McKinney 2011).

<sup>102</sup> N.Y. CORRECT. LAW § 71-a (McKinney 2011).

potentially momentous shift towards a new rehabilitative approach and more forward-looking parole release decisions.<sup>103</sup> However, it became clear that no such grand overhaul would be forthcoming.<sup>104</sup> Following the 2011 amendments, the Board did not engage in the formal rule-making procedure outlined by New York State's Administrative Procedure Act<sup>105</sup> to promulgate new regulations, although the Chairwoman of the Board at the time, Andrea Evans, did issue a short memo noting that risk and needs principles were now required to be considered.<sup>106</sup> However, she noted in her memo that "the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider *has not changed* through the aforementioned legislation."<sup>107</sup> People in prison also reported that no transitional accountability plans were generated prior to their parole interviews.

The Board's apparent failure to comply with the legislature's amendments resulted in substantial litigation. People in prison, while challenging their parole denials, argued that the Board had violated N.Y. Exec. Law § 259-c(4) by not engaging in formal rule-making, and therefore, did not hold a lawful parole hearing. In spite of some success in the trial courts, most notably in *Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*,<sup>108</sup> the Appellate Division, Third Department ultimately sided with the Board that formal rule-making was not required,<sup>109</sup> effectively foreclosing the opportunity for people to win new hearings through this avenue.<sup>110</sup> Other litigants challenged their parole denials based on the lack of

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<sup>103</sup> See, e.g., Philip M. Genty, *Changes to Parole Signal Potentially Sweeping Policy Shift*, 246 N.Y. L.J. 4 (2011).

<sup>104</sup> See Caher, *supra* note 95 (noting that advocates have not seen any changes and quoting a practitioner who stated, "[m]y experience has been it doesn't matter because most of the guys are scoring the lowest risk assessment level and they are still hitting them and saying they are a threat to society").

<sup>105</sup> Such a procedure would require that the Board issue a notice of proposed rulemaking and publication with an opportunity for public comment. N.Y. A.P.A. LAW § 202 (McKinney 2011).

<sup>106</sup> Memorandum from Andrea Evans, Chairwoman, N.Y. State Bd. of Parole, to Members, N.Y. State Bd. of Parole (Oct. 5, 2011), <https://curennewyork.wordpress.com/2012/01/04/andrea-evans-memo-to-parole-board/> [<https://perma.cc/FY3E-37VJ>]. Initially the Board took the position that they were not required to consider the COMPAS score. They were rebuked for taking this position. *In re Garfield v. Evans*, 108 A.D.3d 830, 830-31 (3d Dep't 2013) ("We find no justification for the Board's failure to use the COMPAS instrument . . .").

<sup>107</sup> Evans, *supra* note 106 (emphasis added); see also Caher *supra* note 95.

<sup>108</sup> 40 Misc. 3d 226 (N.Y. Sup. Ct. 2013).

<sup>109</sup> *In re Montane v. Evans*, 116 A.D.3d 197, 202 (3d Dep't 2014).

<sup>110</sup> For a summary of the legal issues involved in the pre-*Montane* litigation challenging the Board's actions following the 2011 legislative amendments to the Executive Law, see Alan Rosenthal & Patricia Warth, *Parole Release Decisions and the Rule of Law*,

transitional accountability plans in their case files, although such challenges were generally unsuccessful.<sup>111</sup>

In response to the wave of litigation, the Board did eventually move to promulgate new regulations, which were proposed in December 2013.<sup>112</sup> In spite of a barrage of comments upon the failure of the proposed new rules to alter the status quo or implement the legislature's 2011 mandate,<sup>113</sup> and a hearing conducted before the New York State Assembly's Standing Committee on Correction for which many advocates submitted forceful testimony for parole reform,<sup>114</sup> the Board ultimately enacted the exact regulations they had proposed, incorporating none of the recommendations of the parole reform community.<sup>115</sup> The new regulations were enacted in 2014, and rather than give any sweeping guidance or revamp the way the Board conducts itself, they did very little, simply adding risk and needs assessments and case plans to the string of factors that the Board must consider.<sup>116</sup>

In response to this failure to incorporate the input of the parole reform community, parole applicants denied release again took to the courts. In 2014, Jorge Linares made his way to the Court of Appeals.<sup>117</sup> Attorneys for Linares argued that he was enti-

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ATTICUS, Summer 2013, at 10, [http://www.nysacdl.org/wp/wp-content/uploads/2010/09/NYSACDL\\_Atticus\\_Summer\\_2013.pdf](http://www.nysacdl.org/wp/wp-content/uploads/2010/09/NYSACDL_Atticus_Summer_2013.pdf) [<https://perma.cc/FTW5-LWR3>].

<sup>111</sup> See, e.g., *Morris*, 40 Misc. 3d 226.

<sup>112</sup> Parole Board Decision-Making, 35 N.Y. State Reg. 51 (proposed Dec. 18, 2013), <https://docs.dos.ny.gov/info/register/2013/dec18/pdf/rulemaking.pdf> [<https://perma.cc/C99E-5X32>].

<sup>113</sup> See, e.g., Jeremy Benjamin, *Newly Proposed Parole Regulations*, N.Y. ST. BAR ASS'N: BLOGS (Oct. 21, 2016, 10:57 PM), <http://communities.nysba.org/blogs/jeremy-benjamin/2016/10/21/newly-proposed-parole-regulations> [<https://perma.cc/8URD-XWV3>]. Some of the principle critiques the parole reform community had of the proposed regulations were that: the Board would be free to disregard the risk and needs assessment if it was only one factor of many; the Board is not required to give individuals any feedback on what they could do to have a better chance of release in the future; and the new regulations give no guidance on *how* risk and needs assessments should be taken into account or used in decision-making. For a summary of the legislative hearing and the advocacy around the proposed regulations, see Prison Action Network, *January 2014*, BUILDING BRIDGES (Jan. 5, 2014), [http://prisonaction.blogspot.com/2014\\_01\\_01\\_archive.html](http://prisonaction.blogspot.com/2014_01_01_archive.html) [<https://perma.cc/W6EQ-R62N>].

<sup>114</sup> See, e.g., Paltrowitz, *supra* note 4; see also STANDING COMM. ON CORR., N.Y. STATE ASSEMBLY, 2013 ANNUAL REPORT 10 (2013), <http://assembly.state.ny.us/comm/Correct/2013Annual/index.pdf> [<https://perma.cc/E7SM-VMQ2>].

<sup>115</sup> These regulations are codified at N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.3 (2014).

<sup>116</sup> See Notice of Adoption: Parole Board Decision-Making, 36 N.Y. State Reg. 30, 11 (July 30, 2014), <https://docs.dos.ny.gov/info/register/2014/july30/pdf/rulemaking.pdf> [<https://perma.cc/LA5N-MZJ6>], codified at N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.3(a)(11)-(12) (2014).

<sup>117</sup> As a pro se litigant, Mr. Linares represented himself in his initial Article 78

tled to a new hearing because of the Board's failure to consider a risk and needs assessment and that the Board must give a proper reason if they decline to release someone deemed low risk. The Court of Appeals affirmed the lower court opinion, which ordered a new hearing because of the Board's failure to consider the risk and needs assessment, but did not consider the arguments regarding the validity of the new regulations. Because the regulations were promulgated after Mr. Linares's parole hearing had taken place, the Board had not yet had an opportunity to evaluate the validity and application of the new regulations.<sup>118</sup> Thus, the Court reasoned, Linares was challenging regulations that had never been applied to him.<sup>119</sup> The suit was dismissed essentially on a technicality, in spite of attracting several amicus briefs and presenting significant and viable challenges to the Board's procedures.<sup>120</sup>

Although a few individuals have been able to obtain relief from the courts when appealing a denial of parole, litigation challenging the Board has at times been piecemeal, which is not surprising given that many litigants are incarcerated and are forced to represent themselves on a pro se basis. Although legislative changes in 2011 presented some opportunity for a shift in the Board's practices, the Board has largely disregarded the tone and intent of that legislation and found ways to circumvent its mandate.

## VI. HOLDING THE BOARD IN CONTEMPT

Other recent developments give cause to believe that change is afoot. In an attempt to bypass the circular process of parole denials, internal appeals, and Article 78 petitions, creative attorneys and jailhouse lawyers have begun asking courts to hold the Board in contempt of court for denials following de novo hearings that stemmed from successful Article 78 petitions.<sup>121</sup> Petitioners argued

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petition and his subsequent appeal to the New York Appellate Division, Third Department. *See In re Linares v. Evans*, 112 A.D.3d 1056 (3d Dep't 2013). However, Mr. Linares obtained counsel when New York's highest court granted leave to appeal. *See In re Linares v. Evans*, 26 N.Y.3d 1012 (2015).

<sup>118</sup> *Linares*, 26 N.Y.3d at 1013-14.

<sup>119</sup> *Id.*

<sup>120</sup> *See* Brief for Columbia Law School Prisoners and Families Clinic as Amicus Curiae, *Linares*, 26 N.Y.3d 1012 (No. 2014-76), 2015 WL 6550689, at \*1 (advocating for "[c]onsistent application of risk and needs assessment tools"); Brief of Criminology Experts as Amici Curiae, *Linares*, 26 N.Y.3d 1012 (No. 2014-76), 2015 WL 6550692, at \*1 (advocating for a decision that "will reinforce the New York Legislature's aim to improve parole decision making by incorporating non-discretionary risk/needs assessment tools").

<sup>121</sup> *Mackenzie v. Stanford*, No. 2789/15, at 1-5 (N.Y. Sup. Ct. May 24, 2016), [https://assets.documentcloud.org/documents/2849697/5-16-Decision-Granting-Contempt-](https://assets.documentcloud.org/documents/2849697/5-16-Decision-Granting-Contempt)

that when the Board of Parole holds a de novo hearing and issues a boilerplate parole denial similar or equivalent to the one issued after the original hearing that was successfully challenged, the Board is directly disobeying the court's order to hold a lawful hearing.

The most well-known case in this area was that of John MacKenzie, who was convicted of killing a police officer in 1975.<sup>122</sup> In 2016, John was 70 years old, and had spent 41 years in prison on a sentence of 25 years to life. While incarcerated, John accomplished a great deal, earning three college degrees, founding new programs for incarcerated men, and undergoing a profound personal transformation.<sup>123</sup>

Judge Maria Rosa of Dutchess County held the Board of Parole in contempt in 2016, writing that MacKenzie's denial at his de novo hearing was "virtually the same [as the original denial]," which was "entirely unsupported by the factual record."<sup>124</sup> Judge Rosa demanded to know: "if parole isn't granted to this petitioner, when and under what circumstances would it be granted?"<sup>125</sup> She imposed a \$500 fine for every day that the Board failed to conduct a lawful hearing.<sup>126</sup>

In July 2016, the Board of Parole held a hearing and again

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Motion.pdf [<https://perma.cc/TP3X-VTD6>]; see also Alexis Watts & Edward Rhine, *Parole Board Held in Contempt After Failing to Follow State's Parole Release Laws*, ROBINIA INST. L. & CRIM. JUST.: NEWS, <https://robinainstitute.umn.edu/news-views/parole-board-held-contempt-after-failing-follow-state%E2%80%99s-parole-release-laws> [<https://perma.cc/Q2C2-DS5F>] (discussing *Mackenzie v. Stanford*).

<sup>122</sup> Victoria Law, *Suicide of 70-Year-Old John Mackenzie After Tenth Parole Denial Illustrates Broken System*, VILLAGE VOICE (Aug. 9, 2016, 9:30 AM), <http://www.villagevoice.com/news/suicide-of-70-year-old-john-mackenzie-after-tenth-parole-denial-illustrates-broken-system-8959954> [<https://perma.cc/PP6D-SVFC>].

<sup>123</sup> *Id.*

<sup>124</sup> *Mackenzie*, No. 2789/15, at 1-2.

<sup>125</sup> *Id.* at 5.

<sup>126</sup> *Id.* In *Cassidy v. N.Y. State Bd. of Parole*, Judge Sciortino similarly held the Board in contempt for a de novo hearing that mimicked, and according to Judge Sciortino, was "even more egregious" than, the first. Ben Bedell, *Parole Board Held in Contempt for Failure to Explain Denial*, N.Y. L.J. (June 1, 2015). However, on appeal, the Second Department Appellate Division reversed Judge Sciortino's decision, holding that the Board had in fact complied with its responsibilities pursuant to the original Supreme Court order, potentially stymieing the success of future contempt motions. *In re Cassidy v. N.Y. State Bd. of Parole*, 140 A.D.3d 953, 954-55 (2d Dep't 2016), *leave to appeal dismissed*, 28 N.Y.3d 1128 (2017), *reargument denied*, No. 2017-252, 2017 WL 1223647 (N.Y. Apr. 4, 2017). As the Court of Appeals denied leave for an additional appeal, the Second Department ruling stands. *In re Cassidy v. N.Y. State Bd. of Parole*, 28 N.Y.3d 1128 (2017), *reargument denied*, No. 2017-252, 2017 WL 1223647 (N.Y. Apr. 4, 2017). However, advocates have argued that the facts in *Cassidy* can and will be easily distinguished from other cases, preserving opportunities for future contempt motions.

denied John release for the tenth time.<sup>127</sup> Days later, John committed suicide in a prison cell in Fishkill Correctional Facility.<sup>128</sup> John was loved and respected by people both inside and outside of prison; his death has become a rallying cry for the reform community.<sup>129</sup>

While many avenues for contempt motions have potentially been closed by a ruling in the Appellate Division, Second Department,<sup>130</sup> the fact that some Judges have been willing to go so far as to hold the Board in contempt is revealing of the extent of the Board's intransigence and unlawful practices.

## VII. PROTECTIONS FOR PEOPLE CONVICTED AS JUVENILES

Other signs of change include a recent line of cases designed to protect people convicted of crimes committed before the age of 18. After reviewing a plethora of scientific evidence, the U.S. Supreme Court concluded that, "children are constitutionally different from adults for purposes of sentencing"<sup>131</sup> because of their diminished culpability and enhanced capacity for rehabilitation.<sup>132</sup> Further, the Constitution demands that juveniles sentenced to life without the possibility of parole before the age of 18 must be afforded a meaningful "opportunity for release . . . to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change."<sup>133</sup> The Court also made clear that these holdings apply retroactively to the states.<sup>134</sup>

In applying these rulings, the New York Appellate Division, Third Department in *Hawkins v. N.Y. State Dep't of Corr. & Cmty.*

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<sup>127</sup> Jesse Wegman, Opinion, *False Hope and a Needless Death Behind Bars*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/06/opinion/false-hope-and-a-needless-death-behind-bars.html> [<https://perma.cc/N2EB-BPSY>].

<sup>128</sup> Law, *supra* note 122.

<sup>129</sup> See, e.g., *id.*; Editorial, *A Challenge to New York's Broken Parole System*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/13/opinion/a-challenge-to-new-yorks-broken-parole-board.html> [<https://perma.cc/Z7KF-Q2J3>]; Joseph Goldstein, *Merciless End for a Long Island Cop Killer*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/30/nyregion/merciless-end-for-a-long-island-cop-killer.html> [<https://perma.cc/464E-BQCB>]; Wegman, *supra* note 127.

<sup>130</sup> See *In re Cassidy v. N.Y. State Bd. of Parole*, 140 A.D.3d 953, 954-55 (2d Dep't 2016), *leave to appeal dismissed*, 28 N.Y.3d 1128 (2017), *reargument denied*, No. 2017-252, 2017 WL 1223647 (N.Y. Apr. 4, 2017).

<sup>131</sup> *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

<sup>132</sup> *Id.*; *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

<sup>133</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

<sup>134</sup> *Id.* at 729.

*Supervision* held in 2016 that these principles pertain just as much to the Board of Parole as to a sentencing court.<sup>135</sup> The Appellate Division explained that a “meaningful opportunity” for release is one in which a person’s youth at the time of the crime, as well as that person’s individual capacity for reform and rehabilitation, are considered as part of the Board’s inquiry.<sup>136</sup>

If the Board follows the mandate of the Third Department and the U.S. Supreme Court as required, and genuinely considers a person’s youthfulness at the time of their crime, hundreds, or perhaps thousands, of people will serve less time in prison for crimes they committed as juveniles.<sup>137</sup> Advocates and attorneys have already begun to mobilize around this issue, identifying and advocating for people in New York State who are serving life sentences for crimes they committed before they were 18.<sup>138</sup>

#### VIII. RECENT CHANGES IN PAROLE BOARD REGULATIONS

Following *Hawkins* and the death of John MacKenzie, the Board once again moved to promulgate new regulations, which were formally proposed in September 2016.<sup>139</sup> They aimed to make more explicit the Board’s mandate to consider risk and needs assessments, and require the Board to consider an individual’s youth at the time of the offense when relevant.<sup>140</sup> In the same spirit, the new proposed regulations also required that in their denials, Commissioners must give “factually individualized” reasons for their conclusions.<sup>141</sup>

However, parole reform advocates and other grassroots lead-

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<sup>135</sup> *Hawkins v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 36 (3d Dep’t 2016).

<sup>136</sup> *Id.* at 37.

<sup>137</sup> See *Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 497; *Hawkins*, 140 A.D.3d at 36-38.

<sup>138</sup> See Kohler-Hausmann et al., *supra* note 69; *New York’s Parole Problems*, WNYC: BRIAN LEHRER SHOW (Dec. 9, 2016), <http://www.wnyc.org/story/nys-parole-juvenile-offenders/> [<https://perma.cc/H5SD-M5QJ>]; Beth Schwartzapfel, *When Parole Boards Trump the Supreme Court*, MARSHALL PROJECT (May 19, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/05/19/when-parole-boards-trump-the-supreme-court> [<https://perma.cc/HAU5-KB8C>]; Issa Kohler-Hausmann et al., Comment Letter on Proposed Rule Making on Parole Board Decision Making 3-6 (Oct. 29, 2016) [hereinafter Kohler-Hausmann, Comment Letter], [http://rappcampaign.com/wp-content/uploads/Letter-re-Proposed-Parole-Regs\\_IKH\\_10-31\\_2016.pdf](http://rappcampaign.com/wp-content/uploads/Letter-re-Proposed-Parole-Regs_IKH_10-31_2016.pdf) [<https://perma.cc/BUN5-M3MW>].

<sup>139</sup> Proposed Rule Making: Parole Board Decision Making, 38 N.Y. State Reg. 39, 7-8 (Sept. 28, 2016), <https://docs.dos.ny.gov/info/register/2016/sept28/pdf/rulemaking.pdf> [<https://perma.cc/4AYS-TWAS>]; see also Joel Stashenko, *Proposed New Parole Rules Fairer to Inmates, Officials Say*, 256 N.Y. L.J. 1 (2016).

<sup>140</sup> Proposed Rule Making: Parole Board Decision Making, *supra* note 139.

<sup>141</sup> *Id.* at 7.

ers argued that the proposed regulations did not fundamentally change the structure or methods of the Parole Board—while they contained some steps towards positive change, the rules did not explicitly require the Board to assess applicants based on their current risk, rehabilitation, and readiness for release.<sup>142</sup> As such, the regulations could permit a continuation of the Board's current practice: refusing to release people from prison even when they pose no risk of endangering public safety and are undeniably rehabilitated and suitable for parole.<sup>143</sup>

Attorneys also argued that the proposed regulations were unlikely to pass constitutional muster in relation to *Hawkins* and the line of U.S. Supreme Court cases that offer unique protections for people convicted as juveniles.<sup>144</sup> Their poor construction and failure to center the hallmark features of youth in their inquiries, as

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<sup>142</sup> See, e.g., Jeremy A. Benjamin, Chair, Comm. on Civil Rights, N.Y. State Bar Ass'n, Comment Letter on Proposed Rule Making on Parole Board Decision Making 1-2 (Nov. 11, 2016), <http://rappcampaign.com/wp-content/uploads/NYS-Bar-Association-Ctteeon-Civil-Rts.pdf> [<https://perma.cc/K6TR-ZFPT>]; Judith Brink, Dir., Prison Action Network, Comment Letter on Proposed Rule Making on Parole Board Decision Making (Nov. 6, 2016), <http://rappcampaign.com/wp-content/uploads/prisonactionnetworkparolecomments.pdf> [<https://perma.cc/LK82-WYNM>]; Elizabeth Gaynes, President & CEO, The Osborne Ass'n, Comment Letter on Proposed Rule Making on Parole Board Decision Making (Oct. 31, 2016), [http://www.osborneny.org/images/uploads/printMedia/Osborne\\_PublicComment\\_Parole.pdf](http://www.osborneny.org/images/uploads/printMedia/Osborne_PublicComment_Parole.pdf) [<https://perma.cc/GXE4-XS6K>]; Justine M. Luongo, Attorney-in-Charge, Criminal Practice, The Legal Aid Soc'y & Karen L. Murtagh, Exec. Dir., Prisoners' Legal Servs. of N.Y., Comment Letter on Proposed Rule Making on Parole Board Decision Making (Nov. 14, 2016) [hereinafter Luongo & Murtagh, Comment Letter], <http://rappcampaign.com/wp-content/uploads/LegalAidSocietyAndPrisonersRightsProject.pdf> [<https://perma.cc/E4PL-MPEH>]; Lauren Melodia, Gen. Manager, Milk Not Jails, Comment Letter on Proposed Rule Making on Parole Board Decision Making (Nov. 10, 2016), <http://rappcampaign.com/wp-content/uploads/MNJ-Parole-Comments-to-DOCCS-111116.pdf> [<https://perma.cc/PNB3-DAC4>]; Nat'l Lawyers Guild – N.Y.C. Chapter, Comment Letter on Proposed Rule Making on Parole Board Decision Making (Nov. 10, 2016) [hereinafter Nat'l Lawyers Guild – N.Y.C. Chapter, Comment Letter], <http://rappcampaign.com/wp-content/uploads/NLG-NYC-Final-Comments.pdf> [<https://perma.cc/KX2B-TH5B>]; Release Aging People in Prison (RAPP) Campaign, Comment Letter on Proposed Rule Making on Parole Board Decision Making 2 (Oct. 8, 2016), <http://rappcampaign.com/wp-content/uploads/RAPP-PUBLIC-COMMENTSOctober2016-3-4.pdf> [<https://perma.cc/77YP-LL5J>]; Judith M. Whiting, Gen. Counsel, Cmty. Serv. Soc'y, Comment Letter on Proposed Rule Making on Parole Board Decision Making (Nov. 10, 2016), <http://rappcampaign.com/wp-content/uploads/CommunityServiceSocietyparolecomments.pdf> [<https://perma.cc/68FG-6RS4>].

<sup>143</sup> See Release Aging People in Prison (RAPP) Campaign, *supra* note 142.

<sup>144</sup> See, e.g., Kohler-Hausmann, Comment Letter, *supra* note 138; Jack Beck, Dir., Prison Visiting Project, Corr. Ass'n of N.Y., Comment Letter on Proposed Rule Making on Parole Board Decision Making 5-6 (Nov. 10, 2016), <http://rappcampaign.com/wp-content/uploads/CorrectionalAssociationofNY.pdf> [<https://perma.cc/L4FR-4TEN>].

well as a lack of proper procedural protections, made the proposed amendments woefully inadequate. Ultimately, while the proposed regulations included new additions, which, if followed, could impact the parole process for many, they do little to shift the underlying approach to and tone of the process.

In response to the inadequacy of the proposed regulations, advocates organized a statewide campaign to solicit public comments that the Board would then be required to review, as with the promulgation of any new administrative rules.<sup>145</sup> The Board of Parole received over 400 comments from the public and from incarcerated people.<sup>146</sup>

While comments varied widely, many suggested that for those who pose little to no risk to public safety (as determined by both an evidence-based evaluation and a more holistic risk and needs assessment), there should be a codified presumption of release.<sup>147</sup> Thus, for those with low risk scores, parole shall “be granted . . . unless exceptional circumstances exist as to warrant a denial.”<sup>148</sup> Commenters also included demands that the Board inform an applicant, upon denial of parole, of specific steps the applicant can take to improve their chances of release at future appearances. Advocates argued that the list should be exhaustive, preventing the Commissioners from arbitrarily denying release at a future hearing.<sup>149</sup> Following this vibrant period of public comment, advocates and others invested in comprehensive parole reform are eagerly

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<sup>145</sup> Parole Justice New York, *Now is the Time to Demand Parole Reform in New York State*, ACTION NETWORK, <https://actionnetwork.org/letters/now-is-the-time-to-demand-parole-reform-in-new-york-state> [<https://perma.cc/T93U-VCCS>]; *Comment on NYS Parole Board Regulations*, RAPP, <http://rappcampaign.com/public-comments-on-draft-parole-regulations/> [<https://perma.cc/78AZ-A876>].

<sup>146</sup> NYS Public Safety, *NYS Board of Parole Meeting January 2017*, YOUTUBE (Feb. 3, 2017), <https://www.youtube.com/watch?v=QwXLacRmfNE> [<https://perma.cc/4U92-283B>].

<sup>147</sup> *See 3 Steps to Parole Justice in New York*, RAPP (Feb. 12, 2016), <http://rappcampaign.com/3-steps-to-parole-justice-in-new-york/> [<https://perma.cc/3CX7-J5ME>] (providing links to comments from various individuals and organizations); *see also* Kohler-Hausmann, Comment Letter, *supra* note 138.

<sup>148</sup> Nat'l Lawyers Guild – N.Y.C. Chapter, Comment Letter, *supra* note 142; Luongo & Murtagh, Comment Letter, *supra* note 142, at 2.

<sup>149</sup> *See, e.g.*, Luongo & Murtagh, Comment Letter *supra* note 142, at 4; Glenn E. Martin, Founder & President, JustLeadershipUSA, Comment Letter on Proposed Rule Making on Parole Board Decision Making (2016), <http://rappcampaign.com/wp-content/uploads/JLUSA-Parole-Board-Comments-.pdf> [<https://perma.cc/6Z8M-EJLP>]; Nat'l Lawyers Guild – N.Y.C. Chapter, Comment Letter, *supra* note 142; Claudia S. Trupp, Dir., Justice First & Client Re-Entry Projects, Ctr. for Appellate Litig., Comment Letter on Proposed Rule Making on Parole Board Decision Making (Nov. 7, 2016), [http://rappcampaign.com/wp-content/uploads/2016-Commentary-on-Parole-Regulations\\_CAL.pdf](http://rappcampaign.com/wp-content/uploads/2016-Commentary-on-Parole-Regulations_CAL.pdf) [<https://perma.cc/5DHN-7ZVJ>].

awaiting the publication of revised parole regulations.<sup>150</sup>

### IX. LEGISLATIVE INTERVENTION

Similar to the success of the public comment period, legislative advocacy has generated great momentum at the grassroots level and is slowly taking hold with legislators. The Safe and Fair Evaluations (S.A.F.E.) Parole Act,<sup>151</sup> a bill drafted by parole reform advocates and championed as a law that would create a presumption of release and force the Board to grant parole to those who pose little to no viable risk to public safety, has several key sponsors and supporters. It will require, however, extensive public pressure and additional legislative support in order to overcome Republican and conservative opposition in the New York State Senate.<sup>152</sup>

Several legislators, including members of the State Assembly Committee on Correction, newly chaired by Assemblyperson David Weprin, have proposed additional legislation that could also dramatically alter current parole policy. Assemblyperson Perry has introduced Bill 2619-A, which alters the composition of the Board to include members that reflect the composition of the prison population in race, age, and geographic area of residence.<sup>153</sup> Bill 4034, sponsored by Assemblyperson Weprin and fellow Assemblyperson Daniel O'Donnell, removes from the Executive and Correction Laws any language referring to deprecation of the severity of the

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<sup>150</sup> On January 30, 2017, at the monthly Parole Board meeting, counsel to the Board, Kathleen Kiley, announced that counsel's office was still in the process of reviewing the public comments they received, and that they are determining whether another public comment period will be necessary after the revisions are made. NYS Public Safety, *supra* note 146, at 2:45.

<sup>151</sup> The S.A.F.E. Parole Act was originally introduced in 2011 and has been re-introduced every subsequent year. Assemb. 4108, 2013-2014 Leg., Reg. Sess. (N.Y. 2013), <http://legislation.nysenate.gov/pdf/bills/2013/A4108> [<https://perma.cc/26MV-QW38>]; *see also* S. 1128, 2013-2014 Leg., Reg. Sess. (N.Y. 2013), <http://legislation.nysenate.gov/pdf/bills/2013/S1128> [<https://perma.cc/8DVT-4EVK>]; *see also* Robinson-Oost, *supra* note 62, at 137-42 (providing a thorough analysis of the S.A.F.E. Parole Act).

<sup>152</sup> Liberal legislation has proven difficult to pass in the New York State Senate because of the Independent Democratic Conference, which allows the Republican Party to control the Senate despite the Democratic Party's numerical majority. Jesse McKinley, *Breakaway Democrats in New York Add Another to Their Ranks*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/nyregion/independent-democratic-conference-republicans-state-senate.html> [<https://perma.cc/F5MY-TK57>].

<sup>153</sup> Assemb. 2619, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A02619&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A02619&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y) [<https://perma.cc/A75T-YACJ>]; *see also Memorandum in Support of Legislation: A02619*, N.Y. ST. ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A2619&term=2017&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A2619&term=2017&Memo=Y) [<https://perma.cc/4KTD-GG38>].

crime.<sup>154</sup> Bill 1908 would radically reform the appeals process by guaranteeing more timely appeals, affording attorneys to appellants seeking relief from the courts, and allowing courts to grant release upon a successful appeal.<sup>155</sup>

However, not all pending bills will change parole policy in ways that are advantageous to parole-eligible applicants. Assembly Bill 2350-A and the corresponding Senate Bill 2997-A would increase the maximum time allowed between parole hearings from two years to five.<sup>156</sup> If passed, people in prison will have far fewer opportunities for release, and will continue to languish in prison for years longer than their minimum sentence. Another bill mandates life without parole sentences for people convicted of killing police officers, effectively sentencing them to die in prison.<sup>157</sup> A recently introduced geriatric parole bill, A.2386, grants parole to every person who is 60 years of age and older and who has served at

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<sup>154</sup> Assemb. 4034, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A04034&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A04034&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y) [<https://perma.cc/9KRF-VXJZ>]; see also *Memorandum in Support of Legislation: A04030*, N.Y. ST. ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A4\]034&term=&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A4]034&term=&Memo=Y) [<https://perma.cc/95PW-EQFF>] (proving rationale for the proposed law).

<sup>155</sup> Assemb. 1908, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A01908&term=2017&Summary=Y&Actions=Y&Text=Y&Votes=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A01908&term=2017&Summary=Y&Actions=Y&Text=Y&Votes=Y) [<https://perma.cc/GS94-GR3K>]; see also *Memorandum in Support of Legislation: A0198*, N.Y. ST. ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A1908&term=2017&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A1908&term=2017&Memo=Y) [<https://perma.cc/9MK9-T6PT>] (“This bill aims to speed up the process of parole appeals and provide for needed court oversight of the board’s decisions. It permits [applicants] to bypass the parole appeals unit to appeal directly to the court and allows the court to receive the entire record that had been before the board. It transfers the right to counsel from the administrative appeal to the Article 78 petitioning process. It also permits the court broader remedies upon review, including the right to order an [applicants] to be released from prison. The bill requires the board to make a timely transcript of its hearings and provide an audio recording of the hearing, including any testimony by witnesses other than the [applicant] being considered for parole.”).

<sup>156</sup> Assemb. 2350-A, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), <http://legislation.nysenate.gov/pdf/bills/2017/A2350A> [<https://perma.cc/5HSS-AKH9>]; S. 2997-A, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), <http://legislation.nysenate.gov/pdf/bills/2017/S2997A> [<https://perma.cc/QSR7-LAPB>]; see also *Memorandum in Support of Legislation: A02350*, N.Y. ST. ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A02350&term=2017&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A02350&term=2017&Memo=Y) [<https://perma.cc/NAY4-M4XP>] (“This bill would extend the number of months from twenty-four to sixty as the time within which the parole board must set for reconsideration of a denied application for parole in cases where an [applicant] was sentenced for a violent crime.”).

<sup>157</sup> Assemb. 4989, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), <http://legislation.nysenate.gov/pdf/bills/2017/A4989> [<https://perma.cc/A74W-KF3F>] (“Mak[ing] life imprisonment without parole mandatory for defendants convicted of murder in the first degree and [sic] the victim is a police officer.”); S. 3681, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), <http://legislation.nysenate.gov/pdf/bills/2017/S3681> [<https://perma.cc/5NFR-M8TP>].

least one-half of their minimum sentence.<sup>158</sup> However, the bill excludes people convicted of murder in the first degree, the population that is most in need of additional release mechanisms and among the least likely to recidivate.<sup>159</sup>

Other bills have yet to be introduced, but hold potential. The Truth in Parole bill was written by incarcerated people in New York State, and its drafters, some of whom were released in 2016, are currently securing sponsors and support for their proposal.<sup>160</sup>

While much of the proposed legislation accurately reflects the demands of parole reform advocates, those who are formerly incarcerated, and parole-eligible people in prison, the current climate in the New York State Senate, in which conservative and Republican legislators carry the majority, means that a change in policy will require significant public pressure and targeted campaigns.

#### X. THE HISTORY OF THE PAROLE PREPARATION PROJECT

After several years of advocating for and supporting various anti-incarceration campaigns, the Mass Incarceration Committee (“MIC”) of the National Lawyers Guild (“NLG”) sought a project in which the legal skills, knowledge, and expertise of the people associated with the NLG could be brought directly to bear on the crisis of mass incarceration. In 2013, Scott Paltrowitz, a longtime MIC member and then-Associate Director of the Prison Visiting Project of the Correctional Association, attended a summit hosted and organized by the Lifers and Longtermers’ Organization at Otisville Correctional Facility. The summit focused specifically on the obstacles faced by people serving life sentences during the parole preparation process and on some of the Board’s unfair and unlawful practices. At the summit, incarcerated advocates called upon their counterparts in the free world to not only push for legislative and judicial reform, but to directly assist parole-eligible people in their struggle for release.<sup>161</sup>

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<sup>158</sup> Assemb. 2386, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), <http://legislation.nysenate.gov/pdf/bills/2017/A2386> [<https://perma.cc/7CUM-RGC5>].

<sup>159</sup> *Id.* (excluding persons who have “a conviction for murder in the first degree”); KEYSER, *supra* note 14, at 14 (finding that in New York State from 1985-2011, only 0.8% of people convicted of murder came back to prison because of a new offense).

<sup>160</sup> Lewis Webb, *Ending Parole Abuses and Reuniting Families in NY*, INDIEGOGO <https://www.indiegogo.com/projects/ending-parole-abuses-and-reuniting-families-in-ny> [<https://perma.cc/3WXE-4D43>]. The Project has worked alongside the drafters of the bill, some of whom are now free, and others who are still incarcerated.

<sup>161</sup> While at the time there were (and currently are) several private practitioners willing to assist people in the parole preparation process and in parole appeals, their fees are often far beyond the reach of those incarcerated. The list of attorneys and

In response to this request, as part of a pilot project, MIC members Nora and Michelle began working with Eddie Lopez,<sup>162</sup> who, as mentioned in the introduction, has been incarcerated for over 37 years. With assistance from attorneys at The Legal Aid Society, the Center for Appellate Litigation, the NLG, and jailhouse lawyers, Nora and Michelle requested records and legal documents, created a parole packet to submit to the Board, and practiced interviewing techniques with Eddie. After Eddie was again denied parole in 2014,<sup>163</sup> the need for intervention became even more urgent and pronounced.

Nora and Michelle began to envision and build a project in which lawyers and non-lawyers could assist and work alongside parole-eligible people serving life sentences across the state. Again in collaboration with The Legal Aid Society and the Center for Appellate Litigation, Nora and Michelle created a training curriculum and a Continuing Legal Education course on the basics of parole preparation work. They generated written materials to support outside advocates as they assist parole applicants in prison preparing for their interviews with the Board. In 2014, Nora, Michelle, and other members of the MIC founded the Parole Preparation Project (“the Project” or “PPP”).<sup>164</sup>

Since 2013, the Project has trained more than 200 volunteers to work alongside over 100 parole applicants and develop solid release plans, create compelling advocacy packets, and practice interviewing skills. Project volunteers have spent countless hours in prison visiting rooms, on the phone, and in written correspondence with parole applicants inside.

Project volunteers include lawyers, law students, social workers, teachers, writers, and many others. PPP volunteers rely on each other, the Coordinators, and parole applicants for skills and knowledge about the law, the criminal legal system, DOCCS, and the

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organizations who assist pro bono in parole matters is also short. Some indigent appellate providers represent clients for parole appeals, but most people are left to their own devices to prepare for the Parole Board interview. While people inside have developed their own innovative ways of assisting each other, they still face the tremendous obstacles described in previous sections.

<sup>162</sup> Names and identifying details have been changed.

<sup>163</sup> Eddie was again denied parole in March 2017. He will not be eligible for parole again until 2018, unless he successfully challenges his parole denial and is awarded a de novo hearing.

<sup>164</sup> Michelle Lewin, *NLG-NYC Mass Incarceration Committee Launches Parole Preparation Project*, GUILD NOTES, Winter 2014, at 10, <https://www.nlg.org/guild-notes/wp-content/uploads/sites/3/2016/11/Guild-Notes-Winter-2014-WEB.pdf> [https://perma.cc/V7L8-3ZLW].

other systems that impact the lives of people in prison. Volunteers attend an initial training where they learn the basic parameters of the Project and hear from former Project applicants who have returned home, as well as formerly incarcerated leaders in the parole justice movement.

After volunteer groups are paired with an applicant, they attend monthly meetings where they receive additional in-depth training and hear from a series of guest speakers. During monthly meetings each volunteer group has an opportunity to check in with the Coordinators and work through difficult and applicant-specific issues that might arise. Volunteers also have access to memoranda, resources, templates, and written guides for each step of the parole preparation process. A local law firm specializing in civil rights law provides legal supervision so that the Project may communicate with applicants through privileged legal mail in order to preserve confidentiality. PPP also conducts legal visits as the authorized representative of that firm.

Thirty-one of the 60 people (over 50%) who have received assistance from the Project and have gone before the Board have been granted release, compared to the average release rate of 26%, based on data collected in 2015.<sup>165</sup> However, the need for assistance far exceeds the Project's capacity. The Project receives hundreds of letters each year from people in prison requesting their services.<sup>166</sup> And beyond those who write to the Project, there are still thousands more people who will appear before the Board without any form of outside assistance.

## XI. PPP'S PHILOSOPHY AND PRACTICE

The Parole Preparation Project envisions and wishes to build a world without prisons, while simultaneously offering direct, concrete assistance to individual people seeking freedom. However, we do not see these efforts as distinct. We believe that creating spaces in which relationships between people in prison and community

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<sup>165</sup> The Project works only with people serving life sentences. The 26% release rate refers to people convicted of an A-1 violent felony who appeared before the Board in 2015. Prison Action Network, *February 2016*, BUILDING BRIDGES (Feb. 4, 2016), <http://prisonaction.blogspot.com/2016/02/february-2016.html> [https://perma.cc/R59N-E69J]. In 2015, the Board's overall release rate for all people serving indeterminate sentences was 23% and only 17% for those reappearing. N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, *supra* note 4, at 1.

<sup>166</sup> People in prison have tremendous unmet legal needs in many areas of the law, not just parole preparation. For example, many need assistance with disciplinary appeals, medical advocacy, motions for a new trial and other post-conviction work, family law, and civil rights claims, to name just a few.

volunteers can thrive is, in itself, a way to transform the current criminal legal system. People in prison, especially people serving life sentences who have spent decades inside, are both demonized and made invisible by the carceral state—their existence is devalued and forgotten by those beyond their friends and family. By bringing forward the stories and experiences of people in prison and those who have come home, we ensure that their voices are centered and amplified within our movements and broader communities.

This prioritization is also essential because we believe that people with direct contact with prisons and parole are the leaders in the movement to transform those systems. We work for the release of parole-eligible people because, while we wish to reunite people with their families, we also need their leadership and vision to guide our movements.

Within the Parole Preparation Project, we practice these principles by taking direction and leadership from our 12-member Advisory Board. Our Advisory Board is composed almost entirely of people who have spent time in prison and previously appeared before the Parole Board, including former parole applicants released after working with the Project, as well as family members of those inside. The Advisory Board ensures that we are directly accountable to those most impacted by New York State parole policies. We also regularly invite people who are formerly incarcerated to participate in our monthly volunteer meetings, to serve as faculty at our new volunteer trainings, and to review our written guides and training materials.

## XII. THE IMPACT OF THE PROJECT

For volunteers, the relationship they forge with parole applicants is deeply transformative. In more traditional attorney-client relationships, particularly among public interest lawyers representing marginalized people, attorneys often substitute their judgment for the client's, and tend to see their client as less-than-capable of participating in their own legal case or defense.<sup>167</sup> In contrast, from the first training, PPP volunteers are pushed to conceptualize

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<sup>167</sup> Over twenty years after the publication of Gerald P. López's seminal critique of traditional law practice, which he designates "regnant" lawyering, where lawyers incorporate the voices of the clients only when necessary for accomplishing the goals of litigation, this model still predominates the legal field. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); see also Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005); David A. Singleton, *To Love or Not to Love: The Possibility, Promise, and*

their relationship with an applicant as one of solidarity and partnership. Volunteers are trained to see applicants as inherent experts in their own lives and in the criminal legal system, and to see their relationships with applicants as rooted in self-determination and love. Thus, applicants are the significant, if not primary, contributors to the parole preparation process, which the volunteers then support.

In contrast to traditional lawyering, volunteers are also encouraged not to focus solely on the end-goal of parole release, but rather to focus on the holistic experience of working in tandem with someone in prison. Attorneys are often fixated on the nature of the representation and the case at hand, and can reject their clients' attempts to share insights, personal experiences or feelings as extraneous. However, as Project volunteers are building the foundation for long-term relationships, story-telling and sharing purely for the sake of human connection is highly valued.

However, this process of building relationships across cultural, racial, religious, generational, and gender differences is also deeply challenging; undoubtedly the racism, white supremacy, classism, ableism, and other systems of oppression that are inherent in all dynamics infuse the relationships established between volunteers and applicants. Many Project volunteers identify as white, college-educated, and queer, and are from states outside of New York. The majority also identify as women. In contrast, parole applicants are mostly aging or elderly Black or Latino men from the five boroughs of New York City.

In recognition of this reality, the Project requires that volunteers interrogate their own power and privilege and develop an anti-racist praxis as they negotiate the relationship with the applicant with whom they work. Through discussions at volunteer meetings, sharing reading materials,<sup>168</sup> and providing intensive

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*Peril of Mutually Transformative Attorney-Client Friendships*, 46 SETON HALL L. REV. 743 (2016).

<sup>168</sup> These reading materials include: ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); DANIEL HUNTER, *BUILDING A MOVEMENT TO END THE NEW JIM CROW: AN ORGANIZING GUIDE* (2015); VICTORIA LAW, *RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN* (2009); JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* (2012); *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* (Eric A. Stanley & Nat Smith eds., 2d rev. ed. 2015); Phyllis L. Crocker, Essay, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981 (1998); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13 (2011). The Project also draws heavily from the Catalyst Project's resources, *Catalyst Project Workshop Readers*, CATALYST PROJECT: ANTI-

individual consultations with volunteer teams, the Project supports volunteers in enacting solidarity from an anti-oppressive framework. In this light, we see our work as part of the profound struggle for racial justice and the promise of Black Lives Matter that has taken hold across this country and the world.

Beyond interrogating dynamics of power and privilege, volunteers and applicants explore deep philosophical questions about interpersonal violence, harm, and accountability. Our volunteers frequently discover that the reasons why a person committed harm in the way they did and how an applicant came to be in prison is often the tragic result of a lifetime of experiencing systemic and structural violence and personal trauma. Further, the rigid and prevailing distinctions that are often made between those who commit crimes and those who are harmed are suddenly blurred—volunteers come to learn that “victims” and those who harm them are so often from the same communities and even families, and have each occupied both roles in different moments.<sup>169</sup>

Engaging with these realities, and in many cases some of the darkest realms of human experience, PPP volunteers encounter the limitless potential for redemption and transformation. PPP encourages participants to embrace the idea that no one is defined exclusively by the worst thing they have ever done. And every person, regardless of the harm they have caused, is entitled to be treated with dignity and respect, and should have a meaningful and genuine opportunity to return home to their community. Volunteers also witness the profound resiliency of people in prison, and the ways in which people inside maintain a sense of dignity in the face of extreme deprivation. Such exposure undoubtedly shifts one’s perspective on what it means to be free.

Prisons are isolated and remote by design—their inaccessibility allows the state to perpetrate horrific violence against those in-

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RACISM FOR COLLECTIVE LIBERATION, <http://collectiveliberation.org/resources/catalyst-project-workshop-readers/> [<https://perma.cc/NM7Y-CSDH>]; see, e.g., *From a Place of Love: Catalyst Project and the Strategy of Collective Liberation Leadership in White Communities: An Interview with Catalyst Project*, in CHRIS CRASS, *TOWARDS COLLECTIVE LIBERATION: ANTI-RACIST ORGANIZING, FEMINIST PRACTICE, AND MOVEMENT BUILDING STRATEGY* 251, 251-70 (2013); DANNI WEST, *THE CATALYST PROJECT, LEGACIES OF RESISTANCE: WHITE ANTI-RACIST ACTIVISM* (2004), [http://collectiveliberation.org/wp-content/uploads/2013/01/west\\_Legacies\\_of\\_Resistance.pdf](http://collectiveliberation.org/wp-content/uploads/2013/01/west_Legacies_of_Resistance.pdf) [<https://perma.cc/58T6-WFRP>].

<sup>169</sup> Sarah Stillman, *Black Wounds Matter*, *NEW YORKER* (Oct. 15, 2015), <http://www.newyorker.com/news/daily-comment/black-wounds-matter> [<https://perma.cc/4ZPC-2GBQ>]; Carrie Johnson, *Black Men Who Are Crime Victims Have Few Places to Turn*, *NPR: AROUND THE NATION* (Aug. 17, 2015, 5:10 AM), <http://www.npr.org/2015/08/17/432542041/advocates-work-to-help-black-men-who-are-victims-of-violent-crime> [<https://perma.cc/R6R5-CJDR>].

side.<sup>170</sup> By creating avenues for people in the free world to enter prisons, our volunteers also bear witness to the injustices and brutality that take place within them. This exposure and the volunteers' deep relationships with people in prison serve as both a political education and a profound call to action. Many volunteers feel inspired and mobilized to participate in reform and anti-incarceration efforts beyond the Project,<sup>171</sup> thus strengthening the broader movement.

Further, the Project, through our presence in the prisons and the advocacy materials we submit, reminds DOCCS and the Parole Commissioners that there are individuals in the free world who are monitoring and scrutinizing their actions, and are prepared to hold them accountable.

Ultimately, the deep connections that form and flourish be-

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<sup>170</sup> People in prison live under horrific conditions. They are subjected to medical neglect, isolation, torture, and abuse. Many have witnessed and experienced extreme and fatal violence at the hands of Correctional Officers, and some have seen others killed. The death of Samuel Harrell is just one instance of many. Michael Winerip & Michael Schwartz, *Prison Guard 'Beat Up Squad' is Blamed in New York Inmate's Death*, N.Y. TIMES (Aug. 18, 2015), <https://www.nytimes.com/2015/08/19/nyregion/fishkill-prison-inmate-died-after-fight-with-officers-records-show.html> [<https://perma.cc/4QMX-6379>]; see also Michael Winerip & Michael Schwartz, *An Inmate Dies, and No One is Punished*, N.Y. TIMES (Dec. 13, 2015), <https://www.nytimes.com/2015/12/14/nyregion/clinton-correctional-facility-inmate-brutality.html> [<https://perma.cc/W3QX-K79N>]; see generally CORR. ASS'N OF N.Y., VOICES FROM CLINTON: FIRST-HAND ACCOUNTS OF BRUTALITY, TORTURE, AND COVER-UP FROM PEOPLE INCARCERATED AT AN INFAMOUSLY ABUSIVE NEW YORK STATE PRISON (2016), <http://www.correctionalassociation.org/wp-content/uploads/2016/05/Voices-From-Clinton-FINAL-6-2016.pdf> [<https://perma.cc/E6JT-LQBW>]; CORR. ASS'N OF N.Y., 2014 UPDATED CORRECTIONAL ASSOCIATION REPORT ON ATTICA (2014), <http://www.correctionalassociation.org/wp-content/uploads/2014/12/Attica-2014-CA-Updated-Report-Final1.pdf> [<https://perma.cc/L6V2-FEKN>]; *10 Things You Need to Know About Brutality and Abuse at Clinton Correctional Facility*, CORRECTIONAL ASS'N N.Y.: NEWS (Sept. 4, 2015), <http://www.correctionalassociation.org/news/10-things-you-need-to-know-about-brutality-and-abuse-at-clinton-cf> [<https://perma.cc/F6NX-J9U4>].

<sup>171</sup> Volunteers and Coordinators participate in many of the campaigns and project of our partners such as Parole Justice New York, a coalition committed to passing the S.A.F.E. Parole Act and advocating for parole-eligible people in New York. *About Us*, NATION INSIDE: PAROLE JUSTICE N.Y., <https://nationinside.org/campaign/parole-reform-campaign/about/> [<https://perma.cc/KK35-P63T>]. Release Aging People in Prison (RAPP) is a grassroots advocacy group led by people who are aging and formerly incarcerated. *About RAPP*, RAPP, <http://rappcampaign.com/about/> [<https://perma.cc/U8HB-KH4W>]; see also *About Us*, MILK NOT JAILS, <https://milknotjails.wordpress.com/contact-us/> [<https://perma.cc/H7TC-WPV2>]; *About Us*, NATION INSIDE: CHALLENGING INCARCERATION, <https://nationinside.org/campaign/challenging-incarceration/about/> [<https://perma.cc/69FR-VZ2M>]; *Home*, #CLOSERIKERS, <http://www.closerikers.org/> [<https://perma.cc/SU86-Q2MG>]; *About Us*, N.Y.C. JAILS ACTION COALITION, <http://nycjac.org/about-us/> [<https://perma.cc/TJN7-7CFQ>]; *Mission*, N.Y. CAMPAIGN FOR ALTERNATIVES TO ISOLATED CONFINEMENT, <http://nycaic.org/statement-of-principles/> [<https://perma.cc/8G4Q-92KQ>], and many others.

tween volunteers and people in prison, as well as the partnerships built with our community-based allies, are the most meaningful part of our work, and perhaps why the Project has grown so much in the past several years. In the following pages, PPP volunteers and applicants describe their work, their lives, and what being part of the Parole Preparation Project has meant to them.

### XIII. INTERVIEWS WITH PROJECT APPLICANTS AND VOLUNTEERS

*Excerpts of interviews with author Michelle Lewin, Mark Shervington, and Project volunteers Hillary Packer and Emily Sims. Mark served 29 years in New York State prisons after receiving a sentence of 15 years to life.*

**ML:** [Mark], how old were you when you went to prison?

**MS:** I was twenty. Twenty, yeah, just about to turn twenty-one, right before I went to prison. Well I wasn't selling bibles, let's put it like that. I wasn't like public enemy number one or anything like that, but I was selling weed to survive, basically. It was a job . . . . I would say I was a middle management type of person [laughter]. I basically ran the operation. Of course I didn't expect that to last long and I knew I was basically taking a chance, but I thought that because I couldn't get a job . . . I had a high school diploma—a GED . . . . Mind you, this is me after losing my mother, like basically watching her just evaporate. The older I got the less she was there.

. . . .

But yeah, anyway, I met this young woman and things got serious and we started making plans. Then one day she goes shopping . . . on Jamaica Ave., and she goes into [a store] and on her way out, I won't say his name, but someone decided that she looked so nice, he couldn't stop touching her, and he sexually assaulted her right in the store. She came home and she was hysterical and frustrated . . . . So she tells me what happened and I'm practically on autopilot—you know, I had this, like, tunnel vision and I was thinking, "Okay, I need to see this dude, like, as soon as I can." Well, ultimately that ended up in a shooting and I went to prison for that.

The judge gave me 15 years to life and he said, "in the interest of justice," but the Parole Board decided they wanted to inflict some more punishment and they practically doubled that. By the time I came home, I counted, it was 29 years, 3 months, and 14 days, and that was with your help. I was so blessed to meet a team of Harriet Tubmans, you know? . . . You guys are like my underground railroad. Serious business.

ML: **When you got that sentence of 15 to life, what went through your mind, what were you thinking?**

MS: Well I knew because of what I had done, that I was going to jail, but it just was—I don't know if surreal is the word—but just hearing him finally say it, my knees kind of buckled a little bit. You know I was like, well now, stand up, champ, you did this, you got to deal with it.

ML: **Did you go to trial or did you plea?**

MS: No, I pleaded guilty, ultimately. I was going to go to trial, but I had this lawyer—what was his name? . . . [M]y fiancée was going to testify and she goes to his office for him to interview her and he tells her, “Listen, the jury is going to be 12 middle class white people who don't like n\*\*s to begin with—and you're Puerto Rican so when you take the stand they're gonna really get mad and convict him on spite.” And she was hysterical about that, too. And I was like, “He told you what?” . . . At the same time he told my Aunt Marlon that the only thing the family can do to help me is convince me to cop out, you know, plead guilty and hope I don't get 25 to life . . . .

So I asked the judge to just get rid of him [the lawyer], and he did. He gave me another lawyer, but that was crazy. Like I said, I acknowledge the fact that I committed a crime. I took someone's life. Hearing the judge say that, you know, thinking of what that meant, just in that moment, that was kind of stunning.

ML: **Did you know other people that had done long sentences upstate?**

MS: Not at that time, no. I met them when I got there. There were people who had been in prison, like, all of my life and stuff . . . . Leaving Downstate [Correctional Facility] reception and on this bus that took forever going to the first prison where I would actually start doing my time, which was Clinton Correctional Center, way up yonder in Dannemora, New York. And you can see the town is built around the prison so everything in the town is connected to the prison—the people, like, everything. But as the bus is pulling in, you can see the prison right in the middle of the town and you can see into the yard, the prison yard. And the part that you can see, as you get closer it looks like a bunch of rusted and twisted metal. When you get there you see that those are like those half-drums that people use for barbeque pits? They have those out in the yard. But as I'm looking I see all this rusted metal and I'm thinking, “This looks like something from *Escape from New York!* Like, seriously? This is not going to be good.” It was crazy . . . . But sur-

prisingly I didn't have any problem. You knew what you were supposed to do, they knew what they were supposed to do—don't cross the line. Some people did. Some people didn't—you know they were dealt with, right. But I never had a problem. So I just skated on through, you know, really smoothly and went on to the next place.

...

**ML: How did your interest in working in the law library start?**

**MS:** Well, it started when I was on Riker's Island. I remember this old vet came up to me one day and he said, "Excuse me youngblood, I'm not trying to get in your business but, um, what kinda crime you got?" And he just seemed concerned, not like some person trying to run a scam or anything. I just said, "Well I got a homicide." He said, "You need to get your ass in that law library and find out what these people tryna do to you." At first I looked him up and down and was like, "Yeah, ok, thanks." I mean, I can read, my mother was an egghead, you know, she was smart—she taught me how to read and write . . . . But anyway, so I go to the commissary, I get two of those yellow legal pads and a couple of pens and I walk into the law library for the first time. And like, I learned out of necessity, and I mean, it even got to the point where I realized that lawyers don't even speak English, like regular English. Like, I'm in the courtroom one day and my new lawyer, he said something about wave—and I'm saying "Okay we're not at the beach, I don't see no hands in the air, what the hell is this man talking about?" Come to find out he just gave away something of mine! [Laughter]. I didn't realize that there was another waive! You know? So I was like, wait a minute, I really gotta read. So I really started paying attention and learning seriously what this stuff means, how it works. It's like I got on this one-man reverse ingenuity mission, you know, I'm going to crank this thing up, I'm looking up under it, I'm taking every wire, screw, whatever, apart and I'm gonna put it back together so I can understand. I just had to start. I learned out of necessity. It became a skill and after a while, it kind of became an art.

**ML:** I mean, you helped a lot of people inside, especially in those last couple of years.

**MS:** Oh yeah, every time the Board hit me, I would turn around and say, "Ok, you, you, and y'all over there, come on, line up," and just start batting people over the fence. That's what I would do.

...

**ML: When did you start thinking about parole? How far into your**

**time did you start thinking about parole and about going before the Board?**

MS: . . . Getting ready for that, I started to wonder . . . do I have all the facts straight, do they have all my diplomas, can I get some letters? You know, pretty much similar to what you do . . . Here's another thing—when a person is sent to prison, before the judge sentences him, [the judge] reviews what they call a pre-sentence report . . . So we took that format and tried to make something like, where it's not a sentencing situation, but something like that. To package all this and submit it to the Board. And that's what I tried to do, right? I'm thinking, well, maybe because it came from me, they probably thought of it as self-serving, but by then things kind of heated up with the politics of parole. The law hadn't changed but the politics did. Governor Pataki, he practically rolled into office on our backs, talking about violent crime and parolees.

Now realistically, someone like myself who had done all that time and basically—I squared up so much I even took the bop out of my walk. You know what I mean? [Laughter]. We [people serving long sentences] are like the last people to go back to prison for anything, but we became the poster children for his politics. And another thing he did, really slick, was Clinton's 1994 crime bill—they were giving away boatloads of money to any state that would come up with whatever kind of law they could to increase the time served for violent crime. They couldn't go back and change my sentence or anyone else's like me, so what they did was that they started tearing us up at the Parole Board, but disguising it. As if because I committed a crime, I became one.

And I'm like, well, when does this stop then, because what else can I do? You sent me to prison to get corrected. What haven't I done to show you that? Or is it just like, now I'm no longer capable of being a human being? I mean I even donated money to . . . hurricane relief and stuff, we did school giveaways. We did all kinds of stuff. That's me and some guys. No one asked us to do it, we just thought we should.

I'm not the only one. There's a bunch of other people in there that probably just couldn't get a break for some reason.

There's some people in there that are not coming home. I talked to one guy, he used to keep a smile on his face, I mean he was the most gentleman, stand-up dude. So I asked him one day, I said, "Man, when are you going home?" And now he gets all deadpan and serious, and he said, "Man, I got 66 to life." And I was like "Wow." So I said, "How can you be that way?"

and he said, "What the hell else am I going do?" He knows he's going to die in prison but he still does what he does.

ML: **Did you think you would die in prison?**

MS: At one point, yeah. I had two heart attacks right before my last Parole Board [interview]. I didn't know that's what was happening. The first time I thought I pulled a muscle or sprained something. I was like, wait a minute. I would carry a backpack of stuff to and from the law library every day, so I'm thinking it's that. I mean at Otisville it's different. You walk up and downhill and everything is spread out, so its a half a mile to the law library and a half a mile back. So I'm walking a mile every day with a bunch of stuff, so I thought maybe, I don't know what this is. I'd never felt pain like this in my life. And it kind of immobilized me, like I was conscious but . . . .

But now it happens again and so now I'm scared. I didn't go to the doctor the first time, I just toughed it out. Laying in my bunk. And it happened again, and I said "no, no, no, something is wrong," so I go screaming to the clinic . . . .

I found out I had a heart attack when I got home. I go to the Coming Home Program at St. Luke's that they had for people coming home from prison. They offer you all kinds of programs and medical help. As soon as I told the doctor what happened, he said, "You had a heart attack." This is the first person to talk to me in plain English. So now I'm sitting there stunned, thinking, "I could have not been here right now, just for not knowing what was going on," . . . and that was like a real moment of clarity for me. And it made me even more grateful for what you guys have done and invested in me.

ML: **Do you remember the first time that y'all talked?**

MS: I remember that I got a letter from the three GI Janes, and I was like, ok. Did you visit first? Or did we talk on the phone first? I don't remember.

HP: I think we talked on the phone first, and it was always [Emily's] phone.

ES: I think we talked on the phone, and at some point we decided that we were going to come out and visit.

MS: Yeah . . . yeah.

ML: **Were you like, a little suspicious at first, or were you a little weary? I guess you had first talked to Nora.**

MS: You have people, for some reason, they think it's ok to prey on prisoners . . . . So me finding out about the Project, I was a little concerned because I was like, "Are they actually going to

hear me?” I mean regardless of what happened I have no money, so I don’t see how they could . . . and I don’t want to damage any opportunity that I may have so I’m thinking, well, if we are going to do something, we need to be clear about it.

. . .

If you are not willing to listen, it makes communication difficult, and then you will not be able to speak from my actual perspective to the Parole Board to like, help me present myself in a way I should be, or need to be, presented. I didn’t have all the answers. It was kind of weird. There’s like this—not an adage—but there’s always, like, this one guy who could get anybody out of prison except himself. And I didn’t want to be that person but it was looking like I was starting to be that person. And I was like well, everything I did, didn’t work, why now?

**ML: What did you think when you kept getting denied in the beginning, at the first couple of hearings? What was your thought process or what were you thinking about? What did you think was the reason?**

**MS:** Well, up until Pataki and his politics, and Clinton, generally if a judge gave you 5 or whatever years, you did your time and you went home, as long as you didn’t do anything outrageous while you were locked up. But now, here comes the politicians and they change all that so now, that’s not enough. So you must be practically crucified before they let you go, as an old man. That’s another thing, a lot of the guys, a lot of those old timers came in there as young men . . . I was just trying to make it out before Social Security. I didn’t know how much longer I was going to be in there, but I got numb. I think I told you guys about this, I was just kind of numb. Like, I know I was supposed to talk to these people, but I wasn’t expecting anything good. And that could have had something to do—aside from the politics—with my failure prior to meeting the team and the Project, because I would go in expecting that. I would go in and say whatever—I don’t know, it could be that, but it could just be that it seemed perfunctory, like, that law said, “you must do this,” even though they know that they aren’t going to release you.

**ML: Yeah. So what was the first visit like with all of y’all together?**

**MS:** I was curious. I think I asked a lot of questions. I know I asked, “Are you in college?” They looked like children almost. I told them that. I said, “Are they grown-ups?” Because they looked so young.

**ES:** We had to go buy over-sized sweatpants and shirts to wear in because we were all inappropriately dressed, so we all came in,

in like extra-large, brightly-colored sweat pants. So we looked like children.

. . .

MS: But another thing was that I thought, “Ok, they might be teenagers, or very young, so I’m gonna have to school them on what exactly is the nature of this beast that they are dealing with, and I hope that they have the heart to stick with it and see it through, because it was frustrating for me, and they aren’t even locked up. So, it’s probably going to blow their minds dealing with these [Parole Commissioners]” . . . And I told them everything I knew and that I could about myself. And I even got into stuff that I don’t even talk about. That’s how comfortable they made me feel. Like, “Ok, do an open-heart surgery right here. This is me.”

ML: **And then how did things develop? How did you guys start working on prepping for the interview with the Board and putting together the packet? What was the process like?**

. . .

ES: I remember that anticipation in the car ride up . . . It was just a lot of conversation about how do we even meet you and present ourselves and not seem like these crazy outsiders who know nothing about your situation and are about to delve into something really private for you, and not come off as intrusive

. . . .

ML: **Yeah. Why did y’all even get involved in the Project to begin with? What brought you to the work?**

. . .

ES: I believe that the commonality between the three of us and the way that we even knew each other, is a deep belief in reforming the system, and this was a new and different way to do it. I didn’t know anything about parole. And you very rarely think about that when you are talking about criminal justice reform . . .

HP: . . . the three of us had been at the Fortune Society, working with people, and then I was in [law] school. And it was a way to come back to something that I really cared about, which I felt very removed from and detached from, having no interaction with people on the inside or on their way out, or on their way in. It felt like I was losing something. It was present for me, [I was] still talking about it in [law] school, but there was still something missing if you weren’t in communication with people who were impacted.

ML: . . . **I am always so curious about volunteers and applicants,**

**like, if you see the Project as a part of a movement for reform or even [prison] abolition, or if you see it more as just connecting with people, or advocating for people, or if it's all of those things. Like if you see it as part of something bigger, or not?**

- MS: Before I went back to the Parole Board, I felt like, well, even if this doesn't work, right, I'm confident, you know, I just felt good about this before I even went through . . . . I'm saying, I just felt as prepared as I would ever be to deal with something like that. You know, you guys made me. I don't know, I would say I grew a little spine about dealing with these people. You know, I just felt ready. I wasn't even aware there's this mob of people interested in what I now know as a prison abolition movement, but I just knew that I had three people that actually gave a f\*\*\* about me. You know I just felt good about that.
- HP: I think what is so cool about the Project is the time restraint. You're sort of forced to be as open as possible, as quickly as possible, so you can start to work together. And I think the intimacy and the connection that we all made working on this thing is so unique in that way. Ok, we're now a team and now we're all working on this thing together and that feels really small and private and isolated and yet, I think, without knowing it, bigger things are happening. The Parole Board knows that someone's watching . . . . There's a spotlight on this issue, on the institution . . . and on the Commissioners, and so I think that's what's so cool. That you're able to have this sort of private dialogue and relationship, that's really personal and really moving.
- MS: Did I tell you? When I went to the Parole Board, they did it by videoconference. And what was her name? Hernandez? Commissioner Hernandez? She held a package up to the screen and said, "Oh yeah, we received your package," I forget her exact words. But she held it up to the screen and was like insistent, . . . . "See? Look. See?" Like she was really excited . . . like, "We got it. It's been considered."
- All: Yeah. Yeah.
- MS: I was like, "Man, ok. That's different." But you know I've never seen them get excited. Usually they're like, "Oh, yeah. We got your stuff," "Yea. Ok." And they keep talking.
- ML: You made them pause.
- . . .
- ES: That's also what, I suppose, ends up being disheartening for me, in a way, because I really never felt like we did anything

for you that you hadn't already done for yourself. Those packets, all the communication, everything you and that other lawyer had worked with. You guys had all that stuff . . . . Then it seemed like, for whatever reason, whatever it was, whether it was just that the Parole Board already knew that they were going to do it or because it was the support of the program and they had the packet, or because of you, the way you were when you went in, or a combination. It just happened.

I guess, the disheartening part of it is for me is, if in any way it was because of that packet, it's like, oh, all of a sudden the outside is now, like, looking in, and therefore the last nine, ten times, Mark Shervington didn't really matter to them . . . . You know it took very minimal work compiling this packet that you had already done, put a little stamp on it from us that they finally opened, maybe.

MS: Yeah, but you see, I didn't get like that. You know how we did those mock Parole Boards. You know, we talked about a lot of things in terms of interviewing. Writing something and stapling a bunch of papers together is one thing, but dealing with the actual dynamics of having that exchange—especially like, it's me versus the State—that was different. That's different.

HP: Mark you were such an interesting person to go before the Board because being a lawyer, being a jailhouse lawyer, remember, you had been correcting them a bunch—to your credit—in the previous hearings. Remember you'd be like, "We litigated that! And I won that!"

. . .

MS: [JT], the lawyer that helped me out before I met you guys, he told me once, he said, "Listen, the Parole Board is not the place to seek justice. You are there to convince someone. It's not like you are in the courtroom. You don't have to go in there a flaming sword like you're actually litigating. You're there to convince them you're not going to cause any problems if they do release you." I said, "Ok, I get that." So then, I kind of toned down off of that . . . litigation perspective. I said, "That makes sense." As bad as I wanted to check them or correct them about stuff . . . .

ML: It's funny, everyone in this group talks about the mock interviews. I feel like that's the story that I remember from this team—when Hillary came in and basically grilled you.

All: [Laughter].

MS: Yeah! I froze up. For a moment the next day I was like, "Damn."

ES: She was in character!

MS: Yeah, she was! For real!

All: [Laughter]

MS: For real, for real! Unbelievable. [Laughter] I actually froze up like I was there talking to them 'cause they were saying crazy stuff to me . . . .

ML: **The Commissioners? What kind of stuff?**

. . .

MS: This guy in particular, he had been, up to that point, every kind of cop imaginable. Like, the whole alphabet. And now he's a Parole Commissioner. Asked me some crazy stuff like, we're in the middle talking about, I forget, about my release plans or what I've done in prison, I forget. And he comes out and says, "Were you arrested with the victim's body?" I'm like, "What? Excuse me. What are you talking about?" . . . He waited and then we talk about some more general stuff and then he comes back and says, "Oh, so you would kill a cop wouldn't ya?" "What?" . . . He's coming up with all sorts of imaginary stuff. They not gonna let me go . . . .

You don't know me, but I know, that guy on paper that committed them crimes, that's a fraction of my life experience. That's not me. That hasn't been me, you know, beyond those moments, that hasn't been me at all.

. . .

At Otisville, they always put me last [to see the Board] or something 'cause my last name starts with an "S." I'm usually at the end of the line . . . . So one day, they had me waiting there for so long, it's like nighttime now. I'm the last one they see, but now I can't leave because the prison is doing a count. Prisoners can't walk around when they're doing a count. So I'm stuck there waiting for them to finish the count, . . . but as soon as I leave the parole hearing, all of the Commissioners, all of them, come piling out of the room and walk right by me with their coats on. They walked right out the door. I'm like, "Wow. That was quick." They were just waiting to see me and go.

. . .

ML: **So then you wanted to [leave that prison]?**

MS: I wanted to go anywhere.

HP: Because you thought it would change your parole outcome.

MS: Right.

HP: Not because you were necessarily thinking that that would be a better place to live.

MS: No. Hell no. I'm locked up. None of that's cool . . . . I don't care if it's on the moon, I'm still locked up. Yea, it was the geography and the parole.

. . .

ML: **So what about your last parole hearing? You talked a little bit about Commissioner Hernandez holding up the packet. But what else went down? What else happened?**

MS: It was like we were having a conversation. [Hernandez] did most of the talking. The other two just chimed in like, like they were backup singers or something. [Laughter.]

. . .

I kind of had this feeling like, I got, like, this gang of people that just helped me stand up to this so I really didn't give a shit what they thought I did. I was ready. You know if it ain't gonna happen now, it may not ever, because I don't think I could be more prepared than I am. Like Emily said, it's the same information. The only thing I think I added was the real estate stuff that I had done up to that point. And your letter, right. The crime will never change, right? And other than my age, you know, I didn't see what else would change. When is enough, enough?

Oh! One thing. Guys had been telling me that the Parole Board had gotten a habit of asking what I thought was a trick question at the end of the hearing. They would say, "Do you think you had a fair hearing?" That would blow my mind, too. Like, "What are you asking?" But I'd be thinking, "That's a trick. I'm not gonna answer that. I gotta find some way to dance around it, because if I say yes to something like that, and they smash me, then, there's nothing you can do about that. You just ate that."

. . . But now when I get there, to the end of the hearing, I'm waiting for that. Because, I think I got it figured it out. But instead they were like Heckle and Jeckle, falling all over each other, saying, "Do you think he had a fair hearing? What about you?" Like, the magpies on the cartoon.

And I'm like, "Whoa. I wasn't expecting to watch this stuff." They were stumbling all over themselves congratulating themselves on giving me a fair hearing.

It actually was. It actually was.

HP: Fair?

MS: Yea, it actually was, because we were having a conversation. It wasn't like, "Well, you killed somebody. Ok." You know, like the standard it would normally be if they recited a script. And then, "Ok. And, thank you. We'll get back to you in a couple days." You know. "Next." Almost, like, assembly line fashion in like, six minutes or less. We used to call it "Doug E. Fresh." You know the rapper Doug E. Fresh?

HP: **Yeah, but what's the reference?**

MS: The reference is, like, in one of his songs, his hypeman is saying, "Six minutes Doug E. Six minutes you're on." [Laughter.]

So we would time each other, like, who beats the record. We would sit there and time each other and if you were in there past six minutes, we would be like, "Yo. What happened? What happened?" Because they would boot you out in that time.

And again, I had gotten so numb that, I wouldn't—you get the decision in an envelope and they make you go to the law library and pick it up and, you know, sign for it, like legal mail. And most people, they snatch it and rip it open right away and they're either laughing hysterically or they're cursing. I had gotten to the point where I wouldn't even open it right away. I would just wait and let this adrenaline and nausea and all this stuff [pass] and just calm down a little bit before I open this up. I walked around with it in my pocket for about a week, I think, before I spoke to Emily.

ML: **So you hadn't opened it, and you got on the phone?**

MS: Yeah, and she's like, "What happened? What happened?" And she said, "What do you mean, you don't know?" So I reminded her, I said, "I didn't want to open that right away. I didn't want to get my hopes up and stuff." She's like "Oh, well, when you do—" she seemed kind of disappointed—she said "Well, when you do, you know, let me know."

I thought about it, for a split second second, I was like, "Well, you know what, wait a minute, they just rode with me for like a year or something and they put a lot of effort and time into this." I said, "You know what, let's do this right now," and I opened it up. And the first thing you always see when you get denied is this Notice of Appeal. You don't even have to read the rest. If there's an appeal notice in there, you've been denied, and they're telling you, "Yeah, take it on the hot." You know, "See you next time." So I open it up, and I look, and I don't see no appeal paper. And I was narrating the play-by-play. It's like, "I'm opening and I'm looking, where's that notice, I don't see it . . . they probably tucked it in here somewhere, I'll find it." I open it up and there's no appeal paper.

And I'm like, "What? Nah, this is a trick. Open date. Seriously?" The last thing I remember about that is that everyone just started screaming.

All: [Laughing.]

MS: I'm standing there and now I am numb for a whole different reason. I'm like, in shock. Like, "What? Me? Serious?" I've been walking around free for a week and didn't know it. But, you know, because [of] what I had been through, like I said, I didn't want to get my hopes up. The thing that I would do, you know, at least up to that point, was call home, talk to my aunt. Like, "Listen, are you ready to hear this? I don't even know this, we are hearing this together for the first time." And it was just kind of sad. She went from crying to cursing, and then just disgusted, you know? I remember her telling me once—never did a day of jail in her life—she said, "Do you know why they are doing this? Cause they know your a\*\* ain't going back." I said, "Wow, this is coming from a complete square, a law-abiding person all her life, who had no involvement with criminal justice, but she sees what I am going through, and she sees that." And I'm like, "Wow, is it that obvious?" And I'm like, "I don't even cross the street when I'm not supposed to." Except for when I ran over to hug you guys.

ALL: [Laughter.]

. . .

ML: **Yeah. What did y'all feel? You were on the phone with Mark when you found out.**

ES: Thank you for sharing that. Yeah, I was just excited.

MS: I thought you earned it. You put in a lot of time and effort, the three of you, at least getting me to the door. You know what I mean? I mean, if anyone deserves to hear this, it's you. Whatever it is, you know, and I was nervous too when I was opening that thing. And I was like, "I hope it says what it should say and what it needs to say, finally." You know? I was just surprised as hell, though.

ML: **In retrospect, and even in the future, what is the impact of the Project on each of your lives, if there is one? And what does it mean to you now, after coming home and after having some distance, after almost a year?**

MS: I remember a time when every time something came up, like a milestone, it was my first Christmas or something, and I'm still just grateful that you guys stepped in for me . . . .

[Laughter.]

I mean, you helped me have a life to begin with, right? I'm in with both feet. You know, until it stops. And if you guys are doing anything else, I'm in that, too.

HP: I think there's so much that happens . . . . I feel connected to Mark in a way that's just really unique and I feel really grateful for that . . . I feel lucky, but I think, you know, part of it is that now I have the story of Mark and I, and people who really are not thinking at all about prison, or the people who are living inside of prison, are learning about this one incredibly remarkable person who spent far too much time in. I think that's really key . . . . Nobody really talks about parole, specifically, and I feel like, for every volunteer that gets to have this amazing person to work with and learn from, . . . .

. . .

MS: I'm shouting off the rooftops . . . . "Hey listen, go talk to them as soon as you can."

HP: I'm so grateful we had the outcome that we did. You know, hearing you talk about it again and reflecting on it, I wonder what would have happened. Because I remember when we went in there, this is not really about your question, but I'm just thinking when we went in there, you really had it, you were just legitimately, like, "f\*\*\* these people, one more time, I'm done," and we didn't really even know what you meant by that, but you just were at the point of hopelessness.

MS: Well, I was just thinking, "If this doesn't work now, I'm just not going to go [before the Board]. I'm just gonna be here and keep refusing. Because I'm through with it now." There's no way in the world that this makes sense. I shouldn't be here at this point . . . especially when the team helped me get my act together.

HP: But I wonder if we had been down for another round if you think it would have made a difference or you would just have—

MS: Well, if there had been a denial, I think that regardless of what I might have thought at that moment, you guys would have probably talked me into it.

HP: I was just thinking, we would have talked you into it. That's exactly what I was thinking.

MS: I would have been like, "Yeah! She's right, yeah! Yeah, I ain't afraid, let's go!" You know?

All: [Laughing.]

ML: You would have done it for each other somehow.

HP: Yeah, it's sort of interesting, I never heard you say that before

that you were like, “S\*\*\*, well let me open it [the decision], like, Emily had worked so hard,” you know, it sounds like you opened it because she was disappointed because you hadn’t opened it. And you were like, “This is information we are all waiting for.”

MS: I said, “We had put in enough. We put in a whole lot of,”—but actually nobody did what [the volunteers] did. In seconds I added it all up and said, “No, they deserve to hear this now, too, so let’s get it over with.”

It’s funny because sometimes people will try to guess what their decision is, you know, take the envelope and hold it and see how much it weighs and, like, try to peek through it, and you’re always wrong.

All: [Laughing.]

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*Excerpts of interview with author Michelle Lewin, Anthony Dixon, and volunteers Arielle Adams, Lauren Katzman, and Nikki Herst-Cook. Anthony was arrested when he was 23 years old and served 32 years in New York State prisons. Arielle, Lauren, and Nikki are public defenders with The Legal Aid Society.*

ML: **I wanted to start with you, Anthony. If you could talk just a little bit about your life before you went inside and where you were, and where you were living, and what it was like?**

AD: I came in when I was 22 years old. Prior to that, I lived a lot of my life in crime. At the time of my arrest, prison was the best place for me. Had a rough upbringing. My mother died when I was 18 years old. I got into the streets when I was 5, 7 years old, and started breaking the law. I got into drugs; eventually that led me further into the criminal lifestyle. And I hurt a lot of people in the process; that, I regret to this day—I can never change that. I got to a point where I used to rob people for their drugs and redistribute it on the streets. Then it got to a point where I used to rob robbers. Figure, I let them rob the people, and I rob them. And it got to a point where my conscience wasn’t working. My moral compass wasn’t telling me what was right or wrong. I was determining what was right or wrong. And I was shutting off my conscience. And doing the forbidden. And eventually, I got caught. Somebody died . . . . And that led to me being sentenced to 30 years to life.

ML: **And how were the first few years when you went in? What was in your mind, in those first three or four years?**

AD: Well, when I first got in, it was 1984. Twenty-two years old. I had ruined my life—got 30 years to life. I knew I blew up my

life . . . I didn't think I was gonna make it. Well, a lot of thoughts came through my mind. And I thought about how my mother had died around four years prior to that. How I hurt her most of my life. By breaking her heart, by what I was doing.

And so many people had reached out to me to try to help me. And I still kept my wayward ways. And people used to tell me I'm rebellious. I'd say, "No, I'm determined." And I thought I was the exception to the rule, when they would tell me I did that. And it didn't work. Inside I was saying, "Watch me. I'll do it and it'll work."

So at 22 years old, my first three years in was sort of difficult. It was a transition period . . . I was trying to let off the old man and start a new course. And that course I never knew before. It was something wholly new for me. So when I turned 25, I was like, just keep going forward. By the time I got to 27, I couldn't believe what was happening in me. My conscience was fully there and I wasn't . . . I knew there was a change that was happening to me. I didn't know how much, but I knew it was drastically different. And I laid down one day on my bed and I said to myself, "Man, you really are changing."

So, as I pressed forward my attitude was, I'm gonna make my life count whether I'm in prison or whether I'm outside. That my life was going to count for more than what I made it count for in those 22 or 20 years. That it had to amount to something.

**ML: Did you know other guys doing life [sentences]? Like how many guys would you say that you were with were doing life at the time?**

**AD:** Well, when you got that kind of time, they send you way upstate at first. Your first two to four years you stay up there. And if you're not getting in trouble, they send you down to a [maximum security prison]. Where guys got a lot of time, but they tryin' to cool out as well. So my first two years was in Elmira. Yes, it was a lot of bad stuff, a lot of violence. When you put a lot of people together that got max time, a lot of stuff happens. Things that you would never believe. Stuff you would never even hear about happens in those type of prisons.

**ML: What were some of your proudest moments inside? Like your most fond accomplishments? The things you think back on during your time in?**

**AD:** I developed a Breaking Free From Criminal Thinking Program. That has been running for like, six years now. And so far, everybody that graduated from that program and went home, they

never came back. A zero recidivism rate. So I'm touching a lot of people still to this day. We got close to a hundred people that has completed that program.

Also, I developed a drug program for Green Haven [Correctional Facility]. They use that program curriculum. That was a proud moment for me, the booklet there for the facilitating staff. And also, for the clients there. And they service upward of 200 people a year, in Green Haven, in an anti-drug program.

And also I was very violent, so I created a program in overcoming criminal thinking as an antidote to that. I went that far because I didn't believe a lot of material in DOCCS was helpful. But more could be done.

**ML: When did you starting thinking about the Parole Board? When was that something that was on your mind?**

**AD:** We tend to think, when you got this much time, that when you got 30 years to try to get out of prison . . . eventually, if you keep hitting, you're gonna get through [by means other than parole]. Well, I never broke through, so it became real for me the last, like three or five years. I said, "It's inevitable, I'm not getting out through courts or through appeal." And I [was] going to have to see, as we say, "those people."

And some of 'em [the Parole Board Commissioners] that was only teenagers when you came in, or wasn't born maybe . . . that's how you're thinking. And then you start to think about all the despicable things you did that you're gonna be judged for. And you're thinking that maybe they will view the other stuff that I've done.

And then, as you get close you start to learn that there's nothing that you can do once human life has been taken. It shakes you to the core, the more you think about it. So throughout my whole time in prison, there's times that I thought about people that I've hurt. Not only victims that lost [their] life, but I used to go on a block and sometimes children used to run for fear 'cause what they heard about me. That brought tears to my eyes.

When I first was told that by somebody that came to prison, [he said,] "I used to run off the block when you used to come down." And I didn't know that.

**ML: So when did you start preparing? Do you remember what year your first interview was with the board?**

**AD:** Yeah, 2014.

**ML: And so you had hit 29 or 30 years.**

AD: Yeah. I did my 30th year.

ML: **And what did you do for that first interview?**

AD: Well, I put my foot to the throttle and prepared myself the best I know how. Since 1993, I've been into parole preparation because that was part of my job description, working as a peer counselor at Green Haven Community Preparation Center. So for a few years I learned how to do that. So now my skills had to kick in and the physician had to now heal himself, and apply what I had learned from that time forward.

I had been a chairman of the Lifer's Committee in Green Haven and we used to read the minutes of parole hearings. And now, one of the tasks I used to give individuals was to give them the minutes and tell them to give us a synopsis the next class.

My first hearing, well . . . I was dry-mouthed. Cotton in my mouth. When you had three perfect strangers before you, it is difficult to be candid with the most intimate details of your closet of secrets. And you don't know . . . there's no mutual disclosure. It's just one way.

ML: **This is sort of a question for everybody. What did you think of the Parole Board? What was your understanding of how parole worked, and your take on the Commissioners? And maybe for y'all [the volunteers], before you started working with this Project, what did you think about the Board?**

AD: Well, I believe, and I still do, that the Parole Board is a necessary mechanism in the justice system. It needs to be a filter to find out, "Has a guy changed? Is he a public risk? Is he [at] the same level [as] where he came in?" To protect society.

So I still believe that . . . and that's been my perception. I firmly believe, too, that the right players are not in there. I believe that a lot of subjectivity goes into the Parole Board. Different worldviews are present at that Parole Board. That is not advantageous to the person that is sitting there; that they cannot relate to that person or they already have a pre-disposition. There's a foregone conclusion; their body language shows it. Their questions show it . . .

And then there's a political backlash if they do [release certain people], then they are almost guaranteed not to be reappointed six months later. And you're looking at individuals that have already left one profession . . . probably a D.A. [District Attorney]. Retired money, and now they looking at \$106,000, maybe \$120,000 a year.

So it is a lot at stake and this is the type of stuff that goes on

. . . I don't think our parole system is really working right, is what I'm saying. I think there's other things that need to happen for it to be a fair and balanced system.

**ML: And what about y'all [the volunteers]? What did y'all know or think about the Board before you started?**

**AA:** I probably went into it with the conceptions that I have about the criminal system in general . . . it's political. Its bent is to not let people out. And perpetuates how the system works when people enter it. But I remember going to the first Parole Preparation Project meeting, and sort of—it sounds silly, to be in shock. I mean, even going into it with such low expectations, and to still learn about release numbers, who is on the Commission, how many times people are hit before they're released . . . my eyes were open to a . . . totally different aspect of the system that's completely forgotten.

**NHC:** Yeah, I would agree. I think I had no image of it because all of the work we do is on the front end. I had really no idea what happens on the back end. But because just being a public defender, the assumption is the system works to keep people in, so my assumption was that it would be difficult to get out. But I didn't know how difficult, and who the people were, and what the process was like. And I think I was equally surprised by how low the numbers were of how many people were being let out, even though I knew this was a system that was designed and meant to keep people in.

**ML: And so why did y'all want to be part of the Project? What brought y'all to the work? As public defenders you're already so entrenched, right?**

**LK:** Hearing the description of the Project really enticed me. I guess the idea behind the Project that we really let the applicant lead and that it's just built on mutual respect, and really acknowledging the applicant's experience within the system. I really liked what I had heard about the Project and was intrigued by it. And I think because our jobs can be just so insanely frustrating and depressing, I like to then do other work in the criminal justice system outside of work, to build community around these issues, to come at it from a different angle. I think in some ways, even though the parole system is so terrible, there is something and was something more hopeful in working with Anthony. Obviously seeing you get out is so much more hopeful than a lot of the work that we do as public defenders.

**AA:** I think the Project sort of creates this feeling of solidarity. This idea of community building. For me personally I'd also never

been to a prison in New York State, and that wasn't what drew me to it, but I also thought a lot about doing the work that we do [as public defenders], and how you can stay so far removed from it.

NHC: This is obviously all work that we are all passionate about and I think sometimes being stuck doing the same work it can feel like we are processing people and not really connecting with any one person at any one time [because we have] so many clients. . . . I feel like I work with so many people in these little snippets and I don't get to know them and where they come from in their lives and where they're going, and when the case is over I don't see them again and that can be really exhausting . . . . And so the idea of meeting one person and getting to know them and their story . . . seemed similar, connected [to], but different than what I do all day.

ML: **What was the first visit like?**

LK: . . . We went into the waiting room and they had us sit at a table and, like, there are all these rules about who can sit where and which way you had to face, and we're waiting and waiting and then . . . what did he say? This man walked up—oh my God—what did he say?

AD: So I [walk up and] yell, "Are y'all looking for Anthony Dixon?"

LK: [Laughter.] We were all like, "Yes, yes." And then didn't you like, walk away and then come back?

ALL: [Laughter.]

AD: Yeah, I looked at them and I said, "Y'all waiting for Anthony Dixon?" They said, "Yes, yes, yes." [Laughter.] I said, "I'll get him here in a moment." I walked away and then I came back.

AD: . . . and then I said, "I'm him." "You are?!" [Laughter.]

LK: That definitely broke the ice. [Laughter.]

ML: **And were you nervous? Like, what were you feeling?**

AD: Uh no, I actually wasn't. I was able to divulge to them, it was like a natural thing; I could talk to them. My feeling was that they were here to help me . . . . And that people coming up this far and they already signed on to this type of work. It wouldn't be good not to just divulge to them and they're lawyers. They're coming here with an empathetic heart. And they need all the facts to try to do you good.

ML: **And what were y'all [the volunteers] feeling? Were you nervous or anxious?**

NHC: Yeah, I mean the whole process is unknown.

- LK: We all were very committed to doing this no matter who we were paired with, but just on a personal level, like you don't know if you're going to get along with the person you're paired with . . . . We might not have liked each other. You might not have liked us. So then to meet him was such a relief because, you know . . . we all laughed . . .
- AA: We all laughed. Right.
- LK: . . . and Anthony is so warm and inviting and it was just really comfortable.
- ML: . . . **And what did y'all talk about on the first visit, like what did you cover?**
- All: [Laughter.] [All at once] Relationships.
- AA: We were in the middle of talking about, like, how we had all met our significant others and then, like, Anthony just joined in the conversation. [Laughter.]
- ML: **And then how did it build from there? How did it progress? Did y'all talk on the phone at all? Did you write letters? How did it grow?**
- AD: Mainly over the phone and continuing visits, coming up to prepare me in the process.
- AA: You sent us a lot of paperwork.
- AD: Right.
- All: [Laughter.]
- AA: Yeah, weekly phone calls and visits, primarily.
- AD: And I worked in the ideal part of the prison where I can do a lot of this stuff that needed to be done. And they had access to stuff that I couldn't do, so they did that.
- ML: **Was there disagreement ever?**
- AD: Sometimes we agreed, sometimes we didn't. We heard it out. And sometimes we changed our views. And it was always the intention to get me home.
- ML: **What did y'all spend the most time working on? Was it interview prep? Was it putting together documents?**
- AA: I mean I would say we spent a lot of time doing interview prep. I mean, [Anthony] did the packet. We collected some letters of support that [Anthony] didn't have yet.
- AD: And they weeded out stuff. They said, this stuff is not as germane to the point as this. This is redundant. And I showed them, well, these are my ideas that I think that should, you know, fall on a page. So, I can get that done this way . . . . It

was an innovative process and it was the first time ever doing anything like this . . . .

What they brought was, they actually turned up the fire on me and said, “You can do better.” And that made me get on [the] ball more because I was like, [on] cruise control, rolling in there. Yeah, I got this down. And there was certain, they like sharpen[ed] me and I begin to now appreciate their naiveté, so to speak. And how they was looking at it, was how [the Board] was looking at it. And I needed those eyes and I needed that voice. And so, they was able to really help me. Had they not been there, I think I wouldn’t have been able to walk in there with the confidence I did and relax.

**ML: Did y’all have any fights? Did you fight about anything?**

AD: Every time. [Laughter.]

AA: We had to push you to . . . have your wife write a letter.

AD: Yes, yes.

LK: That’s true.

. . .

AA: I think we pushed you—I might be wrong about this—but I think we pushed you a little bit to be a little more emotionally vulnerable with your family details. I think that was something you were holding very—which I understand—very close to your chest.

AD: That’s true. They did. And they humanized my delivery—how I went in there. I tell other guys the same stuff: you gotta be heart-to-heart not head-to-head. People understand hearts, not heads all the time. And they helped me get there. And that’s the part that I needed helping, too. The academic stuff I got down pretty good . . . . This is my third board because of my LCTA [Limited Credit Time Allowance hearing], and I felt very confident when I walked in there next to them. It was the fact that I know I had three other people besides my family that was concerned about me coming home. That made me want to represent myself. All that gave me a boost, that they came in there and that they were genuine.

**ML: And what were those moments after the interview like? What were you feeling?**

AD: After the interview I was saying to myself “I think I made it, but I’m not sure.”

. . .

[Commissioner Hernandez] was the best. I knew where she was going based on her questions. The middle one had asked me a

very sensitive question and the last one did not. So I was very concerned because anytime they don't ask you a question, you're in the dark. And then you're not so much in the dark if, in fact, you look at their body language and you realize they're reading the caseload from the guy before, and yet they're going to vote on you. They didn't give undivided attention to you.

. . .

**ML: And what was it like for y'all knowing that he had already gone before the Board, but not knowing the outcome?**

LK: It was really nerve-wracking.

AA: The [day of the hearing] you had called me . . . I'm so, so happy that you did, but in that moment I said, "Trust yourself, you're ready for it, go for it . . ." And we were just sort of waiting.

AD: Yeah. I wanted them to take the ball for me and tell me what to do! I called my wife. And when I did go in there, I was so happy that I got [Commissioner] Hernandez as my lead. That's another issue. We know it's always the nature of the crime, but the Commissioners who are there, even if they do legislate the law about [not relying solely on the] nature of the crime—it's still the Commissioners.

**ML: Even though you felt like you did really well, was there a part of you in the back of your mind that thought "I could really be here forever; I might really never go home"?**

AD: I didn't want to believe that. I wanted to be optimistic. I would have been nerve-wracked if they hit me again. The last time I went, I felt upset with the system. I felt upset because I know I was community-ready . . . They are aware that the more time you do, the less likely you are [to come back]. Those with homicide crimes got the least recidivism. And that men who educate and get education are less likely to recidivate. In other words, I had everything in my favor, statistically. And I developed a program behind there. It wasn't a matter of, could I do enough to bring back the life—I could never do that. But if you're going to deny me, then why even have parole? If the life taken is the issue, why even have it? Cause I could never do anything [to bring back the life taken].

I think their task is a high task, to make a quick assessment of whether this individual (in my case) is still violent. If you look at my disciplinary, that's really the only thing they had that they could engage about. We're under stricter scrutiny than someone out in the streets. There's staff watching over you 24/

7. And they will get you for the strictest laws and the smallest violations, yet I had almost nine years without a ticket. And I had [correctional] officers who vouched for me.

It hurts [to be denied]. Because they are telling you, “You haven’t changed.” Fine me or something else, but not that. That hurt me for those years. I had to push through that. It took months to shake that off. Sometimes you wake up with it. Sometimes you go to bed with it. And you’re laughing with other people throughout the day, trying to get it off your mind, but you can’t. Trying not to let your mind focus on [getting hit by the Board]. It’s like an emotional roller coaster long after you get hit. Also your family—it’s like a post-traumatic ripple effect. Even the fact that we call it a “hit.” That’s a punitive term. It’s not a hold. It’s a “hit.” We’ve been psychologically “hit.” That’s damaging to a person emotionally. It takes away . . . the Board still wants you to have hope. And they are abusing their authority in a system that they led you to believe was right and fair, you find out it’s unjust. It’s so unjust. And so you got to just pull your bootstraps up and find some way to keep having goals—to keep going. And that’s hurtful to someone who goes eight or nine times. Somebody like John MacKenzie, he just got tired of it.

**ML: So what about when you found out you were coming home? What was that like?**

**AD:** When I found out, I really had to pinch myself. It was incredible. I couldn’t go to sleep. My eyes were closed but I was still up. I’m walking around in an environment that I know I’m leaving, and I have to try and pull myself out of it. But I still have to play the role as if I’m not leaving. And in your mind you’re saying “This is going to be over for real? I’m not going to be doing this next week or next month?” That’s amazing. And I felt like doing hopscotch. Like jumping up and down. And it’s incredible. It’s a breath of fresh air, but you can’t release it in there because there’s guys in there who can’t relate to what you’re going through. So you gotta contain all that! And try to act mundane. And even until the last moment I was like that. And when I got out, I told my wife, “Drive fast!” Just in case some paperwork was wrong. “I gotta get out of here!” They can’t reserve it once I’m out of this territory. They gave me my money and they told me I could go down the street and cash it at the bank and I said, “You crazy—I ain’t staying around here.”

**All:** [Laughter.]

**AD:** So that was quite a process. Sometime I still go to bed thinking

about it. I'm just two months out. Everything I'm doing is for the first time. I now know what's it's like to feel tired at the end of the workday. I like going to work and coming home. Going to work and coming home. Going to work and coming home. I like it. I like taking out the garbage at 5:30 in the morning. I do, I'm telling you. It's a good feeling. Responsible things. I know I'm in the city, so I still gotta watch my surroundings. I'm still somewhat naïve, even though I used to live the criminal life . . . . So it's been a good experience and a weird experience.

ML: . . . **[W]hat was it like for y'all when you found out he was coming home? How'd you find out?**

AA: Totally surreal . . . You were so ready to come home, like, if you didn't come home . . . then, like, who was coming home? But we also knew the reality of the Parole Board . . . it's still crazy to see you here.

AD: Yeah, they was a godsend to me. I remember you making that statement, "if you're not ready, then nobody's ready," and stuff like that, and that made me feel so good, but I said, "if I don't [get released] they're going to feel so bad," because it felt like a part of me was in prison, and a part of them was in me, and they was going to feel bad. So I took a big sigh after that visit when they said that to me. I think too, that all lawyers that are in the criminal justice system should go through this process at the front end and at the back end. Because we seem to have a good system on getting 'em in, but the exit plan is terrible, all the way through. No good exit plan. I think that more people that are graduating from law school need to be exposed to this.

ML: **What do you think the impact of the Project has been on you? Overall and just since your time coming home?**

AD: First of all, I was unaware that there was this many conscientious lawyers in New York State. I just thought that there was one, or two, or three, an exception. I was unaware still when I got ahold of the invite to be a part of it, and I almost said, "I don't really need them, I don't think I'm going to need them," and I would have missed a[n] opportunity had I not signed up. I wouldn't be here today, I don't think. I definitely wouldn't have went into the Board that well-prepared. And like I said, sometimes knowing it all is fatal and you need somebody outside of you to help you. And my awareness, too, increased when I was able to let down my guard and become vulnerable to them, and they wasn't judging me. It was at a human level. You know, I did some bad things, and they were just taking it

in and saying, “we’re here to help [you] out,” and that made me feel so good. And the emotional relief they felt with me when I made the Board. I told my wife, I felt that somehow we will be forever connected as a result of this. This was a monumental part of my life—I can’t say what kind of words I want to say, but it was a big turn in my life from there to now and they played an important part of it.

**ML: And what about for y’all [the volunteers]? How has it changed you, if it has? What has the impact been?**

**LK:** I mean, it’s been just an amazing experience throughout. I mean, I did not go into it realizing that I was going to make a new friend for life in Anthony . . . . And I remember towards the beginning of the process, the three of us talking about what the hell do we have to offer Anthony? He’s so accomplished. I mean, he had done every program in prison, gotten degrees, started his own programs, helped other guys prep for their hearings and had all the documents he needed, so we were like, there was nothing really left for us to do. But going through the experience and hearing Anthony reflect on it, I see now that just being able to be there for him and support him through it and know that he had people on his side was a tremendous help, and so that was a really amazing, humanizing experience.

**AD:** Yeah, they came up on regular visits when my family came up and they also came up on lawyer visits. And you call them up at nighttime past hours and you talk to them and they talk to you, and you feel like, “wow, these people really care about me.” And after being inside and being treated like an animal for decades and have people in this capacity reach out to you, it makes you feel different, like I got somebody at my side, and it’s not just me and my family . . . .

**NHC:** For me, I was so genuinely surprised in a good way about the connections that we all had to each other. Both with Anthony but also with each other as a group. It was such a great experience for the four of us to do this together, since whenever we were there in person [in the visiting room], we were there until we weren’t allowed to be there anymore. And it just felt like beyond going through your packet, there was so much to talk about that we all connected, which was such the surprise . . . .

**AA:** Yeah, it was strangely transformative . . . . Being here almost a year later, feeling like I look at the world differently . . . . [Anthony] walking out of those gates and thinking that [he] could never walk out of those gates, and knowing who [he was] as a person and thinking about what a tragedy, that the world

could miss out on [him] . . . . I think that that was such a hard part of the Project and very humbling, and something that stays with me, because we know how many of your friends are still on the inside . . . .

- LK: It also feels like, I know I really enjoy being able to talk to Anthony about my work as a public defender. And it feels like I've found, the only word that is coming to mind is comrade, a comrade in the struggle because it was really moving—the three of us went to the rally for John MacKenzie in Harlem when Anthony was still in and that felt really important and special to be able to do that. And now Anthony is doing this amazing work helping formerly incarcerated people find jobs, and just to be able to dialogue about that and share in what you're doing and what we're doing. It just feels like we're growing this community that is really special.
- AD: . . . We need one another for this to work, and we are the answer together, not alone, and it will take all of us working on this to change things the way that we want. And so I do feel that way with them too, and I feel that I'm at a time in life, and [in] a climate to show up on that platform. And I'm so glad that I have other people like you as well.
- ML: **I'm just curious if [the volunteers] think that this work has changed the way you practice law or think about lawyering, or the way you live your day-to-day job or your day-to-day life?**
- AA: I think it's just solidified my own personal need to do work outside [my job]. Like, as Lauren was talking about in the beginning, our work can be very surface level, like we have a lot of clients, people who are in crisis and we don't get to—unfortunately, and sometimes fortunately—we get them in and out of the system, right? The Project [gives me an] understanding of the systems together . . . . That that is truly what I need to do to sustain myself in the practice—talk about the front end and the back end, and think about how they work together.
- LK: It is really refreshing coming from a high-volume practice where there's all this pressure to just keep moving and have shorter interviews and go along to get along—it's so refreshing to be able to work in a space where we're just getting to know you and building a relationship and asking you what we could do for you, and that was a refreshing juxtaposition. And I think it's also probably important for us going forward to think of ways to, ways in which, and times in which, we can ask our clients, "What do you need from me? . . . What do you want me to do?"

- ML: Well, thank you everybody, for being here. We really appreciate it.
- AD: It was a privilege . . . . I wouldn't have missed it for the world. Thank you for allowing me this platform to speak. I hope that it impacts the right people in this law school.

#### CONCLUSION

For decades, the New York State Board of Parole has kept thousands of people serving indeterminate sentences locked up and away from their families, despite applicants' significant accomplishments, profound personal transformations, demonstrated low risk to public safety, and readiness for release. The Board's most common reasoning for these denials—that the nature of a person's crime justifies indefinite incarceration—is deeply flawed and ultimately unlawful. It is an approach rooted in retribution, racism, and a profound disregard for the lives of people in prison.

By highlighting the dignity and humanity of incarcerated people, offering technical assistance to parole applicants in their struggle for release, and galvanizing community volunteers to participate in movements to end incarceration, the Parole Preparation Project seeks to challenge the Board and hold it accountable for its harmful and devastating practices. Further, by creating spaces where deep and meaningful relationships can thrive across prison walls, we seek to heal our communities from the harm caused by mass incarceration, and to replace such practices of punishment and retribution with ones rooted in mercy, compassion, and love. By working with and advocating for people convicted of violent crimes who have served decades in prison, we also challenge normative ideas of violence and encourage the public and policymakers to view violence with nuance and to retreat from inflexible distinctions between those who cause harm and those who are harmed.

Ultimately, it is our hope that the work of the Parole Preparation Project is and will be one small antidote to the profound abuse and dehumanization entrenched in the criminal legal system and the parole process in New York State—and that our fight to set people free is a direct affront to the legacy of slavery and incarceration of Black people and people of color that has defined this country from its inception.



# RECLAIMING RESTORATIVE JUSTICE: AN ALTERNATE PARADIGM FOR JUSTICE

*Shailly Agnihotri & Cassie Veach*<sup>†</sup>

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Restorative Justice (“RJ”) is a rapidly growing field of study and practice that cuts across disciplines, from criminal law and criminology to education and social work. It has become a catchall term which may describe a theory of justice, particular practices or outcomes, the mobilization of restorative practices in a particular place,<sup>1</sup> or a social movement seeking to transform the way society conceives of justice.<sup>2</sup> There are programs springing up in schools, workplaces, courtrooms, and prisons.<sup>3</sup> States have passed legislation to incorporate restorative practices into various points in the criminal system.<sup>4</sup> There are trainings, conferences, institutes

<sup>1</sup> Some practitioners understand RJ as a model which exists wholly within the criminal justice system, while the application of RJ practices outside of the courtroom is labeled Transformative Justice. This article does not make such a distinction in terminology, but seeks to analyze the effects of state power on court- and community-based RJ programs.

<sup>2</sup> CHRIS CUNNEEN & CAROLYN HOYLE, *DEBATING RESTORATIVE JUSTICE* 102 (2010) (“Restorative justice can be defined in a number of ways—as a process, for instance, or as a set of values or goals, or more broadly as a social movement seeking specific change in the way criminal justice systems operate.”).

<sup>3</sup> See, e.g., TREVOR FRONIUS ET AL., WESTED JUSTICE & PREVENTION RESEARCH CTR., *RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW* (2016), [http://jpic.wested.org/wp-content/uploads/2016/02/RJ\\_Literature-Review\\_20160217.pdf](http://jpic.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf) [<https://perma.cc/Z3WY-WZK3>] (RJ in schools); AM. BAR ASS’N, *MEDIATION IN CRIMINAL MATTERS: SURVEY OF ADR AND RESTORATIVE JUSTICE PROGRAMS* (2009), <http://www.americanbar.org/content/dam/aba/publications/criminaljustice/mediationsurvey.authcheckdam.pdf> [<https://perma.cc/B2QG-5KGB>] (RJ programs in criminal justice matters); *NYC Programs and Institutions Implementing and/or Promoting Restorative Practices*, RESTORATIVE JUST. INITIATIVE, <http://www.restorativejustice.nyc/restorative-justice-nyc/> [<https://perma.cc/Q2H2-3CSX>] (detailing programs in the New York City area which implement RJ in a variety of contexts); *Restorative Justice*, IOWA DEP’T CORRECTIONS, <https://doc.iowa.gov/victim-services/restorative-justice> [<https://perma.cc/53EY-H2BP>] (RJ in prisons); *Restorative Justice*, MO. DEP’T CORRECTIONS, <http://doc.mo.gov/OD/DD/RJ.php> [<https://perma.cc/XY4F-PYM5>] (RJ in prisons); *Restorative Justice*, MONT. DEP’T CORRECTIONS, <https://cor.mt.gov/Victims/Restorative> [<https://perma.cc/T4AH-B68V>] (RJ in prisons); *Restorative Justice*, VT. DEP’T CORRECTIONS, <http://doc.vermont.gov/justice/restorative-justice> [<https://perma.cc/UF99-GT7A>] (RJ in prisons).

