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Volume Twenty-Three Winter 2020 Number One

CITIES IN INTERNATIONAL LAW: RECLAIMING RIGHTS AS GLOBAL CUSTOM

Andrew Bodiford†

INTRODUCTION

Cities are the foundation of humanity's collective social life as a governed community. In the modern world, the proportion of the global urban population has reached a tipping point such that, for the greater part of humanity, life is intimately linked to their city. Two thirds of the world's people will live in cities by 2050 and a majority already live in cities today.[1] However, cities' status in international law remains ambiguous. Not quite private entities like non-governmental organizations ("NGOs"), and

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[1] *2018 Revision of World Urbanization Prospects,* UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS (May 16, 2018), https://perma.cc/FK4W-XHJU.

yet not quite states, cities occupy what could be described as an intermediate place of mixed quasi-sovereignty that puts them in a twilight zone in international law between sovereign and not sovereign.[2]

Cities have been analyzed for a long time by legal scholars and historians as both units of history and as entities of international law. Thucydides' *History of the Peloponnesian War* describes the epic battles of sovereign cities in ancient Greece, where cities and leagues of cities such as Athens and Sparta comprised a great part of international sovereigns.[3] However, since the Early Modern Era, 1500-1800 C.E., city states like those in Ancient Greece and in the mixed sovereignty of Medieval Europe have been gradually absorbed into Westphalian states and consequently superseded by the unified nation state with its concentration of power into the metropolitan center, all at the expense of the sovereignty that small regional powers traditionally held.[4] Today, cities fall for the most part into a different category of sovereignty from their ancient predecessors, and the centralized state denies modern cities the sovereign powers of Athens or Sparta. However, cities still manage to maintain a distinct existence from national governments across the world.

City states did not disappear with the Treaty of Westphalia.[5] They still exist. Today, Singapore, Luxembourg, and the Vatican City are all

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[2] LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 70 (6th ed. 2014) (discussing how non-governmental bodies can contribute to a legislative practice while not constituting state practice); Helmut Philipp Aust, *Shining Cities on the Hill? The Global City, Climate Change, and International Law*, 26 EUR. J. INT'L L. 255, 256 (2015); Janne E. Nijman, *Renaissance of the City as Global Actor: The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors*, *in* THE TRANSFORMATION OF FOREIGN POLICY: DRAWING AND MANAGING BOUNDARIES FROM ANTIQUITY TO THE PRESENT 210 (Gunther Hellmann et al. eds., 2016).

[3] THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 27-28 (Richard Crawley trans., 2009) (ebook); *see* RICHARD NED LEBOW, A CULTURAL THEORY OF INTERNATIONAL RELATIONS 116 (2008).

[4] PETER WILSON, HEART OF EUROPE: A HISTORY OF THE HOLY ROMAN EMPIRE 171 (2016); *see* Nijman, *supra* note 2, at 211, 214. The Westphalian state is often the name given to modern states that have a singular, unified claim to sovereignty sharply exclusive of any other overlapping claim. For Westphalian statehood as it is traditionally understood, the key feature of the Sovereign is this singularity: there can only be one legitimate claim to sovereign statehood for any particular territory. Of course, in any large or diverse country with a need for independent local government, authority never looks this simple, and in reality it is often shared as a matter of constitutional practice—take, for example, the United States' federalist system. As the scope of state power has expanded to encompass more sovereign functions, tension between the sovereignty exercised by the city and that by the state has grown.

[5] *See generally* Nijman, *supra* note 2, at 215-16 (discussing the shift from an international economy controlled by sovereign territorial states to a global economy controlled by so-called global cities).

recognized by the international community as fully sovereign states.[6] Yet, these city states are just that—cities that happen to be more or less co-extensive with their own state. They are *de facto* states and are seen as such by the Westphalian delineation between state and non-state. In contrast, cities as most people understand them are very different. Almost all cities exist within the confines of a state's sovereign power,[7] and the role these cities play in international law[8] is the focus of this article.