<sup>4</sup> See, e.g., COLO. REV. STAT. § 24-4.1-303(11)(g) (2016); FLA. STAT. § 985.155 (2014); HAW. REV. STAT. § 353H-31 (2013); MINN. STAT. § 611A.775 (1998), MINN. STAT. § 609.092 (2009); VT. STAT. ANN. tit. 28, § 2a (2011); VT. STAT. ANN. tit. 24, §§ 1962-1967 (2015).

and academic journals devoted to RJ.<sup>5</sup> Program models are being exported across the nation and the globe.<sup>6</sup> Large sources of funding are being offered to develop restorative programming both domestically and internationally.<sup>7</sup> The ABA has a committee addressing RJ and a UN working group has issued guidelines for best practices.<sup>8</sup>

The growth of RJ has been fueled by different motivations both inside and outside of the courtroom. While these motivations have shaped the current landscape of RJ, this article provides an analytical framework to evaluate the impact of restorative justice programs regardless of the intentions guiding them. This framework considers three models of RJ based on their relationship with State power, as manifested by the criminal justice system (“CJS”). At one end of the spectrum are court-based RJ

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<sup>5</sup> See, e.g., *Center for Restorative Justice and Peacemaking*, U. MINN., <http://www.cehd.umn.edu/ssw/rjp/> [<https://perma.cc/B46F-2ZCM>] (offering RJ trainings); *Training Center*, N.Y. PEACE INST., <http://nypeace.org/trainings/> [<https://perma.cc/4TG9-UD6H>] (offering RJ trainings); INT’L INST. FOR RESTORATIVE PRACTICES, <http://www.iirp.edu/> [<https://perma.cc/3LUD-UXH8>] (offering RJ trainings); *Contemporary Justice Review*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/toc/gcjr20/current> [<https://perma.cc/FF7C-NADU>] (journal devoted to RJ); *Restorative Justice: An International Journal*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/toc/rrej20/current> [<https://perma.cc/TF4R-C2LA>] (journal devoted to RJ); *6th National Conference on Community and Restorative Justice*, NAT’L ASS’N COMMUNITY & RESTORATIVE JUST., [http://nacj.org/index.php?option=com\\_content&view=article&id=87&Itemid=715](http://nacj.org/index.php?option=com_content&view=article&id=87&Itemid=715) [<https://perma.cc/ZT5U-383S>] (holding annual conferences); *3rd International Symposium on Restorative Justice*, RESTORATIVE JUST. FOR ALL, <http://www.rj4all.info/content/RJsymposium2016> [<https://perma.cc/XFL4-TBZ7>] (promoting RJ Conference). The Department of Justice has also adopted various RJ practices under both the auspices of Community Oriented Policing Services and the Office of Juvenile Justice and Delinquency Prevention. See, e.g., CAROLINE G. NICHOLL, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, TOOLBOX FOR IMPLEMENTING RESTORATIVE JUSTICE AND ADVANCING COMMUNITY POLICING (1999), <http://restorativejustice.org/am-site/media/toolbox-for-implementing-restorative-justice-and-advancing-community-policing.pdf> [<https://perma.cc/95CH-3NMQ>]; KAY PRANIS ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, GUIDE FOR IMPLEMENTING THE BALANCED & RESTORATIVE JUSTICE MODEL (1998), <https://www.ncjrs.gov/pdffiles/167887.pdf> [<https://perma.cc/ZTS9-8EGY>].

<sup>6</sup> See, e.g., U.N. OFFICE ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, U.N. Sales No. E.06.V.15 (2006), [https://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf) [<https://perma.cc/DK9U-4ZEW>]; CTR. FOR JUST. & RECONCILIATION, <http://restorativejustice.org/> [<https://perma.cc/K867-48R3>].

<sup>7</sup> See, e.g., JUSTICE CTR., COUNCIL OF STATE GOV’TS, FEDERAL FUNDING OPPORTUNITIES TO SUPPORT SCHOOL DISCIPLINE, CLIMATE AND SAFETY IMPROVEMENTS (2014), <https://csgjusticecenter.org/wp-content/uploads/2014/05/FederalGrantProgramsChart.pdf> [<https://perma.cc/A5AU-MFBG>].

<sup>8</sup> *Criminal Justice Section: Alternative Dispute Resolution and Restorative Justice Committee*, AM. B. ASS’N (Sept. 26, 2016), <http://apps.americanbar.org/dch/committee.cfm?com=CR100000> [<https://perma.cc/S637-74LV>]; U.N. OFFICE ON DRUGS & CRIME, *supra* note 6.

programs, which are fully embedded within the CJS. At the other end of the spectrum is a wholly independent community-based model of RJ. A hybrid quasi-court model of RJ describes programs that intersect with the CJS, but are not fully contained by it.

This article examines the current landscape of restorative justice programs, compares their philosophical foundations, and offers a structure for analysis. Section I presents the landscapes of RJ and the CJS. Section II evaluates the court-based model of RJ. Section III considers the quasi-court-based model for RJ. Section IV discusses the independent community-based model of RJ. Considered under this framework, establishing RJ practices within the CJS cannot transform the overarching criminal system. Rather, in the court-based model, the values of restorative justice are co-opted and used to expand the power of the State. However, as a free-standing, community-based model, restorative justice has the potential to flourish as an alternative pathway to justice.

## I. LANDSCAPES OF RESTORATIVE JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

### A. *Restorative Justice*

“Circles move like waves and function as prisms which make spectrums visible. Lines clear-cut, divide, conquer. Circles meander and move in response to the terrain shaped by voices that generate unique contours and infinite variation. Lines are limited to agendas harboring specific meaning and interpretation. Circles generate meaning as a conduit for open interpretation. A line is a means to an end. Circles are ends in themselves. They ripple out, rather than cut through.”

—John Delk<sup>9</sup>

#### 1. What is Restorative Justice?

Restorative Justice means many different things to different people. Indeed, “turning to the restorative justice movement for clarity can be disheartening because we discover that there exist nearly as many definitions of restorative justice as there are people offering them.”<sup>10</sup> In our view, RJ is a mechanism for communities to come together around an issue in a way that allows emergent wisdom to surface and to guide decision-making. It is based on the

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<sup>9</sup> THE RESTORATIVE CTR., *THE NEWBURGH MODEL OF COMMUNITY CIRCLES: ESSAYS AND WORKBOOK* 9 (2d ed. 2015).

<sup>10</sup> DENNIS SULLIVAN & LARRY TIFFT, *RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES* 32 (2001).

values of shared power, voluntary participation, and equal voice. Though there are a range of practices broadly categorized as RJ, we understand RJ as a circle-based process, which is able to fully manifest these values.<sup>11</sup> The circle process is a facilitation model where participants gather in a circle and speak, one at a time, going repeatedly around the circle. A circle is a way to hold space for people to come together “as equals to have honest exchanges about difficult issues and painful experiences in an atmosphere of respect and concern for everyone.”<sup>12</sup> Circles may be used to address conflict, but also for celebration, support, and community building.

As circles frequently require participants to honestly discuss serious and challenging issues, participation in a circle must be voluntary. A facilitator, or circle keeper, may guide the dialogue through the use of a talking piece, which represents the power sharing within the circle. The circle keeper does not have an agenda in resolving the matter in any particular way.<sup>13</sup> When someone has the talking piece, they may speak at length without interruption, hold silence, or pass the talking piece without speaking. Each person has the opportunity to speak. A circle thus creates a space for people to share freely and listen deeply. This process allows the emergent wisdom of the participants to surface. A circle is “a container strong enough to hold: anger[,] frustration[,] joy[,] pain[,] truth[,] conflict[,] diverse worldviews[,] intense feelings[,] silence[,] paradox.”<sup>14</sup>

## 2. Other Practices Often Categorized as Restorative Justice

In addition to circles, a range of other practices have been categorized under the RJ umbrella. While some define RJ broadly to include the practices of victim-offender<sup>15</sup> mediation (“VOM”)<sup>16</sup>

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<sup>11</sup> It is important to note that not all discussions that take place in circles are restorative justice. Group therapy, for instance, may follow this format, but it is focused on behavioral modification of participants and not about building awareness of the community.

<sup>12</sup> KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 6 (2005).

<sup>13</sup> This process is distinguished from an elder circle, where particular individuals facilitate the conversation and are expected to disseminate their wisdom among the group.

<sup>14</sup> PRANIS, *supra* note 12, at 9.

<sup>15</sup> The terms “victim” and “offender” are used in this piece to the extent that they are used in CJS and some restorative practices. Though far from unproblematic, these terms are used when necessary to provide clarity about the various models. A further critique of how these terms have been used in restorative practices is articulated in section II.B.3, below.

<sup>16</sup> Here, VOM is used as a catchall to encompass programs labeled Victim-Of-

and reparative boards, these fall outside the circle-based definition used here.

VOM is often heralded as the origin of the court-based RJ model and VOM programs have been widely adopted across the country.<sup>17</sup> This practice was influenced by the victim's rights movement and Mennonite beliefs about the moral benefits of apology and forgiveness.<sup>18</sup> However, we see a fundamental difference in the process of mediation and do not consider mediation-based models to be Restorative Justice. Though some advocates of VOM seek to distance themselves from mediation and to situate themselves fully in the RJ camp, others accept the mantle of mediation and the additional confidentiality protections that it may afford.<sup>19</sup> Like traditional mediation, VOM programs are designed to bring about facilitated resolution of conflict by finding a middle ground that both sides can agree to.<sup>20</sup> In contrast, RJ is a model of shared justice that goes beyond the directly impacted individuals to other interested parties and community members. In the authors' view, RJ attempts to get to the deepest reservoir of connection among people in a circle to create the conditions for emergent wisdom to arise. While mediation seeks to resolve conflicts, RJ seeks a deeper engagement with the philosophical underpinnings of conflict—humans' lack of empathy and understanding of another's point of view.

Community boards<sup>21</sup> likewise fall outside this definition of RJ. In this model, a panel of community volunteers meets with an offender diverted from the CJS to determine the conditions of the diversionary program or probation. Though codified by Vermont statute as "restorative justice,"<sup>22</sup> these Boards do not reflect the

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fender Reconciliation Programs (VORP), Victim-Offender Dialogue (VOD), and Victim-Offender Conferencing (VOC).

<sup>17</sup> Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 673 (2005).

<sup>18</sup> See, e.g., Howard Zehr, *Changing Lenses: Restorative Justice for Our Times* 129-57, 159-66 (4th ed. 2015).

<sup>19</sup> See generally Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 *J. DISP. RESOL.* 401, 405; UNIF. MEDIATION ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) [<https://perma.cc/RA4D-X3XC>].

<sup>20</sup> HOWARD ZEHR WITH ALI GOHAR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 51, 60 (2003); MARK S. UMBREIT & JEAN GREENWOOD, *CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE I* (2000), [https://www.ncjrs.gov/ovc\\_archives/reports/96517-gdlines\\_victims-sens/ncj176346.pdf](https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/ncj176346.pdf) [<https://perma.cc/9GF7-NXDW>].

<sup>21</sup> These are also sometimes termed reparative or restorative boards, restorative panels, or reparative probation.

<sup>22</sup> See, e.g., VT. STAT. ANN. tit. 24, §§ 1961-1967 (2015).

goals of shared power and equal voice. Though they may achieve a non-retributive outcome (e.g. no criminal record, no prison time), these Boards rely on a hierarchal power dynamic and act as a sort of community-based lay court to impose sanctions like community service, victim restitution, or additional programming requirements.<sup>23</sup>

### B. *The Criminal Justice System*

#### 1. Constitutional Foundations and Purpose of the Criminal Justice System

At best, the American criminal justice system is the unfolding of modulated State power to fairly address accusations of unlawful behavior against members of the populace.<sup>24</sup> By function, there are only two powers in the CJS—the State and the accused. All shifts or exchanges in criminal justice dynamics are thus a recalibration of these two powers.<sup>25</sup> In this two-power system, loss of power of the accused is reflected by a corresponding gain in the power of the State and vice versa. The parties in the adversarial system are represented by professionals, who navigate the complex legal and administrative systems and argue for their side to prevail with the judge acting as referee.<sup>26</sup> By design, there are limited opportunities for impacted people to speak on their own behalf.

In criminal proceedings, the State has a monopoly on the

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<sup>23</sup> Indeed, this program developed as a result of a poll circulated by the Vermont Department of Corrections, which indicated a desire for more community control over the criminal court process. See Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 65-66 (2003).

<sup>24</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”); see also *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964) (“[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.” (footnote omitted)).

<sup>25</sup> See generally Brooke D. Coleman, *Prison Is Prison*, 88 NOTRE DAME L. REV. 2399, 2400 (2013) (exploring the impact of the Supreme Court’s differing views of state power in the criminal and civil contexts as they impact the right to counsel).

<sup>26</sup> Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge As the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 945-47 (2008).

power to charge people with crimes.<sup>27</sup> Concerned about the potential for tyrannical abuse of state power, the writers of the Constitution enshrined a series of powerful protections for the accused when the State exercises its police and prosecutorial powers.<sup>28</sup> The first protection in the adversarial system is the codification of the presumption of innocence.<sup>29</sup> The State must prove its case in a public forum, with evidence untainted by unlawful searches or seizures and with testimony from witnesses who are sworn to tell the truth.<sup>30</sup> The accused has the right to cross-examine any witnesses and present their own evidence, but the State cannot compel the accused to testify or to incriminate himself. A jury of the accused's peers is charged with determining whether the State has met its high burden of proving every element of the charges beyond a reasonable doubt.<sup>31</sup> Only then can the State impose the stigma and penalty of a conviction. The degree to which the State should err on the side of innocence is emphasized by Blackstone's formulation that "it is better that ten guilty persons escape, than that one innocent suffer."<sup>32</sup> Benjamin Franklin's iteration of this maxim increases this ratio by a magnitude, noting, "it is better a hundred guilty persons should escape than one innocent person should suffer . . . ."<sup>33</sup>

In cases where the State is able to establish guilt, whether through plea or conviction, it has the authority to impose sanctions on the offender. Under the theory of retribution or "just deserts," the moral culpability of the offender gives the State a duty to impose punishment.<sup>34</sup> Under this theory, those who have caused suffering morally deserve suffering and the scales of justice are rebalanced by meting it out.<sup>35</sup> This exercise of state-sanctioned punishment should be proportionate to the severity of the offense

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<sup>27</sup> The advent of modern criminal law began with the Norman Conquest of Britain in the twelfth century. Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 6 (2004). This transformed the view of crime as a conflict between individuals to a breach of the king's peace, giving the monarch increased power over the people. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999).

<sup>28</sup> U.S. CONST. amends. IV-VI, VIII; *id.* art. III, § 2.

<sup>29</sup> 29 AM. JUR. 2D *Evidence* § 250 (2016).

<sup>30</sup> U.S. CONST. amends. IV-VI, VIII.

<sup>31</sup> U.S. CONST. art. III, § 2; *In re Winship*, 397 U.S. 358, 368 (1970).

<sup>32</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

<sup>33</sup> 11 BENJAMIN FRANKLIN, WORKS 13 (John Bigelow ed., 1904) (letter from Benjamin Franklin to Benjamin Vaughan dated Mar. 14, 1785).

<sup>34</sup> THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: COMPACT EDITION 602 (Stephen Michael Sheppard ed., 2011).

<sup>35</sup> *Id.*

and the blameworthiness of the offender.<sup>36</sup> Under the theory of utilitarianism, punishment is justified by the useful purpose that punishment serves such as deterrence, incapacitation, rehabilitation, and restitution.<sup>37</sup> The CJS has adopted a huge array of possible sanctions under the principles of these different theories of punishment, which are frequently incompatible with one another.<sup>38</sup>

## 2. How the Criminal Justice System Functions in Practice

Though the constitutional foundations for the CJS demand that the State meet this high burden to impose punishment, in practice, the carefully crafted balance of power has shifted. Today, very few criminal cases go to trial and the vast majority are resolved through guilty pleas.<sup>39</sup> By forgoing the right to trial and the protections that it affords, the accused nearly always waives at least some of the rights designed to protect them and to balance the scales against state tyranny.<sup>40</sup> Though the accused may validly waive some of these rights, the reliance on pleas to resolve most cases means that the State rarely needs to meet its high burden to prove guilt. Rather, practices like selective policing, charge stacking, pre-trial detention, cash bail, and the trial tax allow the State to put its thumb on the scale and exert pressure on the accused to plead early.<sup>41</sup> In cases where the accused demands that the State meet their burden, the wheels of the system turn slowly.<sup>42</sup> Thus, whenever the State is able to avoid the rigors of trial, State power is enhanced.

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<sup>36</sup> *Id.*; Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, 18 LEWIS & CLARK L. REV. 893, 912 (2014); Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2333 (2013).

<sup>37</sup> Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 847 (2013).

<sup>38</sup> CUNNEEN & HOYLE, *supra* note 2, at 170.

<sup>39</sup> Sources estimate upwards of 90% of state and federal criminal cases are resolved through guilty pleas. *See, e.g.*, LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/7QJY-KC5R>]; Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/943Q-84D9>].

<sup>40</sup> Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 393 (2015).

<sup>41</sup> *Id.* at 428; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 407 (1992).

<sup>42</sup> *See* Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 227 (2015).

Victims' rights reforms of the CJS have further shifted the balance of power against the accused. The victims' rights movement has advanced the notion that the victim is a party to the proceeding and not merely a witness<sup>43</sup> — for example, giving the complaining witness the right to speak at public hearings involving release, plea, sentencing, and parole.<sup>44</sup> In the balance between the State and the accused, enhancing the role of a victim to aid in prosecution increases the power of the State, which, in a two-party system, can only come at the expense of the accused.

Unsurprisingly, this increase in State power has not been evenly borne, but reflects societal structures of oppression and domination. "Power has an infinite number of ways of regenerating its strategies and justifications for its continued existence, all to protect the status, prestige, and position of the power-wielder, the ownership and control of the power process, and privileged access to benefits that were and continue to be collectively-produced."<sup>45</sup> By turning its "gaze to select marginalized populations", the CJS is able to "mask the effects" of its power within overarching patterns of oppression.<sup>46</sup> In an imperialist, capitalist, white supremacist, ableist, cis-hetero-patriarchy, those targeted by the State are therefore disproportionately poor people, people of color, Native Peoples, people who are trans and gender non-conforming, and people with mental illness.<sup>47</sup> Through the criminalization of pov-

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<sup>43</sup> Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 176-78 (1984); see also Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 584-85 (2004). Obold-Eshleman distinguishes that while some measures have been designed to reduce the fear and traumatization of victims (such as confidentiality of personal information and counseling records), others were intended to increase the victim's power to assist in the prosecution or to impose harsher penalties against the alleged offender. *Id.* at 584-85.

<sup>44</sup> 18 U.S.C. § 3771(a)(4) (2015). In addition to incorporating victims' rights provisions in the federal system, every state has adopted, by legislation or constitutional amendment, some reforms increasing victim participation in the criminal process. Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 32-33 (1999).

<sup>45</sup> SULLIVAN & TIFFT, *supra* note 10, at 134 (citation omitted).

<sup>46</sup> *Id.* at 158.

<sup>47</sup> See, e.g., BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 92 (1984); BELL HOOKS, *THE WILL TO CHANGE: MEN, MASCULINITY AND LOVE* 17, 29 (2004); CAROLINE WOLF HARLOW, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1* (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/5SXY-BWQN>] (showing that the majority of people accused of crimes rely upon indigent defense services); MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* (2007), <http://www.sentencingproject.org/wp-content/uploads/2016/01/>

erty, the selective enforcement of crime, the militarization of the police, and the rise of state surveillance, the State has been able to increase its own power at the expense of those individuals who are least able to defend themselves against it.<sup>48</sup> The result of this has been the explosion of the adult prison population to over two million and nearly seven million under some form of community supervision.<sup>49</sup>

This current crisis of mass incarceration is evidence of the CJS trend toward increased punitiveness.<sup>50</sup> However, the diversity of strategies for punishment allow the State, and to a lesser extent individual courts, to choose from a large menu of possible sanctions.<sup>51</sup> For example, in addition to sentencing individuals to imprisonment<sup>52</sup> the state may impose fines, community service, or

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Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf [https://perma.cc/4BQ5-YQPL] (on racial disparities in incarceration); LAKOTA PEOPLE'S LAW PROJECT, NATIVE LIVES MATTER (2015), <http://www.docs.lakotalaw.org/reports/Native%20Lives%20Matter%20PDF.pdf> [https://perma.cc/2Y75-KTAM]; Jon Marcus, *Bringing Native American Stories to a National Audience*, NIEMAN REP. (Feb. 11, 2016), <http://niemanreports.org/articles/bringing-native-american-stories-to-a-national-audience/> [https://perma.cc/GK54-EHRD] (noting disproportionate incarceration of Native people); FORGE, CRIMINAL JUSTICE?: NEW FAST FACTS ABOUT TRANSGENDER PEOPLE, POLICE, AND INCARCERATION (2011), <http://forge-forward.org/wp-content/docs/fast-facts-police1.pdf> [https://perma.cc/KA79-NZY5] (statistics on the incarceration of transgender and gender non-conforming people); SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), <https://www.hrw.org/sites/default/files/reports/usa1003.pdf> [https://perma.cc/HHH9-X9KJ] (on the incarceration of people with mental illness).

<sup>48</sup> See, e.g., Sarah Childress, *The Problem with "Broken Windows" Policing*, PBS.ORG: FRONTLINE (June 28, 2016), <http://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/> [https://perma.cc/9QTD-LBJ8]; KAREN DOLAN & JODI L. CARR, INST. FOR POLICY STUDIES, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [https://perma.cc/B4RL-LMUF]; Dexter Filkins, "Do Not Resist" and the Crisis of Police Militarization, NEW YORKER (May 13, 2016), <http://www.newyorker.com/news/news-desk/do-not-resist-and-the-crisis-of-police-militarization> [https://perma.cc/H32X-6YEM]; Glenn Greenwald, *New Study Shows Mass Surveillance Breeds Meekness, Fear and Self-Censorship*, INTERCEPT (Apr. 28, 2016, 11:03 AM), <https://theintercept.com/2016/04/28/new-study-shows-mass-surveillance-breeds-meekness-fear-and-self-censorship/> [https://perma.cc/3A6F-XCE4].

<sup>49</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1-2 (2014), [www.bjs.gov/content/pub/pdf/cpus13.pdf](http://www.bjs.gov/content/pub/pdf/cpus13.pdf) [https://perma.cc/9FD8-6AD9] (reporting 2,220,300 people incarcerated and 6,899,000 adults under supervision).

<sup>50</sup> Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007).

<sup>51</sup> CUNNEEN & HOYLE, *supra* note 2, at 170 (citing O'Malley).

<sup>52</sup> See, e.g., N.Y. PENAL LAW § 70 (McKinney 2009). Additionally, in some jurisdictions, the death penalty remains an available punishment. DEATH PENALTY INFO. CTR.,

probation.<sup>53</sup> In other cases, the accused may be offered a diversionary program, where in exchange for a guilty plea and successful completion of the program, the charges are dismissed.<sup>54</sup> However, if an individual does not complete the program to the satisfaction of the court, the conviction stands and the accused faces the traditional penalty of incarceration.<sup>55</sup> Diversionary programs often purport to be rehabilitative and seek to break cycles of crime by providing counseling, job training, and drug treatment services, among others.<sup>56</sup>

The presence of what are perceived to be softer options can be used to secure “the hegemony of law by making the harsher aspects of the criminal justice system more palatable, particularly its racialised, gendered and class-based effects . . . .”<sup>57</sup> Though programs which are based on the principle of rehabilitation may at first glance seem beneficial to all involved, problem-solving or treatment-based approaches which are contingent upon a guilty plea also require that the accused waive constitutional rights.<sup>58</sup> The treatment paradigm may give the State more power to impose programming requirements and justify increased monitoring.<sup>59</sup> In

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FACTS ABOUT THE DEATH PENALTY (2017), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/G3S7-3LL9>].

<sup>53</sup> See, e.g., N.Y. PENAL LAW §§ 65, 85 (McKinney 2014).

<sup>54</sup> Debra T. Landis, Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant’s Consent to Noncriminal Alternative*, 4 A.L.R.4th § 2(a) (1981); Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/76LJ-WV8F>]. Programs labeled alternatives to incarceration (ATI) frequently fit into the diversionary scheme when offered, not as a sentence itself, but as part of an agreement to defer sentencing. RACHEL PORTER ET AL., VERA INST. OF JUSTICE, *BALANCING PUNISHMENT AND TREATMENT: ALTERNATIVES TO INCARCERATION IN NEW YORK CITY* 24 (2002), [http://archive.vera.org/sites/default/files/resources/downloads/Balancing\\_ATI.pdf](http://archive.vera.org/sites/default/files/resources/downloads/Balancing_ATI.pdf) [<https://perma.cc/XZX6-S8TL>].

<sup>55</sup> N.Y. PENAL LAW § 65.05 (McKinney 1992); Dewan & Lehren, *supra* note 54.

<sup>56</sup> PORTER ET AL., *supra* note 54, at 4-5.

<sup>57</sup> CUNNEEN & HOYLE, *supra* note 2, at 164.

<sup>58</sup> Namely, the right against self-incrimination, the right to a jury trial, and the right to confront one’s accusers. See generally *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that a knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one’s accusers); *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”). As a condition of many plea bargains, the accused must also often waive their right to appeal. Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 873 n.24 (2010).

<sup>59</sup> Holly Catania & Joanne Csete, *Drug Courts and Drug Treatment: Dismissing Science*

drug courts in particular, there are concerns that courts are “playing doctor” by requiring offenders to complete programming that may not comport with medical consensus and may even be exacerbating patterns of addiction.<sup>60</sup> Though rehabilitation-based programs may provide some people with helpful tools, these programs cannot overcome the processes of criminalization and coercion that have corrupted the larger system.

## II. COURT-BASED RJ PROGRAMS

“Only free men can negotiate. Prisoners cannot enter into contracts.”

—Nelson Mandela<sup>61</sup>

RJ programs in the court-based model are diversionary programs, which are offered as post-plea, pre-sentence alternatives to incarceration. In this model, the offer of RJ is used as an inducement for the accused to plead guilty. Rather than face the lengthy and uncertain result of proceeding to trial, the accused may waive their right to make the State prove the charges against them, on the understanding that they will receive more limited sanctions. In this model, the court must grant permission for the accused to participate in an RJ program. Typically, the accused must admit responsibility for the alleged conduct and may need to demonstrate their willingness to apologize to any victims. If an agreement cannot be reached in an RJ process, the State retains power to impose traditional penalties. Additionally, the State may also set limits on what falls within the range of acceptable outcomes for a restorative encounter. These limits are usually imposed by courts to prevent outcomes they perceive to be too lenient.<sup>62</sup>

What constitutes “successful” completion of a program varies. It may require the victim and offender to come to a restitution agreement or for the offender to apologize to the victim. By in-

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*and Patients' Rights*, OPEN SOC'Y FOUND.: VOICES (Jan. 10, 2014), <https://www.opensocietyfoundations.org/voices/drug-courts-and-drug-treatment-dismissing-science-and-patients-rights> [<https://perma.cc/V6AF-LHEZ>].

<sup>60</sup> *Id.*

<sup>61</sup> Zindzi Mandela, Statement by Nelson Mandela at a UDF Rally to Celebrate Archbishop Tutu Receiving the Nobel Peace Prize (Feb. 10, 1985), [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&ItemID=NMS013](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS013) [<https://perma.cc/2RXE-A6JE>].

<sup>62</sup> JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 147 (2002). Braithwaite quotes Declan Roche, who noted that internal (restorative) mechanisms intervene to prevent outcomes that are too harsh; external (court) mechanisms prevent outcomes that are too lenient.

serting RJ within the CJS, these programs are attempting to shift the focus from the relationship between the State and the accused to the human relationships impacted by the crime. In this model, the State is attempting to substitute its own version of justice with RJ practices. For the CJS, justice is achieved when the power of the state is held to the standard of proving the guilt of the accused, beyond a reasonable doubt in an open forum, under sworn testimony, and with a jury of their peers concluding whether the state has met its burden. In contrast, court-based RJ programs are primarily concerned with returning to the pre-crime status quo by making parties whole, through material and/or symbolic restitution. These programs purport to provide space “for healing” and give impacted parties the opportunity to “put things right.”<sup>63</sup>

However, the danger with this approach is that it seeks to restore humanity to a system that was not designed to be human. Because the court-based model of RJ remains embedded in the CJS, it is fully contained within the hierarchical system of power manifested in the CJS. These models have a direct effect on the balance between State power and the rights of the accused. This complex interchange often leads to the diminished rights of the accused and the enhanced rights of the state.<sup>64</sup> In addition to implicating the rights of the accused, the court-based model co-opts RJ to serve the needs of the CJS. In this model, access to RJ is controlled and confined by the larger system it inhabits. Court-based RJ models must accept certain realities of the CJS in order to operate within it. In this model, elements of the CJS permeate RJ, preventing it from operating on its own terms. As this section demonstrates, the good intentions propelling this model are thus incentivizing the displacement of the adversarial system configured to regulate the power of the State.

#### A. *Rights of the Accused*

Those critical of the court-based model raise concerns about the ability of these programs to adequately protect the Constitutional rights of the accused.<sup>65</sup> Proponents are quick to cite the possibilities of reduced criminal penalties, reduced recidivism, low

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<sup>63</sup> ZEHR WITH GOHAR, *supra* note 20, at 18, 25, 54-55.

<sup>64</sup> Reimund, *supra* note 17, at 681-82.

<sup>65</sup> See, e.g., *id.* at 683; Buckingham, *supra* note 37, at 876-77; C. Quince Hopkins, *The Devil is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses to Sexual Assault Cases*, 50 CRIM. L. BULL. 478 (2014); Reimund, *supra* note 27.

costs, and increased community connections as benefits.<sup>66</sup> Substantively, they argue, court-based RJ provides a more holistic model of accountability, which meets basic human needs left unaddressed by the traditional CJS model. Nonetheless, RJ programs “stand on constitutionally questionable ground,” and rest on the accused’s willingness to forgo an array of Constitutional protections.<sup>67</sup> By waiving these rights, the accused cedes some of their power, thus enhancing the power of the state. Though this trade-off marks a general trend in the operation of the CJS—all plea deals, which resolve the vast majority of criminal cases, rely on similar waivers—restorative justice should not be used to legitimate this broadening of state power.

RJ programs in this model implicate the right of due process (particularly freedom from coercion), the right against self-incrimination, the right to counsel, and confidentiality.<sup>68</sup>

### 1. Due Process and Coercion

One of the key concerns about restorative programs within the criminal system is the presence of coercion, which is protected against by the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>69</sup> The accused’s waiver of constitutional protections must be voluntary and not coerced.<sup>70</sup> A plea is not voluntary if induced by threats, misrepresentations, or bribes.<sup>71</sup> However, the bar for demonstrating that a plea is involuntary is fairly high.<sup>72</sup> Concerns about coercion are particularly salient during diversions, which take place early in the criminal process and encroach on the

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<sup>66</sup> CUNNEEN & HOYLE, *supra* note 2, at 25, 33-34; Braithwaite, *supra* note 27, at 18; Buckingham, *supra* note 37, at 854-57.

<sup>67</sup> Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760 (2000).

<sup>68</sup> Others have raised concerns about how court-based RJ programs may limit opportunities to challenge evidence obtained through an unlawful search or seizure. Cases diverted out of the system through pleas increase the risk that the State will not be held accountable for abuses of this power.

<sup>69</sup> See, e.g., *Brady v. United States*, 397 U.S. 742, 755 (1970).

<sup>70</sup> *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *McCarthy v. United States*, 394 U.S. 459, 470-72 (1969).

<sup>71</sup> See *Brady*, 397 U.S. at 755 (“(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957))).

<sup>72</sup> See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *North Carolina v. Alford*, 400 U.S. 25 (1970).

presumption of innocence.<sup>73</sup> Where the accused lacks information about the likely outcome of their case, their fear can be more easily exploited to secure cooperation in restorative programs.<sup>74</sup> Where RJ is offered as an alternative sentence, these concerns are less pronounced, but offenders often still feel compelled to participate in these programs when they are offered.<sup>75</sup> When the accused is held in state custody due to an inability to afford bail, an offer that would allow them to get out of jail creates a strong incentive for participation.

Most proponents of restorative practices argue that the incentives to accept these programs are no greater for restorative programs than for any other diversionary program or a plea bargain. However, unlike a program for drug-treatment or defensive driving, “successful” completion of a restorative program generally requires the consensus of all of the participants.<sup>76</sup> Though some suggest that this requirement will ensure that only those offenders who are “serious” about a restorative option will pursue this course, the threat of additional penalties may encourage participants to perform contrition or whatever the restorative program requires to be deemed a success. Even if the inducement does not rise to the level of coercion, these programs still raise due process concerns because they circumvent a legal procedure that might have resulted in acquittal.<sup>77</sup>

## 2. Right against Self-Incrimination

The right against self-incrimination is also implicated in the court-based model. One scholar estimates that roughly half of the RJ programs operating in the US require the accused to admit guilt to participate in the program,<sup>78</sup> thus waiving their right against self-incrimination, which would otherwise be in effect through sentencing.<sup>79</sup> If the RJ process is not successful, the case is referred back to the CJS, and any statements that the accused made could be used against them.<sup>80</sup> In addition to the instant offense, it is possible that the offender or other participants may admit to other criminal

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<sup>73</sup> Dancig-Rosenberg & Gal, *Restorative Criminal Justice*, *supra* note 36, at 2322.

<sup>74</sup> *Id.*

<sup>75</sup> Reimund, *supra* note 17, at 684.

<sup>76</sup> OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 5, at 9-15 (listing various programs which require an agreement among participants).

<sup>77</sup> Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 78 (1998).

<sup>78</sup> Reimund, *supra* note 27, at 8.

<sup>79</sup> *Mitchell v. United States*, 526 U.S. 314, 325 (1999).

<sup>80</sup> Landis, *supra* note 54.

acts. The absence of guarantees about confidentiality means that any information shared at an RJ process would open the door for attorneys to question and cross-examine participants about any such acts.<sup>81</sup> Where RJ programs require facilitators to be mandated reporters, certain admissions by participants would be referred to the authorities by design.

### 3. Right to Counsel

The right to counsel is also implicated in many programs in this model. The right to counsel is guaranteed by the Sixth Amendment and applies at every “critical stage” of criminal proceedings.<sup>82</sup> Though programs which take place in the corrections context, after a prisoner has exhausted all of their legal remedies, would not implicate this right, programs which take place at any point before this may. Though some restorative programs allow participants’ attorneys to attend, others do not,<sup>83</sup> finding their participation to be at odds with the informal and non-adversarial nature of most restorative practices. Nonetheless, programs in this model deprive the accused of the benefit of the advice of counsel that they would have received in the CJS.

### 4. Confidentiality

The question of confidentiality occupies murky territory in court-based RJ processes. There is no constitutional or statutory guarantee to confidentiality in restorative programs.<sup>84</sup> The ABA tried to address this particular challenge, issuing a guideline that “statements made by victims and offenders and documents and other materials produced during the mediation/dialogue process [should be] inadmissible in criminal or civil court proceedings.”<sup>85</sup> Still, such guidelines are not binding and attorneys could later use

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<sup>81</sup> Crawford v. Washington, 541 U.S. 36, 57-59 (2004) (collecting cases where courts have admitted testimonial hearsay into evidence despite the lack of opportunity to cross-examine the out-of-court witness).

<sup>82</sup> United States v. Wade, 388 U.S. 218, 228 (1967).

<sup>83</sup> Tina S. Ikpa, Note, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL’Y 301, 313 (2007).

<sup>84</sup> To the extent that RJ is a type of mediation, one avenue for protection is the Uniform Mediation Act, which several states have adopted. Despite such protections, mediation records may still be vulnerable to subpoena, and there are questions about whether restorative practices can be properly classified as mediation. See Reimund, *supra* note 17, at 686, 686 n.140.

<sup>85</sup> RANDOLPH N. STONE, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES (1994), [https://www.americanbar.org/content/dam/aba/directories/policy/1994\\_am\\_101b.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1994_am_101b.authcheckdam.pdf) [<https://perma.cc/W368-7D8M>].

information learned in restorative processes to question and cross-examine participants. Additionally, the use of mandated reporters as facilitators explicitly rejects any confidentiality guarantees where a participant makes certain admissions.

This uncertain state of confidentiality also raises concerns for defense attorneys representing an individual who is considering participating in a restorative process. Though the duty of confidentiality is an ethical requirement and not an explicit Constitutional guarantee,<sup>86</sup> a breach of this duty could lead to a claim of ineffective assistance of counsel, thereby rendering counsel's assistance constitutionally deficient in the criminal context.<sup>87</sup> To retain attorney-client privilege, communication between the parties must be kept private,<sup>88</sup> which is the source of the ubiquitous advice to the accused to not discuss a pending case with others. Restorative practices, which depend on dialogue among the parties, are in direct conflict with this advice.

Proponents of the court-based model have called for increased protections for confidentiality in restorative encounters, in the form of legislation or cooperation from prosecutors not to use statements made during the process.<sup>89</sup> However, no legislation can extinguish the accused's right to cross-examine witnesses against them in a criminal trial, and prosecutors would be reluctant to surrender their access to RJ proceedings if a defense attorney could use a diversionary restorative process to gather information, return to the adversarial process, and use information to the benefit of the accused. Many programs thus rely on cooperation with the prosecutor and the court to preserve some sense of confidentiality. Even if these promises are always honored, the unsettled matter of confidentiality gives prosecutors broad discretion to limit when RJ is used in the court-based model.<sup>90</sup>

### B. *Cooptation of Restorative Justice*

In addition to concerns about the rights of the accused, the court-based model gives the court the power to control how RJ is utilized. This control has marginalized RJ within CJS, making it available to a limited class of alleged offenders, and only when a

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<sup>86</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

<sup>87</sup> *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

<sup>88</sup> Thomas M. Geisler, *Proof of Waiver of Attorney-Client Privilege*, 32 AM. JUR. 3D *Proof of Facts* § 189 (2017).

<sup>89</sup> Hopkins, *supra* note 65, § II.B.

<sup>90</sup> Indeed, the increased confidentiality provisions in CJS proceedings involving youth may be a factor in limiting court-based RJ programs to young offenders.

court or prosecutor grants permission.<sup>91</sup> This model also requires RJ programs to accept the overarching CJS framework, though the values of the two systems are inherently contradictory. Constrained by the larger system, court-based RJ programs are unable to operate on their own terms and are coopted to achieve the objective of the CJS—namely to meet its goals of crime control and restore the negative image of the CJS itself.

Indeed, RJ programs in this model sometimes seek to emphasize their toughness to appeal to the CJS—both in terms of the emotional toll on the offender and increased accountability in completing any restitution or community service agreements.<sup>92</sup> Seeking to bridge the gap between the goals and values of the CJS and RJ, some proponents have gone so far as to state that “restorative justice is not an alternative *to* punishment but an alternative form *of* punishment.”<sup>93</sup> Likewise, pressures on RJ to demonstrate that these programs meet CJS goals, such as cost-efficiency and reduced recidivism, may lead proponents of this model to adopt a narrow view of how RJ programs should be deployed in order to allow them to maintain their position within the courts.

### 1. Control, Marginalization, and Criminalization

Within the CJS, the state controls when and for whom restorative practices may be used, keeping them marginalized within the broader system. Despite the widespread growth of RJ as a discipline,<sup>94</sup> it maintains only a toehold in the US criminal system.<sup>95</sup> RJ interventions in the CJS are often limited to the “shallow end” of criminal justice and are frequently limited to cases where: the offender is a youth; the offense is a low-level (typically non-violent) crime; and/or it is the person’s first offense.<sup>96</sup> This sort of risk management approach bifurcates the criminal system, separating those who would, in the State’s view, benefit from a restorative approach and those who deserve punishment. This bifurcation allows the State to point to the existence and benefits of court-based RJ

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<sup>91</sup> Landis, *supra* note 54 (“Prosecutors have long employed diversion on an informal, individual basis by deferring prosecution if, for example, the accused entered the military or agreed to undergo rehabilitative treatment.”).

<sup>92</sup> BRAITHWAITE, *supra* note 62, at 149.

<sup>93</sup> CUNNEEN & HOYLE, *supra* note 2, at 44.

<sup>94</sup> Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 520-21 (2007).

<sup>95</sup> CUNNEEN & HOYLE, *supra* note 2, at 185.

<sup>96</sup> *Id.* at 48.

programs to restore its own image, while retaining control over who is diverted from more punitive sanctions.

Programs in this model also implicitly accept the CJS's process of criminalization and serve to naturalize practices that bring an offender to the attention of restorative programs within the courts.<sup>97</sup> The process of criminalization is shaped both by the types of harms that the CJS addresses and the communities that are disproportionately targeted by selective policing. Structural violence—social arrangements which allow some to thrive at the expense of others—is not considered to be a violation of the law.<sup>98</sup> This distinction is what allows society to view someone subject to street violence as “worthy of our concern, empathy, and attention,” while someone subject to structural violence is “unworthy, even of the designation of victim.”<sup>99</sup> Limiting the use of RJ as a state-sanctioned response to certain types of harm greatly limits the potential of RJ to address the broader context in which crime occurs. If the goal of this model is to restore participants to the pre-crime status quo, restoring someone to an environment of pervasive structural violence can provide limited benefits, at best.

## 2. Voluntariness

Another fundamental principle of RJ is that participants appear in circle on a voluntary basis. This freedom of presence creates the bases for the actualization of one's own power to speak and make choices within the group. This foundational principle of RJ cannot exist when it is vested within the CJS. No one voluntarily becomes the accused in CJS. There is a dishonesty in claiming that the accused voluntarily waives their constitutional rights to participate in RJ circle, when their presence in the court is due to the state. Though the waiver of constitutional rights may not be the result of outright coercion, most practitioners and courts know that the result of any guilty plea is the result of many coercive, systematic pressures toward the least injurious resolution of a case.<sup>100</sup> In the court-based model, the notion that all parties are participat-

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<sup>97</sup> *Id.* at 164.

<sup>98</sup> SULLIVAN & TIFFT, *supra* note 10, at 157.

<sup>99</sup> *Id.* at 158 (citation omitted).

<sup>100</sup> Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 856-59 (1998) (discussing the coercive pressure of defense counsel on defendants' pleading decisions, as recognized by courts); *see also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 69-70 (2011).

ing voluntarily creates an obstacle to the honest manifestation of a circle.

### 3. Power-Sharing

The court-based model imposes serious limitations on the ability of RJ programs to create an experience of shared power, as the framework of the CJS imputes significant power to the victim at the expense of the accused. Acceptance of the CJS's identity-fixing labels of "victim" and "offender" as valid and meaningful legitimates the state's process for identifying and classifying people in conflict and only serves to "separate, brand, marginalize, control, and constrain" the possibilities.<sup>101</sup> Within the criminal system, these terms establish roles which create a dichotomy where one party should be "blamed or pitied" and the other should be "sanctioned, controlled, and surveilled."<sup>102</sup> Even where the terms victim and offender are rejected, programs in this model may adopt the roles of "the person who has been harmed" or "the person who has harmed."<sup>103</sup> While these terms do strive to re-center the humanity of participants beyond the labels imposed by the CJS, this framework still adopts the binary of the criminal courts and imputes the power to define the harm to one party. This power is antithetical to the value of equal voice and power sharing required by RJ. Fixing these roles prior to an RJ encounter risks closing the door to conversations about past harms among participants or structural harms that underlie the immediate dispute.

Though parties may be permitted to speak in turn, the defendant is sitting in the circle with a case pending in the superseding court system. Though they can speak freely, the defendant is the only one facing criminal prosecution at the conclusion of the circle. If there is anything that the criminal justice system is good at, it is to inform all of the participants of what the effects of their words and actions within the system would be, so that all participants quickly learn what needs to be said in front of the judge, for the purpose of a plea, and even to their lawyers. It is hard to conceive of a situation where a person facing a criminal conviction would participate in an RJ circle and feel free to point out how the behavior of the identified victim mitigates the defendant's own actions or may have even provoked the situation.<sup>104</sup> The person with the most

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<sup>101</sup> SULLIVAN & TIFFT, *supra* note 10, at 80.

<sup>102</sup> *Id.* at 82.

<sup>103</sup> *See, e.g., id.* at 80.

<sup>104</sup> *See generally* Joseph Robinson & Jennifer Hudson, *Restorative Justice: A Typology*

power in the CJS circle is the victim. The person designated as a victim is in a place of extreme protection and privilege in the court-based model.<sup>105</sup> Indeed, most circles within CJS will not convene unless the accused has made a full admission of guilt and expressed willingness to apologize to the victim.<sup>106</sup> In some ways, the programs in this model are nearly as theatrical and scripted as the roles in the CJS system. All parties are aware of what they should say to achieve the best outcomes for themselves.

### C. Conclusion

In the court-based model, RJ is, at best, a court-sanctioned diversionary program for certain offenders deemed worthy of a restorative approach. At worst, offenders may be coerced into waiving Constitutional rights with the promise of reduced criminal penalties, denying them both essential rights in the criminal arena and the opportunity for a truly restorative process.

## III. QUASI-COURT-BASED RESTORATIVE JUSTICE PROGRAMS

In this model, RJ programs do not reside within the criminal justice system, but seek to address the ancillary fallout of the CJS and mitigate the impact of interacting with the CJS. It is a hybrid of the purely court-based or community-based models. The entryway into these systems is the exit point away from the CJS. Though these RJ models do not fall squarely within the CJS power dynamic, due to their close proximity to and intersection with the CJS, they often reflect the power interplay of the courts.

As hybrid models, quasi-court programs have considerable variation, and the extent of the State's influence depends on the stage of criminal proceedings where the RJ intervention occurs.<sup>107</sup>

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*and Critical Appraisal*, 23 WILLAMETTE J. INT'L L. & DISP. RESOL. 335, 351 (2016) ("When victims' narratives and needs are institutionally dominant, offenders' needs may suffer a concomitant loss. This criticism is especially acute when offenders are ordered or incentivized to participate in RJ. Victim-lecturing, in which the victim harangues and verbally abuses the offender, may be more commonplace than is generally assumed and results in a negative and disempowering experience for the offender.").

<sup>105</sup> Ikpa, *supra* note 83, at 313-15.

<sup>106</sup> See, e.g., Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y & L. 142, 156 (2008) ("[R]emember that during restorative justice conferences the apologies of the offender to the victim are an essential part of symbolic reparation.").

<sup>107</sup> See, e.g., Kate E. Bloch, *Reconceptualizing Restorative Justice*, HASTINGS RACE & POVERTY L.J. 201, 211 (2010); GORDON BAZEMORE & MARK UMBREIT, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, A COMPARISON OF FOUR RESTORATIVE CONFERENCING MODELS 7 (2001), <https://www.ncjrs.gov/pdffiles1/>

Programs in this model include pre-charge diversions; programs which do not require a plea of guilty, but hold the outcome of a case in abeyance pending successful completion of an RJ program; circles convened outside the courts to develop recommendations for sentencing; or RJ programs operating within prisons to foster dialogue among those impacted by crime or preparing for re-entry. Rather than attempting to reform the CJS, programs in this model tend to focus on harm reduction or mitigating the impact of involvement with the CJS.<sup>108</sup> These programs are often designed to address the punitive tendencies of the CJS, such as the prosecution of youth in adult courts, lengthy prison sentences, and lack of rehabilitative programming for prisoners.<sup>109</sup>

Though programs in this model may implicate some of the rights of the accused, since they frequently take place pre-charge or post-conviction, they do not implicate the full array of rights required during a pending criminal case. Additionally, as programs within this model view the CJS as the primary mechanism for justice, RJ programs in this model tend to be more focused on restoring human connections than providing a substitute for the CJS. Though the proximity to the CJS may impact the values of RJ programs in this model, these programs do not allege that they are diverting State power and tend to acknowledge the extent to which they are constrained by it.<sup>110</sup> The primary concerns with this model are net-widening and the inability of this model to address the larger process of criminalization, which brings people to the attention of the CJS, and thus this hybrid model, in the first place.

#### A. *Impact on Restorative Justice Values*

The issues around voluntariness and power-sharing in the court-based model are not as pronounced in the quasi-court-based

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ojjdp/184738.pdf [https://perma.cc/7FEN-D46H ] (“The models differ in point of referral and in structural relationship to formal court and correctional systems. The models also differ in eligibility, which ranges from minor first offenders to quite serious repeat offenders (in the case of circle sentencing).”).

<sup>108</sup> BRAITHWAITE, *supra* note 62, at 155-56 (“[I]t may be important to think of restorative justice in terms of avoiding harm more than in terms of doing good. . . . Hence the most important ways restorative justice may be able to reduce social injustice involve reducing the impact of imprisonment as a cause of the unequal burdens of unemployment, debt with extortionate interest burdens, suicide, rape, AIDS, hepatitis C, and . . . multiple-drug-resistant tuberculosis . . .”).

<sup>109</sup> See, e.g., ZEHR WITH GOHAR, *supra* note 20, at 54 (describing alternative and diversionary programs that “aim to divert cases from, or provide an alternative to, some part of the criminal justice process or sentence”).

<sup>110</sup> See, e.g., *id.* at 24 (discussing the relationship between restorative justice and the state).

model. In this model, there is no assumption of voluntariness because the process itself is designed to mitigate the effects of the CJS and to soften its impact on the accused.<sup>111</sup> The extent to which power can be shared in this model varies, particularly where some participants are incarcerated and others are at liberty. However, as there are typically not criminal charges hanging over anyone's head in this model, participants are more able to engage in a process that fosters human connection.

### B. *Limits of Quasi-court-based Model*

In pre-charge diversion programs, there are concerns about net-widening. Net-widening refers to processes that widen the net of State social control and result in a greater number of people being controlled by the CJS.<sup>112</sup> In this model, police may refer people suspected of committing crime to a restorative process, rather than pursue criminal charges.<sup>113</sup> This allows police to exercise discretion about who is referred to these alternatives, and it runs the risk of involving more people in the system in situations where authorities previously may not have pursued any action. These programs usually require an admission of responsibility, compelling the alleged offender to admit guilt and accept any consequences imposed, without the advice of counsel, which raises due process concerns.

Programs in this model identify potential participants based on their position in the CJS. Though programs in this model may not need to rely on permission from the court to engage in RJ, the scope of this model is limited by the policies of criminalization which disproportionately bring people from marginalized communities into the CJS.<sup>114</sup>

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<sup>111</sup> *Id.* at 53-55 (describing the purposes behind different models of restorative justice).

<sup>112</sup> Matthew C. Leone, *Net Widening*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 1087, 1087-88 (David Levinson ed., 2002). In RJ in particular, net-widening may occur by "dragging into the justice system people or behaviours that would otherwise be left alone on the grounds that the system has something beneficial to offer them." CUNNEEN & HOYLE, *supra* note 2, at 45.

<sup>113</sup> See, e.g., Bruce P. Archibald, *Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in A Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice*, 16 *CARDOZO J. INT'L & COMP. L.* 1, 39 (2008); *Lesson 5: Implementation Issues: Net Widening or Diversion*, *CTR. FOR JUST. & RECONCILIATION*, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-5-implementation-issues/diversion-or-net-widening/> [<https://perma.cc/HMV5-U7VE>].

<sup>114</sup> See generally *THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 1 (2d. ed. 2008),

## IV. COMMUNITY-BASED RESTORATIVE JUSTICE

In the community-based model, RJ is a free-standing paradigm for seeking justice, distinct from the CJS. In this model, the power to engage in restorative justice is inherent in humankind, and there is no need to seek or get permission from the State to address and resolve matters between people. When a circle is convened, power is shared equally among participants and the facilitator. The justice that comes forth is a shared justice based on the emergent wisdom of those who participate in the process. In community-based RJ, the ideal outcome is the profound understanding that crime and other harms occur as a result of the “us versus them” binary attitude that reflects a lack of human connection. As a manifestation of community dynamics, the responsibility of addressing conflict likewise rests with communities themselves.

Community-based RJ programs can be based in schools, workplaces, neighborhoods, places of worship, or any other place outside the purview of the CJS. Schools are an increasingly popular location for community-based RJ, as educators seek methods to address conflict beyond suspension and there is some established sense of community.<sup>115</sup>

A. *Location of Power and Relationship to the State*

The community-based model can be framed as returning conflicts to the communities that they impact.<sup>116</sup> However, a frequent critique of RJ is that it relies on a notion of community that is now obsolete. Critics argue that prior to the State monopoly on crime, communities that relied on practices that would now be termed restorative justice were small and tightknit. The realities of post-

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<http://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf> [https://perma.cc/Q4YW-9SB6]; Jeremy Prichard, *Net-Widening and the Diversion of Young People from Court: A Longitudinal Analysis with Implications for Restorative Justice*, 43 AUSTRALIAN & N.Z. J. CRIMINOLOGY 112, 114 (2010) (describing negative externalities like increased police power).

<sup>115</sup> See, e.g., JESSICA ASHLEY & KIMBERLY BURKE, ILL. CRIMINAL JUSTICE INFO. AUTH., IMPLEMENTING RESTORATIVE JUSTICE: A GUIDE FOR SCHOOLS (2009), <https://www.scc.gov.org/sites/pdo/ppw/SEAP/Documents/SCHOOL%20RJP%20GUIDEBOOK.pdf> [https://perma.cc/9XQC-8UHZ]; Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspension*, N.Y. TIMES MAG. (Sept. 7, 2016), <https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html> [https://perma.cc/7R36-L2B3]; Eric Westervelt, *An Alternative to Suspension and Expulsion: ‘Circle Up!’*, NPR (Dec. 17, 2014), <http://www.npr.org/sections/ed/2014/12/17/347383068/an-alternative-to-suspension-and-expulsion-circle-up> [https://perma.cc/XV2N-2JT8].

<sup>116</sup> Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 6 (1977).

industrialization have rendered communities segregated and diffuse. Typically, we know other people as roles rather than as full human beings. Where our relationships with people are less comprehensive, we accept the notion that only trained experts are qualified to evaluate someone's individual competence.<sup>117</sup> This has resulted in the surrender of our shared right to conflict. We have been willing to outsource our complaints to professionals, dealing at arm's length with those involved in a conflict, where prosecutors label the harm and judges passively pronounce the norms.<sup>118</sup>

Though contemporary communities may be more diffuse than in years past, returning conflicts to communities can be a source of revitalization for communities where the connections among people are weakened or absent. In this way, community-based RJ is a recursive process that relies on communities to address conflict and strengthens community ties in the process.<sup>119</sup> In some instances, a community may exist prior to the commencement of an RJ process; in others, a community may converge and develop during the process.

#### B. *Limits of a Community-based Model*

While RJ provides broader opportunities for engagement in terms of participants and types of conflicts, its reach is not limitless. Conflicts which are in the process of being adjudicated in the criminal justice system will likely be outside the reach of an RJ intervention, where it would implicate the accused's Constitutional rights.

While this may appear to exclude many eligible conflicts from the purview of community-based RJ, it is important to remember that the CJS is also constrained in the cases it prosecutes. Many crimes go unreported, and many reported crimes go unsolved.<sup>120</sup> The offender-focus of the CJS means that it cannot deliver its version of justice as punishment where an offender is unknown or unidentified. A victim of crime has no right to petition the state for restitution.<sup>121</sup> In the community-based model, the victim could convene a circle to address the harms they have encountered and

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<sup>117</sup> *Id.* at 5.

<sup>118</sup> Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563, 568 (2010).

<sup>119</sup> Christie, *supra* note 116, at 5.

<sup>120</sup> BRAITHWAITE, *supra* note 62, at 138.

<sup>121</sup> The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 1, 6 n.5 (2010) ("[R]estitution, unlike many of the other rights provided in section 3771(a), necessarily depends on the existence of a predicate conviction . . . .")

seek community support, though the perpetrator may be unknown. While a restorative process may be more resonant where all of the relevant stakeholders are present, it is not essential.

The primary limits of this model are internal. People are accustomed to handing conflicts over to professionals to resolve on their behalf.<sup>122</sup> Engaging in RJ requires time and a willingness to listen to others and to speak honestly about difficult topics. As participation is strictly voluntary, there must be people willing to participate in a community-based model for it to thrive. Some have suggested that RJ remains limited because people want retribution, they want to see offenders punished.<sup>123</sup> While this may be the case, people are not as punitive as we often think. The general public is more likely to support harsher penalties in the abstract, but not when applied to specific facts, and they are less punitive than judges and prosecutors.<sup>124</sup> Additionally, it is crucial to remember that punishment itself is “counterviolence, a variant of the violence that required corrective action in the first place . . . .”<sup>125</sup> By perpetuating this cycle:

We become a variant of the person who subdues other face-to-face; we share in the destruction of life by chiseling away at the foundations of the kind of community we say we desire. The only difference is that we do not get to see clearly who or what we have become and what kind of community we are in fact creating because the justifications that vengeance and retribution offer us sedate our consciousness.<sup>126</sup>

Community-based RJ creates the potential to build community, to seek constructive solutions to conflict, and to challenge oppressive societal structures.<sup>127</sup> By developing a model that operates outside the auspices of the CJS, the decision-making power of the community is not confined to the legal issue identified by the courts. Though RJ cannot transform the criminal justice system from within, the development of a robust community-based alternative has the potential to transform how we approach justice as a society. If individuals in conflict could request an independent RJ

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<sup>122</sup> Christie, *supra* note 116, at 9; *see also* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 426 (2007) (noting the common “perception that defendants who represent themselves are foolish at best and mentally ill at worst”).

<sup>123</sup> ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 51 (2004).

<sup>124</sup> BRAITHWAITE, *supra* note 62, at 148.

<sup>125</sup> SULLIVAN & TIFFT, *supra* note 10, at 5.

<sup>126</sup> *Id.* at 9.

<sup>127</sup> Reimund, *supra* note 27, at 2.

process rather than rely on police and prosecutors to address the issue, reliance on the criminal justice system may decrease.<sup>128</sup> We can only discover the full potential of RJ as an alternate paradigm for justice by collectively investing in it.

#### V. CONCLUSION

For restorative justice to take root and flourish as an alternative paradigm for justice, it must be community-based and distinct from the criminal justice system. Though programs in the quasi-court model may provide some measure of relief from the consequences of CJS involvement, RJ is not designed to transform the criminal justice system. Though advocates for merging the two paradigms argue that restorative justice can improve the criminal system, it stands little chance of fundamentally changing the way society deals with crime within the power dynamics of the CJS. Rather than reforming the criminal justice system, attempts to “soften” the inherent nature of the adversarial system by implementing RJ within its structure actually function to expand the powers of the State. If restorative justice is to transform how society responds to crime, it must be on its own terms, as an alternate path to justice.

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<sup>128</sup> Reimund, *supra* note 17, at 671.

# COMMUNITY LAW CLINICS IN THE NEOLIBERAL CITY: ASSESSING CUNY'S TENANT LAW AND ORGANIZING PROJECT

*John Whitlow*<sup>†</sup>

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“[W]e think that poor people need solidarity with each other and consequent political power and we provide legal services that advance that project. We have given up the illusion that lawyers might be able to liberate clients, one by one.”<sup>1</sup>

“The more New York’s economy follows the dictates of real estate, the more it experiences the agonies of dislocation.”<sup>2</sup>

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<sup>1</sup> Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 407 (2008) (footnote omitted).

<sup>2</sup> TOM ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE* 43 (2011).

## INTRODUCTION

This article takes up the question of what it means for a law school clinic to do anti-displacement work in a city where real estate “drives the growth machine, government oils and repairs it, the building trades make the parts, and global and local capital deliver the fuel.”<sup>3</sup> The article looks at how a clinical law program centered on tenant advocacy can be designed so that its lawyering efforts address the deep, structural forces underlying inequality and gentrification, while also winning victories for clients and training students to be effective public interest lawyers. Through an exploration of models of law and organizing in the clinical law setting and of the political-economic forces driving urbanization in New York City in recent decades, I argue that such an endeavor requires the construction of a model of clinical practice that uses legal services to build solidarities among poor and working class tenants in gentrifying sections of the city, and that critically engages the core tenets of neoliberalism.<sup>4</sup>

The challenges of constructing such a clinical model are manifold. The dominant legal services paradigm with regard to tenant advocacy is highly individuated, prioritizing eviction prevention over lawyering strategies that support community organizing and redistributive policy and law reform campaigns.<sup>5</sup> Such prioritization dovetails with traditional approaches to clinical legal education that privilege student work on individual cases in discrete legal areas over more politicized modes of lawyering aimed at supporting the organizing efforts of collectivities of subordinated people.<sup>6</sup> While an increasing number of law clinics have incorporated community lawyering components<sup>7</sup>—including group representation

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<sup>3</sup> *Id.* at 39.

<sup>4</sup> The ideology of neoliberalism is predicated on the belief that all of our social institutions function best when they work according to the principles of the market. This has meant the erosion of policies and practices based in the common good, and the emergence of a state apparatus the main purpose of which is to buttress markets rather than counter their deleterious effects. See LESTER K. SPENCE, *KNOCKING THE HUSTLE: AGAINST THE NEOLIBERAL TURN IN BLACK POLITICS* 9-10 (2015).

<sup>5</sup> Telephone Interview with Robert McCreanor, Former Legal Dir., Catholic Migration Servs. (Dec. 4, 2016). Catholic Migration Services is a nonprofit legal organization that represents low-income immigrant tenants and workers. *Who We Serve*, CATHOLIC MIGRATION SERVICES, <http://catholicmigration.org/> [<https://perma.cc/4AVD-3H3G>].

<sup>6</sup> See Ashar, *supra* note 1, at 368-69.

<sup>7</sup> See, e.g., *Immigrant Rights Clinic*, U.C. IRVINE SCH. L., <http://www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html> [<https://perma.cc/9BEP-49TF>]; *Community Economic Development Clinic*, U.C. HASTINGS C. L., <http://www.uchastings.edu/academics/clinical-programs/clinics/community-economic-develop>

and support for community organizing initiatives—overall the hegemonic approach in clinical legal education remains the provision of essential legal services to a limited number of individuals in crisis.

Even where legal services—in or outside a law clinic—are deployed in support of groups organizing for social change and progressive law reforms, in the area of tenants' rights, problems of structural inequality and displacement are still difficult to address. Real estate markets in global cities are rich sources of economic growth and speculation, and the policy tools required to regulate these markets often reside beyond the scale of local governments. In New York City, for example, organizing campaigns to protect tenants from the escalating rents and evictions generated by overheated real estate markets must contend with the fact that the City has little legislative authority over its housing supply.<sup>8</sup> Consequently, these campaigns, which are by-and-large highly localized, find themselves up against seemingly abstract forces and making demands of officials whose authority to act is circumscribed.<sup>9</sup>

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ment/index.php [https://perma.cc/C9NQ-5S6B]; *Community Group Advocacy and Social Change Lawyering Clinic*, U.C. HASTINGS C. L., <http://www.uchastings.edu/academics/clinical-programs/clinics/group-advocacy-change/index.php> [https://perma.cc/V68J-UXXSY]; *Community & Economic Development*, CUNY SCH. L., <http://www.law.cuny.edu/academics/clinics/ced.html> [https://perma.cc/M46B-82EU]; *Pro Bono Scholars Program Externship/Clinic: Litigation, Organizing and Systemic Change*, N.Y.U. SCH. L., <http://www.law.nyu.edu/academics/clinics/pbsp-litigation-organizing-social-change> [https://perma.cc/A8DQ-U392]; *Community and Economic Development Clinic*, MAURICE A. DEANE SCH. L. HOFSTRA U., <http://law.hofstra.edu/clinics/community-andeconomicdevelopmentclinic/> [https://perma.cc/CBE8-QF86]; *Business and Tax Clinic*, U. N.M. SCH. L., <http://lawschool.unm.edu/clinic/clinic-sections/index.php> [https://perma.cc/NM7Y-YA3W] (the Business and Tax Clinic is also known as the Economic Justice Clinic). These, among others, provide legal support to grassroots partner organizations working on social, economic, and racial justice issues.

<sup>8</sup> In 1971, the New York State legislature enacted the Urstadt Law, through which it effectively seized legislative authority from New York City over the latter's supply of rent-regulated housing. Urstadt Law, N.Y. UNCONSOL. LAW § 8605 (McKinney 2010); Guy McPherson, Note, *It's the End of the World as We Know it (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 *FORDHAM L. REV.* 1125, 1137-38 (2004). Note that the Urstadt Law is elaborated upon *infra* Section II.A.

<sup>9</sup> In organizing campaigns to strengthen rent regulation, for example, the efforts of New York City-based tenant advocacy groups are constrained by the fact that elected officials outside of the City typically have no rent-regulated constituents. *See, e.g.*, Mike Vilensky & Josh Dawsey, *Real-Estate Developers Retain Clout in Albany*, *WALL ST. J.* (June 25, 2015, 11:37 PM), <https://www.wsj.com/articles/real-estate-developers-retain-clout-in-albany-1435280204> [https://perma.cc/2EQE-Z2KR]; Nicholas Confessore & Thomas Kaplan, *Albany Reaches Deal on Tax Cap and Rent Rules*, *N.Y. TIMES* (June 21, 2011), <http://www.nytimes.com/2011/06/22/nyregion/deal-on-rent-laws-and-property-tax-cap-in-albany.html> [https://perma.cc/K75J-F4C9]. Under the current framework, in which control of rent-regulation is vested with the State Legisla-

In this context, the work of an anti-displacement law clinic must be nimble, strategic, and interdisciplinary. As it confronts a crisis of affordable housing that is altering the race and class composition of many urban neighborhoods,<sup>10</sup> such a clinic must strike the proper balance between direct legal services that yield urgently-needed results for clients and support for organizing and policy initiatives aimed at protecting large groups of poor and working class tenants from deleterious market effects. Moreover, because of the complexity of the problem of market-driven gentrification, the law clinic's legal services must be configured to span multiple legal areas—e.g., landlord-tenant, land use, consumer protection, etc.—and to support organizing and policy initiatives that operate across municipal and state scales of governance and that challenge the dominant mode of market-driven urbanization. In the midst of all this, the clinic must also train students to become effective social justice advocates.

In this article, I will discuss the building blocks of this project—the strategic combining of legal services and community organizing efforts, and a critique of the prevailing paradigm of neoliberal urbanization—and relate them to the work of CUNY School of Law's Tenant Law and Organizing Project ("TLOP").<sup>11</sup> In Part I of the article, I will discuss how law and community organizing can come together in a clinical law setting in a way that provides targeted and collaboratively-based legal services to—and builds meaningful solidarities among—subordinated clients while at the same time facilitating the training of soon-to-be public interest attorneys. In Part II, I will turn my attention to the political-economic and public policy context of gentrification in New York

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ture, organizing campaigns led by City residents must grapple with the challenge of lobbying and pressuring legislators who have little-to-no incentive to address their concerns and whose campaigns are often supported by real estate interests.

<sup>10</sup> For example, the NYU Furman Center's *State of New York City's Housing and Neighborhoods* found that New York City's population has become younger, more educated, and more weighted towards non-family households since 1990, and that these shifts have been even more dramatic in gentrifying neighborhoods. MAXWELL AUSTENSEN ET AL., NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015 8 (2016), [http://furmancenter.org/files/sotc/NYUFurmanCenter\\_SOCin2015\\_9JUNE2016.pdf](http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf) [<https://perma.cc/HP6R-VWBG>]. Further, "[s]ince the 1990s, the share of the population identifying as black or white has declined in the city as a whole, while the share identifying as Asian or Hispanic has increased. The share of the population that identified as black also declined in gentrifying neighborhoods between 1990 and 2010 (37.9 percent to 30.9 percent), but the share of population that identified as white increased (18.8 percent to 20.6 percent). The Asian and Hispanic shares also grew in gentrifying neighborhoods, but more slowly than they did in the city as a whole. ." *Id.* at 12 (footnote omitted).

<sup>11</sup> *Community & Economic Development*, *supra* note 7.

City, and I will also trace an alternate vision of urbanization that I argue can inform the approach of the clinic I am envisioning in this article. Finally, in Part III, I will describe the work of TLOP in putting these diverse strands—law and organizing and a critical engagement with neoliberalism—into practice in a law clinic.

## I. LAW, ORGANIZING, AND LAW CLINICS

### A. *In Search of a Model*

Since the advent of modern law clinics in the late 1960s, a tension has existed between clinics' role in educating the next generation of attorneys and their capacity to participate in movements for social change.<sup>12</sup> While some clinicians have argued that the purpose of a law clinic should be primarily pedagogical and not necessarily rooted in social justice, others have advocated for a more politicized approach to clinical education. In her article on the design of community economic development clinics, Alicia Alvarez avers that poverty reduction should be an organizing thread that runs through case selection, student learning, and clinical practice.<sup>13</sup> Going a step further, Sameer Ashar has advocated for the creation of law clinics that provide legal assistance to collectivities of poor and subordinated people in the process of organizing for social change.<sup>14</sup> My aim in this article is to extend Alvarez and Ashar's construction of politically-oriented law clinics to specifically account for anti-displacement legal and policy advocacy in the context of neoliberal urbanization. In this section, I will begin that discussion through an exploration of frameworks of law and organizing that can be applied in a clinical law setting.

Law and organizing<sup>15</sup> emerged as a self-conscious movement in the 1990s, in response to a number of trends, including unprecedented wealth accumulation, escalating attacks on legal services, and a growing dissatisfaction with traditional litigation-centered approaches to poverty law.<sup>16</sup> A key feature of the law and organizing

<sup>12</sup> See George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 176-177 (1974).

<sup>13</sup> Alicia Alvarez, Essay, *Community Development Clinics: What Does Poverty Have to Do with Them?*, 34 FORDHAM URB. L.J. 1269, 1270-71 (2007).

<sup>14</sup> See Ashar, *supra* note 1, at 356.

<sup>15</sup> I adopt the definition of "organizing" used by Michael Grinthal, who describes "organizing" as "the processes by which people build and exercise power by collecting and activating relationships." Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 34 (2011).

<sup>16</sup> Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 446 (2001).

paradigm is “its insistence that lawyers can advance social justice claims and shift power to low-income constituencies through a particular type of legal advocacy . . . that is intimately joined with, and ultimately subordinate to, grassroots organizing campaigns.”<sup>17</sup> In other words, adherents to a law and organizing framework embrace a politicized view of lawyering that strives to place the efforts of attorneys in the service of poor and subordinated people who are acting collectively to challenge the structural causes of their predicament.<sup>18</sup>

As law and organizing has developed, it has generated a body of scholarship reflective of practical concerns within the paradigm about how lawyers and organizers relate to each other and to represented parties. Recently, E. Tammy Kim and Michael Grinthal explored the mechanics of how legal services can be structured vis-à-vis community-led organizing efforts. Kim has advocated for an approach to combining law and organizing that she calls the resource-ally model. Rooted in the work of the Urban Justice Center’s Community Development Project, where she was a workers’ rights staff attorney, this model allows “lawyers [to] support community organizing efforts through legal representation of members of external grassroots organizations . . . .”<sup>19</sup> In contrast with more fluid models that blend the roles of lawyers and organizers,<sup>20</sup> Kim’s approach is characterized by a mode of legal advocacy that is walled off from—but driven by—the exigencies of partner organizations’ organizing and policy campaigns.<sup>21</sup> In practice, this means that a grassroots organization will refer strategically important cases<sup>22</sup> to a “resource-ally” lawyer, who will then seek to prevail on their clients’ claims in much the same way that any con-

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<sup>17</sup> *Id.* at 447.

<sup>18</sup> An early advocate of this type of politicized approach was Gary Bellow, who notably said that “[t]he fact that most law practice is not done self-consciously is simply a function of the degree to which most law practice serves the status quo.” Gary Bellow, Response Essay, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 301 (1996).

<sup>19</sup> E. Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 220 (2009).

<sup>20</sup> See generally Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (describing the work of a worker center where the legal clinic is only one part of a larger organizing effort).

<sup>21</sup> See Kim, *supra* note 19, at 225-26.

<sup>22</sup> I use “case” here because litigation is the focus of Kim’s article, but it is also possible for a partner organization to seek transactional or policy legal support from a “resource-ally” law office. *Id.* at 227.

scientious poverty lawyer would.<sup>23</sup> The key here is that while the work of the resource-ally lawyer generally takes place in the context of a broader organizing campaign and typically entails collaboration with an organizer, it unfolds primarily in a legal, rather than an organizing, space.<sup>24</sup>

Kim's emphasis on the separation of the work of resource-ally lawyers from community organizing efforts is grounded in concerns about client empowerment and attorney efficacy. In terms of the former, resource-ally lawyers work at the behest of community-led groups, and do so in a way that avoids encroaching on decision-making spaces better occupied by clients and organizers.<sup>25</sup> In terms of the latter, as resource-ally lawyers do not engage in the work of organizers, they are able to focus their energies on the lawyering tasks they are trained to perform. As we will see, this bounded aspect of the resource-ally model makes it well-suited for a law clinic where students are learning, often for the first time, to do the complex work of lawyering.

The resource-ally model is useful in terms of laying out a framework in which legal services can combine with, and support, the organizing efforts of grassroots partner organizations. It is complimented by Grinthal's typology of practice models for lawyers working "with marginalized groups in the process of organizing for

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<sup>23</sup> I say "conscientious poverty lawyer" here to emphasize the micro-dynamics at work in lawyering relationships with subordinated clients. These dynamics have been explored by a number of legal scholars, including Gerald López and Lucie White, and are exemplified by López's entreaty that "lawyers must know how to work with (not just on behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly. They must know how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation. They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come into contact, particularly about the traditions and experiences of life on the bottom and at the margins." Gerald P. López, *The Rebellious Idea of Lawyering Against Subordination*, in *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 187, 196 (Susan D. Carle ed., 2005).

<sup>24</sup> "Space" is used here to connote a field of practice, as well as a geographical location, since—as Kim stresses—the work of resource-ally attorneys unfolds apart from the work of organizers on both fronts "[t]he spatial boundary inherent to the CDP model prevents us from engaging in activities we are not trained to do. Generally speaking, law school does not train us 'to deal with the non-legal aspects of social or economic problems or, for that matter, with any form of multi-dimensional problem-solving,' and while we should learn to think in broader, more diverse ways, we should also be humble about how much we can realistically accomplish." Kim, *supra* note 19, at 226 (quoting Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 76 (2000)) (footnote omitted).

<sup>25</sup> *Id.*

power.”<sup>26</sup> Of Grinthal’s heuristic models of law and organizing, the “Legal Services as M\*A\*S\*H Unit” approach and the “Political Enabler” approach are most relevant here. In the former, lawyers provide an array of legal services to individuals who are actively participating in the organizing efforts of community-led organizations;<sup>27</sup> in the latter, lawyers provide legal services in direct support of the organizing process itself, creating space for a group to organize and access variegated levers of political power.<sup>28</sup> In the type of law clinic envisioned by this article, the clinic would sign on to take the cases of members of tenant advocacy partner organizations, with a preference for affirmative, group actions. At the same time, the clinic would stand at the ready to support partner organizations’ organizing efforts directly through research, community legal education, and legislative testimony in relation to proposed law and policy reform campaigns. The clinic would also provide legal support to preserve the organization’s ability to organize where it was threatened by litigation or state action.<sup>29</sup>

The resource-ally, Legal Services as M\*A\*S\*H Unit, and Political Enabler models are well-suited for a law and organizing-based law clinic, as they allow law students to gain practical experience representing clients through a structured partnership with outside organizations. In these frameworks, students are able to take ownership of their cases and inhabit the role of attorneys, as they do in most clinical settings, but here they do so in the context of organizing campaigns intended to leverage political reform and social change for poor and subordinated constituencies. From a pedagogical standpoint, students hone standard lawyering skills—interviewing, counseling, fact-gathering, etc.—through their work on cases and projects and, at the same time, they grapple with the complex power dynamics and ethical tensions that inhere in the law and organizing paradigm, as we will see in the next section.

In addition to being sound pedagogical platforms, Kim and Grinthal’s law and organizing models, particularly the resource-ally and Legal Services as M\*A\*S\*H\* Unit models, are also a good fit for law clinics because clinics are uniquely situated to develop and implement creative advocacy approaches to all manner of problems facing poor clients. Though law clinics have limited capacities and face significant logistical obstacles given the con-

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<sup>26</sup> Grinthal, *supra* note 15, at 26.

<sup>27</sup> *Id.* at 48.

<sup>28</sup> *Id.* at 50.

<sup>29</sup> Examples of this type of work could include securing permits for rallies and defending against lawsuits intended to chill an organization’s protected activity.

straints of semester timelines and student turnover, they are spaces where students and supervising attorney-professors can push the law in innovative directions. Unlike many legal services organizations that are faced with significant restrictions on their activities,<sup>30</sup> law clinics are generally free to take on a wide range of cases and projects, provided they fit into their school's mission. This relative freedom allows for the creation of partnerships with community-led organizations that are doing cutting edge work, and the deployment of targeted and multi-faceted legal services that are bound together by a politicized approach to lawyering.<sup>31</sup>

Ashar has written on the implementation of politicized law and organizing models in a clinical law setting. In his article on the subject of politicized law clinics, Ashar describes the framework of a clinic designed to support collectivities of poor and subordinated people who are organizing for radical democratic social change. In Ashar's aspirational "collective mobilization" law clinic, all aspects of the clinical program would be shaped by the legal needs of poor and subordinated constituents and the clinic would evolve to work primarily with populations involved in political organizing.<sup>32</sup> "The clinic would both support the project of organizing the unorganized and condition the provision of services to communities on the establishment of collectives."<sup>33</sup> Access to the clinic's legal resources would be predicated on an organization's work in opposition to market forces,<sup>34</sup> and partner organizations would typically be member-led and rooted—geographically, culturally, and politically—in subordinated communities.

In practice, the work of Ashar's clinic would be contingent and shifting, depending on the priorities of its organizational partners, which would supply the clinic with clients, cases, and projects, based on several explicitly politicized requirements: e.g., a key member of the partner organization finds herself in a serious legal predicament, a particular project or case advances an organizing campaign, or a case preserves or creates space for the organization to continue doing its work. As in Kim and Grinthal's models of law and organizing, the driving force behind the clinic's design is a commitment to meeting the legal needs of poor and subordinated people who are getting organized, and who are referred for legal

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<sup>30</sup> See David Luban, Essay, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 220-26 (2003).

<sup>31</sup> See Bellow, *supra* note 18, at 299-300.

<sup>32</sup> See Ashar, *supra* note 1, at 356.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 359.

assistance by a grassroots partner organization. As will be seen in Part III, this structural setup was a major plank of CUNY School of Law's TLOP.

*B. Productive Tensions of the Model*

Law and organizing is important to the kind of tenant advocacy project envisioned in this article because it offers the hope that legal services can be mobilized to work against the structural causes of poverty, as opposed to focusing exclusively or primarily on their immediate instantiations (in the form of evictions, benefits cutoffs, etc.), as much of tenant-side legal services is configured to do.<sup>35</sup> Although the law and organizing formulations of Kim, Grinthal, and Ashar are not directed specifically to tenant advocacy,<sup>36</sup> their key lessons—particularly with regard to legal services' capacity to facilitate collective action and the ethical challenges that inhere in working with organizations and organizers—are translatable to this area.

In the law and organizing paradigm, as we have seen, legal services generally have a broader, more politicized purpose than the successful representation of individual clients.<sup>37</sup> In Kim's resource-ally model and Grinthal's Legal Services as M\*A\*S\*H Unit model, in particular, legal services are deployed in a targeted manner to support the organizing priorities and/or build out the capacities of partner organizations. This might take the form of representation of an individual member of an organization in a specific legal action;<sup>38</sup> or, legal services in the law and organizing paradigm may be used to more actively facilitate the construction

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<sup>35</sup> It should go without saying that nothing in this article is intended to detract from the hard and crucial work of tenants' attorneys who are working every day to prevent evictions and improve their clients' housing conditions. It is precisely because law clinics are in such a unique institutional position that they can afford to try out new approaches that I know many do not have the luxury—because of some combination of heavy caseloads and funding restrictions—to take up.

<sup>36</sup> Kim and Ashar's work is targeted mainly at low-wage immigrant worker law and organizing. See Ashar, *supra* note 1, at 361; see also Kim, *supra* note 19, at 214. Grinthal's is relatively agnostic on this point. See generally Grinthal, *supra* note 15.

<sup>37</sup> It should be noted that this point raises important ethical considerations regarding how public interest attorneys allocate their (scarce) legal resources. According to Paul Tremblay, this type of orientation "constitutes a justifiable, justice-based allocation of resources away from clients' short-term needs and in favor of a community's long-term needs." Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 950 (1992).

<sup>38</sup> Here, the mode of legal representation will likely mirror that of more traditional legal services offices—i.e., there is not necessarily a politicized component to lawyering efforts other than that a case was accepted through a politicized, organization intake mechanism.

of solidarities among clients.<sup>39</sup> For Kim, writing in the context of resource-ally-driven workers' rights litigation, this means concentrating lawyering efforts on group representation of partner organizations' members in state and federal wage and hour litigation, a practice that she says "avoid[s] perpetuating the separation and isolation of workers . . . ."<sup>40</sup> In an anti-displacement clinical program based in law and organizing, as we will see in Part III, legal resources are devoted to supporting the organizing efforts of tenants who are members of—and were referred by—grassroots partner organizations. In this context, cases are taken and claims are developed with the purpose of helping clients to view their grievances as shared and the solutions to those grievances as requiring collective action.

While law and organizing can amplify the potency of legal efforts—by building solidarities among clients and/or by strengthening the organizing campaigns of community partners—a law and organizing arrangement involving a partnership with a grassroots organization poses significant challenges with regard to the development of ethically-sound, trustworthy attorney-client relationships, particularly in a law clinic. This is so mainly because the involvement of a third party—here, an organizer from a partner organization—in the attorney-client relationship disrupts the normative, client-centered approach at the heart of much of clinical pedagogy.<sup>41</sup> This approach holds that client autonomy is facilitated by a mode of lawyering in which attorneys decenter their own privilege and prioritize client voice and decision-making.<sup>42</sup> But even in

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<sup>39</sup> While the law and organizing literature cited thus far focuses on the structural and mechanical relationship between the work of lawyers and partner organizations, the content of particular legal claims or frameworks, operative within a law and organizing paradigm, can also help facilitate collective mobilization. In this regard, Benjamin Sachs has stressed that certain legal regimes have an enhanced capacity to foster collective action among clients. For Sachs, such regimes must have the capacity to galvanize a group of people capable of acting collectively, must be capable of protecting the group's collective activity against reprisals, and must be able to generate successive and increasingly robust forms of collective activity. Sachs' intervention points to the possibility of intentionally configuring legal services—and, more specifically, the legal claims and strategies they produce—to maximize the construction of solidarities between clients. *See generally* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685 (2008).

<sup>40</sup> Kim, *supra* note 19, at 223.

<sup>41</sup> As Muneer I. Ahmad notes, "[t]he traditional model of lawyering presumes a single lawyer and a single client. The Model Rules, as well as the Model Code of Professional Responsibility, are both premised upon this conception of a lawyer-client dyad." Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 *UCLA L. REV.* 999, 1045 (2007).

<sup>42</sup> *Id.* at 1047-48.

relatively bounded models of law and organizing, like the one described by Kim,<sup>43</sup> organizers participate in direct and indirect ways in the cases they refer, and attorney-client relationships are multi-layered and complex as a result.

In the law and organizing context, client autonomy is challenged because organizers tend to be closer to clients—along cultural, class, racial, ethnic, and linguistic lines—than their attorneys. Also, organizers may have strongly-held and well-founded views about how a case should unfold in the context of an organizing campaign or an effort to leverage policy reform. The conflux of these points means that organizers wield a considerable amount of influence vis-à-vis clients, even where their involvement in a particular case is limited. In most law and organizing frameworks, therefore, client autonomy does not flow neatly from a one-on-one attorney-client relationship, but rather is negotiated through a web of relationships: between attorney and client, client and organizer, attorney and organizer, etc.

This negotiation generates tensions that should be viewed by clinicians as potential enhancers of—rather than obstacles to—effective, trustworthy attorney-client relationships. For clinicians working within this paradigm, the existence of thorny representational issues stemming from the involvement of organizers and partner organizations creates a space to honestly and realistically reckon with the context in which our lawyering efforts take place. Rather than abstracting clients from their cultural, social, and political milieus, our collaborations with organizers allow us to surface the power dynamics that impact the representation of poor and subordinated people and to discuss these issues with our students in a manner that enriches our lawyering efforts.<sup>44</sup> In many instances, this approach leads to a unique and robust working relationship with clients who come to view us as accessible and open to creative legal strategies aimed at winning discrete legal victories *and* fostering collective action.<sup>45</sup>

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<sup>43</sup> See Kim, *supra* note 19, at 220.

<sup>44</sup> See Ahmad, *supra* note 41, at 1068.

<sup>45</sup> This calls to mind the interventions of Ascanio Piomelli around collaborative lawyering. Building on the work of Gerald López and Lucy White, Piomelli has averred that two of the central tenets of a collaborative approach to law practice are the radical reshaping, along lateral rather than hierarchical lines, of relationships between lawyers and clients and an emphasis on larger, collective efforts to challenge the status quo. This vision of collaborative lawyering is organically linked to the paradigm of law and organizing, as the latter can be viewed as creating an architecture within which attorneys, through the mediation of organizers, can involve clients in substantive decision-making *and* link clients' legal problems to broader movements

The tensions that inhere in law and organizing, while challenging to navigate, can be helpful to the development of lawyers-in-training. In the clinical setting, many law students arrive with an exaggerated view of the law's capacity to resolve problems and, simultaneously, a narrow view of their clients' legal issues. The process of acknowledging our clients' embeddedness in variegated structures of power, a process that is often facilitated by working with an organizer, is indispensable to overcoming such misconceptions. In the law and organizing paradigm, students learn through experience that discrete but vital legal solutions—preventing an individual eviction or restoring a client's benefits—can be deepened and extended when they are connected to grassroots movements for political reform and social change.

The law and organizing paradigm—in particular the models I have highlighted—holds the promise of allowing attorneys to contribute their skills to such movements in an intentional and bounded manner. But thus far my discussion of this paradigm has only gone part of the way to addressing the challenge at the heart of this article: the creation of a tenant advocacy clinical program capable of targeting the structural causes of urban inequality and displacement in a global, neoliberal city. While we have discussed structural frameworks of combining law and organizing that can be implemented in a law clinic, we have yet to explore the content of the clinic's vision and how it informs the design of the program. It is to that task that I turn in the following section.

## II. NEOLIBERAL URBANIZATION AND THE RIGHT TO THE CITY

### A. *Neoliberal New York City and the Crisis of Affordable Housing*

In this section I will explore the political-economic and policy context of the tenant advocacy clinical law program at the core of this article. While the previous section focused on the way legal services can combine with community organizing efforts to facilitate social change favoring poor and subordinated clients, here I will look at the structural forces underlying urban inequality and displacement. My aim is to use this exploration to more effectively design a law clinic that trains law students to advocate for low-income tenants *and* counter policies that have produced high levels of inequality and market-driven displacement.

The causes of inequality run deep and are often hidden from

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for social change. See generally Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006).

view, while also operating at a scale seemingly beyond the day-to-day interventions of lawyers and organizers.<sup>46</sup> In global cities whose economies are driven in significant part by expanding real estate markets, tenants in gentrifying neighborhoods face acute pressures from landlords, pressures often generated by unseen flows of capital that are regulated by policies outside the scale of local politics.<sup>47</sup> This is not exactly a new phenomenon, as the growth of capitalism has since its inception been bound up with urbanization, financialization, and uneven development,<sup>48</sup> but many of its particularities are recent innovations stemming from the turn to neoliberalism in the 1970s and 1980s.<sup>49</sup>

The term neoliberalism is notoriously slippery and has come to take on a number of meanings.<sup>50</sup> Depending on the commentator, it can refer to a regime of economic policy, a modality of governance, or a mode of reason.<sup>51</sup> For purposes of this article, I will focus mainly on the political-economic policy paradigm shift<sup>52</sup>—emergent in New York City during the fiscal crisis of the mid 1970s and nationally in the early 1980s—that “calls for deregulation,

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<sup>46</sup> See generally SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY* (2014) (elaborating on the complexities of the global economy and the large-scale influences that drive displacement and inequality).

<sup>47</sup> According to Ada Colau and Adrià Alemany, “A recurring problem, and not just limited to the issue of housing, is the lack of tools and resources available to municipalities when faced with a problem whose origin is global. Increasingly, conflicts specific to an urban area are caused by phenomena that exceed the formal powers held by municipal governments.” ADA COLAU & ADRIÀ ALEMANY, *MORTGAGED LIVES: FROM THE HOUSING BUBBLE TO THE RIGHT TO HOUSING* 126 (Michelle Teran & Jessica Fuquay trans., 2014).

<sup>48</sup> See DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* 42 (2012) [hereinafter *REBEL CITIES*].

<sup>49</sup> According to Ruth Wilson Gilmore, neoliberalism came to the fore in a moment of economic and political crisis and was from the outset a racialized, class-based political project aimed at rolling back the redistributive functions of the state built up after the Great Depression and fortified during the Civil Rights Movement. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 34 (2007).

<sup>50</sup> WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 20 (2015).

<sup>51</sup> *Id.* at 20-21.

<sup>52</sup> In describing the political-economic framework that preceded neoliberalism, often called ‘embedded liberalism,’ David Harvey notes “[the] acceptance that the state should focus on full employment, economic growth, and the welfare of its citizens, and that state power should be freely deployed, alongside of or, if necessary, intervening in or even substituting for market processes to achieve these ends. . . . A ‘class compromise’ between capital and labour was generally advocated as the key guarantor of domestic peace and tranquility. States actively intervened in industrial policy and moved to set standards for the social wage by constructing a variety of welfare systems (health care, education, and the like).” DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 10-11 (2005) [hereinafter *A BRIEF HISTORY*].

privatization, market-driven development, decentralization, and the downloading of government functions to weak local governments, nonprofit organizations, and civil society.”<sup>53</sup> It is well-settled that the conflux of neoliberal policies has produced staggering levels of inequality over the past several decades.<sup>54</sup>

New York City in the 1970s was a staging ground for the national rollout of neoliberalism a decade later.<sup>55</sup> In New York, neoliberal policies were ushered to the fore by an array of powerful corporate and state interests that mobilized to resolve the City’s deep fiscal crisis through a massive diminution and rescaling of the institutions comprising what Joshua Freeman has called the City’s “social democratic polity.”<sup>56</sup> With the City teetering on the edge of bankruptcy, emergency measures were enacted that effectively removed the City’s legislative control over a number of key components of the City’s network of social welfare institutions, including its vaunted public university and hospital systems.<sup>57</sup> In the years following the crisis, these measures were made permanent and the institutions in question were subjected to increasing austerity.<sup>58</sup>

In the area of housing, New York’s system of rent regulation,<sup>59</sup>

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<sup>53</sup> ANGOTTI, *supra* note 2, at 12.

<sup>54</sup> See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 21 (Arthur Goldhammer trans., 2014). Inequality is currently the highest it has been since just before the Great Depression. Including capital gains, the share of national income going to the richest 1% of Americans has doubled since 1980, from 10.7% in 1980 to 20.2% in 2014. USA, *WORLD WEALTH & INCOME DATABASE*, <http://wid.world/country/usa/> (filter “Key Indicators” to “Top 1% Share” and use navigation bar to compare years). This is roughly where it was a century ago: in 1927, this share was 20.3%. *Id.* The share going to the top 0.01%—some 16,000 families with an average income of \$24 million—has quadrupled from just over 1% to almost 5%. *Forget the 1%: It Is the .01% Who Are Really Getting Ahead in America*, *ECONOMIST* (Nov. 6, 2014), <http://www.economist.com/news/finance-and-economics/21631129-it-001-who-are-really-getting-ahead-america-forget-1> [<https://perma.cc/6CW4-J84F>].

<sup>55</sup> See A BRIEF HISTORY, *supra* note 52, at 48. Harvey notes that “[t]he management of the New York fiscal crisis pioneered the way for neoliberal practices both domestically under Reagan and internationally through the IMF in the 1980s.” *Id.*

<sup>56</sup> JOSHUA B. FREEMAN, *WORKING CLASS NEW YORK: LIFE AND LABOR SINCE WORLD WAR II* 55-71 (2000). According to Kim Moody, the institutions comprising the social democratic polity included “a public hospital system that had twenty-two hospitals at its height, an expanding City University system, extensive public housing, significant union-provided cooperative housing, rent control . . . , and civil rights legislation . . . .” KIM MOODY, *FROM WELFARE STATE TO REAL ESTATE: REGIME CHANGE IN NEW YORK CITY, 1974 TO THE PRESENT* 16-17 (2007).

<sup>57</sup> MOODY, *supra* note 56, at 39.

<sup>58</sup> WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS* 21-35 (1982).

<sup>59</sup> For two decades following the end of World War II, the New York State Legislature maintained price controls on apartments built prior to 1947 until, in 1969, the New York City Council passed the Rent Stabilization Law, which extended regulatory

a remnant of federal price controls implemented during World War II and a vital element of Freeman's "social democratic polity," also underwent dramatic changes in the 1970s. In 1971, the State Legislature responded to the New York City Council's 1969 expansion of tenant protections by passing the Urstadt Law, which removed the City's home rule over its supply of rent-regulated housing.<sup>60</sup> The Urstadt Law was renewed in the package of rent laws that passed the state legislature in 1974,<sup>61</sup> marking the onset of the rent regulatory regime that remains largely in effect to this day. In the post-Urstadt era, legislative control of rent regulation has resided at the state level, and rent stabilization, the City's most prevalent form of affordable housing,<sup>62</sup> has been gradually weakened.<sup>63</sup>

The significance of rent regulation, in particular the predominant form of rent stabilization, is that it offers tenants security of tenure in the form of a statutory right to a renewal lease and places limits on rent increases for lease renewals.<sup>64</sup> In practice, this means that many rent-stabilized tenants are able to remain in their apartments, at relatively affordable rents, for long periods of time, even when property values in their neighborhood are increasing rapidly. It stands to reason that, as Craig Gurian has noted, rent-stabilized apartments are typically viewed by their residents as homes, with all the implications of longevity and rootedness in a particular community that the term connotes, rather than as assets to be maximized by their landlord.<sup>65</sup>

The weakening of rent regulation has profoundly impacted New York City's supply of affordable housing: from 1994 to 2012, the City lost 152,751 rent stabilized apartments, with 74% of the

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coverage to 400,000 units that were not previously subject to rent control. *History of Rent Regulation*, TENANTNET, <http://www.tenant.net/Oversight/50yrRentReg/history.html> [<https://perma.cc/S52D-J7GH>].

<sup>60</sup> McPherson, *supra* note 8, at 1137.

<sup>61</sup> Urstadt Law, L. 1971, ch. 372, *as amended by* L. 1971, ch. 1012 (codified as N.Y. UNCONSOL. LAW §8605 (McKinney 2010)).

<sup>62</sup> According to the New York City Rent Guidelines Board, there are currently approximately 1 million rent-stabilized units in New York. N.Y.C. RENT GUIDELINES BD., 2016 HOUSING SUPPLY REPORT 4 (2016), [http://www.nycrgb.org/downloads/research/pdf\\_reports/16HSR.pdf](http://www.nycrgb.org/downloads/research/pdf_reports/16HSR.pdf) [<https://perma.cc/T5R2-P9T5>].

<sup>63</sup> See Craig Gurian, *Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York*, 31 *FORDHAM URB. L.J.* 339 (2004). Specific examples of the weakening of rent stabilization include high rent vacancy decontrol, which means that an apartment leaves the system when it reaches a certain monthly rent level, currently \$2500, and there is a vacancy; and greater leeway for landlords who charge preferential rents. *Id.* at 367-73.

<sup>64</sup> *Id.* at 341-42.

<sup>65</sup> *Id.* at 351-52.

losses directly attributable to legislatively-created loopholes in the rent laws.<sup>66</sup> The loss of so many rent stabilized apartments is notable because empirical evidence shows that New York's rent regulations reduce monthly rents significantly: in 2008 an econometric study found that rent regulations—both rent control and rent stabilization—reduced monthly rents by an average of \$458, “with an average effect ranging from \$829 per month in Manhattan to \$195 per month in the Bronx.”<sup>67</sup> Furthermore, while there are no income requirements to being a rent-regulated tenant, those who live in rent regulated housing tend to be poorer than their counterparts in market-rate apartments.<sup>68</sup> In short, New York's system of rent-regulated housing represents one of the last bastions of affordable housing for working class people in the City, and it has been hemorrhaging units in recent years.<sup>69</sup>

In the same period that rent regulatory protections have been reduced, a long boom in New York's real estate market has generated a crisis in affordability that has adversely impacted low-income tenants. Between 2002 and 2012, median apartment rents—both regulated and unregulated—in New York City rose by 75 percent, compared to 44 percent in the rest of the country, with rents rising the fastest in the borough of Brooklyn.<sup>70</sup> The most recent phase of the rent spike comes in the wake of the economic crisis of 2008, from which many people have yet to fully recover; in particular, the income levels of working families in the bottom half of the income distribution remain stagnant.<sup>71</sup> The convergence of these factors—

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<sup>66</sup> FRANK BRACONI & STEPHEN CORSON, OFFICE OF THE N.Y.C. COMPTROLLER, *THE GROWING GAP: NEW YORK CITY'S HOUSING AFFORDABILITY CHALLENGE 20* (2014), [http://comptroller.nyc.gov/wp-content/uploads/documents/Growing\\_Gap.pdf](http://comptroller.nyc.gov/wp-content/uploads/documents/Growing_Gap.pdf) [<https://perma.cc/A79U-PSFT>] [hereinafter *THE GROWING GAP*]. Note that these losses are pegged specifically to high-rent vacancy deregulation and high-rent high-income deregulation.

<sup>67</sup> *Id.* at 7.

<sup>68</sup> NYU FURMAN CTR., *PROFILE OF RENT-STABILIZED UNITS AND TENANTS IN NEW YORK CITY 4* (2014), [http://furmancenter.org/files/FurmanCenter\\_FactBrief\\_RentStabilization\\_June2014.pdf](http://furmancenter.org/files/FurmanCenter_FactBrief_RentStabilization_June2014.pdf) [<https://perma.cc/MK6S-NBT3>]. In 2011, the average median household income in rent regulated apartments was \$36,600, compared to \$52,260 in market rate units. *Id.*

<sup>69</sup> According to the Furman Center for Real Estate & Urban Policy, there was a net loss of 231,000 rent-regulated units from 1981 to 2011. FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, *FACT BRIEF: RENT STABILIZATION IN NEW YORK CITY 2* (2012), [http://furmancenter.org/files/publications/HVS\\_Rent\\_Stabilization\\_fact\\_sheet\\_FINAL\\_4.pdf](http://furmancenter.org/files/publications/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf) [<https://perma.cc/QP6J-ANMF>]. More recently, there was a loss of 8,009 rent-stabilized units in 2015. *See* N.Y.C. RENT GUIDELINES BD., *CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NEW YORK CITY IN 2015 8* (2016), [http://www.nycrgb.org/downloads/research/pdf\\_reports/changes2016.pdf](http://www.nycrgb.org/downloads/research/pdf_reports/changes2016.pdf) [<https://perma.cc/3AAE-8E4C>].

<sup>70</sup> *THE GROWING GAP*, *supra* note 66, at 5.

<sup>71</sup> *Id.* at 9-10.

rapidly rising rents and stalled incomes—has meant a sharp increase in the rent-to-income ratios of low-income New Yorkers, particularly those earning between \$20,001 and \$40,000 annually.<sup>72</sup> In 2012, more than 1 million households in the City—or half of all New York renters—were considered rent burdened.<sup>73</sup> This has resulted in a spike in housing court proceedings and a record number of people living in homeless shelters.<sup>74</sup>

In the absence of local control and in an age characterized by neoliberal public policy, successive mayoral administrations, including the current, self-styled progressive administration of Bill de Blasio, have addressed the City's shortage of affordable housing predominantly through the market-facilitative mechanism of inclusionary zoning, or upzoning, as it is sometimes called.<sup>75</sup> Upzoning incentivizes private developers to incorporate some percentage of below-market-rate units into their new developments by altering zoning laws to allow for taller—and thus more populated—residential structures.<sup>76</sup> The often-cited problems with this approach are that it does not produce enough affordable housing units and that the City's definition of affordability is inaccessible to most New Yorkers.<sup>77</sup> While these criticisms are valid, according to Samuel Stein, “[t]he real problem with inclusionary zoning is that it marshals a multitude of rich people into places that are already experiencing gentrification,” thereby accelerating rent increases for those who already reside in an affordable apartment.<sup>78</sup> In other words, the prevailing mode of remediating the City's crisis of affordable housing actually exacerbates the problem by placing upward pressure on rents in areas targeted for upzoning.

In sum, the neoliberal political-economic turn that took root

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<sup>72</sup> *Id.* at 10-11.

<sup>73</sup> SEAN CAPPERIS ET AL., NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2013 32 (2014) [https://wagner.nyu.edu/files/faculty/publications/SOC2013\\_HighRes.pdf](https://wagner.nyu.edu/files/faculty/publications/SOC2013_HighRes.pdf) [<https://perma.cc/H2MR-LEBW>].

<sup>74</sup> THE GROWING GAP, *supra* note 66, at 12; N.Y.C. OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RESOURCES ADMIN., 2016 ANNUAL REPORT 22-27 (2016), [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL\\_08\\_29\\_2016.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf) [<https://perma.cc/MF5S-KFLU>] (noting that despite overall downward trends, there has been a recent uptick in nonpayment proceedings in the Bronx and an increase in Housing Part petitions overall from 2014 to 2015).

<sup>75</sup> Samuel Stein, *De Blasio's Doomed Housing Plan*, JACOBIN (Oct. 3, 2014), <https://www.jacobinmag.com/2014/10/de-blasios-doomed-housing-plan/> [<https://perma.cc/5382-FSD8>].

<sup>76</sup> See ANGOTTI, *supra* note 2, at 54.

<sup>77</sup> Stein, *supra* note 75.

<sup>78</sup> *Id.*

in New York City in the 1970s has produced a context in which grave social problems like extreme inequality and displacement proliferate; at the same time, market-based solutions to these problems are largely taken for granted. For housing advocates, particularly those working within a law and organizing framework, it is vital to critically engage the neoliberal paradigm in order to effectively deal with the structural conditions underlying poverty and inequality. An anti-displacement law clinic of the kind proposed by this article should look to partner with grassroots organizations that embrace an alternative mode of urbanization—one that is rooted in the common good, rather than market principles, and that validates the uniquely democratic quality of urban space. In the section that follows, I will explore such an alternative mode of urbanization, with the aim of relating it to a tenant advocacy clinical law practice.

### B. *The Right to the City*

In a context of rising land values, weakened rent laws, and soaring inequality, many of New York's neighborhoods have undergone profound and rapid processes of gentrification in recent years.<sup>79</sup> On a recurring basis, working class and poor tenants of color and the small businesses that cater to them have been priced out to make way for their wealthier replacements.<sup>80</sup> In the process, areas once considered “fringe” have become battlegrounds over urban space, with long-time tenants, landlords, developers, and affluent newcomers all jockeying for position. The stark changes to the social composition of urban areas wrought by gentrification have raised the specter that the historical character of cities—as “frontier zones where actors from different worlds can have an encounter for which there are no established rules of engagement, and

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<sup>79</sup> THE GROWING GAP, *supra* note 66, at 15-18. Gentrification has been characterized by Neil Smith as “the leading residential edge of . . . the class remake of the central urban landscape.” NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY 37 (1996). It describes the process in which formerly poor and working class urban neighborhoods are transformed by an influx of private capital and middle class homeowners and renters. *Id.* at 30. For Smith, gentrification is driven primarily by capital investment (rather than consumer preferences) and is backed by state policy; it occurs in areas where there exists a “rent gap,” i.e., a disparity between the actual rent that can be obtained under the present land use and the potential rent level. *Id.* at 64-67. In this formulation of gentrification, the impoverishment of urban zones in one historical moment—through years of disinvestment, deindustrialization, and suburbanization—is precisely what makes them potentially profitable sites for future development. *Id.* at 32-45.

<sup>80</sup> See generally AUSTENSEN ET AL., *supra* note 10.

where the powerless and the powerful can actually meet”<sup>81</sup>—is under siege.

The notion that the special character of urban life is being undermined by gentrification evokes the New Left concept of the right to the city (“RTC”), which originated with the writings of French social theorist Henri Lefebvre and in recent years has enjoyed a resurgence amid the immense urban inequality and precarity produced by neoliberal restructuring.<sup>82</sup> Since its advent in the late 1960s, the RTC has evoked an imaginary of cities as sites of radical, democratic, and anti-capitalist struggles. According to David Harvey, the RTC is a collective, rather than an individual, right requiring the reinvention of urban space according to the exercise of a “shaping power over the processes of urbanization, over the ways in which our cities are made and remade . . . .”<sup>83</sup> Peter Marcuse argues that the RTC is “an exigent demand by those deprived of basic material and legal rights, and an aspiration for the future by those discontented with life as they see it around them . . . .”<sup>84</sup> For both Harvey and Marcuse, the RTC signifies a struggle over the use and accessibility of urban space, and the policy and planning decisions shaping it.<sup>85</sup>

By all accounts, the RTC runs contrary to neoliberal understandings of urbanization, as it affirms the right of a diverse mix of urban residents to democratically construct processes of urban economic development and to access urban space as a sort of commons, free from the impingement of market forces.<sup>86</sup> The full valence of this point comes into focus when it is placed in relation to the ways in which cities have historically functioned within capitalism—i.e., as focal points for the production, circulation, and

<sup>81</sup> Saskia Sassen, *Who Owns Our Cities – and Why This Urban Takeover Should Concern Us All*, *GUARDIAN* (Nov. 24, 2015, 3:30 PM), <https://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all> [<https://perma.cc/2KKC-MXK3>].

<sup>82</sup> Cedric Johnson, *Charming Accommodations: Progressive Urbanism Meets Privatization in Brad Pitt’s Make It Right Foundation*, in *THE NEOLIBERAL DELUGE: HURRICANE KATRINA, LATE CAPITALISM, AND THE REMAKING OF NEW ORLEANS 187, 192* (Cedric Johnson ed., 2011).

<sup>83</sup> *REBEL CITIES*, *supra* note 48, at 5.

<sup>84</sup> Peter Marcuse, *Whose Right(s) to What City?*, in *CITIES FOR PEOPLE, NOT FOR PROFIT 24, 30* (Neil Brenner et al. eds., 2012).

<sup>85</sup> According to Brenner, Marcuse, and Mayer, “[u]rban space under capitalism . . . is continually shaped and reshaped through a relentless clash of opposed social forces oriented, respectively, towards the exchange-value (profit-oriented) and use-value (everyday life) dimensions of urban sociospatial configurations.” Neil Brenner et al., *Cities for People, Not for Profit: An Introduction*, in *CITIES FOR PEOPLE, NOT FOR PROFIT*, *supra* note 84, at 1, 3-4.

<sup>86</sup> *A BRIEF HISTORY*, *supra* note 52, at 73.

consumption of commodities,<sup>87</sup> and as nodes of capital accumulation and valorization.<sup>88</sup> Under the RTC, the neoliberal conception of cities primarily as sites of growth and market discipline<sup>89</sup> gives way to a view of cities as spaces where democracy, equality, and diversity flourish, and where the use value of urban space predominates over its exchange value.<sup>90</sup>

While the RTC has historically been conceived as a revolutionary demand rather than a concrete policy platform,<sup>91</sup> there do exist an array of legal protections and subsidies in the U.S. that reflect some of the core principles of the RTC. Consumer advocate-turned legal scholar Alan M. White points to two such examples: municipal social property tax programs that are intended to address the reality of unaffordable property taxes for poor and working class homeowners (presumably in gentrifying areas) and social rates for water and energy services that provide relief to low-income customers.<sup>92</sup> Both programs insulate residents from deleterious market forces by effectively socializing pricing in key, housing-related areas; and the resultant decrease in costs has the effect of reducing market-driven displacement.<sup>93</sup>

Another example of a legal-regulatory regime that reflects the RTC principle that urban space should be democratic and accessible is the system of rent regulation prevalent in New York and several other cities. As outlined in Part II, rent regulation typically confers on tenants an enhanced property right to their rental apartments in the form of a statutory right to a renewal lease.<sup>94</sup> This means that in gentrifying areas of cities, where property owners are incentivized to replace poorer tenants with wealthier ones who can pay more in rent, the former can rely on a legal frame-

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<sup>87</sup> Brenner et al., *supra* note 85, at 3.

<sup>88</sup> REBEL CITIES, *supra* note 48, at 6-7.

<sup>89</sup> Margit Mayer, *The "Right to the City" in Urban Social Movements*, in CITIES FOR PEOPLE, NOT FOR PROFIT, *supra* note 84, at 63, 67.

<sup>90</sup> "Use value" refers to the everyday usefulness of a commodity, whereas "exchange value" refers to the quantitative value at which it can be exchanged with other commodities. According to Mark Purcell, "[t]he use value aspect of urban space must . . . be the primary consideration in decisions that produce urban space. The conception of urban space as private property, as a commodity to be valorized (or used to valorize other commodities) by the capitalist production process, is specifically what the right to appropriation stands against." Mark Purcell, *Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant*, 58 GEOJOURNAL 99, 103 (2002).

<sup>91</sup> Alan M. White, *Market Price, Social Price, and the Right to the City: Land Taxes and Rates for City Services in Brazil and the United States*, 44 U. MIAMI INTER-AM. L. REV. 313, 315-16 (2013).

<sup>92</sup> *Id.* at 327-34.

<sup>93</sup> *Id.* at 328.

<sup>94</sup> See Gurian, *supra* note 63, at 379.

work that limits landlords' rate of return on their property (i.e. the tenant's home). In this way, rent regulation places a limit on capital's ability to fully valorize urban space. Anecdotally, in my experience as a tenant attorney in New York City, I have noted that areas with a high density of rent-regulated housing tend to retain their pluralistic and working class character even as market forces fundamentally alter the race and class composition of surrounding areas.

While the existence of social property tax and utility programs and rent regulatory regimes is not constitutive of a state-sanctioned RTC under US law, these programs demonstrate that public policies can be fought for and constructed to promote the use-value of urban space for low-income people. And though they are far from revolutionary, these policies stand for the core RTC tenet that those who create the texture of urban life have a right to remain in their homes without regard to the vicissitudes of the market.<sup>95</sup> In this way, these RTC-inflected policies operate in opposition to the prevailing mode of neoliberal urbanization that grafts market logic on to efforts to solve our most pressing urban social problems.<sup>96</sup> As such, they are examples of the types of political reforms that a tenant advocacy clinic based in law and organizing and located in a global city can and should take on.

### III. CUNY SCHOOL OF LAW'S TENANT LAW AND ORGANIZING PROJECT

#### A. *BHIP and Bushwick*

When students approached me in my second year of teaching about the possibility of incorporating tenant advocacy into their Community and Economic Development<sup>97</sup> clinical experience, my instinct was to seek out community-based tenant organizations working in gentrifying areas of the city and to see what we could offer them in the way of legal services, within the frameworks of the resource-ally and M\*A\*S\*H Unit models described in Part IA. Having worked in a law and organizing framework at the Urban Justice

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<sup>95</sup> White, *supra* note 91, at 317.

<sup>96</sup> See generally BROWN, *supra* note 50.

<sup>97</sup> Founded and directed by Prof. Carmen Huertas-Noble, CUNY School of Law's Community & Economic Development Clinic ("CED Clinic") addresses economic inequality in marginalized communities in New York City through litigation, transactional representation, grassroots community advocacy, and policy reform. *Faculty Profile: Prof. Carmen Huertas-Noble*, CUNY SCH. L., <http://www.law.cuny.edu/academics/clinics/ced/Carmen-Huertas-Noble.html> [<https://perma.cc/GZ46-TCQH>]; *Community & Economic Development*, *supra* note 7.

Center's Community Development Project<sup>98</sup> and at Make the Road New York,<sup>99</sup> I knew that partnering with vibrant, grassroots organizations was the best starting point to aligning our advocacy efforts with community organizing initiatives. After putting out feelers with a number of organizations, we agreed to collaborate with the Brooklyn Housing Independence Project (BHIP),<sup>100</sup> a small, member-based nonprofit working mainly with immigrant tenants in the Bushwick section of Brooklyn.

BHIP was an ideal organizational partner for our foray into tenant advocacy for a number of reasons. It had a deep history of working with low-income, immigrant tenants who had difficulty accessing legal services.<sup>101</sup> The organization emphasized preserving affordable housing by focusing its resources on rent-stabilized apartment buildings where landlords were employing aggressive tactics aimed at displacing longtime residents. Also, BHIP approached its work through the lens of grassroots organizing—there was a full-time organizer on staff who connected tenants to each other and worked with them to understand and exercise their rights under the rent stabilization law—and the organization had experience working with housing attorneys from a range of legal services offices.<sup>102</sup>

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<sup>98</sup> The Community Development Project of the Urban Justice Center “provides legal, participatory research, and policy support to strengthen the work of grassroots and community-based groups in New York City to dismantle racial, economic and social oppression.” *Community Development Project: Our Vision*, URBAN JUST. CTR., <http://cdp.urbanjustice.org/cdp-ourvision> [<https://perma.cc/NF3L-UNCZ>]. I was a staff attorney at the Community Development Project from 2005 to 2007.

<sup>99</sup> Make the Road New York is a membership-based organization that “builds the power of Latino and working class communities to achieve dignity and justice through organizing, policy innovation, transformative education, and survival services.” *Who We Are: Our Mission*, MAKE THE ROAD N.Y., <http://www.maketheroadny.org/whoweare.php> [<https://perma.cc/VG7K-9GEZ>]. I was a supervising attorney at Make the Road New York from 2008 to 2011.

<sup>100</sup> BHIP is a membership-based organization—with roots in the Catholic Worker tradition—that advocates for immigrant tenants who are organizing for affordable and decent housing. BHIP members tend to be undocumented workers living in rent-stabilized apartments in the Bushwick section of Brooklyn. I have served as a member of BHIP's board of directors since 2011.

<sup>101</sup> This difficulty stems from a number of factors. Legal services offices in receipt of Legal Services Corporation Funds are generally prohibited from representing undocumented individuals. 45 C.F.R. § 1626.3 (2014). Also, there have historically been many more tenants in need of legal assistance than there are service providers. See Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187, 225-27 (2009).

<sup>102</sup> In the past, BHIP had partnered with housing attorneys from Ridgewood-Bushwick Legal Services, Brooklyn Legal Services Corp. A, Brooklyn Legal Aid, and South Brooklyn Legal Services.

The geographical focus of BHIP's work—in the neighborhood of Bushwick, Brooklyn—was also significant to our partnership. In 2012, at TLOP's inception, Bushwick was widely recognized as an epicenter of overheated gentrification, and its recent history closely tracks the broader transformation of New York City following the fiscal crisis of the 1970s. In the wake of that crisis, Bushwick rapidly became a symbol of urban decay, with austerity measures lowering the standard of living of the neighborhood's working-class, increasingly-immigrant population.<sup>103</sup> More recently, as gentrification from neighboring Williamsburg spilled out beyond its geographical limits, Bushwick's relative underdevelopment and comparatively low rents made it an attractive site for both capital investment and newcomers with means.<sup>104</sup> In the span of a few years in the 2000s, the neighborhood morphed into a destination for the City's avant-garde, with sleek boutiques and condos occupying the same blocks as dilapidated housing and small, immigrant-owned storefronts.<sup>105</sup>

Bushwick's mash-up of contradictory dynamics—characterized by renovation and dislocation in close proximity<sup>106</sup>—is summed up by reading together two *New York Times* pieces, published within four months of each other. The first, an article entitled “Adieu Manhattan, Bonjour Bushwick,” follows a trendy French restaurateur as he rediscovers himself by relocating from Manhattan to Bushwick, where he revels in the gritty, ethnic texture of the neighborhood by day and enjoys its array of hip cafes and clubs by night.<sup>107</sup> Though the article mentions the steep increase in rents in

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<sup>103</sup> Forrest Hylton, *You Think the Highland Clearances Were Bad? Why the Avant Garde Moved to Brooklyn*, COUNTERPUNCH, Jan. 2007, at 1, 4, <http://www.unz.org/Public/Counterpunch-2007jan01-00001> [<https://perma.cc/AV2W-SPXL>]; see also SEAN CAPPERIS ET AL., NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2014 (2015), [http://furmancenter.org/files/sotc/NYUFurmanCenter\\_SOC2014\\_HighRes.pdf](http://furmancenter.org/files/sotc/NYUFurmanCenter_SOC2014_HighRes.pdf) [<https://perma.cc/QMU9-KLYB>]; Neil deMause, *After Williamsburg's Gentrification Began, Bushwick's Was Inevitable*, GOTHAMIST (Sept. 28, 2016, 2:40 PM), [http://gothamist.com/2016/09/28/the\\_bushwick\\_wars\\_redevelopment.php#photo-1](http://gothamist.com/2016/09/28/the_bushwick_wars_redevelopment.php#photo-1) [<https://perma.cc/C6RD-SP45>].

<sup>104</sup> Hylton, *supra* note 103, at 5.

<sup>105</sup> *Id.* at 1.

<sup>106</sup> In neighborhoods like Bushwick, there is often a contradictory cocktail of renovation and dislocation, as urban chic collides—often in tight quarters—with the violence of displacement. These seemingly contradictory forces can, in practice, be strangely complementary. As Neil Smith put it: “where the militance or persistence of working-class communities or the extent of disinvestment and dilapidation would seem to render such genteel reconstruction a Sisyphean task, the classes can be juxtaposed by other means. Squalor, poverty and the violence of eviction are constituted as exquisite ambience.” SMITH, *supra* note 79, at 25.

<sup>107</sup> Liz Robbins, *Adieu, Manhattan; Bonjour, Bushwick: Florent Morellet Revels in a New*

recent years—average rents for one-bedroom apartments in Bushwick rose to \$1,950 in 2013 from \$1,535 in 2010—it says nothing of the neighborhood’s long-time Puerto Rican, Dominican, and Mexican residents, who have created much of the cultural milieu in which the protagonist is luxuriating and who now find themselves being priced out of their homes.<sup>108</sup> That task is left to “The Fight for 98 Linden,” which tells the story of a group of rent stabilized neighbors, all hailing from Nicaragua, who, with the assistance of BHIP and legal services attorneys, fought back against a relentless campaign of harassment by their landlord that included the unlawful gut renovation of swaths of their building, leaving them without bathrooms and kitchens for an extended period of time.<sup>109</sup>

In partnering with BHIP and centering our work in Bushwick, TLOP’s objective was to employ the law and organizing frameworks described in Part IA in the fight against landlord tactics of the sort used at 98 Linden, and to assist tenants who were organizing to preserve the diverse and working class character of their neighborhood. BHIP’s membership structure and its emphasis on grassroots organizing, as well as its lack of in-house legal services, dovetailed with the description of partner organizations in both Kim’s resource-ally model of law and organizing and Grinthal’s M\*A\*S\*H Unit model.<sup>110</sup> BHIP would be able to refer us the legal cases of its members, who were in the process of getting organized while also dealing with intense landlord harassment. The organization would select which cases to send our way, according to its organizing priorities, with the shared understanding that affirmative and group cases would be prioritized. In keeping with the M\*A\*S\*H Unit model, there was also a shared understanding that TLOP would take on particularly urgent cases of individual members of BHIP and that our representation would not necessarily be limited to housing court proceedings. Notably, BHIP would staff referred cases with an organizer, who would work to ensure that the tenants sustained their cohesiveness and remained connected to BHIP’s ongoing organizing activities during the course of the litigation.

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*Scene in Brooklyn*, N.Y. TIMES (Nov. 1, 2013), <https://mobile.nytimes.com/2013/11/03/nyregion/florent-morellet-revels-in-a-new-scene-in-brooklyn.html> [https://perma.cc/95YN-3KZ4].

<sup>108</sup> *Id.*

<sup>109</sup> Mona El-Naggar, *The Fight for 98 Linden*, N.Y. TIMES: TIMESVIDEO (Feb. 24, 2014), <https://www.nytimes.com/video/nyregion/10000002727148/the-fight-for-98-linden.html> [https://nyti.ms/1fG5Zyx].

<sup>110</sup> Students in TLOP had read and discussed Kim and Grinthal’s articles in CUNY School of Law’s CED Seminar.

In the following section, I will describe how TLOP's partnership with BHIP played out and to what degree we lived up to our aspirations of providing anti-displacement legal services while also addressing the structural forces underlying inequality and gentrification.

*B. TLOP in Practice*

On a grey September morning, four clinical law students and I set out for a rundown apartment building on Starr Avenue in Bushwick to meet with BHIP's lead organizer and a group of aggrieved tenants. The building was located in a corner of the neighborhood where family-run storefront businesses were being replaced by sleek espresso bars and vintage clothing shops, and new, metallic condos were springing up left and right. BHIP had a longstanding relationship with four of the building's six residents, all of whom were undocumented immigrant workers with rent-stabilized leases and sub-\$1000 rents. The tenants had each lived in the building for over ten years—one had been there for nearly twenty—and they had been engaged in an escalating battle with successive landlords for as long as they could remember.

In the past two years—in the midst of a period of rapidly rising rents across Bushwick<sup>111</sup>—the tenants' landlord had grown increasingly aggressive in his efforts to get them out of the building: initial buyout offers<sup>112</sup> morphed into harassment; then came a series of meritless eviction proceedings;<sup>113</sup> and all the while the building was left in a state of constant disrepair. The only thing standing in the way of the landlord's plan to displace the tenants was their rent-stabilization status and their refusal to leave their homes in spite of their landlord's harassing tactics; instead, several of the tenants had become members of BHIP and had invited an organizer into the building. Through their engagement with BHIP, the tenants knew that the rent laws gave them a statutory right to remain in

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<sup>111</sup> From 2000 to 2012, the real average rent for Bushwick rose by 50.3%, from \$684 per month to \$1,028 per month. Bushwick's percent increase in real average rent from 2000 to 2012 is surpassed only by the New York neighborhoods of Brooklyn Heights/Fort Greene and Williamsburg/Greenpoint, with increases of 58% and 76.1%, respectively. *THE GROWING GAP*, *supra* note 66, at 16-17.

<sup>112</sup> Buy-outs are common in areas of rapidly rising rents. See Louis W. Fisher, Note, *Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartments*, 50 HARV. C.R.-C.L. L. REV. 491, 494-99 (2015). Typically, a landlord will approach tenants and offer a payment of a few thousand dollars if they will vacate their apartment. See *id.* at 497.

<sup>113</sup> These included nonpayment cases where the tenant had already paid the alleged amount.

their apartments and that this in turn gave them cover to organize and agitate for better conditions.<sup>114</sup> What the tenants lacked were the legal resources to challenge the landlord's practices.

TLOP was well-positioned to engage in this work. Operating under the umbrella of CUNY School of Law's clinical arm, Main Street Legal Services,<sup>115</sup> TLOP was free from the contractual, funding, and logistical constraints of many of New York's housing legal services offices.<sup>116</sup> Not only were we able to represent undocumented individuals, we were also unencumbered by the imperative to take on a high volume of eviction defense cases. In short, even though TLOP's capacity was limited, we were one of the few legal services providers in the City that could take on an affirmative, group housing case on behalf of undocumented tenants.<sup>117</sup> And from preliminary discussions with BHIP's organizer, this seemed to be what the Starr Avenue tenants were looking for.

As we approached the building on Starr Avenue for our initial meeting with the tenants, I felt a last-minute rush of anxiety. The meeting had been set up by BHIP's organizer, a force of nature and fixture in the local tenant advocacy community who had told me on a call a few days earlier that she would attend and that she planned to intervene liberally; she was happy to have our services

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<sup>114</sup> N.Y. REAL PROP. LAW § 223-b (McKinney 2005) protects all tenants, regardless of their rent-regulatory status, from retaliatory action by their landlord under certain circumstances, including engaging in organizing activity. However, in practice this statute provides only limited protection to tenants of unregulated apartments, who can be evicted at-will at the conclusion of their lease.

<sup>115</sup> Main Street Legal Services ("MSLS") is a public interest law firm that is staffed by CUNY clinical law students who work under the supervision of experienced attorneys. MSLS includes the following programs: the CED Clinic, the Criminal Defense Clinic, the Economic Justice Project, the Elder Law Clinic, the Immigrant and Non-Citizen Rights Clinic, the Human Rights and Gender Justice Clinic, and the Mediation Clinic. See *Clinical Programs*, CUNY SCH. L., <http://www.law.cuny.edu/academics/clinics.html> [<https://perma.cc/734W-5Z97>].

<sup>116</sup> Legal services offices that receive federal Legal Services Corporation funding are generally prohibited from representing undocumented individuals. *About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVICES CORP., <http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs> [<https://perma.cc/AK5H-V5YC>]. Further, at the time of the events of this article, very few tenant legal services organizations devoted significant resources to affirmative group litigation, instead focusing primarily on individual eviction defense.

<sup>117</sup> This situation has changed somewhat in recent years, with tenant-side legal services more readily available under Mayor de Blasio's affordable housing and economic development plan. Press Release, Office of the Mayor of N.Y.C., Protecting Tenants and Affordable Housing: Mayor de Blasio's Tenant Support Unit Helps 1,000 Tenants Fight Harassment, Secure Repairs (Feb. 29, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/208-16/protecting-tenants-affordable-housing-mayor-de-blasio-s-tenant-support-unit-helps-1-000#/0> [<https://perma.cc/V8HK-88DT>].

and thought we could be helpful to the tenants' cause, but she was also protective of the tenants and openly wary of the idea of law students handling a case in housing court, where landlord attorneys are known to be hyper-aggressive. The organizer's apprehensions raised concerns regarding our representation of the tenants and the pedagogical needs of the students. To what extent would we be able to develop effective attorney-client relationships when the organizer who had referred us our clients' case lacked confidence in our abilities? And how would we operate effectively within a resource-ally law and organizing framework when the organizer seemed intent on playing an active role in our representation?

While I was confident we would be able to work through these issues, I also recognized that the stakes for the first meeting were high. I had no solid backup plan in the event we did not take the tenants' case (or if the tenants opted not to retain us). Also, as this was our first time at the building and our first encounter with the tenants, the meeting, out of necessity, had to serve a number of functions: client intake, rapport-building, fact-investigation, and initial counseling session. In addition to introducing ourselves and securing basic information about the clients, we needed to identify their legal issues and goals, begin to evaluate them, and, as per the organizer's instructions, generate some preliminary legal options. Perhaps most challenging of all, we needed to do this in a group setting that included an organizer who likely had her own ideas about how best to address the problems in the building.

The meeting also posed other, more subtle challenges. The students needed to take into account the fact that our dialogue would be translated between English, the language of the students, and Spanish, the language of the tenants and the first language of the organizer, leading to at least some degree of awkwardness and miscommunication. Also, we would be enmeshed in a web of long-standing relationships among neighbors, and put in direct relation to a third-party attendee, the organizer, who was a confidant of the tenants and more than a little skeptical of the idea of legal services administered by law students. In short, the meeting was a far cry from the interview room of the students' law school simulations,<sup>118</sup> as it placed us on our clients' geographical, cultural, and linguistic home turf. Navigating all these dynamics—while establishing the building blocks for an effective attorney-client relationship—was no small task.

The students were well prepared for the challenges posed by

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<sup>118</sup> Ahmad, *supra* note 41, at 1078-79.

the meeting, based on the curriculum of CUNY's CED Clinic, our small-group TLOP sessions, and their own experiences at tenants living in New York City. In terms of the formal training offered by the CED Clinic, the students had engaged with theories of law and organizing, community lawyering, ethical issues in group representation, and cultural competency. Class discussions in the seminar portion of the Clinic regularly touched on issues of race, class, and culture in the representation of poor and subordinated clients. And in-class exercises were structured to make students keenly aware of the micro-dynamics at play in lawyering across these lines of difference.

In our TLOP small-group sessions, which met outside the regularly scheduled Clinic class time, we focused on getting up to speed on relevant aspects of New York City landlord-tenant law, no small task given the array of statutes and regulations in play.<sup>119</sup> We also read and discussed scholarly articles about gentrification and urbanization, with a focus on the Bushwick neighborhood that was the geographical locus of our advocacy efforts. These discussions were useful in understanding the historical-cultural context of the neighborhood and the political-economic and policy context of gentrification, and helped us to frame our representation in terms of a larger struggle to preserve affordable housing in a traditionally working class, immigrant section of the City.

Finally, it should be noted that much of the students' preparation for their work in TLOP occurred outside of the classroom, as the students were all tenants living in New York City. Although they were not subject to the same degree of economic precarity or landlord harassment as our prospective clients, the students knew what it meant to live in a tight, predatory real estate market on a relatively low income. They appreciated the value of an affordable, rent-stabilized apartment and knew what it meant to struggle to get much-needed repairs from a stubborn landlord. Because of these experiences, the students approached our tenant meeting with a not-insignificant amount of understanding, empathy, and solidarity.

As it turned out, our meeting with the tenants went well, if not smoothly. The interpretation was a bit clunky,<sup>120</sup> and the students

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<sup>119</sup> At a minimum, students needed to have a working knowledge of the New York City Rent Stabilization Law, N.Y. UNCONSOL. LAW ch. 4 (McKinney 2017), and the N.Y. REAL PROP. ACTS. LAW ch. 81, (McKinney 2017), as well as the N.Y. C.P.L.R. ch. 8 (McKinney 2017).

<sup>120</sup> The organizer and I co-interpreted the meeting, occasionally stepping on each other's toes.

were predictably tentative, particularly when it came to the client counseling portion of the agenda. Also, the organizer and one of the tenants spoke far more than anyone else in the group, causing me to wonder about the internal dynamics of the group.<sup>121</sup> Still, even if there had been a couple of stumbles, the meeting produced two concrete takeaways: the tenants wanted us to represent them and we learned that they were determined to get more than just repairs in the building; they also wanted to get their landlord's attention and to force him to take their concerns seriously. In the meeting, the tenants told us that for years the landlord had treated them like they were invisible and disposable, ignoring their complaints and taking them to court under false pretenses; now, with their neighborhood changing all around them, they wanted to stake a strong claim to their homes.

The tenants' desire for recognition from their landlord, combined with the fact that they were in the process of getting organized, directly informed our legal strategy, leading us to opt for a rarely-used type of housing court case: an Article 7a proceeding.<sup>122</sup> The latter tends to catch the attention of offending landlords because it seeks the appointment of an administrator to manage and control the rent rolls of buildings with unrepaired, emergency housing conditions.<sup>123</sup> From a law and organizing standpoint, 7a cases are useful because they require the participation of at least

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<sup>121</sup> From my experience working with tenant associations, this issue raised a yellow—if not a red—flag, in relation to maintaining a successful group litigation. I had several cases early in my career in which a single tenant dominated meetings, often foreclosing space for other tenants to actively participate in their case and in broader organizing efforts. Alternatively, I had cases where many tenants deferred to a perceived tenant leader and never reached a sustained level of investment in their case. I have generally deferred to organizers to ensure more democratic participation in group settings, but I have also occasionally intervened in tenant meetings in a way intended to induce such participation.

<sup>122</sup> Article 7a proceedings are rarely used because they require an organized group of tenants and because service of process is notoriously difficult. N.Y. REAL PROP. ACTS. LAW §§ 770(1), 771(1) (McKinney 2013); MOLLY WASOW PARK, CITY OF N.Y. INDEP. BUDGET OFFICE, REVIEW OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT'S ARTICLE 7A PROGRAM 6 (2003) ("A significant number—50 percent—of 7A cases brought either by tenants or HPD do not result in the appointment of an administrator, because the judge instead allows the building owner to enter into an agreement to complete repairs. Similarly, when a building is sold—even after a 7A administrator is appointed—judges generally give the new owner the opportunity to correct building violations.").

<sup>123</sup> N.Y. REAL PROP. ACTS. LAW § 770(1) states that a 7a proceeding can be maintained where there exists in a building "or in any part thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination of such conditions; or course of

one-third of a building's tenants.<sup>124</sup> This minimum participation requirement facilitates solidarity-building among clients, as, by statute, maintaining a 7a proceeding requires a portion of a building's tenants to come together and sustain at least a semi-active investment in the litigation.<sup>125</sup> Over the course of a case, tenants in a 7a proceeding are compelled to be in communication with one another, a fact that often leads to viewing their grievances against their landlord as shared and intertwined.

Following our initial client meeting and the decision to opt for a 7a proceeding, our next task was to draft our pleadings in a way that reflected our clients' core concern that their landlord had been continually harassing them in an effort to get them to leave their homes. Even though 7a cases typically only relate to conditions,<sup>126</sup> we made sure to include in the pleadings allegations of the landlord's various attempts to get the tenants to vacate the building. Our approach served two purposes: in theory, it alerted the judge to the context in which the lack of repairs was taking place, and it allowed the tenants to share with us, and with each other, their experiences of being dragged to court for no reason and repeatedly harassed to accept a paltry buyout offer. Surfacing these events in our tenant meetings and including them in our pleadings not only honored the tenants' lived experience, it also fortified their belief that the action against the landlord was rooted in shared grievances, and therefore truly a collective one.

In terms of the merits and potential success of our case, from the outset we were clear with the tenants that although it was highly unlikely a court would take the fairly drastic measure of appointing a 7a administrator, simply filing for this form of relief would send the landlord a firm message—namely, that the tenants were to be taken seriously and that they had no intention of leaving their homes. The 7a litigation lasted nearly the entire academic year, with a number of highs and lows. The tenants were well-organized and clear-minded with regard to their goals, but they were disappointed by how long it took to get repairs done in the build-

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conduct by the owner or the owner's agents of harassment, illegal eviction, continued deprivation of services or other acts dangerous to life, health or safety . . . ."

<sup>124</sup> *See id.*

<sup>125</sup> At a minimum, after at least one-third of the tenants in a building sign on to the petition, they should also continue to appear at court appearances to avoid the landlord challenging their claim as defective for failing to sustain the minimum participation requirement. *See id.*

<sup>126</sup> Even though the 7a statute expressly includes harassment as a ground for the proceeding, *see id.*, judges rarely sustain such a claim when based on this ground.

ing, even once we were in court. On at least two occasions in the early stages of the litigation, the landlord's workers failed to show up to make agreed-upon, court-ordered repairs. And at an early court appearance, before any repairs had been made, the presiding judge essentially attempted to gut our entire case by asking us to remove the threat of a 7a administrator.<sup>127</sup> The same judge granted lengthy adjournments to the landlord, and appeared unmoved by the conditions in the building or by the landlord's harassment.

In the context of the inertia of the litigation, providing effective representation to the tenants required a sensitivity to the dynamics of the group and a steady collaboration with the organizer. Early on—and with the tenants' permission<sup>128</sup>—we included the organizer in our strategic planning for the case. In preparing for our initial court appearances, we relied heavily on her to ensure that the tenants appreciated the importance of being unified and present, even when it was clear that little or any legal significance was likely to occur. We also worked with the organizer to coordinate regular meetings with the tenants, meetings that often doubled as litigation updates and check-ins about the morale of the group.

It should be noted that, as the organizer became increasingly confident that we were up to the task of representing the tenants, her interventions in the legal spaces of our attorney-client relationship decreased. Whereas at the beginning of the case, the organizer would volunteer suggestions about questions of legal strategy and would make it a point to attend all meetings and court appearances, by the end of the litigation her attendance and participation were on an as-needed basis. In this way, our partnership, which was intended to operate under a resource-ally model of law and organizing, with its separation of attorney and organizer roles, evolved to fit the dictates of that model organically through our practice.

Overall, the involvement of the organizer, particularly in the early stages of our litigation, was critical to building a trusting attorney-client relationship with the tenants and to maintaining solidar-

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<sup>127</sup> The judge attempted to force a settlement by suggesting that we remove the threat of an appointed administrator in exchange for a promise to make repairs.

<sup>128</sup> The students discussed confidentiality and privilege with the tenants but it was determined that the presence of the organizer was so integral to our early meetings that she should be included notwithstanding the potential ethical concerns. Later, as the case developed, the students would meet with the tenants without the organizer present.

ity within the group, but it also sparked concerns among the students. We clearly had ethical obligations to our clients—to maintain their confidences, to zealously advocate for their interests, etc.—but what, if any, duties did we owe to the organizer and/or to BHIP, and how did our relationship with BHIP interface with our duties to our clients? The Rules of Professional Responsibility provided scant guidance on this point, as they failed to take into account the nuances and practicalities of our institutional partnership with BHIP: we were taking this particular case because BHIP had identified it as strategically important to its goal of maintaining affordable housing for working class, immigrant tenants in Bushwick; moreover, our ability to take cases from BHIP in the future was predicated not just on our effective representation of the tenants, but on our ability to work well with the organizer. Luckily, these concerns proved mostly academic, as the tenants clearly and explicitly identified their interests with the goals of BHIP and they were unanimously in favor of the active participation of the organizer, even if that posed potential problems with regard to client confidentiality and/or attorney-client privilege.

In the end, despite setbacks and delays, our 7a case was a success on a number of fronts. At what turned out to be our final court appearance, after we had moved to hold the landlord in criminal contempt<sup>129</sup> for his repeated disregard of court orders, he finally caved, agreeing to make all the necessary repairs. Just as importantly, he emphasized that the tenants should contact him personally in the future if there were any problems in the building—such was his desire to avoid another protracted court fight. This point was particularly gratifying to the tenants, who at least for the time being felt they had a partner, rather than an adversary, in the upkeep of the building. In early May, when we had our final tenant meeting, the building's interior spaces were nearly unrecognizable—clean hallways, new doors and floors, etc. In my decade of representing tenants in disputes with their landlords, I had never seen a building so completely transformed during the course of litigation. The ultimate mark of approval came when the organizer, initially skeptical of the capacity of a law clinic to do battle with an

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<sup>129</sup> Section 750(A)(3) of the New York Judiciary Law allows for the imposition of criminal contempt upon a finding of “Wilful disobedience to [the court’s] lawful mandate.” N.Y. JUD. LAW § 750(A)(3) (McKinney 2017). In 7a cases, criminal contempt is possible where the party fails to comply with the terms of a court-ordered stipulation agreement, e.g., an agreement to make specified repairs in a building by a date certain. *See id.*

aggressive slumlord, told the students and me that she had tenants in other buildings whom she wanted us to represent.

While TLOP engaged in other efforts that year—a community education training and a collaboration with a tenant advocacy organization on a law reform campaign—the 7a litigation was our high water mark. Despite the litigation’s many successes—achieving our clients’ objectives, successfully partnering with BHIP, and getting the students hands-on lawyering experience—I came away feeling a bit pessimistic. Though we had worked collaboratively and creatively with our clients and had put our lawyering at the service of a community-led organization along the lines of the law and organizing models we had discussed in class, it was hard to escape the limitedness of our impact. Given the scale of gentrification across New York City, it felt futile to focus our efforts on a single building and to work squarely within the confines of landlord-tenant law.

The models and tools of law and organizing—working at the direction of a grassroots partner organization and crafting legal claims to take into account the construction of solidarities among poor and subordinated tenants—had served our clients and the students well in this particular instance. But, in isolation, they could not live up to the bigger challenge, asserted by the RTC, to imagine and recreate our cities as democratic spaces that prioritize use-value of urban space, particularly in relation to the accessibility of decent and affordable housing and the prevention of market-driven displacement. Achieving those goals, particularly in a rapidly gentrifying global city, would require more of an engagement with the policy and market forces that have led to increased inequality and weakened legal protections for tenants.

### *C. Future Directions for TLOP*

As we have seen, creating a law and organizing-based tenant advocacy law clinic that takes on urban inequality and displacement from an RTC perspective is a complicated endeavor. The first iteration of TLOP managed to do impactful but partial work in this regard. While we collaborated effectively with a grassroots, partner organization and successfully represented a group of tenants in one of New York’s most rapidly gentrifying neighborhoods, our work did not branch out to impact policies of the sort discussed in Part II. To have a broader impact on gentrification and market-driven displacement, a more robust version of TLOP would need to expand its advocacy efforts beyond the confines of landlord-ten-

ant litigation, and also become more involved with community-led law and policy reform campaigns, across multiple scales of governance, that aim to enhance protections for tenants.

Landlord-tenant law is vital—indeed required—to protecting tenants in rapidly gentrifying areas from displacement; it can also be useful in forcing landlords to make much-needed repairs, as we saw in the previous section. But it has limitations in relation to organizing large groups of tenants<sup>130</sup> and to reducing urban inequalities. Where tenants are residents of discrete buildings—even ones owned by the same landlord—landlord-tenant law offers little to nothing in the way of remedies.<sup>131</sup> Further, even the most robust landlord-tenant practice cannot stave off economic development and policy initiatives that contribute to rising real estate values and displacement. The limitedness of this area of law means that future projects should look to other legal frameworks to support tenant collective action and prevent widespread displacement. One possibility in this regard is land use law, which can be used to regulate and reign in local real estate development.<sup>132</sup> Another area to explore is consumer protection law, which in some circumstances allows tenants living in separate buildings to file claims against a common owner.<sup>133</sup> Future projects should also look into community land trust formation,<sup>134</sup> as land trusts offer an alternative form of property ownership that creates access to affordable housing for low-income and working class tenants, and can serve as a bulwark against rapidly increasing land values.

As mentioned above, future iterations of TLOP should also look to expand the inaugural project's focus to include law and

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<sup>130</sup> This is so mainly because the affirmative, group claims available to tenants under landlord-tenant law require tenants to live in the same building.

<sup>131</sup> There are two types of tenant-initiated proceedings under landlord-tenant law: HP actions, brought pursuant to the Housing Maintenance Code, N.Y.C. ADMIN. CODE § 27-2115, and 7a proceedings, brought pursuant to N.Y. REAL PROP. ACTS. LAW § 770(1). Both allow for multi-tenant proceedings, but tenants must all reside in the same property.

<sup>132</sup> See Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 229 (2014).

<sup>133</sup> An example of the use of consumer protection law in the tenant organizing context occurred in the case of *Aguaiza v. Vantage*, where a group of tenants, living in separate buildings, sued their private equity landlord on the basis of its deceptive business practices. See *Aguaiza v. Vantage Props., L.L.C.*, 69 A.D.3d 422 (1st Dep't 2010); see also Gretchen Morgenson, *Questions of Rent Tactics by Private Equity*, N.Y. TIMES (May 9, 2008), <http://www.nytimes.com/2008/05/09/business/09rent.html> [<https://perma.cc/3WA9-5BDV>].

<sup>134</sup> Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 77-81 (1995).

policy reform efforts.<sup>135</sup> This will entail partnering with RTC organizations that are advocating for policies—for example, stronger rent stabilization protections—that attack displacement by privileging the use value of urban space over its exchange value. It is worth noting here that attempts to fortify the rent stabilization laws would run directly up against the Urstadt Law, referenced in Part IIA *supra*, which removed the City's home rule over its supply of rent-regulated housing. For this reason, another possible, longer-term RTC reform is the repeal of Urstadt so as to return local control of rent-stabilization to City residents. Going forward, TLOP should also engage with progressive community planning efforts that seek to achieve equality, social inclusion, and environmental justice.<sup>136</sup> As with the advocacy efforts undertaken by TLOP in its first edition, law and policy reform work would be contingent upon—and driven by—the organizing priorities of grassroots, partner organizations whose memberships bear the brunt of a mode of urbanization that has benefited the few at the expense of the many.

In terms of the impact of a built-out TLOP on the professional and educational development of its student participants, the latter would work in—and be exposed to—multiple legal areas, which would be articulated together by a commitment to challenging the underlying structural causes of urban inequality and market-driven displacement. The policy and law reform aspects of TLOP would offer students not only hands-on experience with researching, envisioning, and drafting legislation, but also a view of the law as dynamic and subject to change. And, as described in Part IIIB *supra*, TLOP's continued affirmative group litigation work would afford students valuable experience collaborating with partner organizations and helping clients resolve concrete, often critical legal issues in a law and organizing context.

#### CONCLUSION

This article has been an attempt to envision an anti-displacement law clinic that combines frameworks of law and organizing and a critical approach to neoliberal urbanization. My hope is that such a clinic can win concrete gains for tenants, train law students in the complexities of representing poor and subordinated clients

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<sup>135</sup> In its first year, TLOP provided limited assistance—in the form of submitting administrative complaints on behalf of tenants being charged questionable rent increases—to a community organization that was working to strengthen rent-stabilization protections. This was not a significant aspect of the Project's work, which is why it is not detailed in this article.

<sup>136</sup> See ANGOTTI, *supra* note 2, at 8.

through close collaborations with partner organizations, and, ultimately, contribute to the creation of more equitable, diverse, and democratic cities.



**PARADOXES OF SOVEREIGNTY AND  
CITIZENSHIP: HUMANITARIAN INTERVENTION  
AT HOME**

*Hawa K. Allan*†

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## INTRODUCTION

“If I invoked the Insurrection Act against her wishes, the world would see a male Republican president usurping the authority of a female Democratic governor by declaring an insurrection in a largely African American city. That would arouse controversy anywhere. To do so in the Deep South, where there had been centuries of states’ rights tension, could unleash holy hell.”

—George W. Bush, *Decision Points*<sup>1</sup>

“George Bush doesn’t care about Black people.”

—Kanye West<sup>2</sup>

“I am deeply insulted by the suggestion that we allowed American citizens to suffer because they were black. As I told the press at the time, ‘The storm didn’t discriminate, and neither will the recovery effort. When those Coast Guard choppers, many of whom were first on the scene, were pulling people off roofs, they didn’t check the color of a person’s skin.’”

—George W. Bush, *Decision Points*<sup>3</sup>

“. . . and the fiction of the facts assumes randomness and indeterminacy.”

—Claudia Rankine, *Citizen*<sup>4</sup>

In the days after Hurricane Katrina breached critical levees and submerged most of New Orleans under water, news reporters

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<sup>1</sup> GEORGE W. BUSH, *DECISION POINTS* 321 (2010).

<sup>2</sup> See, e.g., Lisa de Moraes, *Kanye West’s Torrent of Criticism, Live on NBC*, WASH. POST (Sept. 3, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html> [<https://perma.cc/Z46B-QUKQ>] (“West: I hate the way they portray us in the media. You see a Black family, it says, ‘They’re looting.’ You see a white family, it says, ‘They’re looking for food.’ And, you know, it’s been five days [waiting for federal help] because most of the people are Black. And even for me to complain about it, I would be a hypocrite because I’ve tried to turn away from the TV because it’s too hard to watch. I’ve even been shopping before even giving a donation, so now I’m calling my business manager right now to see what is the biggest amount I can give, and just to imagine if I was down there, and those are my people down there. So anybody out there that wants to do anything that we can help — with the way America is set up to help the poor, the Black people, the less well-off, as slow as possible. I mean, the Red Cross is doing everything they can. We already realize a lot of people that could help are at war right now, fighting another way — and they’ve given them permission to go down and shoot us! . . . George Bush doesn’t care about Black people!”).

<sup>3</sup> BUSH, *supra* note 1, at 325.

<sup>4</sup> CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* 85 (2014).

referred to the city as a “third world country”<sup>5</sup> and to its mostly-Black residents stranded in attics and other makeshift shelters as “refugees.”<sup>6</sup> Commentators condemned these labels, which they said betrayed a persistent perception of Black citizens as foreigners in their own country.<sup>7</sup> While corrective monikers surfaced—such as *internally displaced persons*, a term for persons dislocated within their country by, say, civil war or natural disaster<sup>8</sup>—newscasters posed more troubling questions, their cameras rolling at home and minds wandering abroad. “Why no massive airdrop of food and water?”<sup>9</sup> CNN news anchor Soledad O’Brien asked on a broadcast aired five days after the hurricane hit. “In Banda Aceh, in Indonesia, they got food dropped two days after the tsunami struck.”<sup>10</sup>

The above anecdotes raise questions that are this article’s point of departure and site of eventual return. How does one reconcile the swift federal response to a “third world country” abroad relative to the “third world country” at home? Does this Freudian slip, the rhetorical stripping of Black citizenship, bear any rele-

<sup>5</sup> See, e.g., David Carr, *The Pendulum of Reporting on Katrina*, N.Y. TIMES, (Sept. 5, 2005), <http://www.nytimes.com/2005/09/05/business/media/the-pendulum-of-reporting-on-katrina.html> [https://perma.cc/D57W-HQZM] (“It was left to reporters embedded in the mayhem to let Americans know that a third world country had suddenly appeared on the Gulf Coast.”).

<sup>6</sup> See, e.g., Joseph B. Treaster & Deborah Sontag, *Local Officials Criticize Federal Government Over Response*, N.Y. TIMES (Sept. 2, 2005), <http://www.nytimes.com/2005/09/02/us/nationalspecial/local-officials-criticize-federal-government-over.html> [https://perma.cc/2QP3-7B96] (“Thousands of refugees from Hurricane Katrina boarded buses for Houston, but others quickly took their places at the filthy, teeming Superdome, which has been serving as the primary shelter.”).

<sup>7</sup> See, e.g., *Calling Katrina Survivors ‘Refugees’ Stirs Debate*, NBC NEWS (Sept. 7, 2005, 2:06 PM), [http://www.nbcnews.com/id/9232071/ns/us\\_news-katrina\\_the\\_long\\_road\\_back/t/calling-katrina-survivors-refugees-stirs-debate/](http://www.nbcnews.com/id/9232071/ns/us_news-katrina_the_long_road_back/t/calling-katrina-survivors-refugees-stirs-debate/) [https://perma.cc/RZ3F-SU69] (“Many, including The Associated Press, have used ‘refugee’ to describe those displaced by the wrath of Hurricane Katrina. But the choice has stirred anger among some readers and other critics, particularly in the black community. They have argued that ‘refugee’ implies that the displaced storm victims, many of whom have been black, are second-class citizens—or not even Americans.”); Tina Daunt & Robin Abcarian, *Survivors, Others Take Offense at Word ‘Refugees’*, L.A. TIMES (Sept. 8, 2005), <http://articles.latimes.com/2005/sep/08/entertainment/et-refugee8> [https://perma.cc/6SL8-XEYK].

<sup>8</sup> See, e.g., Francis M. Deng (Representative of the Secretary-General on Internally Displaced Persons), *Guiding Principles on Internal Displacement*, ¶ 2, U.N. Doc E/CN.4/1998/53/Add.2, annex (Feb. 11, 1998), <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx> [https://perma.cc/RP3F-Z6QF].

<sup>9</sup> See Marc Fisher, *Essential Again*, AM. JOURNALISM R., Oct.-Nov. 2005, <http://www.ajr.org/article.asp?id=3962> [https://perma.cc/A8PD-9N7B] (quoting Soledad O’Brien).

<sup>10</sup> *Id.*; see also *Transcripts: American Morning*, CNN (Sept. 2, 2005, 7:00 AM), <http://transcripts.cnn.com/TRANSCRIPTS/0509/02/1tm.01.html> [https://perma.cc/XRG8-CD8S].

vance to the delayed federal response to Hurricane Katrina? While provocative, these questions are not erudite translations of Kanye West's blunt assertion. They also do not deign to infer what lies in the hearts or minds of federal decision-makers. These questions, rather, are raised to consider the value of thinking internationally about domestic concerns – specifically, as this article will explore, to consider the federal response to crises at home in light of the conceptual framework developed to guide humanitarian intervention abroad.

Returning, for the moment, to this article's epigraph, why in response to a natural disaster had President Bush's administration considered declaring an "insurrection"? Why, given this inclination, had the presidential administration been *hesitant* to declare an "insurrection in a largely African American city"?<sup>11</sup> The source of this conundrum is the Insurrection Act of 1807:<sup>12</sup> an arcane and largely-unstudied statute that also happens to be the linchpin of iconic events that—from pro- and anti-slavery clashes of Bleeding Kansas, through public school desegregation in the South, to the Los Angeles riots—epitomize the formation and frustrations of Black citizenship in the United States. The Insurrection Act, in brief, authorizes the president to domestically deploy federal troops with law enforcement powers in the event of an "insurrection," "rebellion" or "unlawful combination."<sup>13</sup> In other words, in the event of some internal crisis or chaos or upheaval, as it were, the Insurrection Act allows the president to use federal military force to restore law and order.

While the Insurrection Act provides clear *legal authority* for the domestic deployment of federal troops to enforce the law, determining when to exercise this authority is ambiguous because, among other things, there is no definition of "insurrection" (or "rebellion" or "unlawful obstruction") in the statute.<sup>14</sup> Thus, what constitutes an "insurrection" is in the eye of the beholder – either

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<sup>11</sup> BUSH, *supra* note 1, at 321.

<sup>12</sup> Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331-335 (2006)). The Insurrection Act is part of a bundle of legislation passed over the course of a century defining the powers of the federal government to call forth state militias or deploy federal troops, colloquially referred to as the Militia Acts. *See generally* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 152-53 n.9 (2004).

<sup>13</sup> 10 U.S.C. §§ 331-333 (2006).

<sup>14</sup> There is some case law defining insurrection, however largely in the context of insurance litigation. *See, e.g.*, Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1005 (2d Cir. 1974) (stating that insurrection requires "an intent to overthrow a lawfully constituted regime").

that of the *president*, who may *unilaterally* proclaim an incident as such, or of the *state governor*, who may *request* that the president make a proclamation of “insurrection,” thereby, in either scenario, formally triggering the authorization for federal troops to be deployed with law enforcement powers.<sup>15</sup> As an “insurrection” is effectively what the executive proclaims one to be, it is difficult to *deductively* define whether a given incident warrants such a proclamation. Thus, the term lends itself to being defined *inductively*—that is, by reference to a survey of past incidents that have been proclaimed as such.

As will be discussed in this article, the Insurrection Act is a recurring facet of the history of civil rights in the United States—generally, in scenarios where the federal government has militarily intervened to enforce the civil rights of Black Americans and/or to suppress “race riots.” Bleeding Kansas, public school desegregation, and the Los Angeles riots, noted above, are merely three examples. Under the Insurrection Act, federal military intervention was also authorized, for example: during Radical Reconstruction; to enforce the rights of civil rights protesters to march from Selma to Montgomery; and, further, to suppress riots that erupted in Detroit during 1947 and 1963; as well as to put down civil unrest in the wake of Martin Luther King, Jr.’s assassination in Baltimore and Washington D.C.

Past invocations of the Insurrection Act, then, reflect a historical tension over the legitimacy of federal intervention in state affairs where Black citizens are concerned. An overview of the above incidents reveals that the Insurrection Act has generally been invoked *unilaterally* by the President to enforce civil rights (violated by state actors), or *by request* of the state governor in order to suppress “race riots” (engaged in by non-state actors)—with intervention in the former instances deemed *more* politically fraught insofar as state officials considered it an *illegitimate* intrusion upon sovereignty,<sup>16</sup> and in the latter cases—while *less* politically fraught insofar as federal military intervention was requested by state officials—still nonetheless the subject of controversy.

Accordingly, in the case of Hurricane Katrina, the proposed invocation of “insurrection” was controversial in light of the state

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<sup>15</sup> See *infra* Section I.A.2. on the Insurrection Act; see also Timothy E. Steigelman, Note, *New Model for Disaster Relief: A Solution to the Posse Comitatus Conundrum*, 57 NAVAL L. REV. 105, 113-16 (2009).

<sup>16</sup> See *infra* Section I.B. on Just Cause.

governor's objection to federal law enforcement.<sup>17</sup> President Bush was reportedly concerned over media reports of looting and violence in New Orleans, and therefore did not want to deploy a requested 40,000 federal troops to Louisiana without law enforcement powers provided under invocation of the Insurrection Act<sup>18</sup>—*i.e.*, without the authority to, among other things, search suspects, seize evidence, make arrests, and, more generally, use force.<sup>19</sup> Then-Louisiana Governor Kathleen Blanco, for her part, objected to the proposed invocation of the Insurrection Act.<sup>20</sup> Instead, she contended that the president authorize the deployment of the requested troops and other assistance solely in accordance with an act that had already been triggered<sup>21</sup>—the Robert T. Stafford Disaster Relief and Emergency Assistance Act.<sup>22</sup> The Staf-

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<sup>17</sup> See, e.g., Manuel Roig-Franzia & Spencer Hsu, *Many Evacuated, but Thousands Still Waiting*, WASH. POST (Sept. 4, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301680\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301680_pf.html) [<https://perma.cc/Z8KU-W5P4>] (“Behind the scenes, a power struggle emerged, as federal officials tried to wrest authority from Louisiana Gov. Kathleen Babineaux Blanco (D). Shortly before midnight Friday, the Bush administration sent her a proposed legal memorandum asking her to request a federal takeover of the evacuation of New Orleans, a source within the state’s emergency operations center said Saturday. The administration sought unified control over all local police and state National Guard units reporting to the governor. Louisiana officials rejected the request after talks throughout the night, concerned that such a move would be comparable to a federal declaration of martial law.”).

<sup>18</sup> See, e.g., Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES (Sept. 9, 2005), <http://www.nytimes.com/2005/09/09/us/nationalspecial/political-issues-snarled-plans-for-troop-aid.html> [<https://perma.cc/2HST-WYZV>].

<sup>19</sup> *Id.* (“To seize control of the mission, Mr. Bush would have had to invoke the Insurrection Act, which allows the president in times of unrest to command active-duty forces into the states to perform law enforcement duties.”).

<sup>20</sup> Spencer S. Hsu et al., *Documents Highlight Bush-Blanco Standoff*, WASH. POST (Dec. 5, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400963\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400963_pf.html) [<https://perma.cc/BTV8-Y7WA>] (“Blanco’s reluctance stemmed from several factors. According to documents and aides, her team was not familiar with relevant laws and procedures, believed the change would have disrupted Guard law enforcement operations in New Orleans and mistrusted the Bush team, which they saw as preoccupied with its own public relations problems and blame shifting.”).

<sup>21</sup> Letter from Kathleen Babineaux Blanco, Governor, La., to George W. Bush, President, U.S. (Aug. 27, 2005), <http://blancogovernor.com/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=778&navID=3> [<https://perma.cc/A7S8-D5SF>]; see also *Blanco’s State of Emergency Letter to President Bush*, TIMES-PICTAYUNE (Aug. 27, 2005, 12:00 PM), [http://www.nola.com/katrina/index.ssf/2005/08/blancos\\_state\\_of\\_emergency\\_letter\\_to\\_president\\_bush.html](http://www.nola.com/katrina/index.ssf/2005/08/blancos_state_of_emergency_letter_to_president_bush.html) [<https://perma.cc/7GQS-3FWC>].

<sup>22</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (current version at 42 U.S.C. §§ 5121-5191). The Stafford Act is the statutory authority for most federal disaster response activities, especially with regard to FEMA and FEMA programs. The Stafford Act was originally signed into law on November 23, 1988 as an amendment to the Disaster Relief Act of

ford Act is generally applied to coordinate the federal response to natural disasters such as hurricanes, floods and brush fires, (although it can also be applied to respond to “man-made disasters,” as defined therein). Moreover, and importantly, the Stafford Act does *not* authorize any federal troops deployed thereunder to enforce the law. Thus, a dispatch of federal troops consistent with the Stafford Act would allow Blanco, as governor, to retain control over the police powers of the state. A deployment of requested federal troops under the Insurrection Act, by contrast, would have both conferred such troops with law enforcement authority and stripped the governor of her role as ultimate commander-in-chief of the National Guard, which would have been federalized under executive command. In the end, the Louisiana governor prevailed in the federalism dispute, and the requested additional troops were deployed five days after the hurricane hit landfall<sup>23</sup>—well into the televised crisis in New Orleans.

In the end, as will become clear by international analogy, the president’s proposed invocation of the Insurrection Act was more akin to contemplated *humanitarian intervention*—in one sense, military action taken against an insurgency that gravely endangers the rights and lives of civilians—than *humanitarian aid*—the provision of emergency relief to help rescue and shelter civilians amid a disaster. Indeed, akin to the ostensible purpose of humanitarian intervention, the Insurrection Act has been invoked, on the one hand, to enforce the fundamental rights of persons persecuted by a given state (or whom such state is unable or unwilling to protect from persecution), and, on the other, to enforce the law amid a total breakdown of order—in other words, to enforce civil rights or to suppress race riots. In light of this analogy, the president’s hesitancy to deploy federal troops to Louisiana under the Insurrection Act is analogous to the formal inhibitions to engage in humanitarian intervention abroad. The contemplated proclamation of “insurrection” at home, then, is more analogous to the decision whether to restore law and order (and thereby save lives) in, say,

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1974, Pub. L. No. 93-288, 88 Stat. 143. The most recent reauthorization happened in 2013. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 113-2, 127 Stat. 4.

<sup>23</sup> STEVE BOWMAN ET AL., CONG. RESEARCH SERV., HURRICANE KATRINA: DOD DISASTER RESPONSE 1 (2005), <https://fas.org/sgp/crs/natsec/RL33095.pdf> [<https://perma.cc/4VYJ-FSX4>] (“The Department of Defense’s Northern Command began its alert and coordination procedures before Katrina’s landfall, however many deployments did not reach the affected area until days after.”).

Somalia in the early 1990s,<sup>24</sup> than the decision to help provide aid and shelter to tsunami victims in Indonesia.<sup>25</sup>

Following the international analogy to its conclusion—namely, the paradox of sovereignty and citizenship—this article reconsiders the Katrina crisis and other federal military interventions at home in light of the pre-existing analytical framework of “just war” theory. In other words, this article applies the conceptual framework developed to guide humanitarian intervention abroad—*i.e.*, questions of *legality*, *necessity*, and *purpose*—to the federal response to Hurricane Katrina and other “crises” at home. Though immediately counterintuitive, the conceptual framework is useful for considering—both retrospectively and prospectively—domestic federal military intervention. This framework not only sheds new light on familiar historical events, but also can be a useful aid in the decision-making process regarding future domestic deployments of federal troops.

As discussed in Part I, similar questions of legality, necessity, and purpose—or, in “just war” parlance, *legal authority*, *just cause*, and *right intention*—arise domestically that can be clarified by reference to the international context. Further, in distinguishing humanitarian intervention—*i.e.*, the use of military force to enforce fundamental rights and/or law and order—from humanitarian aid—*i.e.*, the non-combative extension of emergency relief to save lives—this article considers how the interpretation of a given crisis at the executive level can influence the nature of federal response. Accordingly, the following question is presented in Part I: when is domestic federal intervention framed as humanitarian intervention versus humanitarian aid? Moreover, in considering the purpose (or intention) of federal military intervention, Part I of this article examines the potential for selective enforcement where domestic humanitarian intervention and aid are concerned.

As discussed in Part II of this article, an overview of domestic federal military intervention in light of “just war” theory uncovers two paradoxes—one of *sovereignty* and another of *citizenship*. As for sovereignty, while it would appear that federal military infringement upon the sovereignty of the several states during a crisis should be relatively uncontroversial given the clear legal authority

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<sup>24</sup> See, e.g., *Somalia, 1992-1993*, U.S. DEP'T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/somalia> [<https://perma.cc/4WFX-PXS9>].

<sup>25</sup> See, e.g., *Tsunami Aid: Who's Giving What*, BBC NEWS (Jan. 27, 2005, 8:40 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/4145259.stm> [<https://perma.cc/4EBQ-K9L5>] (“Washington also sent military assistance involving 12,600 personnel, 21 ships, 14 cargo planes and more than 90 helicopters.”).

to do so, the potential political fallout of doing such renders the sovereignty of the states far less permeable than would be imagined—perhaps akin to that of a foreign state. As to citizenship, while the federal government’s responsibility to protect all citizens within United States borders is unequivocal and expected to be fulfilled uniformly, an overview of the nature of federal military intervention in response to a given domestic crisis raises the question whether, where Black citizens have been concerned, the primary intention to restore law and order has trumped any intention to save lives.

### I. HUMANITARIAN INTERVENTION AT HOME

Though a single definition of “humanitarian intervention” has not emerged, the term is generally understood to refer to the use or threat of use of *military force* by one or more states within another state for ostensibly humanitarian purposes.<sup>26</sup> Humanitarian intervention is at times construed to encompass the provision of *emergency relief* by one or more states to another in order to help rescue and shelter civilians amid a disaster—a relatively uncontroversial activity referred to herein as humanitarian aid.<sup>27</sup> Indeed, U.S. provision of emergency aid to Indonesia in the wake of the tsunami is an example of such aid.<sup>28</sup> Used here, and as illustrated in the table below, “humanitarian intervention” describes a relatively controversial activity; it refers to the military intervention of one or more states into another (1) for the ostensible purpose of

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<sup>26</sup> See, e.g., Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 107 n.2 (2006), <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanHumanitarianInterventionPretextsforWar.pdf> [<https://perma.cc/95TB-8TST>] (“A conventional definition of ‘humanitarian intervention’ is ‘the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.’” (quoting SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11-12 (1996))).

<sup>27</sup> See, e.g., Kate Mackintosh, *Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and Their Staff in International Humanitarian Law*, in INTERNATIONAL LAW AND HUMANITARIAN ASSISTANCE: A CROSSCUT THROUGH LEGAL ISSUES PERTAINING TO HUMANITARIANISM 33, 36 (Hans-Joachim Heintze & Andrej Zwitter eds., 2011); *Deliver Humanitarian Aid*, UNITED NATIONS, <http://www.un.org/en/sections/what-we-do/deliver-humanitarian-aid/index.html> [<https://perma.cc/F8KT-RCHW>].

<sup>28</sup> Press Release, Office of the Press Sec’y, White House of President George W. Bush, Fact Sheet: Continuing Report for Tsunami Relief (Feb. 9, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050209-20.html> [<https://perma.cc/DYW5-WRAU>] (“The Defense Department has been providing vital supplies and logistics to the humanitarian effort since December 30.”).

enforcing the human rights of persons persecuted by the target state or whom the target state is unable or unwilling to protect from persecution by some third party, or, further, (2) amid a total breakdown of law and order. Prior to the events of September 11, 2001, examples of such interventions made by the United States through the North Atlantic Treaty Organization (“NATO”) or otherwise include those in Bosnia, Kosovo, and Somalia;<sup>29</sup> moreover, an example of a situation that, in hindsight, has been deemed to warrant such intervention is the genocide in Rwanda.<sup>30</sup>

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<sup>29</sup> See generally *The Evolution of NATO, 1988-2001*, U.S. DEP’T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/evolution-of-nato> [<https://perma.cc/D3MU-YFZU>]; see also *The War in Bosnia, 1992-1995*, U.S. DEP’T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/bosnia> [<https://perma.cc/Z2M7-HGVK>]; *Somalia, 1992-1993*, U.S. DEP’T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/somalia> [<https://perma.cc/J445-Z9N6>]; *Peace Support Operations in Bosnia and Herzegovina*, NATO (Sept. 7, 2015, 2:52 PM), [http://www.nato.int/cps/en/natohq/topics\\_52122.htm](http://www.nato.int/cps/en/natohq/topics_52122.htm) [<https://perma.cc/772M-DPCD>]; *NATO’s Role in Kosovo*, NATO (Sept. 6, 2016, 12:23 PM), [http://www.nato.int/cps/en/natohq/topics\\_48818.htm](http://www.nato.int/cps/en/natohq/topics_48818.htm) [<https://perma.cc/Q2GK-2L62>].

<sup>30</sup> See, e.g., ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* 109 (2001) (“A realistic U.S. military intervention launched as soon as President Clinton could have determined that genocide was being attempted in Rwanda would not have averted the genocide. It could, however, have saved an estimated 75,000 to 125,000 Tutsi from death, about 15 to 25 percent of those who ultimately lost their lives, in addition to tens of thousands of Hutu.”); Scott R. Feil, *Could 5,000 Peacekeepers Have Saved 500,000 Rwandans?: Early Intervention Reconsidered*, ISD REP., April 1997, at 1, 1-5, [https://isd.georgetown.edu/sites/isd/files/ISDreport\\_Could\\_5000\\_Feil.pdf](https://isd.georgetown.edu/sites/isd/files/ISDreport_Could_5000_Feil.pdf) [<https://perma.cc/6QLB-PAYW>]; *Ghosts of Rwanda: America’s Response to the Genocide*, PBS.ORG: FRONTLINE (Apr. 1, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/themes/response.html> [<https://perma.cc/KEC4-G9JJ>]. For more background on the institutional failures that prevented intervention in the Rwandan Genocide, see Matthew Levinger, *Why the U.S. Government Failed to Anticipate the Rwandan Genocide of 1994: Lessons for Early Warning and Prevention*, 9 GENOCIDE STUD. & PREVENTION, no. 3, 2016, at 33, <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1362&context=gsp> [<https://perma.cc/Z99K-D35R>].

TABLE 1.1 DOMESTIC ANALOGIES TO HUMANITARIAN INTERVENTION &amp; AID

International Intervention	Domestic Federal Intervention	Purpose of Intervention
Humanitarian Intervention	Insurrection Act	Use of Military Force in Order to Enforce Fundamental Rights and/or Restore Law and Order
Humanitarian Aid	Stafford Act	Extension of Emergency Relief in Order to Save Lives and Alleviate Suffering

Legal scholars, moral philosophers, as well as both crafters and critics of U.S. foreign policy have long theorized about and debated the legitimacy of humanitarian intervention in the international context.<sup>31</sup> The *legitimacy* of such intervention has been at issue in light of the general *non-intervention principle*—whereby the sovereignty of a given state is inviolable absent certain *exceptional* circumstances.<sup>32</sup> While legal scholars of humanitarian intervention have predominantly considered the requisite exceptional authority of a given state to infringe upon the sovereignty of another state, under the UN Charter and otherwise,<sup>33</sup> moral philosophers have attempted to establish criteria for determining those instances where humanitarian concerns trump the integrity of state sovereignty.<sup>34</sup> Furthermore, moral philosophers, as well as commentators on U.S. foreign policy, have contemplated the purity of

<sup>31</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 703 cmt. e, 905 (AM. LAW INST. 1987); Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, ETHICS & INT'L AFFAIRS, October 1, 2005, at 31, 50-54, <http://teachers.colonelby.com/krichardson/Grade%2012/Carleton%20-%20Int%20Law%20Course/Week%207/R2P%20or%20Trojan.pdf> [<https://perma.cc/SR4F-KPDX>]; Goodman, *supra* note 26; Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Rachel VanLandingham, *Politics or Law? The Dual Nature of the Responsibility to Protect*, 41 DENV. J. INT'L L. & POL'Y 63 (2012); *With Good Intentions: U.S. Foreign Policy & Humanitarian Intervention*, CATO INST. (Mar. 14, 2006), <https://www.cato.org/events/good-intentions-us-foreign-policy-humanitarian-intervention> [<https://perma.cc/YWT5-5X94>].

<sup>32</sup> See, e.g., G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970), <http://www.un-documents.net/a25r2625.htm> [<https://perma.cc/63FM-T6L3>].

<sup>33</sup> See, e.g., MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 61 (1977).

<sup>34</sup> *Id.* at 107-08.

motives guiding humanitarian intervention. The former have elaborated, among the established moral criteria for such intervention, that intervening states use military force – in all instances warranting such – for purely humanitarian purposes;<sup>35</sup> the latter have relied on empirical analyses to point out that, in practice, such intervention has been selectively conducted by states pursuing interests that are not solely humanitarian in nature.<sup>36</sup> In sum, and borrowing terminology also used in “just war” theory, domestic federal military intervention has largely considered questions of (1) legality, or proper (*i.e.*, legal) authority to intervene; (2) necessity, or whether the relevant incident constitutes a just cause warranting intervention; and, (3) purpose, that is, independent of the stated cause or goal of a given intervention, whether the intervention is made with the right intention.<sup>37</sup>

As an initial matter, principles developed to guide humanitarian intervention abroad are instructive at home insofar as they contextualize and assist an analysis of the *decision-making process* entailed in authorizing domestic federal military intervention. Taking the delayed federal response to Hurricane Katrina as a key example and cautionary tale, it will become clear that decisions made at the executive level as to whether to invoke the Insurrection Act—*i.e.*, engage in humanitarian intervention at home—are not only influenced by the same kind of concerns that arise when contemplating humanitarian intervention abroad, but can also hinder or distort the federal response to domestic disaster. As summarized in the table below, this conceptual framework—questions of legal authority, just cause, and right intention—is applied in Part I to reconsider domestic federal military intervention. This conceptual exercise will elaborate on federal military intervention in *theory* and *practice*. The *theory*, as will be discussed in subsection A.1., is grounded in *legal authority*—that is, the legal framework authorizing domestic federal military intervention in the exceptional event of an “insurrection.” The consideration of *practice* as discussed in subsections A.2. and A.3., will be illustrated by each of those incidents deemed to warrant a *just cause*—*i.e.*, events deemed to be “insurrections”—and by a consideration of *right intention*—*i.e.*, the disparate purposes of “crisis” response set forth in the Insurrection

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<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g., id.* at 102-03.

<sup>37</sup> For an overview of the definitional components of “just war” – and in particular, *jus ad bellum*, which refers to the theory of justification for initiating a war – see *War*, STAN. ENCYCLOPEDIA PHIL. (May 3, 2016), <https://plato.stanford.edu/entries/war/#JusAdBell> [<https://perma.cc/T25A-UV3J>].

and Stafford Acts, respectively, and the possibility of selective enforcement as to which legislation is applied to respond to a given event. This analysis will ultimately show how the legal framework governing domestic federal military intervention betrays the fraught relation between race and state sovereignty, and, further, raises questions of disparate responses to disaster as to different subsets of citizens. In other words, this exercise will summarily reveal paradoxes of sovereignty and citizenship.

TABLE 1.2 DOMESTIC APPLICATION OF CONCEPTUAL FRAMEWORK

Conceptual Framework	Humanitarian Intervention Abroad	Humanitarian Intervention at Home
Non-Intervention Principle	General Inviolability of State Sovereignty	General Inviolability of the Sovereignty of the Several States as to Implied Police Powers
Legal Authority	UN Charter, Chapter VII	Insurrection Act (and Article IV, Sections 2 & 4, Article I, Section 8, and Article II, Section 2 of the Constitution)
Just Cause	Grave Violation of Human Rights by State Actors, or by Non-State Actors that Overwhelms Capacity of State to Respond	Violation of Constitutional Rights by State Actors, or by Non-State Actors that Overwhelms the Capacity of any of the Several States to Respond
Right Intention	Theoretical: Solely Humanitarian Purposes Empirical Trend: State-Sponsored Human Rights Violation; Insurgency by Non-State Actors that causes Human Rights Violations	Theoretical: Solely Humanitarian Purposes Empirical Trend: State-Sponsored Civil Rights Violations; 'Race Riots' Engaged in by Non-State Actors

#### A. *Legal Authority*

The conceptual exercise employed in this article—considering federal military intervention at home in light of the analysis developed to guide humanitarian intervention abroad – could appear

incongruous where legal authority is concerned. Indeed, as discussed further, while the legal authority of one state to militarily intervene in the affairs of another state is equivocal, the same authority domestically, by contrast, is unequivocal. The “non-intervention” principle in the international context establishes a high threshold for one state to violate the sovereignty of another—a threshold that is not only politically fraught but also legally vague.<sup>38</sup> However, as will become clear, there is an analogous “non-intervention” principle in effect in the U.S. federalist system of government, which renders federal military intervention politically fraught regardless of the unambiguous legal authorization of the executive to engage in it.

In the international context, the UN Charter is the primary source of the legal authority of one or more member states to engage in humanitarian intervention.<sup>39</sup> However, such authority is established in the Charter as an exception to a general rule that prohibits a given state from intervening in the internal affairs of another. Specifically, the UN Charter sets forth a “non-intervention principle” enshrining the sanctity of state sovereignty, stating in Article 2(7) that “nothing . . . shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>40</sup> Member states, accordingly, must not violate the territorial integrity of another state except for reasons of self-defense or, arguably, to maintain international peace and security.<sup>41</sup> While some scholars have cited other sources of international law that legally authorize humanitarian intervention<sup>42</sup>—including, for example, the obligation to prevent and punish genocide under the Genocide Convention<sup>43</sup>—it is clear that any incidents internal to a given state that legally warrant intervention constitute exceptions to the general rule to respect state sovereignty.

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<sup>38</sup> See generally Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 232, 242 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

<sup>39</sup> Compare U.N. Charter arts. 41-42 with U.N. Charter art. 2, ¶¶ 4, 7.

<sup>40</sup> U.N. Charter art. 2, ¶ 7.

<sup>41</sup> U.N. Charter art. 2, ¶ 4.

<sup>42</sup> See, e.g., Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 2002 FINNISH Y.B. INT'L L. 141, [http://eprints.lse.ac.uk/21492/1/Humanitarian\\_intervention\\_the\\_case\\_of\\_Kosovo\(LSERO\).pdf](http://eprints.lse.ac.uk/21492/1/Humanitarian_intervention_the_case_of_Kosovo(LSERO).pdf) [<https://perma.cc/3NYB-8BXF>].

<sup>43</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> [<https://perma.cc/5YBW-KF4S>].

Again, similar quandaries of legal authority may not be immediately thought to occur domestically. For one, the responsibility of the U.S. government to protect non-citizens abroad is of dubious legal certainty and politically fraught;<sup>44</sup> by contrast, the same obligation at home is legally unequivocal and, moreover, presumably politically uncontroversial. However, upon further reflection, it is clear that the degree of autonomy reserved to the several states in the federalist system of U.S. government is a domestic analogue to the sanctity of state sovereignty enshrined in the U.N. Charter.

Indeed, federalism entails a separation of powers between the federal and state governments—the latter of which are entitled to a degree of autonomy, (or, as popularly termed, “states’ rights”), that is analogous to the international concept of “state sovereignty.” Certainly, there are instances in which federal and state governments have overlapping powers; however, key to a consideration of humanitarian intervention at home is the constitutional delegation of police powers to the several states, (subject, of course, to specified exceptions).

The constitutional and legislative manifestations of the “non-intervention principle,” as well as codified exceptions to this principle, are discussed in this section. First, this section gives an overview of the limits on the domestic deployment of federal troops enumerated in the U.S. Constitution, including a brief discussion of anxieties documented in *The Federalist Papers*<sup>45</sup> about the threat of establishing a federal military force. Next, this section discusses the Posse Comitatus Act of 1878,<sup>46</sup> post-Civil-War legislation that generally prohibits the domestic deployment of federal troops to enforce the law. Further, this section discusses a relevant exception to the Posse Comitatus Act—the Insurrection Act, which is the domestic analogue to legally authorized humanitarian intervention. Finally, this section discusses the Stafford Act, which is legislation that authorizes the federal administration of humanitarian aid to the several states.

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<sup>44</sup> Compare MADELEINE K. ALBRIGHT & RICHARD S. WILLIAMSON, *THE UNITED STATES AND R2P: FROM WORDS TO ACTION* (2013), <https://www.ushmm.org/m/img/20130613-The-United-States-and-R2P.pdf> [<https://perma.cc/8S9W-PLMH>], with STEVEN GROVES, *THE HERITAGE FOUND.*, *THE U.S. SHOULD REJECT THE U.N. “RESPONSIBILITY TO PROTECT” DOCTRINE*, (2008), <http://www.heritage.org/research/reports/2008/05/the-us-should-reject-the-un-responsibility-to-protect-doctrine> [<https://perma.cc/3UHV-SYTH>].

<sup>45</sup> *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961).

<sup>46</sup> Posse Comitatus Act of 1878, ch. 263, § 15, 20 Stat. 145, 152 (current version at 18 U.S.C. § 1385 (1994)).

### 1. “Non-Intervention” Principle

Analogous to the non-intervention principle in the international context, the Constitution, as a general rule, reserves to the several states the power to enforce the law within their respective territories. The Tenth Amendment reserves to the several states, or to the people, any powers not expressly granted to the federal government or not otherwise prohibited by the Constitution—including implied police powers.<sup>47</sup> The implied police powers of the state have been construed as those exercised to promote and maintain the health, safety, morals, and general welfare of the public—powers which are understood to authorize each of the several states to enforce law and order within their territories. The laws of the several states, moreover, are fairly uniform in establishing the governor, chief executive of the state, as commander-in-chief of the state militia—which, in modern day, has been formally reconstituted as the National Guard.<sup>48</sup>

The Constitution, however, also establishes a framework for the federal exercise of police power in exceptional circumstances. Article IV, Section 4 of the Constitution guaranteeing a republican form of government may be interpreted to authorize the domestic deployment of federal troops in furtherance of such guarantee;<sup>49</sup> further, Article IV, Section 4 regarding the federal obligation to protect the several states from domestic violence may be interpreted to authorize the same.<sup>50</sup> As for the federal government’s exceptional authorization to commandeer *state* military forces, Article I, Section 8, Clause 15 of the Constitution authorizes Congress to *call forth* the state militia to execute the laws of the union—*i.e.*, federal law—to suppress insurrections and repel invasions.<sup>51</sup> Further, under Article II, Section 2, Clause 1 the president is the commander-in-chief of the U.S. army and navy, as well as of the militia of the several states *when called into the actual service of* the federal government.<sup>52</sup> In tandem, these provisions allow for state militia, when called forth by Congress, to be federalized under presidential command. In other words, the president is authorized to federalize, and thereby usurp, a state governor’s command over state mili-

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<sup>47</sup> U.S. CONST. amend. X.

<sup>48</sup> 53 AM. JUR. 2D *Military & Civil Defense* § 30 (2017).

<sup>49</sup> U.S. CONST. art. IV, § 4.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* art. I, § 8, cl. 15.

<sup>52</sup> *Id.* art. II, § 2, cl. 1.

tia—as presently constituted, the National Guard—and, further, deploy such troops domestically in order to enforce the law.

As discussed in this subsection, Congress delegated to the president its authority to call forth the state militia to enforce the law in, among other legislation, the Insurrection Act and related statutes collectively referred to as the Militia Acts.<sup>53</sup> Before elaborating on the legislative authority for the president to use federal (and in the case of the state militia, federalized) military force domestically, it is useful to briefly consider the general constitutional rule and its exceptions in light of initial concerns over the establishment of a federal military documented in *The Federalist Papers*<sup>54</sup>—namely, anxieties over the threat of standing armies and the potential abuse of federal power.

a. *The Federalist Papers*

*The Federalist Papers*<sup>55</sup> set forth the theoretical underpinning for the domestic non-intervention principle, namely anti-federalist fears about the potential use of the federal military to subjugate the peoples of the several states. In allaying such fears, federalists—Alexander Hamilton and James Madison, in particular—minimized the perceived threat posed by a federal military, whose domestic deployment they presumed would be limited to protecting the republic from invasion and suppressing any insurrections in one or more of the several states.<sup>56</sup> Moreover, they extolled the potency of the state militia, which they contended would be sufficiently robust to combat any abuse of federal military power.<sup>57</sup>

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<sup>53</sup> See, e.g., Vladeck, *supra* note 12, at 152-53 n.9 (“The five statutes are the Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795); the Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331-335 (2000)); the Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331-335 (2000)); the Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (current version at 10 U.S.C. §§ 331-335 (2000)); and specific parts of the Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3-4, 17 Stat. 13, 14-15 (expired in part 1873 and current version at 10 U.S.C. § 333).”). *Id.* at 159-67.

<sup>54</sup> THE FEDERALIST PAPERS, *supra* note 45.

<sup>55</sup> *Id.*

<sup>56</sup> See THE FEDERALIST NO. 29 (Alexander Hamilton), No. 46 (James Madison).

<sup>57</sup> It is worth noting, here, an analogy to the international context – namely, early discussions over the contemplated authority of the UN Security Council to use military force in order to “maintain or restore international peace and security.” U.N. Charter art. 39. Similar to the adjudged weakness of the American confederation of sovereign states as compared to the proposed federalist system of government, founding members of the UN determined that the establishment of an armed force commandeered by the Security Council was a marked improvement over the former system under the League of Nations—which lacked its own military force and depended solely on the armed forces of state members.

Before elaborating on the non-intervention principle set forth in *The Federalist Papers* and its relation to insurrection, it is useful to first delineate the “militia,” as referenced therein and in the Constitution, from the distinct and at times encapsulating “federal military.” “Militia” is referred to in *The Federalist Paper No. 29* as the military forces of the several states subject to the direction of state officials.<sup>58</sup> Such militia, further, was to be distinct from the body of troops that would constitute the proposed federal military—*i.e.*, those bodies of armed forces including the army and the navy, among others.

*The Federalist Papers* also contemplated the role of the federal military in suppressing insurrections. As Alexander Hamilton expressed in *The Federalist Paper No. 28*, regardless of the ultimate form of government, it would be necessary to have “a force constituted differently from the militia, to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions.”<sup>59</sup> Though Hamilton contemplated that a federal military would be the force of first resort for suppressing insurrection, he also considered the deployment of state militia as a supplemental force in such a scenario: “In times of insurrection, or invasion, it would be *natural and proper* that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition.”<sup>60</sup>

Apart from the emphasized need for a federal military to suppress insurrection, the role and potency of this force was generally downplayed relative to the state militia and other armed mobilizations of peoples within the several states. James Madison, for example, attempted to dispel any concerns over the potential for the abuses of a federal military force by asserting that the state militia would be sufficiently armed and numerous to repel an army that served at the will of the federal government.<sup>61</sup> Similar assertions were made about the relative potency of state and federal military forces in discussions about the unorganized militia—*i.e.*, self-mobil-

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<sup>58</sup> THE FEDERALIST NO. 29 (Alexander Hamilton). It was proposed therein that the federal government provide for the organizing, arming, and disciplining of the militia, and for governing them when they are in federal service. However, the appointment of officers and the authority of training the militia according to a discipline prescribed by Congress would be reserved to the several states.

<sup>59</sup> THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>60</sup> THE FEDERALIST NO. 29, at 187 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

<sup>61</sup> THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

ized collectives of armed civilians. Hamilton presumed that armed state citizens who exercised “that original right of self-defense which is paramount to all positive forms of government” would be better equipped to resist the “usurpations of national rulers” than that of state representatives.<sup>62</sup> He further surmised that any collective of armed civilians would be woefully unorganized and ill-equipped to combat the unjust encroachment of state power, but not that of federal power.<sup>63</sup>

Finally, while promoting a system of military checks and balances,<sup>64</sup> it was assumed in *The Federalist Papers* that the federal government would have the authority to commandeer state militias in order to enforce the law. Hamilton rejected as “absurd”<sup>65</sup> that the president would be prohibited from calling out the *Posse Comitatus*—in Latin, ‘the power of a county’,<sup>66</sup> and, colloquially, a body of armed men summoned by a sheriff to enforce the law<sup>67</sup>—because the then-proposed Constitution did not expressly authorize such a power.<sup>68</sup> For one, Hamilton submitted that the inherent loyalty of members of the ‘militia’ to state officials would check any federal abuse of authority when the president commandeered such forces.<sup>69</sup> Further, to the extent that such a notion was considered a danger to public safety, Hamilton preemptively asked:

Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who

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<sup>62</sup> THE FEDERALIST NO. 28, at 180 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>63</sup> THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>64</sup> THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he general government [would] at all times stand ready to check the usurpations of the state governments, and these [would] have the same disposition towards the general government.”).

<sup>65</sup> THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>66</sup> See *Posse Comitatus*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/posse%20comitatus> [<https://perma.cc/774A-UNTZ>]; see also Hawa Allan, *By What Authority?*, BAFFLER (Nov. 23, 2016), <http://thebaffler.com/latest/insurrection-hawa-allan> [<https://perma.cc/AW7A-5XCZ>].

<sup>67</sup> See ERIC V. LARSON & JOHN E. PETERS, RAND CORP., PREPARING THE U.S. ARMY FOR HOMELAND SECURITY: CONCEPTS, ISSUES, AND OPTIONS 243 (2001), [https://www.rand.org/content/dam/rand/pubs/monograph\\_reports/MR1251/MR1251.AppD.pdf](https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1251/MR1251.AppD.pdf) [<https://perma.cc/5HDV-PQ83>] (quoting the Black’s Law Dictionary definition of *posse comitatus*).

<sup>68</sup> THE FEDERALIST NO. 29, at 183-84 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>69</sup> *Id.*

participate with them in the same feelings, sentiments, habits and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have *the sole and exclusive appointment of the officers*?<sup>70</sup>

b. *Posse Comitatus*

Despite Hamilton's incredulity, the Posse Comitatus Act—a legislative response to the abovementioned “shadow of danger”—was later enacted. As discussed *infra*, Posse Comitatus was passed in 1878 as a response to federal military intervention in Southern states during Reconstruction.<sup>71</sup> Specifically, Posse Comitatus codified the hitherto unwritten agreement made as part of the Compromise of 1877, which secured the election of Rutherford B. Hayes to the office of president in exchange for the removal of federal troops from former Confederate states.<sup>72</sup> In short, Posse Comitatus became the legislative manifestation of the domestic “non-intervention” principle.

The text of Posse Comitatus as currently codified is as follows:

Whoever, *except in cases and under circumstances expressly authorized by the Constitution or Act of Congress*, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>73</sup>

The precise language of Posse Comitatus renders the statute a palliative rather than a cure-all because, despite the general prohibition on the domestic deployment of federal troops to enforce the law, the statute expressly authorizes exceptions to this rule “authorized by the Constitution or Act of Congress,” which include the Insurrection Act, discussed below.<sup>74</sup>

As for the practical import of Posse Comitatus, the statute has been interpreted by federal district courts to disallow the “active” use of federal or federalized armed forces to enforce the law—prohibiting such troops from making arrests, seizing evidence, conducting searches, investigating crimes, and interviewing wit-

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<sup>70</sup> *Id.* at 186 (emphasis added).

<sup>71</sup> Posse Comitatus Act of 1878, ch. 263, § 15, 20 Stat. 145, 152 (current version at 18 U.S.C. § 1385 (1994)).

<sup>72</sup> Andrew Buttarò, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135, 136, 161 (2015).

<sup>73</sup> 18 U.S.C. § 1385 (1994) (emphasis added).

<sup>74</sup> *Id.* Other exceptions include the National Defense Authorization Act.

nesses.<sup>75</sup> However, other federal district courts have interpreted *Posse Comitatus* *not to* prohibit the “passive” engagement of federal and federalized troops in law enforcement activity—*i.e.*, the “mere presence” of such troops for reporting purposes, preparation of contingency plans, advice or recommendations given to civilian law enforcement authorities and the provision of materials or equipment to such authorities.<sup>76</sup>

It is worth noting, here, the analogous operational limitations that generally apply to the U.S. military when facilitating the provision of humanitarian aid abroad—that is, when intervening in the affairs of a sovereign state, typically by local invitation, in order to provide emergency relief in the aftermath of a disaster that overwhelms the capacity of such state to respond. In brief, the U.S. military plays a supporting role in such missions, restricted not only to complementing the activities of the United States Agency for International Development (“USAID”) and non-governmental organizations, but, further and importantly, supplementing the efforts of the civilian authorities of the state to which relief is being provided.

## 2. Insurrection Act

The Insurrection Act is among the legislative exceptions to the non-intervention principle enumerated in the Constitution and later codified in *Posse Comitatus*. The domestic analogue to an authorization of humanitarian intervention abroad, the Insurrection Act, in brief, authorizes the president to domestically deploy federal troops with law enforcement powers. As the Insurrection Act lacks any legislative history, this subsection will detail the more technical aspects of the legislation—including its antecedents and other related statutes, such as those enacted to allow for federal military intervention to suppress the Ku Klux Klan and enforce the

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<sup>75</sup> *See, e.g.*, *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975).

<sup>76</sup> This distinction between active and passive law enforcement was articulated in decisions in a number of federal cases brought by members of the American Indian Movement (AIM) who challenged the use of federal military intervention to disband their armed occupation of the village of Wounded Knee in South Dakota. In at least two such decisions, federal courts overturned the criminal convictions of AIM defendants involved in the occupation, finding that, absent any presidential proclamation authorizing such use under the Insurrection Act, they were apprehended in violation of *Posse Comitatus* with the *active* engagement of federal armed forces. *See, e.g.*, *United States v. Red Feather*, 392 F. Supp. 916, 923 (D.S.D. 1975) (“It is clear from the legislative history of 18 U.S.C. § 1385 and the above cases, the intent of Congress in enacting this statute and by using the clause ‘uses any part of the Army or the Air Force as a posse comitatus or otherwise’, was to prevent the direct active use of federal troops, one soldier or many, to execute the laws. Congress did not intend to prevent the use of Army or Air Force materiel or equipment in aid of execution of the laws.”).

Fifteenth Amendment. As this subsection will begin to demonstrate, the Insurrection Act has been a site of contention over theoretical federalist principles, and, in practice, has played a key role in federal enforcement of the civil rights of Black citizens.

The Insurrection Act is among the legislation referred to as the Militia Acts, which, among other things, collectively defined the form and function of the state militia.<sup>77</sup> With the enactment of the Militia Act of 1903 (also known as the Dick Act), the state militia was reconfigured as the modern-day National Guard.<sup>78</sup> The Dick Act established the current system of administration of state militia—*i.e.*, whereby the National Guard is a reserve force that, under a given state constitution, generally serves at the will of the state governor and, further, is subject to being ‘called forth’ into federal service by the president.

The Militia Acts also set forth the terms and conditions regarding executive authority to engage in “humanitarian intervention” in one or more of the several states. The Insurrection Act—which remains in force to date<sup>79</sup>—authorizes the president to deploy both state militia and federal armed forces to respond to specified internal disturbances. Recalling Article I, Section 8 of the Constitution, the Insurrection Act authorizes the president to call forth the militia, as well as federal armed forces, in order to suppress insurrection and/or enforce federal law.<sup>80</sup> The Insurrection Act gives the president considerable discretion to determine when a given

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<sup>77</sup> As to *form*, the first of this series of legislation, titled the 1792 Uniform National Militia Act, provided that “each and every free able-bodied white male citizen of the respective states” between the ages of 18 and 45 was enrolled in the militia, and set forth requirements for how state officials were to organize and arm its members. Militia Act of 1792, ch. 33, 1 Stat. 271, 272. This early definition was altered with subsequent legislation that shifted more control to the federal government in designating precisely how state militia was to be organized and equipped (thereby limiting discretion of state officials as to such matters), and, further, expanding the criteria for membership – including the racial desegregation of the militia in 1862. Militia Act of 1862, ch. 201, 12 Stat. 597.

<sup>78</sup> Militia Act of 1903, ch. 196, 32 Stat. 775, 775.

<sup>79</sup> 10 U.S.C. §§ 331-335 (1956).

<sup>80</sup> *Id.* § 331 (“Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.”). Ability to repel invasion is mysteriously absent in the Act, though it is likely that such authorization is inherent. *Cf.* U.S. CONST. art. I, § 8, cl. 15 (“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]”).

internal disturbance rises to the level of an “insurrection”<sup>81</sup> that warrants federal military intervention. While Section 331 of the currently-in-force Insurrection Act conditions such intervention *upon the request* of the governor or legislature of the target state, Sections 332 and 333 authorize the president to *unilaterally* deploy state and federal troops to suppress any “rebellion” or “insurrection” that impedes the execution of federal law or obstructs the execution of state law so as to deprive persons within a given state of any constitutional right, respectively. The sole condition to unilateral action, apart from the requisite presidential determination, is the proclamation of dispersal set forth in Section 334.<sup>82</sup>

The current text of the Insurrection Act reflects the state of the law after a number of limits on presidential discretion to domestically call forth the militia (and, later, federal armed forces) had been removed.<sup>83</sup> Among the remaining statutory requirements

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<sup>81</sup> Or, in addition, any instance of domestic violence or unlawful obstruction, combination, assemblage or rebellion.

<sup>82</sup> 10 U.S.C. § 334.

<sup>83</sup> See generally Vladeck, *supra* note 12, at 159-67. The Militia Act of 1792—the original predecessor of the Insurrection Act—authorized the president to call forth only the militia (and not federal armed forces) in order to suppress an insurrection upon “application of the legislator of such state” or the executive (*i.e.*, governor) of a given state if the legislature was not in session. Further, once the requisite state legislative requests (or approvals) were made, the president was authorized to commandeer both the militia of the given state as well as of any other states “as may be applied for.”

The president’s authorization to call forth the militia in order to “execute the laws of the union,” meanwhile, was subject to additional conditions under the 1792 Act. In addition to the president’s initial order that any insurgents “disperse,” such authorization was subject to notification by a Supreme Court justice or other federal judge that the laws of the union were being opposed or their execution obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.” Upon receiving such notification, the president was authorized to call forth the militia of states other than the target state only if militia of the target state refused to execute federal law and Congress were not in session. Moreover, the president’s authorization to commandeer militia of other states was time-bound: the president could do so for up to thirty days after the commencement of the ensuing session of Congress.

Intervening legislation—namely, the Militia Act of 1795 (1795 Act)—eliminated the requirements for approvals from state and judicial branches, as well as the time limitation imposed on the deployment of militia from other states when Congress was out of session. Furthermore, the Insurrection Act as passed in 1807 broadened the president’s powers by authorizing the unilateral deployment of both state militia *and* federal armed forces.

The Suppression of the Rebellion Act of 1861 represents the final major revision to the legislative regime authorizing the president to domestically deploy the militia and federal armed forces in order to suppress insurrection. Incorporated into the text of the current-day Insurrection Act, the 1861 version expanded both the time period during which the president was authorized to call forth the militia and federal armed forces, and the discretion of the president in determining those instances that warranted federal military intervention.

for federal military intervention under the Insurrection Act is a proclamation of insurrection—specifically, pursuant to Section 334, the president must “immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.”<sup>84</sup> Once made, such a proclamation defines an internal disturbance as an “insurrection” warranting federal military intervention. Courts have determined that – in the absence of the requisite presidential proclamation—the deployment of federal troops with law enforcement powers was a violation of *Posse Comitatus*.

A review of archival presidential proclamations for this article reveals that past presidents have invoked the Insurrection Act or its preceding legislation at least 24 times.<sup>85</sup> While presidential proclamations based on a grant of constitutional or statutory authority have the force of law, they are directed *outside* the government at civilians; accordingly, proclamations of insurrection are supplemented by executive orders, which are directives aimed at parties inside the government in order to facilitate the requisite federal military action to be taken to restore law and order.<sup>86</sup>

a. *2007 National Defense Authorization Act*

In the wake of the Hurricane Katrina crisis, the Insurrection Act was amended to broaden the category of scenarios that would authorize the president to deploy federal troops with law enforcement powers<sup>87</sup>—a move that was later countered by the National

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<sup>84</sup> 10 U.S.C. § 254 (2016) (formerly codified at 10 U.S.C. § 334).

<sup>85</sup> A presidential proclamation is “‘an instrument that states a condition, declares a law and requires obedience, recognizes an event or triggers the implementation of a law (by recognizing that the circumstances in law have been realized)’”. In short, presidents ‘define’ situations or conditions on situations that become legal or economic truth. These orders carry the same force of law as executive orders—the difference between the two is that executive orders are aimed at those inside government while proclamations are aimed at those outside government. The administrative weight of these proclamations is upheld because they are often specifically authorized by congressional statute, making them ‘delegated unilateral powers.’ Presidential proclamations are often dismissed as a practical presidential tool for policy making because of the perception of proclamations as largely ceremonial or symbolic in nature. However, the legal weight of presidential proclamations suggests their importance to presidential governance.” *Presidential Proclamation Database*, PERFECT SUBSTITUTE (Nov. 4, 2009), <http://perfectsubstitute.blogspot.com/2009/11/presidential-proclamation-database.html> [<https://perma.cc/2WNT-XK4N>] (citation omitted). See also *Presidential Proclamations: Washington - Trump*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/proclamations.php> [<https://perma.cc/X4DQ-267Q>].

<sup>86</sup> JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-772 A, EXECUTIVE ORDERS AND PROCLAMATIONS (1999).

<sup>87</sup> National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, sec. 1076, § 333, 120 Stat. 2083, 2404-05 (2006).

Association of Governors, who mobilized to revoke all such amendments and, thus, once again limit the presidential discretion to deploy federal troops with law enforcement powers.<sup>88</sup>

The Insurrection Act amendments were buried in the 2007 National Defense Authorization Act, passed on October 17, 2006. Specifically, Section 333—the title of which was renamed “*Major public emergencies; interference with State and Federal law*”—was amended to authorize the president to militarily intervene to “restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition . . . .”<sup>89</sup> Such intervention, under the revised text, was authorized upon the president’s determination that “domestic violence ha[d] occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order,” and such violence results in the obstruction of federal law or the inability of the state or possession to protect the constitutional rights of persons present therein.<sup>90</sup>

After a nearly year-long challenge led by the National Governors Association, amendments to the Insurrection Act were repealed in their entirety in a scarcely noticed section of the defense appropriations bill for the 2008 fiscal year.<sup>91</sup> However, upon signing the 2008 defense appropriations bill into law, President Bush issued a signing statement stating that its provisions would be construed in a manner consistent with the constitutional authority of the President.<sup>92</sup>

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<sup>88</sup> NAT’L GOVERNORS ASS’N, AMERICA WINS: THE STRUGGLE FOR CONTROL OF THE NATIONAL GUARD (2012), <https://www.nga.org/files/live/sites/NGA/files/pdf/1210NationalGuardAmericaWins.pdf> [<https://perma.cc/B6RM-WNPD>].

<sup>89</sup> National Defense Authorization Act for Fiscal Year 2007, sec. 1076, § 333 (a)(A).

<sup>90</sup> *Id.*

<sup>91</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, sec. 1068, § 333, 122 Stat. 3, 325-26 (2008).

<sup>92</sup> “Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.” Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

b. *Reconstruction Act and the Enforcement Acts*

It is well known that the Reconstruction Act of 1867<sup>93</sup> and the Enforcement Acts passed in 1870 and 1871<sup>94</sup> authorized executive deployment of federal troops to enforce the law in specific response to violations of civil rights during Reconstruction and, later, carried out by vigilante groups such as the Ku Klux Klan. What has been generally little discussed is the relationship between this legislation and the antecedent Insurrection Act. Provisions of the Reconstruction Act and the Enforcement Acts track the language in the Insurrection Act, partially delegating the calling forth power of Congress to the president in order to suppress “insurrection” or “rebellion.” Unlike the Insurrection Act, these statutes *specified* instances of “insurrection” warranting federal military intervention, respectively, to be disturbances of the fledgling peace in former Confederate states after the Civil War, and, thereafter, the vigilante violence carried out in former rebel states by the Ku Klux Klan. In other words, their legislation authorized federal military intervention to enforce the fundamental rights of persons who were being persecuted by the state and/or an insurgent third party.

The Reconstruction Act essentially subjected the former Confederate states (with the exception of Tennessee) to federal military administration. The act provided for the division of eleven former Confederate states into five military districts,<sup>95</sup> with each one to be administered by an officer of the army. Each such officer was to be detailed military force to “enable [him] to perform his duties and enforce his authority within the district to which he [was] assigned.”<sup>96</sup> Among such officer’s assigned duties was to “protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals[.]”<sup>97</sup> The Reconstruction Act was subsequently amended to expressly add as duties of such military officers the registration of voters and the supervision of elections.<sup>98</sup>

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<sup>93</sup> First Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

<sup>94</sup> Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 22, 17 Stat. 13.

<sup>95</sup> “[R]ebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama, and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.” § 1, 14 Stat. at 428.

<sup>96</sup> *Id.* § 2.

<sup>97</sup> *Id.* § 3.

<sup>98</sup> Second Reconstruction Act of 1867, ch. 6, 15 Stat. 2.

The premise for federal military intervention, as set forth in the preamble to the statute, was that no “legal . . . governments or adequate protection for life or property” existed in such former rebel states.<sup>99</sup> In other words, the former rebel states were analogous to “failed states.” Accordingly, people of such failed states were denied representation in Congress until new constitutions were drafted and ratified in each such state that provided for the suffrage of *all* men aged twenty-one and over and adopted the Fourteenth Amendment of the U.S. Constitution. Until such time, federal military forces would administer the rebel states and any civilian governments functioning in the interim period would be deemed provisional.<sup>100</sup>

The Enforcement Acts—of May 31, 1870, February 28, 1871, and April 20, 1871—(“Force Acts”) were enacted to enforce, among other things, Black suffrage, and authorized the use of federal military force to protect the right of newly enfranchised Black citizens to vote. The 1870 Act imposed fines and criminal penalties<sup>101</sup> upon persons who did, or conspired to, “by force, bribery, threats, intimidation, or other unlawful means, . . . hinder, delay, prevent or obstruct, . . . any citizen . . . from voting at any election . . . .”<sup>102</sup> Further, in a clause aimed at the Ku Klux Klan, the 1870 Act provided for the felony conviction of “two or more persons [who] shall band or conspire together, or in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of [the] act, or to injure, oppress, threaten, or intimidate any citizen” with intent to deprive such citizen of his or her constitutional rights.<sup>103</sup> Any warrants issued pursuant to the Force Acts were to be executed by federal marshals, who were authorized to call forth the militia—as well as federal armed forces and even civilian bystanders—in order to do such. The subsequent acts expanded the authorized scope of federal intervention, chiefly

<sup>99</sup> § 1, 14 Stat. at 428.

<sup>100</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* 276-77 (1988) (“The Reconstruction Act of 1867 divided the eleven Confederate states, except Tennessee, into five military districts under commanders empowered to employ the army to protect life and property. And without immediately replacing the Johnson regimes, it laid out the steps by which new state governments could be created and recognized by Congress—essentially the writing of new constitutions providing for manhood suffrage, their approval by a majority of registered voters, and ratification of the Fourteenth Amendment. . . . The act contained no mechanism for beginning the process of change, an oversight soon remedied by a supplemental measure authorizing military commanders to register voters and hold elections.”).

<sup>101</sup> Enforcement Act of 1870, ch. 114, 16 Stat. 140.

<sup>102</sup> *Id.* § 4.

<sup>103</sup> *Id.* § 6.

by providing for federal supervision of elections in February 1871, and, in April 1871, making it lawful for the president to suspend the writ of habeas corpus during a “rebellion.”<sup>104</sup>

### 3. Stafford Act

Whereas the Insurrection Act is the domestic authority for humanitarian intervention at home, the Stafford Act provides for the domestic provision of *humanitarian aid*.<sup>105</sup> Again, the Stafford Act is worth discussing here in light of its contrast to the *combative* federal law enforcement effectively authorized by the Insurrection Act—and, in other words, for the *non-combative* intention evident in the text of the Stafford Act and the potential fallout of a federal response to internal crisis under the statute versus the Insurrection Act. Moreover, as the Stafford Act provides for federal intervention that does not usurp the police powers of the several states, such intervention—analogueous to humanitarian aid abroad—has been relatively less controversial than intervention authorized under the Insurrection Act.

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<sup>104</sup> KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877* 200-01 (1965) (“Two so-called Force Acts, passed on May 31, 1870, and February 28, 1871, provided that the use of force or intimidation to prevent citizens from voting was to be punished by fine or imprisonment, authorized the President to use the military when necessary to enforce the Fifteenth Amendment, and placed congressional elections under federal supervision. A third Force Act, the Ku Klux Act of April 20, 1871, imposed heavier penalties on persons who ‘shall conspire together, or go in disguise . . . for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.’ Additional federal troops were sent into the South, and President Grant suspended the writ of habeas corpus in a number of South Carolina counties. After scores of arrests, fines, and imprisonments, the Klan’s power was finally broken, and by 1872 it had almost disappeared.”).

<sup>105</sup> Notably, the purpose set forth in the Stafford Act tracks that set forth in the policies and procedures of the U.S. Office of Foreign Disaster Assistance (OFDA)—a unit of USAID responsible for facilitating and coordinating foreign disaster response missions under the Foreign Assistance Act of 1961. Further, OFDA implements its mission to “save lives, alleviate human suffering” and “reduce the economic and social impacts of present and future disasters” with policies derived from the U.N. Guiding Principles for Internal Displacement—a list of humanitarian principles to which the United Nations has advised governments to adhere when responding to internally displaced persons. *Guiding Principles on Internal Displacement*, *supra* note 8; *see also Office of U.S. Foreign Disaster Assistance*, USAID, <https://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/office-us> [<https://perma.cc/XZ2C-FZJQ>] (last updated Nov. 15, 2016) (“OFDA fulfills its mandate of saving lives, alleviating human suffering, and reducing the social and economic impact of disasters worldwide in partnership with USAID functional and regional bureaus and other U.S. Government agencies.”). However, unlike under the Stafford Act, U.S. disaster assistance can only be provided if, among other things, the affected country either requests such assistance or is “willing to accept” such assistance, thus formally enshrining the sanctity of the sovereignty of the affected state.

The Stafford Act is the foremost—though not sole—statutory authority governing federal intervention, military or otherwise, in a natural or man-made disaster.<sup>106</sup> Enacted in 1988, the Act is among the most recent in a series of legislation passed since 1950 establishing a statutory framework for the federal government to assist states and localities in the event of a disaster scenario.<sup>107</sup> The Stafford Act provides for the federal government to assist states and localities with both disaster *response*—*i.e.*, the provision of emergency services to aid search-and-rescue and other response efforts—and disaster *recovery*—whereby monetary aid and other resources are administered to support the reconstruction and rehabilitation of the affected state or locality. The Stafford Act also, importantly, establishes the primary statutory framework for the Federal Emergency Management Agency (“FEMA”) to coordinate and implement disaster response and recovery efforts in collaboration with other federal agencies, as well as state and localities, in the wake of small- and large-scale disasters.

The text of the Stafford Act, emphasized below, characterizes missions carried out thereunder with humanitarian language. The congressional findings and declarations set forth in Title I of the Act as last amended in 2013, for instance, acknowledge that disasters “often cause loss of life, human suffering, loss of income, and property loss and damage; and because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity; special measures . . . are necessary.”<sup>108</sup> Moreover, a number of provisions

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<sup>106</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (current version at 42 U.S.C. §§ 5121-5191); *see also* Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT’L SECURITY J. 537, 626-27 (2014) (“There is no greater example of this than the Robert T. Stafford Disaster Relief and Emergency Act (“Stafford Act”). It is a powerful tool the President can use in a domestic emergency to authorize federal assistance, including military assistance, short of enforcement and intervention.” (footnote omitted)).

<sup>107</sup> In 1950, Congress passed the Federal Disaster Relief Act, which standardized the process of requesting federal assistance for emergency management, replacing an older system of providing funding on an “incident-by-incident” basis. Congress then passed the Disaster Relief Act of 1974, which created a program to directly assist individuals and households in the event of disaster. The Stafford Act built on that foundation when passed as an amendment to the Disaster Relief Act in 1988. FEMA, U.S. DEP’T OF HOMELAND SEC., THE FEDERAL EMERGENCY MANAGEMENT AGENCY PUBLICATION 1, 24, 35 (2010), [https://www.fema.gov/media-library-data/20130726-1823-2504-5-8164/pub\\_1\\_final.pdf](https://www.fema.gov/media-library-data/20130726-1823-2504-5-8164/pub_1_final.pdf) [<https://perma.cc/RC5T-PQJ3>].

<sup>108</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 1, 88 Stat. 143, 143 (1974) (codified as amended at 42 U.S.C. § 5121 (2013)).

therein refer to the intention to save lives and alleviate or prevent human suffering.

Pursuant to the Stafford Act, the federal government is authorized to supplement state and local efforts to respond to, and provide monetary and other relief as to, any “emergency” or “major disaster,” as defined thereunder.

Under the act, an “emergency” means:

any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to *save lives and to protect property and public health and safety*, or to lessen or avert the threat of a catastrophe in any part of the United States.<sup>109</sup>

An “emergency,” as defined, tends to be a fairly small incident that warrants limited federal intervention and pursuant to which total monetary federal assistance is capped at \$5 million per emergency unless the president determines that additional funds are necessary.<sup>110</sup>

A “major disaster” is defined in the Stafford Act as follows:

any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, . . . which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of the States, local governments, and disaster relief organizations in *alleviating the damage, loss, hardship, or suffering caused thereby*.<sup>111</sup>

As compared to an emergency, a “major disaster” is a large-scale catastrophe that is expected to warrant extensive resources of the federal government, which shares with affected states or localities not less than 75 percent of the costs of the provided assistance.<sup>112</sup>

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<sup>109</sup> 42 U.S.C. § 5122(1) (emphasis added).