City life as it is experienced by its *citizens* implies a collective social existence that is at once legally recognized through councils, mayors, and city boards, and rejected by the law as a form of real sovereignty—unlike that exercised by the state. Cities are sovereign, yet not quite *The Sovereign*. They are not a government unto themselves. Nonetheless, cities still can enjoy legal benefits of common law associated with the Sovereign, such as qualified immunity from certain tort claims.[9]

In many ways, the state relies on the city as its foundational unit. A modern state without the city is unthinkable. It would be more of a tribe than a Westphalian state.[10] Cities possess a collectivity of relationships between non-related people who occupy the same temporal and geographic space. Even the earliest states in Mesopotamia, Sumerian city states like Ur, and later Babylon at the center of the Babylonian Empire (circa 1900-539 B.C.E.), were based on the city whose authority spread outwards.[11] The very language of citizenship, important to legal understandings of jurisdiction, alienage, constitutional rights, and state legitimacy, implies an etymological origin in membership of a city.[12] Language reflects this city connection: the ideals of citizenship and the

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[6] *Vatican City*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/6X7E-THK5 (last visited Dec. 22, 2019); Véronique Lambert et al., *Luxembourg*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/8A2J-XXC8 (last visited Dec. 22, 2019) (noting that Luxembourg has sovereignty over a limited area beyond the city); Jim Lim, *Forgotten Independence: Singapore at 53 (Or Is It 55?)*, INTERNAL REFERENCE (Aug. 7, 2018), https://perma.cc/QK4L-9K49.

[7] *See* Nijman, *supra* note 2, at 214 n.13. Because global cities exist within the confines of a state's sovereign power, they lack city-states' level of self-sufficiency.

[8] *See* HENDRICK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 109-11 (1994). Germany provides an example of city-leagues that formed for protection against feudal lords within the structure of the Holy Roman Empire. The city-leagues collected revenues and regulated economic activity in the midst of the development of multiple overlapping German authorities leading to fragmentation as the model of the sovereign state was adopted.

[9] *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 411 (2016); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (holding that qualified immunity applies to local police officers facing suits brought under 42 U.S.C. § 1983 when the officers make a decision that "reasonably misapprehends the law governing the circumstances confronted.").

[10] *See* Nijman, *supra* note 2, at 217-18.

[11] *See* ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY 24-30 (1992).

[12] *See Citizen*, ONLINE ETYMOLOGY DICTIONARY, https://perma.cc/BP7S-RMPG (last visited Dec. 23, 2019).

concepts of civil rights and of civil law all refer to the rights of the people in the state but derive linguistically from the word for city. *Civil rights* in English, *Bürgerrecht* in German, and *les droits du citoyen* in French all imply in this way a relationship to the state derived, at least conceptually, from the historically supported relationship that people have with the city as its citizens.[13]

Furthermore, it would be wrong to assume that the city's status in international law disappeared with the development of the nation state. Indeed, cities' sovereignty should continue to be recognized given their emergence as global actors.[14] The model of a city government—and its chartered reciprocal rights with the city's inhabitants as citizens—serves as a forerunner of the social contract theory of reciprocal legal obligations which people have with the sovereign state.[15] Moreover, in many places, the historical context of the development of the constitution is related to the civil rights which people enjoyed in cities[16]: the special rights given to members of the city against arbitrary power,[17] and the protection from rural serfdom which cities extended to their citizens even in the Middle Ages.[18]

The connections that people develop with others in and between cities also emphasize cities' international character and therefore their importance and necessity as apparent subjects of international law.[19] Cities are often the cosmopolitan seats of international interactions and are increasingly indispensable actors. Many international legal concerns—such as international shipping, property disputes, the effects of climate change, and human rights—take place in the context of international economic relations and social connections sited between different cities.[20] Since Westphalia, the tendency among nation states has been to position the state's institutions within a single metropole,[21] creating a dominant city like London or Paris which in the Early Modern Era dwarfed all other

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[13] *See* WILSON, *supra* note 4, at 498-503; Peter Blickle, *Communalism, Parliamentarism, Republicanism*, 6 PARLIAMENTS, ESTATES & REPRESENTATION 1 (1986).

[14] *See* Nijman, *supra* note 2, at 211; *see also* Barbara Oomen & Moritz Baumgärtel, *Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law*, 29 EUR. J. INT'L L. 607, 609-10 (2018).

[15] *See* Nijman, *supra* note 2, at 214-15.

[16] WILSON, *supra* note 4, at 636, 660.