<sup>110</sup> Michael Widomski, *Bringing in Federal Disaster Help: The Disaster Declaration Process*, FEMA: BLOG (June 16, 2012, 3:02 PM), <https://www.fema.gov/blog/2012-03-07/bringing-federal-disaster-help-disaster-declaration-process> [<https://perma.cc/VR9X-W7G4>] (“The total amount of assistance provided for a single emergency may not exceed \$5 million.”).

<sup>111</sup> *Id.* § 5122(2) (emphasis added).

<sup>112</sup> *Public Assistance: Frequently Asked Questions*, FEMA, <https://www.fema.gov/public-assistance-frequently-asked-questions#Q01> [<https://perma.cc/2GCQ-RAR6>] (last updated Mar. 7, 2016, 10:13 AM) (“FEMA provides supplemental assistance for State and local government recovery expenses, and the Federal share will always be at least 75 percent of the eligible costs.”).

Although the Stafford Act does not authorize the president to domestically deploy troops with law enforcement powers, it is worth noting that, similar to the use of military force under the Insurrection Act, domestic humanitarian aid can be extended under the Stafford Act either unilaterally or by local invitation. Federal assistance is triggered under the Stafford Act either unilaterally, by the president, or pursuant to a presidential declaration of an “emergency” or “major disaster” made at the request of the governor of the affected state.<sup>113</sup> As for the latter trigger, the governor of the affected state may request that the president make a declaration of “emergency” or “major disaster” based, in each instance, “on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”<sup>114</sup> Furthermore, the governor must furnish such a request with information describing efforts and resources that have already been and are expected to be used at the state and local level to respond to the disaster. As for the former trigger of federal assistance, the president may make a unilateral determination that an “emergency” exists, for which the federal government must assume primary responsibility because the incident involves a subject area for which the federal government exercises exclusive or preeminent authority. Though the president is authorized to unilaterally make such a determination, the president must, if practicable, consult with the governor of the affected state in the course of doing so.

### *B. Just Cause*

A “just cause,” as considered in the context of international humanitarian intervention, is a circumstance deemed to justify military intervention in order to protect human life and dignity.<sup>115</sup> This definition is knowingly tautological because such a determination is more philosophical and moral than it is legal in nature, and, thereby, eschews concrete criteria. Indeed, questions of legal authority discussed above arise after a crisis has erupted that elicits from one or more states a responsibility to protect human life that transcends the respect for sovereignty. To the extent that criteria

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<sup>113</sup> *Id.* § 5170.

<sup>114</sup> *Id.* § 5170(a).

<sup>115</sup> INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XII (2001) [hereinafter RESPONSIBILITY TO PROTECT], <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/X59M-6XQA>].

for a just cause were legally definable, it would be akin to a standard rather than a rule—for instance, an attack on human life and dignity so grave as to “shock the conscience.”<sup>116</sup>

However, because different consciences bear different thresholds for shock, additional attention has been paid to the *process* by which a just cause is determined, with some scholars conferring more legitimacy to multilateral (and, perhaps, coalition-based) deliberations than unilateral ones.<sup>117</sup> Specifically, just causes identified by a “jury”—most preferably by the U.N. Security Council or General Assembly and, perhaps, by a regional body—are afforded more formal credibility and moral weight than those made by one state or even a given state and a coalition of its allies.<sup>118</sup> Further, official decision-makers have tended to confer legitimacy to those interventions made pursuant to “local invitation”—that is, a request for or consent to intervention by a state government or internationally recognized non-state actors.<sup>119</sup>

While efforts have been made by moral philosophers and legal scholars to specify standards for what constitutes a just cause as well as processes for determining them, commentators on foreign policy have generally identified just causes *empirically*—that is, by reference to what one or more states have, in practice, deemed them to

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<sup>116</sup> *Id.* at 75 (“If we believe that all human beings are equally entitled to be protected from acts that shock the conscience of us all, then we must match rhetoric with reality, principle with practice.”); *id.* at 32 (“In the Commission’s view, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product of either of deliberate state of action, or state neglect or inability to act, or a failed state situation; or
- large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, actions of terror or rape.

If either or both of these conditions are satisfied, it is our view that the ‘just cause’ component of the decision to intervene is amply satisfied.”).

<sup>117</sup> See, e.g., Stefano Recchia, *Authorising Humanitarian Intervention: A Five-Point Defence of Existing Multilateral Procedures*, 43 REV. INT’L STUD. 50 (2017).

<sup>118</sup> *Id.* at 65, 65 n.80 (citing G.A. Res. 60/1, ¶ 139, 2005 World Summit Outcome (Sept. 16, 2005)).

<sup>119</sup> See, e.g., Michael S. Lund, *Preventive Diplomacy for Macedonia, 1992-1999: From Containment to Nation Building*, in OPPORTUNITIES MISSED, OPPORTUNITIES SEIZED: PREVENTIVE DIPLOMACY IN THE POST-COLD WAR WORLD 173, 206 (Bruce W. Jentleson ed., 2000) (“[A] local invitation was the immediate prompting. This helped greatly overcome barriers to third-party entry that would otherwise be posed by sovereign prerogatives of unwilling protagonists or a dangerous situation.”); James D. Boys, *A Lost Opportunity: The Flawed Implementation of Assertive Multilateralism (1991-1993)*, EUR. J. AM. STUD., Spring 2012, at 1, 7 (describing negative effects from intervening without receiving a local invitation).

be.<sup>120</sup> Accordingly, in realist foreign policy terms, a “just cause” is one for which the political will has been mobilized to support intervention, or, in the absence of timely intervention, a circumstance that has been deemed to warrant intervention by an *ex post facto* moral consensus. For instance, prior to the terrorist attacks of September 11,<sup>121</sup> classic examples of crises deemed, whether retrospectively or at the time, to have warranted humanitarian intervention are the genocidal or other grave events that occurred in Bosnia, Kosovo, Rwanda, and Somalia.<sup>122</sup>

With the above international atrocities in mind, some might consider it hyperbolic to map the dilemmas of humanitarian intervention onto apparently less dire situations at home. Furthermore, while it is unequivocal that the United States government has a responsibility to protect its citizens, which would be presumably uncontroversial to fulfill, the responsibility to do the same for non-citizens abroad is, by comparison, not only of dubious certainty, but its assumption is often politically unpopular.<sup>123</sup> However, as discussed in more detail below, it is fitting to consider humanitarian intervention at home in light of crises deemed to constitute just causes abroad.

As for the relative gravity of crises at home and abroad, what is key in mapping international “just cause” considerations onto domestic ones is not simply the *degree* of violence or rights violations on the ground, but the *nature* of circumstances deemed to warrant intervention. Analogous to the international context, circumstances at home deemed “just causes” are those in which a state was unwilling or unable to protect the rights of persons harmed therein. Specifically, an overview of the application of the Insurrec-

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<sup>120</sup> See, e.g., James Joyner, *How Perpetual War Became U.S. Ideology*, ATLANTIC (May 11, 2011), <https://www.theatlantic.com/international/archive/2011/05/how-perpetual-war-became-us-ideology/238600> [<https://perma.cc/27RA-Q56H>] (describing the legitimacy of interventions through the lens of past interventions); CHRISTOPHER C. BURKETT, THE HERITAGE FOUND., REMAKING THE WORLD: PROGRESSIVISM AND AMERICAN FOREIGN POLICY (2013), [http://thf\\_media.s3.amazonaws.com/2013/pdf/fp47.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/fp47.pdf) [<https://perma.cc/7NHG-TQEV>].

<sup>121</sup> Recent conflicts, revolutions, and rebellions in Egypt, Libya, Syria, Bahrain, and the Arab Spring are beyond the scope of this article.

<sup>122</sup> See *supra* note 28 and accompanying text.

<sup>123</sup> Andrew Kohut, *American International Engagement on the Rocks*, PEW RES. CTR. (July 11, 2013), <http://www.pewglobal.org/2013/07/11/american-international-engagement-on-the-rocks> [<https://perma.cc/C9VR-9E5T>]; Lesley Wroughton, *As Syria War Escalates, Americans Cool to U.S. Intervention*, REUTERS (Aug. 24, 2013, 8:32 PM), <http://www.reuters.com/article/us-syria-crisis-usa-poll-idUSBRE97O00E20130825> [<https://perma.cc/9DDU-3PRT>].

tion Act shows that humanitarian intervention has been largely<sup>124</sup> deemed warranted to, on the one hand, enforce the civil rights of Black (and other non-white) citizens over the objection of state officials, and, on the other, to suppress “race riots.” In other words, “just cause” considerations are apt, regardless of the relative degree of domestic disturbances, because implicit in such considerations, whether at home or abroad, are deliberations over a government’s unjust deprivation of rights or a “failed state” scenario brought about by “civil war” or “insurgency.”

Further, as elaborated in the above discussion of *The Federalist Papers* and the legislative context of Posse Comitatus, federal military intervention at home is not politically uncontroversial. Such intervention has not only been contentious in light of a constitutional balance of federal and state powers, but also poses particular political concern when considered in Southern states (as indicated in President Bush’s quote).<sup>125</sup> Humanitarian intervention at home tends to be more politically fraught when contemplated *unilaterally*, solely by the presidential administration, rather than *mutually*, with the consent or at the request of state officials—in other words, without “local invitation.” Finally, domestic “just causes” are similarly disposed to tautological definitions: the legal authorization for the president to engage in humanitarian intervention at home, ultimately, relies largely on a *subjective* judgment call—that is, whether a circumstance is deemed to be an “insurrection” or not.

Such instances that reveal the trend outlined above are proclamations of insurrection to enforce civil rights during the post-war Reconstruction Era, to desegregate public schools in Alabama, Arkansas, and Mississippi, and to enforce the rights of protestors to march from Selma to Montgomery. Further, insurrection was proclaimed to suppress the following “race riots”: (1) the violent clashes in “Bleeding Kansas” prior to the Civil War; (2) anti-Chinese expulsion campaigns in the Northwest; (3) the Detroit race riots of 1943 and 1967; (4) riots in Baltimore and Washington, D.C. following the assassination of Martin Luther King, Jr.; (5) looting in St. Croix in the aftermath of Hurricane Hugo, and (6) riots in Los Angeles in the wake of the Rodney King verdict.<sup>126</sup>

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<sup>124</sup> *But see, e.g.*, Marjorie Jean Bonney, *Federal Intervention in Labor Disputes*, 7 MINN. L. REV. 467, 472 (1923) (“President Cleveland sent the federal troops to the [Pullman] strike scene, not to quell domestic violence, as did President Hayes, but to protect the United States mails and interstate commerce and to enforce the orders of the federal courts.”).

<sup>125</sup> *See* notes 1, 3, 87-92 and accompanying text *supra*.

<sup>126</sup> *See infra* section I.B.1. (on enforcing civil rights) and I.B.2. (on suppressing

Many of these incidents are well-known and have been discussed in far more detail elsewhere. Accordingly, they are cursorily reconsidered here only in light of their designation as “just causes” warranting the exceptional deployment of federal troops with law enforcement powers. The overview in this subsection will elaborate on the trend noted above (and illustrated in the table below) – namely, that a significant number of proclamations of “insurrection” were made to authorize federal military intervention to enforce civil rights violated by state actors or suppress “race riots” incited by non-state actors, with intervention in the former category of incidents typically authorized *unilaterally* and the latter by gubernatorial request or, in other words, by *local invitation*.

Moreover, as indicated from public speeches made by the president or state officials at the time, those interventions deemed relatively less politically fraught were made at the request of the state governor or other state official(s), and, further, the relevant incident or insurrection in question tended to be a “race riot.”<sup>127</sup> On the other hand, those interventions that were at the time deemed more politically fraught were those made unilaterally in the sole discretion of the executive, and, further, the nature of the incident in question *generally* involved the enforcement of civil

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“race riots”). The federal government also intervened during the Gilded Age to protect market forces, capital, and property, instead of protecting civil rights. FONER, *supra* note 100, at 582-83 (“Among other things, 1877 marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens. Yet the federal government was not rendered impotent in all matters—only those concerning blacks. Hayes did not hesitate to employ the national state’s coercive powers for other purposes. Even as the last Reconstruction governments toppled, troops commanded by former Freedmen’s Bureau Commissioner O. O. Howard relentlessly pursued the Nez Percé Indians across the Far West to enforce a federal order removing them from Oregon’s Wallowa Valley.”). *Id.* at 583 (“Nor did the federal government prove reluctant to intervene with force to protect the rights of property.”). *Id.* at 584 (“As requests for troops descended upon the Administration from frightened governors and beleaguered railroad executives, Hayes neither investigated the need for troops nor set clear guidelines for their use. Thus, when soldiers were sent to cities from Buffalo to St. Louis, they acted less as impartial defenders of order than as strikebreakers, opening railroad lines, protecting nonstriking workers, and preventing union meetings.”)

<sup>127</sup> See, e.g., Jake Lefferman, *A Look Back at Presidential Responses to Racial Violence*, ABC News (Aug. 15, 2014, 1:37 PM), <http://abcnews.go.com/blogs/politics/2014/08/a-look-back-at-presidential-responses-to-racial-violence> [https://perma.cc/Q4DQ-7NYG]; President George Bush, Address to the Nation on the Civil Disturbances in Los Angeles, California (May 1, 1992), <http://www.presidency.ucsb.edu/ws/?pid=20910> [https://perma.cc/5MBW-HGMK]; President Lyndon Johnson, Statement on the Harlem Race Riots (July 21, 1964), <http://www.nytimes.com/1964/07/22/statement-by-president.html> [https://perma.cc/TJ3L-M9K2].

rights.<sup>128</sup>

TABLE 1.3 INSURRECTION AS CIVIL RIGHTS VIOLATION & RACE RIOT

Incident(s)	Civil Rights or 'Race Riot'	Unilateral	Local Invitation
Bleeding Kansas	'Race Riot'		X
Radical Reconstruction	Civil Rights	X	
Anti-Chinese Expulsion	'Race Riot'		X
Detroit Riots of 1943 and 1967	'Race Riot'		X
Public School Desegregation	Civil Rights	X	
March from Selma to Montgomery	Civil Rights		X
Riots in Baltimore and DC after MLK Assassination	'Race Riot'		X
Hurricane Hugo	'Race Riot'	Territorial Governor Claims No Request	Presidential Administration Claims Request from Territorial Senator & Legislative Liaison to White House
Atlanta Prison Riots <sup>129</sup>	'Race Riot'	X	
Los Angeles Riots	'Race Riot'		X

<sup>128</sup> Note that the distinction between suppressing a race riot and enforcement of civil rights can be blurry, as the enforcement of civil rights does incite rioting, as with James Meredith's attempted entry into Ole Miss. However, the relevant distinction here is whether civil rights enforcement was the primary intention of the intervention, as opposed to the restoration of law and order made necessary by riotous civil unrest.

<sup>129</sup> See, e.g., Robert Pear, *Military Hostage Specialists Sent to Help F.B.I. at Atlanta Prison*, N.Y. TIMES (Nov. 26, 1987), <http://www.nytimes.com/1987/11/26/us/military-hostage-specialists-sent-to-help-fbi-at-atlanta-prison.html> [<https://perma.cc/FF3A-A4KM>].

### 1. Enforcing Civil Rights

As discussed in this article, an overview of past proclamations of insurrection reveals that at least thirteen incidents involved the federal military enforcement of civil rights—namely, the deployment of federal troops to enforce constitutional rights of Black citizens in the South during Radical Reconstruction, to desegregate public schools in Alabama, Arkansas, and Mississippi, and to enforce the right of protesters to march from Selma to Montgomery. Of the twelve proclamations of insurrection, eleven were made *unilaterally*, and only one—regarding the march from Selma to Montgomery—was made by request of the state governor (albeit, as will be discussed further, as the result of political maneuvering by both the president and the state governor).<sup>130</sup>

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<sup>130</sup> Andrew Johnson, Proclamation No. 166, Warning Against Obstruction of Justice in the States of North and South Carolina (Sept. 3, 1867), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=72124> [<https://perma.cc/995X-4TN8>]; Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70253> [<https://perma.cc/UT5D-XUAS>]; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70257> [<https://perma.cc/UL58-87K7>]; Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70364> [<https://perma.cc/ZZU5-L5C3>]; Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70420> [<https://perma.cc/SF5U-KXAB>]; Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70422> [<https://perma.cc/WLZ2-4458>]; Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70459> [<https://perma.cc/7EDB-UDFP>]; Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70542> [<https://perma.cc/3NC6-QXR8>]; Dwight D. Eisenhower, Proclamation No. 3204, Obstruction of Justice in the State of Arkansas (Sept. 23, 1957) in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=107178> [<https://perma.cc/BB7U-MYWS>]; John F. Kennedy, Proclamation No. 3497, Obstructions of Justice in the State of Mississippi (Sept. 30, 1962), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=24042> [<https://perma.cc/SZ7C-CXZ3>]; John F. Kennedy, Proclamation No. 3542, Unlawful Obstructions of Justice and Combinations in the State of Alabama (June 11, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=9270> [<https://perma.cc/93N2-DP96>]; John F. Kennedy, Proclamation No. 3554, Obstructions of Justice in the State of Alabama (Sept. 10, 1963), in AM.

Eight of the twelve proclamations of insurrection were issued during the roughly ten-year period after the Civil War<sup>131</sup> known as “Radical Reconstruction,” when the newfound constitutional rights of freed Blacks were enforced, in part, through federal military intervention (or, as sometimes termed, military “occupation” of the South).<sup>132</sup> As discussed above, the Reconstruction Act provided for the division of “rebel States” into districts subject to federal military authority, and, further, the army officer appointed to administer each district was authorized thereunder to use military force to suppress insurrection and otherwise enforce the law. However, despite military officers’ authority under the Reconstruction Act to call forth the militia and federal armed forces in former Confederate states, President Ulysses S. Grant made seven proclamations between 1871 and 1876<sup>133</sup>—each of which track the text of the

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PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> [<https://perma.cc/9YYZ-XTFN>]; Lyndon B. Johnson, Proclamation No. 3645, Providing Federal Assistance in the State of Alabama (Mar. 20, 1965), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=106237> [<https://perma.cc/9US3-RT6M>].

<sup>131</sup> While historians date the start of the overarching Reconstruction Era to 1863—when President Abraham Lincoln issued the Emancipation Proclamation—the era of “radical” Reconstruction was introduced in 1867 with the enactment of the Reconstruction Act, discussed above, and ended in 1877 with the withdrawal of federal troops from the South. FONER, *supra* note 100, at xvii.

<sup>132</sup> Borne, in part, from Republican frustration with then President Andrew Johnson’s unwillingness to enforce the formal pronouncements of Black incorporation into the body politic (as enumerated in the Thirteenth and Fourteenth Amendments), the Reconstruction Act authorized federal military “occupation” of former Confederate states.

<sup>133</sup> Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70253> [<https://perma.cc/UT5D-XUAS>]; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70257> [<https://perma.cc/UL58-87K7>]; Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70364> [<https://perma.cc/ZZU5-L5C3>]; Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70420> [<https://perma.cc/SF5U-KXAB>]; Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70422> [<https://perma.cc/WLZ2-4458>]; Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70459> [<https://perma.cc/7EDB-UDFP>]; Ulysses S. Grant, Proclamation No. 232, Law and

Insurrection Act and order “insurgents” to disperse, thus triggering the authority of the president to deploy state and federal troops to enforce law. Of the seven proclamations, four were issued with respect to South Carolina, two regarding Louisiana, one as to Arkansas, and another as to Mississippi.

Four proclamations of insurrection were issued to enforce the desegregation of public schools in Arkansas, Mississippi, and Alabama, respectively, in accordance with the Supreme Court’s landmark decision in *Brown v. Board of Education*.<sup>134</sup> All four proclamations track the text of the Insurrection Act,<sup>135</sup> specifically citing the president’s authority thereunder to unilaterally deploy federal troops to enforce the law. On September 23, 1957—after failed talks with Arkansas Governor Orval Faubus, who earlier that month had ordered the state National Guard to blockade the Central High School in Little Rock to prevent Black students from entering—President Dwight D. Eisenhower issued a presidential proclamation and, the next day, both deployed U.S. army troops and federalized the entire Arkansas National Guard to protect Black students as they walked into the school.<sup>136</sup> President John F. Ken-

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Order in the State of South Carolina (Oct. 17, 1876), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70542> [<https://perma.cc/3NC6-QXR8>].

<sup>134</sup> *Brown v. Bd. of Educ.*, 347, U.S. 483 (1954) (holding that racially segregated public schools violate the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (requiring the *Brown* decision to be implemented “with all deliberate speed”); see also Dwight D. Eisenhower, Proclamation No. 3204, Obstruction of Justice in the State of Arkansas (Sept. 23, 1957) in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=107178> [<https://perma.cc/BB7U-MYWS>]; John F. Kennedy, Proclamation No. 3497, Obstructions of Justice in the State of Mississippi (Sept. 30, 1962), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=24042> [<https://perma.cc/SZ7C-CXZ3>]; John F. Kennedy, Proclamation No. 3542, Unlawful Obstructions of Justice and Combinations in the State of Alabama (June 11, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=9270> [<https://perma.cc/93N2-DP96>]; John F. Kennedy, Proclamation No. 3554, Obstructions of Justice in the State of Alabama (Sept. 10, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> [<https://perma.cc/9YYZ-XTFN>].

<sup>135</sup> Each order specifically referred to the “the authority vested in [the president] by the Constitution and statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly Sections 332, 333 and 334 thereof,” in ordering any person obstructing the law to cease and desist from such obstruction and disperse. See *supra* note 134.

<sup>136</sup> Dwight D. Eisenhower, Proclamation No. 3204, Obstruction of Justice in the State of Arkansas (Sept. 23, 1957), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=107178> [<https://perma.cc/BB7U-MYWS>]; Exec. Order. No. 10,730, 22 Fed. Reg. 7628 (Sept.

nedy issued three unilateral proclamations of insurrection: one in 1962 to enforce James Meredith's right to attend the University of Mississippi over the objection of Governor Ross Barnett, and two in 1963 to compel the entry of Black students into the University of Alabama and the Tuskegee High School in Huntsville—overriding the defiance of Alabama governor George Wallace, a staunch opponent of desegregation.<sup>137</sup>

The proclamation issued to enforce the right of protestors to march from Selma to Montgomery, however, was technically made by gubernatorial request. On March 20, 1965, President Lyndon B. Johnson issued a proclamation ordering the dispersal of persons obstructing the federal-court ordered<sup>138</sup> right of such protesters, who had attempted to march two times prior—the first on March 7 in a televised confrontation known as “Bloody Sunday,” in which state troopers and local police brutally attacked non-violent protestors with nightsticks and tear gas.<sup>139</sup> The proclamation referenced the federal court order and stated that Governor Wallace had “advised [President Johnson] that the state is unable and refuses to provide for the safety and welfare, among others, of the plaintiffs and the members of the class they represent”<sup>140</sup>—an advisement

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24, 1957); Anthony Lewis, *President Sends Troops to Little Rock; Federalizes Arkansas National Guard; Tells Nation He Acted to Avoid Anarchy*, N.Y. TIMES, Sept. 24, 1957, at A1.

<sup>137</sup> John F. Kennedy, Proclamation No. 3497, Obstructions of Justice in the State of Mississippi (Sept. 30, 1962), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=24042> [https://perma.cc/SZ7C-CXZ3]; John F. Kennedy, Proclamation No. 3542, Unlawful Obstructions of Justice and Combinations in the State of Alabama (June 11, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=9270> [https://perma.cc/93N2-DP96]; Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 12, 1963) (directing the Secretary of Defense to take all appropriate steps to enforce the laws of the United States in Alabama, including calling the National Guard into active service); John F. Kennedy, Proclamation No. 3554, Obstructions of Justice in the State of Alabama (Sept. 10, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> [https://perma.cc/9YYZ-XTFN].

<sup>138</sup> President Johnson made the proclamation following an order by Judge Frank Minis Johnson of the federal district court of the Middle District of Alabama that upheld the First Amendment rights of protestors to march and provided injunctive relief prohibiting police harassment and requiring the state of Alabama to provide police protection to protestors. See *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

<sup>139</sup> Lyndon B. Johnson, Proclamation No. 3645, Providing Federal Assistance in the State of Alabama (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=106237> [https://perma.cc/9US3-RT6M]; Jessie Kindig, *Selma, Alabama, (Bloody Sunday, March 7, 1965)*, BLACKPAST.ORG, <http://www.blackpast.org/aah/bloody-sunday-selma-alabama-march-7-1965> [https://perma.cc/TJZ2-X9QA].

<sup>140</sup> Lyndon B. Johnson, Proclamation No. 3645, Providing Federal Assistance in the

which, as will be discussed below, was part of an underlying tactic by Wallace to publicly maintain the appearance of defiance in the face of federal intervention. Subsequently, civil rights protestors—including Dr. Martin Luther King, Jr. and Ralph Bunche—marched from Selma to Montgomery under the protection of approximately 2,000 U.S. army troops and 1,900 federalized members of the Alabama National Guard.<sup>141</sup>

None of the above proclamations was issued without controversy—which, this paper suggests, was due to the involvement of state actors in fomenting “insurrection” and (with the technical exception of the march from Selma to Montgomery) the unilateral nature of the proclamations. Indeed, the last in the series of proclamations issued to suppress insurrection during Radical Reconstruction foretold the death knell of federal military administration of the former Confederate states. In January 1875, President Grant ordered<sup>142</sup> the use of federal military force in New Orleans, Louisiana when Democrats attempted to forcibly install party members in five contested state assembly seats.<sup>143</sup> After the five members were escorted out of the assembly chambers by federal troops, “Louisiana . . . came to represent the dangers posed by excessive federal interference in local affairs. The spectacle of soldiers ‘marching into the Hall . . . and expelling members at the point of the bayonet’ aroused more Northern opposition than any previous federal action in the South.”<sup>144</sup> In the aftermath of this incident, Republican representatives in Congress became “extremely wary” of further federal military intervention in the South.<sup>145</sup> The following

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State of Alabama (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=106237> [<https://perma.cc/9US3-RT6M>].

<sup>141</sup> Roy Reed, *Freedom March Begins at Selma; Troops on Guard*, N.Y. TIMES, Mar. 21, 1965, at A1.

<sup>142</sup> General Philip Sheridan, a former military governor of the district incorporating both Louisiana and Texas, led the military action. FONER, *supra* note 100, at 307, 554.

<sup>143</sup> *Id.* at 554 (“Having suppressed the New Orleans insurrection of September 1874, Grant, newly determined to ‘protect the colored voter in his rights,’ ordered General Sheridan to use federal troops to sustain the Kellogg administration and put down violence. On January 4, 1875, when Democrats attempted to seize control of the state assembly by forcibly installing party members in five disputed seats, a detachment of federal troops under the command of Col. Phillippe de Trobriand entered the legislative chambers and escorted out the five claimants. The following day, Sheridan wired Secretary of War Belknap, urging that military tribunals be established to try White League leaders as ‘banditti.’”).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 555 (“The uproar over Louisiana convinced Grant of the political dangers posed by a close identification with Reconstruction, and made Congressional Republi-

year, concerns over such intervention were leveraged in resolving the hotly contested presidential election in favor of Republican candidate Rutherford B. Hayes. Among the terms of the Compromise of 1877—an unwritten pact made between the political factions to settle the 1876 presidential election—was an agreement by Southern Democrats to recognize Hayes as the victor of the election over Democrat Samuel Tilden in return for, among other things, removing all remaining federal troops from the former Confederate states.<sup>146</sup> The removal of federal troops from the South, indeed, constituted the end of Radical Reconstruction, and, as discussed above, was codified in the Posse Comitatus Act passed the following year.

Of the four proclamations regarding public school desegregation, two emphasize the insubordination of the state governors, thus implying that *unilateral* deployment of federal troops in these instances was a last resort. All of the governors involved in these incidents were publicly defiant in the face of court-ordered desegregation.<sup>147</sup> Indeed, in publicly voicing dissent against federal court orders mandating public school desegregation, Governor Faubus referred to Eisenhower's unilaterally ordered intervention at Little Rock as "the military occupation of Arkansas."<sup>148</sup> The governors of Mississippi and Alabama, for their part, called upon the constitutional principles of federalism and characterized federal

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cans extremely wary of further military intervention in the South."). *Id.* at 556 ("The legislative infighting of January and February 1875 illustrated how divided Republicans had become over Reconstruction. 'Is it possible,' asked one House member, 'that you can find power in the Constitution to declare war, levy taxes . . . and pass laws upon all conceivable subjects and find means to enforce them, but can find no power to protect American citizens . . . in the enjoyment and exercise of their constitutional rights?' Yet Congressional Republicans had little stomach for further intervention in Southern affairs. Even men like Connecticut's Joseph R. Hawley, who proclaimed (with some exaggeration), 'I have been a radical abolitionist from my earliest days,' had resigned themselves to the conclusion that the South's 'social, and educational, and moral reconstruction' could 'never come from any legislative halls.' Others now echoed the Democratic refrain that blacks should abandon 'the habit . . . [of relying] upon external aid,' and sang the praises of 'local self-government.'" (alterations in original)).

<sup>146</sup> See *id.* at 582 ("'[H]ome rule' quickly came to Louisiana and South Carolina. Within two months of taking office, Hayes ordered federal troops surrounding the South Carolina and Louisiana statehouses, where Chamberlain and Packard still claimed the office of governor, to return to their barracks. (Hayes did not, as legend has it, remove the last federal troops from the South, but his action implicitly meant that the few remaining soldiers would no longer play a role in political affairs.)").

<sup>147</sup> See *infra* notes 148-53 and accompanying text.

<sup>148</sup> Peter Applebome, *Orval Faubus, Segregation's Champion, Dies at 84*, N.Y. TIMES (Dec. 15, 1994), <http://www.nytimes.com/1994/12/15/obituaries/orval-faubus-segregation-s-champion-dies-at-84.html> [<https://perma.cc/XR24-WHCY>].

encroachment into state affairs as a form of foreign invasion. Prior to President Kennedy's formal proclamation, Governor Wallace of Alabama<sup>149</sup> issued a statement that President Kennedy had "order[ed] the federal troops to invade Alabama . . ."<sup>150</sup> Further, in a speech delivered about two weeks before President Kennedy would deploy federal troops to Mississippi, Governor Barnett recited the Tenth Amendment and referred to "an ambitious federal government, employing naked and arbitrary power, [which] has decided to deny us the right of self-determination in the conduct of the affairs of our sovereign state."<sup>151</sup> Calling desegregationists agitators and trouble makers "pouring across our borders," the governor stated that the "federal government teamed up with a motley array of un-American pressure groups against us."<sup>152</sup> In the end, Governor Barnett assured his constituency that he would do all in his power to prevent integration and instigated a form of "posse comitatus," in the traditional sense of the term, by "call[ing] on every public official and every private citizen of [his] great state to join [him]."<sup>153</sup>

As for enforcing the right of protestors to march from Selma to Montgomery, Governor Wallace did technically request that President Johnson deploy federal troops in order to safely escort marching civil rights protestors—*technically*, because he refused the president's advisement to deploy National Guard troops to do the same.<sup>154</sup> The circumstances of the request, however, highlight the

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<sup>149</sup> Governor Wallace sent a telegram to President Kennedy erroneously interpreting the Insurrection Act as precluding the executive from unilaterally deploying federal troops, and asserting that he had not requested any federal military intervention to "quell domestic violence." Telegram from George Wallace, Governor, Ala., to John F. Kennedy, U.S. President (May 13, 1963), in ALA. DEP'T ARCHIVES & HIST., <http://digital.archives.alabama.gov/cdm/ref/collection/voices/id/2224> [https://perma.cc/USL8-QNSP].

<sup>150</sup> Governor George C. Wallace, Statement Made by Governor George C. Wallace After President Kennedy Sent Federal Troops to Handle the Violent Situation in Birmingham, Alabama (May 13, 1963), in ALA. DEP'T ARCHIVES & HIST., <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/2968/rec/20> [https://perma.cc/MWY5-9NBR].

<sup>151</sup> Governor Ross Barnett, Governor Barnett's Declaration to the People of Mississippi (Sept. 13, 1962), in *Integrating Ole Miss: A Civil Rights Milestone*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://microsites.jfklibrary.org/olemiss/controversy/doc2.html> [https://perma.cc/PQY6-E4P8].

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See Lyndon B. Johnson, News Conference at the LBJ Ranch (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=26816&st=&st1=> [https://perma.cc/23YV-KQV7] ("Even more surprising was your telegram of yesterday stating that both you and the Alabama Legislature, because of monetary consideration, believe that the

controversial nature of federal military intervention in enforcing civil rights because, as is clear from White House transcripts of conversations after Bloody Sunday and before the proclamation was made, President Johnson had communicated a strong preference for Governor Wallace to protect the marchers with the state's National Guard,<sup>155</sup> a move that Wallace resisted in a deft political move to appear defiant before his anti-desegregationist base. In essence, then, Governor Wallace's "request" was less a genuine cry for help, so to speak, and more so an official re-characterization of his unwillingness to act. A press statement made by President Johnson, accordingly, highlights both the executive reluctance to declare an insurrection as to the incident and the effective gubernatorial abdication of the state's implied police powers:

It is not a welcome duty for the Federal Government to ever assume a State Government's own responsibility for assuring the protection of citizens in the exercise of their constitutional rights. It has been rare in our history for the Governor and the legislature of a sovereign state to decline to exercise their responsibility and to request that duty be assumed by the Federal Government. Governor Wallace and the legislature of the State of Alabama have now done this.<sup>156</sup>

## 2. Suppressing 'Race Riots'

In addition to the enforcement of civil rights, an overview of past proclamations of insurrection reveals that a significant number were made in response to "race riots." Similar to "insurrection," the term "race riot" is contentious and tautological, subject to varying interpretations and, thereby, self-defining.<sup>157</sup> For one,

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State is unable to protect American citizens and to maintain peace and order in a responsible manner without Federal forces."); Fendall W. Yerxa, *Johnson Calls Up Troops, Deplores Wallace's Acts; Alabama March on Today*, N.Y. TIMES, Mar. 21, 1965, at 1.

<sup>155</sup> Yerxa, *supra* note 154.

<sup>156</sup> Lyndon B. Johnson, News Conference at the LBJ Ranch (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=26816&st=&st1=> [<https://perma.cc/23YV-KQV7>]; see also Laurence Stern, *Sending the Troops to Selma*, WASH. POST (Mar. 21, 1999), [https://www.washingtonpost.com/archive/lifestyle/1999/03/21/sending-the-troops-to-selma/6e5ae053-fd08-4147-899d-df18a5e0f5e5/?utm\\_term=.4f291a16cf15](https://www.washingtonpost.com/archive/lifestyle/1999/03/21/sending-the-troops-to-selma/6e5ae053-fd08-4147-899d-df18a5e0f5e5/?utm_term=.4f291a16cf15) [<https://perma.cc/8K3A-HGJM>]; Alice Anne Stephens, *LBJ, Governor Wallace, and Buford Ellington in Selma, Alabama: The President, the Wildcard, and the Link*, MILLER CTR., <http://archive.millercenter.org/educationalresources/lbj-governor-wallace-and-buford-ellington-in-selma-alabama> [<https://perma.cc/H9VB-E9ZN>].

<sup>157</sup> For one, though, in the United States, the term is commonly used to refer to civil disturbances incited by Black residents of urban areas, the majority of "race riots" have historically been incited by white vigilante groups. Further, in reference to "race riots" incited by Black residents in urban areas, attempts have been made to re-desig-

the distinction between suppressing a “race riot” and enforcing civil rights can be blurry, as past attempts to exercise and enforce civil rights have incited riots—which, in turn, have been suppressed by federal military intervention in order to enforce civil rights.

Again, by international analogy, those incidents deemed to warrant humanitarian intervention abroad are all marked by a grave violation of human rights and, thereby, a critical disruption of law and order; *however*, a fine distinction can be made between those incidents where rights violations were the *primary* justification for intervention (as with civil rights enforcement at home) and those where rights violations were *incident to* large-scale unrest (as with “race riots”). For instance, there is an analogous distinction between those incidents deemed just causes on account of the grave violation of human rights, as in the genocides in Bosnia, Kosovo, and Rwanda, and those incidents deemed such on account of violent insurgencies or clashes that required suppression in order to restore law and order (and thereby enforce human rights), as in Somalia.

Accordingly, this article categorizes as “race riots” those incidents where suppressing a race-related civil disturbance was the *priority* of federal military intervention, regardless of whether presumed or apparent civil rights violations brought about or were implicit in the disturbance. Those incidents that meet such criteria are: the violent clashes in Bleeding Kansas; anti-Chinese expulsion campaigns in the Northwest; the Detroit race riots of 1943 and 1967; riots in Baltimore and Washington, D.C. following the assassination of Martin Luther King, Jr.; looting in St. Croix in the aftermath of Hurricane Hugo; and riots in Los Angeles in the wake of the Rodney King verdict.<sup>158</sup> With the exception of the Hurricane

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nate such incidents as “rebellions” or “uprisings” to indicate the socio-economic and civil-rights related grievances that may underlie them and, thereby, the righteous indignation behind such disturbances. Neutral descriptors such as “unrest” or “civil disturbance,” accordingly, have been used to sidestep the contention that can arise from designating an incident a “race riot.” Nonetheless, the term is used here to highlight larger claims made in this article about race and state sovereignty illustrated through the history of insurrection.

<sup>158</sup> See, e.g., Vivienne M. Baulch & Patricia Zacharias, *The 1943 Detroit Race Riots*, Detroit News: Mich. Hist. (Feb. 10, 1999, 8:00 PM), <http://blogs.detroitnews.com/history/1999/02/10/the-1943-detroit-race-riots/> [<https://perma.cc/79H6-2E26>]; William Branigin, *Hurricane Hugo Haunts Virgin Islands*, WASH. POST (Oct. 31, 1989), <http://www.washingtonpost.com/wp-srv/national/longterm/hurricane/archives/hugo89a.htm> [<https://perma.cc/72LM-C5W6>]; Kathleen Koch, *Nation's Capital Still Recovering from 1968 Riots*, CNN (Apr. 4, 1998, 2:16 PM), <http://www.cnn.com/US/9804/04/mlk.dc.riots> [<https://perma.cc/6VS3-UADX>]; *People and Events: Bleeding*

Hugo incident, federal military intervention in all of the above was at the request of the state governor, and—though they collectively raised less concern among state officials over the legitimacy of such intervention—they were nonetheless the subject of controversy.

Several of the above incidents—namely, the Detroit riots, the riots following Martin Luther King, Jr.’s assassination, and the Los Angeles riots—are well-known and commonly understood to be ‘race riots’. They are notable for the purposes of this article in that they illustrate the trend discussed above: race-related civil disturbances deemed insurrections for the purposes of authorizing federal military intervention (by *local invitation*) to enforce law and order disrupted by *non-state actors*. Indeed, federal military intervention in each of these instances was authorized at the behest of the respective state governor. Further, notwithstanding that intervention in these instances was requested by state officials, the rhetoric of public speeches (and private discussions) indicates the controversial nature of the insurrection proclamation.

With the exception of the proclamation made attendant to the Detroit riot of 1943,<sup>159</sup> all of the remaining proclamations include substantially overlapping language advising that “the law enforcement resources available to the City and State, including the National Guard, have been unable to suppress such acts of violence and to restore law and order”<sup>160</sup>—language which signals that federal military intervention was a *last resort*. Such framing is evident in a transcript of President Johnson’s conversations with advisers and relevant state governors in the midst of riots sparked by Martin Luther King, Jr.’s assassination. In discussing plans for the domestic deployment of troops to suppress the riots, President Johnson instructed Mayor Richard Daley of Chicago that the governor of Illi-

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*Kansas, 1853-1861*, PBS.ORG, <http://www.pbs.org/wgbh/aia/part4/4p2952.html> [<https://perma.cc/AK2R-6Y32>]; Robert Reinhold, *Riots in Los Angeles: The Overview; As Rioting Mounted, Gates Remained at Political Event*, N.Y. TIMES (May 5, 1992), <http://www.nytimes.com/1992/05/05/us/riots-los-angeles-overview-rioting-mounted-gates-remained-political-event.html> [<https://perma.cc/ZHE3-3FR4>]; Kie Relyea, *Remembering Washington’s Chinese Expulsion 125 Years Later*, SEATTLE TIMES (Nov. 7, 2010, 9:46 AM) <http://www.seattletimes.com/seattle-news/remembering-washingtons-chinese-expulsion-125-years-later> [<https://perma.cc/S99R-7ULC>].

<sup>159</sup> Franklin D. Roosevelt, Proclamation No. 2588, Directing Detroit Race Rioters to Disperse (June 23, 1953), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=16414> [<https://perma.cc/9VL6-MASJ>].

<sup>160</sup> See, e.g., Lyndon B. Johnson, Proclamation 384, Law and Order in the State of Illinois (Apr. 7, 1968), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=106125> [<https://perma.cc/LYM4-ARW5>].

nois would have to make a “finding” that the state had “used all [its National] Guard, that [it had] used all [its] facilities, that [it is] unable to take care of the situation . . . .”<sup>161</sup> President Johnson’s reticence was even more apparent as to civil disturbances in Detroit, where Michigan governor and presidential hopeful George Romney vacillated on formally requesting the deployment of federal troops. Given his political aspirations, Governor Romney, on the one hand, was loath to admit that the riots had escalated to a level beyond his control; and President Johnson, on the other hand, was generally averse to the domestic deployment of troops and, accordingly, insisted on Romney’s formal request to exercise this exceptional measure.<sup>162</sup>

In some instances, the then-president further emphasized that such intervention was not authorized in order to enforce civil rights, but for the sole purpose of stemming criminal activity. For instance, in response to the Detroit riots of 1967, President Johnson supplemented the proclamation of insurrection with a public address noting that such action was taken with the “greatest regret” and assuring that “[p]illage, looting, murder, and arson have nothing to do with civil rights,” but were “criminal conduct.”<sup>163</sup> Similar qualifications were used long after the decade characterized by the

<sup>161</sup> *Johnson Conversation with Richard Daley on Apr 06, 1968 (WH6804.01)*, MILLER CTR., <http://archive.millercenter.org/presidentialrecordings/lbj-wh6804.01-12910> [<https://perma.cc/EDR9-7EGN>].

<sup>162</sup> JOSEPH A. CALIFANO, JR., *THE TRIUMPH AND TRAGEDY OF LYNDON JOHNSON: THE WHITE HOUSE YEARS 212-13* (1991) (“Johnson could have ignored Romney’s vacillation and political maneuvering. He had the constitutional and legal authority to deploy troops. He had only to determine that the situation was out of control, order the rioters to disperse, and if they did not, send in troops. But . . . Johnson did not like to use military troops in domestic disorders. He believed that local and state authorities should maintain order. He couldn’t stand the thought of American soldiers killing American civilians. . . . Romney was reluctant to ‘request’ the President to deploy troops and he refused to admit that he was ‘unable’ to maintain order in Detroit. Johnson insisted on a written request. Finally, Romney sent a telegram to the President, ‘I hereby officially request the immediate deployment of federal troops. . . . There is reasonable doubt that we can suppress the existing looting, arson and sniping without the assistance of federal troops.’”).

<sup>163</sup> Lyndon B. Johnson, *Remarks to the Nation After Authorizing the Use of Federal Troops in Detroit (July 24, 1967)*, in *AM. PRESIDENCY PROJECT* (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=28364> [<https://perma.cc/2SEV-2AWS>] (“I am sure the American people will realize that I take this action with the greatest regret—and only because of the clear, unmistakable, and undisputed evidence that Governor Romney of Michigan and the local officials in Detroit have been unable to bring the situation under control. Law enforcement is a local matter. It is the responsibility of local officials and the Governors of the respective States. The Federal Government should not intervene—except in the most extraordinary circumstances.”).

civil rights movement; in the midst of the L.A. riots, President George H.W. Bush stated in a public address that the unrest was “not about civil rights,” but, rather, “the brutality of a mob, pure and simple.”<sup>164</sup> Such distinctions, it can be inferred, were publicly made in order to help legitimize federal military intervention before a watching public, which, perhaps, might have associated such intervention with the controversial proclamations of insurrection attendant to past enforcements of civil rights.

For the sake of brevity, this section will discuss in detail those incidents that are either less well known and/or less commonly understood to be “race riots”: (a) violent clashes in “Bleeding Kansas,” (b) anti-Chinese expulsion campaigns in the Northwest, and (c) looting in St. Croix in the aftermath of Hurricane Hugo.

a. *Bleeding Kansas*

On February 11, 1856, President Franklin Pierce issued a proclamation ordering the dispersal of persons obstructing law and order in Kansas.<sup>165</sup> The proclamation addressed the violent clashes between pro- and anti-slavery factions in a conflict known as “Bleeding Kansas,” which arose after the 1894 Kansas-Nebraska Act effectively nullified the Missouri Compromise of 1820 by authorizing settlers to vote on whether slavery would be allowed in the eponymous territories. In other words, the Kansas-Nebraska Act authorized settlers of the new territories to decide whether slavery would be sanctioned or prohibited by way of self-determination or, as then termed, ‘popular sovereignty’.

Kansas, then, became a battleground. A pro-slavery faction included armed “Border Ruffians” from the adjacent slaveholding state of Missouri who flooded to the neighboring territory, voting illegally and engaging in vigilante violence to ensure that the terri-

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<sup>164</sup> Address to the Nation on the Civil Disturbances in Los Angeles, California, (May 1, 1992), in 1 PUB. PAPERS 685 (1992), <https://www.gpo.gov/fdsys/pkg/PPP-1992-book1/pdf/PPP-1992-book1-doc-pg685.pdf> [<https://perma.cc/MN4W-Q2PA>] (“What we saw last night and the night before in Los Angeles is not about civil rights. It’s not about the great cause of equality that all Americans must uphold. It’s not a message of protest. It’s been the brutality of a mob, pure and simple. And let me assure you: I will use whatever force is necessary to restore order. What is going on in L.A. must and will stop. As your President I guarantee you that this violence will end.”). A video version of the speech is also available online. *Bush on Los Angeles Riots*, HIST., <http://www.history.com/speeches/bush-on-los-angeles-riots#bush-on-los-angeles-riots> [<https://perma.cc/34DR-HK9E>].

<sup>165</sup> Franklin Pierce, Proclamation No. 66, Law and Order in the Territory of Kansas (Feb. 11, 1856), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=67740> [<https://perma.cc/ML99-ACZC>].

tory would not become a haven for escaped slaves. Their antagonists were abolitionists, including both humanitarian associations and armed guerrilla groups, the most notorious among them led by John Brown.<sup>166</sup> Violence and hotly contested elections ensued, with the political arm of each faction establishing a separate legislature and constitution for the territory.<sup>167</sup>

As to Bleeding Kansas, federal military intervention was initially proposed in November 1855 by Kansas territorial governor Wilson Shannon, a pro-slavery sympathizer. In his capacity as commander-in-chief of the state militia, Shannon had called forth a *posse comitatus* of armed men from bordering Missouri to help suppress an insurrection of abolitionist groups assembling within the free state settlement of Lawrence; thereafter, the territorial governor had become overwhelmed by the ensuing unrest and requested that President Pierce dispatch federal troops to help restore order.<sup>168</sup>

The president had been hesitant to heed this call, wary of the public appearance of targeting citizens with the force of the federal military. Moreover, anticipating the 1856 presidential election, President Pierce had been politically invested in the “success” of popular sovereignty in the territory. In light of such concerns, the president authorized federal troops in the territory to serve under the control of Governor Shannon, and in strict adherence to the text of the presidential proclamation and relevant territorial law. In effect, then, federal law enforcement was implemented at the behest and pleasure of the pro-slavery territorial governor.<sup>169</sup>

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<sup>166</sup> See *Pottawatomie Massacre*, PBS: AM. EXPERIENCE, <http://www.pbs.org/wgbh/amex/brown/peoplevents/pande07.html> [<https://perma.cc/AV9A-TAQS>]; see also *People and Events: Bleeding Kansas, 1853-1861*, *supra* note 158.

<sup>167</sup> “In fact what has been done is of revolutionary character. It is avowedly so in motive and in aim as respects the local law of the Territory. It will become treasonable insurrection if it reach the length of organized resistance by force to the fundamental or any other Federal law and to the authority of the General Government. In such an event the path of duty for the Executive is plain. The Constitution requiring him to take care that the laws of the United States be faithfully executed, if they be opposed in the Territory of Kansas he may, and should, place at the disposal of the marshal any public force of the United States which happens to be within the jurisdiction, to be used as a portion of the *posse comitatus*; and if that do not suffice to maintain order, then he may call forth the militia of one or more States for that object, or employ for the same object any part of the land or naval force of the United States.” Franklin Pierce, Special Message (Jan. 24, 1856), in *AM. PRESIDENCY PROJECT* (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=67636> [<https://perma.cc/6MR2-EVX3>].

<sup>168</sup> MICHAEL L. TATE, *THE FRONTIER ARMY IN THE SETTLEMENT OF THE WEST* 83-84 (1999).

<sup>169</sup> Franklin Pierce, Proclamation No. 66, Law and Order in the Territory of Kansas

Accordingly, among the more notorious displays of federal military intervention was the use of federal troops on July 4, 1856 to “disperse” the Topeka convention of a free-state legislative faction, which had been convened to contest and counteract the official pro-slavery territorial government.<sup>170</sup> This deployment sparked controversy, with Northern abolitionist sympathizers criticizing the use of federal military force to uphold a pro-slavery government, and Southern pro-slavery supporters wary of the potential for federal troops to be increasingly used to suppress the incursions of border ruffians and other similarly-aligned factions. Moreover, in the end, President Pierce’s perceived bungling of the situation in the Kansas territory – in part, occasioned by his hesitancy and lack of leadership in failing to assert executive control over the federal military response therein – contributed to his losing the Democratic presidential primary.<sup>171</sup>

b. *Anti-Chinese Expulsion*

President Grover Cleveland issued two presidential proclamations in response to the organized expulsion of Chinese laborers from Washington State in the mid-1880s. Amid an economic downturn that hit the Northwest Pacific region, Chinese residents—who had largely migrated to help build the region’s transcontinental railroad—became scapegoats for anxious white laborers who blamed them for driving down wages and, thereby, posing unfair competition for available work. A wave of propaganda campaigns by members and sympathizers of the Knights of Labor, a labor union, recommended expulsion of Chinese laborers, a tactic which gained significant public support.

The first proclamation, issued on November 7, 1885, concerned the move by groups spurred by the Knights of Labor to threaten and intimidate Chinese residents into leaving Tacoma, Washington.<sup>172</sup> On November 3 of that year—a few weeks after three Chinese laborers were murdered and masked men torched

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(Feb. 11, 1856), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=67740> [<https://perma.cc/MLE9-ACZC>].

<sup>170</sup> *The Missouri-Kansas Conflict 1854-1865: Topeka Legislature Dispersed*, CIV. WAR ON WESTERN BORDER, <http://www.civilwaronthewesternborder.org/timeline/topeka-legislature-dispersed> [<https://perma.cc/T9RM-3PQT>].

<sup>171</sup> Gerhard Peters & John T. Woolley, *Election of 1856*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1856> [<https://perma.cc/7QX8-RMPP>].

<sup>172</sup> Grover Cleveland, Proclamation No. 274, Law and Order in the Territory of Washington (Nov. 7, 1885), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T.

quarters where 37 Chinese workers resided—some 200 Chinese persons were ordered to pack, escorted by Knights of Labor supporters to a Northern Pacific railway, and forced to board a train to Portland, Oregon.<sup>173</sup> President Cleveland’s proclamation, which was made at the request of the territorial governor of Washington, stated “that by reason of unlawful obstructions and combinations and the assemblage of evil-disposed persons” it had “become impracticable to enforce” the law.<sup>174</sup> However, such “evil-disposed people,” having completed their mission, wondered what federal troops would do when they reached Tacoma: “‘What insurrection?’” asked perpetrators as they returned peaceably to their homes. . . . ‘How will they manage to put down a people who are not in rebellion?’ ‘Let them come,’ said the calm-minded. ‘We shall be glad to see them. It will give the boys a change.’”<sup>175</sup>

The president’s second proclamation, which was also made at the request of Washington’s territorial governor, similarly cited “evil-disposed persons” whose unlawful obstructions and combinations made it impracticable to enforce the law. Issued on February 9, 1886, the proclamation responded to a riot that erupted in Seattle after local members and sympathizers of the Knights of Labor attempted to expel Chinese laborers using the “Tacoma Method.”<sup>176</sup> On February 7, such perpetrators had marauded through Seattle’s Chinese neighborhood and threatened residents to depart on a steamship leaving that afternoon. However, after plans were made to postpone the expulsion for the following day, the intended departure was further disrupted by violent clashes between Knight-supporters and white parties who sought to put a

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Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=71275> [<https://perma.cc/BSD4-YAY8>].

<sup>173</sup> See GWEN WHITING, WASH. STATE HISTORY MUSEUM, THE CHINESE EXPULSION ACT OF 1882, [http://www.washingtonhistory.org/files/library/chineseexclusion\\_001.pdf](http://www.washingtonhistory.org/files/library/chineseexclusion_001.pdf) [<https://perma.cc/5YL3-Z2W8>]; see also David W. Chen, *Picturing the Remnants of Anti-Chinese Violence*, N.Y. TIMES: LENS (Aug. 13, 2012), <https://lens.blogs.nytimes.com/2012/08/13/remnants-of-anti-chinese-violence> [<https://perma.cc/FPJ2-JTXQ>].

<sup>174</sup> Grover Cleveland, Proclamation No. 274, Law and Order in the Territory of Washington (Nov. 7, 1885), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=71275> [<https://perma.cc/BSD4-YAY8>].

<sup>175</sup> Carlos A. Schwantes, *Protest in a Promised Land: Unemployment, Disinheritance, and the Origin of Labor Militancy in the Pacific Northwest, 1885-1886*, 13 WESTERN HIST. Q., 373, 383 (1982) (noting that a grand jury issued indictments pursuant to the Ku Klux Klan Act of 1871, which resulted in no convictions).

<sup>176</sup> Grover Cleveland, Proclamation No. 275, Intent to Use Force Against Unlawful Assemblages in the Territory of Washington (Feb. 9, 1886), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=71415> [<https://perma.cc/J2G8-FKMY>].

stop to the scheme. The ship ultimately departed with nearly 200 Chinese persons on board, but thereafter the opposing parties clashed when Knight-supporters tried to escort the remaining Chinese laborers off the dock to await the next ship, leaving five wounded and one person dead.<sup>177</sup>

c. *Hurricane Hugo*

On September 20, 1989, President George H.W. Bush issued a proclamation regarding domestic violence and disorder in the U.S. Virgin Island of St. Croix that was “endangering life and property and obstructing execution of the laws.”<sup>178</sup> President Bush’s proclamation came after reports of looting and violence in St. Croix after Hurricane Hugo hit landfall three days earlier on September 17. The damage wrought by the hurricane severely impaired communications systems, making it difficult for Washington-based officials to confirm conditions on the island. Accordingly, much of the information relied upon was communicated by ham radio operators. Among circulated reports were incidents of racial violence enacted by Black residents against white residents and tourists, which were later determined to be exaggerated.<sup>179</sup> While the precise nature of civil disorder in the aftermath of the hurricane remained unclear, it was undisputed that widespread looting had occurred,<sup>180</sup> with local police, National Guard troops,<sup>181</sup> and even prominent citizens

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<sup>177</sup> Schwantes, *supra* note 175, at 382.

<sup>178</sup> Proclamation No. 6023, 54 Fed. Reg. 39,153 (Sept. 20, 1989), *reprinted in* 103 Stat. 3093 (1989).

<sup>179</sup> Jeffrey Schmalz, *3 Weeks After Storm, St. Croix Still Needs Troops*, N.Y. TIMES (Oct. 9, 1989), <http://www.nytimes.com/1989/10/09/us/3-weeks-after-storm-st-croix-still-needs-troops.html> [<https://perma.cc/4GAY-TGJA>] (“Federal officials say they believe reports that some blacks, who make up 70 percent of the island’s population, had shouted, ‘Whitey, go home!’ But they said that there was no indication that such encounters involved more than shouting, and the complaints were not being pursued.”).

<sup>180</sup> James Gerstenzang & Ronald J. Ostrow, *Washington Officials Paint Grim Picture of Chaos that Led to Approval of Troops*, L.A. TIMES (Sept. 21, 1989), [http://articles.latimes.com/1989-09-21/news/mn-910\\_1\\_virgin-islands](http://articles.latimes.com/1989-09-21/news/mn-910_1_virgin-islands) [<https://perma.cc/Y4TV-VEQL>] (“While Hurricane Hugo’s destruction of communications links left details of the disorders unclear, one Interior Department official reported that every store on St. Croix appeared to have been looted.”).

<sup>181</sup> Branigin, *supra* note 158 (“Most troubling for many people, however, was the apparent insouciance of the police and National Guard, some of whose members were looters, witnesses said. ‘I watched people looting while Gen. Moorehead was standing right out there directing traffic’ a couple of blocks away, one U.S. law-enforcement official said angrily. At one point, the official said, ‘a guy with a National Guard uniform told me to go into a store and ‘take what you need.’ Why? Because the National Guard was looting, too.’”).

having reportedly participated.<sup>182</sup>

News articles written at the time of the domestic disturbance cited reports of hundreds of inmates who broke out of a hurricane-damaged prison, “looters by the thousands” and “[f]leeing tourists [telling] of chaos, long and heavy automatic weapons fire, robbers with machetes and prisoners—including murderers—on the loose.”<sup>183</sup> Other sources quoted at the time reported that the looting was not solely opportunistic, but also need-oriented, engaged in by residents who were running out of food and other necessary provisions.<sup>184</sup> The ensuing unrest, in any event, occurred against a backdrop of racial tensions and socio-economic disparities between the island’s resident population and seasonal tourists.

The presidential proclamation was silent on whether it had been made at the request of the territorial governor of the U.S. Virgin Islands, and news reports provide conflicting accounts. While spokespersons for President Bush stated that the proclamation was made at the request of Virgin Islands territorial governor Alexander Farrelly, Farrelly responded that he had not made any such request.<sup>185</sup> In any event, on September 21, approximately 1,100 federal troops were deployed to the island to aid the Virgin Islands National Guard and other local law enforcement.

As for indicated perceptions of legitimacy, some territorial officials criticized the federal deployment, which they argued diverted necessary resources from relief missions to security

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<sup>182</sup> *Id.* (“The breakdown in order after the hurricane also has prompted much soul-searching about the behavior of Crucians, as people of St. Croix are known, since the looters included not only poor residents of public housing projects but also prominent citizens. The U.S. attorney’s office has charged 15 such persons with offenses ranging from grand larceny to possession of stolen goods. They include a former St. Croix senator and gubernatorial candidate who was police commander in Frederiksted at the time of his arrest, the vice president of a bank, a Christiansted civic leader and a restaurant owner.”).

<sup>183</sup> Bob Sexter & Richard E. Meyer, *St. Croix Chaos Subsides as U.S. Troops Arrive*, L.A. TIMES (Sept. 22, 1989), [http://articles.latimes.com/1989-09-22/news/mn-673\\_1\\_st-croix](http://articles.latimes.com/1989-09-22/news/mn-673_1_st-croix) [<https://perma.cc/E6Q9-9RFM>].

<sup>184</sup> *Id.* (“Some islanders have admitted that they joined in the looting because they were afraid that if they didn’t they would have nothing to eat.”).

<sup>185</sup> Gerstenzang & Ostrow, *supra* note 180 (“Farrelly said Wednesday night that he had not asked for the troops Bush authorized.”); Marita Hernandez & Richard E. Meyer, *U.S. Orders in Troops to Quell Island Violence: St. Croix Looting and Lawlessness in Wake of Hurricane Damage Spurs Authorization by Bush*, L.A. TIMES (Sept. 21, 1989), [http://articles.latimes.com/1989-09-21/news/mn-890\\_1\\_virgin-islands](http://articles.latimes.com/1989-09-21/news/mn-890_1_virgin-islands) [<https://perma.cc/AS7G-VCE9>] (“Presidential spokesman Marlin Fitzwater said Bush authorized deployment after receiving a request for help from Virgin Islands Gov. Alexander Farrelly. In Christiansted, the governor said he had not asked for federal help to restore order. But Holland Redfield, a Virgin Islands territorial senator and legislative liaison to the White House, said he asked for assistance from Washington.”).

operations. Territorial Governor Farrelly, for one, downplayed the level of disorder on the ground.<sup>186</sup> Further, non-voting House of Representatives member Ron de Lugo criticized the media reportage of the disruption on the island, “denounc[ing] the television networks, Time Magazine, The New York Times, The Wall Street Journal, The Miami Herald, The Chicago Tribune and other news organization [sic], accusing them of concentrating on the looting and exaggerating the extent of civil disorder.”<sup>187</sup>

### C. *Right Intention*

When contemplating the legitimacy of humanitarian intervention abroad, moral philosophers and critics of foreign policy, in particular, have considered whether—independent of the underlying circumstance deemed a “just cause”—such intervention was made with the “right intention.” In other words, such scholars have considered whether the “just cause” was merely a pretext for armed intervention, which, accordingly, was not undertaken solely for humanitarian purposes.<sup>188</sup>

Indeed, in the international context, it is understood that states do not always engage in humanitarian intervention for purely humanitarian purposes. Humanitarian intervention, for instance, can be partly motivated by the pursuit of national interests that do not encompass the intent to save lives and protect human rights.<sup>189</sup> Given the understanding that humanitarian intervention is often prompted by such mixed motives, evaluations of right intention have tended to adopt an empirical approach that considers when such intervention has, and has not, been undertaken in light of underlying circumstances that would seem to constitute a just cause. Such evaluations, then, have adopted an inductive analysis to consider when humanitarian intervention appears to have been prompted by non-humanitarian national interests, on the one

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<sup>186</sup> Dennis Hevesi, *Bush Dispatches Troops to Island in Storm's Wake*, N.Y. TIMES (Sept. 21, 1989), <http://www.nytimes.com/1989/09/21/us/bush-dispatches-troops-to-island-in-storm-s-wake.html> [<https://perma.cc/PA28-NFX5>] (“Governor Farrelly of the Virgin Islands, speaking from his office in Charlotte Amalie on St. Thomas, about 30 miles north of St. Croix, acknowledged, ‘There is some looting, no doubt about that. ‘But,’ he added, ‘there is no near state of anarchy. And I should know. I’m in the streets every day and I’m the Governor of this territory.’”).

<sup>187</sup> Schmalz, *supra* note 179.

<sup>188</sup> See, e.g., Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFFAIRS, Nov./Dec. 2002, at 100, 104, 109 (describing the relationship between right intention and national interest in modern humanitarian intervention).

<sup>189</sup> ANDREAS KRIEG, *MOTIVATIONS FOR HUMANITARIAN INTERVENTION: THEORETICAL AND EMPIRICAL CONSIDERATIONS* 37-58 (2013) (ebook).

hand, or, on the other hand, has not been undertaken due to the lack of both national self-interest and political will.

It could be posited that considerations of right intention at play in the international context are not suitable for the domestic context. At home, one would imagine, the federal government's response in protecting its own citizens in a crisis scenario would not only be politically uncontroversial, but would also be fairly uniform in tactical application, in line with the singular and incontrovertible motive of protecting any and all citizens in a given emergency. However, just as an empirical analysis of humanitarian intervention (e.g., in Bosnia, Kosovo, and Somalia) and its absence (e.g., in Rwanda) supports an inductive evaluation of the international community's political priorities, relative indifference, and blind spots, a similar analysis of the nature of federal intervention at home, as discussed in more detail below, not only reveals a curious trend, but also suggests a disparity as to which crises warrant certain kinds of responses.

This section considers the 'right intention' of domestic federal military intervention through a similar inductive analysis—here, with a select consideration of the application of the Stafford Act to govern the federal response to incidents that, on their face, could constitute instances of domestic violence or other obstruction of federal law or the enjoyment of constitutional rights that would warrant the invocation of the Insurrection Act. Such an analysis, albeit cursory and speculative, is nonetheless useful in light of the stated legislative purposes of the Stafford Act and the Insurrection Act, respectively, which frame the *nature* of federal military intervention.

Again, while the Insurrection Act authorizes the deployment of federal troops with law enforcement powers, the Stafford Act does not—a key distinction that is evident in the text of each statute and, further, is translated in the rules of engagement established under the authority of one or both acts. As for the legislative text itself, while the Insurrection Act authorizes the deployment of federal troops to “suppress insurrection” and otherwise quell “domestic violence,”<sup>190</sup> such troops may be deployed under the Stafford Act in accordance with the ultimate purposes to “save lives” and “alleviate . . . suffering.”<sup>191</sup> While such text does not necessarily dictate specific behaviors of every federal military responder on the ground, the legislative authorization does *frame* the overall mission,

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<sup>190</sup> 10 U.S.C. § 333 (2008).

<sup>191</sup> 42 U.S.C. § 5121(b) (2007).

casting intervention as the use of military force to restore law and order, on the one hand, or to provide emergency relief in order to save lives, on the other.

The following subsection briefly considers select incidents of arguably insurrectionary character that were solely deemed either natural or man-made disasters under the Stafford Act. This subsection, moreover, is not intended to provide evidence *per se* of selective federal law enforcement, but to raise for discussion the potential for such selective enforcement and the implications in light of the fraught history of race and sovereignty of the several states.

### 1. Selective Enforcement

Instances of domestic violence in the United States that were not proclaimed insurrections are numerous; this article does not consider them all. Rather, this inquiry of right intention, similar to that offered by commentators on and critics of humanitarian intervention abroad, is episodic and speculative, intended to raise issues for further discussion rather than to make definitive conclusions. Accordingly, while the Stafford Act, passed in 1988, has applied to incidents that arose over a far shorter span of time than the Insurrection Act of 1807, it is nonetheless, for the purposes of this article, a useful benchmark for considering the potential for selective federal law enforcement.

Though the Stafford Act has been generally applied to authorize federal response to natural disasters—such as hurricanes, floods, and flash fires—there are only *three* instances since the legislation was enacted in which it was applied to respond to civil disturbances, specifically, three acts of domestic terrorism: the Oklahoma City Bombing, the 1993 attack on the World Trade Center, and the events of September 11, 2001.

On April 19, 1995, a car bomb detonated and destroyed the Alfred P. Murrah Federal Building in Oklahoma City, killing 169 people, including nineteen children, and injuring 500.<sup>192</sup> On the same day, President Bill Clinton made a unilateral declaration of “emergency” under the Stafford Act.<sup>193</sup> The next day, on April 20,

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<sup>192</sup> *April 19, 1995 — Timothy McVeigh Bombs Oklahoma City Building*, N.Y. TIMES: THE LEARNING NETWORK (Apr. 19, 2002, 4:02 AM), <https://learning.blogs.nytimes.com/2012/04/19/april-19-1995-timothy-mcveigh-bombs-oklahoma-city-building> [https://perma.cc/E2EN-CSSL].

<sup>193</sup> William J. Clinton, Remarks on the Bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma (Apr. 19, 1995), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/>

1995, the Department of the Army transmitted an executive order for military support to civil authorities in Oklahoma City, citing the Stafford Act as legal authority. As for the World Trade Center Attacks, President Bill Clinton declared a “major disaster” after a car bomb was detonated on February 26, 1993 in the garage of the World Trade Center, killing six people and injuring about 1,000 others.<sup>194</sup> In response to the events of September 11, 2001, President George W. Bush declared a “major disaster.”<sup>195</sup> There was no proclamation of insurrection in relation to these attacks; rather, on that date, President Bush further declared a national emergency under the National Emergencies Act,<sup>196</sup> pursuant to which he called upon state governors to activate National Guard troops to patrol airports, train stations, and other transportation depots under Title 32, thereby federally compensating such troops for any law enforcement activities they engaged in under state command. Accordingly, patrolling National Guard troops, though a regular presence in the months following the attacks, were not engaged in *federal* law enforcement.

The above incidents are noteworthy comparators in that they involved acts of grave domestic violence that—while they elicited a robust security response—were not deemed “insurrections” under the Insurrection Act and, thereby, were not subject to federal law enforcement pursuant to the legislation. However, as will be illus-

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index.php?pid=51239 [https://perma.cc/549R-XAB3]. Prior to President Clinton’s declaration, the Department of Defense had already provided assistance to state and local authorities pursuant to its “immediate action authority” to respond to emergencies in order to “save lives, [to] prevent human suffering, or [to] mitigate great property damage” when time does not permit for necessary prior approvals. See Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 1, 4. Such assistance included the dispatch of explosive ordnance personnel, two bomb detection dog teams, and a 66-person rescue team. Thereafter, the primary efforts of the Department of Defense included providing airlift assets for FEMA’s search and rescue teams. *Id.* at 1, 1 n.5.

<sup>194</sup> William J. Clinton, The President’s Radio Address (Feb. 27, 1993), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=46253> [https://perma.cc/QV2L-WQ45]; see also Press Release, President Declares Disasters in Nebraska and New York (Apr. 2, 1993), <https://clinton6.nara.gov/1993/04/1993-04-02-president-declares-disasters-in-nebraska-and-new-york.html> [https://perma.cc/37RK-BLVY] (“President Clinton today declared major disasters exist in both the state of New York following the Feb. 26 bombing of the World Trade Center and in Nebraska as a result of severe March flooding and ice jams.”).

<sup>195</sup> *Bush Declares Major Disaster in New York*, USA TODAY (Sept. 11, 2001, 10:22 PM), <http://usatoday30.usatoday.com/news/nation/2001/09/11/nyc-disaster.htm> [https://perma.cc/KM9C-WVVD].

<sup>196</sup> Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

trated with the case of Hurricane Andrew, the disparity is not merely semantic, but can translate into differences in the permissible use of force by federal troops on the ground. Hurricane Andrew struck Florida in August 1992, especially devastating south Dade County, a suburban part of the Miami metropolitan area where the population was about 50% Hispanic residents, 30% non-Hispanic white residents, and 19% Black residents.<sup>197</sup>

President George H.W. Bush made a proclamation of “major disaster” pursuant to the Stafford Act on August 24, 1992, the same day the hurricane hit landfall in South Florida with winds at an estimated 168 miles per hour.<sup>198</sup> There were numerous reports of looting in the days after the hurricane hit. Though official statistics on the extent of the looting remain uncertain, news stories from that time highlighted an atmosphere pervaded by fear and perceived lawlessness—with reports that signs painted on homes and other buildings read “You loot, we shoot” or “Looters will lose body parts,” and at least one man presumed to be a looter having been shot dead by a South Florida resident.<sup>199</sup> At the height of the crisis, then-governor of Florida, Lawton Chiles, dispatched approximately 5000 of the state’s National Guard troops to secure areas reportedly besieged by looting, including to guard the Cutler Ridge Mall.<sup>200</sup> In response to the governor’s request for additional active-duty troops to Florida without, notably, making a proclamation of insurrection in order to confer law enforcement powers to such troops, federal troops dispatched to the area pursuant to the Stafford Act were armed with weaponry that *lacked ammunition*. As reported in *The Miami Herald*, members of the 82nd Airborne Division—who were armed with M-16 rifles but had not been is-

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<sup>197</sup> RESEARCH & PLANNING SECTION, MIAMI DEP’T OF PLANNING & ZONING, DEMOGRAPHIC PROFILE MIAMI-DADE COUNTY, FLORIDA 1960-2000 10 (2003).

<sup>198</sup> George H.W. Bush, Remarks on Disaster Assistance for Florida Following Hurricane Andrew (Aug. 24, 1992), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=21360> [<https://perma.cc/HY3Q-RHDV>]. For a discussion of the wind speeds, see Mark Silva et al., *Destruction at Dawn: What Hurricane Andrew Did to South Florida 24 Years Ago*, MIAMI HERALD (Aug. 24, 2015, 9:09 AM), <http://www.miamiherald.com/news/weather/hurricane/article32006499.html> [<https://perma.cc/RUS4-XYJU>].

<sup>199</sup> See, e.g., Gary Nelson, *Hurricane Andrew Remembered: 20 Years Later*, CBS MIAMI (Aug. 24, 2012, 7:19 PM), <http://miami.cbslocal.com/2012/08/24/hurricane-andrew-remembered-20-years-later/> [<https://perma.cc/B4QD-4SYV>]; Silva et al., *supra* note 198; Deborah Sontag, *After the Storm; The Days of a Scavenger Amid the Rubble*, N.Y. TIMES (Sept. 1, 1992), <http://www.nytimes.com/1992/09/01/us/after-the-storm-the-days-of-a-scavenger-amid-the-rubble.html> [<https://perma.cc/24DT-RWL4>];

<sup>200</sup> Ardy Friedberg & Kevin Davis, *Looting Heavy Despite Police Presence*, SUN SENTINEL (Aug. 26, 1992), [http://articles.sun-sentinel.com/1992-08-26/news/9201170778\\_1\\_looters-florida-national-guard-troopers](http://articles.sun-sentinel.com/1992-08-26/news/9201170778_1_looters-florida-national-guard-troopers) [<https://perma.cc/5TLA-WDUC>].

sued ammunition—were confronted by an armed gang in South Dade County; though the confrontation was diffused, a captain of the division recalling the incident noted that “[o]ne of these times, somebody’s going to call our bluff, and someone’ll get shot . . . .”<sup>201</sup>

Again, that the aforementioned incidents were not proclaimed insurrections is not evidence *per se* of selective federal law enforcement. However, in light of “insurrections” and would-be “insurrections” that are similarly situated—namely Hurricane Hugo and Hurricane Katrina—and acts of domestic terrorism that pose arguably graver security risks, these incidents raise for serious discussion the potential for selective federal law enforcement and at least illustrate the fraught tension between race and the sovereignty of the several states.

## II. PARADOXES OF SOVEREIGNTY AND CITIZENSHIP

Part I of this article applied the conceptual framework developed to guide humanitarian intervention abroad to domestic federal military intervention authorized under the Insurrection Act—or, as termed herein, humanitarian intervention *at home*. As discussed in detail above, executive decision-making regarding domestic federal military intervention raises similar questions of legal authority, just cause, and right intention, and, moreover, illuminates the fraught relationship between race and federalism. Again, the ostensibly clear legal authority for the executive to deploy federal troops with law enforcement powers is, in practice, vague—rendering “insurrection” tautological. So, as a *just cause* is, in effect, what the executive proclaims one to be, an overview of past incidents deemed “insurrections” helps define the otherwise slippery term, revealing that such crises have tended to either involve the violation of civil rights or so-called ‘race riots’. Furthermore, the application of this conceptual framework subjects the purported humanitarian intention behind such federal military intervention to a deductive inquiry, in that, when considering arguably similarly situated incidents that were not all deemed “insurrections,” the specter of selective enforcement is raised. In other words, the empirical association between “insurrection” and race—in particular, the civil rights of, or civil disturbances involving, Black citizens—might, as with Hurricane Katrina, reframe a mission to provide emergency relief (*i.e.*, humanitarian aid) as one to restore law and order (*i.e.*, humanitarian intervention).

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<sup>201</sup> Peter Slevin, *The Army vs. The Gangs*, MIAMI HERALD, Sept. 6, 1992, at 1A.

Part II of this article further develops this implicit analogy between humanitarian intervention abroad and federal military intervention at home to speculate on two paradoxes that emerge from this conceptual exercise—one of sovereignty and another of citizenship. The definition of a paradox, of course, is a statement that is seemingly contradictory or opposed to common sense and, yet, is perhaps true. As for the sovereignty of the several states, while it would appear that federal military intervention during a crisis should be uncontroversial given the clear legal authority to intervene, the political fallout of doing such renders state sovereignty far less penetrable than would be expected—akin, perhaps, to that of the sovereignty of a foreign state. As to citizenship, while the federal government’s responsibility to protect all citizens within U.S. borders is unequivocal and expected to be fulfilled uniformly, an overview of the nature of federal military intervention in response to a given domestic crisis illustrates an ongoing contest over the incorporation of Black citizens into the nation-state, the legacy of which might result in disparate regimes of federal intervention where Black citizens are concerned, with the primary intention to restore law and order trumping that to save lives.

A. *Sovereignty of the Several States*

The paradox of sovereignty, illustrated in Part I, is that—where usurping police powers are concerned—the potential political fallout of violating the sovereignty of the several states appears to pose as much as, or perhaps more of, a constraint on federal military intervention at home as it does on humanitarian intervention abroad. This statement, seemingly absurd yet well-founded, may explain, in the case of Hurricane Katrina, the slow provision of federal assistance. This statement, moreover, poses an answer to Soledad O’Brien’s question as to why, apparently, such federal assistance was swiftly provided to tsunami victims in Indonesia relative to Louisiana.<sup>202</sup>

Such hesitancy, as discussed above, appears to arise when military intervention is framed under the Insurrection Act—which authorizes federal troops to engage in law enforcement—rather than solely in accordance with the Stafford Act—where, in line with Posse Comitatus restrictions, any federal troops deployed thereunder are *not* authorized to engage in law enforcement activity. The nature of this hesitancy, as explored above is two-fold: arising, on

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<sup>202</sup> See note 10 and accompanying text *supra*.

the one hand, out of a longstanding and perhaps race-neutral aversion (expressed in *The Federalist Papers* and otherwise) to the exercise of federal military power within the several states, and, on the other hand, out of a fraught, racial history whereby, in practice, federal law enforcement was repeatedly authorized to either enforce civil rights of Black citizens or suppress so-called ‘race riots’.

As for the apparently race-neutral source of this hesitancy, an overview of past invocations of the Insurrection Act reveals a will on the part of the state governor of a given state to appear to his or her constituency to possess control over the police powers of the state. Moreover, given such politically motivated will, this overview also reveals a reluctance on the part of the executive to usurp such police powers from the state governor without having been requested to do so. Such hesitancy, in short, appears to arise, in part, out of classic federalist concerns. As raised in *The Federalist Papers*, even the establishment of federal troops sparked fears over their use to overpower state governments and forcibly restrain individual liberty. For instance, during Radical Reconstruction, the aforementioned “spectacle of soldiers ‘marching’” into a New Orleans assembly chamber and “‘expelling members at the point of bayonet’” aroused sufficient aversion among then-Republican congressmen to set in motion the withdrawal of federal troops from former Confederate states.<sup>203</sup> State governors who resisted the court-ordered desegregation of public schools employed fiery rhetoric representing the use of federal troops to enforce civil rights as an unjust encroachment of federal power. The deployment of such troops was referred to as “military occupation” in Arkansas, as a move to “invade Alabama” and, according to the governor of Mississippi, an employment of “naked and arbitrary power” denying a “right of self-determination in the conduct of the affairs of our sovereign state.”<sup>204</sup>

Further, the executive aversion to violating the sovereignty of Alabama led President Johnson to reframe ultimate federal military intervention as a response to a ‘local invitation’ by Governor Wallace rather than a unilateral proclamation of insurrection. Specifically, after Governor Wallace declined to deploy the National Guard to enforce the rights of protestors subjected to violence by state troopers, President Johnson reframed his later proclamation as having been made on account of an ‘unwillingness’ of the state

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<sup>203</sup> FONER, *supra* note 100, at 554.

<sup>204</sup> DAVID NIVEN, *THE POLITICS OF INJUSTICE: THE KENNEDYS, THE FREEDOM RIDES, AND THE CONSEQUENCES OF A MORAL COMPROMISE* 151 (2003).

to intervene that was tantamount to a request.<sup>205</sup> Even where federal military intervention was at the request of a given state governor—as in the case of ‘race riots’—in some instances, the executive was at least rhetorically tentative in heeding this request. In the case of Bleeding Kansas, President Pierce was hesitant to heed the call of territorial governor Shannon to dispatch federal troops to restore law and order, wary of the public appearance of targeting citizens with federal military force.<sup>206</sup> As for the Detroit riots of 1967, after state governor George Romney requested a proclamation of insurrection, President Johnson, for one, was reluctant to domestically deploy federal troops and, further, made clear in the proclamation’s written text that “the law enforcement resources available to the City and State, including the National Guard” were unable to restore law and order, indicating that federal military intervention as a ‘last resort’.<sup>207</sup>

*B. Disparate Responses to U.S. Citizens*

The paradox of citizenship illustrated in this article is three-fold. For one, following from the paradox of sovereignty, an overview of the past proclamations of “insurrection” and their attendant controversy reveals that—where federal military intervention has been contemplated—it could, counter-intuitively, be more efficient for the federal government to respond to crises abroad than to crises at home. As discussed in detail above, U.S. presidents have generally shown reluctance at employing the exceptional power to domestically deploy federal troops. Moreover, even where such deployment has been at the request of the relevant state governor, U.S. presidents have generally been prudent to inform the public that this exceptional authority was not exercised unilaterally, and, in some cases, reassure the public that such intervention was not made to enforce ‘civil rights’.

Second, the uncovered pattern of past “insurrections”—namely, civil rights ‘crises’ and so-called ‘race riots’—evidences the ongoing contest over the incorporation of Black persons into the body politic, and of such persons as, paradoxically, citizens consistently struggling to be afforded and enjoy the full benefit of citizenship.<sup>208</sup> Indeed, a review of the invocation of the Insurrection Act

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<sup>205</sup> See *supra* note 140 and accompanying text.

<sup>206</sup> See Part I.B.2.a. *supra*.

<sup>207</sup> Proclamation No. 3795, 32 Fed. Reg. 10,905 (July 26, 1967).

<sup>208</sup> DANIEL SIGWARD, *FACING HISTORY AND OURSELVES, THE RECONSTRUCTION ERA AND THE FRAGILITY OF DEMOCRACY* 114 (2015), <https://www.facinghistory.org/sites/>

reveals a marked trend as to what past presidents have deemed just causes—that is, on the one hand, the enforcement of civil rights of Black and other non-white persons in a given state (e.g., in Washington state to halt anti-Chinese expulsion campaigns; in Southern states during the Reconstruction Era; in Alabama, Arkansas, and Mississippi to desegregate public schools, as well as to enforce the rights of protesters marching from Selma to Montgomery), and, on the other hand, the suppression of ‘race riots’ that erupted in states unable to restore law and order (e.g., in “Bleeding Kansas” prior to the Civil War; the Detroit riots of 1943 and 1967; the unrest in cities across the United States after Martin Luther King, Jr. was assassinated; and the Los Angeles riots).

In light of this history, the epigraph that begins this article makes sense, rendering domestic federal military intervention particularly fraught where Black citizens are concerned. Again, regarding Hurricane Katrina, President Bush hesitated as to whether federal troops should have been deployed with the primary mission to suppress an insurrection or to save lives. The events of Hurricane Katrina, then, were indeterminate, representing at the same time humanitarian crisis and ‘race riot’, an illegibility that held an executive decision in abeyance for five crucial days. Just as mostly-Black evacuees in New Orleans were, at once, resident and “refugee,” stranded in a “third world country”<sup>209</sup> at home, they were also, at the same time, victims and perpetrators—impotent insurgents, internally-displaced insurrectionists, relief-seeking rioters.

Third—given the disparate invocation of the Insurrection Act, on the one hand, and application of the Stafford Act, on the other, to respond to similarly situated internal crises—this legacy may result in a disparate response to crisis where Black citizens are concerned, with the primary intention to restore law and order trumping that to save lives. The key distinction between the Insurrection Act and the Stafford Act—the presence or absence of law-enforcement authority of federal troops—is implicit in the stated *purpose* of each statute and indicative of the respective nature of federal military intervention thereunder. Whereas federal troops are deployed under the Insurrection Act to suppress “insurrections,” “rebellions” and “unlawful obstructions,” federal assistance (military and otherwise), is provided under the Stafford Act simply

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default/files/publications/The\_Reconstruction\_Era\_and\_The\_Fragility\_of\_Democracy\_0.pdf [https://perma.cc/5PGQ-RNYH].

<sup>209</sup> Carr, *supra* note 5; Treaster & Sontag, *supra* note 6.

in order to “save lives” and “alleviate suffering.”<sup>210</sup> In other words, while the Insurrection Act authorizes the use of military force to achieve humanitarian objectives, both the end and the means of the Stafford Act are humanitarian in nature. Again, while the Insurrection Act presumes federal military intervention of a *combative* nature, the Stafford Act presumes federal intervention that, whether military or non-military, is, by contrast, *non-combative*. This distinction is important because the *intention* of federal disaster response can reframe a mission from one to search-and-rescue to shoot-to-kill.

In light of the above concern, a survey of incidents that have been deemed “insurrections” begs questions about certain incidents that have not. For instance, the bombings of a federal building in Oklahoma City and the World Trade Center in 1992, as well as the events of September 11, 2001—each domestic acts of terrorism—were not proclaimed “insurrections.” Rather, these attacks were solely interpreted as “man-made” disasters within the meaning of the Stafford Act, and, thus, any federal military dispatched thereunder lacked law-enforcement authority.<sup>211</sup> Further, the Stafford Act was solely applied to coordinate the federal response to Hurricane Andrew in South Florida, where news media reported rampant looting in South Dade County—an area in which approximately 70% of the residents were white or Hispanic according to corresponding data.<sup>212</sup> By contrast, the Insurrection Act was invoked to deploy federal troops to St. Croix amid the devastation of Hurricane Hugo in response to media reports of looters menacing tourist enclaves.<sup>213</sup> St. Croix is among the U.S. Virgin Islands, an unincorporated territory of the United States where approximately 85% of the residents were Black according to corresponding census data. To the extent that an “insurrection” is in the eye of the beholder, such incidents raise for serious discussion the apparent racial implications of federal military enforcement.

#### CONCLUSION

“Legal interpretive acts signal and occasion the imposition of violence upon others[,]” wrote Robert M. Cover in *Violence and the Word*.<sup>214</sup> Interpretations of the law, Cover further stated, results in

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<sup>210</sup> See *supra* notes 190-91 and accompanying text.

<sup>211</sup> See *supra* notes 192-96 and accompanying text.

<sup>212</sup> See *supra* notes 197-201 and accompanying text.

<sup>213</sup> See *supra* notes 178-87 and accompanying text.

<sup>214</sup> Robert M. Cover, *Violence and the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203, 203 (Martha Minow et al. eds., 1993).

the sanctioned loss of freedom, property, one's children and even one's life. "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."<sup>215</sup> As discussed in this article, an "insurrection" is a state-authorized utterance that results in the deployment of federal troops to "restore law and order"—a mission that both implies and surely is expected to result in violence. This particular imposition of violence has been controversial, as it represents a threatening exercise of federal power that was formally constrained in this country's founding documents. The hesitancy to proclaim an insurrection discussed in this article, in light of humanitarian intervention abroad, illustrates a paradox of sovereignty: the enigmatic situation where the sovereignty of the several states appears to be given more respect relative to the sovereignty of foreign states. Furthermore, despite this hesitancy to proclaim an insurrection, the proclamation has been made time and again in order to either enforce civil rights or suppress race riots, suggesting a paradox of citizenship — *i.e.*, illustrating the ongoing contest over the incorporation of Black citizens into the American body politic, as "citizens" who are not afforded the full enjoyment of citizenship.

While Hurricane Katrina was a point of entry into this discussion—bringing to the fore, among other things, the question of selective enforcement (*i.e.*, racial profiling) in the executive decision to view hurricane victims as persons with lives to be saved or insurgents disrupting law and order, more recent events further raise the question of disparate responses to internal disturbances. Juxtaposing the responses to Black protesters in Ferguson, Missouri and Baltimore, Maryland, on the one hand, and the armed occupation of the Oregon wildlife refuge by white militants, on the other hand, shows the stark contrast in the use of force or, as Cover put it, "the imposition of violence" on "insurrectionary" actors of racial difference.

Finally, in this new paradigm under a Trump presidency, Cover's words are even more resonant. To the extent a president is uninhibited by traditional and historical constraints on the exercise of the Insurrection Act, the heart and mind of the particular interpreter—*i.e.*, the one who is proclaiming the "insurrection"—becomes less of a speculative side point and more of a legal priority. Given that President Trump has promised to be the "law and order" president who will, for example, "send in the Feds!" to Chi-

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<sup>215</sup> *Id.*

cago and into “inner cities” in order to address gun violence,<sup>216</sup> the racial implications of the Insurrection Act may become yet more stark.

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<sup>216</sup> See, e.g., Nikita Vladimirov, *Trump: 'I Will Send in the Feds' if Chicago Doesn't Fix Violence*, HILL (Jan. 24, 2017, 9:52 PM), <http://thehill.com/blogs/blog-briefing-room/news/315994-trump-i-will-send-in-the-feds-if-chicago-doesnt-fix-carnage> [<https://perma.cc/9RRH-FC94>] (describing Donald Trump's campaign as promising “to bring ‘law and order’ to the country's inner cities”); Donald Trump (@realDonaldTrump), TWITTER (Jan. 24, 2017, 6:25 PM), <https://twitter.com/realDonaldTrump/status/824080766288228352> [<https://perma.cc/78NX-AAKV>] (“If Chicago doesn't fix the horrible ‘carnage’ going on, 228 shootings in 2017 with 42 killings (up 24% from 2016), I will send in the Feds!”).

# 9/11 AND 11/9: THE LAW, LIVES AND LIES THAT BIND\*

*Khaled A. Beydoun*†

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## INTRODUCTION

“Two days American history will never get over: 9/11 [and] 11/9.”

—Nicola Oakley<sup>1</sup>

Fifteen years and two months after the terror attacks on 9/11, Donald Trump surprised pollsters, pundits and much of the public by winning the 2016 presidential election.<sup>2</sup> Shelving the “dog whistle” for the politics of blatant nativism, xenophobia, and racism,<sup>3</sup> Trump turned much of his campaign aggression toward Islam: the

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\* This article is one of six written for CUNY Law Review’s inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: “When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure.” Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

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<sup>1</sup> Nicola Oakley, “11/9 is the new 9/11”: *Americans Liken Trump’s Win to Most Devastating Day in Country’s History*, MIRROR (Nov. 9, 2016, 3:42 PM), <http://www.mirror.co.uk/news/world-news/119-new-911-americans-liken-9224036> [https://perma.cc/5GKT-VNMP].

<sup>2</sup> Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016, 2:57 AM), <http://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070> [https://perma.cc/J4LY-LVPJ].

<sup>3</sup> See generally IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (examining how politicians deploy coded messaging against nonwhites to further their objectives or campaigns).

religion adhered to by approximately eight million Americans.<sup>4</sup>

The very thought of the candidate who proposed to “ban Muslims,”<sup>5</sup> or establish a “Muslim registry,” becoming president was unthinkable for Muslim Americans.<sup>6</sup> However, the absurd became reality on November 9, 2016, instantly referred to by many as “11/9,”<sup>7</sup> which took place during a moment that witnessed rising hatred toward Muslims, and the reinstallation of the state’s orientation of Islam as civilizational rival.

While separated by a generation, the election of Donald Trump restored the same fears Muslim Americans had after 9/11.<sup>8</sup> The scapegoating, rising hostility and hate crimes,<sup>9</sup> and, most strikingly, an executive branch that subscribed to the worldview that the United States was at war with Islam. Some have argued that, “the profound changes in America’s political culture and values in response to 9/11 created a crack that Trump, the entrepreneur and political opportunist, was able to open wide enough so as to slip into the White House.”<sup>10</sup> The culture of war with Islam main-

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<sup>4</sup> A January 2016 estimate by the Pew Research Center counts the Muslim American population at 3.3 million people. Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RES. CTR.: FACTTANK (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population> [https://perma.cc/5HZV-JB4Y]. However, underreporting linked to fear and strategic disidentification suggests that this estimate is far too low. Other estimates figure the Muslim American population to be as high as 8 million. See Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in “War on Terror” America*, 104 CALIF. L. REV. 1463, 1481 n.121 (2016), for an article analyzing how counter-radicalization policing disproportionately targets, and compromises the First Amendment rights of, indigent and working class Muslim Americans.

<sup>5</sup> “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN POL. (Dec. 8, 2015, 4:18 AM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration> [https://perma.cc/C944-KXRM].

<sup>6</sup> See Dara Lind, *Donald Trump’s Proposed “Muslim Registry,” Explained*, VOX (Nov. 16, 2016, 11:40 AM), <http://www.vox.com/policy-and-politics/2016/11/16/13649764/trump-muslim-register-database> [https://perma.cc/X5VA-TU5R].

<sup>7</sup> See Christina Capatides, *Anti-Trump Social Media Users Draw Surprising Comparisons Between 11/9 and 9/11*, CBS NEWS (Nov. 9, 2016, 1:00 PM), <http://www.cbsnews.com/news/people-are-saying-the-date-of-trumps-win-11-9-is-the-new-9-11-september-11th> [https://perma.cc/B3DS-KG4W].

<sup>8</sup> Oakley, *supra* note 1.

<sup>9</sup> Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sep. 17, 2016) <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html> [https://perma.cc/T7XP-5BRR].

<sup>10</sup> Chauncey Devega, *From 9/11 to 11/9: Is Donald Trump’s Election Collateral Damage From the “War on Terror”?*, SALON (Nov. 16, 2016, 11:59 AM), <http://www.salon.com/2016/11/16/from-9-to-11-to-11-9-is-donald-trumps-election-collateral-damage-from-the-war-on-terror> [https://perma.cc/5RK6-863W].

streamed after 9/11,<sup>11</sup> and the government restructuring that endorsed and fomented it, enabled the rise of Trump.

Unlike President Obama, who disavowed the Bush Administration's civilizational binary for rapprochement that touted, "America and Islam are not exclusive and need not be in competition[,]"<sup>12</sup> Trump reinstated the rigid binary pitting the U.S. against Islam as formal state policy. This was most vividly illustrated by the Executive Order, popularly called the "Muslim Ban," signed into law on January 27, 2017.<sup>13</sup>

But unlike his neoconservative predecessors, Donald Trump matched the stridency of his policy proposals with the zeal of his rhetoric.<sup>14</sup> The Trump campaign fully showcased his Islamophobia bona fides, through the ejection of Muslim Americans from his raucous rallies and his frequent demonization of Islam.<sup>15</sup> It can be said that Trump channeled and repackaged the anti-Muslim climate after 9/11 into a cogent and potent campaign strategy, which enabled him to win over "white conservative and right-leaning independent voters" to secure the presidency.<sup>16</sup>

During and after the campaign, Muslim Americans always knew where they stood with Trump. Shifting from Presidents Bush and Obama,<sup>17</sup> who juxtaposed counterterror programs that profiled Muslims as presumptive national security threats with laudatory speeches holding that "Islam is peace,"<sup>18</sup> Trump explicitly

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<sup>11</sup> See Tom Engelhardt, *14 Years After 9/11, the War on Terror Is Accomplishing Everything bin Laden Hoped It Would*, NATION (Sept. 8, 2015), <https://www.thenation.com/article/14-years-after-911-the-war-on-terror-is-accomplishing-everything-bin-laden-hoped-it-would/> [<https://perma.cc/7STP-4KHZ>].

<sup>12</sup> President Barack Obama, Remarks by the President on a New Beginning (June 4, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09> [<https://perma.cc/BC3X-SSL4>].

<sup>13</sup> President Trump enacted an executive order on January 27, 2017, that restricted the entry of refugees and visa holders from seven Muslim-majority countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) and put a halt on incoming refugees. See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); *Full Executive Order Text: Trump's Action Limiting Refugees Into the U.S.*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html> [<https://perma.cc/34K7-KGP3>].

<sup>14</sup> See Khaled A. Beydoun, "Muslims Bans" and the (Re)Making of Political Islamophobia, U. ILL. L. REV. (forthcoming 2017) (analyzing how Islamophobia was crafted and deployed by a number of presidential candidates, most notably by the Trump campaign, as full-fledged campaign strategy).

<sup>15</sup> *Id.*

<sup>16</sup> Devega, *supra* note 10.

<sup>17</sup> While philosophically and rhetorically dissimilar to the counterterror visions of his predecessor and successor, President Obama's counterterror program carried the war on terror forward.

<sup>18</sup> President George W. Bush, Remarks by the President at Islamic Center of Wash-

declared that, “Islam hates us.”<sup>19</sup> In the words of Sara Ahmed, Muslim Americans “just [knew that] it is racism” when Trump addressed them and their faith.<sup>20</sup>

11/9 felt like 9/11, with the same clash of civilizations paradigm, the same Muslim American targets, and the same counterterror presumption that held Muslim identity presumptive of terror threat. Never again, fifteen years later, is happening all over again for Muslim Americans.

This Article focuses on the law, lives, and lies that bind 9/11 and 11/9. Part I analyzes the law, Part II highlights the lives that will be impacted by the Trump Administration, and Part III examines the lies on which this link rests.

## I. THE LAW

The philosophy that drove counterterror policies implemented after 9/11 and 11/9 were rooted in a binary that envisioned Islam as the civilizational nemesis of the U.S. In short, the hardline national security programs enforced by the Bush and Trump Administrations profiled Islam, and the religion’s adherents, as presumptive enemies of the state. The “Clash of Civilizations,”<sup>21</sup> a flawed theory built upon Orientalist and racist baselines, became the backbone of counterterror policy under Bush and Trump.<sup>22</sup>

In 1993, Harvard University Political Scientist Samuel P. Huntington observed a “new phase” of geopolitical rivalry.<sup>23</sup> His primary attention turned to the theorized clash between the West and Islam: “The underlying problem for the West is not Islamic fundamentalism. It is Islam, a different civilization whose people are convinced of the superiority of their culture and are obsessed with

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ington, D.C (Sept. 17, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html> [https://perma.cc/9VVL-Q65Z].

<sup>19</sup> Jose A. DelReal, *Trump: “I Think Islam Hates Us.”*, WASH. POST (Mar. 9, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/09/trump-i-think-islam-hates-us> [https://perma.cc/VTA9-PFJL].

<sup>20</sup> Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/CG47-SZ6A].

<sup>21</sup> See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (arguing in this landmark work that the West is at war with the civilization of Islam, positing that both are monolithic blocs).

<sup>22</sup> Michael Hirsh, *Team Trump’s Message: The Clash of Civilizations is Back*, POLITICO MAG. (Nov. 20, 2016), <http://www.politico.com/magazine/story/2016/11/donald-trump-team-islam-clash-of-civilizations-214474> [https://perma.cc/QE3T-DPJ5]; DelReal, *supra* note 19; see also HUNTINGTON, *supra* note 21.

<sup>23</sup> Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22, 22.

the inferiority of their power.”<sup>24</sup> Huntington’s theory, dubbed the “clash of civilizations,” did not narrowly pit the U.S. against “Islamic fundamentalism,” but the entire whole of Islam:<sup>25</sup> a faith practiced by 1.6 billion people globally and at least 3.3 million American citizens.<sup>26</sup>

Huntington’s theory guided the counterterror policies of the neoconservative Bush administration, furnishing the state with the worldview to launch two wars abroad, with Afghanistan and Iraq, and domestically, to establish the Department of Homeland Security (“DHS”) and enact the USA PATRIOT Act.<sup>27</sup> The Bush Administration’s counterterror policies ushered in an unprecedented degree of suspicion of Muslim Americans, “redeploy[ing] . . . Orientalist tropes” that drove state surveillance and profiling measures that eroded core First Amendment liberties for Muslim Americans.<sup>28</sup>

President Trump revitalized the clash of civilizations binary that steered the state during the post-9/11 era. On December 7, 2015, the Trump campaign released a statement declaring, “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”<sup>29</sup> Popularly dubbed the Muslim Ban, Trump’s proposal characterized a central theme of his presidential campaign, which deployed “Islamophobia” and the clash of civilizations worldview that undergirded it as core campaign strategy.<sup>30</sup>

In addition to the Muslim Ban, Trump’s declaration that “Islam Hates Us,”<sup>31</sup> signaled a marked departure from the philosophy

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<sup>24</sup> HUNTINGTON, *supra* note 21, at 217.

<sup>25</sup> *Id.* at 13-14; Huntington, *supra* note 23.

<sup>26</sup> Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR.: FACTTANK (Feb. 27, 2017), <http://www.pewresearch.org/fact-tank/2016/07/22/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/> [<https://perma.cc/EM5D-9MHL>].

<sup>27</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>28</sup> Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (2002).

<sup>29</sup> Press Release, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [<https://perma.cc/69QG-49LG>]; Diamond, *supra* note 5.

<sup>30</sup> Islamophobia is “the presumption that Islam is inherently violent, alien, and inassimilable. Combined with this is the belief that expressions of Muslim identity are correlative with a propensity for terrorism.” Khaled A. Beydoun, *Islamophobia: Toward A Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 111 (2016).

<sup>31</sup> DelReal, *supra* note 19.

of coexistence and collaboration championed by President Obama,<sup>32</sup> and a return to the post-9/11 binary pitting Islam against America.<sup>33</sup> This was further illustrated in Trump's policy agenda, which outlined the hardline counterterror mandate to, "Defeat the ideology of radical Islamic terrorism, just as we did in order to win the Cold War."<sup>34</sup> "Radical Islamic extremism" was not merely a national security threat, but for Trump, a broader existential, civilizational war with an enemy faith.<sup>35</sup>

Trump's domestic counterterror program integrates the signature facets of the two previous administrations. While Trump adopted Obama's counter-radicalization program, he simultaneously revitalized the "crusade" against Islam that the Bush Administration launched after 9/11.<sup>36</sup> In the process, he mutated the Obama Administration's counter-radicalization policing into a hardline counterterror program that makes even the most benign expressions of Muslim identity presumptive of terror suspicion,<sup>37</sup> further endangering the civil liberties of Muslim Americans.

## II. THE LIVES

Trump capitalized on Islamophobia and converted it into a full-fledged campaign strategy. Mobilizing voters to the ballot box with brazen anti-Muslim fear-mongering and scapegoating. Instead of coded appeals, "[Trump] embraced the hateful language of Quran-burning rallies, anti-mosque protests, and perhaps most violently, the ugly underbelly that is the comments' sections of news articles. Trump sounded more like the Islamophobes on-the-ground torching mosques, instead of Islamophobes in political of-

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<sup>32</sup> Obama, *supra* note 12.

<sup>33</sup> See generally Khaled Ali Beydoun, Comment, *Dar Al-Islam Meets "Islam as Civilization": An Alignment of Politico-Theoretical Fundamentalisms and the Geopolitical Realism of this Worldview*, 4 UCLA J. ISLAMIC & NEAR E.L. 143 (2005) (providing an analysis of the Bush Administration's deployment of the clash of civilization framework to carry forward its war on terror campaign).

<sup>34</sup> Press Release, Donald J. Trump's Plan to Defeat ISIS and Make America Safe Again (Oct. 29, 2016), <https://www.donaldjtrump.com/press-releases/donald-j-trumps-plan-to-defeat-isis-and-make-america-safe-again> [<https://perma.cc/5TVS-Y74N>].

<sup>35</sup> See Julia Edwards Ainsley et al., *Exclusive: Trump to Focus Counter-Extremism Program Solely on Islam – Sources*, REUTERS (Feb. 2, 2017, 10:51 AM), <http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO> [<https://perma.cc/W828-2GEZ>].

<sup>36</sup> MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR 15 (2004).

<sup>37</sup> See generally Amna Akbar, *Policing "Radicalization"*, 3 U.C. IRVINE L. REV. 809, 811 (2013) (describing counter-radicalization theory, policing, and its disproportionate impact on Muslim Americans).

fices supporting surveillance of mosques.”<sup>38</sup> The message that vilified Islam on the campaign trail, and profiled Muslims as presumptively terrorists and non-Americans, ushered in a period of rising hate violence toward Muslim subjects in the U.S.<sup>39</sup>

Trump’s profiling of Muslim Americans as terrorists, and dis-identification of them as citizens, mirrors the process that unfolded after 9/11.<sup>40</sup> The war on terror launched after 9/11 drew a sharp divide between Muslim and American identity. By virtue of their religious identity, Muslims were viewed as non-citizens, manifesting the civilization divide the Bush Administration enshrined into its counterterror philosophy. In *The Citizen and the Terrorist*, Leti Volpp observed that, “September 11 facilitated the consolidation of a new identity category that . . . reflects a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens.”<sup>41</sup> The process of dis-identifying an individual as a citizen, and branding him or her a terrorist, justifies state encroachment on their civil liberties, and during times of heightened crisis, temporary revocation of citizenship.<sup>42</sup>

Muslim Americans were the disproportionate victims of post-9/11 counterterror policies as a consequence of this process, and are slated for the same fate with the Trump administration. However, Trump’s targeting of Muslim Americans did not commence at the beginning of his Administration, but was kicked off during

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<sup>38</sup> Khaled A. Beydoun, Opinion, *Donald Trump: The Islamophobia President*, AL JAZEERA (Nov. 9, 2016), <http://www.aljazeera.com/indepth/opinion/2016/11/donald-trump-islamophobia-president-161109065355945.html> [<https://perma.cc/9TDG-SWCZ>].

<sup>39</sup> Lichtblau, *supra* note 9.

<sup>40</sup> Volpp, *supra* note 28, at 1576.

<sup>41</sup> *Id.*

<sup>42</sup> Many legal scholars, including David Cole, Natsu Taylor Saito, and Leti Volpp, among others, have likened the current treatment of Muslim Americans to Japanese Americans during World War II, analogizing the internment of Japanese Americans and legal residents with the counterterror policing and dragnets deployed against Muslim Americans en masse. See, e.g., David Cole, *Why Trump’s Proposed Targeting of Muslims Would be Unconstitutional*, JUST SECURITY (Nov. 21, 2016, 9:05 AM), <https://www.justsecurity.org/34682/trumps-proposed-targeting-muslims-unconstitutional/> [<https://perma.cc/YKJ3-LPJM>]; Natsu Taylor Saito, *Symbolism under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L.J. 1 (2001); Volpp, *supra* note 28, at 1590-91; see also *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding, in a landmark decision, an Executive Action ordering the internment of at least one-hundred Japanese citizens and residents under the pretense of it being a compelling national security interest); Khaled A. Beydoun, *Fred Korematsu: An Unsung “Muslim-American” Civil Rights Hero*, ISLAMIC MONTHLY (Feb. 2, 2015, 12:05 PM), <http://theislamicmonthly.com/fred-korematsu-an-unsung-muslim-american-civil-rights-hero/> [<https://perma.cc/3CUG-V2L2>].

his polarizing presidential campaign, priming Muslim citizens and residents for the formal state targeting to come in January 2017.

Trump's campaign emboldened bigotry and a frightening rise in hate violence against Muslim Americans. In fact, the incidence of hate crimes and attacks on Muslim American individuals and institutions reached levels that rivaled the year following 9/11.<sup>43</sup> Women with headscarves were attacked, students bullied, and mosques vandalized and set on fire by those that heeded the words of Trump.<sup>44</sup> In addition to emboldening violent Islamophobia, Trump's strident rhetoric and policy proposals arguably authorized this activity.

The California State University-San Bernardino's Center for the Study of Hate and Extremism reported a 78% increase in "anti-Islam" incidents in 2015.<sup>45</sup> The report stated, "Last year's increase was so precipitous, that even if no other anti-Muslim hate crimes are recorded in the remaining unanalyzed states, 2015's partial numerical total would still be the highest since 2001 and the second highest on record."<sup>46</sup> Brian Levin, the report's author stated, "I don't think we can dismiss contentions that rhetoric is one of the significant variables that can contribute to hate crimes."<sup>47</sup>

Like 9/11, the Trump campaign's demonization of Islam spurred a frightening degree of hate violence inflicted on Muslim Americans. However, this hate violence did not begin following Trump's election, or after his formal takeover of the White House. But well before it, foreshadowing that the violent Islamophobia his rhetoric emboldened on the campaign trail will be compounded by the Islamophobic policies his administration will enact into law.

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<sup>43</sup> See Matt Zaptosky, *Hate Crimes Against Muslims Hit Highest Mark Since 2001*, WASH. POST (Nov. 14, 2016), [https://www.washingtonpost.com/world/national-security/hate-crimes-against-muslims-hit-highest-mark-since-2001/2016/11/14/7d8218e2-aa95-11e6-977a-1030f822fc35\\_story.html](https://www.washingtonpost.com/world/national-security/hate-crimes-against-muslims-hit-highest-mark-since-2001/2016/11/14/7d8218e2-aa95-11e6-977a-1030f822fc35_story.html) [https://perma.cc/2EZB-PF8L]. Zaptosky cites FBI data finding that 257 "anti-Muslim incidents" were reported in 2015, a 67% increase from 2014. See Press Release, FBI, FBI Releases 2015 Hate Crime Statistics (Nov. 14, 2016), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2015-hate-crime-statistics> [https://perma.cc/LS4W-8MD8].

<sup>44</sup> Lichtblau, *supra* note 9.

<sup>45</sup> BRIAN LEVIN, CTR. FOR THE STUDY OF HATE AND EXTREMISM, SPECIAL STATUS REPORT: HATE CRIME IN THE UNITED STATES 5 (2016) <https://assets.documentcloud.org/documents/3110202/SPECIAL-STATUS-REPORT-v5-9-16-16.pdf> [https://perma.cc/NTY3-LFY8].

<sup>46</sup> *Id.* at 15 (reporting on data from twenty states).

<sup>47</sup> Clare Foran, *Donald Trump and the Rise of Anti-Muslim Violence*, ATLANTIC (Sept. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-muslims-islamophobia-hate-crime/500840> [https://perma.cc/4FCL-22RG].

## III. THE LIES

Islamophobia rests upon the lie that the primary source of terrorism is Islam, and that anything, and everything, connected to Islam must be closely policed by the state. In a previous Article, I define Islamophobia as “the presumption that Islam is inherently violent, alien, inassimilable; [tied to] . . . the belief that expressions of Muslim identity are correlative with a propensity for terrorism.”<sup>48</sup> This presumption, and strategically manufactured and mobilized lie, drove the state’s sweeping counterterror reforms that targeted Muslim Americans after 9/11, and helped deliver the presidency to Trump on 11/9.

Although a presumption built upon myths and misrepresentations, Islamophobia is a wildly potent and powerful lie. It benefits from being a modern extension of Orientalism, which envisions Islam as the antithesis of the West, and furthermore, Islam as a monolithic, unchanging, and war-mongering creed.<sup>49</sup> Confronting specific terror threats that exploit Islam for discrete, rational ends, the Bush and Trump Administrations institutionalized this Orientalist binary, pitting Islam against the U.S. to justify counterterror policies that criminalized Islam on the home front.

Thus, Islamophobia is a lie that spawns additional lies by the state that erode the civil liberties of Muslim Americans. Although the culprits of the 9/11 terror attacks were all Wahhabis—a fringe sect of Islam with origins in Saudi Arabia practiced by less than 1% of the globe’s Muslim population—the Bush Administration callously conflated Wahhabism with the whole of Islam.<sup>50</sup> This dangerous conflation led the state and private actors to believe that al-Qaeda had some sort of connection, or resonance, with Muslim Americans—an intensely diverse population along lines of race, sect, school of thought, and ancestry.

Abetted by the structure and strategy of President Obama’s Countering Violent Extremism (“CVE”) program, the counter radi-

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<sup>48</sup> Beydoun, *supra* note 30, at 111.

<sup>49</sup> See generally EDWARD W. SAID, *ORIENTALISM* (1979) (referring to the West as the “Occident” and the East, the subject of study and definition, as the “Orient”).

<sup>50</sup> Wahhabism is the textual and fundamentalist interpretation of Sunni Islam established by the 18th Century Arabia Scholar Muhammad b. ‘Abd al-Wahhab, which preaches a return of the form of Islam practiced during the era of the Prophet Muhammad. Saudi Arabia enshrines Wahhabism, and the tradition drives the violent ideology and civilizational worldview of Al Qaeda and ISIS. For an excellent overview of the history, theology, and modern-day relevance of Wahhabism, see generally HAMID ALGAR, *WAHHABISM: A CRITICAL ESSAY* (2002).

calization program instituted in 2011,<sup>51</sup> Trump took the state conflation of Islam with the Islamic State of Iraq and Syria (“ISIS”) three steps further.<sup>52</sup> As a result, mirroring the post-9/11 Era, Muslim Americans of all sects and schools of thought were viewed with suspicion by the state, and branded with the presumption of terror threat by virtue of faith and expression of faith. However, Trump has shelved the CVE title used by the Obama Administration, for a program that is “likely to be renamed Countering Radical Islam or Countering Violent Jihad.”<sup>53</sup> The name is more hardline and aggressive than its predecessor, and built upon the very lie that views the whole of Islam, and its adherents, as either subscribers or susceptible to the fringe interpretation of Islam that inspired al Qaeda and ISIS.

To further weaponize this lie into counterterror policy that will infringe on the Free Exercise rights of Muslim Americans, and threaten their civil liberties at large,<sup>54</sup> Trump has assembled a team of cabinet leaders that believe in this fundamental lie. He appointed Michael Flynn, a retired U.S. Army lieutenant general, to serve as head of the NSA. In his book, *Field of Fight*, Flynn writes, “The countries and movements that are trying to destroy us have worldviews that may seem to be in violent conflict with one another. But they are united by their hatred of the democratic West and their conviction that dictatorship is superior.”<sup>55</sup>

In addition to Flynn, Trump chose Jeff Sessions as Attorney General, Mike Pompeo for the role of Director of the Central Intelligence Agency (“CIA”), and John F. Kelly to head DHS.<sup>56</sup> During the Bush Era, Sessions “defended Mr. Bush’s authority to conduct wiretapping [of Muslim Americans] without a warrant after the

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<sup>51</sup> See generally OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011), [https://obamawhitehouse.archives.gov/sites/default/files/empowering\\_local\\_partners.pdf](https://obamawhitehouse.archives.gov/sites/default/files/empowering_local_partners.pdf) [<https://perma.cc/GPY5-W499>].

<sup>52</sup> See generally FAWAZ A. GERGES, *ISIS: A HISTORY* (2016) (providing a historiography of the terror network, focusing on its origins, worldview, and political strategy).

<sup>53</sup> Michael Crowley, *Trump’s Terror-Fighting Team Yet to Take Shape*, POLITICO (Dec. 20, 2016, 7:17 PM), <http://www.politico.com/story/2016/12/donald-trump-terrorism-232870> [<https://perma.cc/4X64-CVZF>].

<sup>54</sup> The Free Exercise Clause of the First Amendment holds that, “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. CONST. amend. I.

<sup>55</sup> MICHAEL T. FLYNN & MICHAEL LEDEEN, *THE FIELD OF FIGHT* 103 (2016).

<sup>56</sup> Jerry Markon & Dan Lamothe, *Retired Marine Gen. John F. Kelly Picked to Head Department of Homeland Security*, WASH. POST (Dec. 7, 2016), [https://www.washingtonpost.com/world/national-security/retired-marine-gen-john-f-kelly-picked-to-head-department-of-homeland-security/2016/12/07/165472f2-bbe6-11e6-94ac-3d324840106c\\_story.html](https://www.washingtonpost.com/world/national-security/retired-marine-gen-john-f-kelly-picked-to-head-department-of-homeland-security/2016/12/07/165472f2-bbe6-11e6-94ac-3d324840106c_story.html) [<https://perma.cc/9QLL-7E55>].

Sept. 11 attacks.”<sup>57</sup> He also referred to Islam as a “toxic ideology,” similar to phrasing by Flynn who called Islam a “malignant cancer,” and tweeted in February 2016 that “Fear of Muslims is RATIONAL.”<sup>58</sup> Pompeo held that Muslim American organizations that do not explicitly denounce acts of terror (both in the U.S. and beyond) are “potentially complicit.”<sup>59</sup> Kelly, who likewise subscribes to a civilizational war on terror worldview, stated that the U.S. is interlocked with a “savage enemy” inside and outside of the U.S.<sup>60</sup>

Many of the faces in Trump’s counterterror inner-circle are staunch advocates of the clash of civilizations worldview that guided the Bush Administration after 9/11.<sup>61</sup> While the new faces brought into the fold fully subscribe to the civilizational binary that envisions the U.S. as “crusade[r]” against a unified Islamic threat,<sup>62</sup> which looms in the Middle East and within Muslim American communities throughout the country. This lie, originating in Orientalism and enabled today by Islamophobia, is a foundational bind tying the 9/11 and 11/9 moments. Moreover, this fundamental lie has become a foundation of the law that gripped the country from 9/11 onward.

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<sup>57</sup> Matt Apuzzo & Mark Landler, *With National Security Choices, Trump Builds Team to Bulldoze Status Quo*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/politics/flynn-sessions-trump-administration.html> [https://perma.cc/ZAC6-T5TE].

<sup>58</sup> *Id.*; see also @GenFlynn, TWITTER (Feb. 26, 2016, 9:14 PM), <https://twitter.com/GenFlynn/status/703387702998278144> [https://perma.cc/A7W4-CMZ9].

<sup>59</sup> Greg Miller, *Trump’s CIA Pick Is Seen as Both a Fierce Partisan and Serious Student of National Security Issues*, WASH. POST (Nov. 18, 2016), [https://www.washingtonpost.com/world/national-security/trumps-cia-pick-is-seen-as-both-a-fierce-partisan-and-serious-student-of-national-security-issues/2016/11/18/5b089f0e-ad9a-11e6-8b45-f8e493f06fcd\\_story.html](https://www.washingtonpost.com/world/national-security/trumps-cia-pick-is-seen-as-both-a-fierce-partisan-and-serious-student-of-national-security-issues/2016/11/18/5b089f0e-ad9a-11e6-8b45-f8e493f06fcd_story.html) [https://perma.cc/65TP-N9B4].

<sup>60</sup> Markon & Lamothe, *supra* note 56.

<sup>61</sup> President Trump has enlisted a corps of likeminded cabinet appointees to carry forward his hardline counter-radicalization program. In addition to Flynn, Sessions, and Pompeo, on January 28, 2017, President Trump made an unprecedented structural reform to the National Security Council (“NSC”), creating a permanent seat for Stephen Bannon, the White House Chief Strategist. See Zeke J Miller, *Donald Trump Ups Stephen Bannon to National Security Role*, TIME (Jan. 29, 2017), <http://time.com/4652842/donald-trump-national-security-stephen-bannon/> [https://perma.cc/VWN5-4U7K]. In a “staff reshuffling” a few months later, Bannon was removed from this post. Robert Costa & Abby Phillip, *Stephen Bannon Removed from National Security Council*, WASH. POST (Apr. 5, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/04/05/stephen-bannon-no-longer-a-member-of-national-security-council/> [https://perma.cc/Y5UM-ELG6].

<sup>62</sup> MAMDANI, *supra* note 36, at 15.

## CONCLUSION

Fifteen years, a distinct presidential administration, and a shifting national landscape sit between 9/11 and 11/9. However, the foundational baseline that envisions the U.S. to be interlocked in a crusade against Islam, the presumption that Muslim identity is tied to terrorism, and the scapegoating and victimization of Muslim Americans, are commonalities that overwhelm the distinctions.

Another notable similarity between the 9/11 and 11/9 eras is the exclusion of Muslim American involvement within the respective administrations. The virtual absence of any Muslim American involvement in the Trump campaign, or transition team, signaled what was to come with the Trump administration.<sup>63</sup> This further signals that Muslim Americans are a pariah, a fifth pillar to be excluded from state halls of power, unless they are willing to conform their views in line with the “good” or “moderate” Muslim stereotype manufactured by the state,<sup>64</sup> and conform their spiritual and political views in line with state objectives. “Acting Muslim” during the Trump Era may be just as perilous as it was following 9/11.<sup>65</sup>

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<sup>63</sup> The only visible Muslim American who actively supported the Trump campaign was Sajid Tarar, who led the Muslim prayer at the Republican National Convention and appeared in a series of television segments voicing support for Trump. See Abigail Hauslohner, *Meet the Muslim Guy Who Took the Convention Stage and Prayed for Trump*, WASH. POST (July 19, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/19/meet-the-muslim-with-an-unusual-record-praying-in-arabic-at-the-rnc-tonight> [<https://perma.cc/4EHH-QBA5>].

<sup>64</sup> Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004) (discussing various identity markers of “good” and “bad” Muslims propagated by the state); see also MAMDANI, *supra* note 36, at 15-16.

<sup>65</sup> See generally Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. (forthcoming 2017) (theorizing how expression of Muslim identity that confirms counterterrorism stereotypes endangers the Free Exercise rights of Muslim Americans, while those that negate those stereotypes may insulate the actor from state suspicion).

**IN THE SHADOW OF GASLIGHT: REFLECTIONS  
ON IDENTITY, DIVERSITY, AND THE  
DISTRIBUTION OF POWER  
IN THE ACADEMY\***

*Cyra Akila Choudhury*†

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“[I]t could have been something else. . . . Sometimes you just know when it is racism. . . . Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. . . . You are not sure.”

—Sara Ahmed<sup>1</sup>

Postmortems of the 2016 Presidential election continue to proliferate in the aftermath of a grueling campaign and its dramatic conclusion. For many years to come, academics will be dissecting the unexpected defeat of Hillary Clinton and the

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\* This article is one of six written for CUNY Law Review’s inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: “When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure.” Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

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<sup>1</sup> Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/PJ3X-CBKM].

Democratic Party to a billionaire reality television star who won the election through a strategy of denigrating women, Latinxs, Muslims, and the disabled while promoting a crude white nationalism.<sup>2</sup> As both the academy and the punditry search for clues as to how this country elected a long-shot outsider to the highest office in the land, the people of the United States will continue to struggle forward, some with renewed hope, others with a sense of foreboding.<sup>3</sup> For the younger generations, those who came of age in the 1990s and 2000s, this is a strange new reality which has upended their expectations for the future.<sup>4</sup> This age group from which we draw our students now must adjust to a country that is divided along identity lines on what feels like an unprecedented scale. On our majority Latinx campus, I was met with scenes of dejection if not mourning the day after the election; there was a palpable sense of disbelief at the very least. A lot of ground seemed to have been lost for all minorities both in terms of substantive protections (particularly for the undocumented) as well as in popular respect and civility.

In the first wave of analyses, some writers resurrected an old complaint: Democrats' engagement in "identity politics" and "political correctness" was the primary reason for the dramatic and unexpected defeat, we were told.<sup>5</sup> For those of us minorities who came of age in the late 1980s and early 1990s, blaming it on identity politics is a familiar story. As the history of subordination by a dominant group—both structurally, through the institutions of the state, as well as socially, through quotidian denigrations if not outright violence—from well before the founding of this nation attests, we inherited the historical problem of "identity" and

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<sup>2</sup> See generally Heidi M. Przybyla, *After devastating Loss, Democrats Left Searching for Answers*, USA TODAY (Nov. 9, 2016, 6:02 PM) <http://www.usatoday.com/story/news/politics/elections/2016/11/09/hillary-clinton-loss-democrats-trump/93563634/> [<https://perma.cc/6JLF-FDSU>].

<sup>3</sup> See, e.g., Mirren Gidda, *How Donald Trump's Nationalism Won Over White Americans*, NEWSWEEK (Nov. 15, 2016, 3:00 AM), <http://www.newsweek.com/donald-trump-nationalism-racism-make-america-great-again-521083> [<https://perma.cc/9KPH-MQVW>].

<sup>4</sup> See generally Maya Kosoff, *Millennials for Trump? Twenty-Somethings in Battleground States Ponder Their New Reality*, VANITY FAIR (Nov. 11, 2016, 3:03 PM), <http://www.vanityfair.com/news/2016/11/millennials-in-battleground-states-ponder-their-new-reality> [<https://perma.cc/N5N7-R8WU>].

<sup>5</sup> Amanda Hess, *How 'Political Correctness' Went from Punch Line to Panic*, N.Y. TIMES MAG. (July 19, 2016), <https://www.nytimes.com/2016/07/24/magazine/how-political-correctness-went-from-punch-line-to-panic.html> [<https://perma.cc/65FT-J7FE>]. See also Kelton Sears, *A Marxist Critiques Identity Politics*, SEATTLEWEEKLY (Apr. 25, 2017, 1:30 AM), <http://www.seattleweekly.com/news/a-marxist-critiques-identity-politics/> [<https://perma.cc/MBY5-CA7G>].

difference.<sup>6</sup> Even though it has been a mere sixty years since we began to achieve some victories in the fight for racial civil rights and women's rights (and for LGBTIQ rights)<sup>7</sup>, it has taken an additional five decades or so) at every victory there has been a questioning of how much redress is due to the "heretofore" subordinated based on identity and group membership.<sup>8</sup> Moreover, these victories, though limited and insufficient, have catalyzed a number of backlashes the advocates of which have themselves appropriated the conceptual register of equality to reinstate old hostilities and oppressions.<sup>9</sup> With different sides engaging in "identity politics" and leveling the charge against the other, minority academics and activists are left to determine how to move their anti-subordination efforts forward. Should identity now be discarded, reformulated, decentered? Or should we continue to embrace identity and recommit to diversity in the face of reinvigorated oppression and the rise of an unmasked white supremacist, right wing?

In this essay, I want to make two interventions in rethinking the place of identity and diversity in the Academy. First, I want to briefly sketch the evolution in the late 1980s and 1990s of identity politics on campus from its use in resistance to assimilation and erasure to its use as a tool of discipline within minority groups. Second, and more importantly, I want to raise the problem of the easy cooptation of identity and diversity by institutions in defense of the status quo. I argue that in the Academy, in the 1990s and early 2000s multiculturalism and the institutional embrace of diversity gave us the illusion of progress but masked ongoing subordination and repelled efforts to change structural inequality

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<sup>6</sup> See Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1989); See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th ed. 2006); EDIBERTO ROMÁN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* (2010).

<sup>7</sup> See Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 *BROOK. L. REV.* 1015, 1021-32 (2016).

<sup>8</sup> See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 149-200 (commemorative ed. 2002). See generally RORY DICKER, *A HISTORY OF U.S. FEMINISMS* (2008).

<sup>9</sup> See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (15th anniversary ed. 2006). More recently, Van Jones has articulated the phenomenon of a "whitelash" in his analysis of Donald Trump's victory. See John Blake, *This is What "Whitelash" Looks Like*, CNN (Nov. 19, 2016, 9:09 PM), <http://www.cnn.com/2016/11/11/us/obama-trump-white-backlash/> [https://perma.cc/TV9L-4N6X].

on campus.<sup>10</sup> During this time, it was easy to gaslight minorities into doubting their experiences of exclusion and unfair treatment. As Sara Ahmed's quote<sup>11</sup> illustrates, there is a pervasive sense of self-doubt and second-guessing on the part of minorities because of the increasing subtlety of racism and hetero/sexism.<sup>12</sup> In the epigraph, I reduce her words to amplify this equivocation in the minds of the subjects of racism: "*Sometimes you just know . . . . Sometimes you are not sure. . . . You begin to feel paranoid. . . . [Y]ou question everything. . . . You are not sure.*"<sup>13</sup> The blog post in which the quote appears was written in response to Ahmed's own difficult experience with diversity work in the Academy and it reflects the ways in which institutional gestures by way of diversity policies can create a false sense that *racism* is being addressed<sup>14</sup>. But as she notes "doing the document" is not "doing the doing."<sup>15</sup> Moreover, the identity of the doer may not tell us much about the politics behind the deed. Indeed, traditional identity proxies no longer hold the in same way now that an ingenious Right can count on its own set of diversity combatants. All this to say that identity and diversity can be coopted by institutions and can complicate anti-subordination practices and scholarship. We must proceed with caution.

I end the essay with a reminder that minority mobilizations of identity continue to be an important tool against the pervasive, constitutive nature of white identity and dominance in the Academy and in general. As such, rather than fighting for equality in neutral terms we ought to wage that battle more effectively by calling out the misuses of identity politics and imagining alternatives. But to do so, we must not forget the ways in which identity can be put into service of the status quo by institutional actors. Now more than any time in our recent history, we *must* be able to tell the difference between superficial diversity politics and a radical politics of inclusion. Sureness about minority subordination must underwrite our resistance to white supremacy and dominance in the Academy and in the country, yet advisedly

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<sup>10</sup> See SARA AHMED, ON BEING INCLUDED: RACISM AND DIVERSITY IN INSTITUTIONAL LIFE (2012).

<sup>11</sup> Ahmed, *supra* note 1.

<sup>12</sup> I use the term "hetero/sexism" to denote both sexism and heterosexism as a short form. This does not denote that sexism and heterosexism are equivalent or coextensive, rather, it is simply a way to shorten the list of exclusionary identities that this paper seeks to include as subordinated.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

and thoughtfully, we must also recognize the role of some minorities in doing the work of subordination. As we enter another era of unapologetic racism, we must come to terms with the reality that, in fact, very little has changed. Historical lessons about solidarity and anti-subordination and the perils of mistaking identity for political commitment are worth revisiting.<sup>16</sup>

#### I. MULTICULTURAL TOLERANCE, IDENTITY POLITICS, AND THE CONTINGENCY OF PROGRESS

Taking a longer view of the treatment of minorities in the United States, the past two decades were an exception insofar as many whites believed that we had “solved” the race/minority problem through the embrace of multiculturalism.<sup>17</sup> It was the heyday of diversity programs even as substantive legal enactments like affirmative action and Title VII were being whittled away.<sup>18</sup> The justification for that retreat was precisely that we did not need race-based programs any longer because blacks had overcome historic subordination through these policies of redress and inclusion.<sup>19</sup> Similarly, with gender, the rapid advance of women in the workforce was followed by the slowing of gender discrimination wins both legislatively and in courts.<sup>20</sup> Progress towards important goals like paid maternity leave, better work-life balance, and access to health care and abortion rights was either stalled or set back.<sup>21</sup> In general, efforts at material redistribution were countered with calls for personal responsibility and ownership of one’s choices as evidenced by a landmark Democratic welfare reform law: *The Per-*

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<sup>16</sup> In the period of the overt racism of Jim Crow, during the internment of Japanese-Americans, the segregation of people of color from white society in housing, education, and work, the sort of anguished self-questioning of whether you were subject to racism would have been bizarre and out of place. But the progress of the movements for greater equality, though it achieved a great deal, did not expunge racism, sexism, or heterosexism from our lives. Rather the strategies of oppression changed and the modes of resistance similarly changed. See, e.g., KLARMAN, *supra* note 6.

<sup>17</sup> *The End of Racism? Somebody Tell Marge Schott*, EXTRA!, Mar./Apr. 1996, <http://fair.org/extra/the-end-of-racism/> [<https://perma.cc/Y8JU-LCGB>] (noting the claims that racism is over).

<sup>18</sup> See Cary Franklin, *Inventing the Traditional Concept of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012); Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action After Ricci*, 31 BERKELEY J. EMP. & LAB. L. 285 (2010).

<sup>19</sup> The culmination of this was *Shelby County v. Holder*, which dismantled the Voting Rights Act of 1965. 133 S. Ct. 2612 (2013).

<sup>20</sup> See FALUDI, *supra* note 9; Catherine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J.L. & GENDER 569, 569-75 (2014).

<sup>21</sup> See FALUDI, *supra* note 9; MacKinnon, *supra* note 20, at 569. See also sources cited *supra* note 18.

*sonal Responsibility and Work Opportunity Reconciliation Act of 1996.*<sup>22</sup>

On college campuses during these decades, diversity, cultural sensitivity, and accommodation became important institutional indicators of progress in fighting racism and sexism.<sup>23</sup> While it is true that speech codes and conduct policing gave rise to a sense of oppressive political correctness for some, for many minorities who attended college in the 1990s, we remember all too well the pervasive racism that, in fact, existed on our campuses and to which we were subject.<sup>24</sup> Student reactions to these experiences of exclusion was often a greater demand for Black Studies, Ethnic Studies, and Women's Studies departments.<sup>25</sup> If you wanted to learn about the contributions of African Americans to science or math or women's history, you could now choose a course in Black or Women's Studies.<sup>26</sup> This strategy was sometimes adopted instead of demanding that the general curriculum integrate silenced or erased histories.<sup>27</sup> Nevertheless, these courses allowed students to learn alternative histories as well as modes of analysis and critique based on experiences of exclusion and identity that were unavailable before 1980s.<sup>28</sup> For those from minority backgrounds, these academic spaces of insight provided an affirmation of personal identity and a way of imagining oneself as a real participant in history.

In the context of trying to unseat the dominance of whiteness/maleness/heterosexuality, identity politics in the 1990s was a demand for recognition of difference and a resistance to some-

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<sup>22</sup> Lest we forget, the 1990s saw a rising narrative of personal responsibility for achievement and failure, placing the onus on the individual to be "entrepreneurial" and overcome societal setbacks that "everyone" faced. This narrative of responsibility is perhaps best captured by the welfare reform enacted by President Bill Clinton. See, e.g., Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247 (2014).

<sup>23</sup> *Id.*

<sup>24</sup> Fabio Rojas, *Activism and the Academy: Lessons from the Rise of Ethnic Studies*, in PROFESSORS AND THEIR POLITICS 243, 251 (Neil Gross & Solon Simmons eds., 2014); Noel Jacob Kent, *The New Campus Racism: What's Going on?*, THOUGHT & ACTION, Fall 2000, at 83, 86-87, [http://www.nea.org/assets/img/PubThoughtAndAction/TAA\\_00Fal\\_10.pdf](http://www.nea.org/assets/img/PubThoughtAndAction/TAA_00Fal_10.pdf) [<https://perma.cc/SSK3-FGQJ>].

<sup>25</sup> Bob Wing, "Educate to Liberate!": *Multiculturalism and the Struggle for Ethnic Studies*, COLORLINES (May 15, 1999, 12:00 PM), <http://www.colorlines.com/articles/educate-liberate-multiculturalism-and-struggle-ethnic-studies> [<https://perma.cc/WR5E-47YR>]; MICHELE S. MOSES, EMBRACING RACE: WHY WE NEED RACE-CONSCIOUS EDUCATION POLICY 101-03 (2002).

<sup>26</sup> Rojas, *supra* note 24, at 244; Wing, *supra* note 25.

<sup>27</sup> Wing, *supra* note 25.

<sup>28</sup> See Rojas, *supra* note 24, at 244 (noting that ethnic studies programs began to develop in the late 1960s but took more than a decade to reach their peak); see also Kent, *supra* note 27, at 91-92.

times unachievable and undesirable forms of assimilation.<sup>29</sup> These efforts were linked to and carried forward earlier political programs like decolonization,<sup>30</sup> feminism(s),<sup>31</sup> and black nationalism<sup>32</sup> which were projects also founded on a recognition of identity. But these earlier projects included a clear set of distributional demands that could not be met by mere increases in numbers of minorities or with superficial power-sharing through tokenism.<sup>33</sup> Activists and scholars demanded some kind of substantive shift that went beyond mere compliance with liberal expectations of adequate redress. As the 1990s wore on, perhaps because of the difficulty in achieving redistribution, many anti-subordination activists began to focus on representation and difference.

Criticisms of exclusion in the 1990s did not, of course, foreclose cooperation among minority groups.<sup>34</sup> However, as some have pointed out, because of the centrality of representation, it became more difficult to form coalitions and solidarity across difference. For example, while early critiques of the universalizing of white feminism to represent all women regardless of difference helped (and continue to help) reorient feminism to be more responsive to the particularities of religion, race, class, and sexual orientation, some feminists later used difference to silence others from questioning culture or religion.<sup>35</sup> Some feminists condemned this demand for the recognition of difference for depoliticizing and fracturing feminism and “making everything about race” or

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<sup>29</sup> Azizah Y. Al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, in SUSAN MOLLER OKIN ET AL., *IS MULTICULTURALISM BAD FOR WOMEN?* 41 (1999). *But see generally* BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

<sup>30</sup> *See, e.g.*, *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* (Chandra Talpade Mohanty et. al eds., 1991); *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).

<sup>31</sup> *See generally* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF STATE* (1989).

<sup>32</sup> MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 205-08 (1994).

<sup>33</sup> *See supra* notes 32-34. *See also* Sears, *supra* note 5.

<sup>34</sup> Regarding critiques of exclusion, see, for example, Serena Mayeri, Note, “A Common Fate of Discrimination”: *Race-Gender Analogies in Legal and Historical Perspective*, 110 *YALE L.J.* 1045 (2001) (describing the exclusionary tactics of white feminism). Regarding coalition-building, see, for example, Barbara Ellen Smith, *Crossing the Great Divides: Race, Class, and Gender in Southern Women’s Organizing, 1979-1991*, 9 *GENDER & SOC’Y* 680 (1995) (recounting efforts at intersectionality in feminist organizing).

<sup>35</sup> *See* DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* (1989) (questioning anti-essentialism which is a basis for the critique of dominant feminism); *The “Identity Politics” We’re Not Talking About*, *FEMINIST WIRE* (Aug. 2, 2016), <http://www.thefeministwire.com/2016/08/william-ruhmk/> [<https://perma.cc/QM2A-87LF>].

difference.<sup>36</sup>

In the past two decades, minority scholars and activists repeatedly raised the question of who gets to represent minority experience.<sup>37</sup> Who is authorized to speak and about whom? Identity, in other words, became a sort of credential of authenticity authorizing some to speak.<sup>38</sup> It also authorized others to use identity to silence.<sup>39</sup> Recall the popular discussion of Barack Obama's identity during the 2008 Presidential campaign. The question of whether Obama was "black enough"—a question about the authenticity of not only his identity but also his authority to represent black experience—was raised repeatedly.<sup>40</sup> More recently, on campuses, student activism around identity and representation has sometimes been taken too far and had absurd results.

The recent treatment of the director of the film *Boys Don't Cry*,

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<sup>36</sup> For a recent example, this writer pits white women against all other identities in her complaint about the inclusivity of the Women's March on Washington: "But the attempted hijacking of the march's agenda and all the nasty tit-for-tat between white versus black/queer/Muslim/trans and other identities tells a very disturbing story about the divided state of feminism today." Emma-Kate Symons, *Agenda for Women's March Has Been Hijacked by Organizers Bent on Highlighting Women's Differences*, N.Y. TIMES: WOMEN IN THE WORLD (Jan. 19, 2017), <http://nytlive.nytimes.com/womenintheworld/2017/01/19/agenda-for-womens-march-on-washington-has-been-hijacked-by-organizers-bent-on-highlighting-womens-differences/> [https://perma.cc/GJW5-BBAY].

<sup>37</sup> See *supra* notes 34-35.

<sup>38</sup> This is quite different from critique and engagement among people who disagree. For instance, in their response to Nancy Fraser, Brenna Bhandar and Denise Ferreira da Silva point out that liberal feminists continue to obscure the work of Third World and feminists of color, assuming universalized subject position from which they can speak of "us" as a collective or group. This is not to chastise her for speaking for women of color but to point out that dominant feminist theorists continue to ignore the work of women of color, oftentimes publishing similar works which are then treated as novel contributions. See Brenna Bhandar & Denise Ferreira da Silva, *White Feminist Fatigue Syndrome*, CRITICAL LEGAL THINKING (Oct. 21, 2013), <http://criticallegalthinking.com/2013/10/21/white-feminist-fatigue-syndrome/> [https://perma.cc/F3JX-GY8U], critiquing Nancy Fraser, *How Feminism Became Capitalism's Handmaiden—and How to Reclaim It*, GUARDIAN (Oct. 14, 2013, 1:30 AM), <https://www.theguardian.com/commentisfree/2013/oct/14/feminism-capitalist-handmaiden-neoliberal> [https://perma.cc/7NA4-Z75Z].

<sup>39</sup> See Jack Halberstam, *Hiding the Tears in My Eyes—Boys Don't Cry—A Legacy*, BULLY BLOGGERS (Dec. 7, 2016), <https://bullybloggers.wordpress.com/2016/12/07/hiding-the-tears-in-my-eyes-boys-dont-cry-a-legacy-by-jack-halberstam/> [https://perma.cc/442K-SF6B] (discussing the debate around a cisgender, white movie director's depiction of the murder of Brandon Teena, a young trans person, in the 1990s).

<sup>40</sup> David A. Graham, *A Short History of Whether Obama is Black Enough, Featuring Rupert Murdoch*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/politics/archive/2015/10/a-short-history-of-whether-obama-is-black-enough-featuring-rupert-murdoch/409642/> [https://perma.cc/LAG7-BB2J].

Kimberly Pierce is a case in point.<sup>41</sup> In the context of the struggles among feminist, queer and transgender groups, trans activists protested Pierce's talk and the film for transphobia because Pierce cast a cis-gendered woman (Hillary Swank) to play the trans victim of murder, Brandon Teena.<sup>42</sup> The repeated use of epithets, "fuck you bitch" and "fuck this cis-gendered bitch" against a queer filmmaker whose work *in 1999 was groundbreaking* indicates the shallowness of identity unmoored from earlier struggles. Jack Halberstam writing about this incident notes that:

The accounts given of these recent protests at Reed College give evidence of enormous vitriol, much of it blatantly misogynist (the repeated use of the word "bitch" for example) directed at a queer, butch film maker and *they leave us with an enormous number of questions to face about representational dynamics, clashes between different historical paradigms of queer and transgender life and the expression of queer anger that, instead of being directed at murderous enemies in the mainstream of American political life, has been turned onto independent film makers within the queer and LGBT communities.*<sup>43</sup>

Certainly, other communities have had similar experiences of fracture. It is easy to see the reduction of identity to a politics of superficiality pitting the "shifting bottoms"<sup>44</sup> against each other in these cases. These contestations become particularly problematic as silencing techniques, for instance, when some Zionist organizations conflate critique of Israel and anti-semitism in protesting speakers who support Palestinian rights,<sup>45</sup> or when some Muslims question the authority of others to "represent" Islam or Muslims.<sup>46</sup> Furthermore, as these schisms multiply, they have been easy to manipulate. Identity and the politics of representation can then be coopted in ways that discredit any shared experience of subordination.

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<sup>41</sup> Halberstam, *supra* note 39.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (emphasis added).

<sup>44</sup> Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1183 (1999).

<sup>45</sup> Jon Marks, *Cancellation of Palestinian Speaker Leads to Teacher Suspensions and Unrest at Friends*, JEWISH EXPONENT (Feb. 16, 2017), <http://jewishexponent.com/2017/02/16/cancellation-palestinian-speaker-leads-teacher-suspensions-unrest-friends/> [<https://perma.cc/4N8G-T7HW>].

<sup>46</sup> Asra Nomani, *Islamic Feminist: Duke Students Tried To Cancel My Speech. That Made It Even More Important.*, TIME (Apr. 13, 2015), <http://time.com/3818372/islamic-feminist-duke-speech/> [<https://perma.cc/3SXH-42NV>].

## II. COOPTING IDENTITY AND REPRESENTATION IN THE SERVICE OF THE INSTITUTIONAL STATUS QUO

There are two specific strategies by which identity reduced to representation has been easily manipulated to protect the status quo. The first is by making all people of color and women fungible which in turn allows institutions to hire white women as their diversity candidates rather than people of color—particularly women of color.<sup>47</sup> By this logic, one or two people of color *or* white women are enough to “diversify” an overwhelming majority of white males. And even by its own metric of numerical representation, this liberal strategy continues to fail. The legal profession is an excellent example of failure. The *National Association for Law Placement* finds that even after decades of diversity policies, the profession remains 88% white and largely male and as one moves up the ranks in every area of law from of counsels, to partners, to tenured law professors, diversity falls.<sup>48</sup> This is widely acknowledged as a problem but simply adding a few people of color and stirring the pot has not addressed the causes of underrepresentation particularly in senior positions.<sup>49</sup> Anemic will in hiring people of color, lack of support, bias in evaluation and promotion, and the use of double or special standards has resulted in steady attrition up the ranks.<sup>50</sup> In addition, minorities who challenge the status quo and these double standards face discipline through tenure and promotion denials, unfavorable reviews based on subjective criteria, and exclusion from positions of authority in the institution.<sup>51</sup> Those who make it

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<sup>47</sup> And this observation can be taken further and made more granular by incorporating class: affluent immigrants from Africa or Asia often find more in common with similarly placed whites than they do with working class minorities or whites.

<sup>48</sup> *Women and Minorities at Law Firms by Race and Ethnicity - New Findings for 2015*, NALP (Jan. 2016), <http://www.nalp.org/0116research> [https://perma.cc/E8SN-CLSY]. Alternatively, by Professor Lindgren’s account, we should hire more white males because they are “underrepresented” in law faculties *as compared to the legal profession* in which they are, of course, *overrepresented* to begin with. Jim Lindgren, *Law Faculty Diversity: Successes and Failures*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 21, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/law-faculty-diversity-successes-and-failures/> [https://perma.cc/GEE8-79BL].

<sup>49</sup> See Lindgren, *supra* note 48.

<sup>50</sup> See *id.*

<sup>51</sup> SHELLEY J. CORRELL & STEPHEN BENARD, GENDER AND RACIAL BIAS IN HIRING (2006), [http://provost.upenn.edu/uploads/media\\_items/gender-racial-bias.original.pdf](http://provost.upenn.edu/uploads/media_items/gender-racial-bias.original.pdf) [https://perma.cc/TE3C-BZAL]; Marybeth Gasman, Opinion, *An Ivy League Professor on Why Colleges Don’t Hire More Faculty of Color: ‘We Don’t Want Them’*, WASH. POST: GRADE POINT (Sept. 26, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/09/26/an-ivy-league-professor-on-why-colleges-dont-hire-more-faculty-of-color-we-dont-want-them/> [https://perma.cc/7ACJ-UZKM].

are likely to do so because they are comply with institutional politics and expectations.

This brings me to the second strategy of protecting white dominance in the Academy.<sup>52</sup> If promoting minority representation becomes an institutional goal (as it is for the Association of American Law Schools<sup>53</sup>), recruiting minorities willing to act as identity shields can help maintain the structural status quo and distribution of power while providing cover for what amounts to superficial inclusion masking the de facto, ongoing systemic racism and intersectional hetero/sexism.<sup>54</sup>

Racial or identity shielding, in other words, uses willing minorities to discipline other minorities and provides a cunning defense against any charge of discrimination. By functioning as overseers, minorities in these positions trade their identity and extract valuable benefits from the institution and they can act powerfully to maintain white dominance. Some examples of the work that identity shields in positions of authority do to preserve the dominant power are: appoint whites and other shields to powerful committees and administrative roles like deanships; place control of student admissions and curriculum in the hands of traditional powerholders who have no commitment to diversity; structure merit to overvalue the scholarship, teaching and service of whites; to distribute to opportunities afforded faculty and staff to those who are compliant, and; decide how to implement diversity policies.<sup>55</sup> Thus, the identity of the shields can be deployed by the institution to confuse and obscure the existing exclusionary power distribution and it can create the kind of paranoia Ahmed refers to in her post. The subjects of such disciplining—both minorities *and*

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<sup>52</sup> Gasman, *supra* note 51.

<sup>53</sup> See *About*, AM. ASS'N LAW SCHOOLS, <https://www.aals.org/about/> [<https://perma.cc/72UP-8EHQ>] (noting “promot[ing] . . . diversity, including diversity of backgrounds” as part of the mission of the organization).

<sup>54</sup> See, e.g., Robin D.G. Kelley, *House Negroes on the Loose: Malcolm X and the Black Bourgeoisie*, 21 *CALLALOO* 419, 420, 423 (1998) (noting Malcolm X’s differentiation of the role of house and field slaves). The concept of a racial shield comes from colleagues at Florida International University College of Law, I have broadened it to include other identity categories. An analogous or parallel theorization of the use of race or gender to thwart discrimination claims is articulated by Mitu Gulati and Devon Carbado. They describe the Title VII jurisprudence as being unable to address discrimination against black women in a workplace where black men are advanced and white women are advanced, masking both race and gender discrimination. See generally Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J. CONTEMP. LEGAL ISSUES* 701 (2001).

<sup>55</sup> See generally Jenessa R. Shapiro, & Steven L. Neuberg *When Do the Stigmatized Stigmatize? The Ironic Effects of Being Accountable to (Perceived) Majority Group Prejudice-Expression Norms*, 95 *J. PERSONALITY & SOC. PSYCHOL.* 877 (2008).

*their white allies*—are made to questions the *validity* of their *experience* of racial or gender subordination because it comes at the hands of other minorities.<sup>56</sup>

Without attending to the overall context in which these enclaves of inversion exist and with minorities serving as proxies to maintain prevailing race and gender subordinating distributions of power, it is easy to think that those overarching, structural conditions are inoperative, interrupted, or that minorities are not invested in them simply because of identity. This was articulated by Malcolm X in the 1960s in his distinction between the house and field and the critique of black bourgeois complicity in keeping working class blacks in their place.<sup>57</sup> And, indeed, anti-colonial thinkers very early on theorized that one of the most effective strategies of keeping the colonized in line was to train an elite cadre of natives, distribute to them enough of the benefits enjoyed by masters, and tie those gains to keeping the others in line.<sup>58</sup> This strategy of using minority shields blurs the lines between “us” and “them” in ways that identity politics reduced to representation simply cannot address.<sup>59</sup>

### III. LESSONS FROM THE PAST: WHAT ARE WE STRUGGLING FOR AND AGAINST?

In spite of the perils of “identity as representation,”<sup>60</sup> I do not propose a complete retreat from identity even if that were possible. We cannot redress the harms experienced by minorities meaningfully without a recognition that they arise from identity-based subordination.<sup>61</sup> My purpose in this essay is to underscore two areas in

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<sup>56</sup> See Ahmed, *supra* note 1.

<sup>57</sup> Malcolm X’s relationship to the black bourgeoisie was far more complicated than I can do justice to here. Robin D.G. Kelley’s work is instructive on this point. See Kelley, *supra* note 57.

<sup>58</sup> ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (1965); FRANTZ FANON, *THE WRETCHED OF THE EARTH* 65 (1963).

<sup>59</sup> Thomas Erdbrink & Rachel Donadio, *Iranian Director Asghar Farhadi Won’t Attend Oscar Ceremony*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/movies/trump-immigration-oscars-iranian-director-asghar-farhadi.html> [https://perma.cc/D5JM-ZGW6] (describing an Iranian director’s decision not to attend the Academy Awards Ceremony given President Trump’s Muslim Ban and quoting him as saying “[i]n order to understand the world, [hardliners] have no choice but to regard it via an ‘us and them’ mentality, which they use to create a fearful image of ‘them’ and inflict fear in the people of their own countries”).

<sup>60</sup> See Mark Lilla, Opinion, *The End of Identity Liberalism*, N.Y. TIMES: SUNDAYREV. (Nov. 18, 2016), <https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html> [https://perma.cc/4PGA-KFB4].

<sup>61</sup> Sean Illing, *This Professor Set Off a War of Words Over “Identity Politics.” We Debated Him.*, VOX (Dec. 16, 2016, 11:13 AM), <http://www.vox.com/conversations/2016/12/>

which the use of identity has become a hindrance, first, *within* minority anti-subordination politics and, second, in the hands of institutions that seek to maintain the status quo by manipulating identity not to suggest that we discard identity. Furthermore, these two points come together to illuminate how minorities experiencing racial/gender/sexual orientation subordination can be gaslighted into questioning the validity or even the reality of their experiences. That is how I read Ahmed's blog post and quote: it can be hard to tell what is going on in a situation in which the institution is superficially committed to diversity and minorities are deployed against each other.<sup>62</sup>

The recent election jolted us back to the reality that we have been engaged in this struggle for both inclusion (but not necessarily assimilation) and equality since before the founding of the country. Whiteness and racism, sexism and heterosexism are constitutive of and foundational to the United States' dominant national identity.<sup>63</sup> Minorities in every generation have been attempting to dismantle these hierarchies in their various forms. Part of that work has been to make visible the sexualized and racialized violence that is being perpetrated even as proponents of white dominance in society and the state attempt to frame the struggle in gender and race neutral terms, without regard to any inherited inequality, and claim the problem to be "solved".<sup>64</sup> In such times, the paranoia that haunts Ahmed's quote needs to be set aside for certainty.<sup>65</sup> We cannot afford to second guess ourselves. As Jacob Levy argues, we must continue to challenge notions of neutrality and universality when they act as "a mask for the identity politics of the *staatsvolk*. As citizens of a liberal state trying to preserve it, we need to be able to hear each other talking about *particularized* injustices, and to cheer each other on when we seek to overturn them."<sup>66</sup> And in order for us to be able to hear each other

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16/13924742/mark-lilla-identity-politics-liberalism-trump-clinton-race-2016-election [https://perma.cc/SQ4P-SGD2].

<sup>62</sup> Ahmed, *supra* note 1.

<sup>63</sup> See generally LÓPEZ, *supra* note 6.

<sup>64</sup> The most recent example of this is President Trump's immigration Executive Order that has been commonly called the "Muslim Ban," which is now being characterized as not targeting Muslims. See, e.g., Brady Dennis & Jerry Markon, *Amid Protests and Confusion, Trump Defends Executive Order: 'This is Not a Muslim Ban'*, WASH. POST (Jan. 29, 2017), [https://www.washingtonpost.com/national/health-science/trump-gives-no-sign-of-backing-down-from-travel-ban/2017/01/29/4ffe900a-e620-11e6-b82f-687d6e6a3e7c\\_story.html](https://www.washingtonpost.com/national/health-science/trump-gives-no-sign-of-backing-down-from-travel-ban/2017/01/29/4ffe900a-e620-11e6-b82f-687d6e6a3e7c_story.html) [https://perma.cc/HKH8-GPXJ].

<sup>65</sup> Ahmed, *supra* note 1.

<sup>66</sup> Jacob T. Levy, *The Defense of Liberty Can't Do Without Identity Politics*, NISKANEN

talking, we need to stop using identity as *the* marker of authenticity and a proxy a commitment to anti-subordination. Those of us who already exist in diverse institutions can attest that while shared identity may be a starting point, finding shared cultural and political values takes a deeper commitment and more time, requiring us to revisit initial impressions and assumptions. Our experience of identity politics, the uses of diversity by institutional actors and the resulting distribution of power that maintains the status quo of minority subordination *through* minority collaboration has shown that one cannot distinguish an ally from an adversary based on identity alone.

# A HOPELESS CASE?: ESCAPING THE PROOF PITFALL IN POWER-DEPENDENT PARADIGMS\*

*e. christi cunningham*†

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## I. INTRODUCTION

She had been hospitalized on several occasions. Broken ribs. Internal bleeding. Concussions. His beatings had become a way of life. She had become astute at reading his moods because her survival depended on it. When he was tired. . . . When he was intoxicated. . . . When he was playful. . . . When he had had a bad day. . . . But his moods could change suddenly, without explanation or warning. She had lost more than one child – miscarriages caused by a sudden change of mood.

These mood changes nested within a cycle of violence—in- sults, humiliation, beatings that gradually grow in intensity until she is very badly beaten or hospitalized, or flees to a neighbor’s or relative’s house. Then, he apologizes and laments, regrets his behavior and promises never to do it again. Shaking his head in disbelief, how could he have been so cruel? He charms and courts her, offering trinkets as reparation. He promises her a better future and that all of that is in his past. She has hope.

On this particular occasion, like previous occasions, he had

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\* This article is one of six written for CUNY Law Review’s inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: “When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure.” Sara Ahmed, Evidence, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

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repented of his past abuses. They had talked. So when he made the comment, she was devastated. For her, this was how it started. For him, it was just a comment. He didn't mean anything by it. It was no big deal. Why was she so serious and sensitive about everything? It was nothing.

A passage in Professor Sara Ahmed's article, *Evidence*, reflects a similar conversation in the context of racial oppression.<sup>1</sup> She writes:

When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you [that] makes you stand out from the sea of whiteness.<sup>2</sup>

Like the woman who attempts to convince her battering husband not to beat her, Professor Ahmed's observations represent an ongoing conversation about how to convince dominant society that racism is real or relevant.<sup>3</sup> This conversation while perhaps necessary may be similarly futile. And if not futile, then it is limited in what it can accomplish when pleas for just treatment are submitted to institutions that sustain systems of oppression. As Professor Ahmed observes:

Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of *that*? Is *that* why they are passing us over, two women at the table? You are not sure.<sup>4</sup>

The maddening nature of this conversation, asking the abuser to acknowledge, judge, and repent from the abuse that empowers him, is an aspect of the abuse.

Is it a hopeless case? Presenting evidence of violence to free oneself and others from cycles of violence—centuries of slavery to emancipation and Reconstruction<sup>5</sup> to lynchings and Jim Crow<sup>6</sup> to

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<sup>1</sup> Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/2M62-KGCJ].

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Tanya Kateri Hernandez, Response, *The Value of Intersectional Comparative Analysis to the "Post-Racial" Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study*, 43 CONN. L. REV. 1407 (2011).

<sup>4</sup> Ahmed, *supra* note 1.

<sup>5</sup> Reconstruction is the period following the Civil War, 1865 to 1877, when southern Blacks enjoyed relative social and political freedom, even holding public office. See Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2003).

Black is Beautiful,<sup>7</sup> the War on Poverty,<sup>8</sup> and the Civil Rights Movement<sup>9</sup> to trickle down economics,<sup>10</sup> the War on Drugs and the New Jim Crow<sup>11</sup> to President Obama's hope<sup>12</sup> and Black Lives Matter<sup>13</sup> to President-elect Trump's hopelessness.<sup>14</sup>

In a power-dependent relationship, the idea that what is lacking is the necessary evidence of her condition is one of the many pitfalls of her oppression.<sup>15</sup> She complains about the latest episode of emotional abuse to her battering husband. He may deny that the episode ever happened. He may assert that his words or actions were true and therefore merited. He may blame her for provoking his words or actions. He may even admit that his actions were wrong or hurtful. But regardless of the outcome of that particular conversation, she loses because the power in her relationship to

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<sup>6</sup> Jim Crow was a period, following the Reconstruction era in the late 1800s, of resurgent white supremacy re-codifying racial segregation, enforced by racial violence. *But see* James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 *How. L.J.* 113 (2006) (describing aspects of Black resistance during Jim Crow).

<sup>7</sup> "Black is Beautiful" was a slogan of the Black power movement of the 1960s. *See* Imani Perry, *Buying White Beauty*, 12 *CARDOZO J.L. & GENDER* 579, 608 (2006).

<sup>8</sup> The War on Poverty was a program of President Lyndon Johnson in the 1960s to commit federal resources to combatting poverty. *See* Francine J. Lipman and Dawn Davis, *Heal the Suffering Children: Fifty Years After The Declaration of War on Poverty*, 34 *B.C. J.L. & Soc. JUST.* 311 (2014).

<sup>9</sup> The Civil Rights Movement of the 1950s and 1960s halted *de jure* segregation of the Jim Crow era through judicial, legislative, and social action. *See* Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 *U.C. IRVINE L. REV.* 641 (2011).

<sup>10</sup> Trickle down economics was the economic approach of President Ronald Reagan that supported wealth expansion for the rich under the guise that it would trickle down to the middle class and poor. *See generally* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 386-87 (2006) ("This tendency uninterrupted by policy decisions to curb it or disrupt its lopsided material distributions, has increasingly created and cemented vast economic inequalities in the social system, widening and hardening the gap between the rich and the poor.").

<sup>11</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

<sup>12</sup> BARACK OBAMA, *THE AUDACITY OF HOPE* (2006).

<sup>13</sup> The Black Lives Matter movement for racial justice began in opposition to police and state-sponsored brutality against Black people, starting with the 2014 death of Michael Brown in Ferguson, Missouri. *See* Elahe Izadi, *Black Lives Matter and America's Long History of Resisting Civil Rights Protestors*, *WASH. POST* (Apr. 19, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/19/black-lives-matters-and-americas-long-history-of-resisting-civil-rights-protesters/> [<https://perma.cc/ZF63-3E67>].

<sup>14</sup> Following the election of Donald Trump, First Lady Michelle Obama lamented a new era of hopelessness. *Michelle Obama Says America Is Entering a Time of Hopelessness*, *N.Y. TIMES: WOMEN IN THE WORLD* (Dec. 16, 2016), <http://nytlive.nytimes.com/womenintheworld/2016/12/16/michelle-obama-says-america-is-entering-a-time-of-hopelessness/> [<https://perma.cc/SA7K-CG5L>].

<sup>15</sup> *See* Ahmed, *supra* note 1 (discussing the role of evidence).

him and the parameters of her being in a relationship with him remain the same.

This article hypothesizes that the search for proper evidence, proof of oppression in power-dependent relationships, is a trap to ensnare the oppressed in their condition. While the presentation of sound evidence of racism, sexism, religious and ethnic oppression, heterosexism, xenophobia, and other forms of oppression may be an unavoidable exercise, it is essential that individuals and communities appreciate that the likely outcomes of this exercise are limited and that the efforts of this exercise may be in some ways counterproductive, preserving the relationship and dynamic that is the source of oppression.<sup>16</sup> I am not asserting that all claims of discrimination are valid. Nor am I arguing that plaintiffs should not be required to prove their cases. Instead, I am positing that even if all claims were valid and perfectly proven, the current system of laws addressing identity-based oppression is not designed to alter the fundamental distribution of power or the power-dependent nature of those relationships. This article hypothesizes, instead, the possibility of an exit strategy from power-dependent relationships to intentional practices that de-center dominant oppression and engage cross-cultural visioning and creativity.

Part II explores the nature of power-dependent relationships, some of the tools that sustain them, and Professor Ahmed's concept of proof in that context. Part III hypothesizes an exit strategy from this paradigm and these relationships.

## II. POWER-DEPENDENT RELATIONSHIPS

A power-dependent relationship is one in which the controlling individual or class draws its identity and status from the exercise of power over the oppressed individual or group.<sup>17</sup> In other words, in a power-dependent relationship, subjugation of another is essential to the controlling individual's or group's understanding of self. The controller is defined by the power he exerts in the relationship. The battering husband is powerful only to the extent that she is powerless. Whiteness has status and value to the extent that blackness, brownness, Muslim, and other identities do not. Not all people who are privileged or benefit from power-dependent rela-

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<sup>16</sup> See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (arguing that racism cannot be eliminated through the use of law and legal remedies).

<sup>17</sup> See e. christi cunningham, *Exit Strategy for the Race Paradigm*, 50 HOW. L.J. 755, 780 (2007).

tionships condone, perpetuate, or endorse their privilege.<sup>18</sup> Therefore, of course, not all white people are white supremacists, not all men are misogynist, not all Christians are anti-semitic or Islamophobic or vice versa, and not all heterosexuals are homo or transphobic. Nevertheless, white supremacy, for example, needs non-white subjugation in order to exist, and white people and other members of dominant groups, whether complicit or not, are defined by that oppression.

There are many ways that a defined individual or group maintains identity and status in a power-dependent relationship. Force, violence, and controlling resources and information are perhaps the most obvious. Two less evident, but powerful tools of oppression are: 1) the illusion of co-dependence and 2) the perpetuation of engagement.

A. *The Illusion of Co-dependence*

The dominant group is defined by its oppression of the defining group.<sup>19</sup> The illusion of co-dependence means that the defined individual or group projects an illusion, rather deception, that the defining individual or group is similarly dependent upon the relationship of oppression for their identity.<sup>20</sup> An illusion, for example, may be that identity for some is *necessarily* juxtaposed to whiteness, as blackness, whether or not that identity neatly fits or is sufficiently dynamic or excludes many others. The illusion is that identity for some requires a white reference point.

Similarly, the defined group in power-dependent racial, religious, sexual, ethnic, or other relationships projects an illusion that the defining or controlled group is dependent on the relationship for their identity.<sup>21</sup> The deception is that the identity of others is juxtaposed with the oppressor's domination, and that deception cloaks the emergence of identity and status unbounded by oppression. Race was created as an artificial distinction in order to facilitate power and control.<sup>22</sup> Co-dependence manifests as the defining

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<sup>18</sup> See Alex Wagner, *White People vs. White Privilege*, ATLANTIC (May 27, 2016), <https://www.theatlantic.com/politics/archive/2016/05/white-people-vs-white-privilege/484355/> [<https://perma.cc/GYD7-VQ7D>].

<sup>19</sup> Arvin Lugay, Book Review, *"In Defense of Internment": Why Some Americans Are More "Equal" Than Others*, 12 ASIAN L.J. 209, 221-22 (2005) (describing the insider group perspective).

<sup>20</sup> See Cunningham, *supra* note 17.

<sup>21</sup> See Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2241 n.10 (2013) (discussing racial paternalism).

<sup>22</sup> See Gloria Sandrino-Glasser, *Los Confundidos: De-Conflicting Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69 (1998).

or oppressed group integrating the instrument of oppression as an essential aspect of their identity.

The concept of the illusion of co-dependence means that dominant groups need subordinated groups to perceive that their identity exists in relation to the dominant group's identity in order to sustain power and control. So, because bias occurs according to certain irrational parameters, targeted at a particular group, for example, the response to that bias corresponds to those parameters. Evidence is gathered and defenses are drafted according to the parameters set by the dominant group's bias.<sup>23</sup> This illusion of co-dependence on the language and terms set by the power-dependent paradigm fortifies it.

Male domination depends on female subordination.<sup>24</sup> A host of oppressive ideologies and practices enforce male privilege. Disproportionate male governance globally in both business and government, sex-segregation of certain occupations, sexual violence and commodification, and sex-based wage disparities for the same work ensure that men control policies and that resources are distributed in ways that take into account dominant male identity and interests, whether or not female interests, children's interests, trans or intersex interests, or interests of men who are not in the dominant group are considered.<sup>25</sup> Hyperbolized images of heterosexual male sexual fantasy objectify and demean women, making women primarily targets for sexual violence.<sup>26</sup>

The illusion of co-dependence coerces women's acceptance that certain work is not for them or that certain work is only for them, that their leaders are male, their bodies sold or controlled, and that the mother planet that holds us can be raided, stripped, or fracked.<sup>27</sup> At times, the deception of co-dependence means that

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<sup>23</sup> See Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1434 (2012).

<sup>24</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

<sup>25</sup> Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L L.J. 223 (1996); Press Release, World Bank, Report Finds 400 Million Children Living in Extreme Poverty (Oct. 10, 2013), <http://www.worldbank.org/en/news/press-release/2013/10/10/report-finds-400-million-children-living-extreme-poverty> [<https://perma.cc/P6CB-NEHG>].

<sup>26</sup> See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 195-214 (1989).

<sup>27</sup> Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1756 (1990) (“[C]ourts have missed the ways in which employers

women internalize that they are less powerful and worth less.<sup>28</sup> In Rajasthan, India, the government has set up 67 cradles around the state to collect the hundreds of baby girls that are abandoned yearly.<sup>29</sup> In the United States the illusion of co-dependence occurs through the commodification and marketing of women's objectification, ensuring that women's oppression is profitable and normalized. President Trump's initial nominee for Labor Secretary, a restaurant tycoon, told *Entrepreneur* in 2015, "I like our ads. I like beautiful women eating burgers in bikinis. I think it's very American."<sup>30</sup> It reinforces an essential aspect of dominant male identity and privilege, relative freedom of movement in the world, for men compared to women or non-male individuals.<sup>31</sup> This marketed illusion of dependence on hyperbolized dominant male imagining renders female-centered sexual pleasure invisible.<sup>32</sup> It also obscures heterosexual male pleasure that is not based in women's objectification and oppression.<sup>33</sup>

Not only is non-oppressive heterosexual male sexuality disadvantaged by a power-dependent paradigm, the paradigm also creates a caste system of men who are entitled to its privilege and men who are not, or who threaten it. Subjecting certain groups of men

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contribute to creating women workers in their images of who 'women' are supposed to be. Judges have placed beyond the law's reach the structural features of the workplace that gender jobs and people, and disempower women from aspiring to higher-paying nontraditional employment." (footnote omitted)); Sara Jerving, *The Fracking Frenzy's Impact on Women*, PRWATCH (Apr. 4, 2012, 8:44 AM), <http://www.prwatch.org/news/2012/04/11204/fracking-frenzys-impact-women> [https://perma.cc/QQ6S-AX4H] (describing impact of fracking on women's health and violence).

<sup>28</sup> See William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1115 (2014) (discussing "internalized subordination").

<sup>29</sup> Shaifali Agrawal, *Cradles in Rajasthan for India's Unwanted Babies*, AL JAZEERA (Dec. 26, 2016), <http://www.aljazeera.com/indepth/features/2016/12/cradles-rajasthan-india-unwanted-babies-161205080218497.html> [https://perma.cc/9R4R-PJ8W].

<sup>30</sup> Emily Peck, *Trump's Labor Secretary Pick: 'I Like Beautiful Women Eating Burgers in Bikinis'*, HUFFINGTON POST (Dec. 8, 2016, 3:46 PM), [http://www.huffingtonpost.com/entry/andy-puzder-women\\_us\\_5849b59ce4b04002fa80660c?j0wg4dseuf4dkj4i](http://www.huffingtonpost.com/entry/andy-puzder-women_us_5849b59ce4b04002fa80660c?j0wg4dseuf4dkj4i) [https://perma.cc/N6RA-VGD6].

<sup>31</sup> Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. LEGIS. 1, 23 (2000) ("Gender-based violence and the threat of such violence significantly impair women's freedom of movement and economic opportunities by deterring them from using public accommodations, sidewalks, streets, parking lots, and transportation—the very channels and instrumentalities of interstate commerce.").

<sup>32</sup> Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998).

<sup>33</sup> *Id.* at 191-92 ("Andrea Dworkin and Catharine MacKinnon see much sexuality in our culture as male objectification of women; what is erotic for many men and women is male dominance over and objectification of women.").

to forcible rape, incarcerated men of color, for example, is oppression that strips them of the adult male privilege in the power-dependent paradigm to be free from sexual violence.<sup>34</sup> Diverse sexuality is attacked because it presents a challenge to the paradigm that objectifies women by opening the possibility of male objectification, male vulnerability to sexual violence, and a narrative contrary to hyperbolized heterosexual male fantasy.<sup>35</sup>

The illusion of identity co-dependence propagates assumptions about the nature of government and business that skew toward systems of domination. For example, despite the fact that these forms of government, business, and governance have produced continual warring, human suffering, and unprecedented harm to the planet,<sup>36</sup> a deception that oppressed people are dependent on these systems prevails.

One of the central racial struggles reflects an illusion of dependence on white-centered identity. Equality as a goal assumes the illusion that the dominant group is the standard. What does it mean for an oppressed group to be equal to the oppressor? Some of the most powerful universities, banks, and businesses currently in the United States were built on slave labor and investment.<sup>37</sup> What illusion makes their ideology, education, wealth, consumption, and ability to dominate admirable? If the evidence demonstrates the negative reality of systems of oppression, then it is a delusion of co-dependence that ties us to the goal of equality.

### B. *The Perpetuation of Engagement*

Another less evident instrument of oppression that is related to the illusion of co-dependence is the perpetuation of engage-

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<sup>34</sup> JOANNE MARINER, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), <https://www.hrw.org/reports/2001/prison/voices.html> [<https://perma.cc/N3PW-3SSV>]; James Nickerson, *Slavery Trafficking Victims Crippled by Fear in UK*, AL JAZEERA (Jan. 3, 2017), <http://www.aljazeera.com/indepth/features/2016/12/slavery-trafficking-victims-crippled-fear-uk-161231111517043.html> [<https://perma.cc/8HGE-QET6>] (describing sexual violence against trafficked men in the UK).

<sup>35</sup> Ramona L. Paetzold, *Same-Sex Sexual Harassment: Can It Be Sex-Related for Purposes of Title VII?*, 1 EMP. RTS. & EMP. POL'Y J. 25, 59-60 (1997) (discussing reaction to sexual coercion in homosexually-oriented male pornography).

<sup>36</sup> Tracy Dobson, *Loss of Biodiversity: An International Environmental Policy Perspective*, 17 N.C. J. INT'L L. & COM. REG. 277, 299 (1992) (explaining that reductionist science supports capitalism and "reduces the environment, women, and non-white males to commodities to be dominated by white men").

<sup>37</sup> See, e.g., Rachel L. Swarns, *Insurance Policies on Slaves: New York Life's Complicated Past*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html> [<https://perma.cc/B34T-BGRJ>].

ment. In order to maintain their identity and survive as dominant, the defined individual or group must remain engaged with the defining individual or group. Sustaining the relationship is essential to the oppression.

In order for the abusive husband to maintain his power, he must remain engaged in the relationship with his wife.<sup>38</sup> If she leaves, then so does his power and control.<sup>39</sup> For this reason, one of the most dangerous experiences for a woman in an abusive relationship is the process of disengaging from the relationship.<sup>40</sup> For many women, the decision to disengage has proven fatal.<sup>41</sup>

Attempting to convince her battering husband that he is, in fact, abusing her, that it is physically and emotionally harmful to her, that it is not something that she desires, deserves or provokes, and that his abuse matters and should change are activities that are necessary to her survival.<sup>42</sup> In Lebanon, for example, after years of grassroots and social activism, legislatures have taken first steps toward repealing a law that allows a rapist to escape prosecution if he marries his victim.<sup>43</sup> Activism saves lives. However, even if such advances provide momentary reprieve in the cycle of violence, appeals to power-dependent authority nevertheless keep the oppressed group engaged in the power-dependent relationship. Professor Ahmed's article on evidence provides many illustrations of the tactics used to maintain engagement in oppressive paradigms and the frustrations and complications for individuals and groups participating in the exercise of proving the facts in the context of the ebbs, flows, and cycles of oppressive relationships.<sup>44</sup>

Perhaps, in power-dependent relationships, discourse with the oppressor about the oppression functions to preserve the relationship and therefore the paradigm and the oppression. This hypothesis is supported by one of the central themes of Professor Ahmed's article, "that the evidence we have of racism and sexism is

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<sup>38</sup> See Jane Kim, Note, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 443, 461 (2011).

<sup>39</sup> Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 342 (2009).

<sup>40</sup> Susan J. Elliott, *Getting Out of the Abusive Relationship*, PSYCHOL. TODAY (Aug. 12, 2015), <https://www.psychologytoday.com/blog/getting-back-out-there/201508/getting-out-the-abusive-relationship> [<https://perma.cc/XP3U-LQEW>].

<sup>41</sup> See Cianciarulo & David, *supra* note 39, at 351.

<sup>42</sup> See Kelly Grace Monacella, Comment, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699, 704-09 (1997).

<sup>43</sup> Joel Williams, *Lebanon Takes First Step to Abolish Marriage Rape Law*, CNN (Dec. 12, 2016, 1:27 PM), <http://www.cnn.com/2016/12/08/middleeast/lebanon-moves-to-abolish-marriage-rape-law/index.html> [<https://perma.cc/THT7-9HWD>].

<sup>44</sup> Ahmed, *supra* note 1.

deemed insufficient *because* of racism and sexism.”<sup>45</sup> Efforts to explain, characterize, and prove racism, sexism, and many other forms of oppression have been exhaustive and exhausting. Professor Ahmed illustrates this exhaustion through the story of a “diversity worker’s” struggle to implement a pro-diversity policy: “A diversity worker: she ends up exhausted because despite all her efforts the same thing is still happening. Sometimes you stop because it is too hard to get through. So she might leave, or turn her energy toward something else: a new policy, a new document, a new job.”<sup>46</sup> In power-dependent paradigms, ending the oppression is not a matter of evidence. The problem is not that the oppressed individual or group has failed to characterize, name, or prove their oppression; it is not that they did not say “no”; it is not their fault.

Professor Ahmed articulates the suspicion that ending oppression is not a matter of evidence or properly presented proof

No matter how much evidence you have of racism and sexism, no matter how many documents, communications, encounters, no matter how much research you can refer to, or words you can defer to, words that might carry a history as an insult, what you have is deemed as insufficient. The more you have to show the more eyes seem to roll.<sup>47</sup>

Not only is more evidence not what we need, but the efforts of gathering and presenting evidence continue the conversation and engagement. Cycles of oppression continue. And despite our efforts, little changes in the overall distribution of power and control. The proof pitfall is that work that is intended to fight oppression functions to legitimate it and maintain power-dependent relationships.<sup>48</sup>

### III. AN EXIT STRATEGY

Despite the perilous nature of the decision to disengage from a power-dependent relationship, individuals and groups subjected to such relationships must execute an exit strategy. This article does not attempt to provide an entire blueprint for an exit strategy. Power-dependent relationships that have been created and maintained over the course of hundreds or thousands of years will take time, though perhaps not an equal amount of time, to leave. And

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Anthony Paul Farley, *Law as Trauma and Repetition*, 31 N.Y.U. REV. L. & SOC. CHANGE 613, 618 (2007).

the solutions necessarily require collective design. Instead, this article merely suggests a few steps in the plan.

### *Practice*

Practice means that exiting is a process. Mistakes and failures should be anticipated as part of the process. Many early attempts at leaving an abusive relationship fail.<sup>49</sup> But the first few unsuccessful attempts are not conclusive of failure, and failures may inform what is needed for the next attempt.<sup>50</sup> A practice approach encourages patience and tolerance and facilitates imperfect and evolutionary alliances in the escape process.

### *Independence*

Rather than co-dependence, an exit strategy requires intentional rejection of the parameters and identities set by power-dependent relationships. What does liberated identity look like? Not only does independence require demystification of the illusion of co-dependence, but also envisioning non-power-dependent identity, communities, and relationships.<sup>51</sup> What does community not based on responding to issues of oppression or power-dependent identity look like? How do we begin to envision and create new traditions and free our spirituality from power-dependent human contaminations?

### *Exit*

An exit strategy requires an eventual exit from the power-dependent relationship. Leaving the relationship, in this case, does not mean an actual physical departure. Instead, leaving the relationship means becoming disengaged from the conversation and developing new focuses, new conversations, and new relationships. How do we practice initiating these conversations? What do mutually supportive, non-power dependent societies look like?

In the meantime, to make our environments as safe as possible, we will continue to engage in power-dependent conversations

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<sup>49</sup> Terry Lyons, *When Reasonable Efforts Hurt Victims of Abuse: Five Years of the Adoption and Safe Families Act of 1997*, 26 SETON HALL LEGIS. J. 391, 396 (2002).

<sup>50</sup> cunningham, *supra* note 17, at 586 (discussing practicing new identity formation); see generally Warren Binford, *How To Be the World's Best Law Professor*, 64 J. LEGAL EDUC. 542, 543 (2015) (discussing learning from failure); see also Guy Winch, *The 4 Keys to Learning from Failure*, HUFFINGTON POST: THE BLOG (Oct. 10, 2013, 8:46 AM), [http://www.huffingtonpost.com/guy-winch-phd/learning-from-failure\\_b\\_4037147.html](http://www.huffingtonpost.com/guy-winch-phd/learning-from-failure_b_4037147.html) [<https://perma.cc/G35E-CW8P>].

<sup>51</sup> cunningham, *supra* note 17, at 826.

and relationships. We will continue to appeal to oppressive systems and institutions to stop hurting us. Even though “[w]hen [we] say racism, they say: it could have been something else.”<sup>52</sup> We will continue to gather and present evidence of the fact and effects of their oppression.

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<sup>52</sup> Ahmed, *supra* note 1.

## NORMALIZING DOMINATION\*

*Atiba R. Ellis*†

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### I. MAKING THE ABSURD COMMONPLACE

The 2016 election season has revealed the complicity that many Americans have with racist, sexist, homophobic, and xenophobic rhetoric (and, arguably, beliefs).<sup>1</sup> The discriminatory rhetoric of now-President Donald J. Trump and some of his followers—which included claims of Mexico sending the United States felons, Islam as inherently violent, and a knowing disregard of sexually predatory behavior—helped to define his campaign.<sup>2</sup> The broad support of white men and particularly white women in key battleground states (specifically, Michigan, Wisconsin, and Pennsylvania) granted Mr. Trump an Electoral College victory, despite losing the popular vote by nearly three million ballots.<sup>3</sup>

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\* This article is one of six written for CUNY Law Review's inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: "When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure." Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [<https://perma.cc/T39A-28S3>].

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<sup>1</sup> Dana Milbank, Opinion, *Yes, Half of Trump Supporters Are Racist*, WASH. POST (Sept. 12, 2016), [https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a\\_story.html](https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a_story.html) [<https://perma.cc/32VK-AG8Y>].

<sup>2</sup> *Id.*

<sup>3</sup> Eric Sasson, *Blame Trump's Victory on College-Educated Whites, Not the Working Class*, NEW REPUBLIC (Nov. 15, 2016), <https://newrepublic.com/article/138754/blame-trumps-victory-college-educated-whites-not-working-class> [<https://perma.cc/T2EP->

One interpretation of Trump's victory is that his voters agreed with this discriminatory rhetoric.<sup>4</sup> The notion of "Make America Great Again" could imply an America that once again embraces the idea that white supremacy made America great.<sup>5</sup> His avowedly white supremacist voters follow this idea. While it is impossible to know whether Trump voters who are not avowed white supremacists believed this generally, or whether their racist beliefs correlated with their vote at the time they voted, polling data does show that this demographic of voters favors policies that some call racist.<sup>6</sup>

Another inference that could be drawn from Trump's rhetoric and the support it garnered is that these voters considered this racist, sexist, xenophobic, and homophobic rhetoric and decided to ignore it or deem it irrelevant to their decision.<sup>7</sup> Defenders of Trump voters have made it their business to argue that ignoring it is precisely what the voters did.<sup>8</sup> While it's impossible to know whether Trump voters condoned or ignored his rhetoric, what we can say is that the rhetoric was a significant part of the political discourse around Trump, that these voters presumably considered it, and, by their votes in support of Trump, gave him significant political support.

In either case, Trump voters undertook an act of what I will call in this essay "normalizing domination." Normalization for this purpose means making the absurd or incendiary commonplace and acceptable. Specifically, normalization de-stigmatizes the abusive and subordinationist nature of white supremacy and at the same time embraces the benefits of that same hegemony. It makes invisible the ideology of white supremacy by camouflaging it with other normative values while at the same time allowing it to flourish and reinvent itself. It asserts an epistemology of failing to know

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USQ4]; Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN POLITICS (Dec. 22, 2016, 5:34 AM), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/> [https://perma.cc/QCJ7-MRBB].

<sup>4</sup> Milbank, *supra* note 1; Ronald Brownstein, *Trump's Rhetoric of White Nostalgia*, ATLANTIC (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/trumps-rhetoric-of-white-nostalgia/485192/> [https://perma.cc/4PFB-BW7Z].

<sup>5</sup> Charles M. Blow, Opinion, *Trump: Making America White Again*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/opinion/trump-making-america-white-again.html> [https://perma.cc/CPY6-XD42].

<sup>6</sup> Milbank, *supra* note 1.

<sup>7</sup> *See id.*

<sup>8</sup> *See* Janelle Bouie, *There's No Such Thing as a Good Trump Voter*, SLATE (Nov. 15, 2016, 12:00 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/11/there\\_is\\_no\\_such\\_thing\\_as\\_a\\_good\\_trump\\_voter.html](http://www.slate.com/articles/news_and_politics/politics/2016/11/there_is_no_such_thing_as_a_good_trump_voter.html) [https://perma.cc/9DE4-2FKJ].

racism – a key component of what scholars know as post-racialism – as a means of achieving colorblindness. In this sense, it evokes Professor Ahmed’s insight.<sup>9</sup> And yet, as the original jurisprudential assertion of colorblindness in Justice Harlan’s jeremiad against separate but equal in *Plessy v. Ferguson* shows, that assertion is nonetheless built on the belief in the supremacy of whiteness.<sup>10</sup>

Despite this willful not-knowing, racial domination, especially in our political life, is nothing new. The late great Derrick Bell recognized how the underlying structure of American politics is defined by domination that embraces white identity politics as central, and thus, as a component of it, sought to organize the American political and legal structure to protect such domination.<sup>11</sup> This short essay will focus on this problem of the law of politics as a means to the end of racial domination. It will provide a brief overview of the history of how racial domination reinvents itself despite the coming of an insistence on equality, elaborate on Professor Ahmed’s insight<sup>12</sup> about how the shifting of blame from racism leads to paranoia by showing how it is coupled with the willful ignorance of those who benefit, and then speculate briefly about how to break this pattern.

## II. IT ISN’T RAINING

Racial domination under the guise of white supremacy has been the cornerstone fact of America.<sup>13</sup> Our central debates concerning how America ought to know itself have centered around whether and to what extent we have set aside the legacy of slavery.<sup>14</sup> I believe we have not.<sup>15</sup> While it is beyond this essay to offer a

<sup>9</sup> Sarah Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

<sup>10</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”); cf. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 28-30 (1991).

<sup>11</sup> DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW §§6.1- 6.17 (6th ed. 2008).

<sup>12</sup> Ahmed, *supra* note 9.

<sup>13</sup> Lindsay Pérez Huber, “*Make America Great Again!*”: *Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 215-18 (2016).

<sup>14</sup> See generally Darren Lenard Hutchinson, “*Continually Reminded of Their Inferior Position*”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014).

<sup>15</sup> See Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463 (2015) [hereinafter Ellis, *Tiered Personhood*]; Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789

full history of white supremacy in America,<sup>16</sup> any consideration of normalizing domination must start with this core truth.

This history informs how law was shaped in the United States and why the Constitution of the United States took its particular form.<sup>17</sup> The Constitution was designed to reinforce and reinvigorate the structure of slavery, allowing the expressly slaveholding states of the South to continue the political economy that slavery had created.<sup>18</sup> Only after the Civil War and the Reconstruction Amendments did we seek to transform the United States from a political economy based upon slavery to one that aspired to equality.<sup>19</sup> The political domination that came from an African American being considered only three-fifths of a person and seen as property was reversed, for a time, during Reconstruction. Even during this time, this moment of equality proved fleeting.<sup>20</sup> The Court and the cultural and political reassertion of white supremacy made this aspiration towards equality mean something wholly different than what was originally sought.<sup>21</sup>

By 1896, constitutional equality was transformed to “separate but equal.”<sup>22</sup> This transformation evoked the notion of equality, but in actuality it reinvented racial hierarchy as an organizing legal principle.<sup>23</sup> This transformed American life through implementing second-class status for African Americans and, for incarcerated Black men, effectively reinstated slavery.<sup>24</sup> Along with it came outright political domination through exclusion from the vote through poll taxes, grandfather clauses, and felon disenfranchisement.<sup>25</sup>

From this, then, we can think of the third age of the American experiment as one that paid attention to actually implementing the ideas of political equality in what is often referred to as the Civil

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[hereinafter Ellis, *Reviving the Dream*]; Atiba R. Ellis, Polley v. Ratcliff: *A New Way to Address an Original Sin?*, 115 W. VA. L. REV. 777 (2012) [hereinafter Ellis, *Polley v. Ratcliff*].

<sup>16</sup> See generally Ellis, *Reviving the Dream*, *supra* note 15, at 813-20 (offering a relevant overview discussion on this issue).

<sup>17</sup> *Id.* at 814, nn.111-12.

<sup>18</sup> See BELL, *supra* note 11, at §§ 2.4-2.7 (describing the general background of slavery in the United States and the role of slavery at the Constitutional Convention).

<sup>19</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 819-20.

<sup>20</sup> *Id.* at 825.

<sup>21</sup> *Id.* at 826 (discussing the Court’s treatment of the Equal Protection Clause regarding private conduct).

<sup>22</sup> *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

<sup>23</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 826-28.

<sup>24</sup> See generally Ellis, *Tiered Personhood*, *supra* note 15.

<sup>25</sup> *Id.*

Rights period.<sup>26</sup> Certainly, with passage of the Civil Rights Act of 1964,<sup>27</sup> the Voting Rights Act of 1965,<sup>28</sup> the Federal Fair Housing Act of 1968,<sup>29</sup> and other legal mechanisms designed to ultimately implement the original intention of Reconstruction, the Civil Rights period came the closest it had ever been to full effect.<sup>30</sup>

In this era, the Warren Court sought to realize Reconstruction's promise of equality through transforming politics and social relations.<sup>31</sup> *Reynolds v. Sims*<sup>32</sup> and *Harper v. Virginia State Board of Elections*<sup>33</sup> certainly brought to bear the idea that underlies the notion of equality in the American constitutional context. But even the civil rights-era transformations were again recalibrated in order to reassert political and racial hierarchies.<sup>34</sup> Where the Voting Rights Act of 1965 transformed black racial politics in the South over the course of the 20th century, legal change limited those transformations.<sup>35</sup>

Specifically, the Court limited the scope of the constitutional and statutory theories against racial political domination. In *Washington v. Davis*,<sup>36</sup> the Court held that intentional discrimination was the only discrimination on the basis of race that was actionable under the Fourteenth Amendment. Governmental action that had an unintentional disparate impact on the basis of race could not be the basis of a constitutional claim.<sup>37</sup> The Court then adopted this principle within Fifteenth Amendment jurisprudence in *City of Mobile v. Bolden*.<sup>38</sup> This rationale has been further extended to Voting Rights Act litigation regarding felon disenfranchisement and other forms of expressed voter suppression that provide evidence of intentional discrimination.<sup>39</sup> Thus, the lens through which the Court looks at constitutional claims of voter suppression was limited to

<sup>26</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 831-35.

<sup>27</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>28</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

<sup>29</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

<sup>30</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 831-35.

<sup>31</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); see also Ellis, *Reviving the Dream*, *supra* note 15, at 800.

<sup>32</sup> 377 U.S. 533, 562-63 (1964).

<sup>33</sup> 383 U.S. 663, 666-68 (1966).

<sup>34</sup> Ellis, *Tiered Personhood*, *supra* note 15, at 482-85.

<sup>35</sup> *Id.*

<sup>36</sup> 426 U.S. 229, 239 (1976).

<sup>37</sup> *Id.* at 246-48.

<sup>38</sup> 446 U.S. 55, 66 (1980).

<sup>39</sup> See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc); *Simmons v. Galvin*, 575 F.3d 24, 41 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 322-23 (2d Cir. 2006) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1233-34 (11th Cir. 2005) (en banc). Cf. Ellis, *Tiered Personhood*, *supra* note 15, at 475 ("Thus,

instances where legislatures expressly stated their intention to achieve racial domination.<sup>40</sup> This we saw in *Hunter v. Underwood*, which concerned the Alabama felon disenfranchisement statute expressly intended to suppress African-American voters.<sup>41</sup>

The lack of express racial animus becomes the ground on which the court's attempts to erase considerations of race fail.<sup>42</sup> The failure of legislatures to be explicit in their discrimination thus results in the upholding of such laws despite their ongoing tremendous racial impact.<sup>43</sup> We see from this brief sketch of history that the racial domination that underlies the American experiment is in large part a reaction to and a grappling with the idea of equality.

Certainly another important example of this recalibration of equality through the constriction of legal means to prevent racialized political domination is through the recent interpretations of the Voting Rights Act of 1965.<sup>44</sup> Of particular note is the Supreme Court's delimitation of Section 5 of the Voting Rights Act vis-à-vis Section 4(b) of the Act in order to make Section 5 ineffective for purposes of controlling the voting laws of jurisdictions with a clear history of racial domination.<sup>45</sup> This provision of the Act prevented racialized majoritarian domination by forcing covered jurisdictions to receive federal approval of their laws.<sup>46</sup> The goal of this was to prevent retrogressive effects of such laws in the sense that voting laws could be used as tools to aid and abet political majorities from dominating racial minorities through the implementation of laws geared to suppress voting.<sup>47</sup>

Even though Congress approved of continuing this check against racial domination, the Court in *Shelby County v. Holder* ren-

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where distinctions on the basis of race, gender, national origin, or age may serve to violate the Equal Protection Clause, distinctions based upon felon status do not.”).

<sup>40</sup> See N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016).

<sup>41</sup> *Id.*; see also *Hunter v. Underwood*, 471 U.S. 222, 224 (1985).

<sup>42</sup> *McCrory*, 831 F.3d at 233. See also *id.* at 215 (“Although the Fourteenth and Fifteenth Amendments to the United States Constitution prohibit racial discrimination in the regulation of elections, state legislatures have too often found facially race-neutral ways to deny African Americans access to the franchise.”).

<sup>43</sup> See generally Atiba R. Ellis, *When Political Domination Becomes Racial Discrimination: NAACP v. McCrory and the Inextricable Problem of Race in Politics*, 68 S.C. L. REV. (forthcoming 2017).

<sup>44</sup> See generally *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1283 (2015); *Veasey v. Perry*, 135 S. Ct. 9, 12 (2014) (Mem.); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (Mem.); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>45</sup> *Shelby Cty.*, 133 S. Ct. at 2645-46 (Ginsburg, J., dissenting).

<sup>46</sup> See generally *id.*

<sup>47</sup> *Id.*

dered Section 5 ineffective by invalidating the formula in Section 4(b) that determines which states are required to undergo Section 5 preclearance.<sup>48</sup> Chief Justice Roberts argued that this reinvention was necessary in light of the burdens disproportionately imposed on the states formally covered under Section 5.<sup>49</sup> He crafted a narrative that was based on the idea that “things have changed in the South” regarding minority voting rates and the number of minority officeholders.<sup>50</sup> Justice Ruth Bader Ginsburg in dissent rejected this premise as derisive of congressional authority and disconnected from the realities of racially discriminatory voter suppression.<sup>51</sup>

Justice Ginsburg used a famous simile in making her argument—that abandoning the protections of preclearance in the face of the evidence of vote suppression amassed by Congress was like deciding that one no longer needed an umbrella during a pouring rainstorm because the umbrella itself kept its holder dry.<sup>52</sup> This irony, of course points to Professor Ahmed’s insight.<sup>53</sup> In *Shelby County*, we see a reinventing of the narrative of political domination through pointing to something else—that the racism you think is there is actually racial improvement.<sup>54</sup> It is as if the majority’s opinion in *Shelby County* seeks to convince us that despite being in a hurricane, it isn’t raining.

### III. THE ERASING OF RACE AS A MORAL COMPASS

The narrative of domination shapes our consciousness as Americans.<sup>55</sup> It is a compass by which we understand ourselves.<sup>56</sup> It affects the lens we use to understand the history I’ve just discussed. As I have discussed elsewhere regarding *Polley v. Ratcliff*,<sup>57</sup> there is a range of political investment when it comes to thinking about our

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<sup>48</sup> *Id.* at 2626-27 (majority opinion).

<sup>49</sup> *See id.* at 2623-27.

<sup>50</sup> *Id.* at 2621 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (alteration omitted)). *See also id.* at 2642 (Ginsburg, J., dissenting) (“True, conditions in the South have impressively improved since passage of the Voting Rights Act.”).

<sup>51</sup> *Shelby Cty.*, 133 S. Ct. at 2642.

<sup>52</sup> *Id.* at 2635-36.

<sup>53</sup> Ahmed, *supra* note 9.

<sup>54</sup> *See Shelby Cty.*, 133 S. Ct. at 2635-36.

<sup>55</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 814-15; *see also* G. William Domhoff, *The Class-Domination Theory of Power, WHO RULES AMERICA?* (Feb. 2012), [http://www2.ucsc.edu/whorulesamerica/power/class\\_domination.html](http://www2.ucsc.edu/whorulesamerica/power/class_domination.html) [<https://perma.cc/8GS7-5NP9>].

<sup>56</sup> Ellis, *Reviving the Dream*, *supra* note 15.

<sup>57</sup> Ellis, *Polley v. Ratcliff*, *supra* note 15.

history and our current understandings regarding race. In that essay, I describe race consciousness<sup>58</sup> and post-racialism.<sup>59</sup>

Race consciousness relies on the idea that one is actively and willingly aware of how racism is an organizing force in society.<sup>60</sup> Yet one may approach such race consciousness as oriented towards a reassertion of white supremacy (or the supremacy of some other racial group) or such race consciousness can be the grounds for rejecting racial hierarchies for purposes of achieving equality.<sup>61</sup> One may have a subordinationist race consciousness<sup>62</sup> or an egalitarian race consciousness.<sup>63</sup>

Then, there is the notion of post-racialism.<sup>64</sup> This idea espouses the view that America is no longer organized on the basis of race and that having conversations about race is unproductive and demeaning.<sup>65</sup> The notions of erasure of race are often about how racism is a fact and how that fact is veiled behind the particular ideology of race consciousness or anti-race consciousness that one holds.<sup>66</sup>

With this lens in mind, we can look back at *Shelby County*<sup>67</sup> and contemplate the ideological effect of redirecting our attention regarding this transformation in antidiscrimination law. The rationale of *Shelby County* relied upon the notion that the South not only has changed but has changed enough that the federal government's intrusion in voting administration matters became unnecessary.<sup>68</sup>

Here, two particular moves are worth noting. First, the federal government's intervention is deemed a negative intrusion. The federal government's implementation of the Fifteenth Amend-

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<sup>58</sup> See generally *id.*

<sup>59</sup> See generally *id.*

<sup>60</sup> *Id.* at 796.

<sup>61</sup> *Id.* at 795.

<sup>62</sup> Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1273-74 (2011).

<sup>63</sup> *Id.* at 1314.

<sup>64</sup> Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Deborah N. Archer, *Is Post-Racialism an Implicit Bias?*, HUFFINGTON POST (May 15, 2015, 9:44 PM), [http://www.huffingtonpost.com/deborah-n-archer/is-postracialism-an-implicit-bias\\_b\\_6874788.html](http://www.huffingtonpost.com/deborah-n-archer/is-postracialism-an-implicit-bias_b_6874788.html) [<https://perma.cc/3WXL-DTMN>].

<sup>65</sup> See Rinku Sen, *Millennials Don't Know How to Talk About Race, and That's a Problem*, PBS NEWSHOUR (Mar. 25, 2015, 2:08 PM), <http://www.pbs.org/newshour/updates/redefining-racism-systemic-unconscious-hidden/> [<https://perma.cc/4FBT-8D9S>].

<sup>66</sup> Parul Sehgal, *Fighting 'Erasure'*, N.Y. TIMES MAG. (Feb. 2, 2016), <https://www.nytimes.com/2016/02/07/magazine/the-painful-consequences-of-erasure.html> [<https://perma.cc/933U-SERU>].

<sup>67</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>68</sup> See *id.* at 2621.

ment, rather than being seen as fortifying the Constitutional right to vote, is framed as an intrusion that offends fundamental notions of federalism.<sup>69</sup> This shifts blame to the structure.

Second, the Court asserts with scant proof that the racial politics of the South have changed.<sup>70</sup> That narrative focuses on the narrowest measures for that claim: the rate that blacks held political office and the increase in rates in voter participation.<sup>71</sup> It ignores broader discussions about both explicit (felon disenfranchisement)<sup>72</sup> and implicit (heightened voter regulation) voter suppression.<sup>73</sup> This narrative implicitly asserts triumphalism. And this effectively offers us a different explanation—the element of perceived triumph over racism somehow trumps the larger lived experience of black people in the South. Accordingly, it is no longer necessary to be concerned with race.<sup>74</sup> This triumphalism, coupled with damaged federalism, represents the key elements of post-racialism. In other words, in explaining the “something else,” the Court’s opinion turned the racism-as-cause theory inside out.<sup>75</sup>

In the wake of *Shelby County*, legislatures have returned to the old ways of asserting racial majoritarian domination.<sup>76</sup> The states overburdened by preclearance sought to implement rules that targeted minority voting strength.<sup>77</sup> We saw this in North Carolina where the Fourth Circuit found the legislature to have targeted African Americans’ voting rights with “almost surgical precision.”<sup>78</sup> Similarly, in Texas, the Fifth Circuit found that Texas’s voter iden-

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<sup>69</sup> See *id.* at 2622-24.

<sup>70</sup> *Id.* at 2621; *id.* at 2642 (Ginsburg, J., dissenting).

<sup>71</sup> *Id.* at 2628 (majority opinion).

<sup>72</sup> Brent Staples, Opinion, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html> [<https://perma.cc/9RB9-RGUW>].

<sup>73</sup> Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549, 549 (2014).

<sup>74</sup> *Shelby Cty.*, 133 S. Ct. at 2625-27.

<sup>75</sup> *Id.* at 2618-31.

<sup>76</sup> Ryan Eric Emenaker, Voting Rights after *Shelby County*: Starting to Evaluate a Continuing Dialogue, (Apr. 2014) (paper presented at the Western Political Science Association Annual Conference, Apr. 17-19, 2014), <https://wpsa.research.pdx.edu/papers/docs/Emenaker-Voting%20Rights%20After%20Shelby%20County-WPSA%202014.pdf> [<https://perma.cc/R2PF-6AK7>].

<sup>77</sup> Christopher Ingraham, *The ‘Smoking Gun’ Proving North Carolina Republicans Tried to Disenfranchise Black Voters*, WASH. POST: WONKBLOG (July 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/29/the-smoking-gun-proving-north-carolina-republicans-tried-to-disenfranchise-black-voters/> [<https://perma.cc/WNH2-AAYN>].

<sup>78</sup> *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *N.C. State Conf. of NAACP v. McCrory*, 831 F. 3d 204, 214 (4th Cir. 2016) (“Although the new provisions target African Americans with almost surgical precision, they constitute inapt

tification law had a disparate impact against African Americans and Latinos, but only a plurality of the court *en banc* found that this discrimination was intentional.<sup>79</sup> Indeed, the *Veasey v. Abbott* opinion is rife with hesitance to blame discrimination on the basis of race.<sup>80</sup>

I would argue that this consternation is revealing of the core question in this dialogue: is it race? The restrictive voter identification laws introduced post-*Shelby County* reveal the lengths to which legislatures may seek to accomplish the goal of political power through racial domination, but courts may sometimes refuse to believe what is before them by substituting other explanations for racial discrimination.<sup>81</sup> The court may question whether legislation is actually racially discriminatory despite the evidence of racial effect and strong inferences of racist motive.<sup>82</sup> There is an ongoing debate regarding whether the actions that the North Carolina and Texas legislatures took, among others, were simply political in nature.<sup>83</sup>

This argument is believable only if we countenance the notion that political motives can somehow eradicate the moral concern that comes with addressing questions of race in the political context.<sup>84</sup> Even though the inquiries as to the effects might differ, the ultimate concern here is one of placing the professed motive of the

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remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist.”).

<sup>79</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

<sup>80</sup> *Id.* at 281 (Jones, J., dissenting) (by allowing the discriminatory intent claim to go forward, “the majority fans the flames of perniciously irresponsible racial name-calling”); *id.* at 325 (Clement, J., dissenting) (“The plurality also overlooks the total absence of direct evidence of a discriminatory purpose and the effect of plaintiffs’ failure to unearth such evidence—despite repeated assertions that such evidence exists.”). However, upon reconsideration of the case, the district court reaffirmed its finding that the Texas legislature engaged in intentional discrimination in passing the voter identification law. *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 1315593 (S.D. Tex. Apr. 10, 2017).

<sup>81</sup> Nina Totenberg, *Supreme Court Considers Race, Politics and Redistricting in 2 Cases*, NPR (Dec. 5, 2016, 4:37 PM), <http://www.npr.org/2016/12/05/504467218/supreme-court-considers-racial-gerrymandering-in-separate-cases> [https://perma.cc/8SBN-BZEH].

<sup>82</sup> *Id.*

<sup>83</sup> Editorial, *Ballot Integrity Is Not Racist*, NAT’L REV. (Nov. 7, 2016, 8:30 PM), <http://www.nationalreview.com/article/441906/north-carolina-voting-rules-not-racist> [https://perma.cc/B7MN-BY66].

<sup>84</sup> William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, WASH. POST (Sept. 2, 2016), [https://www.washingtonpost.com/politics/courts-law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc\\_story.html](https://www.washingtonpost.com/politics/courts-law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html) [https://perma.cc/D4H3-F5WT].

legislatures above the motive implied from the facts and circumstances accompanying this sort of political change.<sup>85</sup> This in and of itself illustrates arguably another form of erasure of a race consciousness-framed concern.

Arguably, if the Supreme Court chooses to strike down these recent voting rights judicial decisions, it would represent a diminution or maybe a complete denial of the salience of race consciousness within the political and legal landscapes.<sup>86</sup> Yet, it allows the ideology of white supremacy to continue without a name. In the concluding part of this essay, I will speculate briefly as to what we are to think of and how we are to deal with this.

#### IV. A NEW RACE CONSCIOUSNESS

This essay has sought to this point to demonstrate that the erasure of race consciousness-based litigation approaches is an old pattern in American politics. White supremacy continues to transform and reinvent itself so it can continue to exist in connection to political domination.<sup>87</sup> Explaining away its racial effects makes those effects, and their (quite possibly and plausibly) racial intent, invisible.

What is at stake in this is the idea that race can be used as a compass to understand the structure of political domination and thus subvert such domination to create an egalitarian society.<sup>88</sup> To me, the only way to be able to maintain this notion of race consciousness is to make a concerted moral choice that this ought to continue to be an important component of the way our democracy runs. Reconstruction ultimately stands for the notion that race neutrality that seeks to remedy the open racial subordination of slavery is an important democratic value to be implemented within our Republican form of government, as it is a path to freedom for all citizens.<sup>89</sup> But the history that has followed from then to now has been, in the words of this essay, an effort at race erasure that masks racial domination.

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<sup>85</sup> Danielle Lang & J. Gerald Hebert, *Courts Are Finally Pointing Out the Racism Behind Voter ID Laws*, WASH. POST (Aug. 3, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/08/03/courts-are-finally-pointing-out-the-racism-behind-voter-id-laws/> [https://perma.cc/5V7Z-YX57].

<sup>86</sup> Ariane de Vogue & Dan Berman, *Supreme Court Won't Reinstate North Carolina Voter ID Law*, CNN (Aug. 31, 2016, 6:11 PM), <http://www.cnn.com/2016/08/31/politics/supreme-court-north-carolina-voter-id/> [https://perma.cc/C3SV-SS2A].

<sup>87</sup> See Ellis, *Reviving the Dream*, *supra* note 15, at 836-43.

<sup>88</sup> *Id.* at 798-99.

<sup>89</sup> *Id.* at 825-26.

The question becomes, what ideological brand of race neutrality ought the American political system adopt: a race neutrality that seeks racial equity through the erasure of race consciousness or a race neutrality that consciously considers the risk of racial subordination and therefore acts to subvert that kind of racial subordination? To choose a race neutrality through erasure—to buy into the post-racialism premise—is to ignore the pervasive nature of racism.<sup>90</sup> White supremacy is endemic and continues to reinvent itself.<sup>91</sup> Mere legal change in a new era is insufficient to subvert the re-inventive nature of racism, and therefore race will continue to permeate the ongoing drive of partisans to gain political domination. This will be true even if, in the name of avoiding racial domination, the legal tools designed to subvert racial domination are further limited or declared wholly unconstitutional. Indeed, as the history recited above shows, the choice of ending the doctrinal and jurisprudential foundations of race-conscious antidiscrimination law would result in an irony of constitutional magnitude that would decimate the vision of Reconstruction.

Instead, there ought to be a reinvigoration of what race consciousness means, even if that meaning forces us to stand contrary to the majoritarian view that we live in a post-racial society.<sup>92</sup> This requires the reconsideration of history and the realization that this move to erase, to consciously not know racism, is a continuing force in society. And instead of avoiding conversations about race, even if for apparently benign or beneficial reasons, this requires us to reach an open and explicit consensus about what kind of race-conscious concerns ought to be raised in a society that continues to become more diverse rather than less. This requires, in particular, a reconsideration of the competing values of race consciousness and federalism.

Race consciousness, as subordinationist and as affirmative force, will play a formative role in American society through the twenty-first century. Race consciousness can be constructive or destructive, and it is our choice as to whether to be complicit with an erasure of race consciousness that facilitates a new racial domination, or by our consciousness to work to articulate a racial awareness that bolsters our democratic values.

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<sup>90</sup> John Blake, *The New Threat: 'Racism Without Racists'*, CNN (Nov. 27, 2014, 9:32 AM), <http://www.cnn.com/2014/11/26/us/ferguson-racism-or-racial-bias/> [<https://perma.cc/XT4Y-HRGU>].

<sup>91</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 815.

<sup>92</sup> *Id.* at 838.

## ON RACE AND PERSUASION\*

Janine Young Kim†

No one can seriously dispute that the elections of the forty-fourth and forty-fifth Presidents of the United States marked dramatic sea changes in the nation's self-image.<sup>1</sup> The 2008 election enabled us to declare ourselves post-racial.<sup>2</sup> Today, we appear to have moved away from a post-racial America to a post-factual (or post-truth) one.<sup>3</sup> Of course, those who cast doubt on the existence of a post-racial America back in 2008<sup>4</sup> might point out that we were post-factual all along. Did we believe the United States was what we longed for it to be rather than what it actually was? Did our emotions—whether they be guilt, anger, hope, or some strange combination of these—cloud our view of who we really are?

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\* This article is one of six written for CUNY Law Review's inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: "When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure." Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [<https://perma.cc/T39A-28S3>].

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<sup>1</sup> Of course, this is probably not the only significant change. In particular, dramatic policy reversals are anticipated under President Donald Trump. As of this writing, many of those promised reversals—e.g., the repeal of the Affordable Care Act—have not yet been realized. However, President Trump has already altered the federal government's stance on a number of issues, including environmental protection and especially immigration enforcement.

<sup>2</sup> See Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 45 (2016).

<sup>3</sup> This is a common observation. See, e.g., Buck Banks, *I Have My Facts, You Have Yours*, PENSITOREV. (Nov. 17, 2016), <http://www.pensitoreview.com/2016/11/17/i-have-my-facts-you-have-yours> [<https://perma.cc/9WPT-4S4B>]; Mat Johnson, *Looking Back with Gratitude on Obama, and His Optimistic Vision of America*, NPR (Jan. 18, 2017), <http://www.npr.org/2017/01/18/510269800/looking-back-with-gratitude-on-obama-and-his-optimistic-vision-of-america> [<https://perma.cc/9TAY-QJY6>]; Amy B Wang, *'Post-truth' Named 2016 Word of the Year by Oxford Dictionaries*, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm\\_term=.b31e07ff1714](https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm_term=.b31e07ff1714) [<https://perma.cc/BZ9D-ZAL3>].

<sup>4</sup> See, e.g., Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 504-05 (2009).

Sara Ahmed talks about doubt;<sup>5</sup> indeed, we seem to be living in a climate of doubt. Unreliable polls,<sup>6</sup> fake news,<sup>7</sup> photoshopped images,<sup>8</sup> and tweets about hoaxes perpetrated by China<sup>9</sup> (or scientists,<sup>10</sup> or the media<sup>11</sup>) add to the growing, solipsistic dread that truth is increasingly elusive.<sup>12</sup> Perhaps more accurately, what has become elusive is the belief that *any larger truths* are possible; we are left with finding our own small truths—those derived from our immediate experiences, emotions, and choices. It is no wonder that political pundits and journalists now lament the end of an era when facts used to matter.<sup>13</sup>

<sup>5</sup> Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016), <https://feministkilljoys.com/2016/07/12/evidence> [<https://perma.cc/6QRD-CZ2M>].

<sup>6</sup> See, e.g., Ozan Kuru, *What the Failure of Election Predictions Could Mean for Media Trust and Data Journalism*, MEDIASHIFT (Nov. 29, 2016), <http://mediashift.org/2016/11/136541/> [<https://perma.cc/8MHN-ANTQ>] (linking debates about polling with post-factual politics).

<sup>7</sup> See, e.g., Steve Inskip, *A Finder's Guide to Facts*, NPR (Dec. 11, 2016, 8:25 AM), <http://www.npr.org/2016/12/11/505154631/a-finders-guide-to-facts> [<https://perma.cc/FGK5-LWEA>] (providing suggestions for how to tell the difference between fake and real news).

<sup>8</sup> See, e.g., Saskia de Melker, *What Happens When Photoshop Goes Too Far?*, PBS NEWSHOUR (July 26, 2015, 2:47 PM), <http://www.pbs.org/newshour/bb/now-see-exhibit-chronicles-manipulated-news-photos/> [<https://perma.cc/4WXL-8WLD>] (discussing the history of photo manipulation in journalism).

<sup>9</sup> See Louis Jacobson, *Yes, Donald Trump Did Call Climate Change a Chinese Hoax*, POLITIFACT (June 3, 2016, 12:00 PM), <http://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/> [<https://perma.cc/Z7YW-CB4H>].