[17] *Id.* at 636.

[18] *See id.* at 504, 507; *see also* KARL KAUTSKY, COMMUNISM IN CENTRAL EUROPE AT THE TIME OF THE REFORMATION 10-11 (J.L. & E.G. Mulliken trans., Augustus M. Kelley 1966) (1897).

[19] *See* Nijman, *supra* note 2, at 211.

[20] *See* Oomen & Baumgärtel, *supra* note 14, at 609-13; *see also* Aust, *supra* note 2, at 257-58.

[21] This is a capital city or administrative center such as Versailles.

cities in the state by an order of magnitude. For instance, London had 400,000 inhabitants by 1625, twenty times more than any other English city.[22] Nonetheless, even the most centralized traditional nation states have given autonomy to their cities in the form of independent mayors, such as in London.[23]

Despite cities' massively important role in people's daily lives, their historical importance, their established relationship with sovereign rights, and their immediately apparent form of state power expressed through police, collection of local taxes, powers given to mayors, and freedom to provide local legal and social services, cities' joint agreements with each other remain ambiguously understood in international law. Given the paradigm of expanded visions of sovereignty through which both the individual and the NGO can be seen as giving expression to a type of non-state sovereign authority, cities similarly should qualify for having limited quasi-sovereignty and should be seen as competent actors in international law.[24] By considering sovereignty as more of a continuum and less of a binary, cities' rights should clearly prevail over claims of unassailable centralized sovereignty by the state.

This article argues that the global community should recognize the important role cities can play in international law as sovereign actors, especially as cities are likely to become a key unit of decision making in a number of important areas, such as immigration and climate change.[25] This is because many problems of international law directly implicate areas such as the environment, transportation, housing, water, and planning, which cities have traditionally held competence over and which address problems that transcend the traditional boundaries of what is considered a purely local, national, or international issue under the Westphalian system.[26] As the level of urbanization increases, cities' scale and the connections of globalization further link cities' interests to the world beyond the confines of their nation-states and the regions and rural hinterlands they find themselves in.[27] Thus, cities are inevitably becoming necessary ac-

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[22] Maurice Glasman, *The City of London's Strange History*, FIN. TIMES (Sept. 29, 2014), https://perma.cc/YP8R-ZHN9.

[23] *See* MAGNA CARTA cl. 9 (1225); Glasman, *supra* note 22; *Development of Local Government*, CITY OF LONDON, https://perma.cc/AER7-UNFV (last visited Dec. 23, 2019).

[24] DAMROSCH & MURPHY, *supra* note 2, at 70, 92; Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 8 (1999).

[25] Aust, *supra* note 2, at 257-58.

[26] *Id.* at 260.

[27] *2018 Revision of World Urbanization Prospects*, *supra* note 1.

tors of international law that perform indispensable functions in the international system.[28] In keeping with Louis Henkin's theory of sovereignty held by those traditionally considered below the sovereign state,[29] customary international law—the law of what the world does—should follow the developments of cities as organizations and individuals performing functions of sovereignty.

Cities operate parallel to the actions of national governments in areas where they have competence. For example, many of the most important practical determinations made in international agreements regarding climate change, such as the Paris Agreement, involve questions of efficient energy use in power generation, transportation, land use planning, and other areas which fall under cities' jurisdiction.[30] In furtherance of these goals, the measures which the United States is obliged to fulfill under international law to enforce the Paris Climate Agreement can be locally accomplished. Therefore, to achieve environmental and economic standards agreed upon by the international community, cities can play a crucial role in solving global issues at a local level.[31]

Parts I and II of this article consider the history of and philosophical basis for mixed forms of sovereignty surviving Westphalia via customary international law. Part III addresses cities' role as subjects in customary international law and discusses the critical questions of national government supremacy and preemption, the role of constitutional law in the powers retained by cities, and the functions cities have performed thus far on an international scale. Part IV discusses cities' potential to be international actors for some of the most important questions today, including their role in international law for both climate and immigration.

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[28] Aust, *supra* note 2, at 256, 261; *see also About C40*, C40 CITIES, https://perma.cc/Y36P-6CP4 (last visited Dec. 23, 2019) (describing coalition of cities committed to addressing climate change through land use planning, public transportation, flood control, and other methods).