<sup>10</sup> See, e.g., Paul B. Farrell, *Climate Science is a Hoax: Big Oil, GOP, God Say So*, MARKETWATCH (May 27, 2014, 9:45 AM), <http://www.marketwatch.com/story/climate-science-is-a-hoax-big-oil-gop-god-say-so-2014-05-22> [<https://perma.cc/PAN5-VB23>] (observing that the debate over climate change is cultural rather than scientific).

<sup>11</sup> See, e.g., Ravi Somaiya & Leslie Kaufman, *If a Story is Viral, Truth May Be Taking a Beating*, N.Y. TIMES (Dec. 9, 2013), <http://www.nytimes.com/2013/12/10/business/media/if-a-story-is-viral-truth-may-be-taking-a-beating.html> [<https://perma.cc/8W4J-M8R5>] (discussing the problematic nature of digital news).

<sup>12</sup> Ironically, this problem has emerged at a time when we have access to more facts about the world than ever. See, e.g., STANFORD HISTORY EDUC. GRP., *EVALUATING INFORMATION: THE CORNERSTONE OF CIVIC ONLINE REASONING 5* (2011), <https://sheg.stanford.edu/upload/V3LessonPlans/Executive%20Summary%2011.21.16.pdf> [<https://perma.cc/56JV-QHQQ>] (“Never have we had so much information at our fingertips. Whether this bounty will make us smarter and better informed or more ignorant and narrow-minded will depend on our awareness of this problem and our educational response to it. At present, we worry that democracy is threatened by the ease at which disinformation about civic issues is allowed to spread and flourish.”).

<sup>13</sup> See, e.g., William Davies, *Opinion, The Age of Post-Truth Politics*, N.Y. TIMES (Aug. 24, 2016) <https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html> [<https://perma.cc/7BJF-BAFD>] (warning that the focus on data over facts makes it harder to achieve consensus and breeds conspiracy theories); Daniel W. Drezner, *Why the Post-Truth Political Era Might Be Around for a While*, WASH.

But for racial minorities in the United States, this is nothing new. Our experiences, emotions, and choices were never a significant part of the truth (writ large) of America. While blacks were enslaved and dehumanized, raped and killed with impunity, weren't they nonetheless described as living contented, pastoral lives on the plantation?<sup>14</sup> As American Indians were being exterminated—literally and culturally—didn't the history books say (with not a trace of irony) that they were being “saved”?<sup>15</sup> Haven't hard-working immigrants from Central America long been portrayed as a drain on our economy and a threat to our identity?<sup>16</sup> And Asian Americans treated with suspicion as foreigners and spies?<sup>17</sup> The social condition of racial minorities in the United States has always been only a small truth, our own truth. To us, America was always somewhat post-factual.

It is perhaps a wholesome thing, after all, that this realization about America is now more broadly shared and acknowledged. To agree that the truth is complex, multi-faceted, and imbued with the personal is one way of moving away from the monolithic narratives that so readily discount the reality of our experiences. From this perspective, the apparent fracture of American consensus about

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POST (June 16, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/06/16/why-the-post-truth-political-era-might-be-around-for-a-while/?utm\\_term=.a4397c78cc53](https://www.washingtonpost.com/posteverything/wp/2016/06/16/why-the-post-truth-political-era-might-be-around-for-a-while/?utm_term=.a4397c78cc53) [<https://perma.cc/F76D-37XX>]; Christina Pazzanese, *Politics in a 'Post-Truth' Age*, HARV. GAZETTE (July 14, 2016), <http://news.harvard.edu/gazette/story/2016/07/politics-in-a-post-truth-age/> [<https://perma.cc/8EHE-7FXF>].

<sup>14</sup> See, e.g., FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 12 (Boston, Anti-Slavery Office, 1845) (expressing shock that Northerners believe slaves sing because they are happy). Historian Kenneth Stampp describes the brutal reality of slavery: “A wise master did not take seriously the belief that Negroes were natural-born slaves. He knew better. He knew that Negroes freshly imported from Africa had to be *broken* into bondage; that each succeeding generation had to be carefully trained.” KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELUM SOUTH 144 (1956) (emphasis added).

<sup>15</sup> See Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 36-37 (2014) (describing how mainstream history sanitized the federal government's genocidal policies against American Indians).

<sup>16</sup> See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICAN IDENTITY 180, 221-51 (2004) (sounding an alarm against immigration from Latin America and Asia that threatens Anglo-American culture); Rhacel Salazar Parrenas, *Worthy Workers, Unworthy Humans: Immigrant Women and United States Immigration Policies*, 16 BERKELEY WOMEN'S L.J. 201, 201 (2001) (reviewing GRACE CHENG, DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY 7 (2000)) (noting that the predominant image of immigrant women workers is as “[w]elfare cheats’ and ‘brood mares’”).

<sup>17</sup> See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 20-22 (2002).

who we are and where we ought to go from here may be nothing more than (1) an illusion born from a false premise about identity and unity, or (2) if real, the logical outcome of the growing strength of counter-narratives that clash against dominant views.

Of course, this shift presents its own challenges. There are two that I would like to briefly explore in this essay. The first is that in a post-factual setting, persuasion becomes that much more difficult—evidence will not sway the individual who wishes to believe the opposite.<sup>18</sup> The second, related, concern is that emotion trumps (so to speak) reason—instead of hard evidence, the primary tool of persuasion becomes the emotional appeal.<sup>19</sup> These are, indeed, especially serious issues for those of us in the law.

As to the first, however, I suspect that the problem is somewhat overblown. For example, the election of Donald Trump has escalated worries about the post-factual turn in politics.<sup>20</sup> Trump made many false claims during his campaign, and his victory has signaled to commentators that people will accept anything that confirms their preexisting beliefs.<sup>21</sup> While I have no doubt that there were some who believed much of what Trump said, what was striking to me throughout the campaign was the fact that Trump supporters also indicated that they would vote for him even

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<sup>18</sup> In this sense, what Ahmed describes as “hitting a wall” is doubled. *See* Ahmed, *supra* note 5 (“Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness.”). People of color hit that wall when experiencing the racism in the first place, and hit it again when their story is disbelieved. Just as both are instances of racism, both may be understood also as a kind of post-factual problem in persuasion. The first reflects the inability to convince someone that racial hostility, suspicion, etc. is unwarranted because people of color are not in fact, by dint of race, inferior or threatening. The second is the inability to demonstrate, to another person’s satisfaction, that these confrontations with racists actually occur.

<sup>19</sup> *See, e.g.*, Rhaina Cohen et al., *When It Comes to Politics and Fake News, Facts Aren’t Enough*, NPR: HIDDENBRAIN (Mar. 13, 2017, 9:00 PM), <http://www.npr.org/2017/03/13/519661419/when-it-comes-to-politics-and-fake-news-facts-arent-enough> [<https://perma.cc/Z6C8-DS7W>] (“[H]aving the data on your side is not always enough. For better or for worse, . . . emotions may be the key to changing minds.”); Wang, *supra* note 3 (reporting that the Oxford definition of post-truth is “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”); Jess Zimmerman, *It’s Time to Give Up on Facts*, SLATE (Feb. 8, 2017, 5:56 AM), [http://www.slate.com/articles/health\\_and\\_science/science/2017/02/counter\\_lies\\_with\\_emotions\\_not\\_facts.html](http://www.slate.com/articles/health_and_science/science/2017/02/counter_lies_with_emotions_not_facts.html) [<https://perma.cc/JR3P-DCU7>] (“Engaging on the plane of belief, where lies live, means taking a break from trying to prove what’s factually accurate and talking instead about what feels meaningful in the heart.”).

<sup>20</sup> *See* Banks, *supra* note 3.

<sup>21</sup> *See* Davies, *supra* note 13.

though, and even because, they *didn't* believe all of the things he said.<sup>22</sup> These voters suggested that one should not confuse Trump's blustery campaign rhetoric and style with the actual policies that he would pursue once in office.<sup>23</sup> To them, apparent policy positions such as building a wall on the border and ordering mass deportations were only shared fantasies—a way of connecting between candidate and voter—but not a realistic option in immigration reform.<sup>24</sup> A strange way of thinking about one's candidate, to be sure; but it also complicates the assumption that Trump's victory means that his lies were actually believed or that his voters don't care about facts.<sup>25</sup>

The related assumption about this last election is that angry white voters turned out to vote for Trump and that the results were the illegitimate product of emotion (e.g., racial resentment, economic fear) rather than reason.<sup>26</sup> Of course, politics has always been emotional.<sup>27</sup> What appears to be new is the notion that in

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<sup>22</sup> See, e.g., Jenna Johnson, *Many Trump Supporters Don't Believe His Wildest Promises—and They Don't Care*, WASH. POST (June 7, 2016), [https://www.washingtonpost.com/politics/many-trump-supporters-dont-believe-his-wildest-promises—and-they-dont-care/2016/06/06/05005210-28c4-11e6-b989-4e5479715b54\\_story.html](https://www.washingtonpost.com/politics/many-trump-supporters-dont-believe-his-wildest-promises—and-they-dont-care/2016/06/06/05005210-28c4-11e6-b989-4e5479715b54_story.html) [https://perma.cc/J2VD-7RC8]; *The Trump Voters You Don't Know*, CHRISTIAN SCI. MONITOR (Nov. 17, 2016), <http://www.csmonitor.com/USA/Politics/2016/1117/The-Trump-voters-you-don-t-know> [https://perma.cc/TD9N-MQAW] (describing minority Trump voters who disbelieved Trump's racist rhetoric).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Sam Kriss, *The Biggest Political Lie of 2016*, SLATE (Aug. 31, 2016, 2:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/08/the\\_biggest\\_political\\_lie\\_of\\_2016.html](http://www.slate.com/articles/news_and_politics/politics/2016/08/the_biggest_political_lie_of_2016.html) [https://perma.cc/R45M-PKP9] (rejecting the notion that post-truth politics is new and arguing that fantasy has always been an essential aspect of politics).

<sup>26</sup> See, e.g., Philip Bump, *How Donald Trump Dominated Nevada, in One Word: Anger*, WASH. POST (Feb. 24, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/02/23/early-data-suggest-an-angry-nevada-electorate-that-should-favor-donald-trump/?utm\\_term=.d0ab9880f154](https://www.washingtonpost.com/news/the-fix/wp/2016/02/23/early-data-suggest-an-angry-nevada-electorate-that-should-favor-donald-trump/?utm_term=.d0ab9880f154) [https://perma.cc/4A8H-4CE9]; Jessica Chasmar, *Bill Clinton: Donald Trump Knows 'How to Get Angry, White Men to Vote for Him'*, WASH. TIMES (Dec. 19, 2016), <http://www.washingtontimes.com/news/2016/dec/19/bill-clinton-donald-trump-knows-how-to-get-angry-w/> [https://perma.cc/R98G-ST92]; Jeff Guo, *A New Theory for Why Trump Voters Are So Angry — That Actually Makes Sense*, WASH. POST: WONKBLOG (Nov. 8, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/11/08/a-new-theory-for-why-trump-voters-are-so-angry-that-actually-makes-sense/?utm\\_term=.ce89ceaa4a50](https://www.washingtonpost.com/news/wonk/wp/2016/11/08/a-new-theory-for-why-trump-voters-are-so-angry-that-actually-makes-sense/?utm_term=.ce89ceaa4a50) [https://perma.cc/P5NC-X3S6]; Steven Rosenfeld, *Trump Elected President by Wave of Angry White Voters Across Upper Midwest and South*, ALTERNET (Nov. 9, 2016), <http://www.alternet.org/election-2016/trump-elected-president-wave-angry-white-voters-across-upper-midwest-and-south> [https://perma.cc/DQ3J-MXJH].

<sup>27</sup> Many political scientists have begun studying emotions in politics, noting its importance in all kinds of political behavior. See Simon Clarke et al., *The Study of Emotion: An Introduction*, in EMOTION, POLITICS AND SOCIETY 1, 9 (Simon Clarke et al. eds.,

2016, unlike in other years, emotion crowded out reason to such an extent that the expected outcome did not occur.<sup>28</sup> But attributing the unforeseeable political rise of Donald Trump to an angry horde of desperate and uneducated white voters<sup>29</sup> is, I think, both too easy and too dangerous. It is too easy because that view taps into the facile assumption that emotion and reason are opposed to one another. Theorists across many different disciplines have demonstrated that the relationship between emotion and reason is much more complex and that emotions are more often than not undergirded by reason.<sup>30</sup> While it is true that not all reasons behind emotions are good, this speaks to the illegitimacy of certain emotions rather than the irrationality of all emotions.<sup>31</sup> In other words, there is nothing per se wrong with emotional voting.

This simplistic dichotomy is also dangerous because it undermines a progressive understanding of racial emotions. For one thing, it evades the actual problem in certain kinds of emotional voting – the kind that is driven by, say, white racial resentment. Rather than having the harder conversation about how such resentment may be groundless or misguided, the dichotomy allows us to stay within the zone of more comfortable generalizations (e.g., “It’s not that you have racist beliefs, but that you let your emotions undermine your judgment.”). Worse, a wholesale reference to “angry white voters,” without specificity about who they are and why they are angry, is an insinuation about a large group of people that stymies thoughtful discourse and breeds further hostility. While it would be naïve to believe that talking things through will solve the problem of racism, shame and exclusion are certainly

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2006) (calling for a “a more complete and integrated rationalism” that takes emotions into account); *see also generally* G.E. Marcus, *Emotions in Politics*, 3 ANN. REV. POL. SCI. 221 (2000).

<sup>28</sup> *See, e.g.* Weston Williams, *Post-Truth: What Oxford’s Word of the Year Says About Modern Discourse*, CHRISTIAN SCI. MONITOR: THE CULTURE (Nov. 16, 2016), <http://www.csmonitor.com/The-Culture/2016/1116/Post-truth-what-Oxford-s-word-of-the-year-says-about-modern-discourse> [<https://perma.cc/VKV9-87PZ>] (emphasizing the pivotal role of emotional appeals in the 2016 U.S. Presidential election and the Brexit vote in England).

<sup>29</sup> *See, e.g.* Mona Chalabi, *Trump’s Angry White Men—And Why There Are More of Them Than You Think*, GUARDIAN (Jan. 8, 2016, 9:11 AM), <https://www.theguardian.com/us-news/2016/jan/08/angry-white-men-love-donald-trump> [<https://perma.cc/96H9-VCZR>] (explaining the motivations of a hypothetical working-class Trump voter).

<sup>30</sup> *See generally* Janine Young Kim, *Racial Emotions and the Feeling of Equality*, 87 U. COLO. L. REV. 437 (2016) (citing various researchers of emotion, including Sara Ahmed and Martha Nussbaum).

<sup>31</sup> *See generally* Christopher Weber, *Emotions, Campaigns, and Political Participation*, 66 POL. RES. Q. 414 (2013).

more likely to exacerbate the conflict.<sup>32</sup>

Another danger of the dichotomy is that it sweeps so broadly that it includes emotional behaviors that may well be justified. For example, “angry black voters” that support a candidate who promises to rein in stops and frisks or to establish more stringent anti-discrimination measures should not be dismissed as “emotional.” Yet when we talk about emotions in this way, we are indeed being unduly dismissive. Moreover, such ascriptions of irrational emotionality are more likely to stick to racial minorities and women who have been stereotyped as such for a very long time.<sup>33</sup> The point here is that this is not all-or-nothing; we have the wherewithal to evaluate emotions in such a way as to encourage dialogue, share ideas, and advance a more progressive understanding of race in our society.

I want to make one final observation about Sara Ahmed’s excerpt and the current discourse about post-factual America.<sup>34</sup> Both emphasize the negative emotions of race – especially the racial hatred of one group and the racial grief of another.<sup>35</sup> To be sure, race has been constructed around negative emotions.<sup>36</sup> How could it not? The story of race in America is a story of dire inequality. Racial hatred, anger, grief, and fear dominate our understanding of race. It is no wonder that racial discourse is so fraught and demands an inordinate amount of courage to engage.

But here, too, we miss some of the smaller truths if we assume that this is all there is to racial emotions. Beyond these conflicts of inequality, there are communities built on love, solace, and even joy. Black nationalist movements often engendered fear in the

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<sup>32</sup> See Heather C. McGhee, Opinion, *I’m Prejudiced, He Said. Then We Kept Talking*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/2016/12/10/opinion/sunday/im-prejudiced-he-said-then-we-kept-talking.html> [<https://perma.cc/Y9NL-H5N6>].

<sup>33</sup> Ian Burkitt, *Social Relationships and Emotions*, 31 Soc. 37, 49-51 (1997).

<sup>34</sup> See Ahmed, *supra* note 5.

<sup>35</sup> Since Trump’s victory, there has been an increase in reports of hate crimes and harassment. See Melanie Eversley, *Post-Election Spate of Hate Crimes Worse than Post-9/11, Experts Say*, USA TODAY (Nov. 12, 2016, 12:46 AM), <http://www.usatoday.com/story/news/2016/11/12/post-election-spate-hate-crimes-worse-than-post-911-experts-say/93681294> [<https://perma.cc/JH8X-CAVL>]. In addition, there have been multiple stories about people crying and grieving after Election Day. See, e.g., Cindy Atoji Keene, *A New Kind of Grief—Post-Election Trauma*, BOS. GLOBE (Nov. 19, 2016), <https://www.bostonglobe.com/business/2016/11/18/new-kind-grief-post-election-trauma/tNigxxFdJjDR0PDhmDs3vM/story.html> [<https://perma.cc/8LYE-G9HZ>] (describing how people are calling grief counselors to cope with the election results).

<sup>36</sup> Elsewhere, I have argued that the paradigmatic emotions of race are negative ones such as anger, fear, and disgust. See Kim, *supra* note 30, at 448-62.

white mainstream by their militant challenge to the status quo, but they were also focused on service to and development of the black community.<sup>37</sup> Soon after 9/11, and again after the Trump campaign's proposal of a Muslim registry, Japanese American organizations quickly rallied together to stand with Muslim Americans who would be targeted en masse as national security threats.<sup>38</sup> Indeed, these kinds of racial alliances are that much more precious because of the negative experiences and emotions that minorities so often experience outside of them. Moreover, these are not irrational emotions—the brighter side of racial hatred.<sup>39</sup> On the contrary, they are born from common experiences of subordination that create a sense of kinship, and a belief in “linked fate,” among individuals and groups.<sup>40</sup> These kinships, actual and constructed (but not fictive), offer a safe harbor from the conflicts that racial identity can generate – a place where there is *benefit* of the doubt. And sometimes, the emotions of love and sympathy that characterize such kinships can provide the means to collective action against injustice.

My hope is that in these uncertain times of anger and grief, we keep this other side of race in mind as well and remain open to the possibility of discourse, persuasion, and solidarity. Dialogues like this one organized by the CUNY Law Review serve an especially important function today, and I am grateful for the opportunity to participate in this endeavor.

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<sup>37</sup> See, e.g., Tommie Shelby, *Two Conceptions of Black Nationalism: Martin Delany on the Meaning of Black Political Solidarity*, 31 POL. THEORY 664, 665 (2003) (observing that among the salient goals common to nationalist movements are the cultivation of racial solidarity and self-love).

<sup>38</sup> See Matt Stevens & Rong-Gong Lin II, *Talk of a Registry for Muslims Has Japanese Internment Survivors Asking: 'Can't They See What's Wrong?'*, L.A. TIMES (Nov. 18, 2016, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-japanese-internment-2016-11-17-story.html> [<https://perma.cc/EA6R-GHJH>].

<sup>39</sup> But see, e.g., Randall Kennedy, *My Race Problem*, ATLANTIC (May 1997), <https://www.theatlantic.com/magazine/archive/1997/05/my-race-problem/376849/> [<https://perma.cc/42H5-WQQD>] (suggesting that black racial solidarity is equivalent to white nationalism).

<sup>40</sup> See Evelyn M. Simien, *Race, Gender, and Linked Fate*, 35 J. BLACK STUD. 529, 529-30 (2005).

## THE GREAT AMERICAN DILEMMA: LAW AND THE INTRANSIGENCE OF RACISM\*

Erika Wilson†

At the start of the twentieth century, W.E.B. Du Bois noted that, “the problem of the Twentieth Century is the problem of the color-line.”<sup>1</sup> Over a century later, Du Bois’s words remain prescient. In the twenty-first century, the problem of the color line persists. This should come as no surprise. The subordination and marginalization of people of color is embedded into the very fabric of America’s political and social arrangements.<sup>2</sup> Indeed, even American citizenship<sup>3</sup> is color-coded, inextricably tied to whiteness. This was the case initially as a matter of law.<sup>4</sup> It is now the case as a

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\* This article is one of six written for CUNY Law Review’s inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: “When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure.” Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

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<sup>1</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* vii (1903).

<sup>2</sup> The law has historically been used to enslave people of color and deny them access to meaningful and substantive rights. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (“[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [Blacks were] so far inferior, that they had no rights which the white man was bound to respect . . .”); *People v. Hall*, 4 Cal. 399, 404 (1854) (barring the testimony of Chinese witnesses to a murder committed by a white man because “[t]he same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls”).

<sup>3</sup> I use the term citizenship to encompass both the formal rights that come along with citizenship such as the right to vote and the informal benefits of citizenship such as membership and inclusion as part of a community with shared interests.

<sup>4</sup> For much of this country’s history, whiteness was a specified legal prerequisite to becoming a naturalized citizen of the United States. The Naturalization Act of 1790, the first official codification of naturalization requirements, identified whiteness as a prerequisite for citizenship and explicitly stated that only whites could become citizens of the United States. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1952) (stating, in pertinent part, that “any alien, being a free *white person*, who shall

matter of praxis.<sup>5</sup>

While whiteness is no longer a legal prerequisite to formal American citizenship,<sup>6</sup> the racial nativism that undergirded America's initial conceptions of citizenship remain. For non-whites in America, whether native born or naturalized citizens, questions persist about the extent to which they can truly lay claim to America being "their" country, despite changing demographics which suggest that by 2055 America will have no clear racial majority.<sup>7</sup> Even the election of an African-American president has not altered this reality. The election of President Barack Obama at best revealed racial cleavages that have long existed, and at worst, increased rather than ameliorated racial discord.<sup>8</sup> The recent election of Donald J. Trump with his promise to "make America great again," along with the cacophonous battle cry of his followers to "take back our country," demonstrates this point.<sup>9</sup> Arguably, Donald J. Trump was elected President of the United States not in spite of his naked appeal to white racial nativism, but because of it.<sup>10</sup>

Trump's election has made clear what some people of color in

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have resided within the limits and under the jurisdiction of the United States for the term of two years" is eligible for naturalized citizenship (emphasis added)).

<sup>5</sup> Indeed, even after the grant of formal citizenship rights for non-whites, it is debatable whether they enjoy the full parameters of citizenship as "there is often a gap between possession of [formal] citizenship status and the enjoyment or performance of citizenship in substantive terms." LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 31 (2006).

<sup>6</sup> John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817, 841 (2000) ("With the McCarran-Walter (Immigration and Nationality) Act of 1952, Congress finally abandoned the race-based system of naturalization in existence since 1790.").

<sup>7</sup> See D'Vera Cohn & Andrea Caumont, *10 Demographic Trends That Are Shaping the U.S. and the World*, PEW RES. CTR. (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/> [<https://perma.cc/8T3T-C3FV>] (describing the demographic shifts and noting the estimated shift to a majority minority country by the year 2055).

<sup>8</sup> See, e.g., Jamelle Bouie, *Racial Discontent is Rising, But That's Not Obama's Fault*, SLATE (July 15, 2016, 5:00 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/07/racism\\_discontent\\_is\\_rising\\_but\\_that\\_s\\_not\\_obama\\_s\\_fault.html](http://www.slate.com/articles/news_and_politics/politics/2016/07/racism_discontent_is_rising_but_that_s_not_obama_s_fault.html) [<https://perma.cc/V9KG-DXL2>] (describing the ways in which Barack Obama's presidency impacted race relations in America).

<sup>9</sup> See Ronald Brownstein, *Trump's Rhetoric of White Nostalgia*, ATLANTIC (June 2, 2016), <http://www.theatlantic.com/politics/archive/2016/06/trumps-rhetoric-of-white-nostalgia/485192/> [<https://perma.cc/C6GE-L5VV>] ("In the Trump vocabulary, the word 'back' ranks closely behind 'again.' Trump is forever promising to 'bring back' things that have been lost. Manufacturing jobs, steel and coal production, waterboarding of terrorists, 'law and order' in the cities—all of these Trump says he will 'bring back' to reverse what he portrays as years of American decline.").

<sup>10</sup> See, e.g., Nicholas Confessore & Nate Cohn, *Donald Trump's Victory Was Built on Unique Coalition of White Voters*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/us/politics/donald-trump-voters.html> [<https://perma.cc/EVU9-25NK>].

America have long suspected: as a person of color in America, “the flag to which you have pledged allegiance, along with everybody else, has not pledged allegiance to you.”<sup>11</sup> That a majority of white American citizens would vote for a man who openly disparaged Mexicans,<sup>12</sup> was found liable for discriminating against African-Americans in housing,<sup>13</sup> and is overwhelmingly supported by white nationalist groups<sup>14</sup> underscores this suspicion. The election of Donald J. Trump was the proverbial smoking gun for those who have come to believe that race always has and always will matter in America.<sup>15</sup>

Yet critics of the continued salience of racism contest such a proposition. They suggest that racism is an ancillary matter that had little to do with Trump’s election, as some not insubstantial number of whites who voted for Trump this time around previously voted for President Obama.<sup>16</sup> They further suggest that Trump’s election had more to do with economics, most notably that the working class—white working class—felt marginalized and excluded.<sup>17</sup> They also point to the flaws of the Democratic candi-

<sup>11</sup> James Baldwin, Debate with William F. Buckley at the Cambridge Union Society of Cambridge University: The American Dream and the American Negro (Feb. 18, 1965), in N.Y. TIMES, Mar. 7, 1965, at SM32.

<sup>12</sup> See Janell Ross, *From Mexican Rapists to Bad Hombres, The Trump Campaign in Two Moments*, WASH. POST: THE FIX (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/> [<https://perma.cc/2TJ4-T2TA>].

<sup>13</sup> See Jonathan Mahler & Steve Eder, ‘No Vacancies’ for Blacks: How Donald Trump Got His Start, and Was First Accused of Bias, N.Y. TIMES (Aug. 27, 2016), <http://www.nytimes.com/2016/08/28/us/politics/donald-trump-housing-race.html> [<https://perma.cc/V3F6-DH2N>].

<sup>14</sup> See J.M. Berger, *How White Nationalists Learned to Love Donald Trump*, POLITICO MAG. (Oct. 25, 2016), <http://www.politico.com/magazine/story/2016/10/donald-trump-2016-white-nationalists-alt-right-214388> [<https://perma.cc/2YXZ-3XST>].

<sup>15</sup> See, e.g., Roxane Gay, *The Audacity of Hopelessness*, N.Y. TIMES (Nov. 9, 2016, 2:01 AM), <http://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/the-audacity-of-hopelessness> [<https://perma.cc/W2RJ-QY26>] (describing the fear, hurt, and disillusionment that many people of color felt after Trump’s election); Charles M. Blow, Opinion, *America Elects a Bigot*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/10/opinion/america-elects-a-bigot.html> [<https://perma.cc/5D2A-5FLE>] (chronicling the ways in which Trump’s election sends an unwelcoming message to citizens of color).

<sup>16</sup> See, e.g., Eric Levitz, *Trump Won a Lot of White Working-Class Voters Who Backed Obama*, N.Y. MAG.: DAILY INTELLIGENCER (Nov. 9, 2016, 4:10 AM), <http://nymag.com/daily/intelligencer/2016/11/trump-won-a-lot-of-white-working-class-obama-voters.html> [<https://perma.cc/9SNW-T6BW>] (contending that Trump’s election was not primarily about race or racism as evidenced by the number of Trump supporters who previously voted for President Obama).

<sup>17</sup> See, e.g., Nate Cohn, *Why Trump Won: Working-Class Whites*, N.Y. TIMES: THE UPSHOT (Nov. 9, 2016), <http://www.nytimes.com/2016/11/10/upshot/why-trump-won-working-class-whites.html> [<https://perma.cc/AS2A-74JK>].

date and suggest that her flaws were the reason for Trump's victory, not racism.<sup>18</sup> Thus, despite Trump's not so subtle appeal to white nativism, doubts remain as to the salience of racism as a factor in his being elected president. As noted by Professor Sara Ahmed, in this instance, "[w]hen [people] say racism, [critics] say: it could have been something else."<sup>19</sup>

The tendency to look for an explanation other than race or racism is a fairly standard response to dealing with race and racism in America,<sup>20</sup> particularly when an egregious or overt act of racial animus is not readily identifiable.<sup>21</sup> For the most part, within the public discourse, racism is narrowly conceptualized to mean disliking or having malintent towards a person because of their race or ethnicity.<sup>22</sup> Thus, for many people, "racism is equivalent to colour-consciousness and consequently non-racism must be a lack of colour-consciousness."<sup>23</sup> This is why calls to "get beyond race" or to "not see color" are commonly framed as the solution to eradicating racism.

This essay suggests that the law plays a pivotal role in the way in which both race and racism are viewed in the mainstream discourse. To be sure, the law has been a valuable instrument in transforming America from a place of overt bigotry and racial exclusion to one where overt bigotry and racial exclusion are considered unacceptable. Court cases such as *Brown v. Board of Education*<sup>24</sup> and laws like the 1964 Civil Rights Act,<sup>25</sup> in particular, profoundly shaped the way that Americans view race and racism. In the eyes of the public, these two iconic pieces of law have come to define what racism is—denying access or differential treatment because of race—and how to best eradicate it—enacting laws that prohibit dif-

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<sup>18</sup> See, e.g., Mike Abrams, Opinion, *Hillary and Co. Are the Only Ones to Blame for Her Loss*, MIAMI HERALD (Nov. 14, 2016, 8:35 PM), <http://www.miamiherald.com/opinion/op-ed/article114792013.html> [<https://perma.cc/N9YN-PRFA>].

<sup>19</sup> Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [<https://perma.cc/6YQG-L7UY>].

<sup>20</sup> I use the term racism here to mean policies, practices, or procedures that "create[ ] or reproduce[ ] a racially unequal social structure, based on essentialized racial categories . . ." Howard Winant, *Racism Today: Continuity and Change in the Post-Civil Rights Era*, 21 ETHNIC & RACIAL STUD. 755, 760-61 (1998).

<sup>21</sup> See *id.* at 758.

<sup>22</sup> See *id.* at 757-58.

<sup>23</sup> *Id.* at 760.

<sup>24</sup> 347 U.S. 483 (1954) (finding the segregation of public schools unconstitutional).

<sup>25</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

ferential treatment because of race.<sup>26</sup> In this sense the law has helped to usher in undeniable positive gains in terms of racial inclusion and public attitudes towards racism.<sup>27</sup>

At the same time, however, the law also perpetuates a static and harmful understanding of what racism is and how to best alleviate it. Nowhere is this more evident than in how the law deals with claims of racial discrimination. Justice Roberts's proclamation in *Parents Involved in Community Schools v. Seattle School District No. 1* that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race"<sup>28</sup> exemplifies this point. The law sends the not so subtle message that: (i) racism consists of a demonstrable injury suffered by one individual at the hands of another individual, rather than group or systemic harm caused by institutions rather than people;<sup>29</sup> (ii) the only kind of racism worth addressing is the kind in which there was invidious discrimination or malintent;<sup>30</sup> (iii) we should eschew color-consciousness in favor of color-blindness in order to remedy racism;<sup>31</sup> (iv) we should look first for some (or any) race-neutral reason to explain away a policy that has a disparate impact on people of color, and if one exists, that can absolve a party or institution from liability for racial discrimination;<sup>32</sup> and (v) the effects of centuries of racism will be

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<sup>26</sup> Cf. Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1106-07 (2004).

<sup>27</sup> See Valerie Strauss, *How, After 60 Years, Brown v. Board of Education Succeeded—and Didn't*, WASH. POST: ANSWER SHEET (Apr. 24, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/04/24/how-after-60-years-brown-v-board-of-education-succeeded-and-didnt/> [https://perma.cc/PJX8-VYEH].

<sup>28</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>29</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 279, 319-20 (1978) (rejecting the idea that a race-conscious affirmative action program could be implemented for the purpose of ameliorating general societal discrimination and noting that only specific and demonstrable findings of discrimination would justify a race-conscious affirmative action program).

<sup>30</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 240-42 (1976) (requiring a finding of invidious discriminatory intent in order to successfully establish a violation of the Fourteenth Amendment Equal Protection Clause).

<sup>31</sup> See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638-39 (2014) (Roberts, C.J., concurring) ("[I]t is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely [minority self-doubt], and — if so — that the preferences do more harm than good.").

<sup>32</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (setting forth the test for striking a juror because of their race as follows: (1) the defendant must establish a prima facie case that the strike was racially motivated, (2) the burden then shifts to the prosecutor to come forward with a race-neutral reason for the strike, and (3) the

ameliorated by time alone.<sup>33</sup> Further, the law often takes an ahistorical view of racism, all too often rebuffing color-conscious legislation that attempts to remedy the present and persistent residue of historical state-sponsored discrimination against people of color that lingers today.<sup>34</sup>

The rule of law is a powerful force in structuring behavior. To the extent that the law adopts a myopic definition of what constitutes an actionable form of racism, the broader cultural understanding of what constitutes racism is likely to suffer from similar myopia. This leads to what I call the Great American Dilemma: racism is now arguably an intransigent problem, nearly intractable. Following the model set by the very laws ostensibly meant to root out racism, we all too often demand exacting evidence of racism before we will acknowledge that it is real. For example, when Black men, women, and children are disproportionately killed or brutalized by the police,<sup>35</sup> race-neutral reasons are vigorously sought to explain the phenomenon;<sup>36</sup> the history of state over-policing and brutalization of Black bodies dating back to slavery and Reconstruction is rarely acknowledged.<sup>37</sup> Even when there is clear, videotaped evidence of excessive force or an unlawful police killing of a Black person, doubt festers about the unlawfulness of the officer's action<sup>38</sup> and whether the officer would have reacted in the same

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trial judge must assess the credibility of the explanation and determine whether purposeful discrimination has been established).

<sup>33</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary.”).

<sup>34</sup> See, e.g., *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting) (criticizing the majority for failing to engage in a more contextualized and complete examination of the effect of a piece of legislation in light of the history of discrimination faced by people of color in America and noting that “[a]s members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society”).

<sup>35</sup> See Wesley Lowery, *Study Finds Police Fatally Shoot Unarmed Black Men at Disproportionate Rates*, WASH. POST (Apr. 7, 2016), [https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3\\_story.html](https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html) [<https://perma.cc/26ED-7K4C>].

<sup>36</sup> See, e.g., Carl Bialik, *Why Are So Many Black Americans Killed by Police?*, FIFETHIRTYEIGHT (July 21, 2016, 1:24 PM), <https://fivethirtyeight.com/features/why-are-so-many-black-americans-killed-by-police/> [<https://perma.cc/QM7G-5TGS>].

<sup>37</sup> See generally GEORGE YANCY, *BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE* (2008) (discussing the ways in which the Black body has been literally and metaphorically criminalized); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the link between slavery and modern-day forms of incarceration).

<sup>38</sup> See, e.g., Joseph Goldstein, *Is a Police Shooting a Crime? It Depends on the Officer's Point of View*, N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/nyre>

way to a white citizen.<sup>39</sup> Further, we eschew race-based affirmative action and instead prefer class-based affirmative action, because poverty is perceived as non-controversial and our history of slavery and racial segregation are too attenuated to warrant reparatory assistance to people of color.<sup>40</sup>

Finally, unlike other countries with a robust history of racial or ethnic discrimination,<sup>41</sup> the United States routinely shies away from convening a truth and reconciliation process acknowledging its past.<sup>42</sup> While there have been some isolated attempts at establishing truth and reconciliation, in individual localities like the City of Greensboro, North Carolina, for example,<sup>43</sup> there has not been a country-wide comprehensive attempt at Truth and Reconciliation around America's history of slavery and discrimination. The United States does not ensure that its citizens understand or remember that past. Consequently, as the election of Donald J. Trump to the presidency revealed, racism remains the Great American Dilemma. In the words of Justice Sotomayor, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."<sup>44</sup> Until both the law and the broader culture recognize this truth, we as a country will continue to struggle with racism.

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gion/is-a-police-shooting-a-crime-it-depends-on-the-officers-point-of-view.html [https://perma.cc/Y6BS-5XG5].

<sup>39</sup> See, e.g., Lowery, *supra* note 35.

<sup>40</sup> See Lauren Camera, *Poverty Preference Admissions: The New Affirmative Action?*, U.S. NEWS & WORLD REP. (Jan. 12, 2016, 6:06 PM), <http://www.usnews.com/news/articles/2016/01/12/poverty-preference-admissions-the-new-affirmative-action> [https://perma.cc/7XMH-W6GL].

<sup>41</sup> See, e.g., SOUTH AFRICAN TRUTH & RECONCILIATION COMMISSION, <http://www.justice.gov.za/Trc/> [https://perma.cc/Y8BS-CLXS].

<sup>42</sup> See Anand Giridharadas, *Turning the Call for Racial reckonings Back on the U.S.*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/19/us/truth-reconciliation-commission-slavery.html> [https://perma.cc/4RS2-QLEQ].

<sup>43</sup> See GREENSBORO TRUTH & RECONCILIATION COMM'N, GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT: EXECUTIVE SUMMARY (2006), [http://www.greensborotrc.org/exec\\_summary.pdf](http://www.greensborotrc.org/exec_summary.pdf) [https://perma.cc/CUN9-6KA7].

<sup>44</sup> *Schutte v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).



**POLICE BRUTALITY, THE LAW & TODAY’S  
SOCIAL JUSTICE MOVEMENT: HOW THE LACK  
OF POLICE ACCOUNTABILITY HAS FUELED  
#HASHTAG ACTIVISM**

*Corinthia A. Carter*†

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“It is necessary that the weakness of the powerless is transformed into a force capable of announcing justice. For this to happen, a total denouncement of fatalism is necessary. We are transformative beings and not beings for accommodation.”

—Paulo Freire, *Pedagogy of the Heart*<sup>1</sup>

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† Corinthia A. Carter graduated from CUNY School of Law in May 2017. She is grateful to Professor Victor Goode for his guidance while she worked on this article.

<sup>1</sup> PAULO FREIRE, *PEDAGOGY OF THE HEART* 36 (Donaldo Macedo & Alexandre Oliveira trans., 1997).

## I. INTRODUCTION

On April 30, 2014, Milwaukee police officers responded to complaints about a man sleeping in Red Arrow Park.<sup>2</sup> The man was Dontre Hamilton, 31, a Black male with a history of mental illness.<sup>3</sup> Christopher Manney, the white officer, woke up Hamilton and began patting him down.<sup>4</sup> At some point, a struggle ensued and it ended with Hamilton's death; his body left riddled with bullets.<sup>5</sup> Manney had shot Hamilton 14 times.<sup>6</sup> This story, unlike the stories of Michael Brown and a few others, received little social media coverage.<sup>7</sup> The lack of coverage did not inhibit protests by local residents and activists, which even led to the closing of I-43.<sup>8</sup> However, like other cases, the district attorney declined to prosecute, stating that Manney's "use of force . . . was justified self-defense."<sup>9</sup> Additionally, the Department of Justice cited insufficient evidence to pursue a civil rights violation claim.<sup>10</sup> Hamilton's murder is just one of the many murders suffered by Black males at the hands of officers. The seemingly state-sanctioned deaths of Black males are not abstract events, but rather almost daily occurrences.<sup>11</sup>

In recent years, with the assistance of individuals recording officers as they engage in violence against Black citizens, social media has become the venue in which the world has begun to see the

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<sup>2</sup> Aamer Madhani, *No Charges for Milwaukee Officer Who Shot Man 14 Times*, USA TODAY (Dec. 22, 2014, 11:39 AM), <http://www.usatoday.com/story/news/nation/2014/12/22/police-shooting-milwaukee/20760011/> [<https://perma.cc/N4XB-E8R6>] ("At the time of the call, Manney was handling another unrelated incident and two other officers were dispatched to the park, but Manney was unaware of it. The two other officers checked on Hamilton twice and determined he wasn't doing anything wrong."). The officers who originally reported had already left when Manney arrived at the scene. Manney was eventually fired from the Milwaukee Police Department.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Dave Begel, *Dontre Hamilton Deserves Some National Media Attention*, ONMILWAUKEE (Dec. 11, 2014, 5:30 AM), <https://onmilwaukee.com/buzz/articles/dontrehamilton.html> [<https://perma.cc/U6K3-57X5>].

<sup>8</sup> Madhani, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Federal Officials Close Review into the Death of Dontre Hamilton*, U.S. DEP'T JUST. (Nov. 10, 2015), <https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton> [<https://perma.cc/W6F4-UJ46>].

<sup>11</sup> Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015, 3:00 PM), <https://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> [<https://perma.cc/3AUW-CBY5>].

human rights violations against Blacks.<sup>12</sup> This has led to much public outcry and has been the catalyst for today's social justice movements. The Black Lives Matter ("BLM") movement and others are products of the continued failure of this country's legislature and judiciary to enact and apply laws that effectively address the racially driven violence that police officers commit against Blacks. BLM calls for a complete reform in policing policies as well as true accountability for police departments that systematically violate the rights of Black individuals.<sup>13</sup>

BLM's efforts are the latest in a long legacy of Black resistance to police brutality. For decades, there has been a call for justice when police officers are not held accountable for causing the serious injury or death of Black men and women.<sup>14</sup> The responses from the impacted communities have included marches, boycotts, and protests.<sup>15</sup> However, police misconduct and violence continues to be an issue in this so-called post-civil rights era. There have only been some changes made in the way police officers handle their encounters with Black children, women, and men, yet many issues remain the same.<sup>16</sup>

In order to properly understand police violence—and the movements addressing it—today, it must be viewed through a racial lens. To try and address it in another manner would lead us to the same flawed conclusions and failed remedies. Excessive police force has disproportionately impacted Black lives. Numerous schol-

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<sup>12</sup> Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html> [<https://perma.cc/VU3P-XRQK>]; Drew Harwell, *How the Horror of Police Violence Against Blacks Was Shared in the Years Before Facebook*, WASH. POST: THE SWITCH (July 7, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/07/07/how-the-horror-of-police-violence-against-blacks-was-shared-in-the-years-before-facebook/> [<https://perma.cc/SF5E-U8KE>].

<sup>13</sup> *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/>.

<sup>14</sup> Harwell, *supra* note 12.

<sup>15</sup> See ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 67 (1984) ("[N]onviolence became a disciplined form of mass struggle because it was systematically developed through the organized structures of the movement."); Frederick C. Harris, *The Next Civil Rights Movement?*, DISSENT, Summer 2015, at 34, 38 (describing protest tactics used by the civil rights movement and Black Lives Matter); Elahe Izadi, *Black Lives Matter and America's Long History of Resisting Civil Rights Protesters*, WASH. POST (Apr. 19, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/19/black-lives-matters-and-americas-long-history-of-resisting-civil-rights-protesters> [<https://perma.cc/J6RF-CA8J>].

<sup>16</sup> Garret Felber, *What Black Lives Matter Means Beyond Policing Reform*, U.S. NEWS (July 12, 2016, 10:04 AM), <https://www.usnews.com/news/articles/2016-07-12/what-black-lives-matter-means-beyond-policing-reform> [<https://perma.cc/BYR5-YDQS>].

ars have “analogize[d] police brutality today to lynchings in the past.”<sup>17</sup> In the years following the Emancipation Proclamation of 1863, law enforcement officers actively participated in lynching throughout America.<sup>18</sup>

According to recent data, in February 2016, a Black person was killed every thirty-two hours by law enforcement.<sup>19</sup> More than 100 unarmed Black persons were killed by officers in 2015, and less than 10% of those deaths have resulted in criminal charges against the officers involved.<sup>20</sup> There are very few instances where officers are promptly charged with the deaths of the individuals they murdered. In those cases, officers’ race and their victims’ race play a role in the action taken against them.<sup>21</sup> This is important to note as the Supreme Court continues to move toward a defective notion of “colorblindness.”<sup>22</sup> Colorblindness has been defined as a “racial ideology that posits the best way to end discrimination is by treating individuals as equally as possible, without regard to race, culture, or ethnicity.”<sup>23</sup> However, the notion of colorblindness is

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<sup>17</sup> Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 690-91 (1996) (stating that lynchings and excessive force are both used to exercise social control).

<sup>18</sup> *Id.* at 691.

<sup>19</sup> *Police Violence Reports*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/reports/> [https://perma.cc/R283-46HP].

<sup>20</sup> *Police Killed More Than 100 Unarmed Black People in 2015*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/unarmed/> [https://perma.cc/V7JQ-2G6E].

<sup>21</sup> NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 3 (2015), <http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/> [https://perma.cc/4Y4G-ESGM] (“Official data, although woefully inadequate, show that over half of those killed by police in recent years have been Black or Latino. Officers involved in these killings are rarely indicted, much less convicted, for excessive use of force.” (footnotes omitted)). Anecdotal evidence in specific cases demonstrates a trend of failure to prosecute officers for the killing of unarmed Black individuals. *Compare* Kate Abbey-Lambertz, *Charges Dismissed Against Joseph Weekley, Cop Who Fatally Shot Sleeping 7-Year-Old*, HUFFINGTON POST (Jan. 28, 2015, 6:00 PM), [http://www.huffingtonpost.com/2015/01/28/joseph-weekley-charges-dismissed-aiyana-stanley-jones\\_n\\_6566032.html](http://www.huffingtonpost.com/2015/01/28/joseph-weekley-charges-dismissed-aiyana-stanley-jones_n_6566032.html) [https://perma.cc/2UKH-NL2J] (describing dismissal of charges against white officer who shot and killed Black girl in “botched” home raid), *with* Phil Helsel, *Two Louisiana Officers Arrested in the Fatal Shooting of Boy*, 6, NBC NEWS (Nov. 7, 2015, 10:36 AM), <http://www.nbcnews.com/news/us-news/two-louisiana-cops-arrested-fatal-shooting-boy-6-n459136> [https://perma.cc/2LG4-LXHT] (describing two Black officers quickly charged with second-degree murder for killing white autistic boy in his father’s car).

<sup>22</sup> Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 958 n.24 (1993).

<sup>23</sup> Monnica T. Williams, *Colorblind Ideology Is a Form of Racism*, PSYCH. TODAY (Dec. 27, 2011), <https://www.psychologytoday.com/blog/culturally-speaking/201112/colorblind-ideology-is-form-racism> [https://perma.cc/TP96-7H3Z].

deficient because it fails to acknowledge the historical inequalities faced by Blacks in education, poverty, employment, and other areas, as compared to their white counterparts.<sup>24</sup> The laws that were created and continue to exist in this country are anything but colorblind.<sup>25</sup>

The continuous disregard for and attacks by police on “the Black body” should not be viewed as simply a civil rights issue as that framing is too general and too broad. It must be seen as a racial issue that should have criminal ramifications for the officers involved as well as serious financial penalties for police departments or precincts that allow their officers to continue their behavior without reprimand. It must be understood that in America “extinguishing [B]lack lives is legally, constitutionally, and culturally permissible . . . .”<sup>26</sup> Such categorical indifference for Black lives led to the creation of the BLM movement and subsequent groups to bring attention to these tragedies that plague American society.

Today’s social justice movement is a byproduct of inadequate laws and the continued injustice faced by the Black community. In the following pages, I will look at the contextual perception of the laws as well as the laws that were created to tackle police brutality. These laws, by appearing race-neutral, ignore the racist pillars that this country was built on. I will then review the other insufficient remedies that are currently in effect but provide little to no justice. Next, I will provide an overview of past rebellions against police violence and their connection to today’s hashtag activism. Lastly, I will discuss several proposed remedies and address their possible effectiveness.

## II. CONTEXTUAL PERCEPTION OF THE LAWS

The demonization of Blacks has led many to view the brutal conduct of police officers not as violence but rather as officers’ preservation of “self and community.”<sup>27</sup> In order for the vicious treatment of Blacks to be deemed permissible, it is important to paint the Black community as comprised of hyper-aggressive irrational beings that require whatever force police officers determine to be necessary. This provides officers with the green light to treat

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<sup>24</sup> *Id.*

<sup>25</sup> See Flagg, *supra* note 22, at 955-56.

<sup>26</sup> Zach Newman, Note, “*Hands Up, Don’t Shoot*”: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness, 43 HASTINGS CONST. L.Q. 117, 119 (2015).

<sup>27</sup> Freeman, *supra* note 17, at 698-99.

Blacks as if their lives do not matter.<sup>28</sup> As a result of this belief and for fear of retaliation, police violence often goes “underreported, underinvestigated, underprosecuted and underconvicted.”<sup>29</sup>

Historically there has always been a double standard in the way police officers are treated when they commit violence against Blacks. Officers are often excused while victims are often blamed for their own deaths.<sup>30</sup> This was exhibited in the recent deaths of 43-year-old Eric Garner who was accused of selling loose cigarettes, 18-year-old Michael Brown who was accused of stealing cigars from a local store, and 12-year-old Tamir Rice, who was playing with a BB gun.<sup>31</sup> At the end of these cases, the victims were accused of acting in a manner that provoked officers into using deadly force. The list of Blacks being blamed for their deaths at the hands of police officers is extensive.<sup>32</sup>

Black men and boys are particularly at risk of losing their lives to officers regardless of whether they have committed a crime. According to a study published by the American Psychological Association, young Black males are presumed guilty and are considered years older than their actual age.<sup>33</sup> As these individuals are seen as threats, officers perceive that they have the authority to use the force necessary to maintain order and control.<sup>34</sup>

It is important to note that Black police officers have also

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<sup>28</sup> See GHANDNOOSH, *supra* note 21, at 17; Brentin Mock, *Police Are More Aggressive Overall in Encounters with African Americans*, CITYLAB (Nov. 17, 2015), <http://www.citylab.com/crime/2015/11/police-are-more-aggressive-overall-in-encounters-with-african-americans/416253/> [<https://perma.cc/7839-U98E>].

<sup>29</sup> Freeman, *supra* note 17, at 703.

<sup>30</sup> *Id.* at 704; Steve Chapman, *Are Blacks to Blame for Cops' Actions?*, CHI. TRIB. (Dec. 5, 2014, 7:36 PM) <http://www.chicagotribune.com/news/opinion/chapman/ct-garner-brown-ferguson-police-brutality-crime-blacks-perspec-1207-jm-20141205-column.html> [<https://perma.cc/N8MH-74QT>].

<sup>31</sup> Stacey Patton & David J. Leonard, *Viewpoint: Why Eric Garner Was Blamed for Dying*, BBC MAG. (Dec. 8, 2014), <http://www.bbc.com/news/magazine-30340632> [<https://perma.cc/H5DB-UJNR>].

<sup>32</sup> See, e.g., Julia Craven & Nick Wing, *What We Lose When Police Blame Victims for Their Own Deaths*, HUFFINGTON POST (May 15, 2015, 2:32 PM), [http://www.huffingtonpost.com/2015/05/15/police-shootings-victim-blaming\\_n\\_7284792.html](http://www.huffingtonpost.com/2015/05/15/police-shootings-victim-blaming_n_7284792.html) [<https://perma.cc/XJ63-JGWA>]; Simon Vozick-Levinson, *Black Lives Matter: 11 Racist Police Killings with No Justice Served*, ROLLING STONE (Dec. 4, 2014), <http://www.rollingstone.com/politics/news/black-lives-matter-11-racist-police-killings-with-no-justice-served-20141204> [<https://perma.cc/3CJ5-YLBL>].

<sup>33</sup> See generally Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014), <http://www.apa.org/pubs/journals/releases/psp-a0035663.pdf> [<https://perma.cc/Z3J8-UL6B>].

<sup>34</sup> Christopher Cooper, *An Afrocentric Perspective on Policing*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 331, 343 (Roger G. Dunham & Geoffrey P. Alpert eds., 7th ed. 2015).

fallen victims to violence at the hands of their fellow officers, solidifying the racial component of police violence. There have been several instances where Black officers were injured or killed by their colleagues. As early as 1940, “white officers in Harlem mistook a Black officer, John A. Holt Jr., for a burglar and shot him dead in his own apartment building.”<sup>35</sup> In 1972, another Black officer, William Capers, was once again shot and killed by a white officer.<sup>36</sup> This prompted the NYPD to implement the policy that requires undercover officers to wear their badge around their necks.<sup>37</sup>

In 2008, Christopher A. Ridley, a Mount Vernon officer, was shot and killed by Westchester officers while he was trying to restrain a suspect.<sup>38</sup> A year later, on May 29, 2009, off-duty NYPD officer Omar J. Edwards was shot and killed by a white officer shortly after pursuing an individual who had broken into his car.<sup>39</sup> In August 2010, off-duty officer Larry Johnson was beaten by fellow officers, who were called by his wife because there was “an armed man [who] had crashed a party” at their Queens home.<sup>40</sup> The gunman had already left when the police arrived, but then a fight erupted and the officers struggled to “both restrain and repel people . . . .”<sup>41</sup> Johnson was subsequently arrested and “received medical care for a broken hand while in police custody . . . .”<sup>42</sup>

On March 16, 2016, a Black Maryland police detective, Jacai Colson, was shot and killed by fellow officers.<sup>43</sup> The officers involved in the shooting claim that it was an incident of mistaken identity.<sup>44</sup> These incidents further indicate that the underlying is-

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<sup>35</sup> Michael Powell, *On Diverse Force, Blacks Still Face Special Peril*, N.Y. TIMES (May 30, 2009), <http://www.nytimes.com/2009/05/31/nyregion/31friendly.html> [https://perma.cc/F6FZ-L9LM].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Russ Buettner & Al Baker, *Off-Duty Officer Is Fatally Shot by Police in Harlem*, N.Y. TIMES (May 29, 2009), <http://www.nytimes.com/2009/05/29/nyregion/29cop.html> [https://perma.cc/FF8V-KGZL].

<sup>39</sup> *Id.*

<sup>40</sup> Liam Stack, *Queens Officer Who Sued Police Over Beating Is Awarded \$15 Million*, N.Y. TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/nyregion/queens-officer-beaten-by-police-is-awarded-15-million.html> [https://perma.cc/5TN2-SBWJ].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Tracee Wilkins & Andrea Swalec, *Police Chief: Maryland Officer ‘Deliberately’ Shot, Killed Fellow Officer; Sources: Shooting Was Case of Mistaken Identity*, NBC4 WASH. (Mar. 16, 2016, 11:56 AM), <http://www.nbcwashington.com/news/local/Prince-Georges-County-Police-Shooting-Suspect-Hit-With-25-Charges-372235001.html> [https://perma.cc/NEY4-NQ5N].

<sup>44</sup> *Id.*

sue is race, which drives officers to react to Blacks in a violent manner. The fact that the officers who were injured or killed took the same oath as their colleagues meant nothing because in the eyes of the system, they are Black and disposable.

So, how does the law respond to events like these? The next section will consider how the federal laws that were established to control police violence have methodically failed to effectively reduce it.

### III. THE LAW

There is a long history in the United States of police violence against civilians, which led the government to create laws that allowed citizens to seek a remedy when their rights were violated.<sup>45</sup> It has been argued that because the structure of modern police forces stems from slave patrols,<sup>46</sup> it was necessary to create laws to counter behaviors that were once sanctioned by the institution of slavery. Following the Emancipation Proclamation of 1863 and the 14th Amendment, laws were passed consisting of both criminal and civil remedies for civil rights violations.<sup>47</sup>

#### A. 18 U.S.C. § 242

In 1866, in an effort to tackle the violence against Blacks, Congress enacted a law, the substance of which is codified today at 18 U.S.C. § 242.<sup>48</sup> The deprivation of individual rights by federal,

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<sup>45</sup> MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 13 (2003) (affirming that police violence had been documented since the mid-1800s following the formation of the NYPD).

<sup>46</sup> Stephen L. Carter, *Policing and Oppression Have a Long History*, BLOOMBERG VIEW (Oct. 29, 2015, 6:19 PM), <https://www.bloomberg.com/view/articles/2015-10-29/policing-and-oppression-have-a-long-history> [<https://perma.cc/4CC8-BX25>].

<sup>47</sup> See, e.g., Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights-Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 7-8 (1985) (“Reconstruction thus established a new legal order that contemplated direct federal intervention in what had been considered to be state affairs, a system in which federal courts were to enforce newly created federal constitutional rights against state officials through civil remedies and criminal sanctions.”); Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 992-1020 (1983) (describing federal laws passed in the Reconstruction era to provide remedies for civil rights violations).

<sup>48</sup> Civil Rights Act of 1866, ch. 31, sec. 2, 14 Stat. 27, 27 (“That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the

state, or local government officers (including police) acting “under color of any law” became a federal crime and harsher penalties were given when such violations lead to bodily injury or death.<sup>49</sup>

Currently, Section 242 allows for a fine and/or imprisonment of up to one year for any officer that deprives a person of their rights because of their color or race.<sup>50</sup> However, if that violation results in the victim’s death, the officer could face up to life in prison.<sup>51</sup> Apart from Section 242, which names race as an element, “[c]riminal prosecutions can also be brought under generally applicable state laws such as laws against assault, aggravated assault, manslaughter, and murder.”<sup>52</sup> In 1989, the Supreme Court established the objective reasonableness standard of police conduct which the U.S. Department of Justice (“DOJ”) currently applies to its Section 242 cases.<sup>53</sup> The standard determines “whether [an] officer’s actions are ‘objectively reasonable’ in light of facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>54</sup>

#### B. 42 U.S.C. § 1983

As a compliment to Section 242, Congress passed a civil rem-

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punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.”). Similar language was reintroduced in 1948. *See* Act of June 25, 1948, ch. 645, § 242, 62 Stat. 696, 696 (codified as amended at 18 U.S.C. § 242 (2012)) (“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.”).

<sup>49</sup> 18 U.S.C. § 242 (2012); *see also* RACE, RACISM & AMERICAN LAW 463 (Derrick A. Bell ed., 4th ed. 2000).

<sup>50</sup> 18 U.S.C. § 242.

<sup>51</sup> *Id.*

<sup>52</sup> Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 465 (2004).

<sup>53</sup> *See* *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (reasoning that a balancing test weighing the “‘nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake” must be applied in order to determine an officer’s reasonableness (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))); *Law Enforcement Misconduct: Physical Assault*, U.S. DEP’T JUST., <https://www.justice.gov/crt/law-enforcement-misconduct#assault> [<https://perma.cc/2AFK-4YR5>] (last updated Jan. 26, 2017).

<sup>54</sup> *Graham*, 490 U.S. at 397.

edy in 1871.<sup>55</sup> Section 1983 allows individuals to file a civil action against anyone, acting “under color of any statute ordinance, regulation, custom, or usage, of any State or Territory,” that has deprived them “of any rights, privileges, or immunities secured by the Constitution and laws . . . .”<sup>56</sup> The Supreme Court allowed individuals to utilize this law as a means of enforcing their constitutional rights and to curb the police use of deadly force.<sup>57</sup> Similar to Section 242, this statute is rooted in the protections of the Fourth Amendment against “excessive (unreasonable) force during a search or arrest.”<sup>58</sup>

C. 42 U.S.C. § 14141

Another counterpart to Section 242 is Section 14141, which was established two years after the globally broadcasted Rodney King incident of 1991.<sup>59</sup> It was part of the Violent Crime Control and Law Enforcement Act of 1994, which was Congress’s approach to addressing the need for change in police departments across the U.S.<sup>60</sup> Section 14141 allows the DOJ to launch investigations against police departments that potentially “engage in a pattern or practice of [unlawful] conduct by law enforcement officers . . . .”<sup>61</sup>

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<sup>55</sup> Civil Rights Act of 1871, ch. 22, sec. 1, 17 Stat. 13, 13; *see also* Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 400 (2008).

<sup>56</sup> 42 U.S.C. § 1983 (2012).

<sup>57</sup> Lacks, *supra* note 55, at 401.

<sup>58</sup> Armacost, *supra* note 52, at 465.

<sup>59</sup> Simone Weichselbaum, *Policing the Police*, MARSHALL PROJECT (May 26, 2015, 6:12 PM), <https://www.themarshallproject.org/2015/04/23/policing-the-police> [<https://perma.cc/Q6QD-EV6A>] (“The Civil Rights Division conducts its broader, ‘pattern or practice’ investigations under [Section 14141]. That law took shape after the 1991 roadside beating of Rodney King by white officers of the Los Angeles Police Department, and was finally enacted in 1994.”).

<sup>60</sup> *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as amended at 42 U.S.C. § 14141).

<sup>61</sup> 42 U.S.C. § 14141 (2012); *see also* *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP’T JUST., <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> [<https://perma.cc/UVV8-CN7E>] (last updated Aug. 6, 2015) (“The types of conduct covered by this law can include, among other things, excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests. In order to be covered by this law, the misconduct must constitute a ‘pattern or practice’ — it may not simply be an isolated incident. The DOJ must be able to show in court that the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct. However, unlike the other civil laws discussed . . . DOJ does not have to show that discrimination has occurred in order to prove a pattern or practice of misconduct. What remedies are available under this law? The remedies available under this law do not provide for individual monetary relief for the victims of the misconduct. Rather, they provide for injunctive relief, such as orders to end the misconduct and changes in the

This law also grants the U.S. Attorney General the authority to file lawsuits against police departments in order to “obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”<sup>62</sup> The lawsuits were a way “to effect organizational reforms designed to establish standards of accountability that will prevent such abuses from occurring in the future.”<sup>63</sup>

*D. Successes and Shortcomings of the Federal Provisions*

On their face, these laws provide victims with a remedy allowing some form of justice for police violence as well as holding police officers and their departments accountable for their actions and practices. Unfortunately, when the laws are applied, the officers often benefit from their application and victims are left remediless.

In 1945, the landmark case on criminal law accountability for state and private civil rights violators, *Screws v. United States*, addressed an action brought under then Section 20 of the Criminal Code (currently Section 242).<sup>64</sup> That case was about the murder of Robert Hall, a Black male, who was arrested late one night in his home by Sheriff Screws of Baker County, Georgia for stealing a tire.<sup>65</sup> Somewhere between the arrest in his home and arriving at the police station, Hall was beaten to unconsciousness by Screws and two other officers.<sup>66</sup> He died shortly after.<sup>67</sup> The Court established that there must be a balance found between state and federal laws and that a “[v]iolation of local law does not necessarily mean that federal rights have been invaded.”<sup>68</sup> “The fact that a prisoner is assaulted, injured, or even murdered by state officials

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agency’s policies and procedures that resulted in or allowed the misconduct. There is no private right of action under this law; only DOJ may file suit for violations of the Police Misconduct Provision.” (emphasis omitted)).

<sup>62</sup> 42 U.S.C. § 14141.

<sup>63</sup> Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R. L.J. 479, 479 (2009).

<sup>64</sup> *Screws v. United States*, 325 U.S. 91 (1945). Screws and others were indicted and convicted by a federal judge for the deliberate deprivation of Robert Hall’s right not to be deprived of life without due process of law, right to trial, and right to punishment under Georgia’s laws, as well as violation of his Fourteenth Amendment rights, after they beat him to death. At the Supreme Court, though, the convictions were reversed and the case remanded for retrial. At retrial, the defendants were acquitted. John Q. Barrett, *More on Screws v. United States*, JACKSON LIST (2010), <http://thejacksonlist.com/wp-content/uploads/2014/02/20100729-Jackson-List-More-Screws.pdf> [<https://perma.cc/28T6-LP53>].

<sup>65</sup> *Screws*, 325 U.S. at 92.

<sup>66</sup> *Id.* at 92-93.

<sup>67</sup> *Id.* at 93.

<sup>68</sup> *Id.* at 108.

does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.”<sup>69</sup> In interpreting Section 20 to require specific intent of willfulness to deprive someone of Constitutional rights, the Court diminished the strength of the law and in effect devalued Black life.<sup>70</sup>

Twenty years after the *Screws* ruling, in *United States v. Price*, the Court moved away from its previous rulings on Section 241 (conspiracy against rights) and Section 242 and found that three officers and fifteen non-official defendants violated the rights of three civil rights workers when they were released from jail, taken to a secluded area by the county sheriff, and then lynched.<sup>71</sup> The Court reasoned that all eighteen individuals acted “‘under color’ of law” because the private persons were “willful participant[s] in joint activity with the State or its agents.”<sup>72</sup> This case brought about national attention which, in turn, put pressure on the Department of Justice to act.<sup>73</sup> Despite this pressure, many cases of murdered and missing Blacks pre-1970 remain unsolved and the government has taken no action to hold those involved accountable.<sup>74</sup> These deaths were a result of violence faced by Blacks during the Civil Rights movement.<sup>75</sup>

The *Screws* reluctance to hold officers criminally accountable for civil rights violations against Black people is reflected in the civil context as well. In *Monroe v. Pape*, the petitioner brought a Section 1983 action against the City of Chicago because the officers who violated his rights were acting “under color of law” and with-

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<sup>69</sup> *Id.* at 108-09.

<sup>70</sup> *Id.* at 103-05.

<sup>71</sup> *United States v. Price*, 383 U.S. 787 (1966). In *Price*, two white men and one Black man, civil rights workers, were arrested and held in Neshiba County jail, but were later released by the deputy sheriff. The sheriff took the men to a secluded area where the men were murdered and buried. The bodies of the men were discovered weeks later. The perpetrators were charged with violating the rights of the three civil rights workers. The fifteen men sought to have the Section 242 claim dismissed, but that failed.

<sup>72</sup> *Id.* at 794.

<sup>73</sup> FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 147 (1999).

<sup>74</sup> Ed Pilkington, *UN Panel to Consider U.S. ‘Failure’ to Clear Up Racial Murders of Civil Rights Era*, *GUARDIAN* (Mar. 19, 2015, 6:00 AM), <http://www.theguardian.com/world/2015/mar/19/un-us-racial-murders-civil-rights-era> [<https://perma.cc/59VB-VWMG>] (reporting that, in 2015, the United Nation’s Human Rights Council held a special meeting to address America’s failure to comply with a 2008 law that ordered the investigation of hundreds of pre-1970 cases where Blacks either disappeared or were murdered during the Civil Rights Era).

<sup>75</sup> *Id.*

out a search warrant.<sup>76</sup> Applying the *Screws* analysis, the court held that there must be adequate state action where the officer is accused of misusing his authority or violating state law.<sup>77</sup> It also limited municipal incentives to provide better training and supervision. The Court ruled that a cause of action is limited to individual offenders and not the city that employs him/her, thus protecting local governments from economic responsibility.<sup>78</sup> This ruling “left plaintiffs in an unfortunate situation, since police officers were all too often judgement-proof.”<sup>79</sup>

Even plaintiffs seeking injunctive relief in cases where there is a clearly determined violation have an extremely difficult time obtaining that relief.<sup>80</sup> In *Rizzo v. Goode*, the Court ruled that injunctive relief was not a proper remedy because the future actions of a handful of officers were considered too speculative.<sup>81</sup> The Court reasoned that granting such relief is a federal intrusion on State rights and, therefore, not within the Court’s jurisdiction.<sup>82</sup> The decision made it exceedingly difficult for plaintiffs to seek any form of relief and it was furthered by the Court’s ruling in *City of Los Angeles vs. Lyons*, where it found that Mr. Lyons’s claim of repeated injury from a chokehold by LAPD was too speculative,<sup>83</sup> and found his case non-justiciable due to lack of standing.<sup>84</sup>

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<sup>76</sup> *Monroe v. Pape*, 365 U.S. 167, 168 (1961). In *Monroe*, police officers broke into the victim’s home early one morning, forcing the husband and wife to stand naked as they searched the home. They detained Mr. Monroe on “open charges” and he endured ten hours of interrogation about a murder that took place two days prior. He was not allowed to contact his family or an attorney and was later released without going before the magistrate. No criminal charges were filed against him.

<sup>77</sup> RACE, RACISM & AMERICAN LAW, *supra* note 49, at 476.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 477.

<sup>81</sup> *Rizzo v. Goode*, 423 U.S. 362, 372 (1976). In *Rizzo*, numerous allegations of police violence and misconduct towards Black residents lead to class-action suits against the mayor and police commission of Philadelphia, seeking injunctive relief to address the ineffective civilian complaint procedures. *Id.* at 366-67. The trial court found for the plaintiffs, stating that procedures should be reformed. *Id.* at 368-70. The Supreme Court overruled the lower court’s ruling. *Id.* at 380-81.

<sup>82</sup> *Id.* at 379-80.

<sup>83</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1982). Lyons, a Black male, was stopped by officers for a traffic violation. Officers, without provocation, proceeded to choke Lyons to unconsciousness. As it was believed that this was a common practice of L.A. police officers, Lyons sought injunctive relief to prevent officers from applying chokeholds in their future interactions with civilians. The Court ruled that Lyons lacked standing because he was unable to prove that the officers had a policy of applying chokeholds and could not guarantee that he would interact with those officers again and that they would apply a chokehold to him again. *Id.*

<sup>84</sup> *Id.* at 111-13.

The impediments created by the Court coupled with the fact that Section 1983 suits are costly and that “juries are more likely to believe the police officer’s version of the incident than the plaintiff’s” (if the victims survive the encounter) renders these laws extremely limited as just options for victims of police violence.<sup>85</sup> According to Barbara Armacost, legal scholar and law professor, Section 242 and Section 1983 place the typical civil rights plaintiff, a criminal suspect, at a “distinct, practical disadvantage.”<sup>86</sup> These individuals often have criminal records, are poor, and are not considered reliable witnesses by juries.<sup>87</sup> Officers are able to serve as and provide more “credible witnesses” whereas a plaintiff must rely on the testimony of family and friends which jurors tend to view as untrustworthy.<sup>88</sup>

However, there is one noteworthy victory in a Section 1983 action. In *Tennessee v. Garner*, the Court ruled that it was unconstitutional for law enforcement to use deadly force when individuals are attempting to flee.<sup>89</sup> The Court held that laws interpreted to authorize officers to use deadly force to apprehend an “apparently unarmed suspected felon” violated the Fourth Amendment.<sup>90</sup>

While *Garner* was heralded as a victory, scholars have also argued that it was flawed because the Court’s ruling “severely restricted the Any-Felony Rule, but did not limit the use of deadly force to self-defense.”<sup>91</sup> This means that *Garner* essentially allows police officers to use deadly force even where there is no “life-threatening crime.”<sup>92</sup> This led some analysts to find that the decision would not have a substantial effect on “police conduct, be-

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<sup>85</sup> Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 754 (1993) (detailing the extent to which the law does nothing to prevent or discourage police violence as police are offered many protections rendering them virtually untouchable).

<sup>86</sup> Armacost, *supra* note 52, at 467.

<sup>87</sup> *Id.* at 467-68.

<sup>88</sup> *Id.* at 468 (“[O]fficers may be able to allege facts—such as that the plaintiff was resisting arrest or appeared to be reaching for a gun—that would support the officers’ use of force.”).

<sup>89</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In this case, a young Black male suspect attempted to escape by climbing a fence. Officers, in accordance with Tennessee law, fatally shot him. *Id.* at 3-4. The Court found the law unconstitutional, holding that the “use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.” *Id.* at 11.

<sup>90</sup> *Id.* at 3.

<sup>91</sup> Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 245 (1994). The Any-Felony Rule stemmed from English common law and was interpreted by American courts as “legal permission to shoot an unarmed felony suspect in flight.” *Id.* at 242.

<sup>92</sup> *Id.* at 245.

cause the creation or modification of laws has never effectively modified police behavior.”<sup>93</sup>

Years later, the Court in *Graham*<sup>94</sup> “essentially prohibit[ed] any second-guessing of [an] officer’s decision to use deadly force: no hindsight is permitted, and wide latitude is granted to the officer’s account of the situation, even if scientific evidence proves it to be mistaken.”<sup>95</sup> Therefore, the law has not provided any real impact that compels individual officers or police departments to change the way they interact with members of the Black community.<sup>96</sup>

With respect to departmental charges, since its enactment, the DOJ has rarely enforced Section 14141. These cases are difficult to analyze as the DOJ does not provide much data. Between 2000 and 2013, DOJ made approximately 325 preliminary inquiries, but of those inquires only nine (2.8%), resulted in the appointment of an independent monitor.<sup>97</sup> Additionally, no cases have gone to trial under this provision as police departments tend to settle with the DOJ to avoid embarrassment.<sup>98</sup> When the DOJ establishes that a police department exhibits “a pattern or practice,” a monitor may be assigned to supervise reform, though this practice is not consistent across presidential administrations.<sup>99</sup>

Under the Obama administration, the DOJ became more aggressive in its application of the law.<sup>100</sup> However, there has been criticism with respect to the police departments the DOJ choose to investigate because larger police departments such as New York or

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<sup>93</sup> *Id.* (footnote omitted).

<sup>94</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>95</sup> Chase Madar, *Why It's Impossible to Indict a Cop*, NATION (Nov. 25, 2014), <http://www.thenation.com/article/why-its-impossible-indict-cop/> [<https://perma.cc/Z5SL-6BE6>]

<sup>96</sup> See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3202 (2014) (“It only works if aggrieved parties regularly litigate and departments feel the financial consequences of this litigation, thus motivating them to change behaviors and policies.”).

<sup>97</sup> *Id.* at 3226, 3226 n.256. For a list of the negotiated settlements between DOJ and police agencies and which of those settlements resulted in a monitor being appointed, see *id.* at 3247.

<sup>98</sup> *Id.* at 3227-28, 3227 n.270 (all police departments settled).

<sup>99</sup> *Id.* at 3238-39.

<sup>100</sup> *Id.* at 3234 (“In March 2009, less than two months after Eric Holder took over as attorney general, the DOJ approved a consent decree with the Virgin Islands Police Department. This was the first negotiated settlement that the DOJ had approved under § 14141 in over five years. Since then, the DOJ has reached settlement agreements with seven different police agencies in seven different states. In three of these cases - the Virgin Islands; Seattle, Washington; and New Orleans, Louisiana - these settlements have included clauses that require the appointment of an external monitor to ensure departmental compliance with the terms of the agreement.” (footnotes omitted)).

Los Angeles seemed to avoid more serious scrutiny.<sup>101</sup> Critiques have focused on DOJ's lack of transparency in the policy and procedures for deciding which departments are in need of reform.<sup>102</sup>

In December 2015, the DOJ announced its plan to investigate police misconduct in Chicago to "determine whether there are systemic violations of the Constitution or federal law by officers of CPD [Chicago Police Department]."<sup>103</sup> This was long-awaited action by the DOJ because for decades the City of Chicago had been plagued with allegations of torture, murder, and coerced confessions.<sup>104</sup>

Shortly after the events in Ferguson, Missouri, the DOJ began investigating the city and its police department.<sup>105</sup> In its 104-page report, the DOJ concluded that the police engaged in a pattern/practice that violated the rights of its Black residents.<sup>106</sup> In February 2016, the DOJ filed a lawsuit against Ferguson, citing that the city failed to take any remedial measures to protect the rights of its

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<sup>101</sup> *Id.* at 3219.

<sup>102</sup> Rushin, *supra* note 96, at 3243.

<sup>103</sup> *Justice Department Opens Pattern or Practice Investigation into the Chicago Police Department*, U.S. DEP'T JUST. (Dec. 7, 2015), <https://www.justice.gov/opa/pr/justice-department-opens-pattern-or-practice-investigation-chicago-police-department> [<https://perma.cc/KM5H-PWNM>] ("The investigation will focus on CPD's use of force, including racial, ethnic and other disparities in use of force, and its systems of accountability.").

<sup>104</sup> *See, e.g.*, Sarah Macaraeg & Yana Kunichoff, 'Nothing Happens to the Police': Forced Confessions Go Unpunished in Chicago, *GUARDIAN* (Jan. 28, 2016, 9:10 AM), <http://www.theguardian.com/us-news/2016/jan/28/chicago-police-department-false-confessions-torture> [<https://perma.cc/Y3QA-YFJZ>]; G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 *CUNY L. Rev.* 329, 362-63 (2014) (noting the continuous outcries of the citizens of Chicago and the City Council regarding police violence against people of color as well as the lack of accountability for police officers).

<sup>105</sup> *Justice Department Files Lawsuit to Bring Constitutional Policing to Ferguson, Missouri*, U.S. DEP'T JUST. (Feb. 10, 2016), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-bring-constitutional-policing-ferguson-missouri> [<https://perma.cc/M2FC-TMT7>].

<sup>106</sup> *Id.* In the press release, Principal Deputy Assistant Attorney General Vanita Gupta stated "[o]ur investigation found that Ferguson's policing and municipal court practices violate the Constitution, erode trust and undermine public safety . . ." *Id.* The release went on to explain that "[t]he lawsuit, filed pursuant to Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 and Title VI of the Civil Rights Act of 1964 (Title VI), alleges that the city of Ferguson, through its police department and municipal court: conducts stops, searches and arrests without legal justification, and uses excessive force, in violation of the Fourth Amendment; interferes with the right to free expression in violation of the First Amendment; prosecutes and resolves municipal charges in a manner that violates due process and equal protection guaranteed by the 14th Amendment; and engages in discriminatory law enforcement conduct against African Americans in violation of the 14th Amendment and federal statutory law." *Id.*

residents.<sup>107</sup>

The following month on March 30, 2016, the DOJ announced that it had reached a settlement with the city of Newark, New Jersey.<sup>108</sup> The settlement was based on the DOJ's findings that the Newark Police Department "has engaged in a pattern or practice of unconstitutional stops, searches, arrests, use of excessive force and theft by officers in violation of the First, Fourth and 14th Amendments."<sup>109</sup>

As the Court continues to place an insurmountable number of hurdles in front of plaintiffs seeking justice against police officers that have violated these federal laws and the DOJ inconsistently enforces Section 14141, victims and their families are often left to pursue local remedies.

#### IV. CURRENT STATE AND LOCAL REMEDIES

##### A. *Criminal Code*

In theory, police officers can be charged with violating state and local laws ranging from aggravated assault to second degree murder for violence against civilian suspects. However, in practice, officers are rarely prosecuted for such crimes, and on those occasions that they are charged, the officers are often acquitted. Between 2005 and 2014 there were 47 officers charged (including officers from Baltimore, Maryland; Cincinnati, Ohio; North Charleston, South Carolina; and Portsmouth, Virginia) and only 11 of them were convicted of a crime.<sup>110</sup> Officers are given special

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<sup>107</sup> *Id.* (The residents of Ferguson have waited nearly a year for their city to adopt an agreement that would protect their rights and keep them safe. They have waited nearly a year for their police department to accept rules that would ensure their constitutional rights and that thousands of other police departments follow every day. They have waited nearly a year for their municipal courts to commit to basic, reasonable rules and standards. But residents of Ferguson have suffered the deprivation of their constitutional rights – the rights guaranteed to all Americans – for decades. They have waited decades for justice. They should not be forced to wait any longer.)

<sup>108</sup> *Justice Department Reaches Agreement with City of Newark, New Jersey, to Reform Police Department's Unconstitutional Practices*, U.S. DEP'T JUST. (Mar. 30, 2016), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-newark-new-jersey-reform-police-department-s> [https://perma.cc/Y4YQ-8QFJ] ("The Justice Department's findings were announced in July 2014 following a comprehensive investigation into the NPD started in May 2011. The investigation also found that this pattern of constitutional violations has eroded public confidence in the police. As a result, public safety suffers and the job of delivering police services was more difficult and more dangerous.")

<sup>109</sup> *Id.*

<sup>110</sup> Ian Simpson, *Prosecution of U.S. Police for Killings Surges to Highest In Decade*, HUFFINGTON POST (Oct 26, 2015, 9:21 AM), <http://www.huffingtonpost.com/entry/pros>

treatment whereas civilians would be charged and sentenced to the full extent of the law.<sup>111</sup> Bail set for police officers is extremely low considering the type of offense being charged.<sup>112</sup> For example, a young man who participated in the Baltimore riots protesting Freddie Gray's death was arrested for using a traffic cone to smash the window of a police car.<sup>113</sup> He was given \$500,000 bail, whereas the bail amounts for the officers charged with Freddie Gray's actual death ranged between \$250,000-\$350,000.<sup>114</sup>

Bail aside, it seems that there has been a recent "surge" in the number of officers that have been prosecuted.<sup>115</sup> Yet, the number of Blacks killed and the number of prosecutions, not convictions, remains very disproportionate.<sup>116</sup>

As officers rarely face criminal charges, citizens have to turn to other mechanisms of accountability, like filing complaints with their local civilian review boards hoping that some type of disciplinary action will be taken against the officer(s) that violated their rights.

### B. *Civilian (Complaint) Review Boards*

Civil rights advocates first started pushing for Civilian Review Boards ("CRBs") in the 1940s, as a way to offer some type of exter-

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ecution-police-killings\_562e26aee4b0ec0a3894eb23 [https://perma.cc/5QGE-TNDS] (explaining that public outrage, bystander videos, and body cameras are contributing factors that have motivated prosecutors to take some action against officers that murder Blacks).

<sup>111</sup> See, e.g., *White Ex-Police Chief Makes Plea Deal in Shooting of Black Man*, CBSNEWS.COM (Sept. 1, 2015, 3:58 PM), <http://www.cbsnews.com/news/richard-combs-white-police-chief-south-carolina-plea-deal-shooting-narmed-black-man/> [https://perma.cc/DQ5G-62HG]. In the case described in the article, former Police Chief Richard Combs of Eutawville, South Carolina, plead guilty to killing a Black man over a traffic ticket. After two mistrials the murder charges against him were dropped. For the guilty plea he only received a ten year suspended sentence in prison, five years of probation, and one year of home detention.

<sup>112</sup> Todd Oppenheim, Opinion, *Another Baltimore Injustice*, N.Y. TIMES (Nov. 28, 2015), <http://www.nytimes.com/2015/11/29/opinion/another-baltimore-injustice.html?mwrsm=Email> [https://perma.cc/NR7N-P4CB] (noting that officers involved in the death of Freddie Gray were given an opportunity to turn themselves in and assigned considerably low bail amounts).

<sup>113</sup> Adam Howard, *Teen Faces Higher Bail Than Baltimore Cops Accused of Murder*, MSNBC (May 1, 2015, 7:31 PM), <http://www.msnbc.com/msnbc/teen-faces-higher-bail-baltimore-cops-accused-murder> [https://perma.cc/9W7S-6G2N].

<sup>114</sup> *Id.*

<sup>115</sup> Simpson, *supra* note 110.

<sup>116</sup> Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), [http://www.huffingtonpost.com/entry/police-shooting-convictions\\_us\\_5695968ce4b086bc1cd5d0da](http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da) [https://perma.cc/7WG7-3R8C].

nal oversight for police officers and address police corruption and violence.<sup>117</sup> These external entities are set up in cities as a way to police the police by providing “independent review of specific instances of police abuse or to determine whether the internal procedures used by police are legitimate.”<sup>118</sup> The boards’ roles and power are “determined by local politics, [and therefore] CRBs vary wildly in terms of powers, responsibilities, and actual success at supervising police.”<sup>119</sup> Though their purpose is to provide civilians with some authority to review and curb officers’ conduct, these boards in fact have very little impact on officer discipline. For example, in 2012 “the NYPD followed the [Civilian Complaint Review Board’s] recommendation in only 25 out [sic] 258 cases (9.7%). Officers received no discipline in 104 cases (40.3%).”<sup>120</sup> The CCRB recommended that officers receive the most severe discipline (ranging from loss of vacation days, suspension, probation, or termination) in 175 cases, however “the NYPD only sought charges in 7.”<sup>121</sup> Unfortunately, this supports the notion that the CCRB, and similar boards throughout the country, are ineffective in the fight for reforming police practices and stopping the violence against civilians.<sup>122</sup> Some argue that CRBs are ineffective because (1) police departments refuse to cooperate with the boards; (2) police departments generally reject the findings and recommendations of

<sup>117</sup> Andrew Rosado Shaw, Note, *Our Duty in Light of the Law’s Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. POVERTY L. & POL’Y 161, 166 (2012).

<sup>118</sup> Tim Lynch & Richard Stone, CATO Inst., *Civilian Review Boards*, POLICEMIS CONDUCT.NET, <http://www.policemisconduct.net/explainers/civilian-review-boards/> [<https://perma.cc/8SRS-5RVQ>].

<sup>119</sup> *Id.*

<sup>120</sup> *Police Punishment: CCRB vs NYPD*, WNYC, <http://project.wnyc.org/ccrb/> [<https://perma.cc/SZ8T-ZA49>] (emphasis omitted).

<sup>121</sup> *Id.*

<sup>122</sup> Donna Lieberman, Exec. Dir., N.Y. Civil Liberties Union, Testimony before The New York City Council Committee on Public Safety and the Committee on Civil Rights regarding The Civilian Complaint Review Board and Civilian Oversight of Policing (Mar. 9, 2007), <http://www.nyclu.org/content/civilian-complaint-review-board-and-civilian-oversight-of-policing> [<https://perma.cc/Q7C6-62U6>]; see also D. Brian Burghart, *Eyes Wide Open: What Should Citizen Oversight of Law Enforcement Look Like?*, RENO NEWS & REV., (Oct. 16, 2014), <http://www.newsreview.com/reno/eyes-wide-open/content?oid=15222461> [<https://perma.cc/CZ8V-NYKX>] (discussing the effectiveness of Civilian Review Boards in the wake of the nation’s attention to police violence); Sonia Moghe, *NYPD Fails to Discipline Officers Who Use Excessive Force, Report Says*, CNN (Oct. 2, 2015, 12:24 PM), <http://www.cnn.com/2015/10/02/us/new-york-police-excessive-force-report/> [<https://perma.cc/HB9N-432T>]; Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html> [<https://perma.cc/5VK5-RRS3>] (“From 2011 to 2015, 97 percent of more than 28,500 citizen complaints resulted in no officer being punished, according to the files.”).

the boards; (3) citizens are often unaware of the boards' purpose and/or mission.<sup>123</sup>

As shown, these boards are not a viable remedy for Blacks as they have no real power and officers often go unpunished. People are left only with the hope that internal controls within police departments will discipline officers who have engaged in excessive force against Blacks.

### C. *Administrative Action*

Police departments have internal mechanisms that are intended to investigate officers for misconduct (i.e. Internal Affairs). However, this system also fails to properly and consistently discipline officers for their reckless behavior and utter disregard for Black lives. For serious infractions, such as breaking internal policies, officers face little punishment. While the departments conduct an "investigation" officers are regularly given desk duty or administrative leave (often with pay—in other words, a paid vacation) which is often part of their union contracts.<sup>124</sup> As there are often public records exemptions in place, police departments are not forthcoming with data detailing the disciplinary actions taken to enforce their internal policies, many of which may not address issues involving excessive force.<sup>125</sup>

The ineffectiveness of these remedies have left citizens angry and frustrated. Over the years, this has prompted members of the Black community and their allies to take their vexation to the streets.

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<sup>123</sup> ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 73-75 (1998), <https://www.hrw.org/legacy/reports98/police/download.htm> [<https://perma.cc/JM5C-QTYB>] (explaining these limitations as they relate to the New York Civilian Complaint Review Board and Philadelphia's Police Advisory Commission).

<sup>124</sup> See, e.g., Mark Gokavi, *Officer Who Shot John Crawford to Stay on Desk Duty*, DAYTON DAILY NEWS (Dec. 4, 2014, 7:21 PM), <http://www.daytondailynews.com/news/news/crime-law/officer-who-shot-john-crawford-to-remain-on-desk-d/njLwC/> [<https://perma.cc/8BHE-STTB>]; Aaron C. Davis, *Lengthy Review Process Keeps Prince George's Police Who Fire Weapons Off Patrol*, WASH. POST (Apr. 13, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/12/AR2009041202726.html> [<https://perma.cc/2UBU-LJK4>]; *Fair Police Contracts*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/contracts/> [<https://perma.cc/2M9J-DYSC>].

<sup>125</sup> CHRISTINE BECKETT, REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRIVATE EYES: CONFIDENTIALITY ISSUES AND ACCESS TO POLICE INVESTIGATION RECORDS 2 (2010), <https://www.rcfp.org/rcfp/orders/docs/PRIVATEEYES.pdf> [<https://perma.cc/PEA7-PH4W>].

## V. HISTORY OF REBELLION AGAINST POLICE BRUTALITY

America has an extensive history of Black people rebelling against the continuous assault against their communities.<sup>126</sup> Police misconduct against the Black community represents the larger issue of institutional racism.<sup>127</sup> Though it may seem that these incidents are responses to individual events, they in fact symbolize a rebellion against institutional racism and a system that does little to protect its Black citizens.<sup>128</sup> Therefore, the fight against one becomes a figurative fight against all. The following historical events – a sampling of some of the most notable riots that took place – happened as an attempt to compel change and to make others aware of the injustices that plague Black communities. They provide valuable historical context for the rise of BLM.

### 1. Harlem, New York

On August 1, 1943, Robert Bandy, a Black soldier, approached a white police officer who was in the process of arresting a Black woman for disorderly conduct.<sup>129</sup> At some point, the officer shot and wounded Bandy.<sup>130</sup> Shortly after the incident, thousands of angry citizens gathered and a riot began. The next day Mayor Fiorello La Guardia called for the assistance of the U.S. Army and put a 10:30 PM curfew into place.<sup>131</sup> There were two days of civil unrest, which resulted in six deaths and five hundred arrests.<sup>132</sup>

### 2. Philadelphia, Pennsylvania

On August 28, 1964, an argument between a bystander and two police officers (one white and the other Black) ensued shortly after Odessa Bradford's (a Black woman) car stopped working on a

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<sup>126</sup> Casey Gane-McCalla, *Riots Racism and Police Brutality: A Never Ending Cycle*, HUFFINGTON POST: THE BLOG (Feb. 11, 2009, 5:12 AM), [http://www.huffingtonpost.com/casey-ganemccalla/riots-racism-and-police-b\\_b\\_156771.html](http://www.huffingtonpost.com/casey-ganemccalla/riots-racism-and-police-b_b_156771.html) [https://perma.cc/FU6A-W4MF].

<sup>127</sup> Alev Dudek, *Police Brutality Against Black Men, Plausible Outcome of Structural Racism*, HUFFINGTON POST: THE BLOG (June 22, 2015, 5:50 PM), [http://www.huffingtonpost.com/alev-dudek/police-brutality-against-2\\_b\\_7633184.html](http://www.huffingtonpost.com/alev-dudek/police-brutality-against-2_b_7633184.html) [https://perma.cc/7BXW-NVY6].

<sup>128</sup> *Id.*

<sup>129</sup> Ricky Riley, *8 Facts You May Not Know About the Harlem Riot of 1943*, ATLANTA BLACK STAR (Aug. 2, 2014), <http://atlantablackstar.com/2014/08/02/8-facts-may-know-harlem-riot-1943/> [https://perma.cc/NV3M-6P4C].

<sup>130</sup> *Harlem Race Riot of 1943*, ENCYC. BRITANNICA, <http://www.britannica.com/topic/Harlem-race-riot-of-1943> [https://perma.cc/97P9-QFAZ] (last updated Apr. 27, 2016).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

city street.<sup>133</sup> As officers attempted to remove Ms. Bradford from her car, the bystander intervened, which resulted in the arrest of both individuals.<sup>134</sup> Angered by the actions of the officers, residents took to the streets. Close to 800 people were arrested and over 200 stores were destroyed.<sup>135</sup> This marked the first in a series of such rebellions that took place during the Civil Rights Era.<sup>136</sup>

### 3. Harlem, New York

Another revolt erupted in Harlem in 1964 after Lieutenant Thomas Gilligan (who was off-duty at the time), shot and killed James Powell, a 15-year-old Black teenager.<sup>137</sup> Many people, including his classmates, assembled and began protesting and demanding answers.<sup>138</sup> This led to days of protests in Harlem and Bedford-Stuyvesant, Brooklyn. One person died, over 100 people were injured, and there were over 450 arrests.<sup>139</sup>

### 4. Watts, Los Angeles, California

The “Watts Riots” were sparked on August 11, 1965 after police arrested Marquette Frye, a 21-year-old Black man, his friend, and his mother.<sup>140</sup> Frye was pulled over for reckless driving, so many were left confused as to why his mother was arrested upon her arrival at the scene.<sup>141</sup> The arrests caused outrage amongst the Black community, which led to tens of thousands protesting.<sup>142</sup> During the protests, the police commissioner referred to the protesters as “monkeys in a zoo.”<sup>143</sup> Thousands of National Guard

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<sup>133</sup> History Making Productions, *The Philadelphia Race Riot of August 1964*, PHILLY.COM (Aug. 28, 2013, 6:43 PM) <http://www.philly.com/philly/blogs/TODAY-IN-PHILADELPHIA-HISTORY/The-Philadelphia-race-riot-of-August-1964.html> [https://perma.cc/R2NT-L652].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *New York Race Riots*, C.R. DIGITAL LIBR., [http://crdl.usg.edu/events/ny\\_race\\_riots/](http://crdl.usg.edu/events/ny_race_riots/) [https://perma.cc/M3RT-D9DM] (last modified Apr. 6, 2017); Michael W. Flamm, Opinion, *The Original Long, Hot Summer: The Legacy of the 1964 Harlem Riot*, N.Y. TIMES (July 15, 2014), <http://www.nytimes.com/2014/07/16/opinion/16Flamm.html> [https://perma.cc/HE63-2CRK].

<sup>138</sup> Flamm, *supra* note 137.

<sup>139</sup> *New York Race Riots*, *supra* note 137.

<sup>140</sup> James Queally, *Watts Riots: Traffic Stop Was the Spark that Ignited Days of Destruction in L.A.*, L.A. TIMES (July 29, 2015, 9:20 AM), <http://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htmlstory.html> [https://perma.cc/9S47-V2V8].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Lily Rothman, *50 Years After Watts: The Causes of a Riot*, TIME (Aug. 11, 2015), <http://time.com/3974595/watts-riot-1965-history/> [https://perma.cc/N294-43E9].

officers were deployed at the scene.<sup>144</sup> At the conclusion of the six-day rebellion, 34 people were left dead, over 1,000 were injured, and 3,500 people were arrested.<sup>145</sup>

#### 5. San Francisco, California

On September 27, 1966, Matthew Johnson, a 16-year-old teenager, was shot and killed by an officer for trying to flee the scene of a stolen vehicle.<sup>146</sup> Once again people gathered at the scene and began throwing rocks at officers and setting fires.<sup>147</sup> The National Guard was also called in.<sup>148</sup> Fortunately, after days of protests, there were no deaths.<sup>149</sup>

#### 6. Newark, New Jersey

On July 12, 1967, officers pulled over John Smith, a Black taxi driver, and badly beat him and arrested him.<sup>150</sup> This took place near a housing project and was observed by residents who took to the streets and began protesting.<sup>151</sup> In the end, 26 people were killed, over 700 injured and, 1,500 were arrested.<sup>152</sup> It was determined that “most of the deaths were caused by police or National Guard rifles.”<sup>153</sup>

#### 7. Los Angeles, California

Following the August 29, 1992 acquittal of four LAPD officers, in spite of a video recording, for the beating of Rodney King (a Black man), there were four days of civil unrest.<sup>154</sup> Media captured

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<sup>144</sup> Queally, *supra* note 140.

<sup>145</sup> *Id.*

<sup>146</sup> *Hunters Point – Cops Shot into Community Center Sheltering 200 Children*, MOVEMENT, Oct. 1966, at 1, 1, <https://libraries.ucsd.edu/farmworkermovement/ufwarchives/sncc/16B%20-%20October%201966.pdf> [<https://perma.cc/887A-42SJ>]; *1966 Hunters Point Rebellion: Recollections of Harold Brooks and Thomas Fleming*, S.F. BAY VIEW (Sept. 27, 2011) [hereinafter *1966 Hunters Point Rebellion*], <http://sfbayview.com/2011/09/1966-hunters-point-rebellion-recollections-of-harold-brooks-and-thomas-fleming> [<https://perma.cc/S5V3-EZCB>].

<sup>147</sup> *1966 Hunters Point Rebellion*, *supra* note 146.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Nancy Solomon, *40 Years On, Newark Re-Examines Painful Riot Past*, NPR (July 14, 2007, 6:44 PM), <http://www.npr.org/templates/story/story.php?storyId=11966375> [<https://perma.cc/3VFY-C6TX>].

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Jessica Dickerson, *Remembering the 1992 LA Riots Over 2 Decades Later*, HUFFINGTON POST (Apr. 29, 2015, 6:31 PM), [http://www.huffingtonpost.com/2015/04/29/1992-la-riot-photos\\_n\\_7173540.html](http://www.huffingtonpost.com/2015/04/29/1992-la-riot-photos_n_7173540.html) [<https://perma.cc/4B3A-2WW7>].

the protest as it unfolded. Fifty-three people died, at least 2,300 were injured, thousands were arrested, and over \$1 billion in property damage resulted from these events.<sup>155</sup>

#### 8. Cincinnati, Ohio

On April 9, 2001, an unarmed 19-year-old Black male, Timothy Thomas, was shot and killed by a police officer who pulled him over for a traffic violation.<sup>156</sup> The incident led to civil outrage and unrest.<sup>157</sup> The days of demonstrating resulted in \$3.6 million in property damage.<sup>158</sup>

#### 9. Ferguson, Missouri

On August 9, 2014, unarmed teenager Michael Brown was shot and killed following an interaction with a white officer.<sup>159</sup> Brown's body stayed uncovered for hours while media was allowed to take pictures.<sup>160</sup> Protesting ensued shortly after, the National Guard was called in, and a curfew was put in place.<sup>161</sup> Months later, after the prosecutor's officer failed to obtain an indictment of Officer Wilson,<sup>162</sup> protests began again.<sup>163</sup> There were many arrests during both protests. This incident led to the DOJ issuing a report documenting a history of racial discrimination by the Ferguson Po-

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<sup>155</sup> *Id.*

<sup>156</sup> Danny Vinik, *We've Been Here Before. A Solution Exists.*, NEW REPUBLIC (Aug. 18, 2014), <https://newrepublic.com/article/119133/cincinnati-2001-race-riots-reveal-solutions-ferguson-unrest> [<https://perma.cc/4EAE-2JJD>].

<sup>157</sup> *Id.*

<sup>158</sup> Robert Anglen et al., *Riot Costs Add Up*, CIN. ENQUIRER (Oct. 7, 2001), [http://www.enquirer.com/editions/2001/10/07/loc\\_1riot\\_costs\\_add\\_up.html](http://www.enquirer.com/editions/2001/10/07/loc_1riot_costs_add_up.html) [<https://perma.cc/G68Z-W2PH>].

<sup>159</sup> Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [<https://perma.cc/Z7J6-H2K5>].

<sup>160</sup> Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html> [<https://perma.cc/ZJ9E-49ZV>].

<sup>161</sup> Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo.*, USA TODAY (Aug. 14, 2014, 11:59 AM), <https://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/> [<https://perma.cc/6WQ4-GZZG>].

<sup>162</sup> *Darren Wilson Not Indicted: Read the Full Grand Jury Report*, GUARDIAN (Nov. 25, 2014, 12:17 AM), <http://www.theguardian.com/us-news/ng-interactive/2014/nov/25/darren-wilson-not-indicted-ferguson> [<https://perma.cc/Y74W-M4CT>].

<sup>163</sup> Yamiche Alcindor et al., *Ferguson Burning After Grand Jury Announcement*, USA TODAY (Nov. 24, 2014, 9:38 AM), <http://www.usatoday.com/story/news/nation/2014/11/24/ferguson-grand-jury-deliberations/19474907/> [<https://perma.cc/VE69-RLF4>].

lice Department.<sup>164</sup>

#### 10. Baltimore, Maryland

On April 12, 2015, Freddie Gray, a 25-year-old Black man, was arrested after running away from a police officer.<sup>165</sup> Video of his arrest was caught on camera and he can be seen limping and crying out in pain.<sup>166</sup> He was placed in a police van and, half an hour later, was removed from the van unable to breathe and with severe spinal injuries.<sup>167</sup> Gray died a week later.<sup>168</sup> Residents protested, calling attention to the systematic police violence by Baltimore officers.<sup>169</sup> Six officers were charged with Gray's death (both Black and white).<sup>170</sup> All of the officers were eventually acquitted of the charges, leaving no one legally responsible for Freddie Gray's death.<sup>171</sup> However, weeks after the final acquittal in the Gray case, the DOJ released the findings of its investigation of the Baltimore Police Department (BDP).<sup>172</sup> The DOJ found that the BDP's practices included disproportionately stopping, searching, and arresting Blacks; excessive use of force; and continuously failing to address allegations of police officers' racist behavior.<sup>173</sup>

<sup>164</sup> Conor Friedersdorf, *Ferguson's Conspiracy Against Black Citizens*, ATLANTIC (Mar. 5, 2015), <https://www.theatlantic.com/national/archive/2015/03/ferguson-as-a-criminal-conspiracy-against-its-black-residents-michael-brown-department-of-justice-report/386887/> [https://perma.cc/REL6-9H8K].

<sup>165</sup> David A. Graham, *The Mysterious Death of Freddie Gray*, ATLANTIC (Apr. 22, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/> [https://perma.cc/EP7X-NKJA].

<sup>166</sup> *Id.*

<sup>167</sup> Scott Dance, *Freddie Gray's Spinal Injury Suggests 'Forceful Trauma,' Doctors Say*, BALT. SUN (Apr. 21, 2015), <http://www.baltimoresun.com/health/bs-hs-gray-injuries-20150420-story.html> [https://perma.cc/29K7-RVD7].

<sup>168</sup> Graham, *supra* note 165.

<sup>169</sup> Ta-Nehisi Coates, *Nonviolence as Compliance*, ATLANTIC (Apr. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/04/nonviolence-as-compliance/391640/> [https://perma.cc/GR8X-R8AS].

<sup>170</sup> Elliott C. McLaughlin & Amanda Watts, *Charges Against Baltimore Officers in Freddie Gray Case*, CNN (Dec. 16, 2015, 9:14 PM), <http://www.cnn.com/2015/12/15/us/charges-against-baltimore-officers-freddie-gray-trials/index.html> [https://perma.cc/7PBB-45V6].

<sup>171</sup> Sarah Almukhtar et al., *Freddie Gray Case Ends with No Convictions of Any Police Officers*, N.Y. TIMES (July 27, 2016), <http://www.nytimes.com/interactive/2015/04/30/us/what-happened-freddie-gray-arrested-by-baltimore-police-department-map-timeline.html> [https://perma.cc/Y7XZ-SWNF].

<sup>172</sup> *Justice Department Announces Findings of Investigation into Baltimore Police Department*, U.S. DEP'T JUST. (Aug. 10, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> [https://perma.cc/N4QM-AP57].

<sup>173</sup> CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), <https://www.justice.gov/opa/file/883366/download>

As shown, the riots were destructive, with most of the damage done in the neighborhoods inhabited by the same suffering community. This type of response did not accomplish much. While these riots—spanning over 73 years—have resulted in some change, they have not resulted in the type of change that will lead to an end to police misconduct against the Black community. It was clear that in order for there to be actual change, the community must move away from violent riots. This gave birth to a new movement that sought to use 21st century tactics to obtain constructive changes without the destructive effects (like injuries, arrests, and property damage). Hence, the founders of BLM began the fight for citizen control over the police by pushing legislation and being a very visible part of the political arena. BLM “has been described as ‘not your grandfather’s civil-rights movement,’ to distinguish its tactics and its philosophy from those of nineteen-sixties-style activism” because it “eschews hierarchy and centralized leadership . . . .”<sup>174</sup>

#### VI. TODAY’S SOCIAL JUSTICE MOVEMENT: AN EXTENSION OF THE HISTORY OF POLICE VIOLENCE

Today’s social justice movement has been prompted by what Blacks perceive as systematic racism by police officers throughout this country against their community.<sup>175</sup> Social media is the mechanism that has allowed the world to gain some insight into the violence that Blacks encounter on a daily basis and to see that what Blacks endure is not merely perception but rather an unrelenting reality. While social media is a new tool, today’s movement is merely a continuation of the rebellions of the past 70 years, all similarly calling for police accountability and reform in policing tac-

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[<https://perma.cc/QK4Y-9XP4>]. The DOJ findings emphasized that “the consequence of the large racial disparities in stops, searches, and arrests may also manifest itself in what may be disproportionate use of force against African Americans by BPD. We found that African Americans accounted for roughly 88 percent of the subjects of non-deadly force used by BPD officers in a random sample of over 800 cases we reviewed.” *Id.* at 61. The report further stated that “BPD misclassifies and fails to investigate complaints of racial slurs and racial bias, allowing a culture of bias against African Americans to persist.” *Id.* at 67.

<sup>174</sup> Jelani Cobb, *The Matter of Black Lives: A New Kind of Movement Found its Moment. What Will Its Future Be?*, NEW YORKER (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/where-is-Black-lives-matter-headed> [<https://perma.cc/T9Q9-YPSC>].

<sup>175</sup> David A. Graham, *Systemic Racism or Isolated Abuses? Americans Disagree*, ATLANTIC (May 7, 2015), <http://www.theatlantic.com/politics/archive/2015/05/systemic-racism-or-isolated-abuse-americans-disagree/392570/> [<https://perma.cc/9V7N-NWCT>].

tics. America's consistent disregard for Black lives continues to strengthen recently founded organizations like BLM.

Social media has and continues to have a profound impact on today's reaction to police brutality because it allows citizens to essentially become journalists and disseminate information to people in a matter of seconds.<sup>176</sup> It has allowed activists to organize a rally or protest and communicate with thousands in minutes.<sup>177</sup> Social media has become a platform for protesting police violence and exposing the many flaws of the American justice system.<sup>178</sup> It allows activists to raise awareness and garner support.<sup>179</sup>

Issues turned into hashtags<sup>180</sup> cannot be ignored as they quickly begin forcing mainstream media to take notice. Today, there are many hashtags that have been created for various reasons, but there is one that has captured the attention of millions of people throughout the world.

#Blacklivesmatter, which started as a tweet from a young woman in 2012, turned into an organization that currently has 38 chapters located throughout the country.<sup>181</sup> Defying the odds, this organization continues to gain support from individuals of all backgrounds in its fight against a system that treats Black lives as insig-

<sup>176</sup> Frederick C. Harris, *The Next Civil Rights Movement?*, DISSENT (Summer 2015), <https://www.dissentmagazine.org/article/black-lives-matter-new-civil-rights-movement-fredrick-harris> [<https://perma.cc/KVQ8-JK37>].

<sup>177</sup> Noah Berlatsky, *Hashtag Activism Isn't a Cop-Out*, ATLANTIC (Jan. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/01/not-just-hashtag-activism-why-social-media-matters-to-protestors/384215/> [<https://perma.cc/ED4M-ENRJ>]; Eric Yaverbaum, *#HashtagActivism — Turning Whispers into Shouts and Fighting Stigma with Story*, HUFFINGTON POST (Dec. 9, 2015, 3:20 PM), [http://www.huffingtonpost.com/eric-yaverbaum/hashtagactivism-turning-w\\_b\\_8751204.html](http://www.huffingtonpost.com/eric-yaverbaum/hashtagactivism-turning-w_b_8751204.html) [<https://perma.cc/H62G-JSQ3>].

<sup>178</sup> See generally Yarimar Bonilla & Jonathan Rosa, *#Ferguson: Digital Protest, Hashtag Ethnography, and the Racial Politics of Social Media in the United States*, 42 AM. ETHNOLOGIST 4 (2015), <http://onlinelibrary.wiley.com/doi/10.1111/amet.12112/epdf> [<https://perma.cc/F29B-XEEN>].

<sup>179</sup> See, e.g., *id.*; *Social Media Plays Major Role in National Debate on Police Violence*, PBS NEWSHOUR (July 15, 2016, 2:12 PM), <http://www.pbs.org/newshour/bb/social-media-plays-major-role-national-debate-police-brutality/> [<https://perma.cc/22NX-E4M5>]; Kimberlee Morrison, *Social Media Activism: Sandra Bland, Police Brutality and #BlackLivesMatter*, ADWEEK (July 30, 2015), <http://www.adweek.com/digital/social-media-activism-sandra-bland-police-brutality-and-blacklivesmatter/> [<https://perma.cc/ZK6L-8U4A>].

<sup>180</sup> Rebecca Hiscott, *The Beginner's Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), <http://mashable.com/2013/10/08/what-is-hashtag/#2WtFHecHXuqB> [<https://perma.cc/62MV-ADZ7>] (defining hashtags as "those short links preceded by the pound sign (#)," used as an important way "we communicate online").

<sup>181</sup> See Alicia Garza, *A HerStory of the #BlackLivesMatter Movement*, BLACK LIVES MATTER, <http://blacklivesmatter.com/herstory/>; *Locate a Chapter*, BLACK LIVES MATTER, <http://blacklivesmatter.com/find-chapters/>.

nificant.<sup>182</sup> The organization has successfully held rallies, boycotts, and protests throughout the country,<sup>183</sup> all the while maintaining its aim of disrupting business as usual and of “shut[ting] sh\*t down.”<sup>184</sup>

For example, days before Christmas 2015, BLM held demonstrations at the Mall of America and Minneapolis-St. Paul International Airport, which led to the forced closing of a number of stores as well as delays.<sup>185</sup> Just days earlier, a judge denied the Mall’s request for a restraining order to prevent the demonstration, despite the fact that in 2014 a similar BLM protest had disrupted many businesses and caused some to close for the day.<sup>186</sup>

BLM also serves as a legal and political platform. During the 2016 presidential campaign, the organization made headlines when it disrupted Bernie Sanders during one of his political rallies in Seattle<sup>187</sup> and met with Hillary Clinton to ask her questions about past policies she supported.<sup>188</sup> The organization is forcing politicians to address issues involving policing and race in

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<sup>182</sup> See, e.g., Alexandra Olteanu et al., *Characterizing the Demographics Behind the #BlackLivesMatter Movement*, 2016 AAAI SPRING SYMP. SERIES 310, 313, <http://www.aaai.org/ocs/index.php/SSS/SSS16/paper/view/12720/11945> [<https://perma.cc/3UEZ-25LB>] (explaining that 60% of users of the #BlackLivesMatter hashtag are African American, 40% are white, and 4% are Asian, with adults between 30 and 64 years old being the most active age group); Munmun De Choudhury et al., *Social Media Participation in an Activist Movement for Racial Equality*, in PROCEEDINGS OF THE TENTH INTERNATIONAL CONFERENCE ON WEB AND SOCIAL MEDIA 92, 100 (2016), <http://www.aaai.org/Library/ICWSM/icwsml6contents.php> [<https://perma.cc/VUN2-RMMR>] (“Our results demonstrate that while notable events may have triggered many individuals to engage in cursory or one-time discourse on the various issues of the Black Lives Matter activist movement, some individuals remained involved in the social media conversations over a long period and across temporally spread-out events. This indicates that Twitter emerged as an important platform of discourse and reflection for many individuals, allowing them to share stories, find common ground and agitate for police and government reform around racial issues.”).

<sup>183</sup> Sara Sidner & Mallory Simon, *The Rise of Black Lives Matter: Trying to Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015, 8:28 AM), <http://www.cnn.com/2015/12/28/us/Black-lives-matter-evolution/> [<https://perma.cc/22AW-F8UC>].

<sup>184</sup> *Id.*

<sup>185</sup> Amanda Holpuch, *Black Lives Matter Protest Shuts Down Mall of America and Airport Terminal*, GUARDIAN (Dec. 23, 2015, 4:46 PM), <https://www.theguardian.com/us-news/2015/dec/23/black-lives-matter-organizers-protest-mall-of-america> [<https://perma.cc/6C97-9UZR>].

<sup>186</sup> *Id.*

<sup>187</sup> Alex Seitz-Wald, *Bernie Sanders Event Shut Down by Black Lives Matter Activists*, MSNBC (Aug. 8, 2015, 9:17 PM), <http://www.msnbc.com/msnbc/bernie-sanders-event-shut-down-Black-lives-matter-activists> [<https://perma.cc/TN3N-4FUR>].

<sup>188</sup> Darrel Rowland, *Black Lives Pair Meets with Hillary Clinton in Cleveland*, COLUMBUS DISPATCH (Oct. 21, 2016, 12:01 AM), <http://www.dispatch.com/content/stories/local/2016/10/21/hillary-clinton-cleveland.html> [<https://perma.cc/YT4C-TKYF>].

America.<sup>189</sup> BLM demands that local political leaders respond promptly when police misconduct occurs.<sup>190</sup>

Recently, BLM has been instrumental in influencing the outcomes of several elections, particularly in cities where police officers committed violent acts against Blacks and the incumbent failed to adequately address the issue. In Chicago, Cook County State's Attorney Anita Alvarez lost her prosecutorial position,<sup>191</sup> which she held for two previous terms.<sup>192</sup> Alvarez's controversial decision to wait a year to prosecute the officer in the death of Laquan McDonald subsequently led to her losing her bid for reelection 2-1 to her opponent.<sup>193</sup> Meeting the same fate, Cleveland's Timothy McGinty, the Cuyahoga Prosecuting Attorney, also lost his bid for reelection.<sup>194</sup> McGinty "encouraged a grand jury not to charge the two officers who opened fire on [Tamir] Rice after less than two seconds on the scene."<sup>195</sup> In both instances, BLM, working with other organizations, protested, canvassed, and created hashtag campaigns.<sup>196</sup> These strategies have proven successful and helps BLM further their mission.

There have been calls by conservatives to label BLM as a hate group even though the group maintains that it does not support or condone violence against police officers.<sup>197</sup> These critics are trying to exhaust whatever means are available to prevent conversations about racism and racist policing from taking place. These attempts show how important and necessary it is to address the racial issues that are plaguing America.

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<sup>189</sup> Jessica Washington & Perry Bacon Jr., *How 'Black Lives Matter' Activists Are Shaping the 2016 Campaign*, NBC NEWS (July 31, 2015, 5:00 AM), <http://www.nbcnews.com/news/nbcblk/how-Black-lives-matter-activists-are-shaping-2016-campaign-n401146> [<https://perma.cc/Q9EM-F8FV>].

<sup>190</sup> *Id.*

<sup>191</sup> Jessica Lussenhop, *Chicago Prosecutor Loses her Fight with Black Lives Matter*, BBC NEWS MAG. (Mar. 16, 2016), <http://www.bbc.com/news/world-us-canada-35817890> [<https://perma.cc/77D5-EPUF>].

<sup>192</sup> Dana Ford, *Anita Alvarez Concedes Bid for Third Term in Chicago*, CNN (Mar. 15, 2016, 10:59 PM), <http://www.cnn.com/2016/03/15/politics/anita-alvarez-election/> [<https://perma.cc/284D-3R86>].

<sup>193</sup> Lussenhop, *supra* note 191.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* On Election Day in Chicago, the group hired an airplane that displayed a massive banner with the words #ByeAnita. The campaign launched against her caused her to lose key endorsements.

<sup>197</sup> See Hilary Hanson & Simon McCormack, *Fox News Suggests Black Lives Matter is a 'Murder' Movement, 'Hate Group'*, HUFFINGTON POST (Sept. 1, 2015, 3:49 PM), [http://www.huffingtonpost.com/entry/Black-lives-matter-fox-news-hate-group\\_55e5c102e4b0b7a9633a3b12](http://www.huffingtonpost.com/entry/Black-lives-matter-fox-news-hate-group_55e5c102e4b0b7a9633a3b12) [<https://perma.cc/4V8Q-W55S>].

The methods by which BLM seeks to end police violence differ from the civil rights leaders of the 1960s and 1970s because social media provides a tool that can be used to quickly expose acts of police violence and spread the word to organize the masses. However, the message remains the same: people cannot and should not stand idly by and allow police officers to murder Black men and women with impunity. This call to action can be accomplished by calling out America's systematic racism and charging politicians at the federal, state, and local levels to change laws to hold officers accountable for their actions.<sup>198</sup>

Today's social justice movement is the reaction to this country's failure to provide actual police reform and accountability. The organizations that make up today's movement, like movements of the past, have also provided lawmakers with recommendations that can help remedy the ongoing problem of police violence.<sup>199</sup>

## VII. RECOMMENDATIONS

Until laws are reformed to address the racial components of police violence against Black people and officers are ACTUALLY held accountable for their actions, America will continue this cycle of civilian deaths and civil unrest. The following are recommendations that should be applied at every level: federal, state/local and civilian.

### A. Federal Action

Congress must to take a more active role in effectuating change in policing. One step towards that change would be to increase the funding to the DOJ for Section 14141 so that the law can be aggressively enforced.<sup>200</sup> If police departments believe that this

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<sup>198</sup> For example, the Movement for Black Lives policy platform lays out a number of concrete policy proposals that government officials could enact to strengthen police accountability. MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK FREEDOM, POWER, AND JUSTICE (2016), <https://policy.m4bl.org/wp-content/uploads/2016/07/20160726-m4bl-Vision-Booklet-V3.pdf> [<https://perma.cc/63V9-C6V7>].

<sup>199</sup> Radley Balko, Opinion, *The Black Lives Matter Policy Agenda is Practical, Thoughtful — and Urgent*, WASH. POST (Aug. 25, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/08/25/the-black-lives-matter-policy-agenda-is-practical-thoughtful-and-urgent/?utm\\_term=.b6662d9fba28](https://www.washingtonpost.com/news/the-watch/wp/2015/08/25/the-black-lives-matter-policy-agenda-is-practical-thoughtful-and-urgent/?utm_term=.b6662d9fba28) [<https://perma.cc/53G7-FEF2>].

<sup>200</sup> See Rushin, *supra* note 96, at 3226 ("In 2000, the DOJ requested \$100 million in additional funding to expand the number of police department investigations under § 14141. This increase in funding was supposed to hire an additional sixteen new investigators each year—suggesting that investigations are a costly endeavor. The average investigation 'can take years as investigators wade through piles of internal records and personnel files.'" (footnotes omitted)).

law is an actual and viable threat, they are more likely to curtail officer behavior and change department policy. The DOJ should be more transparent by modifying its process for selecting and investigating police departments.<sup>201</sup> It should also publish “best practices” and target those departments that choose not to follow the recommended policies.<sup>202</sup>

In order to properly protect the constitutional rights of Black people, it is necessary for the federal government to take an active, multi-faceted role in addressing police brutality.<sup>203</sup> Shortly after the Ferguson protests, President Obama formed “The President’s Task Force on 21st Century Policing,” which provided a final report in May 2015.<sup>204</sup> This report could be used by the DOJ as an outline of best practices. The report states that modern policing must focus on six “pillars” to repair community relations: (1) building trust and legitimacy; (2) policy and oversight; (3) technology and social media; (4) community policing and crime reduction; (5) training and education; and (6) officer wellness and safety.<sup>205</sup> The report provides a number of recommendations that police departments should implement and enforce for more effective policing. Similar to the Task Force’s Interim Report, the Final Report “calls for ‘procedurally just behavior’ based on four principles, including treating people with dignity and respect, giving individuals a voice in encounters, remaining neutral and transparent, and conveying trustworthy motives.”<sup>206</sup>

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<sup>201</sup> *Id.* at 3237 (“The DOJ should adopt a more transparent case selection process that incentivizes local law enforcement agencies to reform proactively.”).

<sup>202</sup> *Id.* at 3240 (“One way that that [sic] the DOJ could do this is by creating a national list of best practices each year, and prioritizing suits against departments that fail to implement these recommended policies. This solution would not only require the DOJ to develop a core set of best practices each year, it would also require the DOJ to collect data from all of the nation’s police agencies on whether the department currently employs certain best practices.”).

<sup>203</sup> *See* Newman, *supra* note 26, at 143 (“[F]ederal oversight of individual civil rights violations and of the constitutional violations by entire police departments represents an important mechanism for ensuring constitutional compliance but should not displace efforts to objectively prosecute individual officers. Thus, Department of Justice (“DOJ”) investigations represent only one important solution to the intertwined problems of use of excessive force, implicit and explicit racial bias, and unconstitutional policing.”)

<sup>204</sup> PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/M8UR-SKE7>].

<sup>205</sup> *Id.* at 1-4.

<sup>206</sup> Newman, *supra* note 26, at 153; *see also* PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 204, at 10.

B. *State/Local Action*

State and local governmental officials must push police departments to adjust their policies, particularly because taxpayers bear the brunt of paying victims and their families for police misconduct.<sup>207</sup> These officials should create new policies that would require victim payments to be deducted from police budgets and officer pensions. This may be a radical recommendation, but it seems that the current system of city payouts have not motivated change.<sup>208</sup> City funds should not be used to pay for officers' misconduct; the funds should be used to address issues in our education systems, homelessness, and other social welfare initiatives.<sup>209</sup>

Another recommendation that can be implemented at the local level is enlisting special prosecutors to ensure that cases involving officers are handled without bias.<sup>210</sup> The bond between a local prosecutor and the police department is a close one that cannot be easily severed or neutralized when officers break the law.<sup>211</sup> States must provide special prosecutors so that victims and their families have some type of reassurance, knowing that officers will not receive special treatment.

Police body cameras and dashboard cameras are another essential element for change.<sup>212</sup> The cameras are beneficial for po-

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<sup>207</sup> Patton, *supra* note 85, at 802; Nick Wing, *We Pay a Shocking Amount for Police Misconduct, And Cops Want Us Just to Accept It. We Shouldn't.*, HUFFINGTON POST (May 29, 2015, 7:39 AM), [http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements\\_n\\_7423386.html](http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html) [<https://perma.cc/RG7E-8DU2>] (“But if we continue to do nothing, we are giving tacit approval to a relationship in which taxpayers sometimes end up being victimized twice—both as the direct casualties of police misconduct and the unwilling enablers who must eventually pay for that misconduct.”).

<sup>208</sup> Patton, *supra* note 85, at 771-72 (“[C]ities will likely choose to pay punitive damages because officers may otherwise sue the city for poor representation or conflict of interest. Consequently, police officers have absolutely no economic incentive to stop their violent behavior, since they are fully insulated from the financial effects of a lawsuit. ‘Instead, the taxpayers keep paying large amounts of money and the brutality continues.’”).

<sup>209</sup> Wing, *supra* note 207.

<sup>210</sup> Newman, *supra* note 26, at 157.

<sup>211</sup> *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <https://www.join-campaignzero.org/solutions/#force> [<https://perma.cc/URU7-VPUX>] (“Local prosecutors rely on local police departments to gather the evidence and testimony they need to successfully prosecute criminals. This makes it hard for them to investigate and prosecute the same police officers in cases of police violence. These cases should not rely on the police to investigate themselves and should not be prosecuted by someone who has an incentive to protect the police officers involved.”).

<sup>212</sup> JAY STANLEY, AM. CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 7 (2015), [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf) [<https://perma.cc/DE5N-7NYH>] (“The ACLU supports the use of cop cams for the purpose of police accounta-

lice and civilians as they can exonerate an officer who is potentially accused of wrongdoing and can support a victim's abuse complaint. However, where there is public outcry and accusations of excessive force, these recordings should be released as soon as possible. Citizens should not have to wait for videos to be released a year after an incident takes place, as recently seen in Chicago.<sup>213</sup> The apparent police cover-up situation in the death of Laquan McDonald<sup>214</sup> proves that there is true value in the evidence video recordings provide.

Police Departments should also be forced to make serious efforts to diversify their departments so that they are more reflective of the communities they patrol.<sup>215</sup> Funding should be provided to support these efforts.<sup>216</sup> Though this is not a perfect solution, it

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bility and oversight. It's vital that this technology not become a backdoor for any kind of systematic surveillance or tracking of the public. Since the records will be made, police departments need to be subject to strong rules around how they are used. The use of recordings should be allowed only in internal and external investigations of misconduct, and where the police have reasonable suspicion that a recording contains evidence of a crime.”).

<sup>213</sup> Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/25/us/chicago-officer-charged-in-death-of-black-teenager-official-says.html> [https://perma.cc/V8NT-X4W8] (“For months, the city had refused to release the video. On Thursday, Franklin Valderrama, a Cook County judge, ordered it released. The city initially indicated that it would appeal, but [Mayor] Emanuel then announced that Chicago would release the video, and he issued a statement condemning Officer Van Dyke’s actions and calling for prosecutors to take prompt action. ‘In accordance with the judge’s ruling, the city will release the video by Nov. 25, which we hope will provide prosecutors time to expeditiously bring their investigation to a conclusion so Chicago can begin to heal,’ Mr. Emanuel said last week.”).

<sup>214</sup> Mitch Smith & Richard A. Oppel Jr., *7 Chicago Officers Face Firing Over Laquan McDonald Cover-Up*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/laquan-mcdonald-chicago-police.html> [https://perma.cc/8BPF-FFWC].

<sup>215</sup> Matt Apuzzo & Sarah Cohen, *Police Chiefs, Looking to Diversify Forces, Face Structural Hurdles*, N.Y. TIMES (Nov. 7, 2015), <http://www.nytimes.com/2015/11/08/us/politics/police-chiefs-looking-to-diversify-forces-face-structural-hurdles.html> [https://perma.cc/5G42-WA8A] (“Though the history of discrimination and segregation looms large over American policing, many police chiefs are eager to hire minorities yet face structural hurdles that make it hard to diversify their departments. Those issues vary by state and city, making any single solution particularly elusive. In many cities, well-intentioned policies that were not meant to discriminate have become obstacles to hiring a diverse police force. In Inkster, Chief Riley found, a significant problem was something that seemed mundane: how training is paid for. Other cities face rigid hiring processes that were intended to prevent elected leaders from handing out police jobs as patronage, but that now make it harder to shape the force to mirror the population.”).

<sup>216</sup> *Id.* (“In his first weeks in Inkster, Chief Riley met a young Black man who wanted to become a police officer. But the man said he did not have the \$6,000 or more it would cost to attend a police academy and be certified.

The chief was taken aback. Traditionally, cities pay for training. Inkster does not.

may lead to some positive change. Campaign Zero also provides a comprehensive list of solutions that can bring about more effective policing.<sup>217</sup> Their proposed wide-ranging solutions include the use of body cameras and demilitarization of the police.<sup>218</sup> Though officers in New York and presumably throughout the country are resistant to reform, this should not deter policymakers from enacting laws that protect Black constituents from the nonstop harassment and violence they confront on a daily basis.<sup>219</sup>

### C. *Civilian Action*

Civilians should take several steps to push for change. For example, consider the action taken by the civilian women that founded Black Lives Matter. First, citizens can appeal to all local politicians and demand more effective community oversight of their local police departments. The true power is in one's ability to hold elected officials accountable. Citizens should also continue to record and share incidents of police violence whenever possible. This will empower victims to come forward as well as cause embarrassment to those police departments that do not take swift action to punish corrupt officers. Lastly, in several states the ACLU has a downloadable application called Mobile Justice, which allows individuals to record their interaction with police.<sup>220</sup> The videos are transmitted directly to the ACLU office located in that particular

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Like many Michigan cities, it prefers to hire only officers who are already certified. Hiring uncertified officers means paying not only the training expenses but also their salaries and benefits while they are at the academy.”).

<sup>217</sup> *Solutions*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions/#solutionsoverview> [<https://perma.cc/T3GB-VPMN>].

<sup>218</sup> *Id.*

<sup>219</sup> Alex S. Vitale, Opinion, *PBA Continues Misguided Resistance to Reform*, GOTHAM GAZETTE (Aug. 31, 2015), <http://www.gothamgazette.com/index.php/opinion/5864-pba-continues-misguided-resistance-to-reform-lynch-vitale> [<https://perma.cc/T8K4-PLVM>] (“By attempting to evade transparency and accountability, [Pat Lynch] is signaling to his members and the public that police have something to hide about the way they interact with the public. Further, his suggestion that accountability hurts crime fighting is based on the faulty belief that the only way to reduce crime is through aggressive, disrespectful, and unconstitutional policing. This is a deeply disturbing view of policing and should be of great concern to elected leaders and the public.”).

<sup>220</sup> *ACLU-NJ Launches Mobile Justice Smartphone App*, AM. C.L. UNION N.J. (Nov. 13, 2015), <https://www.aclu-nj.org/news/2015/11/13/aclu-nj-launches-mobile-justice-smartphone-app> [<https://perma.cc/FU4W-FN33>] (“As part of a national movement to hold police departments accountable, the ACLU-NJ joins 11 other ACLU affiliates today in launching state-specific versions of Mobile Justice, an app for Android . . . and Apple . . . phones that allows users to record interactions with police and to send them immediately to the ACLU to evaluate for civil rights and civil liberties violations.”).

state, so if an officer gains access to the phone and the recording mysteriously disappears, the video remains safe.<sup>221</sup> Unfortunately, this application is not available in all states.<sup>222</sup>

#### D. Data Collection

Data collection around police involved shootings can be an important factor in determining whether there is a pattern or practice of abuse in a particular police force. Although there have been numerous police shootings that have taken place throughout the years, until recently there was no federal database used to collect the data.<sup>223</sup> Previously, the government relied on data it voluntarily received from local police departments, which seemed to deem many of their own shootings as “justified.”<sup>224</sup> Databases created by The Guardian prompted the FBI into action and it began collecting this type of information.<sup>225</sup> The Guardian’s “The Counted” disaggregates police shooting data across a number of parameters, including the victim’s race, age, state/city, and whether the person was armed (if armed what type of weapon) or unarmed.<sup>226</sup> Similar to The National Police Violence Map,<sup>227</sup> it provides information on each victim as well as their picture.<sup>228</sup> The Guardian has also pro-

<sup>221</sup> *Id.* (describing additional features of the app such as the ability to operate the app through a locked screen and an “witness” option for the recorder to share their location with other users of the app while recording).

<sup>222</sup> *Id.* (noting that, including NJ, twelve states were participating in the launch of Mobile Justice).

<sup>223</sup> Jon Swaine & Oliver Laughland, *Number of People Killed by U.S. Police in 2015 at 1,000 After Oakland Shooting*, GUARDIAN (Nov. 16, 2015, 11:22 AM), <http://www.theguardian.com/us-news/2015/nov/16/the-counted-killed-by-police-1000> [<https://perma.cc/M6Q8-XMZJ>] (describing The Guardian’s new interactive website called “The Counted”, designed as a means of sharing data about 2015 police-involved shootings throughout the U.S.). The information collected on The Counted may have been used to assist President Obama’s Task Force on 21st Century Policing (created after last year’s unrest in Ferguson). *Id.* (“Brittany Packnett, a member of Barack Obama’s taskforce on 21st century policing and a founder of the Campaign Zero movement that lobbies to curb the levels of police violence in America, said the milestone should be met with ‘sadness, but not deep shock’. [sic] ‘Black folks like me have known for a long time that the police do not always represent safety for us and that an encounter could be deadly,’ said Packnett. ‘But having these statistics that add to our personal stories should continue to move everyone towards wanting to having a part in correcting this.’”).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *The Counted*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<https://perma.cc/7M7Q-66NS>].

<sup>227</sup> MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> [<https://perma.cc/JUK6-6X37>] (last updated Jan. 1, 2017).

<sup>228</sup> *The Counted*, *supra* note 226.

vided data on police violence in the U.S. compared to other countries.<sup>229</sup> According to the site, the number of deaths is over 1,100; 216 of those victims were unarmed yet less than 5% of deaths have led/will lead to the criminal prosecution of police officer(s).<sup>230</sup> Collection of this data should continue so lawmakers can see that police violence is not limited to isolated incidents but rather part of a widespread problem.<sup>231</sup>

### VIII. CONCLUSION

The people are the ones to force the government to change. Even after centuries of oppression and decades of resistance and revolt, Blacks remain continuously fearful that any interaction with police officers could potentially result in their death. Blacks should enjoy the ability to move freely without feeling that officers are looking to destroy their Black bodies. Police officers throughout America should not be granted the license to act as if they are at war with this country's Black population.

The Black Lives Matter movement and other groups, through social media and otherwise, have employed mechanisms by which we can hold our government accountable for its unwillingness to address the systemic and racially charged violence that police officers perpetrate against the Black community. Only through sustained collective action, continued public pressure, direct engagement with legislators and other public officials, and reckoning with the truth of the data around police misconduct will people be able to bring about the cultural and institutional changes needed to end police brutality once and for all. As writer Ta-Nehisi Coates explains,

You may have heard the talk of diversity, sensitivity training, and body cameras. These are all fine and applicable, but they under-

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<sup>229</sup> See Jamiles Lartey, *By the Numbers: US Police Kill More in Days Than Other Countries Do in Years*, GUARDIAN (June 9, 2015, 6:00 AM), <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries> [https://perma.cc/2L27-9ZFU].

<sup>230</sup> Swaine et al., *supra* note 11 (“Of the 1,134 people killed, about one in five were unarmed . . . .”); *id.* (“Law enforcement officers were charged with crimes in relation to 18 of 2015’s deadly incidents – 10 shootings, four deadly vehicle crashes and four deaths in custody.”).

<sup>231</sup> Sendhil Mullainathan, *Police Killings of Blacks: Here is What the Data Say*, N.Y. TIMES: THE UPSHOT (Oct. 16, 2015), <https://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html> [https://perma.cc/548T-SZHP]; Eric Bradner, *Factcheck: Grim Statistics on Race and Police Killings*, CNN (Dec. 3, 2014, 8:38 PM), <http://edition.cnn.com/2014/12/02/politics/kristoff-oreilly-police-shooting-numbers-fact-check/index.html> [https://perma.cc/R9TP-MSGJ].

state the task and allow the citizens of this country to pretend that there is real distance between their own attitudes and those of the ones appointed to protect them. The truth is that the police reflect America in all of its will and fear, and whatever we might make of this country's criminal justice policy, it cannot be said that it was imposed by a repressive minority.<sup>232</sup>

Reform cannot be accomplished by merely training officers in diversity or equipping them with new technology; rather, it must be achieved by a number of means which include addressing the racist and oppressive ideals that are rooted in the American criminal justice system. Racism can no longer be ignored: “[P]olice brutality and its connection to racism has [sic] reached the national consciousness.”<sup>233</sup> This statement, though it was made decades ago, is uniquely relevant today because society is finally being forced to face the racial undertones that clearly are linked to police violence; social media has brought this issue to the forefront and made it part of an ongoing conversation—a national dialogue. However, discussing its existence is not enough – action is the only way to bring about change. The fight to protect Black lives can be accomplished through pressure points in the law and social activism. The latter can force the hand of the former to change.

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<sup>232</sup> TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 78-79 (2015).

<sup>233</sup> RACE, RACISM & AMERICAN LAW, *supra* note 49, at 477.



# A SILENT STRUGGLE: CONSTITUTIONAL VIOLATIONS AGAINST THE HEARING IMPAIRED IN NEW YORK STATE PRISONS

*Farina Mendelson*†

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## I. INTRODUCTION

Imagine sitting through a prison disciplinary proceeding for starting a small fire within the prison and disobeying a direct order a few days later. Imagine sitting through the proceeding and not being able to understand the proceeding around you because you are deaf. Not only can you not hear the officer during your disciplinary hearing, but you were not given a qualified sign language interpreter.

Now, imagine being sentenced to six months in the solitary housing unit as a result of that proceeding. You are forced to sit in an eight-by-ten-foot cell for twenty-three hours of the day, isolated from any human contact. You are unable to communicate with the prison therapist because they do not know how to sign. Qualified sign language interpreters occasionally come to the facility, but these visits are few and far between. As a result, you must communi-

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† J.D. Candidate, 2017, University at Buffalo School of Law. This piece is dedicated to each and every individual in prison: you do not leave your constitutional rights when you enter the prison doors. I am ever grateful to Maria Pagano and the Prisoners' Legal Services of New York family for the wonderful work they do. I am also thankful to Professor Tara Melish for the guidance and motivation in writing this piece. I'd like to also thank Gary Muldoon for his edits and endless help.

cate with staff by writing your needs on a sheet of paper and exchanging notes.

This reflects the experiences of many prisoners incarcerated in New York because State Department of Corrections and Community Supervision (“DOCCS”) regulations omit the necessary safeguards needed to protect deaf individuals incarcerated in New York State prisons. Specifically, the regulations fail to comply with the prison’s constitutional obligations to provide inmates with due process protections before further restricting their liberty, thereby contributing to inhumane conditions which otherwise constitute cruel and unusual punishment.

This article addresses the human rights violations against deaf inmates in New York State prisons and proposes policies and procedures in hopes of better protecting inmates who are deaf and hard of hearing.<sup>1</sup> Part I discusses deaf inmates in the New York prison system, the internal disciplinary procedures of DOCCS, and the rights of deaf inmates. When an inmate is found guilty in a disciplinary hearing, the hearing officer issues a disposition that typically parallels the criminal procedure of state and federal court. One such punishment is placement in the Solitary Housing Unit (“SHU”). In fact, deaf individuals are some of the most likely to be placed in solitary confinement<sup>2</sup> and they are severely disadvantaged in disciplinary procedures because of their hearing impairment.<sup>3</sup> Human rights advocates have spoken out against solitary confinement as inhumane and have suggested that such punishment is far worse for a deaf inmate.<sup>4</sup>

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<sup>1</sup> As a clerk at Prisoners’ Legal Services, I often found myself researching this issue with an inability to cite to a particular source addressing it. Given the large number of people affected by the possible constitutional violations, there is a great need to document and expose the harm members of our society face, concealed in the shadows of our opaque prison disciplinary system.

<sup>2</sup> “According to the advocacy group HEARD, which maintains the only known national database of incarcerated individuals who are deaf, deaf individuals are among those most likely to be held in solitary, often as a ‘substitute for the provision of accommodations for and protection of deaf and disabled prisoners.’” REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS* 11 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf> [HTTPS://PERMA.CC/PG5C-KM3F].

<sup>3</sup> See JAMELIA MORGAN, AM. CIVIL LIBERTIES UNION, *CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES* 35-36 (2017), <https://www.aclu.org/files/caged-in/010916-ACLU-SolitaryDisabilityReport-Accessible.pdf> [https://perma.cc/WYA4-VLGD].

<sup>4</sup> HEARD: HELPING EDUCATE TO ADVANCE THE RIGHTS OF THE DEAF, #DEAFIN-PRISON CAMPAIGN FACT SHEET 2 (2014) [hereinafter HEARD], <http://www.behearddc.org/images/pdf/deafinprison%20fact%20sheet%20.pdf> [https://perma.cc/WA9E-

However, before reaching a disciplinary proceeding or the punishment phase, an inmate is first accused of violating a prison rule.<sup>5</sup> Notably, a DOCCS directive provides that, “[n]o deaf or hard of hearing inmate shall be disciplined for failing to obey an [sic] verbal order or rule which has not been communicated alternatively in a manner which can be understood by the deaf or hard of hearing inmate.”<sup>6</sup> There is a history of the deaf being treated unjustly in prison, for example deaf inmates are often punished for violating noise regulations, despite a clear rule mandating accommodations: this will continue to happen if rules are not strengthened.<sup>7</sup>

In one case, a deaf inmate was charged for violating a prison noise regulation because he was calling out a guard at a level he could not physically gauge.<sup>8</sup> He wrote, “I didn’t making [sic] loud noise, I just called the porter for something. I’m ‘deaf mute’ I cannot hear but my voice is very loud noises [sic].”<sup>9</sup> Prisoners’ Legal Services regularly receives correspondence from inmates requesting help with disciplinary proceedings where similar violations of a direct order occur despite evidence on the record of the inmate not hearing the order in the first place.<sup>10</sup> DOCCS needs to take

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Y5SK]; MORGAN, *supra* note 3, at 36. Research shows that solitary confinement can have a severe impact, especially on those with disabilities. VALLAS, *supra* note 2, at 3. In one “tragic but all-too common case” that demonstrates the mental health effects of prolonged solitary confinement, Kalief Browder died by suicide after nearly two years in solitary confinement in Rikers Island on charges that he had stolen a backpack. *Id.* Those charges were later dismissed. *Id.* at 13.

<sup>5</sup> N.Y. DEP’T OF CORR. SERVS., STANDARDS OF INMATE BEHAVIOR: ALL INSTITUTIONS 3 (2006), [http://www.legal-aid.org/media/121933/standards-of-inmate-behavior%20\(2\).pdf](http://www.legal-aid.org/media/121933/standards-of-inmate-behavior%20(2).pdf) [<https://perma.cc/8AV7-STGK>].

<sup>6</sup> N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 2612, INMATES WITH SENSORIAL DISABILITIES 10 (2015) [hereinafter DOCCS 2612], [www.doocs.ny.gov/Directives/2612.pdf](http://www.doocs.ny.gov/Directives/2612.pdf) [<https://perma.cc/6YCS-GF5B>].

<sup>7</sup> Armen H. Merjian, *Lonesome Agony: Heard v. the District of Columbia and the Struggle Against Disability Discrimination in the D.C. Penal System*, 47 AM. CRIM. L. REV. 1491, 1492 (2010); Bonnie P. Tucker, *Deaf Prison Inmates: Time to Be Heard*, 22 LOY. L.A. L. REV. 1, 10 n.34 (1988) (discussing the experience of a hard of hearing prisoner in Arizona who, in 1987, was placed in solitary confinement for failing to obey an order which he did not hear); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1032-33 (S.D.N.Y. 1995) (finding that New York Department of Correctional Services violated Due Process and the Eighth Amendment when failing to accommodate inmates with deafness and hearing impairment).

<sup>8</sup> *Clarkson*, 898 F. Supp. at 1050.

<sup>9</sup> *Id.*

<sup>10</sup> Based on experience of the author as clerk at Prisoners’ Legal Services of New York. Other advocacy organizations also frequently see deaf inmates punished on these grounds. *See, e.g.*, HEARD, *supra* note 4, at 2-3, (“Deaf prisoners are frequently punished for failure to obey commands or follow rules that were communicated to them in inaccessible methods within audio-centric prison confines.”).

corrective action for all of the individuals currently deprived of their constitutional rights and this should include training and consequences for the correctional facility that fails to provide sufficient services. To remedy the harm deaf inmates could potentially face as a result of inadequate translation services, best practices urge capturing a deaf individual's statements through video recording.<sup>11</sup>

This article will argue that the safeguards in place to protect deaf inmates before solitary confinement is imposed are inadequate, leading to deaf inmates being unfairly placed in solitary confinement. Part II argues that current DOCCS regulations are insufficient to prevent harm to deaf prisoners and violate the Eighth and Fourteenth Amendments of the Constitution as applied to prisoners housed in New York State prisons. Part III proposes two sets of reforms using a rights-based framework focusing on the Due Process Clause and the Eighth Amendment's prohibition on Cruel and Unusual Punishment. The first set targets aspects of the prison disciplinary process that can be altered to result in a less disparity between hearing-disabled and hearing-enabled inmates in punishments. The second set calls for a ban on housing deaf inmates in the solitary housing unit. Both are necessary to ensure the constitutional rights of hearing-disabled individuals while serving in New York State prisons.

## II. DEAF PRISONERS IN THE UNITED STATES

In 2014, the United States held an estimated 1.5 million prisoners in state and federal custody.<sup>12</sup> An estimated 35 to 40% of inmates suffer from some degree of hearing loss.<sup>13</sup> That compares to a mere 13% of the U.S. population as a whole that suffers from hearing loss.<sup>14</sup> This population is part of a class of people with disa-

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<sup>11</sup> KELLIE STEWART ET AL., NAT'L CONSORTIUM OF INTERPRETER EDUC. CTRS., BEST PRACTICES: AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN COURT AND LEGAL SETTINGS 22 (2009), [http://www.interpretereducation.org/wp-content/uploads/2011/06/LegalBestPractices\\_NCIEC2009.pdf](http://www.interpretereducation.org/wp-content/uploads/2011/06/LegalBestPractices_NCIEC2009.pdf) [<https://perma.cc/N5NP-GHLL>] ("Using technology to visually record an ASL/English Interpretation is the only way to preserve an accurate video record of the interpretation a deaf person received in the course of making a statement. Recording the interpretation is essential for preserving any evidence or future need for analysis of the interpretation that might arise during a court or legal proceeding.")

<sup>12</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014: SUMMARY (2015), [https://www.bjs.gov/content/pub/pdf/p14\\_Summary.pdf](https://www.bjs.gov/content/pub/pdf/p14_Summary.pdf) [<https://perma.cc/BVX2-N9T5>].

<sup>13</sup> Jessie L. Krienert et al., *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 SW. J. CRIM. JUST. 13, 15 (2003); MORGAN, *supra* note 3, at 32.

<sup>14</sup> *Deaf Population of the U.S.*, GALLAUDET U. LIBR., <http://libguides.gallaudet.edu/>

bilities who are disproportionately incarcerated and likely disproportionately placed in solitary confinement.<sup>15</sup>

Indeed, deaf and hard of hearing inmates were more likely to be convicted of violent offenses than the average inmate in the general population.<sup>16</sup> In a Texas study, 64.6% of hearing-impaired inmates were convicted of violent offenses as opposed to 49.7% of the overall population.<sup>17</sup> This may be due, in part, to the likely association between deafness and other socio-economic factors linked with criminality, such as “educational underachievement, low social status, social isolation, and unemployment.”<sup>18</sup>

Once a deaf individual is in the prison system, they may experience disciplinary segregation in the SHU. Disciplinary segregation separates an inmate from the population and is used by DOCCS to enforce standards of behavior within the facility.<sup>19</sup> SHU security facilities were established to house the most “invidious and dangerous criminals in the nation’s prisons who pose such a threat to prison security that they can only be controlled by isolation.”<sup>20</sup> DOCCS maintains statistics on the number of Tier III<sup>21</sup> hearings resulting in a SHU sanction: from 2007 through 2011, about 64%

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content.php?pid=119476&sid=1029190 [https://perma.cc/8THM-LYXW] (last updated Feb. 2014).

<sup>15</sup> MORGAN, *supra* note 3, at 40-44.

<sup>16</sup> Katrina R. Miller et al., *Violent Offenders in a Deaf Prison Population*, 10 J. DEAF STUD. & DEAF EDUC. 417, 417, 419 (2005).

<sup>17</sup> *Id.* at 419.

<sup>18</sup> Bruce Harry & Park Elliott Dietz, *Offenders in a Silent World: Hearing Impairment and Deafness in Relation to Criminality, Incompetence, and Insanity*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 85, 94 (1985), <http://www.jaapl.org/content/13/1/85.full.pdf> [https://perma.cc/MHQ6-JP22]. Although many studies have attempted to link deafness with an increased propensity for violence, they have been inconclusive. See Harry & Dietz, *supra*, at 93-94.

<sup>19</sup> N.Y. COMP. CODES R. & REGS. tit. 7 §§ 250.2, 251-1.7, 301.2 (1999). An inmate may be segregated from the rest of the prison population in either disciplinary segregation, which is what this article will discuss, or administrative segregation. *Id.* §§ 301.2 (disciplinary admission), 301.4 (administrative admission); Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U. PA. L. REV. 1159, 1161 (2015) (describing the difference between disciplinary and administrative segregation).

<sup>20</sup> Maximilienne Bishop, Note, *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461, 461-62 (2005) (using the term “Supermaxes” synonymously with solitary confinement).

<sup>21</sup> Inter-prison disciplinary hearings are separated into three tiers by the degree of severity of punishment. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3 (1998). Tier I hearings impose the least intense punishment for offenses minor in nature and Tier III hearings permit punishments intended for the most serious offenses. N.Y. DEP’T OF CORR. SERVS., *supra* note 5, at 3.

of Tier III hearings resulted in SHU time.<sup>22</sup> That translates to the solitary confinement of more than 68,000 individuals between 2007 and 2011 for ticketed violations that include not moving in the correct order, any sort of disorderly conduct, or arguing with a direct order.<sup>23</sup>

Prisons already contain a vulnerable subclass of the population in relation to race, ethnicity, and social class.<sup>24</sup> A physical disability adds another layer of vulnerability.<sup>25</sup> Aware of this reality in the criminal setting, judges often consider offender vulnerability as a mitigating factor.<sup>26</sup> At times, mitigating factors permit judges to commit certain vulnerable individuals to mental health treatment instead of imprisonment.<sup>27</sup>

In the prison disciplinary system, once an individual is admitted into a DOCCS facility, the Department is responsible for identifying an inmate's hearing impairment.<sup>28</sup> An individual with a sensorial disability is defined as one that has a "hearing impairment that substantially limits one or more of the person's major life activities . . . ."<sup>29</sup>

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<sup>22</sup> NYS DEP'T OF CORR. SERVS., INMATE DISCIPLINARY SYSTEM: COUNT OF TIER 3 HEARINGS (2012), <http://www.boxedinny.org/wp-content/uploads/2012/09/Tier-III-Hearings-Resulting-in-SHU-Sentences-by-Categories-of-Rule-Infractions-2007-2011.pdf> [<https://perma.cc/48D8-EGVC>] (showing 68,063 of 105,555 hearings result in a SHU sanction in a report provided by DOCCS upon FOIL request by N.Y. Civil Liberties Union); *see also* SCARLET KIM ET AL., N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 21 (2012), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_boxedin\\_FINAL.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf) [<https://perma.cc/SUP8-TEWY>]; GARY MULDOON, HANDLING A CRIMINAL CASE IN NEW YORK § 23:107 (rev. ed. 2016).

<sup>23</sup> NYS DEP'T OF CORR. SERVS., *supra* note 22; N.Y. DEP'T OF CORR. SERVS., *supra* note 5, at 9, 14, 17 (2006). There are also Tier I and Tier II hearings for less serious infractions; however, these are not discussed in this article. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3 (2017); N.Y. DEP'T OF CORR. SERVS., *supra* note 5, at 3.

<sup>24</sup> Krienert et al., *supra* note 13, at 13.

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (holding that an individualized consideration of mitigating factors is required under the 8th and 14th Amendments during sentencing in death penalty cases).

<sup>27</sup> E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 627 (2014).

<sup>28</sup> DOCCS 2612, *supra* note 6, at 7-8 ("All inmates newly received into the custody of the Department . . . who wear hearing aids, or have a history of hearing loss or observable behavior indicating hearing loss . . . will be immediately transferred . . . for classification and assessment. . . . [N]otice of the rights of the inmates under the Americans with Disabilities Act, will be reviewed with deaf, hard of hearing, blind, and severely visually impaired inmates by appropriate staff during orientation at any new facility. . . . Upon completion of the reception program, inmates with hearing or vision disabilities who require adaptive equipment other than hearing aids or eye glasses will enter an evaluation period for assessment . . . ." (emphasis omitted)).

<sup>29</sup> *Id.* at 1.

Title II of the Americans with Disabilities Act prohibits states from discriminating against individuals with disabilities.<sup>30</sup> To comply with state and federal rules, DOCCS enacted Directive 2612.<sup>31</sup> Directive 2612 grants a deaf or hard of hearing inmate sign language interpreter services “whenever necessary.”<sup>32</sup> However, any additional requests must be initiated by the individual either verbally or with the submission of a reasonable accommodations form.<sup>33</sup>

The particular difficulty in dealing with deaf inmates is both their varying communication needs and the varying skills a sign language interpreter may possess. These factors are consequential because American Sign Language (“ASL”) is a discrete language entirely separate from English.<sup>34</sup> Generally, three sign languages are used in the United States: 75% of prelingually deaf individuals use ASL; “others employ some form of Signed English; still others use Pidgin Signed English (‘PSE’). A substantial minority of deaf individuals are exclusively oral.”<sup>35</sup> Certified interpreters may be skilled in ASL, “others in PSE or some form of Signed English, and others in oral interpretation.”<sup>36</sup> A sign language interpreter must use the “context and meaning of the spoken word” during the conversation to understand what is said.<sup>37</sup> In a court proceeding, the interpreter may need to have additional training as a legal interpreter to be qualified,<sup>38</sup> and in addition, a qualified interpreter may not simply be a family member or other non-certified individual because they may lack legal training.<sup>39</sup>

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<sup>30</sup> *Id.*; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12131-12213 (2009)).

<sup>31</sup> DOCCS 2612, *supra* note 6, at 1.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 175 (1994).

<sup>35</sup> *Id.* at 167 (footnotes omitted).

<sup>36</sup> *Id.* at 168.

<sup>37</sup> *Id.* at 179 n.111.

<sup>38</sup> *Exam Information*, N.Y. STATE UNIFIED CT. SYS., <http://www.nycourts.gov/COURTINTERPRETER/ExamInformation.shtml> [<https://perma.cc/4R2J-ADE4>] (last updated Apr. 5, 2017) (“Although the Unified Court System does not test for proficiency in American Sign Language, the Chief Administrative Judge has established the Registry of Interpreters for the Deaf, Inc (RID) as a recognized credentialing authority.”).

<sup>39</sup> DOCCS 2612, *supra* note 6, at 2 (requiring that sign language interpreters be able to interpret “effectively, accurately, and impartially”); N.Y. JUD. LAW § 390 (McKinney 2015); N.Y. STATE UNIFIED COURT SYS., COURT INTERPRETING IN NEW YORK A PLAN OF ACTION: MOVING FORWARD 4 (2011), <https://www.nycourts.gov/publications/pdfs/ActionPlanCourtInterpretingUpdate-2011.pdf> [<https://perma.cc/4Q26-FSS>]; see also Randall T. Shepard, *Access to Justice for People Who Do Not Speak English*, 40

Lastly, a common misconception is that an inmate who possesses a hearing aid is less worthy of accommodation.<sup>40</sup> Hearing aids do not solve a deaf inmate's issue: they merely amplify, not clarify.<sup>41</sup> A hard-of-hearing inmate is not only susceptible to miscommunication with officers but also among other inmates as well. A deaf person cannot hear "the chatter among other inmates" and cannot be understood when crying out for help during an attack, or even a rape, because their words come out jumbled.<sup>42</sup> Thus, particular care must be taken to examine the role that vulnerability contributes not only to disproportionality in SHU sentencing, but also to harm in its totality.

### III. OVERCOMING CONSTITUTIONAL HURDLES

The current regulations that DOCCS has in place to comply with state and federal law are insufficient as they do not adequately provide deaf inmates with: (1) due process of the law and (2) protection from cruel and unusual punishment. This section argues that the Due Process Clause is violated when qualified sign language interpreters are not provided at prison disciplinary hearings and when those hearings are not videotaped. Oftentimes disciplinary hearings result in deaf inmates being sentenced to time in the SHU. This punishment, for a deaf inmate in particular, amounts to cruel and unusual punishment. The following section will show that the conditions of solitary confinement are more harmful for deaf individuals.

#### A. *Right to Due Process in Prison Disciplinary Hearings*

The failure of DOCCS to ensure a qualified sign language interpreter in prison disciplinary hearings—which may result in solitary confinement time—violates due process of the law. An

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IND. L. REV 643, 653 (2007) (describing barriers and responses to the need for interpreters based upon a survey of Indiana judges).

<sup>40</sup> See, e.g., Complaint for Declaratory Injunctive Relief at 17, Disability Rights Fla., Inc. v. Jones, 4:16-cv-00047-RH-CAS (N.D. Fla. Jan. 26, 2016) (describing plaintiff's difficulties obtaining a hearing aid while incarcerated). "The FDOC also operates under the false stereotype that once a prisoner is given a hearing aid, his or her hearing is restored to perfect levels . . ." *Id.* at 6.

<sup>41</sup> See David H. Kirkwood, *FDA Proposes Guidance to Clarify Differences Between Hearing Aids and PSAPs*, HEARING HEALTH & TECH. MATTERS (Nov. 13, 2013), <http://hearinghealthmatters.org/hearingnewswatch/2013/fda-proposes-guidance-clarify-differences-hearing-aids-psaps/> [<https://perma.cc/6867-Y3UB>].

<sup>42</sup> James Ridgeway, *The Secret World of Deaf Prisoners*, MOTHER JONES (Oct. 2, 2009, 1:59 PM), <http://www.motherjones.com/mojo/2009/10/secret-world-deaf-prisoners-0> [<https://perma.cc/TDZ8-88LD>].

individual is not stripped of all constitutional rights simply because he is incarcerated, and the right to due process is not an exception: certain standards must continue to be afforded. Specifically, in 1974, the United States Supreme Court in *Wolff v. McDonnell* held that, in prison disciplinary proceedings, due process requires that a written notice of the charges be given to the inmate, “that there must be a ‘written statement by the factfinders as to the evidence relied on and reasons’ for the disciplinary action,” and “that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.”<sup>43</sup>

When an inmate is deprived of life, liberty, or property, they must still be afforded the due process of law.<sup>44</sup> The *Wolff* Court held that confinement in a solitary housing unit threatens a liberty interest protected by the Due Process Clause.<sup>45</sup> In 1995, in *Sandin v. Conner*, the Supreme Court narrowed the holding of *Wolff*.<sup>46</sup> The *Sandin* Court stated that, although an individual may have liberty interests,

these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes *atypical* and *significant* hardship on the inmate in relation to the ordinary incidents of prison life.<sup>47</sup>

This article proposes that the proper application of the Due Process Clause for deaf inmates requires that two procedures be afforded to them as a matter of right in prison disciplinary proceedings: (1) qualified sign language interpreters and (2) videotaping of proceedings to ensure a record for appeal. To determine whether a particular procedure is constitutionally required under the Due Process Clause, a two-step inquiry is pur-

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<sup>43</sup> *Wolff v. McDonnell*, 418 U.S. 539, 564, 566 (1974); *see also* 83 N.Y. JUR. *Penal and Correctional Institutions* § 151 (2d ed. 2017) (“[H]owever, due process does not require confrontation and cross-examination procedures and does not require that the inmates have the right to counsel.”).

<sup>44</sup> *Wolff*, 418 U.S. at 556 (citing *Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Screws v. United States*, 325 U.S. 91 (1945)).

<sup>45</sup> *Id.* at 556-58 (holding that lost good-time credit with a guilty verdict, which would otherwise merit an early release, raises the requirements of procedural due process).

<sup>46</sup> *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

<sup>47</sup> *Id.* at 484 (emphasis added) (citations omitted).

sued.<sup>48</sup> Courts first determine whether a life, liberty, or property interest is at stake.<sup>49</sup> If so, courts apply a three-part test to determine what procedures are required to protect that interest. Application of this inquiry to inmate disciplinary hearings demonstrates that additional proceedings are necessary to protect the core constitutional rights of inmates.<sup>50</sup>

As in *Sandin*, courts first determine whether there is a life, liberty, or property interest at stake.<sup>51</sup> In the context of deaf inmates in disciplinary proceedings, the disciplinary procedure must subject those individuals to “atypical and significant hardship” on the inmate in “relation to the ordinary incidents of prison life” in order for there to be a protected interest at stake.<sup>52</sup> For example, the Second Circuit looks to the specific conditions and circumstances of the punishment such as: whether there is regular review of the punishment imposed on each inmate, whether it will ultimately have an impact on that inmate to be granted parole, the length of the sentence, and a comparison of the conditions in segregation with those in the prison’s general population.<sup>53</sup> In other words, the “touchstone of the inquiry into the existence of a protected, state-created liberty interest” is not whether the restrictive condition is a violation created by a state statute, but whether the conditions are different from “the ordinary incidents of prison life.”<sup>54</sup>

Thus, although *Sandin* restricted the ability of an inmate to implicate a liberty interest by requiring a restricted comparison to the ordinary incidents of prison life, it did not ban such claims altogether.<sup>55</sup> *Sandin* simply requires consideration of the length of confinement and the implications thereof.<sup>56</sup> Where a prolonged amount of time with no harm may not be found to implicate a

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<sup>48</sup> See, e.g., *Brown v. Plaut*, 131 F.3d 163, 169-72 (D.C. Cir. 1997).

<sup>49</sup> See, e.g., *Sandin*, 515 U.S. at 477-78.

<sup>50</sup> *Brown*, 131 F.3d at 169-72.

<sup>51</sup> See *Sandin*, 515 U.S. at 477-78; see also *Brown*, 131 F.3d at 169.

<sup>52</sup> *Sandin*, 515 U.S. at 484.

<sup>53</sup> See, e.g., *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) (holding that regulations permitting lengthy administrative confinement compel the conclusion that extended disciplinary confinement is necessarily compatible with due process, simply because that was the point of comparison in the *Sandin* court).

<sup>54</sup> *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (internal quotations and citations omitted) (discussing conditions at Ohio State Penitentiary, which houses up to 504 persons in single-inmate cells).

<sup>55</sup> See *Sandin*, 515 U.S. 472; *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997).

<sup>56</sup> *Sandin*, 515 U.S. at 476, 486 (discussing the length of solitary confinement and the expunging of the prisoner’s disciplinary record as a factor to assess in determining whether treatment was atypical).

liberty interest,<sup>57</sup> one week in intensified conditions may arguably create a liberty interest.

In the context of solitary confinement of deaf and hard-of-hearing prisoners, such atypical and significant hardship is satisfied. “Confining someone in a segregation cell is not a minor punishment. Equally important, an inmate’s prison record may have a great effect on the future punishment he will receive and may even affect his chances for parole.”<sup>58</sup> Inmates placed in solitary housing face extreme isolation, deprived of environmental and “sensory stimuli and of almost all human contact.”<sup>59</sup> However, for deaf inmates in particular, the threat of solitary confinement does implicate a liberty interest, requiring the protection of the Due Process Clause as outlined by *Sandin*.

Once a protected right has been established, a three-part test is required to determine *what* procedures are required.<sup>60</sup> Under *Mathews v. Eldridge*, the following are considered: (1) the inmate’s private interest affected by the state; (2) the risk of erroneous deprivation through the current procedure employed by the state; and (3) the state’s interest.<sup>61</sup>

Under the first factor, the liberty deprived as a result of disciplinary proceedings must be considered in comparison with the baseline restriction of confinement. It must be evaluated “within the context of the prison system and its attendant curtailment of liberties,”<sup>62</sup> as opposed with regard to an individual’s circumstances free from the confines of a prison.

Next, under the risk of erroneous deprivation factor, efforts must be made to reduce the possibility of erroneous deprivation.<sup>63</sup> Such efforts may include offering the inmate to submit objections prior to the final level of review and multiple review stages before a ruling can be made.<sup>64</sup> By providing multiple levels of review as safeguards, with the power to overturn at each level, and a subsequent review within a period of placement in segregated confinement,

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<sup>57</sup> See *id.* at 486; see also *Colon v. Howard*, 215 F.3d 227, 230-34 (2d Cir. 2000) (discussing the merits of a bright-line rule at 180 days of solitary confinement).

<sup>58</sup> *Wilkinson v. Skinner*, 34 N.Y.2d 53, 58 (1974) (citing *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970)).

<sup>59</sup> *Austin*, 545 U.S. at 214.

<sup>60</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>61</sup> *Id.*; see also Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 888-89 (2000).

<sup>62</sup> *Austin*, 545 U.S. at 225.

<sup>63</sup> *Id.* at 225-26.

<sup>64</sup> *Id.* at 226.

the risk of erroneous deprivation is reduced.<sup>65</sup>

Finally, under the State interest factor, courts weigh the state's obligation to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.<sup>66</sup> "[C]ourts must give substantial deference" to prison officials before requiring procedural safeguards for prisoners.<sup>67</sup> Scarce resources are another component of the State's interest, weighing against implementing additional procedures.<sup>68</sup>

### 1. Sign Language Interpreters May Satisfy the *Sandin* and *Mathews* Tests

Although "qualified [S]ign [L]anguage interpreter[s]" are mandated in disciplinary hearings, there is evidence that prisons may not take this requirement seriously.<sup>69</sup> DOCCS Directive 2612, outlining regulations for Inmates with Sensorial Disabilities, states:

Qualified Sign-Language Interpreting Services: A sign language interpreter certified by the National Registry of Interpreters for the Deaf or other National or New York State credentialing authority, or a sign-language interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. The qualifications of an interpreter are determined by the actual ability of the interpreter in a particular interpreting context to facilitate effective communication. Except as otherwise indicated below, qualified interpreters may include inmates, correctional staff, including Correction Officers and volunteers, when their skills meet the above definition and factors such as emotional or personal involvement and considerations of confidentiality will not adversely affect their ability to interpret "effectively, accurately, and impartially" or jeopardize the safety and security of the inmate.<sup>70</sup>

This directive falls short because it does not require all interpreters to be qualified by the National Registry, which is consid-

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<sup>65</sup> *Id.* at 226-27.

<sup>66</sup> *Id.* at 227.

<sup>67</sup> *Id.* at 228.

<sup>68</sup> *Austin*, 545 U.S. at 228.

<sup>69</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (McKinney 2017); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1050 (S.D.N.Y. 1995) (holding that the liberty interest created by a parole-board hearing requires that deaf inmates be provided with a qualified interpreter); see also James C. McKinley Jr., *Judge Orders State to Provide Special Help to Deaf Prisoners*, N.Y. TIMES (June 20, 1995), <http://www.nytimes.com/1995/06/20/nyregion/judge-orders-state-to-provide-special-help-to-deaf-prisoners.html> [https://perma.cc/P9PY-RQUS].

<sup>70</sup> DOCCS 2612, *supra* note 6, at 2.

ered the most reliable means of ensuring the competence of an interpreter.<sup>71</sup> Specialized training is needed for those who are interpreting, or intend to interpret, in legal settings.<sup>72</sup> Those certified by the Registry are deemed qualified, however there is no explicit requirement in the regulation. “Interpreters who lack the preparation, skills, and qualification to practice, yet provide interpreting services in legal settings, increase the risk of inaccuracy.”<sup>73</sup>

Further, the directive permits Corrections Officers and volunteers to interpret when their skills meet the standard of accurate, effective, and impartial interpretation, instead of requiring an external, professional interpreter. An external interpreter, qualified by the National Registry is guaranteed to have the skills needed to interpret accurately and is not biased by the confines of prison. Further, this regulation fails to distinguish between different types of sign language: an individual who knows a different variation of a sign language, such as Signed English, is not a qualified interpreter for a prisoner with a hearing impairment who primarily communicates in ASL, and vice versa.<sup>74</sup> A prison guard with only basic sign language ability is not a qualified interpreter, and is not guaranteed to be impartial. Even with these shortcomings, there is no evidence that DOCCS is taking steps to ensure this policy is being followed.<sup>75</sup>

A qualified interpreter would likely satisfy the *Mathews* procedural requirements.<sup>76</sup> Deaf inmates must be afforded procedural protections because of the potential harm resulting from disciplinary hearings.<sup>77</sup> Under the *Mathews* private interest prong, in comparison with the baseline restrictions within a prison—as opposed to a criminal trial—a disciplinary hearing will not permit the same

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<sup>71</sup> Joint Comm. on Access to the Courts, *Improving the Access of Deaf and Hearing-Impaired Litigants to the Justice System*, 48 REC. ASS’N B. CITY N.Y. 834, 839 (1993).

<sup>72</sup> *Id.*

<sup>73</sup> Len Roberson et al., *American Sign Language/English Interpreting in Legal Settings: Current Practices in North America*, 21 J. INTERPRETATION 64, 66 (2011).

<sup>74</sup> *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1026-27 (1995) (stating that an interpreter who uses Signed English is not qualified to interpret for a prisoner who uses ASL); see also CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL III-4.6100 (1993), <http://www.ada.gov/taman3.html> [<https://perma.cc/XZ8A-8NEV>].

<sup>75</sup> See MORGAN, *supra* note 3, at 6 (“[P]rison authorities have failed to provide accommodations—such as sign language interpreters for deaf prisoners or text-to-audio devices for blind prisoners—in all prison programs, thus actively thwarting effective communications with these prisoners.”); see also *id.* at 44-46 (discussing deprivations of prisoners with disabilities in disciplinary hearings).

<sup>76</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>77</sup> See MORGAN, *supra* note 3, at 44.

amount of processes. In New York, for example, an individual has the right to a qualified interpreter in a criminal proceeding.<sup>78</sup> An individual has the right to understand the hearing officer and the procedure in a disciplinary hearing, which may deprive them of liberty.<sup>79</sup>

Second, the risk of erroneous deprivation with the current standard is high. Without a qualified interpreter, who is also certified by a recognized agency, a deaf individual may be paired with an interpreter who does not sign their language and there would be no way to alleviate this in an appeal because the record would simply reflect the output of the interpreter. Given the intricacies in the different types of sign languages that a deaf inmate may communicate in,<sup>80</sup> one interpreter may be sufficient for one inmate, that same interpreter may not qualify for another. For example, an inmate who converses in ASL must have a qualified ASL interpreter. Just as a Spanish interpreter would not be provided to an inmate who speaks French, an ASL interpreter should not be provided for an inmate who uses a sign language other than ASL. Another concern is whether the interpreter is qualified to interpret legal terms. A prison disciplinary hearing is filled with legal terms that are not common to ordinary sign language interpreters, who may not convey them appropriately.<sup>81</sup> This creates a high risk of deprivation, where an inmate may potentially go through an entire hearing without understanding the proceeding. Therefore, sign language interpreters should not only be qualified as DOCCS defines, but should also be trained in legal vocabulary and certified by a recognized organization.

Lastly, the state's interest in prison safety or the welfare of the prison would not be compromised. Qualified interpreters do not pose a safety threat, nor will there be a unique cost to hiring a qualified interpreter. DOCCS directives already require interpret-

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<sup>78</sup> N.Y. JUD. LAW § 390(1) (McKinney 2015) ("Whenever any deaf or hard of hearing person is a party to a legal proceeding of any nature, or a witness or juror or prospective juror therein, the court in all instances shall appoint a qualified interpreter . . . ."); *Chatoff v. Pub. Serv. Comm'n*, 60 A.D.2d 700, 700 (1977).

<sup>79</sup> See Joint Comm. on Access to the Courts, *supra* note 71, at 834-35.

<sup>80</sup> See McAlister, *supra* note 34, at 167-68, 175-76.

<sup>81</sup> See *About the Legal Interpreter*, NAT'L CONSORTIUM OF INTERPRETER EDUC. CENTERS, <http://www.interpretereducation.org/specialization/legal> [<https://perma.cc/Y3W5-SPBQ>] ("Typically, the knowledge and skills required of interpreters to work in this setting are acquired after completion of a solid academic foundation in interpreting, coupled with multiple years of practice, followed by specialized training in legal interpreting and supervised field experience.").

ers and the prison and state must accommodate for this cost when the prejudicial value is so high in this balancing test.

The rights of deaf individuals have been successfully litigated in a medical care case before the Supreme Court of Canada in *Eldridge v. British Columbia*.<sup>82</sup> There, the court recognized positive obligations on the government to allocate resources towards sign language interpretation where it was necessary for effective communication.<sup>83</sup> As a result of the decision, a new program was established that delegated interpreting services to a separate non-profit body that was composed of a board of primarily members who are deaf to delegate interpreting services when needed.<sup>84</sup> The remedy in this case may be one to draw from and implement in the prison disciplinary system, which would in turn create high quality interpreting services.<sup>85</sup>

## 2. Videotaping may Satisfy the *Sandin* and *Mathews* Tests

Absent from the regulations is the requirement of a meaningful review of the disciplinary hearing.<sup>86</sup> The only accommodation to a deaf inmate during the disciplinary hearing is the requirement to provide such an inmate with a qualified sign language interpreter at the hearing.<sup>87</sup> An inmate has the right to appeal a disciplinary ruling,<sup>88</sup> but deaf inmates are significantly disadvantaged at the appeal process as they will not have an adequate record on appeal when the possibility of ineffective sign language interpretive services is at bay. Likely, when statements are made by an inmate in a disciplinary proceeding and a sign language interpreter translates those statements, the only record that would remain on ap-

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<sup>82</sup> *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (Can.).

<sup>83</sup> *Id.* at 677.

<sup>84</sup> Bruce Porter, *Canada: Systemic Claims and Remedial Diversity*, in *SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK* 201, 218 (Malcolm Langford et al. eds., 2017).

<sup>85</sup> The dictum in *Eldridge* suggested that at issue is the complexity of the services at issue. It is arguable that the complexity of legal concepts at issue in a prison disciplinary hearing would rise to the level in *Eldridge* that would require a sign language interpreter. See *Eldridge*, 3 S.C.R. at 683 (stating that this analysis would “take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved”).

<sup>86</sup> See DOCCS 2612, *supra* note 6.

<sup>87</sup> *Id.* at 8-9; N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (1997) (also providing that hard of hearing inmates who have amplification devices as accommodations be able to use them in a Tier III hearing).

<sup>88</sup> COMP. CODES R. & REGS. tit. 7, § 254.8 (providing for an appeal within 30 days of the decision); see also Stuart M. Bernstein, *The Evolving Right of Due Process at Prison Disciplinary Hearings*, 42 *FORDHAM L. REV.* 878, 878 (1974).

peal is that of the sign language interpreter. Even with a qualified sign language interpreter who is able to adequately translate legal colloquia for the inmate, the potential risk does persist.<sup>89</sup> By failing to videotape, the original statement of the deaf inmate is lost and there is no evidence of any legal challenge that the inmate may make.

Additionally, videotaping a hearing would satisfy the *Mathews* procedural limitations.<sup>90</sup> Under the first private interest prong, a videotape of the disciplinary hearing would protect the interest of a deaf inmate that is already afforded to hearing-enabled inmates. A hearing inmate has the opportunity to dispute and appeal the disciplinary hearing within the prison at the state and federal level after exhausting administrative remedies.<sup>91</sup> Every statement made in the disciplinary hearing is transcribed and available to the inmate.<sup>92</sup> When a deaf individual is on the stand, their statements are completely lost because they are visual rather than verbal. Therefore, a deaf inmate's statements are not preserved in the record at all: all that is left in the record is the statements of the interpreter. However, if the interpreter does not sufficiently translate the deaf individual's statements, there is no way to dispute that on appeal.<sup>93</sup>

Under the second prong, the risk of erroneous deprivation as the current procedures stand is high. Without a video record, there is no way to appeal the adequacy of visual sign language translation. The record on appeal only contains the verbal statements made in the hearing. These verbal statements are those of the interpreter<sup>94</sup> and the hearing officer. The statements of the inmate,

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<sup>89</sup> STEWART, *supra* note 11, at 13-14.

<sup>90</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>91</sup> 42 U.S.C. § 1997e(a) (2013); 42 U.S.C. § 1983 (1996); N.Y. C.P.L.R. 7801 (McKinney 1962).

<sup>92</sup> N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, DIRECTIVE NO. 6910, CRIMINAL PROSECUTION OF INMATES 3 (2015), <http://www.doocs.ny.gov/Directives/6910.pdf> [<https://perma.cc/T4SX-J769>].

<sup>93</sup> For example, if a Spanish-speaking inmate has an interpreter at the disciplinary hearing and they dispute the adequacy of translation, a third party can review the hearing tapes, listen for the statements made by the inmate in Spanish, and compare the statements of the interpreter. While the sufficiency of a translation is a viable ground for appeal, without a video this ground is functionally foreclosed for deaf inmates as there is no way to independently compare the statements of the inmate with the translation performed. *People v. Rios*, 57 A.D.3d 501, 502 (2d Dep't 2008) (looking to the statements of the interpreter when analyzing a challenge to sign language translation services); *In re Lizotte v. Johnson*, 4 Misc. 3d 334, 337 (Sup. Ct. 2004) (challenging the adequacy of interpreter services).

<sup>94</sup> Paired with the argument made earlier, if the interpreter is not highly qualified, the risk of error is amplified when the interpreter can possibly make mistakes during the hearing. See *supra* Section A.1.

if visual, are left behind in the disciplinary hearing room.

Lastly, under the third prong, the state's cost of implementing video recordings of hearings for deaf inmates would increase. It is likely that the State will argue that if deaf prisoners are accorded video recording of their hearings, the same should be afforded to non-English speakers. However, deaf inmates pose a unique category of threatened individuals; in the case of a non-English speaker, on review of the already-offered audio tape of a disciplinary proceeding, the sufficiency of the translation may be challenged. A non-English speaker may subsequently have a qualified interpreter compare the original non-English audio with the "English" translation. A deaf inmate cannot do this. On review, a deaf inmate who communicates in any form of sign language cannot "hear" their original statements as they are visual. This would justify the added cost only for disciplinary proceedings involving deaf or hard-of-hearing inmates.

Statistics on the number of deaf inmates in the prison population range from 6.2% to an estimated 35%.<sup>95</sup> The State may argue that accommodating such a high number of prisoners would be expensive.<sup>96</sup> However, the expense does not rise to the level of precluding this procedure. The disciplinary proceeding as it stands is audio-recorded; enhancing this procedure would only require a video camera and television review system.<sup>97</sup> This would also only

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<sup>95</sup> JENNIFER BRONSON ET AL., U.S. DEP'T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-12 3 (2015), <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf> [<https://perma.cc/4VZK-XLLM>] (stating that 6.2% of people in state and federal prison identified as having a hearing disability, as compared with 2.6% of the general population); MORGAN, *supra* note 3, at 32 ("[B]etween 35 and 40 percent of all inmates experience some degree of hearing loss, including 13 to 20 percent with significant hearing loss." (internal quotations omitted)).

<sup>96</sup> As an example, as a result of a settlement, the South Carolina Department of Corrections upgraded its facilities for inmates with mental illness at the one-time cost of \$1.7 million for facility upgrades and \$7 million annually for staffing, phased over three years. John Monk, *Negligent SC Prison System Agrees to Reforms for the Mentally Ill*, STATE (June 1, 2016, 10:22 AM), <http://www.thestate.com/news/local/crime/article81081252.html> [<https://perma.cc/GYH6-JH34>].

<sup>97</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(a)(2) (McKinney 2015). In contrast, the SHU is videotaped. "A trend less known to people outside the criminal justice community is the proliferation of ultra-maximum-security 'lockdown' units, highly secure prisons within prisons in which inmates are confined 23 hours a day. In these stark facilities, all movement is monitored by video surveillance and assisted by electronic door systems. Special alarms, cameras and security devices are everywhere. Living conditions include either solitary confinement or double-celling, where two men are forced to share limited living space around the clock." JENNIFER R. WYNN ET AL., CORR. ASS'N OF N.Y., LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS 7 (2003), <https://www.prisonpolicy.org/scans/lockdown-new-york-1.pdf> [<https://perma.cc/39BM-XSE3>]. Further, a decade ago DOCCS reported spend-

be implemented when there is a hearing-impaired inmate. Thus, to afford deaf inmates due process of the law, DOCCS must provide said inmates with a qualified sign language interpreter and must video tape the prison disciplinary hearings because such hearings may result in the loss of a protected liberty interest.

*B. Solitary Confinement of Deaf Inmates Violates the Eighth Amendment*

New York State prisons are exposing hearing-impaired prisoners to cruel and unusual punishment by sentencing them to the SHU. The Eighth Amendment imposes an obligation on prisons to provide for the basic needs of inmates.<sup>98</sup> Although “the Constitution does not mandate comfortable prisons,” it does not permit inhumane ones.<sup>99</sup> In addition to imposing restrictions on the use of physical force, the Eighth Amendment “also imposes duties on [prison] officials, who must provide humane conditions of confinement; . . . must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates . . . .”<sup>100</sup>

The Eighth Amendment prohibits punishments which, although not physically barbarous, “involve the unnecessary and wanton infliction of pain,”<sup>101</sup> or are “grossly disproportionate to the severity of the crime . . . .”<sup>102</sup> There is no bright-line rule that determines when conditions are cruel and unusual, and the Eighth Amendment draws meaning from the “evolving standards of decency that mark the progress of a maturing society.”<sup>103</sup> These principles will be used when the conditions of confinement are in question, rather than the state of the prison itself, as a prison may not necessarily be up-to-date to the evolving standards of decency, as we will see here.<sup>104</sup>

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ing more than \$35 million on cameras and custody within the prison for the purpose of surveillance. N.Y. DEP'T OF CORR. SERVS., PRISON SAFETY IN NEW YORK 33 (2006), <http://www.doocs.ny.gov/PressRel/06commissionerrpt/06prisonsafetyrpt.pdf> [<https://perma.cc/9VJ6-9Z3T>].

<sup>98</sup> U.S. CONST. amend. VIII; see *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

<sup>99</sup> *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

<sup>100</sup> *Farmer*, 511 U.S. at 832 (internal quotations and citations omitted).

<sup>101</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>102</sup> *Rhodes*, 452 U.S. at 346.

<sup>103</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>104</sup> *Id.* at 347. Traditionally, the inquiry into whether an inmate's Eighth Amendment right to be free from Cruel and Unusual Punishment has been violated requires proof of two prongs: the objective and the subjective prong. Because this Article is not challenging a specific instance of a violation of a particular inmate's rights—as one would in a § 1983 claim, for example—the mental state of one particular agent of the

To qualify as a deprivation of the right against cruel and unusual punishment, the alleged deprivation must be objectively “sufficiently serious” and must result in denial of “the minimal civilized measure of life’s necessities . . . .”<sup>105</sup> Under this test, the court will look at whether the condition or conditions being challenged could seriously affect an inmate’s health or safety and the minimal civilized measure of life’s necessities.<sup>106</sup> Courts evaluate whether inmates are deprived of the “civilized measures of life’s necessities” by considering the length of time in solitary confinement and possible harm in the future.<sup>107</sup>

At the base level, deaf inmates are treated like hearing-enabled inmates despite their inability to hear. They are only afforded “reasonable accommodations” at the discretion of the superintendent.<sup>108</sup> DOCCS regulations define “reasonable accommodation” as:

Any change in the environment or the manner in which tasks are completed that enables a qualified individual with a disability to participate in a program or service. Such accommodation should not impose any undue hardship on the Department. Reasonable accommodations *might* include the following: making existing facilities readily accessible to meet a particular individual’s needs[;] providing readers, interpreters, note takers, sighted guides, daily living skill aides[;] acquisition or modification of equipment or devices.<sup>109</sup>

Although additional accommodations may be granted at the request of a deaf inmate, the baseline accommodations are insuffi-

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Department of Corrections cannot be challenged, as would be required for an inmate to succeed on such a claim, and will not be addressed here.

<sup>105</sup> *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes*, 452 U.S. at 347).

<sup>106</sup> *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998).

<sup>107</sup> The brief nature of unsavory conditions may be seen as a roadblock to recovery, however it is not dispositive. *See, e.g.*, *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir. 1994) (holding deplorably filthy and “patently offensive” cell with excrement and vomit not unconstitutional because conditions lasted only for 24 hours); *White v. Nix*, 7 F.3d 120, 121 (8th Cir. 1993) (holding an 11-day stay in unsanitary cell not unconstitutional because of relative brevity of stay and availability of cleaning supplies); *Harris v. Fleming*, 839 F.2d 1232, 1234-36 (7th Cir. 1988) (holding five day stay in “filthy, roach-infested cell” not unconstitutional).

<sup>108</sup> DOCCS 2612, *supra* note 6, at 12-13 (outlining the request procedure). *See also id.* at 8 (“Facilities designated in Section III shall make available to deaf and hard of hearing inmates the auxiliary aids, services, and assistive devices as approved through the reasonable accommodation process which are necessary to facilitate full and effective participation in prison programs, activities, and services.”). *See also id.* at 12 (“All requests for accommodations shall be forwarded to the Deputy Superintendent for Program Services or designee within the facility and all time frames within this Section shall apply.”).

<sup>109</sup> DOCCS 2612, *supra* note 6, at 2 (emphasis added).

cient to meet the needs of hearing-impaired prisoners, especially those housed in the solitary housing unit.

It is well-established that solitary conditions are particularly harsh for inmates with physical disabilities.<sup>110</sup> The conditions of the solitary units have been described as follows:

[Secure housing] units are usually about eight feet by six feet in size . . . . [T]here is generally a stainless steel sink and toilet, as well as some type of desk and bed. The walls of the cell are bare and white with no windows. Usually the only light is a bare light bulb, which hangs from the ceiling and remains on twenty-four hours a day. Inmates are unable to control the brightness of their cells and are unable to tell what time of day it is. . . . [The doors] are made of solid steel, interrupted only by a small approximately eye-level clear window and a waist-level food slot. . . . Moreover, the door is usually outfitted with strips on each side so as to muffle any possible conversations between inmates in adjacent cells. . . . The doors also have the effect of cutting off ventilation in the units, so that the air becomes heavy and dank.<sup>111</sup>

The detrimental psychological and physiological effects of segregation are well-documented.<sup>112</sup> The United Nations reported that solitary confinement in excess of fifteen days can amount to torture or cruel, inhuman, or degrading treatment or punishment.<sup>113</sup> Similarly, the First Circuit stated in dictum that “even the

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<sup>110</sup> See, e.g., *Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006). The American Civil Liberties Union summarizes the harm to inmates with sensory disabilities as such: “In solitary confinement there is often little to no access to natural light. Some solitary confinement cells have no windows. Artificial lights can be kept on for 24 hours a day. Most cells have a solid steel door with a narrow viewing window and small slot. Communication is highly curtailed, mainly occurring through these small slots designed for food trays, passing mail or medications, or cuffing prisoners prior to their exiting their cells. These harsh and isolating conditions are especially harmful for prisoners with sensory disabilities who experience profound and heightened isolation due not only to the sensory and social deprivation experienced by all prisoners subjected to solitary, but also because they face huge barriers to meaningful communication in correctional environments.” MORGAN, *supra* note 3, at 32.

<sup>111</sup> Kathryn D. DeMarco, Note, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523, 537-38 (2012) (quotations and footnotes omitted).

<sup>112</sup> Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 478 (1997).

<sup>113</sup> Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 88, U.N. Doc. A/66/268 (Aug. 5, 2011) (“It is clear that short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment; it can, however, be a legitimate device in other circumstances,

permissible forms of solitary confinement might violate the Eighth Amendment if imposed inappropriately, or for too long a period . . . .”<sup>114</sup> The constitutional harm dictates the need for “systematic, periodic review of the prisoner’s condition, his ability to reenter the general population,” and feasible alternatives to segregated confinement.<sup>115</sup> The length of isolation has repeatedly been urged as an important factor to consider in a cruel and unusual analysis.<sup>116</sup>

A punishment has been deemed cruel and unusual when it is excessive and serves no valid legislative purpose.<sup>117</sup> The excessiveness prong involves the requirement of proportionality to the crime charged, the focus being on the amount of pain and suffering that may be constitutionally inflicted.<sup>118</sup> With deaf offenders, the proportionality analysis must shift the points of comparison. The question remaining is whether the harshness of the penalty imposed is disproportionate to the penalty imposed upon a hearing offender.

For example, similar protections from solitary confinement are recommended for women and individuals who suffer from mental illness. “Women face many physical, medical, psychological, and socio-cultural challenges in prison. A higher percentage of women than men find themselves in prison for non-violent offenses.”<sup>119</sup> Although confined in female-only prisons, “[w]omen in custody are frequently guarded during their most private moments by men without a female guard present, despite the potential for

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provided that adequate safeguards are in place. In the opinion of the Special Rapporteur, prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.”).

<sup>114</sup> *Jackson v. Meachum*, 699 F.2d 578, 582 (1st Cir. 1983) (internal quotations omitted) (citing *O’Brien v. Moriarty*, 489 F.2d 941, 944 (1st Cir. 1974)).

<sup>115</sup> *Id.* at 584.

<sup>116</sup> *Id.* at 584 (citing *Hutto v. Finney*, 437 U.S. 678, 686 (1978)).

<sup>117</sup> *Furman v. Georgia*, 408 U.S. 238, 332 (1972) (Marshall, J., concurring) (“[W]here a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it.”).

<sup>118</sup> *Id.* at 271 (Brennan, J., concurring) (“The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering.”). *Id.* at 279-80 (“(The Clause) is directed, not only against punishments of the character mentioned (torturous punishments), but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” (alteration in original) (internal quotations and citation omitted)).

<sup>119</sup> AM. CIVIL LIBERTIES UNION, *WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 2* (2014), <https://www.aclu.org/report/worse-second-class-solitary-confinement-women-united-states> [<https://perma.cc/XP5S-AYN4>].

abuse and degradation.”<sup>120</sup> Human Rights Watch has spoken out against the potential for abuse and degradation in the prison context when female prisoners are in their most intimate moments, such as dressing, showering, or using the toilet, instances which are guarded most prevalently in solitary confinement.<sup>121</sup> A woman’s vulnerability may increase her chance of harm if she has been a victim of past sexual abuse, and the isolation and absence of stimulation can contribute to further deterioration in an already-vulnerable individual.<sup>122</sup>

There is further harm when women who are mothers are placed in solitary confinement. The collateral consequences on their families is especially damaging because a mother’s relationship with her child deteriorates when she is unable to physically comfort her child.<sup>123</sup> The psychological bond between a mother and child must be considered when placing women in isolation.<sup>124</sup> Lastly, a harm that is specific to women is the risk associated with placing pregnant women in solitary. To correct this harm, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders—known as the Bangkok Rules—prohibit the placement of pregnant or nursing women in solitary confinement.<sup>125</sup> These protections, however, are

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<sup>120</sup> *Id.* at 3.

<sup>121</sup> See generally HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998), <http://www.hrw.org/reports98/women/Mich.htm> [<https://perma.cc/Z8YZ-924D>] (calling upon corrections departments to limit male guards’ access to community showers, toilets, and dormitories during changing times).

<sup>122</sup> See Cassandra Shaylor, “*It’s Like Living in a Black Hole*”: Women of Color and Solitary Confinement in the Prison Industrial Complex, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 390-92 (1998) (describing the vulnerability to sexual harassment and abuse caused by constant surveillance by men and the possibility of re-traumatization for women with a history of abuse).

<sup>123</sup> SUSAN D. PHILLIPS, THE SENTENCING PROJECT, VIDEO VISITS FOR CHILDREN WHOSE PARENTS ARE INCARCERATED: IN WHOSE BEST INTEREST? 1-2 (2012), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Video-Visitation-for-Children-In-Whose-Best-Interest.pdf> [<https://perma.cc/26SK-KVU4>] (describing the importance of and barriers to visitation of incarcerated parents).

<sup>124</sup> AM. CIVIL LIBERTIES UNION, *supra* note 119, at 7.

<sup>125</sup> G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), r. 22 (Dec. 21, 2010) (“Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.”); see also Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 61, U.N. Doc. A/68/295 (Aug. 9, 2013); U.N. OFFICE ON DRUGS & CRIME, HANDBOOK FOR PRISON MANAGERS AND POLICYMAKERS ON WOMEN AND IMPRISONMENT, at 41, U.N. Sales

not reflected in U.S. law. The American Civil Liberties Union (“ACLU”) argues that solitary confinement does not take into account the unique medical needs of pregnant women when in solitary.<sup>126</sup> The ACLU recommends solitary confinement “only when [female] prisoners pose a current, continuing, and serious threat” to safety, because of how “harsh and damaging” it is.<sup>127</sup> The instances where female prisoners meet these categories should be very rare because prisons “can physically separate” inmates “without resorting to solitary confinement.”<sup>128</sup>

Similarly high levels of vulnerability have been recognized in prisoners with mental disabilities.<sup>129</sup> In solitary, inmates with mental illnesses suffer from psychiatric deterioration that may result in attempted or actual suicide.<sup>130</sup> Many prisoners in need of mental treatment were being placed in isolated confinement instead of being treated in New York State prisons.<sup>131</sup> After a settlement agreement with Disability Advocates, Inc., the state created a unique resident mental health wing intended for inmates classified with serious mental illness sentenced to more than thirty days of SHU time. These units would permit inmates four hours of mental health treatment per day and an additional hour of recreation each day.<sup>132</sup> The settlement also required regular reviews of the

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No. E.08.IV.4 (2008), <https://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf> [<https://perma.cc/MZR9-UL36>].

<sup>126</sup> AM. CIVIL LIBERTIES UNION, *supra* note 119, at 9.

<sup>127</sup> *Id.* at 10.

<sup>128</sup> *Id.*

<sup>129</sup> New York State Office of Mental Health (“OMH”) and DOCCS entered into a settlement agreement with Disability Advocates, Inc. (“DAI”) in 2007 for major improvements in psychiatric treatment for New York State prisoners with mental illness. *See* Disability Advocates v. N.Y. State Office of Mental Health, No. 02 Civ. 4002 (S.D.N.Y. Apr. 27, 2007), <http://www.op.nysed.gov/surveys/mhpsw/doccs-att3.pdf> [<https://perma.cc/7G2L-K5ZL>].

<sup>130</sup> ANNA GUY, AVID PRISON PROJECT, LOCKED UP AND LOCKED DOWN: SEGREGATION OF INMATES WITH MENTAL ILLNESS 5-6 (2016), <http://avidprisonproject.org/assets/locked-up-and-locked-down—avid-prison-project.pdf> [<https://perma.cc/G4EW-ZMJ9>] (“Even the president of the United States has recognized that a person’s mental illness can worsen in segregation, and inmates with mental illness are more likely to commit suicide.”); E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR. & NAT’L SHERIFF’S ASS’N, MORE MENTALLY ILL PERSONS ARE IN JAIL AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 10 (2010), [http://www.treatmentadvocacycenter.org/storage/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf) [<https://perma.cc/N63F-USGL>].

<sup>131</sup> FAQ, SOLITARY WATCH, <http://solitarywatch.com/facts/faq> [<https://perma.cc/M8PL-LX9S>].

<sup>132</sup> N.Y. DEP’T OF CORR. SERVS., DOCS FACT SHEET: DAI SETTLEMENT (2007), <http://www.doccs.ny.gov/FactSheets/PDF/daisettlement.pdf> [<https://perma.cc/9A7A-RBAR>]. “As a result of the DAI settlement agreement, OMH and DOCS developed a 100-bed RMHU. The target population for the RMHU is people who meet the criteria

amount of time spent in SHU; improved treatment programs and suicide prevention assessments; limits on the use of observation cells;<sup>133</sup> limiting the use of restricted diets; and a limitation on solitary confinement punishments for prisoners with serious mental illnesses.<sup>134</sup> These improvements were funded with a State budget of approximately \$50 million dollars.<sup>135</sup> These policies need to be adopted throughout the New York state prison system, as society's evolving standards of decency now require similar accommodations across vulnerable populations.

The vulnerabilities detailed above are comparable to those of deaf inmates in solitary confinement. In the Special Housing Unit ("SHU") at Massachusetts Correctional Institution in Walpole, Massachusetts, the restricted environment and social isolation of solitary confinement is "toxic to brain functioning" at the level of cognitive impairment.<sup>136</sup> Inmates developed florid delirium, which was defined as a psychosis paired with "intense agitation, fearfulness, and disorganization."<sup>137</sup> The harm can result in a "prolonged or permanent psychiatric disability," which may have reduced the inmate's chance of successful reentry to both the general prison population and the broader society as a whole out of prison.<sup>138</sup> These prisoners pose a danger to those around them, especially because this kind of trauma is experienced by a population of individuals already known to be "volatile, impulse-ridden, and inter-

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for Serious Mental Illness and have a sentence of more than 30 days of SHU time or 60 days of Keeplock." ALEXANDRA H. SMITH & JENNIFER J. PARISH, URBAN JUSTICE CTR. MENTAL HEALTH PROJECT, WHEN A PERSON WITH MENTAL ILLNESS GOES TO PRISON: HOW TO HELP 8 (2010), <http://il.nami.org/when%20a%20person%20with%20mental%20illness%20goes%20to%20prison.pdf> [<https://perma.cc/54WZ-4YNJ>].

<sup>133</sup> "If a person in DOCS' custody has a psychiatric crisis (for example, becomes suicidal or psychotic), s/he will generally be transferred to an OMH Satellite Mental Health Unit Residential Crisis Treatment Program (RCTP) inside a prison. . . . The RCTPs are operated by OMH and consist of observation cells and dormitory beds. The cells are under 24-hour observation. People in psychiatric crisis in an observation cell are alone in the cell without any property, including their own clothes." SMITH & PARISH, *supra* note 132, at 5.

<sup>134</sup> N.Y. DEP'T OF CORR. SERVS., *supra* note 132.

<sup>135</sup> *Prisoner Mental Health*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/lawreform/lawreform/prisonersrightsproject/prisonermentalhealth.aspx> [<https://perma.cc/VWV8-TSRC>].

<sup>136</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 349 (2006) (discussing a practitioner's observations made during his involvement in a class action lawsuit).

<sup>137</sup> *Id.* at 354.

<sup>138</sup> *Id.*; International Psychological Trauma Symposium, *Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), [http://solitaryconfinement.org/uploads/Istanbul\\_expert\\_statement\\_on\\_sc.pdf](http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf) [<https://perma.cc/593C-358H>].

nally disorganized.”<sup>139</sup>

The restricted environmental stimulation harms the hearing impaired even more so than the hearing-abled. Studies have shown that deaf individuals exhibit significantly higher rates of paranoia, which affects hearing-impaired individuals at multiple levels of deafness.<sup>140</sup> Thus, those with preexisting vulnerabilities, such as deaf or hearing-impaired individuals, may suffer more psychological pain and may be at greater risk of permanent damage than the average person.<sup>141</sup> “[H]ealthy people tend to be resilient in their responses to stressor events” like solitary confinement, but “[t]hose with preexisting psychological disorders may therefore suffer more psychic pain and be at greater risk for permanent damage” such as PTSD.<sup>142</sup> Further research done with torture survivors on the psychological effects of solitary confinement corroborate its harmful effects.<sup>143</sup> “The fact that solitary confinement is among the most frequently used psychological torture techniques seems to underscore its aversive nature and destructive potential.”<sup>144</sup>

One study showed “extraordinarily high rates of symptoms of psychological trauma among prisoners” in solitary confinement, including

anxiety and nervousness, headaches, troubled sleep, and lethargy or chronic tiredness, . . . nightmares, . . . . confused thought processes, an over-sensitivity to stimuli, irrational anger, . . . social withdrawal[,] . . . . violent fantasies, emotional flatness, mood swings, chronic depression, . . . feelings of overall deterioration, . . . hallucinations and perceptual distortions, and . . . suicidal ideation.<sup>145</sup>

All studies of solitary confinement lasting longer than ten days have shown negative psychological effects.<sup>146</sup> Thus, inmates who have been deprived of such fundamental sensory functions “cannot adjust to a sudden release into a free society because [their] mental and emotional mechanisms are adjusted to the deprivation

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<sup>139</sup> Grassian, *supra* note 136, at 354.

<sup>140</sup> *Id.* at 364-65.

<sup>141</sup> See MORGAN, *supra* note 3, at 32-33.

<sup>142</sup> Haney & Lynch, *supra* note 112, at 534.

<sup>143</sup> See, e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130 (2003) (“[T]he harmful psychological consequences of solitary and supermax-type confinement are extremely well documented.”).

<sup>144</sup> Haney & Lynch, *supra* note 112, at 508.

<sup>145</sup> *Id.* at 524.

<sup>146</sup> *Id.* at 531.

circumstances” and cannot tolerate “normal environments.”<sup>147</sup> These psychological effects paired with the vulnerability of deaf inmates rises to the level of “sufficiently serious” deprivation.

New York State prisons should prohibit placing deaf inmates in solitary confinement. This conclusion is supported by parallel reasoning against placing pregnant or nursing women and those with mental illnesses in solitary confinement. Because confining deaf and hard of hearing inmates to solitary confinement rises to the level of cruel and unusual punishment, such conduct should be proscribed.

At the international level, the United Nations requires all Member States to promote the human rights of all individuals, including those with disabilities.<sup>148</sup> Although the United States has yet to ratify the United Nations Convention on the Rights of Persons with Disabilities, President Obama signed the Convention in 2009, indicating an intention to take steps to be bound by the treaty at a later date.<sup>149</sup> President Obama has created an obligation, in the period between signing and ratification, to refrain from acts that would defeat the object and purpose of the treaty.<sup>150</sup>

The Convention identifies discrimination against any person on the basis of a disability as being a “violation of the inherent dignity and worth of the human person” and promotes an environment that protects those human rights.<sup>151</sup> The purpose of the Convention is to promote such human rights by ensuring the equal and full enjoyment of all human rights and fundamental free-

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<sup>147</sup> *Id.* at 515 (alteration in original) (internal citations and quotations omitted).

<sup>148</sup> United Nations Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3 (Dec. 13, 2006) [hereinafter CRPD]; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948).

<sup>149</sup> *Convention on the Rights of Persons with Disabilities*, U.S. INT’L COUNCIL ON DISABILITIES, <http://uscd.org/index.cfm/crpd> [<https://perma.cc/E32Z-FGGM>] (“The United States signed the CRPD in 2009. On December 4, 2012 the United States Senate considered the ratification of the CRPD but fell 5 votes short of the super-majority vote required . . . .”); *Convention on the Rights of Persons with Disabilities*, U.N. TREATY COLLECTION [hereinafter U.N. TREATY COLLECTION], [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en) [<https://perma.cc/V47F-DRV1>] (indicating that the U.S. has signed, but not yet ratified, this treaty).

<sup>150</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/H9GS-BD5Q>]; Office of the U.N. High Comm’r for Human Rights, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, at 50, <http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf> [<https://perma.cc/TU76-GJV8>].

<sup>151</sup> CRPD, *supra* note 148, at Preamble (h).

doms.<sup>152</sup> Because a disability may present a barrier that hinders full and effective participation in society on an equal basis with others, member states have a responsibility to accommodate and respect, protect, and fulfill the human rights of persons with disabilities.<sup>153</sup> In particular, the United Nations intended these mandates to encompass prisons as shown in Article 13 of the Convention, which mandates prison staff to be appropriately trained to help ensure effective access to justice.<sup>154</sup> The United States has expressed intent to be bound by the Convention on the Rights of Persons with Disabilities; thus, the evolving standards of decency required by the 8th Amendment to the U.S. Constitution should be extracted from the Convention.<sup>155</sup>

Segregated confinement on its own has not been found to constitute cruel and unusual punishment unless the situation is intolerable.<sup>156</sup> Solitary confinement for the deaf, however, constitutes an intolerable scenario, and as it stands, the framework for accommodating the deaf is in violation of the United States Constitution.

#### IV. CONCLUSION

Deafness imposes a general liability on a prison, requiring greater protections given the audio-centric structures of our prison system.<sup>157</sup> Sentencing deaf inmates to solitary confinement fails to serve any legitimate penal interest when there are alternative solutions that will not subject deaf inmates to such cognizable harms. The cost and burden of implementing greater protections must be considered, but the balance of interests tips in favor of protecting those most vulnerable. New York State must accommodate the needs of its deaf inmates because placing them in solitary confinement tips the scale of harm far beyond constitutional purview.

The disproportionate number of individuals who are hearing-impaired in prisons requires an inquiry into the possibility of harm in New York State prisons. Not only is the prison disciplinary system skewed against them but the punishment that results harms

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<sup>152</sup> *Id.* art. 1.

<sup>153</sup> *Id.* art. 4.

<sup>154</sup> *Id.* art. 13(2).

<sup>155</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”); U.N. TREATY COLLECTION, *supra* note 149; *see also* Vienna Convention on the Law of Treaties, *supra* note 150, art. 18.

<sup>156</sup> *See, e.g., Rifkin v. Goord*, 273 A.D.2d 878, 879 (4th Dep’t 2000).

<sup>157</sup> *About, PRISONERS’ LEGAL SERVICES N.Y.*, <http://plsny.org/about/> [<https://perma.cc/MX5S-5AM3>].

deaf inmates more than hearing-enabled prisoners. A person does not leave their human rights behind when they enter prison. The prison disciplinary process must be altered to accommodate deaf inmates by: (1) ensuring a qualified sign-language interpreter at each disciplinary hearing and (2) videotaping all disciplinary hearings to preserve issues for appeal. Furthermore, evolving standards of decency require adoption of a complete ban on housing deaf inmates in the Solitary Housing Unit. Only once these protections are implemented will deaf individuals incarcerated in New York State prisons begin to be treated equally.

# LOCAL RESPONSES TO TODAY'S HOUSING CRISIS: PERMANENTLY AFFORDABLE HOUSING MODELS

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## INTRODUCTION

The housing crisis has reached unprecedented levels as the cost of living in global cities<sup>1</sup> has become too expensive for all but the exorbitantly wealthy.<sup>2</sup> Financial theorists warn that these cities are to become “citadels for the rich”<sup>3</sup> if the current trend continues.<sup>4</sup> In a diversified economy, this would be a catastrophe for all, as skilled and unskilled laborers, service workers, and professionals are interdependent on one another to provide essential services. Low-income communities commuting hours each day to reach essential jobs is not a viable solution.

When the housing costs in Rochester, Minnesota, became too high for hospital workers, the Mayo Clinic responded by helping to fund a Community Land Trust (“CLT”) in 2002.<sup>5</sup> This employer-sponsored CLT, called First Homes, provided affordable housing for employees close to the hospital, as was in the interest of the employer and patients of the hospital alike.<sup>6</sup> Nobody wants to imagine a hospital worker drawing blood or administering medicine incorrectly, or failing to provide sanitary conditions because of workers’ inadequate and inconvenient living conditions. Similarly, the state of California recently passed a bill to support affordable housing for teachers, so that they may live closer to the schools where they teach.<sup>7</sup>

In response to the low- to moderate-income communities who have been displaced from their neighborhoods,<sup>8</sup> local govern-

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<sup>1</sup> Mary Pennisi, *The Global City: Globalizing Local Institutions*, 11 J. INT’L BUS. & L. 111, 113-14 (2012) (defining the “global city” as “the epicentre of the international market where fiscal dealings, upper-level management, and industrial coordination are highly concentrated” and the “control or command centre[ ] within the global networks of financial and business service (or ‘producer service’) firms” (internal quotations and citations omitted)).

<sup>2</sup> See generally MILOON KOTHARI, *THE GLOBAL CRISIS OF DISPLACEMENT AND EVICTIONS: A HOUSING AND LAND RIGHTS RESPONSE* (2015), [http://www.rosalux-nyc.org/wp-content/files\\_mf/kothari11.pdf](http://www.rosalux-nyc.org/wp-content/files_mf/kothari11.pdf) [<https://perma.cc/P5YN-62XW>].

<sup>3</sup> Emily Badger, *Are Global Cities Really Doomed to Become ‘Citadels’ for the Rich?*, CITY-LAB (June 17, 2013), <http://www.citylab.com/work/2013/06/are-global-cities-really-doomed-become-citadels-rich/5929> [<https://perma.cc/TP8A-55TR>].

<sup>4</sup> See KOTHARI, *supra* note 2.

<sup>5</sup> Dwan Packnett, *The First Homes Community Land Trust* (Lincoln Inst. of Land Policy, Working Paper No. 05DP1, 2005), <http://cltnetwork.org/wp-content/uploads/2014/01/2005-The-First-Homes-CLT.pdf> [<https://perma.cc/PRH2-5J98>].

<sup>6</sup> See generally *First Homes*, COMMUNITY-WEALTH.ORG, <http://community-wealth.org/content/first-homes> [<https://perma.cc/JM5P-ULFT>].

<sup>7</sup> S.B. 1413, 2015-2016 Reg. Sess. (Cal. 2016) (enacted).

<sup>8</sup> Karen Chapple, *Displacement: The Misunderstood Crisis*, BERKELEY BLOG: ECON. (Aug. 28, 2015), <http://blogs.berkeley.edu/2015/08/28/displacement-the-misunderstood-crisis/> [<https://perma.cc/5ATZ-CTZW>] (explaining that displacement is dis-

ments and community stakeholders have implemented a variety of strategies that aim to create innovative affordable housing solutions. This Note argues that permanently affordable housing initiatives must be implemented on a larger scale to prevent the displacement of low- and middle-income residents at the current, unprecedented rate.<sup>9</sup>

In Section I, this Note introduces the CLT model and explores the economic and social benefits of permanently affordable housing. It argues that since the government has historically played an active role in incentivizing home ownership, it must continue to do so by supporting permanently affordable housing initiatives. The communities facing displacement today who would benefit from CLTs are the same groups who were targeted by discriminatory policies like redlining and reverse redlining. The government's role today is essential in ameliorating the harm these policies have caused.

Although the manifestation of the housing crisis differs in each municipality, there are similarities in rapidly gentrifying cities around the country. Section II of this Note examines permanently affordable housing initiatives in New York City and the Bay Area of California, illustrating the viability and challenges of implementing CLTs in urban hubs.

Section III of this Note offers several policy recommendations that federal, state, and local governments, as well as lending institutions should take in order to support the creation of permanently affordable housing.

The initiatives discussed in this Note do not offer a panacea to widespread displacement of low- to moderate-income communities. However, in examining alternatives that have been successful in cities around the country, this Note argues that they should be implemented on a larger scale.

## I. COMMUNITY LAND TRUSTS

A shortcoming of many low- to moderate-income housing models that have been tried in the past is that the terms of affordability often expire after a set number of years.<sup>10</sup> Given the

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tinct from gentrification, and that the two words should not be used interchangeably).

<sup>9</sup> See KOTHARI, *supra* note 2, at 1, 2 (discussing the impact of gentrification on the unprecedented global housing crisis).

<sup>10</sup> See, e.g., *infra* Section II (discussing Mitchell Lama Housing and Limited Equity Housing Cooperatives in New York); see also *What Happens to LIHTC Properties After Affordability Requirements Expire?*, POL'Y DEV. & RES. EDGE, Aug. 20, 2012, <https://www>

scarcity and commodification of land,<sup>11</sup> constructing replacement units from scratch is no longer a viable option. Community Land Trusts (“CLTs”) address this issue by creating affordable housing whose terms do not expire. CLTs are nonprofit entities that acquire land with the goal of maintaining control in perpetuity for a community use such as affordable housing.<sup>12</sup> The first Community Land Trusts in America were an outgrowth of the civil rights movement in the Deep South, designed to help African American farmers gain access to land ownership,<sup>13</sup> but they are now thriving in cities nation-wide because of their effectiveness in resisting mass resident displacement.<sup>14</sup>

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.huduser.gov/portal/pdredge/pdr\_edge\_research\_081712.html [https://perma.cc/W97U-5YLG] (describing the Low-Income Housing Tax Credit, which requires private developers to keep units affordable for first 15 years, and then 30 years). Short-sighted solutions may have adequately addressed immediate housing needs, reflecting the difficulty of getting private developers to agree to build affordable units, as well as legal complications to creating legal requirements of affordability in perpetuity. See Claire Zippel, *Why Affordable Housing Doesn't Stay Affordable Forever*, GREATER GREATER WASH. (Nov. 21, 2016), <https://ggwash.org/view/43574/why-affordable-housing-doesnt-stay-affordable-forever> [https://perma.cc/G45Y-Y8PP] (proposing that federal rental subsidies that presently expire could be made permanent).

<sup>11</sup> See *The Scarcity of Land: Land Suitable for Development is Limited, After All*, ECONOMIST: FREE EXCHANGE (June 18, 2009), [http://www.economist.com/blogs/freeexchange/2009/06/the\\_scarcity\\_of\\_land](http://www.economist.com/blogs/freeexchange/2009/06/the_scarcity_of_land) [https://perma.cc/9WYD-PFV3] (discussing whether land scarcity is a valid explanation of the current housing shortage). Although there is an abundance of undeveloped land, increased populations moving into urban centers, as well as a greater trend towards housing rentals as compared to home ownership, have created housing scarcity and commodification of urban land. See generally JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *AMERICA'S RENTAL HOUSING—EXPANDING OPTIONS FOR DIVERSE AND GROWING DEMAND* (2015), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ch\\_1\\_rental\\_housing\\_demand\\_from\\_americas\\_rental\\_housing\\_2015\\_web.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ch_1_rental_housing_demand_from_americas_rental_housing_2015_web.pdf) [https://perma.cc/9QLA-U7GC].

<sup>12</sup> BRIAN COOK & ANDREW L. KALLOCH, OFFICE OF THE N.Y.C. COMPTROLLER, *BUILDING AN AFFORDABLE FUTURE: THE PROMISE OF A NEW YORK CITY LAND BANK 4* (2016), [http://comptroller.nyc.gov/wp-content/uploads/documents/The\\_Case\\_for\\_A\\_New\\_York\\_City\\_Land\\_Bank.pdf](http://comptroller.nyc.gov/wp-content/uploads/documents/The_Case_for_A_New_York_City_Land_Bank.pdf) [https://perma.cc/29AQ-X3AK] [hereinafter *BUILDING AN AFFORDABLE FUTURE*].