[29] Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 32-35 (1996). Customary international law is one of the primary sources of international law and is said to be the law of how international subjects behave. DAMROSCH & MURPHY, supra note 2, at 57, 60. City relationships in the international economy have greatly expanded, and cities have entered into legal relationships which evidence a greater degree of contact with international institutions than before. This creates an interplay between international and domestic constitutional law but does not create a contradiction, as entities like the European Union already have such a blend. Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUR. L.J. 125, 132-34 (2001).

[30] *See* Paris Agreement (Dec. 12, 2015), *in* U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-First Session, Addendum*, Annex, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement].

[31] *See* ELINOR OSTROM, THE FUTURE OF THE COMMONS 70, 81-82 (2012).

I. PHILOSOPHICAL BACKGROUND

In his *Idea of a Universal History on a Cosmopolitical Plan*, Immanuel Kant explored, among other topics, the tendency of people to form a state and the problematic arrangement of state sovereignty that involves the subversion of imperfect humans to the will of another imperfect human.[32] Kant's theory of law embodies the idea of a law of interdependent states seeking the good in perpetual peace.[33] Kant believed that "[t]he highest problem for the Human Species, to the solution of which it is irresistibly urged by natural impulses, is the establishment of a universal Civil Society founded on the empire of political justice."[34] The potential for abuse of power in sovereign states where the sovereign had interests divergent from those of the people was obvious to Kant—and remains obvious today.[35]

Kant believed that all things humans create are subject to the human condition,[36] and that the vertical power structure of the all-powerful sovereign ultimately exhibits the same imperfections of lawlessness and uncontrolled liberty that people exhibit.[37] This suspicion of Kant's can certainly be confirmed by the political experience of many nation-states. So, despite the advantages of cities and states' sharing consistent policies and laws, the deficiency of subsuming a city's power for international cooperation to the trust of a higher sovereign such as a state or federal government is that the city's particular interests continue to be difficult to resolve while their room for experimentation is often minimized. The best international system promotes the common good of humanity with the maximum political representation to determine the common good. Cities, like

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[32] *See* Immanuel Kant, *Idea of a Universal History on a Cosmopolitical Plan in* THE COLLECTED WRITINGS OF THOMAS DE QUINCEY 428, 434-35 (David Masson ed., 1897).

[33] *See generally* IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH § 2 (1795) (ebook), https://perma.cc/PG9J-4YUU.

[34] Kant, *supra* note 32, at 433.

[35] "But, on the other hand, in a constitution which is not republican, and under which the subjects are not citizens, a declaration of war is the easiest thing in the world to decide upon, because war does not require of the ruler, who is the proprietor and not a member of the state, the least sacrifice of the pleasures of his table, the chase, his country houses, his court functions, and the like. He may, therefore, resolve on war as on a pleasure party for the most trivial reasons, and with perfect indifference leave the justification which decency requires to the diplomatic corps who are ever ready to provide it." KANT, *supra* note 33, § 2.

[36] This includes states. "To what purpose is labour bestowed upon a civil constitution adjusted to law for individual men, *i.e*. upon the creation of a Commonwealth? The same antisocial impulse which first drove men to such a creation is again the cause that every commonwealth, in its external relations,—i.e. as a state in reference to other states,—occupies the same ground of lawless and uncontrolled liberty; consequently each must anticipate from the other the very same evils which compelled individuals to enter the social state." Kant, *supra* note 32, at 435-36.

[37] *Id*. at 436.

other polities, are best able to represent themselves under this logic, and this sentiment largely inspires the idea of federalism in the United States.[38]

Parallel to Kant's idealism, Hugo Grotius envisioned a system of international law which is largely ancestral to the practice of international law today and which arose in the same time period as the Westphalian state. This system, which relies on norms, is the basis for the notion that the constitutions and customs which humans create should be freely followed in all of their forms. As a founder of the tradition of natural rights in international law, Grotius turned to the fundamental instincts towards self-preservation and sociability in human nature.[39]

Grotius' conceit was generally accepted by the global community as the basis of international law. Indeed, Sir William Blackstone rooted the law of nations in natural law: "The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world" in which "the individuals belonging to each [state]" were relevant in the intercourse of independent states.[40]