<sup>13</sup> Oksana Mironova, *The Value of Land: How Community Land Trusts Maintain Housing Affordability*, URBAN OMNIBUS (Apr. 29, 2014), <http://urbanomnibus.net/2014/04/the-value-of-land-how-community-land-trusts-maintain-housing-affordability> [https://perma.cc/9FLM-XQZ8].

<sup>14</sup> In 2007, The Lincoln Institute reported there to be 186 CLTs nation-wide, the largest being the Burlington Community Land Trust (BCLT) in Vermont. Yesim Sungu-Eryilmaz & Rosalind Greenstein, *A National Study of Community Land Trusts* (Lincoln Inst. of Land Policy, Working Paper No. 07YS1, 2007), [http://www.lincolnst.edu/pubs/dl/1274\\_Sungu-Eryilmaz%20Final.pdf](http://www.lincolnst.edu/pubs/dl/1274_Sungu-Eryilmaz%20Final.pdf) [https://perma.cc/3JWK-NMJZ]; Rosalind Greenstein & Yesim Sungu-Eryilmaz, *Community Land Trusts: Leasing Land for Affordable Housing*, LAND LINES, Apr. 2005, at 8, 8, [http://www.lincolnst.edu/sites/default/files/pubfiles/1008\\_landlines%20final%2004.05.pdf](http://www.lincolnst.edu/sites/default/files/pubfiles/1008_landlines%20final%2004.05.pdf) [https://perma.cc/K74S-4489].

As a “steward” of the land, a CLT is economically advantageous, preserving and recycling public subsidies.<sup>15</sup> Through a 99-year ground lease whereby the CLT leases the land to residents,<sup>16</sup> the CLT allows for usage by a qualifying low-to-middle-income resident and maintains affordability for future homeowners or tenants.

Many CLTs are seeded with vacant or mismanaged property in the city’s control, or with properties transferred to a CLT by the individual owner or government entity that acknowledge that the property may be better maintained with more community involvement.<sup>17</sup> The initial investment in affordable housing through tax subsidy or donation of land is recycled by the resale restrictions contained in the lease.<sup>18</sup> No matter the improvements done on the house or the property appreciation, the CLT restricts tenants from reselling the property at market rate.<sup>19</sup>

A. *Permanently Affordable Housing Models Rectify the Consequences of Discriminatory Housing Policies: Benefits of CLTs*

There are several long-term benefits of developing and subsidizing permanently affordable housing through CLTs. The government would be saving money in the long run, rather than recreating new housing once the terms of affordability expire.<sup>20</sup> The cost-effectiveness of permanently affordable housing models is significant. One need only compare the number of years of affordable housing a CLT provides with each dollar of the public subsidy spent.<sup>21</sup> Tom Angotti, Professor of Urban Affairs and Plan-

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<sup>15</sup> KELLY WEISS, NEIGHBORHOOD HOUS. AND CMTY. DEV. & AUSTIN HOUS. FIN. CORP., THE COMMUNITY LAND TRUST REPORT: CREATING PERMANENT AFFORDABLE HOMEOWNERSHIP OPPORTUNITIES IN AUSTIN, TEXAS 10 (2005), <http://www.hud.gov/offices/cpd/about/conplan/foreclosure/pdf/austincommtrust.pdf> [<https://perma.cc/2XH4-ATSB>].

<sup>16</sup> Issuing a 99-year ground lease to tenants while the CLT holds ownership of the land upon which the house is built is the most common model of CLT. Other models include the CLT maintaining title while the improvements on the land are owned by the owner, or the resident may own, and thereby pay taxes on the house and land itself. Taxation of CLT property where the land and house may be taxed separately is further discussed in this article. See *infra* Section III.C.

<sup>17</sup> See discussion *infra* Section I.

<sup>18</sup> WEISS, *supra* note 15, at 10.

<sup>19</sup> NAT’L CMTY. LAND TR. NETWORK, THE CLT TECHNICAL MANUAL ch. 17 (Kirby White ed., 2011), <http://cltnetwork.org/wp-content/uploads/2014/01/MASTER-CLT-MANUAL.pdf> [<https://perma.cc/K8YZ-GZCA>].

<sup>20</sup> Peter Marcuse, *Blog #54 – Community Land Trusts as Transformative Housing Reforms*, PETER MARCUSE’S BLOG (July 23, 2014), <https://pmarcuse.wordpress.com/2014/07/23/blog-54-community-land-trusts-as-transformative-housing-reforms/> [<https://perma.cc/J3T4-EV2C>].

<sup>21</sup> See Tom Angotti, *Community Land Trusts and Low-Income Multifamily Rental Hous-*

ning at Hunter College and the City University of New York Graduate Center, cites a “preliminary analysis [that] suggests that the Cooper Square CLT [in New York City] more effectively spends public subsidies than any other City programs for low-income multifamily housing.”<sup>22</sup> The preservation of diversity within American cities is a stated goal of many elected officials, and the development of permanently affordable housing is a cost-effective way to achieve that goal.

As well as economic benefits, there are also social benefits to permanently affordable housing like CLTs. Permanently affordable housing initiatives help build communities and stabilize neighborhoods, maximizing social capital by preventing displacement. The type of investment in neighborhoods that becomes possible when residents know the needs and concerns of the place in which they live include belonging to community boards, cultivating community gardens, participating in neighborhood groups, and engaging in the democratic process.<sup>23</sup>

Further, cooperatively owned property, as exists in the CLT model, provides for democratic management of housing. By involving residents, public officials, and neighborhood leaders on the coop or CLT boards, educated decisions about expenditures and investment can be achieved.<sup>24</sup> Affordable housing that builds a sense of responsibility and ownership among residents to take care of the property rather than allowing it to fall into disrepair, is in the best interest of residents and investors alike, and serves as an example of how some failed models of housing projects could have been avoided.<sup>25</sup>

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ing: *The Case of Cooper Square, New York City* 17 (Lincoln Inst. of Land Policy, Working Paper No. 07TA1, 2007).

<sup>22</sup> *Id.*

<sup>23</sup> “In 1984, two church associations came together to form the Time of Jubilee Community Land Trust (TJCLT) with the mission of revitalizing a blighted section of Syracuse, New York. The TJCLT and its development affiliate, Jubilee Homes of Syracuse Inc., partnered with the city of Syracuse to develop vacant city-owned land in southwest Syracuse into affordable single-family residences. By 1992, Jubilee Homes had developed and sold 26 dwellings, with the TJCLT taking ownership of the underlying land in order to oversee the long-term affordability of the housing units and the preservation of the city’s subsidy. Since then, the TJCLT and Jubilee Homes . . . have also joined with local partners to create a homeownership education program for land trust home-owners and a business resource center to aid local small, minority- and women-owned businesses.” Ryan Sherriff, *Affordable Homeownership*, URBAN LAND, Sept. 2009, at 128, 131, [http://www.homesthatlast.org/wp-content/uploads/2009/12/CLTarticle\\_UL\\_Sept09.pdf](http://www.homesthatlast.org/wp-content/uploads/2009/12/CLTarticle_UL_Sept09.pdf) [<https://perma.cc/L9QP-TKFP>].

<sup>24</sup> Marcuse, *supra* note 20.

<sup>25</sup> The public housing of other cities such as St. Louis and Chicago that were demolished due to disrepair, Jarrett Murphy, *Worst Case for Public Housing Seen in 2 Mid-*

Despite the benefits of CLTs in addressing the affordable housing crisis, this model has not been widely embraced because of the way in which it runs counter to the capitalist myth that the free market and private development will address housing needs.<sup>26</sup> The United States government has steered housing development in significant ways: tax incentives to encourage homeownership have been embraced as a part of our American system, whereby homeowners “may deduct mortgage interest and property tax payments as well as certain other [home-related] expenses from their federal taxable income.”<sup>27</sup> Helping low- to moderate-income communities acquire adequate and stable housing should likewise be incentivized by exempting permanently affordable housing from certain taxes, and transferring vacant property dedicated to this purpose.

The government’s role in creating the current housing crisis is exemplified by the practice of redlining.<sup>28</sup> In the late 1930s, the Federal Home Owner’s Loan Corporation (“HOLC”) began using a four-tiered rank system that gave Black homebuyers the lowest rating, and therefore, little likelihood that they would receive a federally-insured mortgage.<sup>29</sup> Post World War II, the Federal Bureau of Public Roads targeted low-income communities of color for redevelopment projects (such as highway construction) that would displace them in order to facilitate the commute of white suburbanites.<sup>30</sup> Further, the U.S. legal system allowed the continuation

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*western Cities*, CITYLIMITS.ORG (Mar. 14, 2017), <http://citylimits.org/2017/03/14/worst-case-for-public-housing-seen-in-2-midwestern-cities/> [https://perma.cc/FVX9-8MS6], can be contrasted with the goals of New York’s Urban Homestead Assistance Board that aims to “empower[ ] low- to moderate-income residents to take control of their housing and enhance communities by creating strong tenant associations and lasting affordable co-ops.” *About UHAB*, URBAN HOMESTEADING ASSISTANCE BOARD, <http://uhab.org/about> [https://perma.cc/K483-NDML]. The limited equity coops that UHAB helps create and CLTs are both forms of permanently affordable housing that overlap in ways discussed below.

<sup>26</sup> For example, Mayor de Blasio’s affordable housing plan relies on private developers to include affordable units instead of funding CLT projects. *See infra* Part II.

<sup>27</sup> *What Are the Tax Benefits of Homeownership?*, in TAX POLICY CTR., THE TAX POLICY BRIEFING BOOK: A CITIZENS’ GUIDE TO THE TAX SYSTEM AND TAX POLICY, <http://www.taxpolicycenter.org/briefing-book/what-are-tax-benefits-homeownership> [https://perma.cc/6SEN-K78G].

<sup>28</sup> *See* Camila Domonoske, *Interactive Redlining Map Zooms in on America’s History of Discrimination*, NPR (Oct. 19, 2016, 3:22 PM), <http://www.npr.org/sections/thetwo-way/2016/10/19/498536077/interactive-redlining-map-zooms-in-on-americas-history-of-discrimination> [https://perma.cc/6THF-CX8J].

<sup>29</sup> *Id.*

<sup>30</sup> *See generally* RAYMOND A. MOHL, THE INTERSTATES AND THE CITIES: HIGHWAYS, HOUSING, AND THE FREEWAY REVOLT (2002), <http://www.prrac.org/pdf/mohl.pdf> [https://perma.cc/DC72-QD42]. “[B]y the mid-1960s, when interstate construction was well underway, it was generally believed that the new highway system would ‘dis-

of racially restrictive housing covenants well into the mid-1900s.<sup>31</sup> Finally, even after Congress passed the Community Reinvestment Act (“CRA”) of 1977, which was meant to regulate redlining practices, there are inadequate enforcement schemes to hold lending institutions accountable.<sup>32</sup> Banks are not penalized for predatory lending or required to provide for the banking needs of low-income communities in which they do business, as they are required to do by the statute.<sup>33</sup>

Redlined communities were also targeted decades later by policies such as “reverse redlining,” whereby minority groups were singled out for predatory loans that offered onerous mortgage terms that set them up to default.<sup>34</sup> According to a 2010 report by the Center for Responsible Lending, while about 4.5% of white borrowers lost their homes to foreclosure during the mid-to-late 2000s, Black and Latino borrowers had 7.9% and 7.7% foreclosure rates, respectively.<sup>35</sup> That means that Blacks and Latinos were more than

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place a million people from their homes before it [was] completed.’ A large proportion of those dislocated were African Americans, and in most cities the expressways were routinely routed through black neighborhoods.” *Id.* at 2-3 (footnote omitted); see also Raymond A. Mohl, *The Interstates and the Cities: The U.S. Department of Transportation and the Freeway Revolt, 1966-1973*, 20 J. POL’Y HIST. 193 (2008).

<sup>31</sup> See, e.g., Charles Abrams, *Stuyvesant Town’s Threat to our Liberties: Government Waives the Constitution for Private Enterprise*, COMMENTARY (Nov. 1, 1949) <https://www.commentarymagazine.com/articles/stuyvesant-towns-threat-to-our-libertiesgovernment-waives-the-constitution-for-private-enterprise/> [<https://perma.cc/M94V-KCZL>].

<sup>32</sup> See discussion *infra* Section III.D.

<sup>33</sup> See discussion *infra* Section III.D. Without adequate government enforcement, and mandatory resident-involvement in coming up with ratings, banks almost always receive passing scores, despite falling short of meeting the credit needs of low-income communities in which they do business. At least 97% of banks receive passing scores despite evidence that many have engaged in discriminatory practices (during the 2008 foreclosure crisis, for example). DARRYL E. GETTER, CONGRESSIONAL RESEARCH SERV., THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT 9 (2015), <https://www.newyorkfed.org/medialibrary/media/outreach-and-education/cra/reports/CRS-The-Effectiveness-of-the-Community-Reinvestment-Act.pdf> [<https://perma.cc/M44L-UGWX>]. In making resident-input optional rather than mandatory, and in providing neither training nor monetary reimbursement for residents engaging in this process, the enforcement scheme needs improvement. See Oscar Perry Abello, *Formerly Redlined Brooklyn Community Now Regulates Banks*, NEXT CITY (July 5, 2016), <https://nextcity.org/daily/entry/formerly-redlined-brooklyn-community-regulates-banks> [<https://perma.cc/E7B2-PAMN>].

<sup>34</sup> Natasha M. Trifun, *Residential Segregation After the Fair Housing Act*, 36 HUM. RTS., Fall 2009, at 14, 18, [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2009/fall2009/residential\\_segregation\\_after\\_the\\_fair\\_housing\\_act.html](https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/fall2009/residential_segregation_after_the_fair_housing_act.html) [<https://perma.cc/6J4E-BMH3>].

<sup>35</sup> DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 8 (2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf> [<https://perma.cc/XH6F-QPHC>].

70% more likely to lose their homes to foreclosure during that period.<sup>36</sup> Even those with credit scores, loan sizes and incomes similar to those of whites were more likely to receive subprime loans during the housing boom, and thus were more likely to default on their loan payments due to reverse-redlining practices.<sup>37</sup>

Although some see the displacement of low-income communities as an inevitable outgrowth of development and gentrification,<sup>38</sup> the process can be regulated through government intervention. “While gentrification may bring much-needed investment to urban neighborhoods, displacement prevents these changes from benefitting residents who need them the most.”<sup>39</sup> There is a vicious cycle of gentrification, whereby individuals are priced out of one neighborhood and move to the next, pricing out the residents there, only to see that area grow unaffordable as well.<sup>40</sup> Because it is in society’s interest to prevent the consequences that come with mass evictions, homelessness, as well as the transformation of cities into “citadels for the rich,”<sup>41</sup> the creation of additional permanently affordable housing must be immediately pursued.

## II. A COMPARATIVE STUDY OF CLTs: NEW YORK AND THE BAY AREA

New York City and the Bay Area of California are among the most expensive and rapidly-gentrifying metro areas in the coun-

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<sup>36</sup> *Id.*

<sup>37</sup> Renae Merle, *Minorities Hit Harder by Foreclosure Crisis*, WASH. POST, (June 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/18/AR2010061802885.html> [https://perma.cc/9EZE-JVQ6].

<sup>38</sup> Richard Florida, *The Complicated Link Between Gentrification and Displacement*, CITY-LAB (Sept. 8, 2015), <http://www.citylab.com/housing/2015/09/the-complicated-link-between-gentrification-and-displacement/404161> [https://perma.cc/HN2L-4EBK].

<sup>39</sup> CAUSA JUSTA: JUST CAUSE, DEVELOPMENT WITHOUT DISPLACEMENT: RESISTING GENTRIFICATION IN THE BAY AREA 7 (2014), <http://www.acphd.org/media/343952/cjic2014.pdf> [https://perma.cc/SNG8-XQJ9] [hereinafter CAUSA JUSTA].

<sup>40</sup> See INST. FOR CHILDREN, POVERTY, & HOMELESSNESS, *THE PROCESS OF POVERTY DESTABILIZATION: HOW GENTRIFICATION IS RESHAPING UPPER MANHATTAN AND THE BRONX AND INCREASING HOMELESSNESS IN NEW YORK CITY* (rev. ed. 2014), [http://www.icphusa.org/wp-content/uploads/2016/09/ICPH\\_policybrief\\_TheProcessofPovertyDestabilization\\_Revised-022614.pdf](http://www.icphusa.org/wp-content/uploads/2016/09/ICPH_policybrief_TheProcessofPovertyDestabilization_Revised-022614.pdf) [https://perma.cc/94E9-SRYG]; William R. Aronin, *Gentrification and the “New” New York*, 2016 ASPATORE SPECIAL REP. 5, 5; Amanda Briney, *Gentrification:*

*The Controversial Topic of Gentrification and Its Impact on the Urban Core*, THOUGHTCO. (Feb. 28, 2017), <https://www.thoughtco.com/gentrification-and-its-impact-on-urban-core-1435781> [https://perma.cc/VB4F-GFW7].

<sup>41</sup> Badger, *supra* note 3.

try.<sup>42</sup> An examination of how CLTs are being proposed and implemented, even in these cities where land is scarce and the housing market saturated,<sup>43</sup> shows the viability of this model in urban centers around the country.

#### A. *New York City*

In 2014, more than 56% of New York City renters spent more than one-third of their income on rent.<sup>44</sup> Nearly 30% spent more than half of their income on rent.<sup>45</sup> According to a recent study by the Furman Center, many of the neighborhoods that housed low-income communities in the 1990s have experienced such rapid rent increases that they are now unaffordable to low-income communities.<sup>46</sup> These gentrifying neighborhoods are not just based in Manhattan but also the “outer boroughs” of New York City, which were some of the most diverse neighborhoods in the world.<sup>47</sup> Although New York City still has more racial and economic diversity than many cities,<sup>48</sup> permanently affordable housing models must now swiftly be embraced in order to preserve that diversity.

#### 1. NYCHA

New York City Housing Authority (“NYCHA”) is the agency that provides low-to-middle income New Yorkers across the five

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<sup>42</sup> See Abigail Sindzinski, *Why Homes in Major U.S. Cities Are Nearly Impossible to Afford*, CURBED (Jan. 27, 2016, 11:30 AM), <http://www.curbed.com/2016/1/27/10843266/buying-homes-major-cities-unaffordable-new-york-san-francisco-la> [https://perma.cc/76W4-69PC].

<sup>43</sup> *The Scarcity of Land: Land Suitable for Development is Limited, After All*, *supra* note 11.

<sup>44</sup> Press Release, N.Y.C. Dep’t of Hous. Pres. & Dev., HPD Releases Initial Findings of 2014 New York City Housing and Vacancy Survey (Feb. 24, 2015), <http://www1.nyc.gov/site/hpd/about/press-releases/2015/02/24.page> [https://perma.cc/AAG7-JMJD].

<sup>45</sup> ELYZABETH GAUMER & SHEREE WEST, N.Y.C. DEP’T OF HOUS. PRES. & DEV., SELECTED INITIAL FINDINGS OF THE 2014 NEW YORK CITY HOUSING AND VACANCY SURVEY 7 (2015), <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf> [https://perma.cc/JU5W-4Q6D].

<sup>46</sup> See MAXWELL AUSTENSEN ET AL., NYU FURMAN CTR., STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015 5 (2016), [http://furmancenter.org/files/sotc/NYUFurmanCenter\\_SOCin2015\\_9JUNE2016.pdf](http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf) [https://perma.cc/BYG6-9P48].

<sup>47</sup> Svati Kirsten Narula, *The 5 U.S. Counties Where Racial Diversity Is Highest—and Lowest*, ATLANTIC (Apr. 29, 2014), <https://www.theatlantic.com/national/archive/2014/04/mapping-racial-diversity-by-county/361388/> [https://perma.cc/WSB2-7Q95] (naming Queens county as the third most diverse county in the United States).

<sup>48</sup> Richie Bernardo, *2016’s Most Diverse Cities in America*, WALLETHUB (May 11, 2016) <https://wallethub.com/edu/most-diverse-cities/12690/> [https://perma.cc/K7VX-SJNR].

boroughs with affordable housing.<sup>49</sup> Today, its operating budget is millions in debt and over 270,000 people remain on the waiting list.<sup>50</sup> In order for the agency to stay solvent, strategies are now being considered about how to generate additional funds, including partnerships with private developers.

Proposals for a NYCHA public-private partnership take different forms.<sup>51</sup> In one iteration supported by the de Blasio mayoral administration, private developers would build market rate housing on underused portions of NYCHA campuses and give NYCHA a portion of the revenue.<sup>52</sup> These funds would be used to renovate low-income housing and fill the deficit.<sup>53</sup> Sites have already been selected for the private developments that would be 50% affordable, and 50% market rate housing: Wyckoff Gardens in Brooklyn and Holmes Towers on the Upper East Side of Manhattan.<sup>54</sup> At Holmes, the new development would be built in the space where there is now a playground for resident children.<sup>55</sup>

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<sup>49</sup> *About NYCHA*, N.Y.C. HOUSING AUTHORITY, <http://www1.nyc.gov/site/nycha/about/about-nycha.page> [<https://perma.cc/J6Y4-3SBL>]. NYCHA also administers a Section 8 rent subsidy program. *About Section 8*, N.Y.C. HOUSING AUTHORITY, <http://www1.nyc.gov/site/nycha/section-8/about-section-8.page> [<https://perma.cc/R6PP-G3JP>].

<sup>50</sup> MARJORIE LANDA, N.Y.C. OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE NEW YORK CITY HOUSING AUTHORITY'S MANAGEMENT OF VACANT APARTMENTS 1, 3 (2015), [http://comptroller.nyc.gov/wp-content/uploads/documents/MD15\\_060A.pdf](http://comptroller.nyc.gov/wp-content/uploads/documents/MD15_060A.pdf) [<https://perma.cc/VES8-2B52>] (noting that, as of the fall of 2014, 2,342 NYCHA apartments sat vacant while NYCHA maintained a waitlist of 273,391 households); *Preliminary Budget Hearing Before the Comm. on Pub. Hous.*, N.Y.C. Council 5-23 (Mar. 28, 2016) (testimony of Shola Olatoye, Chair and CEO of NYCHA), [http://www1.nyc.gov/assets/nycha/downloads/pdf/budget\\_testimony\\_20160328.pdf](http://www1.nyc.gov/assets/nycha/downloads/pdf/budget_testimony_20160328.pdf) [<https://perma.cc/T7FB-GLDR>]. In her budget testimony to the NY City Council, Olatoye declared that government disinvestment has resulted in a nearly \$2.5 billion loss in operating and capital funding since 2001, a deficit that will grow to a cumulative \$5 billion in 10 years. She goes on to state that the majority of NYCHA buildings are more than a half-century old and require \$17 billion in funding for major capital repairs.

<sup>51</sup> *Partnerships*, N.Y.C. HOUSING AUTHORITY, <https://www1.nyc.gov/site/nycha/about/partnerships.page> [<https://perma.cc/Z7MG-7QKG>].

<sup>52</sup> Nick Pinto, "It's A Land Grab": NYCHA Tenants Protest Private Development Plans for Public Land, *GOHAMIST* (Oct. 21, 2015, 12:15 PM), [http://gothamist.com/2015/10/21/nycha\\_deblasio\\_protest.php](http://gothamist.com/2015/10/21/nycha_deblasio_protest.php) [<https://perma.cc/YQ5S-8WQZ>].

<sup>53</sup> *Id.*

<sup>54</sup> Jackson Chen, *Wariness the Watchword Among NYCHA "Infill" Advisory Committee Members on UES*, *MANHATTAN EXPRESS* (June 30, 2016), <http://www.manhattanexpress-news.nyc/wariness-watchword-among-nycha-infill-advisory-committee-members-ues/> [<https://perma.cc/YW3E-DDDR>]; Abigail Savitch-Lew, *Intense NYCHA Engagement Effort Could Soften Infill Opposition*, *CITYLIMITS* (June 21, 2016), <http://citylimits.org/2016/06/21/intense-nycha-engagement-effort-could-soften-infill-opposition/> [<https://perma.cc/Z2QL-AJS9>].

<sup>55</sup> Chen, *supra* note 59.

Mayor de Blasio is currently receiving pushback for supporting this plan to build market rate housing on NYCHA campuses, a plan that was first proposed by the more conservative Bloomberg administration.<sup>56</sup> Many believe that the burden of solving budget deficits should not fall on underrepresented residents, and that New York City should instead reinvest in NYCHA so it could make the necessary capital repairs.<sup>57</sup> Low-income residents should not be burdened with overcrowding and other side effects of the construction.<sup>58</sup>

## 2. Mitchell-Lama Housing

Unlike NYCHA, which is publically owned, Mitchell-Lama is a form of subsidized, privately-owned, affordable housing in New York City, whose mission is likewise being eroded due to privatization.<sup>59</sup> The New York City- and State-sponsored Mitchell-Lama program, first developed under the 1955 Limited Profit Housing Companies Act “for the purpose of building affordable housing for middle-income residents,”<sup>60</sup> was used by the federal government as a model for similar subsidized apartments.<sup>61</sup> Over 105,000 apartments were built under the Mitchell-Lama program, including rental units and cooperatively owned apartments.<sup>62</sup> However, the initial terms of affordability in many Mitchell-Lama houses have expired.<sup>63</sup> “After twenty years from initial occupancy, housing companies are statutorily permitted to voluntarily dissolve . . . and leave

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<sup>56</sup> Pinto, *supra* note 52; *see also* Tom Angotti, *Stop NYCHA Infill Plan, Save Public Housing*, CITYLIMITS (May 9, 2013), <http://citylimits.org/2013/05/09/stop-nycha-infill-plan-save-public-housing/> [https://perma.cc/X7WS-ZK7A].

<sup>57</sup> Pinto, *supra* note 52.

<sup>58</sup> *Id.* (quoting N.Y.C. Councilmember Ben Kallos, who represents residents at one of the targeted properties, Holmes Tower). Kallos stated the following at a protest outside of Mayor de Blasio’s gala fundraiser in October of 2015: “We shouldn’t be building luxury housing on public land. Any development on public housing land needs to come with the approval of the existing tenants, and it needs to be 100 percent affordable.” *Id.*

<sup>59</sup> *See Mitchell-Lama*, N.Y.C. HOUSING PRESERVATION & DEV., <http://www1.nyc.gov/site/hpd/renters/mitchell-lama-rentals.page> [https://perma.cc/6T93-EETM]; *see also* Abigail Savitch-Lew, *Tough Fight to Keep Mitchell-Lamas from Going Private*, CITYLIMITS (May 10, 2016), <http://citylimits.org/2016/05/10/tough-fight-to-keep-mitchell-lamas-from-going-private/> [https://perma.cc/W72U-U733].

<sup>60</sup> *Mitchell-Lama Housing Program*, N.Y. HOMES & COMMUNITY RENEWAL, <http://www.nyshcr.org/Programs/mitchell-lama/> [https://perma.cc/G3E8-UEUT] (last updated Apr. 1, 2015); Private Housing Finance Law, N.Y. PRIV. HOUS. FIN. LAW ch. 44B, art. II (2017).

<sup>61</sup> *Mitchell-Lama Housing Program*, *supra* note 60.

<sup>62</sup> *Id.*; *Mitchell-Lama*, *supra* note 59.

<sup>63</sup> *Mitchell-Lama Housing Program*, *supra* note 60.

the program. To date, 93 Mitchell-Lama rental developments (approximately 31,700 apartments) have voluntarily dissolved.<sup>64</sup> The developer is statutorily permitted to raise the rents once the mortgage, interest, as well as tax abatements received from the government are returned.<sup>65</sup>

The first buyout took place in September 1984 when a developer raised the rent of his tenants by about 40% in a building that was largely inhabited by senior citizens.<sup>66</sup> These residents were given the choice to move or pay higher rents.<sup>67</sup> The state brought suit on behalf of the senior residents, but the court found that it did not have jurisdiction to reverse the buyout.<sup>68</sup> Most Mitchell-Lama rentals are at this point rent-regulated,<sup>69</sup> but some Mitchell-Lama coops have also been converting to market rate homes.<sup>70</sup>

Some of the neighborhoods where Mitchell-Lama buildings were built have seen a dramatic increase in real estate prices, making buyout an even more viable and attractive prospect.<sup>71</sup> When a Mitchell-Lama coop goes private, those who own apartments can sell them at market rates.<sup>72</sup> This happened at the Mitchell-Lama

<sup>64</sup> *Id.*; N.Y. PRIV. HOUS. FIN. LAW § 35 (McKinney 2017).

<sup>65</sup> N.Y. PRIV. HOUS. FIN. LAW § 35(2); N.Y. COMP. CODES R. & REGS. tit. 9, § 1725-1.1 (2017).

<sup>66</sup> *History*, MITCHELL-LAMA RESIDENTS COALITION, <http://www.mitchell-lama.org/history.html> [<https://perma.cc/7AA8-KGV8>].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* See also David J. Sweet & John D. Hack, *Mitchell-Lama Buyouts: Policy Issues and Alternatives*, 17 FORDHAM URBAN L.J. 117, 153 (1989); Philip S. Gutis, *Unfettering Mitchell-Lama*, N.Y. TIMES (Feb. 23, 1986), <http://www.nytimes.com/1986/02/23/realestate/unfettering-mitchell-lama.html> [<https://perma.cc/9TWR-HX4U>].

<sup>69</sup> See *Mitchell-Lama Housing Program*, *supra* note 65 (explaining that, in areas subject to the Rent Stabilization Law or the Emergency Tenant Protection Act, developments that “buy out” are covered by rent stabilization). The term “rent-regulated housing” refers to both “rent-controlled” and “rent-stabilized” apartments. *Rent-Regulated & Market-Rate Housing: What Is It & Where Can You Find It?*, N.Y.C. RENT GUIDELINES BOARD, <http://www.nycrgb.org/html/resources/stabilized.html> [<https://perma.cc/59BD-AEMG>] [hereinafter *Rent-Regulated & Market-Rate Housing*]. If a rent-stabilized apartment is vacated, it can become market rate for the new tenant. *Id.* The distinctions between rent regulated and rent controlled apartments do not exist in other jurisdictions including the Bay Area. See discussion *infra* Section III.

<sup>70</sup> Abigail Savitch-Lew, *The Seven Worries of New York City's Mitchell-Lama Tenants*, CITYLIMITS (Mar. 2, 2016), <http://citylimits.org/2016/03/02/the-seven-worries-of-new-york-citys-mitchell-lama-tenants/> [<https://perma.cc/3QER-HAYJ>] (“[A]bout half of the state’s rental Mitchell-Lamas have left the program . . . [but] only 7 percent of cooperatives have left the program. Yet privatization can be tempting to shareholders: [since it] . . . allows shareholders to sell their apartments at market rates.”).

<sup>71</sup> Raanan Geberer, *Mitchell-Lama Co-ops: The Pressure to Privatize*, N.Y. COOPERATOR (Oct. 2015), <https://cooperator.com/article/mitchell-lama-co-ops> [<https://perma.cc/UA78-TLFT>].

<sup>72</sup> Raanan Geberer, *The Mitchell-Lama Buyout Process: The Challenges of Going Private*,

Southbridge project, which overlooks the East River of Manhattan. After a contentious eight-year debate, shareholders voted to leave Mitchell-Lama, paving the way for residents to sell their apartments without resale caps.<sup>73</sup>

### 3. Mandatory Inclusionary Housing

With long waiting lists for NYCHA housing, the affordability of Mitchell-Lama expiring or being outvoted, and rapid rates of displacement of low-income families from once-affordable neighborhoods, the current City administration has made a housing plan that aims to build or preserve 200,000 units of affordable housing.<sup>74</sup> Part of the construction plan focuses on Mandatory Inclusionary Housing (“MIH”), which requires private developers to include affordable housing in their construction plans in exchange for strategic zoning changes.<sup>75</sup> The complications of MIH housing show the limitations of relying on private developers to agree to the construction of affordable units.

On March 22, 2016, the New York City Council adopted an amended version of MIH.<sup>76</sup> Even with the policy in place, many private developers claim that, without the lapsed New York State subsidy (“Section 421-a”),<sup>77</sup> MIH will be unsuccessful.<sup>78</sup> In the

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N.Y. COOPERATOR (July 2015), <http://cooperator.com/article/the-mitchell-lama-buyout-process> [<https://perma.cc/4QXP-NA46>].

<sup>73</sup> Ronda Kaysen, *Divided by a Windfall: Affordable Housing in New York City Sparks Debate*, N.Y. TIMES (Nov. 14, 2014), <http://www.nytimes.com/2014/11/16/realestate/affordable-housing-in-new-york-city-sparks-debate.html> [<https://perma.cc/9PL4-NVKE>].

<sup>74</sup> CITY OF N.Y., HOUSING NEW YORK, A FIVE-BOROUGH TEN-YEAR PLAN 6 (2014), [http://www.nyc.gov/html/housing/assets/downloads/pdf/housing\\_plan.pdf](http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf) [<https://perma.cc/2K5R-XWEZ>]. Over the past 20 years, wages have increased by less than 15% whereas monthly rents in New York City have increased by almost 40%. *Id.* at 5. Also, “[f]or the first time in decades, more people are moving or staying in [New York] City than leaving.” *Id.* Older residents are not moving away from the city as they used to, and neither are young families moving to the suburbs. *Id.* At the same time, unprecedented numbers are moving from all over the country and world. *Id.* In this climate, there is not enough housing, let alone affordable housing for current residents. *Id.*

<sup>75</sup> Abigail Savitch-Lew, *Everything You Need to Know About Mandatory Inclusionary Housing but Were Afraid to Ask*, CITYLIMITS (Nov. 17, 2016), <http://citylimits.org/2016/11/17/everything-you-need-to-know-about-mandatory-inclusionary-housing-but-were-afraid-to-ask> [<https://perma.cc/DQV2-S2NR>].

<sup>76</sup> *Mandatory Inclusionary Housing*, N.Y.C. DEP’T CITY PLAN. (Mar. 22, 2016), <http://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> [<https://perma.cc/P8V2-9HPB>].

<sup>77</sup> N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2015); Kathryn Brenzel, *Can New Affordable Housing Programs Fill the 421a Void?*, REAL DEAL (Mar. 18, 2016, 8:00 AM), <http://therealdeal.com/2016/03/18/can-new-affordable-housing-programs-fill-the-421a-void> [<https://perma.cc/9JV3-SEA7>].

meantime, private developers hesitate to develop these mixed-income apartment buildings unless adequate subsidies are available.<sup>79</sup>

Private developers are not the only ones with qualms about Mandatory Inclusionary Housing; some low-income residents also have objections, claiming that the newly created “affordable” units would still be outside their income brackets.<sup>80</sup> According to a New York Times article, most of the 200,000 “affordable housing” units proposed by the Mayor would be unaffordable to half the city’s population.<sup>81</sup> With both private developers as well as low-income communities dissatisfied with this policy, advocacy groups and other branches of city government are looking into alternatives that would create permanently and truly affordable housing.

#### 4. An Alternative Strategy: Converting Vacant Land to Permanently Affordable Housing

A growing number of organizations around New York City have initiated studies to track vacant property, and to transfer that land into public or nonprofit hands that would redevelop the land for permanently affordable housing.<sup>82</sup> This would eliminate the

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<sup>78</sup> Duscia Sue Malesevic, *Developers Say de Blasio Affordable Housing Plan Is “Almost Meaningless” Without 421a*, REAL DEAL (Mar. 22, 2016, 9:36 AM), <http://therealdeal.com/2016/03/22/developers-say-de-blasio-affordable-housing-plan-is-almost-meaningless-without-421a> [<https://perma.cc/559B-MH6C>]. Re-passage of Section 421-a is on hold until the real estate sector and construction unions can come to an agreement about the wages that workers would receive at construction sites. See Steven Wishnia, *With 421-a Construction Subsidy Expired, What’s Next?*, LABORPRESS (Feb. 3, 2016), <http://laborpress.org/sectors/building-trades/6749-with-421-a-construction-subsidy-expired-what-s-next> [<https://perma.cc/BTL9-YET2>]. On August 17, 2016, New York State Governor Andrew Cuomo proposed to developers a resolution: they would not have to hire union workers, but they would have to pay a competitive base hourly salary and benefits that would be subsidized by the state in exchange for setting aside a portion of developed housing for below market rentals. Konrad Putzier, *Cuomo Offers Wage Subsidy to Save 421a*, REAL DEAL (Aug. 18, 2016, 8:42 AM), <http://therealdeal.com/2016/08/18/cuomo-offers-wage-subsidy-to-save-421a> [<https://perma.cc/78YU-Z6RN>].

<sup>79</sup> Malesevic, *supra* note 78.

<sup>80</sup> Miranda Katz, *De Blasio’s Affordable Housing Plan Faces Angry Resistance in Northern Manhattan*, GOTHAMIST (Mar. 17, 2016, 2:20 PM), [http://gothamist.com/2016/03/17/inwood\\_residents\\_implore\\_council\\_to.php](http://gothamist.com/2016/03/17/inwood_residents_implore_council_to.php) [<https://perma.cc/434H-7R6S>].

<sup>81</sup> Michael Kimmelman, *In Gowanus, A People’s Housing Plan to Challenge the Mayor’s*, N.Y. TIMES (Aug. 1, 2016), <http://www.nytimes.com/2016/08/02/arts/design/in-gowanus-a-peoples-housing-plan-to-challenge-the-mayors.html> [<https://perma.cc/Q5U4-3S7H>].

<sup>82</sup> Picture the Homeless, The New Economy Project, and 596 Acres, to name a few, have all released studies on this topic. See, e.g., PICTURE THE HOMELESS, HOMELESS PEOPLE COUNT: VACANT PROPERTIES IN MANHATTAN (2015), [http://picturethehomeless.org/wp-content/uploads/2015/12/Homeless\\_People\\_Count2.pdf](http://picturethehomeless.org/wp-content/uploads/2015/12/Homeless_People_Count2.pdf) [<https://perma.cc/78YU-Z6RN>].

problem of expiring terms of affordability and of getting private developers to agree to the creation of these units.

City Comptroller Scott Stringer introduced a proposal for a New York City Land Bank in February of 2016.<sup>83</sup> Land banks are “nonprofit corporations designed to convert tax-delinquent and vacant properties into affordable housing or other productive uses.”<sup>84</sup> Land banks, already in various cities including in the Midwest<sup>85</sup> and throughout New York State,<sup>86</sup> have proven successful at redeveloping available land for public use.<sup>87</sup>

Comptroller Stringer starts out his proposal for a New York City Land Bank by explaining the gravity of the city’s affordable housing crisis: since 2000, the City has lost over 400,000 apartments renting for \$1,000 a month or less, with the harshest consequences being felt by working New Yorkers earning less than \$40,000 a year.<sup>88</sup> He stated that these pressures have contributed to a surging homeless population, with more than 58,000 people living in the City’s shelter system, including more than 23,000 children.<sup>89</sup> A recent audit of the City’s Department of Housing Preservation and Development (“HPD”), indicated that there are currently 1,459 vacant properties owned by the City that sit unused and undeveloped.<sup>90</sup> The Comptroller’s Office has also identified 247 persistently tax delinquent properties that could be readily converted into affordable housing.<sup>91</sup>

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ma.cc/E2B3-2CRQ]; *Publications*, NEW ECONOMY PROJECT, <http://www.neweconomy-nyc.org/type/publications> [<https://perma.cc/WK4V-ZQ5X>] (providing reports on the topic); *We Made These Online Advocacy Tools*, 596 ACRES, <http://596acres.org> [<https://perma.cc/MJ4S-TKKN>].

<sup>83</sup> See BUILDING AN AFFORDABLE FUTURE, *supra* note 12.

<sup>84</sup> *Id.* at 4.

<sup>85</sup> See URBAN LAND INST. CHI., COOK COUNTY LAND BANK TAP 2 (2012), <http://chicago.uli.org/wp-content/uploads/sites/16/2012/03/121171-ULI-CC-Land-Bank-TAP.pdf> [<https://perma.cc/Y5S5-8PKP>].

<sup>86</sup> *New York State Land Bank Program*, EMPIRE STATE DEV., <https://esd.ny.gov/businessprograms/nyslbp.html> [<https://perma.cc/37NL-G6P5>].

<sup>87</sup> *Benefits of a Landbank*, LAND BANK: BUFFALO ERIE NIAGRA LAND IMPROVEMENT CORP., <http://www.benlic.org/benefits-of-a-land-bank> [<https://perma.cc/NAM5-NWVF>] (listing some of the benefits attributable to a land bank).

<sup>88</sup> BUILDING AN AFFORDABLE FUTURE, *supra* note 12, at 4.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 4-5.

<sup>91</sup> *Id.* at 4. The exact number of abandoned properties cited in the report has been contested. Some housing groups claim that a number of the thousand-plus vacant properties are in flood zones or had other issues that would make development a challenge. They also pointed to an additional 150 properties that were better suited for projects other than residential buildings, such as parks and police stations. Mireya Navarro, *Audit Faults New York City for Not Using Vacant Lots for Affordable Housing*, N.Y. TIMES (Feb. 17, 2016), <https://www.nytimes.com/2016/02/18/nyregion/audit-pro>

New York City's traditional model for developing affordable housing, selling the property to a private developer in exchange for setting aside a percentage of affordable units for a limited duration, is critiqued in Stringer's report. Within this model, the City loses leverage by transferring title and cannot mandate that the land be kept affordable in perpetuity. With a land bank, the City could maintain title to the land and dedicate its use to affordable housing. Comptroller Stringer's office proposed to "[s]eed the land bank by transferring vacant, city-owned properties and/or re-directing a portion of outstanding tax liens to the land bank . . . ."<sup>92</sup> The Comptroller's study stated that a land bank could have stepped in during the 2008 housing bubble and credit crisis in order to purchase some of the foreclosed properties.<sup>93</sup>

The foundations for a land bank in New York City have already been set. New York State authorized the creation of municipal land banks with the passage of the New York Land Bank Act in 2011, signed into law by Governor Andrew Cuomo.<sup>94</sup> In 2013, New York State Attorney General Schneiderman announced a \$20 million grant to help communities still recovering from the foreclosure crisis, including more than \$12.4 million designated for local land banks.<sup>95</sup> Although there are land banks in Upstate New York in areas including Syracuse, Albany, and Broome County,<sup>96</sup> there is

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poses-using-vacant-lots-owned-by-new-york-city-for-affordable-housing.html [https://perma.cc/GM8V-N8XU]. Public officials such as the Commissioner of Housing, Preservation and Development, Vicki Been, objected to the assertion that HPD allows vacant city-owned properties to languish in the face of an affordable housing crisis. She and other officials maintain that if the city maintains title to vacant land, it is for good reason, like its inhabitability, or that development plans are already underway. Tanay Warerkar, *Thousands of Vacant City-Owned Lots Could Become Affordable Housing: Report*, CURBED N.Y. (Feb. 18, 2016, 12:20 PM), <http://ny.curbed.com/2016/2/18/11080200/thousands-of-vacant-city-owned-lots-could-become-affordable-housing> [https://perma.cc/ADQ6-TBG8].

<sup>92</sup> BUILDING AN AFFORDABLE FUTURE, *supra* note 12, at 5.

<sup>93</sup> *Id.* at 26.

<sup>94</sup> *New York State Land Bank Program*, *supra* note 86. New York State permits twenty land banks statewide. *Id.*

<sup>95</sup> Press Release, Att'y Gen. Eric T. Schneiderman, A.G. Schneiderman Announces First Round of Awards for \$20 Million Program to Rebuild and Reinvest in Communities Recovering from the Housing Crisis (Oct. 29, 2013), <https://ag.ny.gov/press-release/ag-schneiderman-announces-first-round-awards-20-million-program-rebuild-and-reinvest> [https://perma.cc/P4DN-YEDX].

<sup>96</sup> CENTERSTATE CEO, NEW YORK STATE LAND BANKS: COMBATING BLIGHT AND VACANCY IN NEW YORK COMMUNITIES 7 (2014), [http://broomelandbank.org/resources/2014\\_NYS\\_Land\\_Banks\\_Web.pdf](http://broomelandbank.org/resources/2014_NYS_Land_Banks_Web.pdf) [https://perma.cc/MY5J-V9P9]; *see, e.g., Restoring Properties, Revitalizing Neighborhoods*, GREATER SYRACUSE LAND BANK, <http://syracuse-landbank.org> [https://perma.cc/G4W4-AKHX]; ALBANY COUNTY LAND BANK CORP., <http://albanycountylandbank.org> [https://perma.cc/N6JL-FAEB].

not yet one in New York City.

The land bank that City Comptroller Stringer proposed in his report would transfer the land it acquires to a CLT, in order to designate the land for affordable housing.<sup>97</sup> The concept of CLTs in New York is growing in popularity. In addition to the Comptroller including CLTs in his proposal, City Council Speaker Melissa Mark-Viverito made CLTs part of New York City's District Eight rezoning plan.<sup>98</sup> Mark-Viverito supports the establishment of the East Harlem/El Barrio CLT, which plans to own land to lease for affordable housing, as well as develop a resident-controlled mutual housing association to help manage those properties.<sup>99</sup>

At least two buildings in East Harlem have been identified that would be transferred to the CLT.<sup>100</sup> These properties were created as limited equity coops,<sup>101</sup> under a program "launched in 1978, [that] provided the tenants of buildings abandoned by their landlords an opportunity to form cooperatives and buy their buildings from the city for \$250 a unit."<sup>102</sup>

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<sup>97</sup> BUILDING AN AFFORDABLE FUTURE, *supra* note 12, at 13-15.

<sup>98</sup> OFFICE OF CITY COUNCIL SPEAKER MELISSA MARK-VIVERITO ET AL., EAST HARLEM NEIGHBORHOOD PLAN 68-69 (2016), [http://www.eastharlempian.nyc/EHNP\\_FINAL\\_REPORT.pdf](http://www.eastharlempian.nyc/EHNP_FINAL_REPORT.pdf) [<https://perma.cc/4X4Z-AD52>]. After Speaker Mark-Viverito's report, a similar plan was adopted in Gowanus, Brooklyn that gives residents a voice in the rezoning plan for the neighborhood. Kimmelman, *supra* note 86.

<sup>99</sup> Telephone Interview with Marie Winfield, President, East Harlem/El Barrio Cmty. Land Tr. (July 20, 2016).

<sup>100</sup> Abigail Savitch-Lew, *City Slow to Embrace Land Trusts as Housing Tool*, CITYLIMITS (May 9, 2016), <http://citylimits.org/2016/05/09/city-slow-to-embrace-land-trusts-as-housing-tool/> [<https://perma.cc/7AE2-V8HF>].

<sup>101</sup> 154 buildings remain in the Tenant Interim Lease (TIL) program, now revamped as the Affordable Neighborhood Cooperative Program. *Id.* This program created Limited Equity Cooperatives (LECs) in New York City which have been criticized for their lack of caps on resale prices, with their terms restricting price resale typically only lasting 10-40 years. Michelle Higgins, *Bargains With a 'But': Affordable New York Apartments With a Catch*, N.Y. TIMES (June 27, 2014), <https://www.nytimes.com/2014/06/29/realestate/affordable-new-york-apartments-with-a-catch.html> [<https://perma.cc/K88R-QMRX>]. This means that although the apartments were created as affordable units, they can be converted into market rate units as a result of lack of permanent restrictions. *Id.* The City Council recently proposed a mandated resale cap allowing for appreciation of value due to improvements but not a large profit. The resale caps would be imposed in exchange for forgiveness of property taxes that many LECs currently owe. Josh Barbanel, *New York City Council Proposes Ending Property Taxes for Low-Income Co-ops*, WALL ST. J. (Nov. 29, 2015, 9:16 PM), <http://www.wsj.com/articles/new-york-city-council-proposes-ending-property-taxes-for-low-income-co-ops-1448846154> [<https://perma.cc/M2EH-LATW>]. The Urban Homesteading Assistance Board stated before the New York City Council that the cost of forgiving all NYC-based LECs' tax arrears in a full tax abatement program would be much less than the cost to create new affordable units. *Id.*

<sup>102</sup> Savitch-Lew, *supra* note 100.

Now, residents of these properties would like to transfer ownership of the land to the East Harlem CLT and the multi-building mutual housing association.<sup>103</sup> East Harlem tenants believe that a CLT and mutual housing association would provide more effective oversight and management of the property than the management they are receiving from the City.<sup>104</sup> There are also aging residents living in the properties that have become mobility-impaired, but are still living on the top floors of their walk-up apartments.<sup>105</sup> Residents believe that with the CLT model, they could serve on the CLT board, or be a part of the mutual housing association that will manage the properties, paving the way to greater accountability to use resources in a way that meets residents' actual needs.<sup>106</sup> The CLT has been in negotiation with the city for years now about finalizing the transfer.<sup>107</sup>

Transferring limited equity cooperatives that were created in the 1970s and 1980s to a CLT is a strategy that is also being considered in other neighborhoods around New York City, including Bushwick, Brooklyn. Ridgewood Bushwick Senior Citizen Council ("RBSCC"), which works on housing preservation, rehabilitation, and development of affordable housing within areas of Brooklyn and Queens, is teaming up with Urban Homestead Assistance Board ("UHAB") to create a Community Land Trust that would oversee a group of 17 limited equity cooperatives all located within a two-block radius of each other.<sup>108</sup> The transfer of ownership of these 17 buildings, and possibly other affordable housing units in the future,<sup>109</sup> would be managed by a Community Land Trust to

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<sup>103</sup> *Id.* David West states that, as CLTs are being created all around the country, they are most often established in coordination with municipal housing agencies with the CLT owning the land, and the MHA managing and sometimes owning the properties themselves. David West, *Valuation of Community Land Trust Homes in New York State*, 8 J. PROP. TAX ASSESSMENT & ADMIN., no. 4, 2011, at 15.

<sup>104</sup> Savitch-Lew, *supra* note 100.

<sup>105</sup> Telephone Interview with Marie Winfield, President, East Harlem/El Barrio Cmty. Land Tr. (July 20, 2016).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Telephone Interview with Scott Short, Assistant Exec. Dir. of Bus. Dev. & Real Estate, Ridgewood Bushwick Senior Citizens Council, Inc. (July 7, 2016).

<sup>109</sup> *Id.* The development process of the CLT began in 2006. *Id.* Negotiations with the New York Attorney General's office began in 2010 to transfer the coops to the hands of the emerging CLT. *Id.* UHAB is in charge of drafting the offering plan – the document that outlines the transfer of the 17 TIL properties to the CLT, and the establishment of the CLT jointly. *Id.* Once the offering plan is approved, RBSCC is prepared to start to form the CLT board that will be comprised of UHAB members, RBSCC staff, tenants of the buildings, and community members. *Id.*

ensure the affordability of these units in perpetuity.<sup>110</sup>

Besides the CLTs that are now emerging in New York City in response to the affordability crisis, there is one successful CLT in existence from decades ago: the Cooper Square Committee.<sup>111</sup> This CLT was established to oppose a city redevelopment plan that would have displaced local residents while demolishing blighted properties and rebuilding for more affluent communities.<sup>112</sup> The Committee developed an alternative plan that preserved housing for residents while still allowing for new units. The alternative plan was approved in the 1960s, paving the way for equitable redevelopment.<sup>113</sup> To this day, the Committee oversees affordable housing in the area that has been rapidly gentrified.<sup>114</sup>

Other coalitions have also emerged to promote CLTs. New York City Community Land Initiative (“NYCCLI”), an alliance of academics, affordable-housing developers, and community activists, educate the public about Community Land Trusts and advocate for their inclusion in city policy.<sup>115</sup> NYCCLI member organizations including Picture the Homeless, 596 Acres, and the New Economy Project have all been active in the advocacy work.<sup>116</sup>

The creation of CLTs in New York City is essential to ensure permanently affordable housing that can help preserve the diversity of the City. The Comptroller’s proposal for a land bank administered by a CLT, as well as City Council and community groups’ support for CLTs to address the affordable housing crisis, must be embraced as an integral part of the Mayor’s Housing Plan. Private partnerships and city-sponsored deals to work with private developers have brought more complications than actual benefits to residents of this city, and permanently affordable alternatives should be recognized as the preferable approach.

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<sup>110</sup> *Id.*

<sup>111</sup> Mironova, *supra* note 13.

<sup>112</sup> Daniel Weinberg, *Our Historical Accomplishments*, COOPER SQUARE COMMITTEE (June 3, 2009), <http://coopersquare.org/about-us/our-historical-accomplishments> [<https://perma.cc/UL78-MQEP>].

<sup>113</sup> *Id.*

<sup>114</sup> See Jamiles Lartey, ‘Cooper Square Is Here to Stay,’ But First They Had to Go on the Warpath, BEDFORD + BOWERY (Jan. 1, 2015), <http://bedfordandbowery.com/2015/01/cooper-square-is-here-to-stay-but-first-they-had-to-go-on-the-warpath/> [<https://perma.cc/U74M-8ENP>].

<sup>115</sup> *Mission, Core Values and Strategies*, N.Y.C. COMMUNITY LAND INITIATIVE, <https://nyccli.org/about/mission-and-strategies/> [<https://perma.cc/DLL2-KNKP>].

<sup>116</sup> *Members and Endorsers*, N.Y.C. COMMUNITY LAND INITIATIVE, <https://nyccli.org/about/members-and-endorsers/> [<https://perma.cc/W4VD-YQ79>].

B. *The Bay Area of California*

San Francisco has the most pronounced housing shortage in the nation<sup>117</sup> with rents that are higher than any other U.S. city.<sup>118</sup> The situation has worsened since the current tech boom in San Francisco and the Silicon Valley, as newcomers earning higher incomes push up the rental and housing prices area-wide.<sup>119</sup> Local residents have experienced “no-fault” evictions or are priced out of their homes, and in turn have relocated to surrounding cities,<sup>120</sup> either displacing the low-to-middle income communities there<sup>121</sup> or ending up homeless.<sup>122</sup>

Given the seriousness of the housing crisis, local advocates are trying to address the pressing need for housing in a number of ways, including the formation of CLTs. There are now several CLTs in the Bay Area: the San Francisco CLT (“SFCLT”), Oakland CLT (“OakCLT”), the Bay Area CLT in Berkeley (“BACLt”), Northern California Land Trust (“NCLT”), and others, who are part of a consortium of Bay Area CLTs.<sup>123</sup> There is also a California statewide coalition of CLTs.<sup>124</sup> The concentration of CLTs in the Bay Area is unique, and holds potential for coordinated change utilizing this land-preservation method.

The SFCLT was incorporated in 2003 by a group of San Francisco residents involved in tenant anti-displacement and affordable

<sup>117</sup> Erin Carlyle, *San Francisco Tops Forbes' 2015 List of Worst Cities for Renters*, FORBES (Apr. 16, 2015, 9:11 AM), <http://www.forbes.com/sites/erincarlyle/2015/04/16/san-francisco-tops-forbes-2015-list-of-worst-cities-for-renters/#d17697e56e77> [https://perma.cc/K5BU-RY7X].

<sup>118</sup> Kate Abbey-Lambertz, *There's a Profoundly Simple Explanation for San Francisco's Housing Crisis*, HUFFINGTON POST (June 2, 2016, 7:48 PM), [http://www.huffingtonpost.com/entry/san-francisco-housing-crisis\\_us\\_5750a95ee4b0eb20fa0d682e](http://www.huffingtonpost.com/entry/san-francisco-housing-crisis_us_5750a95ee4b0eb20fa0d682e) [https://perma.cc/82NP-WBJC].

<sup>119</sup> *Id.*

<sup>120</sup> See generally ANTI-EVICTION MAPPING PROJECT, <http://www.anti-evictionmap.com> [https://perma.cc/7RWA-89SN] (documenting the dispossession and resistance of San Francisco Bay area residents).

<sup>121</sup> J.K. Dineen, *S.F. Workers Lured Eastward as Home Prices Head Upward*, S.F. CHRON. (Jan. 16, 2016), <http://www.sfchronicle.com/bayarea/article/S-F-workers-lured-eastward-as-home-prices-head-6764475.php> [https://perma.cc/LM7U-GHA6].

<sup>122</sup> Caleb Pershan, *71% of SF Homeless Once Had Homes In SF*, SFIST (Feb. 11, 2016, 11:00 AM), [http://sfist.com/2016/02/11/71\\_of\\_sf\\_homeless\\_once\\_had\\_homes\\_in.php](http://sfist.com/2016/02/11/71_of_sf_homeless_once_had_homes_in.php) [https://perma.cc/8W72-3AQT] (stating that 71% of the 7,000 homeless individuals in San Francisco once had homes in the city).

<sup>123</sup> BAY AREA CONSORTIUM COMMUNITY LAND TR., <http://www.bacclt.org> [https://perma.cc/X3CE-4MTB].

<sup>124</sup> *California CLT Network*, BAY AREA CONSORTIUM COMMUNITY LAND TR., <http://www.bacclt.org/cacltnetwork/> [https://perma.cc/DJ9X-RZE2].

housing activism.<sup>125</sup> Initially, the SFCLT focused on legislative reform aimed to “allow tenants in buildings to buy their apartments as limited equity condominiums with permanent resale restrictions . . . .”<sup>126</sup> The SFCLT conducts educational outreach to residents so that they are aware of income restrictions and household limitations of affordable housing, to help prevent evictions and being priced out of their apartments. Rent has skyrocketed under the guise of major capital improvements, and many families have been threatened with eviction because of sudden enforcement of household occupancy limits, or landlord move-ins.<sup>127</sup>

The SFCLT is currently concentrating on maintaining rent-stabilized housing in San Francisco.<sup>128</sup> Private developers are eliminating the pool of rent-stabilized housing in San Francisco through the Ellis Act,<sup>129</sup> a state law holding that landlords have the right to evict all tenants, removing the building from the rental market in order to convert the rental units into condominiums or single family homes.<sup>130</sup> At least 10,000 San Francisco residents have already been displaced because of the Ellis Act.<sup>131</sup> Most Ellis evictions are

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<sup>125</sup> *About Us*, S.F. COMMUNITY LAND TR., <http://sfclt.org/about.php> [<https://perma.cc/AU7L-VVLF>] [hereinafter SFCLT].

<sup>126</sup> *Id.*

<sup>127</sup> “Subject to certain restrictions, outlined below, a landlord can evict a tenant if the landlord is going to move into the unit to live, or (only if the landlord is also going to be living in the building) for a close relative to move in and live there. These evictions are highly abused and landlords who want to evict a tenant in order to raise the rent on a new tenant typically use owner move-in evictions (OMIs/landlord move-in evictions/LMIs) that are only allowed if done properly.” *Owner or Relative Move-In Evictions*, S.F. TENANTS UNION, <https://www.sftu.org/omi/> [<https://perma.cc/A3TU-9S5Q>].

<sup>128</sup> Telephone Interview with Tracy Parent, Former Org. Dir., S.F. Cmty. Land Tr. (May 23, 2016). New York City, by comparison, has separate categories of rent controlled and stabilized apartments, while the only category of rent regulated apartments in the Bay Area is “rent stabilized.” *Rent-Regulated & Market-Rate Housing*, *supra* note 74.

<sup>129</sup> *Ellis Act Evictions*, S.F. TENANTS UNION, <https://www.sftu.org/ellis/> [<https://perma.cc/QM2X-5ZF5>] (“The Ellis Act is included in the just causes for eviction under the Rent Ordinance as Section 37.9(a)(13).” (citation omitted)); S.F., CAL., ADMIN. CODE § 37.9.

<sup>130</sup> *Ellis Act Evictions*, *supra* note 129. Once a landlord decides that he will convert his rental units into condos through the Ellis Act, he must file a Notice of Intent to Withdraw Rental Units From Rental Market with The San Francisco Rent Board, tell tenants that they have rights to relocation assistance, and tell elderly or disabled tenants that some of them have the right to extend their leases. *Topic No. 205: Evictions Pursuant to the Ellis Act*, S.F. RENT BOARD, <http://sfrb.org/TOPIc-no-205-evictions-pursuant-ellis-act> [<https://perma.cc/X2D2-JZ94>].

<sup>131</sup> DEAN PRESTON, TENANTS TOGETHER & THE ANTI-EVICTION MAPPING PROJECT, THE SPECULATOR LOOPHOLE: ELLIS ACT EVICTIONS IN SAN FRANCISCO 2 (2014), <http://www.tenants-together.org/sites/tenants-together.org/files/Ellis%20Act%20Report%20FINAL.pdf> [<https://perma.cc/A7ZN-K3SP>] [hereinafter TENANTS TOGETHER].

used to convert rental units to for-sale units, using loopholes in the condominium law.<sup>132</sup> A common trend is for real estate speculators to buy an existing rent stabilized building at a discounted price due to its rent restrictions, fully occupied, and then invoke the Ellis Act in order to convert the rent-regulated units to higher-priced, for-sale units.<sup>133</sup>

The SFCLT was able to help advocate for a source of city funding, earmarked as an anti-displacement or small-sites acquisition fund, to combat this trend.<sup>134</sup> The CLT uses the fund to purchase rent-stabilized buildings that might otherwise be converted to market rate units or short-term rentals (e.g., Airbnb), to preserve the housing units as permanently affordable.<sup>135</sup> Since the creation of this fund in 2014, the SFCLT has been able to acquire an additional nine properties.<sup>136</sup> The SFCLT now has within its housing portfolio 12 properties containing 102 housing units.<sup>137</sup>

The SFCLT also works in partnership with various Community Development Corporations (“CDCs”) that oversee affordable housing in working class communities of color at risk of displacement, such as Chinatown Community Development Center and the Mission Economic Development Agency.<sup>138</sup> The CLT assists the CDC to work with residents at risk of eviction, educating them about their rights and housing alternatives.

East of the San Francisco Bay, the OakCLT is tackling its own set of challenges. The OakCLT started in response to the more than 13,000 foreclosures that occurred in Oakland between 2007 and 2013.<sup>139</sup> Through the organizing efforts of the Oakland chap-

<sup>132</sup> *Ellis Act Evictions*, *supra* note 129.

<sup>133</sup> Telephone Interview with Tracy Parent, *supra* note 128. E-mail from Tracy Parent, Org. Dir., S.F. Cmty. Land Tr., to Julie Gilgoff (May 3, 2017, 10:16 AM) (on file with author).

<sup>134</sup> *Id.*

<sup>135</sup> News Release, Office of the Mayor, City & Cty. of S.F., Mayor Lee Announces Funding for Small Site Acquisition Program to Protect Longtime San Francisco Tenants (Aug. 11, 2014), <http://www.sfmayor.org/index.aspx?recordid=653&page=846> [<https://perma.cc/8K3G-VKWM>].

<sup>136</sup> Telephone Interview with Tracy Parent, *supra* note 128.

<sup>137</sup> E-mail from Tracy Parent, Org. Dir., S.F. Cmty. Land Tr., to Julie Gilgoff (July 8, 2016, 2:48 PM) (on file with author).

<sup>138</sup> *Community Partners*, S.F. COMMUNITY LAND TR., [http://sfclt.org/Community\\_Partners](http://sfclt.org/Community_Partners) [<https://perma.cc/E93M-UPGR>]; *Resident Services*, CHINATOWN COMMUNITY DEV. CTR., <http://www.chinatowncdc.org/building-community/resident-services> [<https://perma.cc/K2UY-7HFW>]; *Community Real Estate*, MISSION ECON. DEV. AGENCY, <http://medasf.org/programs/community-real-estate/> [<https://perma.cc/D2C9-95ZJ>].

<sup>139</sup> Telephone Interview with Steve King, Exec. Dir., Oakland Cmty. Land Tr. (June 7, 2016).

ter of the Association of Community Organizations for Reform Now (“ACORN”) and the Urban Strategies Council, the OakCLT incorporated as a 501(c)(3) tax-exempt corporation in January 2009 to help low-income communities devastated by the collapse of the housing market.<sup>140</sup> On April 21, 2009, the Oakland City Council approved a resolution authorizing an allocation of Federal Neighborhood Stabilization Program funds to the OakCLT.<sup>141</sup> The OakCLT used these funds to bid on and acquire vacant foreclosed properties to rehabilitate for sale or rental to low-to-middle income families.<sup>142</sup> The CLT served its purpose in helping the City of Oakland weather the foreclosure crisis, and is now playing its part to combat the affordability crisis.<sup>143</sup>

Although the OakCLT still has a stock of single-family homes in its portfolio, it is looking to acquire apartment buildings that could more adequately address the widespread need for affordable units in Oakland. The organization has also broadened its scope to include land for purposes other than housing.<sup>144</sup> The OakCLT is currently looking into the acquisition of thirteen vacant lots, nine of which would be used for community gardens and urban agriculture.<sup>145</sup> It plans to take advantage of the California state code, allowing nonprofits to intervene on default properties after five years of delinquency and before a private developer is given the opportunity to bid, while working on this urban agriculture project.<sup>146</sup> In addition, the OakCLT wishes to take on the issue of displacement of nonprofit organizations, acquiring land to keep it permanently affordable for businesses that benefit the community.<sup>147</sup>

The OakCLT relies on a variety of sources of private financing, but those funds need to be supplemented by public subsidies. The CLT was hit hard by the 2012 state closure of the California State Redevelopment Agency, which had played a substantial role in funding the development of affordable housing throughout Cali-

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<sup>140</sup> *Id.*

<sup>141</sup> *OakCLT Timeline*, OAKLAND COMMUNITY LAND TR., <http://oakclt.org/about/history/> [https://perma.cc/TDD3-S94P].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; *Our Work is Currently Focused on Three Main Areas*, OAKLAND COMMUNITY LAND TR., <http://oakclt.org/about/our-work/> [https://perma.cc/2245-TY6C].

<sup>144</sup> Telephone Interview with Steve King, *supra* note 139.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; CAL. REV. & TAX. CODE § 3791.4 (West 2010).

<sup>147</sup> *Id.* Nonprofits have been displaced through rising rents in Oakland, the city where Uber purchased a 330,000-square-foot building in downtown Oakland in 2015. *Id.*; Caille Millner, *Uber Is Coming for Oakland's Soul, All Right*, S.F. CHRON. (Sept. 25, 2015, 12:09 PM), <http://www.sfchronicle.com/entertainment/article/Uber-is-coming-for-Oakland-s-soul-all-right-6528037.php> [https://perma.cc/E795-RHRV].

fornia.<sup>148</sup> Although the OakCLT qualified for Federal Neighborhood Stabilization Program funds during the foreclosure crisis,<sup>149</sup> it now needs another source of permanent subsidy. A City of Oakland infrastructure bond was recently approved in November of 2016 that sets aside \$100 million for affordable housing and could provide the subsidy that the OakCLT is looking for.<sup>150</sup>

Providing another model, the Bay Area CLT (“BACLt”), based in Berkeley, has the mission to provide permanently affordable, resident-owned cooperative housing to low-to-middle income people from diverse backgrounds.<sup>151</sup> It advocates for cooperative ownership, as well as cohousing - a lifestyle where people share resources or space within a common living area, and live cooperatively.<sup>152</sup> These ideas are a natural fit in the city of Berkeley, which has an abundance of existing cooperatives and a history of progressive politics.<sup>153</sup>

BACLt has two Limited Equity Housing Cooperatives (“LEHCs”)<sup>154</sup> in its housing portfolio: Ninth Street Coop and Derby-Walker House.<sup>155</sup> In 2015, the Ninth Street Coop, already 28 years in existence<sup>156</sup>, decided to transfer a portion of the value of its land to the Bay Area CLT and sign a ground lease with them.<sup>157</sup> Residents of this cooperatives made this decision to transfer some of the land to BACLt since the partnership would ensure “that the units [would] remain permanently affordable to lower income people, and that the property [would] be well-managed far into the

<sup>148</sup> Casey Blount et al., *Redevelopment Agencies in California: History, Benefits, Excesses, and Closure* 1 (Office of Pol. Dev. & Research, U.S. Dep’t of Hous. & Urban Dev., Working Paper No. EMAD-2014-01, 2014), [https://www.huduser.gov/portal/publications/Redevelopment\\_WhitePaper.pdf](https://www.huduser.gov/portal/publications/Redevelopment_WhitePaper.pdf) [<https://perma.cc/96BH-F6KL>].

<sup>149</sup> *OakCLT Timeline*, *supra* note 141.

<sup>150</sup> *Oakland Measure KK: Investing in Oakland’s Infrastructure and Affordable Housing*, CITY OAKLAND CAL., <http://www2.oaklandnet.com/ibond2016/index.htm> [<https://perma.cc/RR4T-6E9K>].

<sup>151</sup> BAY AREA COMMUNITY LAND TR., <http://bayareact.net/BACLt/Home.html> [<https://perma.cc/DYR5-REVA>].

<sup>152</sup> *Co-op, Cohousing: What’s the Connection?*, BAY AREA COMMUNITY LAND TR., [http://bayareact.net/Co-op\\_Cohousing\\_Connection.html](http://bayareact.net/Co-op_Cohousing_Connection.html) [<https://perma.cc/V3N9-4EY6>].

<sup>153</sup> CMTY. OWNERSHIP ORG. PROJECT, *THE CITIES’ WEALTH* 1, 24 (1976), <https://ecommons.cornell.edu/bitstream/handle/1813/40494/CitiesWealth.pdf> [<https://perma.cc/2GC9-74X5>].

<sup>154</sup> Limited Equity Cooperatives are termed Limited-Equity Housing Cooperatives in California. Cal. Gov’t Code § 62120.7 (West).

<sup>155</sup> *Projects*, BAY AREA COMMUNITY LAND TR., <http://www.bayareact.org/projects/> [<https://perma.cc/NZ2K-36X5>].

<sup>156</sup> E-mail from Rick Lewis, Exec. Dir., Bay Area Cmty. Land Tr., to Julie Gilgoff (Apr. 26, 2017, 9:34 PM) (on file with author).

<sup>157</sup> *Ninth Street Co-op Becomes a BACLt Project!*, BAY AREA COMMUNITY LAND TR., <http://bayareact.net/BACLt/NinthSt.html> [<https://perma.cc/S7NH-Z2QK>].

future, even after current residents move out.”<sup>158</sup>

There are significant barriers to creating new LEHCs in California.<sup>159</sup> Local CLTs in the Bay Area have therefore utilized a new cooperative model, called the Non-equity Co-op (“NEC”).<sup>160</sup> The primary difference with the LEHC model is that NECs operate as rentals.<sup>161</sup> There is no share purchase - the residents remain renters of the property rather than shareholders.<sup>162</sup> As a result, the property remains tax-exempt, since nonprofit rental housing in California is exempt from property taxes if the residents have incomes below 80% of the area median income (“AMI”).<sup>163</sup> This tax status can significantly reduce operating costs and make an NEC cooperative affordable to lower-income members.<sup>164</sup> The BACLTL utilized this model in their most recent project, “Brown Shingle.” The NEC model is becoming increasingly popular in California due to regulatory restrictions on Limited Equity Coops.<sup>165</sup>

At this point in BACLTL’s organizational history, it has largely been limited to acquiring land that sells for below-market rate, is donated or transferred to it.<sup>166</sup> BACLTL may have more options to purchase property in the future, if the city of Berkeley approves a small-sites acquisition fund, similar to that which exists in San Francisco.

There is currently the potential to open a CLT in the City of Richmond, one of the last enclaves of affordable housing in the East Bay.<sup>167</sup> Richmond is now experiencing rapid population growth because of resident displacement from surrounding ar-

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<sup>158</sup> *Id.*

<sup>159</sup> See generally Rick Lewis, *Challenges Abound in Creating New Housing Cooperatives in the San Francisco Bay Area*, COOPERATIVE HOUSING BULL., Summer 2015, at 8.

<sup>160</sup> *Id.* See also E-mail from Rick Lewis, Exec. Dir., Bay Area Cmty. Land Tr., to Julie Gilgoff (Apr. 26, 2017, 9:34 PM) (on file with author) where Lewis explains that Bay Area CLTs ended up not coining the non profit coop model as “RONs”, but rather “NECs”, or zero-equity coops.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> E-mail from Rick Lewis, Exec. Dir., Bay Area Cmty. Land Tr., to Julie Gilgoff (July 16, 2016, 10:45 AM) (on file with author)

<sup>166</sup> E-mail from Rick Lewis, Exec. Dir., Bay Area Cmty. Land Tr., to Julie Gilgoff (Apr. 26, 2017, 9:34 PM) (on file with author). Lewis explains that although BACLTL has taken out mortgages on each of their properties, including for renovations, BACLTL has been limited to purchasing properties that sell below market rate.

<sup>167</sup> Alex L. Weber, *Land Trusts: Conserving Homeownership*, RICHMOND CONFIDENTIAL (Oct. 26, 2009, 6:04 AM), <http://richmondconfidential.org/2009/10/26/land-trusts-conserving-homeownership/> [https://perma.cc/58NE-A2S2].

eas.<sup>168</sup> While dealing with an influx of residents from Berkeley, Oakland, San Francisco, and other areas, progressive City of Richmond officials have successfully defeated Chevron-backed politicians in local elections.<sup>169</sup> This is a ripe time, amidst a supportive political base for the creation of a Community Land Trust in the City of Richmond before it experiences the sort of gentrification and displacement of surrounding areas.

Generating city-specific funds for the acquisition of new CLT land has been a successful tactic of Bay Area CLTs. In San Francisco, they were able to create the small-sites acquisition fund and in Oakland the infrastructure bond.<sup>170</sup> The City of Berkeley also recently passed a ballot measure that raised the rental unit business license taxes for landlords that own five or more units, in order to fund affordable housing.<sup>171</sup> The consortium of Bay Area CLTs, is a useful forum to share strategies on how to raise these funds and introduce local ballot measures for permanently affordable housing initiatives.

The stakes for implementing permanently affordable housing in the Bay Area are extremely high. There has already been substantial and disproportionate displacement of African Americans in gentrifying neighborhoods, as well as a loss in African American homeownership.<sup>172</sup> Between 1990 and 2011, the proportion of African Americans in all Oakland Neighborhoods decreased by nearly 40%.<sup>173</sup> African Americans dropped from being 50% to 25% of all homeowners in North Oakland.<sup>174</sup> During the same time period, San Francisco's Black population was cut in half from about 10% to only 5% of the population.<sup>175</sup>

CLTs and other non-market based approaches to housing and community development are just part of the solution to the cur-

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<sup>168</sup> Adam Hudson, *Early-Stage Gentrification: Richmond, California, Residents Push Back*, TRUTHOUT (July 17, 2015) <http://www.truth-out.org/news/item/31926-early-stage-gentrification-richmond-california-residents-push-back> [<https://perma.cc/6D5Y-N8VY>].

<sup>169</sup> *Id.*

<sup>170</sup> Office of the Mayor, City & Cty. of S.F., *supra* note 140; *Oakland Measure KK*, CITY OF OAKLAND, CAL., <http://www2.oaklandnet.com/ibond2016/index.htm> [<https://perma.cc/X68W-6XPR>].

<sup>171</sup> Aleah Jennings-Newhouse et al., *City Measures T1, U1, V1, W1, X1, Y1, Z1, AA Pass; Measures BB, CC, DD Fail*, DAILY CALIFORNIAN (Nov. 9, 2016), <http://www.dailycal.org/2016/11/09/city-measures-t1-u1-v1-w1-x1-y1-z1-aa-pass-measures-bb-cc-dd-fail/> [<https://perma.cc/AT7V-STL3>].

<sup>172</sup> CAUSA JUSTA, *supra* note 39, at 7.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

rent housing crisis.<sup>176</sup> A multi-faceted solution including enforcement of tenant protections, maintenance of existing affordable units, relocation benefits for displaced community members, as well as additional subsidies and funding for affordable housing would more adequately combat displacement.<sup>177</sup> Additional models of permanently affordable housing are being piloted by Bay Area groups. The Sustainable Economies Law Center and People of Color Sustainable Housing Network have been promoting a new form of permanently affordable housing called the Permanent Real Estate Cooperative (“PREC”).<sup>178</sup> This innovative model “combines features of CLTs, limited equity housing cooperatives, real estate investment cooperatives, and self-organizing social movements.”<sup>179</sup> One of the major differences between CLTs and PRECs is the governance structure. Instead of relying on the Board of Directors of a CLT, as mandated by its 501(c)(3) status, the cooperatively run PREC further democratizes decision making by implementing the one-member one-vote system.<sup>180</sup>

Just as the Bay Area is facing the worst housing crisis in the country, it is also offering some of the most innovative solutions, with a proliferation of CLTs, and other permanently affordable models to resist mass displacement.

### III. STRATEGIES TO SUPPORT THE GROWTH OF LAND BANKS, LIMITED INCOME COOPS AND COMMUNITY LAND TRUSTS

As outlined in Section I, it is economically and socially advantageous for the government to encourage the development of permanently affordable housing. Further, the government has the responsibility to combat displacement of communities of color due to discriminatory policies that helped create the crisis. The following section provides an outline of the steps that federal, state, and local governments, as well as lending institutions, should now take to support these housing initiatives.

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<sup>176</sup> *See id.* at 59.

<sup>177</sup> *Id.* at 58-60, 68.

<sup>178</sup> E-mail from Sara Stephens, Hous. and Coops. Att’y, Sustainable Econs. Law Ctr., to Julie Gilgoff (Dec. 14, 2016, 3:17 PM) (on file with author).

<sup>179</sup> Sustainable Econs. Law Ctr. & People of Color Sustainable Hous. Network, Permanent Real Estate Cooperatives: The Basics and FAQ (on file with author).

<sup>180</sup> *Id.*; Janelle Orsi, *Home Ownership is Dead! Long Live the Permanent Real Estate Cooperative!*, SUSTAINABLE ECONOMIES L. CTR. (Aug. 10, 2016), [http://www.thesehc.org/homeownership\\_is\\_dead](http://www.thesehc.org/homeownership_is_dead) [<https://perma.cc/8X2S-K3WD>].

A. *Preserving Tax-Delinquent Properties for Affordable Housing, Rather Than Auctioning the Properties to Private Bidders*

There are derelict buildings where landlords have not paid taxes, made mortgage payments, or kept the buildings in good repair. A city could seize such properties and convert them to permanently affordable housing or auction to a nonprofit such as a CDC or CLT.<sup>181</sup> Giving nonprofits priority over private developers in bidding on tax delinquent-properties is part of California law.<sup>182</sup> New York housing advocates are pushing for the same type of law to be passed in their state in order to help seed emerging CLTs.<sup>183</sup> They want to allow CLTs to convert boarded up, unused properties into affordable housing, and also help struggling homeowners stay in their homes, ending the tax lien sale policies whereby the city and banks profit from a homeowner missing her monthly payments. Policies should reflect a city's priority to help people have adequate housing rather than profiting from their inability to make what often amounts to inflated payments due to unreasonably high interest rates.<sup>184</sup>

Further, cities have the power to use eminent domain for public use, and could use this power to seize foreclosed and tax delinquent homes, converting them into affordable units.<sup>185</sup> Once the property is seized, cities can make a decision to retain ownership of the land and manage it through a Land Bank or CLT, or to turn the property over to a nonprofit organization, which would manage the property and preserve its affordability.

Massachusetts utilizes eminent domain to achieve these goals. Massachusetts General Laws, Chapter 121A, outlines that the elimination of blighted or substandard areas in cities is considered a public use, which qualifies the land for seizure through eminent domain.<sup>186</sup> Under Section 11 of Chapter 121A, government agen-

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<sup>181</sup> See, e.g., Higgins, *supra* note 101.

<sup>182</sup> CAL. REV. & TAX. CODE § 3791.4 (West 2010).

<sup>183</sup> Telephone Interview with Leo Goldberg, Senior Policy Assoc., Ctr. for N.Y.C. Neighborhoods (July 15, 2016).

<sup>184</sup> See Lartey, *supra* note 114.

<sup>185</sup> See discussion of Dudley Street Neighborhood Initiative *infra*.

<sup>186</sup> MASS. GEN. LAWS ch. 121A, § 1 (1998). Public use is a legal requirement under the Takings Clause of the Fifth Amendment. See also U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation"). Thus, if property is seized by eminent domain for public use, the property owner must be paid "just compensation." *Id.* In a series of court decisions such as *Berman v. Parker*, 348 U.S. 26, 33 (1954), the Court has expanded what a public use could be, from not just being used by the public in the case of highways or parks, but also a project that makes the city more visually attractive. In *Kelo v. City of New London*, 545 U.S. 469, 500 (2005)

cies like the Boston Redevelopment Authority “may delegate the exercise of eminent domain [to] urban redevelopment corporations for certain projects.”<sup>187</sup> With the approval of the local housing board, an authorized corporation may take land by eminent domain.<sup>188</sup> Although eminent domain is not a power that should be delegated widely to non-governmental organizations, Boston’s local government has devised a process to vet the organizations that will use this authority for the community’s benefit.<sup>189</sup>

Dudley Street Neighborhood Initiative (“DSNI”) is a nonprofit community-based group in Boston which became an urban redevelopment corporation and was authorized under state law to exercise the governmental power of eminent domain.<sup>190</sup> DSNI developed a long-term plan for the neighborhood, focusing on the establishment of an “urban village” with a park, retail shops, community centers, and affordable housing.<sup>191</sup> The key to their plan was to promote “[d]evelopment without displacement.”<sup>192</sup> The city donated the land that was needed, but the city-owned land was interspersed with private property, which needed to be seized through eminent domain in order to complete the urban village.<sup>193</sup>

Allowing this nonprofit to seize abandoned property for the creation of affordable housing was a power facilitated by state law.<sup>194</sup> Although some might argue that eminent domain should not be delegated to non-governmental organizations and used to

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(O’Connor, J., concurring), the court declared that a city could use its eminent domain power to seize private property to sell to private developers, under the basis that it would generate jobs and tax revenue.

<sup>187</sup> Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1075 (1995); see also MASS. GEN. LAWS ch. 121A, § 11 (1975).

<sup>188</sup> Ch. 121A § 11.

<sup>189</sup> Taylor, *supra* note 187, at 1075.

<sup>190</sup> *Id.* at 1077-80. The neighborhood had been devastated by white flight and disinvestment in the 1980s, leaving more than 20% of the land vacant. Penn Loh, *How One Boston Neighborhood Stopped Gentrification in Its Tracks*, YES! MAG. (Jan. 28, 2015), <http://www.yesmagazine.org/issues/cities-are-now/how-one-boston-neighborhood-stopped-gentrification-in-its-tracks> [https://perma.cc/368G-59DB]. To obtain approval, DSNI submitted an application to the Boston Redevelopment Authority and then a plan to the City Council and Planning Board about their vision to revitalize the Dudley Street neighborhood. Taylor, *supra* note 190, at 1075-76 (outlining requirements to obtain project approval).

<sup>191</sup> Taylor, *supra* note 187, at 1079.

<sup>192</sup> PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 108 (1994).

<sup>193</sup> Taylor, *supra* note 187, at 1080.

<sup>194</sup> See Taylor, *supra* note 187.

develop affordable housing, the use of eminent domain has already strayed so far from its legislative intent to include private development as “public use.”<sup>195</sup> The creation of affordable housing more closely parallels the purpose of eminent domain, which is reclaiming land for use by the community, and the tactics implemented in Boston by DSNI should be replicated elsewhere.

*B. Providing Favorable Loans and Allocating Housing Funds to Permanently Affordable Models*

Local, state, and federal governments can provide financial support to permanently affordable housing initiatives.

[F]ederal funds that are offered to nonprofit 501(c)(3) corporations for the construction of affordable housing or the redevelopment of low-income neighborhoods can be used . . . by CLTs. The two federal programs from which CLTs have received the greatest project support over the past decade have been the Community Development Block Grant Program (CDBG) and HOME.<sup>196</sup>

State Housing Finance Agencies in various states such as Colorado, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, Oregon, Washington, Wisconsin, Wyoming, and Vermont have also provided financing for CLT-housing.<sup>197</sup> “In Delaware, the State Housing Authority has taken the lead, along with the Delaware Housing Coalition, in helping to create a CLT that will act as the steward of affordability for resale-restricted, owner-occupied housing throughout the state.”<sup>198</sup>

Many cities have also provided interest-free or low-interest loans to CLTs. Cooper Square CLT qualified for a no-interest renewable loan from New York City for rehabilitation of the buildings in the Lower East Side of Manhattan.<sup>199</sup> Northern California Land Trust (“NCLT”) purchased property through a low-interest loan from the City of Berkeley, with a 30-year term.<sup>200</sup> A condition of this loan was that “no annual payments need[ed] to be made

<sup>195</sup> See *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O’Connor, J., concurring).

<sup>196</sup> JOHN EMMES DAVIS, *STARTING A COMMUNITY LAND TRUST: ORGANIZATIONAL AND OPERATIONAL CHOICES* 51 (2007), <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/tool-burlington-startingCLT.pdf> [<https://perma.cc/P9BL-RZP9>].

<sup>197</sup> *Id.* at 53.

<sup>198</sup> *Id.*

<sup>199</sup> Angotti, *supra* note 21, at 11.

<sup>200</sup> *Id.* at 12.

unless there [was] a positive cash flow . . . .”<sup>201</sup> There was also a guarantee that after the 30-year term expired, the loan could be renewed.<sup>202</sup> Some of Berkeley’s loan went to rehabilitation costs, to pay for the property, as well as to pay tenants for their labor in building and fixing up the house.<sup>203</sup>

Especially with big banks and lending institutions reluctant to lend money to CLTs for the acquisition of land, it falls to local, state, and federal governments to allocate money from their budgets to permanently affordable housing initiatives.<sup>204</sup> Favorable loans like the ones given by Berkeley and New York City benefit the city and residents in the long run.

### C. *Creating a Favorable Tax Structure*

As the National Community Land Trust Network states in a 2011 publication, property tax assessments can make the difference to a low- to mid-income family on whether the unit is affordable.<sup>205</sup> Property taxes are added on to the homeowner’s monthly housing costs after the value of the land is assessed.<sup>206</sup> If the assessed value of CLT homes increases during tax assessments due to the appreciation of the land and neighborhood, this would result in diminished affordability for whoever is paying the increased tax amount (either the CLT, homeowner, or resident).<sup>207</sup> The primary goal of permanently affordable housing is to keep the value fixed at the purchasing price with modest adjustments for improvements, inflation, or the consumer price index.<sup>208</sup> Therefore, CLTs and limited income coops need a supportive tax structure to accomplish their mission.

Most CLTs do not seek exemption from property taxes for their homeowners; residents of CLT homes consume local government services to the same extent as other residents of the community.<sup>209</sup> However, taxes must be kept fixed, as long as resale rates of

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Interview with Rick Lewis, Exec. Dir., Bay Area Cmty. Land Tr., in Berkeley, Cal. (May 26, 2016).

<sup>205</sup> NAT’L CMTY. LAND TR. NETWORK, *supra* note 19, at ch. 17-1.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Orsi, *supra* note 180. *See also* NAT’L CMTY. LAND TRUST NETWORK, PERMANENTLY AFFORDABLE HOUSING: SECTOR CHART & GLOSSARY OF TERMS (2015), <http://cltnet.org/wp-content/uploads/2015/01/Permanently-Affordable-Housing-Sector-Chart-Glossary-11-2014-design-update.pdf> [<https://perma.cc/3ZJE-8FEZ>].

<sup>209</sup> NAT’L CMTY. LAND TR. NETWORK, *supra* note 19, at ch. 17-1.

the housing units are capped. Any form of “shared equity homeownership” should be taxed differently from unrestricted properties.<sup>210</sup> Although the locale would be losing on tax revenue from appreciating property taxes, there is greater value in providing permanently affordable housing to communities that need it the most.

CLTs have argued specifically that for tax purposes, the market value of the homeowner’s property should be defined as equal to the CLT’s purchase option price (the maximum permitted resale price) at the time of tax assessment.<sup>211</sup> Florida<sup>212</sup> and North Carolina<sup>213</sup> codes tax Community Land Trust property at lower rates than unrestricted properties. The Vermont tax code phrases its policy more broadly, that all forms of shared equity homeownership are taxed at a lower rate than market-rate private property.<sup>214</sup> In some states like New Jersey, courts have stepped in to uphold reduced assessments for shared-equity homes.<sup>215</sup>

“In many states, local tax assessment practices are guided . . . by various[ ] . . . state agencies (e.g. California’s Tax Equalization Board, or New York’s Office of Real Property Services [ORPS]).”<sup>216</sup> These agencies interpret the applicable law (legislation and/or case law) and assist local assessors in complying with it, but taxation

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<sup>210</sup> Shared equity homeownership refers to joint ownership of real estate by both lenders and property dwellers. It is a mix of ownership and rental models, and includes CLTs along with LECs, mutual housing associations (“MHAs”), and deed-restricted housing, all of which ensure property affordability through sale-restriction. When a shared-equity property is sold, owners share in the proceeds, or equity. In the meantime the property occupants benefit from interest and property tax write-offs. Shared equity homeownership ensures that the homes remain affordable to lower income households on a long-term basis by restricting the appreciation that the owner can retain. *See generally* JOHN EMMEUS DAVIS, NAT’L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING (2006), <http://www.nhi.org/pdf/SharedEquityHome.pdf> [<https://perma.cc/ZF7M-Z9Z8>].

<sup>211</sup> NAT’L CMTY. LAND TR. NETWORK, *supra* note 19, at ch. 17-2.

<sup>212</sup> FLA. STAT. § 193.018 (2011); FLA. CMTY. LAND TR. INST., FREQUENTLY ASKED QUESTIONS 3 (2012), <http://www.flhousing.org/wp-content/uploads/2012/04/CLT-FAQ-final.pdf> [<https://perma.cc/VY2S-GUHK>] (“Florida Statute 193.018 instructs property appraisers to assess CLT properties in accordance with the resale-restricted value, rather than the price that the property would fetch on the open market.”).

<sup>213</sup> NAT’L CMTY. LAND TR. NETWORK, *supra* note 19, at ch. 17-6.

<sup>214</sup> John Emmeus Davis, *Taxation of Shared-Equity Homes*, SHELTERFORCE (June 11, 2008), [http://www.shelterforce.org/article/952/taxation\\_of\\_shared\\_equity\\_homes/](http://www.shelterforce.org/article/952/taxation_of_shared_equity_homes/) [<https://perma.cc/K9F3-8QTY>] (“[T]he Vermont Law on Property Tax Appraisals of Covenant-Restricted Homes, enacted in 2005, says that procedures for estimating the fair-market value of a property must take into consideration any ‘decrease in value in non-rental residential property due to a housing subsidy covenant . . . .’”).

<sup>215</sup> *See* Prowitz v. Ridgefield Park Vill., 584 A.2d 782 (N.J. 1991); NAT’L CMTY. LAND TR. NETWORK, *supra* note 19, at ch. 17-3.

<sup>216</sup> NAT’L CMTY. LAND TR. NETWORK, *supra* note 19, at ch. 17-3.

of shared equity homes is not applied as uniformly as in Florida, Vermont, and other states with a blanket policy.<sup>217</sup>

In a nation-wide study of tax assessment by the Lincoln Institute of Land Policy, “New York was the only state where there was absolutely no consensus on assessment methods for resale-restricted property.”<sup>218</sup> Tax subsidies were granted for individual limited equity cooperatives, for example, receiving complete or partial exemption from real estate taxes for up to 40 years under Article XI of the New York Private Housing Finance Law.<sup>219</sup> But each limited equity coop needs to be individually chartered to receive an Article XI exemption, and it is difficult to qualify.<sup>220</sup>

Despite the lack of consensus on how CLT property should be taxed in New York, there is a growing trend to consider resale restrictions in the valuation of land.<sup>221</sup> The Office of Real Property Tax Services (“ORPTS”), a division within the New York State Department of Taxation and Finance releases guidance on this issue, and points to the New Jersey *Prowitz* case that upheld a permanent resale restriction, although this decision is not binding in New York.<sup>222</sup> ORPTS has not gone so far as to set a policy and instead is waiting to let another branch of government clarify the situation.<sup>223</sup> “The *de facto* policy is that assessors can, and in some cases do, consider resale restrictions in assessment, but if the assessor does not, CLTs’ homeowners cannot force consideration.”<sup>224</sup>

To encourage the proliferation of CLTs, and the feasibility of permanently affordable housing, a uniform tax structure should be adopted in all fifty states, taxing restricted, shared equity housing at a lower rate than unrestricted market rate homes.

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<sup>217</sup> *Id.*

<sup>218</sup> West, *supra* note 103, at 19 (citation omitted).

<sup>219</sup> N.Y. PRIV. HOUS. FIN. LAW § 577(3)(a) (McKinney 2009); *Article XI*, N.Y.C. HOUSING PRESERVATION & DEV., <https://www1.nyc.gov/site/hpd/developers/tax-incentives-article-xi.page> [<https://perma.cc/RNF5-QFVE>].

<sup>220</sup> See *Article XI*, *supra* note 221.

<sup>221</sup> See generally West, *supra* note 103; see also Office of Real Prop. Tax Servs., N.Y. Dep’t of Tax. & Fin., Opinions of Counsel No. 11-29 (Apr. 10, 2002); Office of Real Prop. Tax Servs., N.Y. Dep’t of Tax. & Fin., Opinions of Counsel No. 10-34 (Apr. 25, 1997); Office of Real Prop. Tax Servs., N.Y. Dep’t of Tax. & Fin., Opinions of Counsel No. 10-45 (Mar. 6, 1996).

<sup>222</sup> West, *supra* note 103, at 21; Office of Real Prop. Tax Servs., N.Y. Dep’t of Tax. & Fin., Opinions of Counsel No. 10-34 (Apr. 25, 1997); see also *Prowitz v. Ridgefield Park Vill.*, 584 A.2d 782 (N.J. 1991).

<sup>223</sup> West, *supra* note 103, at 20.

<sup>224</sup> West, *supra* note 103, at 20 (emphasis added).

*D. Additional Oversight for Banks*

The Federal Community Reinvestment Act (“CRA”) is “intended to encourage depository institutions to help meet the credit needs of the communities in which they operate, including low- and moderate-income neighborhoods . . . .”<sup>225</sup> Under the CRA, each depository institution’s record is “evaluated by the appropriate Federal financial supervisory agency,” in terms of how it was able to “help meet the credit needs of the communit[y]” in which it is based.<sup>226</sup> Members of the public may submit comments on a bank’s performance.<sup>227</sup> Comments are supposed to “be taken into consideration during the next CRA examination. A bank’s CRA performance record is taken into account in considering an institution’s application for deposit facilities.”<sup>228</sup>

“The CRA was passed as a key element of the 1977 Housing and Urban Development Act, whose stated purpose was to outlaw ‘redlining.’”<sup>229</sup> Beyond creating more accountability for banks to desist from engaging in redlining practices, the statutory goal of meeting the credit needs of low-income communities has largely not been enforced.<sup>230</sup> It falls to volunteer groups of residents to accumulate data and prove that banks have not been meeting their needs.<sup>231</sup> In 1998, a group of Brooklyn residents living in neighborhoods experiencing gentrification testified before the Federal Reserve Board of Governors about lending practices of big banks in their neighborhoods.<sup>232</sup> The group of activists, small business owners, and other residents of Brooklyn Community District 5 started meeting with bankers and banking regulators with data they had

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<sup>225</sup> *Community Reinvestment Act*, BD. GOVERNORS FED. RES. SYS., [https://www.federalreserve.gov/communitydev/cra\\_about.htm](https://www.federalreserve.gov/communitydev/cra_about.htm) [<https://perma.cc/G53F-BULA>] (“[The CRA] was enacted by the Congress in 1977 (12 U.S.C. 2901) and is implemented by Regulation BB (12 CFR 228). The regulation was substantially revised in May 1995 and updated again in August 2005.”).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* See, e.g., Fed. Reserve Bd., Public Meeting Regarding Citicorp and Travelers Group, Transcript of Panel Eleven (June 25, 1998), <https://www.federalreserve.gov/events/publicmeeting/19980625/panel11.htm> [<https://perma.cc/9UMY-8BR2>]. Members of the Reinvestment Committee of Cypress Hills and City Line of Brooklyn, NY testified about the lending practices of the banking institutions in their neighborhoods before the Federal Reserve Board.

<sup>228</sup> *Community Reinvestment Act*, *supra* note 225.

<sup>229</sup> Penny Loeb et al., *The New Redlining*, U.S. NEWS & WORLD REP., Apr. 17, 1995 (defining redlining as “a refusal by a financial institution to make mortgage loans to certain neighborhoods because of their racial composition, income level, or age of residents”).

<sup>230</sup> See Abello, *supra* note 33.

<sup>231</sup> See, e.g., *id.*

<sup>232</sup> *Id.*; Fed. Reserve Bd., *supra* note 227.

collected about redlining practices.<sup>233</sup> While the initial focus of the group was redlining, the group also addressed the threat of gentrification more generally, advocating for banks to provide greater lending and other support for equitable economic development.<sup>234</sup> It took seven years of a volunteer, resident-led group, accumulating Home Mortgage Disclosure Act data from their neighborhood's census tracts to try to hold their banks accountable to providing for their needs in the face of displacement.<sup>235</sup>

A 2015 report issued by the Association for Neighborhood and Housing Development (“ANHD”) outlined that “[t]he average community development loan size went up, but fewer loans went out” compared to the year before.<sup>236</sup> “Eight of 20 banks reported that none of their community development loans fell under the economic development category.”<sup>237</sup> Although the CRA is a mechanism for local groups to get banks to discuss their community practices, it takes the ongoing advocacy work of organizations like ANHD and District 5 residents to bring any enforceability to the CRA, rather than enforcement coming from government institutions that reimburse residents for their involvement in assessing their banks. As it is now, about “98 percent of banks receive satisfactory or outstanding CRA ratings.”<sup>238</sup> A stricter enforcement of the CRA including a requirement that banks assist in the creation of permanently affordable housing solutions by giving loans to CLTs is one example of how banks should be required to comply with the CRA.<sup>239</sup> Mandatory resident involvement in assessing the

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<sup>233</sup> Abello, *supra* note 33. District 5 is comprised of the East New York, Cypress Hills, and City Line neighborhoods.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* The ANHD is an organization that publishes a yearly “State of Bank Reinvestment report, analyzing the local impact of the CRA, highlighting industry trends, and identifying and comparing how individual banks do or don’t meet NYC’s credit and banking needs.” *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> A more optimistic view of the CRA claims that, since its “enactment in 1977, banks have significantly increased their lending in [low- and moderate-income (“LMI”)] neighborhoods.” Richard D. Marsico, *Enforcing the Community Reinvestment Act: An Advocate’s Guide to Making the CRA Work for Communities*, 27 N.Y. L. SCH. J. HUM. RTS. 129, 129 (2000). This view argues that the primary enforcement agents of the CRA have been community-based not-for-profit organizations who have used the CRA to “advocate[ ] for banks to lend more money to LMI neighborhoods to support affordable housing, small businesses, community development projects, and consumer credit needs.” *Id.* This argument may be useful for community advocates interested in using the CRA to increase lending in their neighborhoods. OneUnited Bank provides a model of how a bank can use innovative practices to promote CLT homes and meet the needs of low-income communities. Press Release, OneUnited Bank, OneUnited

banks' performance should also be required.

Banks must also change the way they issue mortgage loans in the cases of limited income coop and CLTs to achieve a passing score under the CRA. Some CLTs have developed relationships with local banks that understand their mission, and others have even established their own revolving loan funds.<sup>240</sup> A CLT has the capacity to underwrite individual mortgages, and could even help prevent foreclosure of individual homes by stepping in to cure default.<sup>241</sup> Lending institutions can and should assist CLTs in helping to prevent foreclosure. The Federal National Mortgage Association ("FNMA," commonly known as Fannie Mae)<sup>242</sup> even has a Uniform CLT Ground Lease Rider that allows the CLT to intervene if foreclosure is imminent.<sup>243</sup>

Besides federal regulation of banking practices, cities can also do their part in mandating that banks invest in low-income communities. When the city of Oakland chose JP Morgan Chase to handle its municipal deposits in 2013, for example, the City Council made the bank promise to invest in low-income neighborhoods, "especially in Oakland's under-served Black and Latino communities."<sup>244</sup> Despite this promise, most of the bank's residential loans

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Bank Introduces Unity Community Land Trust Home Loan Program (Sept. 1, 2016), <https://www.oneunited.com/PressKit/PressReleases/oneunited-bank-introduces-unity-community-land-trust-home-loan-program.pdf> [https://perma.cc/Z6HM-AAC7]. OneUnited is a Black-owned bank that devised a loan specifically for CLTs, and works together with the Dudley Street Neighborhood Initiative to promote their community development plan that preserves housing for the local community. *Id.*

<sup>240</sup> MEAGAN EHLENZ, NAT'L CMTY. LAND TR. NETWORK, LIMITED EQUITY COOPS BY COMMUNITY LAND TRUSTS A2, A3, C3 (2013), <http://cltnetwork.org/wp-content/uploads/2013/12/2013-Limited-Equity-Coops-by-CLTs.pdf> [https://perma.cc/94NE-WUEM].

<sup>241</sup> WEISS, *supra* note 15, at 10.

<sup>242</sup> Fannie Mae is one of the two largest mortgage companies in the U.S. See Kate Pickert, *A Brief History of Fannie Mae and Freddie Mac*, TIME (July 14, 2008), <http://content.time.com/time/business/article/0,8599,1822766,00.html> [https://perma.cc/RYK6-5VDN]. Along with Federal Home Loan Mortgage Corporation (Freddie), Fannie Mae was founded in 1938 during the Great Depression as part of the New Deal. *Id.* This government-sponsored enterprise ("GSE") expands the secondary mortgage market by securitizing mortgages in the form of mortgage-backed securities ("MBS"). FANNIE MAE, BASICS OF FANNIE MAE: SINGLE-FAMILY MBS 3 (2016), <http://www.fanniemae.com/resources/file/mbs/pdf/basics-sf-mbs.pdf> [https://perma.cc/MAF9-RY8J].

<sup>243</sup> FANNIE MAE, COMMUNITY LAND TRUST GROUND LEASE RIDER (2010), [https://www.fanniemae.com/content/guide\\_form/2100rev.pdf](https://www.fanniemae.com/content/guide_form/2100rev.pdf) [https://perma.cc/WMP9-F65].

<sup>244</sup> Darwin BondGraham, *JP Morgan Chase's Home Loans in Oakland Mostly Went to White and Wealthy Residents*, EAST BAY EXPRESS (Jan. 13, 2016), <http://www.eastbayexpress.com/oakland/jp-morgan-chases-home-loans-in-oakland-mostly-went-to-white-and-wealthy-residents/Content?oid=4640249> [https://perma.cc/3LXP-EGHS].

“were invested in houses in the city’s whitest and highest-income neighborhoods.”<sup>245</sup> Now that the contract is expiring,<sup>246</sup> Oakland might choose to bank with another institution that takes these promises more seriously, or at least hold Chase more accountable through a binding agreement in the future. Oakland is also considering establishing a public, city-owned bank as an alternative.<sup>247</sup> Cities must wield their financial influence to urge banking institutions to change racist and classist lending practices.

Banks and other lending institutions, as well as the government, must play their part in helping low-to-mid-income communities procure housing and challenge the status quo of property ownership in America.

#### CONCLUSION

The current affordable housing crisis affects most Americans, many of whom are no longer able to purchase their own homes or rent in neighborhoods where they’d like to live. Although low-income communities of color are being hit the hardest, the current trend of displacement affects a broad array of middle-class and low-income residents, forcing them to move farther and farther from the city center where most jobs are located. If major cities were to become “citadels for the rich” as some portend,<sup>248</sup> it would constitute an economic and social catastrophe.

A variety of mechanisms may stabilize land values, including public ownership, land banks, CLTs, rent controls, and resale restrictions on affordable housing units like limited income coops.<sup>249</sup> All have a part to play in addressing the current housing crisis. CLTs, LECs, and land banks are parts of a broad community-based development strategy that reinforces non-market control of land. Past victories of implementing permanently affordable housing models have not come easy – they were the result of “decades-long organizing by tenants to secure support from the City.”<sup>250</sup> At this point, although CLTs, LECs, and Land Banks have a limited pres-

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Gabrielle Cannon, *Will Oakland Become the First U.S. City to Ditch Wall Street and Establish a Public Bank?*, EAST BAY EXPRESS (Mar. 19, 2017), <http://www.eastbayexpress.com/oakland/will-oakland-become-first-us-city-to-ditch-wall-street-and-establish-a-public-bank/Content?oid=5812942> [<https://perma.cc/UD3T-3LQR>].

<sup>248</sup> Badger, *supra* note 3.

<sup>249</sup> Thomas J. Miceli et al., *The Role of Limited-Equity Cooperatives in Providing Affordable Housing*, 5 HOUSING POL’Y DEBATE 469, 469-70 (1994).

<sup>250</sup> Angotti, *supra* note 21, at 22.

ence in large urban areas, they are likely to grow as city officials realize that permanently affordable housing models are in everyone's interests, and they are more effective than other affordable housing models that have been tried in the past.

As the former President of the MacArthur Foundation said in an event announcing the creation of the first city-sponsored Community Land Trust in Chicago, Illinois, "[t]here is mounting evidence that stable, affordable housing helps people get and keep jobs, advances their health and well-being, and is a vital ingredient for the economic vitality of neighborhoods, cities and regions."<sup>251</sup> CLTs and other forms of affordable housing discussed in this Note are the most effective way to achieve those goals by "safe-guarding . . . public investments for generations to come."<sup>252</sup>

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<sup>251</sup> Jonathan Fanton, President, MacArthur Found., Remarks by Jonathan Fanton at Event Announcing Establishment of New Chicago Community Land Trust (Dec. 1, 2005), <https://www.macfound.org/press/speeches/remarks-jonathan-fanton-event-announcing-establishment-new-chicago-community-land-trust-december-1-2005/> [<https://perma.cc/FS9P-VUMM>].

<sup>252</sup> *Id.*