Much of the theory that places sovereignty as a single undivided edifice is ultimately rooted in a particular time and place of the Early Modern Era, yet outside the earliest conceptions of international law. In many ways, this theory contrasts the concerns of many early international legal theorists like Grotius. For instance, Jean Bodin, French jurist and political philosopher of the mid to late sixteenth century, responded to the religious chaos in France at the time by contending that sovereignty was a singular Sovereign.[41] Bodin is credited with introducing the concept of sovereignty adopted in later theory, and many of his ideas specifically opposed contemporary Medieval European ideas of an ultimate universal sovereign that lay above the state, like the Pope or the Emperor.[42] However, this conception of sovereignty was itself ahistorical to the ways in which different powers actually exercised sovereignty as Bodin was writing.

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[38] George Clinton, Letter, *Extent of Territory Under Consolidated Government Too Large to Preserve Liberty or Protect Property (Cato Essay No. III)*, NEW-YORK J. (Oct. 25, 1787), *reprinted in* THE ANTIFEDERALIST PAPERS 46-47 (Bill Bailey ed., 2012) (ebook), https://perma.cc/N46M-HCSW.

[39] Martti Koskenniemi, *Imagining the Rule of Law: Rereading the Grotian 'Tradition,'* 30 EUR. J. INT'L L. 17, 34 (2019). Grotius came to a less idealistic but similar conclusion as Kant, that the basis of the international order should be grounded in human rights.

[40] 4 WILLIAM BLACKSTONE, COMMENTARIES *66.

[41] Edward Andrew, *Jean Bodin on Sovereignty*, 2 REPUBLICS LETTERS 75, 78 (2011).

[42] *Jean Bodin,* ENCYCLOPÆDIA BRITANNICA, https://perma.cc/326R-MGHQ (last visited Jan. 19, 2020).

Bodin's theory of sovereignty is thus often interpreted more as a prescriptive model for centralized states with absolute sovereigns than as a description of the "way states behave."[43]

In today's reality, with international problems that transcend the scope of a single sovereign's power and a multiplicity of international obligations, international norms can best be upheld by a broad range of different actors at different levels around the world. In the absence of John Austin's supreme sovereign to enforce rules,[44] all arrangements of international law require a voluntarist consensus of sovereign opinions.[45] This favors many of the natural law conceptions of the state that were in fact original to international law and disfavors the supreme sovereign paradigm that Bodin and positivist theories adopted. There is no global sovereign, yet rules are accepted as part of international custom. Whether this happens on a smaller level with cities or exclusively with nation states, adherence to the law requires some form of consent on one level or another by a governing body.[46] Cities have been subsumed under the power of national laws in the name of considerations of physical location, optimizing cultural influence, and military strategy.[47] Given that international norms by definition require parties' faith and confidence and have no external "policemen," supreme "sovereign," or even a hegemon to enforce the means of accountability, cities should act where the Sovereign has failed to enforce a monopoly on power.[48]

Given history and custom, this article thus supports and furthers Henkin's analysis of sovereignty as in retreat since the beginning of international conventions on human rights and the establishment of international institutions, and that local sovereignties, which may have been stripped away by degrees by the advance of absolutism and the European State system, never really went away.[49]

II. HISTORICAL ANALYSIS

The role cities play in international law has changed over time. With the growth of the centralized national state since the Treaty of Westphalia

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[43] Andrew, *supra* note 41. Many states have recognized varied notions of sovereignty. Even today, legal fictions such as "one country two systems" represent modern confusion over sovereignty's strict lines. Louis Henkin posits that sovereignty has been in retreat since the beginning of international conventions on human rights after Nuremberg and the establishment of international institutions. Henkin, *supra* note 29, at 31-32.

[44] DAMROSCH & MURPHY, *supra* note 2, at 3-4.

[45] *Id.* at 59; *see* Koskenniemi, *supra* note 39.

[46] *Id.*; *see* DAMROSCH & MURPHY, *supra* note 2, at 59.

[47] WILSON, *supra* note 4, at 585.

[48] Aust, *supra* note 2, at 265.

[49] Henkin, *supra* note 29, at 31-32.

1648,[50] the wide autonomy of cities and other sub-national territories, which had existed since the Middle Age, began to be curtailed.[51] Cities became seen as subsumed under the state. However, this was a change from preceding historical reality. While our modern image of the city-state comes from Greek antiquity,[52] later examples of powerful cities set their own policies with other cities within the framework of a larger state, particularly in Medieval and Early Modern Germany.[53] This phenomenon is the subject of this section.

A. The Holy Roman Empire

The Middle Ages in Europe, 500-1500 C.E., featured much looser systems of internationally recognized sovereignty than those currently recognized in the modern world. The typical medieval European state structure featured a king or queen, a supranational church, lesser nobility like dukes and counts with a degree of sovereignty over their demesnes, and often independent cities.[54] *De facto* control over territory often rested with these lesser powers who swore allegiance to a lord. Sovereignty as it is now understood was therefore divided: similarly to how the theory of property rights is interpreted even today as a bundle of rights, sovereignty could be seen as a public bundle of rights,[55] which in the Middle Ages was divided between different concurrent and overlapping sovereigns that did not each command a monopoly on all sovereign power.[56] Instead, sovereignty overlapped between different authorities such as kings, popes,

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[50] The Treaty of Westphalia ended the Thirty Years War in 1648, a war that had raged in different phases since the Bohemian Revolt in 1618. This devastating war attracted foreign intervention by France and Sweden and killed up to one-third of the population of Germany. The treaty is considered to have granted each German principality *landeshoheit*, which has been interpreted as state sovereignty, and is seen as enshrining unified sovereignty more broadly. *See* WILSON, *supra* note 4, at 500. However, the treaty never ended the previous constitutional arrangement or the sovereignty of the Holy Roman Empire throughout Germany, which remained until 1806. WILSON, *supra* note 4, at 171, 174, 500.

[51] Nijman, *supra* note 2, at 215.

[52] LEBOW, *supra* note 3, at 116.

[53] WILSON, *supra* note 4, at 568-73 (discussing how the cities of the Hanseatic League in particular formed truly international legal agreements spanning beyond Germany).

[54] *Id.* at 524-25, 528-29 (discussing how cities often exercised chartered rights).

[55] Andrew Blom, *Hugo Grotius*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://perma.cc/7TYN-AKNP (last visited Dec. 14, 2019); David A. Lake, Memorandum on Delegating Divisible Sovereignty 3 (Mar. 3, 2006), https://perma.cc/38DS-VHZ4 (quoting Hersch Lauterpacht to note that, "from the point of view of international law, sovereignty is a delegated bundle of rights . . . [and] therefore divisible, modifiable, and elastic").

[56] WILSON, *supra* note 4, at 172.

counts, dukes, cities, and even communes.[57] This system created rights and obligations which could flow from multiple sufficient authorities.[58] For instance, a state's control over all lands within its borders was not exclusive and the state's monopoly over legitimate authority within its borders was not internationally recognized. This is most obvious when considering the enormous power and property of the medieval European church. The ensuing dispute over who held legitimate sovereignty contributed to Bodin's advocacy for a monopoly on sovereignty.[59]

However, this particular paradigm of absolute sovereignty was not internationally recognized as the only source of legitimate authority. Multiple authorities could exercise different powers through chartered rights which had been agreed upon and which divided traditionally understood functions of sovereignty among them. This system persisted most strongly in Germany because of the constitution of the Holy Roman Empire, but was also present throughout Europe, including England.[60] The paradigm of chartered rights is implicit in one of the common law's foundational documents, the Magna Carta. For example, the Great Charter confirmed the rights of the City of London, which were recognized as ancient custom from the time of Edward the Confessor.[61]

The Holy Roman Empire (800-1806 C.E.) was a peculiar continuation of Charlemagne's kingdom, claiming wide sovereignty as the highest sovereign recognized by the Catholic Church and also featuring wide autonomy for local princes, particularly after the Golden Bull of 1356.[62] In fifteenth-century Germany, free imperial cities (*Freie Reichsstädte*) developed as effectively quasi-sovereign entities in symbiosis with the surrounding areas and with the Emperor.[63] Their particular form of sovereignty coexisted with that of the Emperor, who was their only *de jure* sovereign. German free cities were granted rights and freedoms that were

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[57] *Id*. Vassals could often be more powerful than kings, or even more powerful than another country's sovereign within the other country's borders (as was the case with King Edward III of England, who held territory in France as a nominal vassal of the King of France before the Hundred Years War). *See generally* G. Templeman, *Edward III and the Beginnings of the Hundred Years War*, 2 TRANSACTIONS ROYAL HIST. SOC'Y 69 (1952).

[58] SPRUYT, *supra* note 8, at 60.

[59] Lake, *supra* note 55, at 1-2. This is a key difference from a modern era of states, where a nation-state exercises monopoly on sovereignty over its localities.

[60] *See* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 220-22 (Ernest F. Henderson ed., trans., 1905 ed.).

[61] *See* D.A. Carpenter, *King Henry III and Saint Edward the Confessor: The Origins of the Cult*, 122 ENG. HIST. REV. 865, 880 (2007).

[62] WILSON, *supra* note 4, at 40-41.

[63] *Id.* at 514, 517.

recognized by law and custom within the community of principalities in the empire.[64]

Unlike Italy, where some mercantile city states such as Venice functioned in certain ways as miniature versions of larger, emerging centralized states like France or England,[65] and where even many of the modern features of statecraft—such as permanent ambassadors—were developed,[66] Germany's model was widely understood to constitute mixed sovereignty.[67] Part of what distinguished the Holy Roman Empire from other states was that the nominal sovereign of the Emperor recognized the *de facto* autonomy of states in the Empire.[68] While famously convoluted and byzantine in its structure and complexity, law in the Holy Roman Empire relied largely on established historical rights and charters granted by the sovereign to other localities, including cities, to exercise independent authority over a particular area.[69] Cities, as well as other units of the Holy Roman Empire, thus possessed a degree of shared sovereignty as the pretense of centralized imperial authority deteriorated in the Late Middle Ages, never to return.[70]

While prior to the Treaty of Westphalia in 1648, the Emperor was properly considered the sovereign in Germany and imperial legal decisions set precedent for the accepted law over much of the Empire,[71] the Emperor did not exercise widely-accepted definitions of sovereignty, such as control of borders or land outside of the lands which he directly controlled, after 1648.[72] Before and after 1648, the Emperor had largely indirect authority in Germany that was complemented not only by smaller regions' large degree of autonomy but also by areas of at least *de facto*

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[64] *Id.* at 517-19, 524.

[65] SPRUYT, *supra* note 8, at 149.

[66] *See* Daniel Goffman, *Negotiating with the Renaissance State: The Ottoman Empire and the New Diplomacy, in* THE EARLY MODERN OTTOMANS: REMAPPING THE EMPIRE 61, 62 (Virginia H. Aksan & Daniel Goffman eds., 2007).

[67] WILSON, *supra* note 4, at 279 ("This countered Bodin's either/or approach with its insistence that sovereignty was either wholly wielded by the emperor or exercised through the Reichstag, [sic] Instead, power was diffused through the Empire's different authorities, making them interdependent.").

[68] *Id.* at 278-79. The emperor was widely acknowledged as the "Sovereign" but sparingly exercised sovereignty.

[69] *See id.* at 630, 636. Rights in the Empire were primarily seen as a corporate patchwork based on charters, which resembled contractual rights. Many cities today with no origin in the Middle Ages maintain similar charters.

[70] *Id.* at 630, 636; *see generally* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 220-22.

[71] WILSON, *supra* note 4, at 636.

[72] *See id.* at 389-92.

regional sovereignty.[73] In many instances, states in the Holy Roman Empire exercised this *de facto* sovereignty for centuries before their status was formally recognized internationally. For example, the Dutch Republic and Switzerland were both recognized as sovereigns emerging out of the Holy Roman Empire in the Treaty of Westphalia, even though they exercised many of the post-Westphalian ideas of sovereignty while still being a part of the Holy Roman Empire.[74]

Overall, cities benefited greatly from this loose constitution of the Holy Roman Empire. The imperial free city of Freiburg, or *free town*, for example, was created from its beginning with immunities "in a deliberate attempt to attract wealth and labour by offering an attractive new settlement."[75] Cities were able to operate within a common imperial legal structure while also operating autonomously and making agreements with each other, defying the presumption that sovereignty is a binary black and white concept.[76]

One outgrowth of the sovereign city was the league of cities. Many cities in the fifteenth century developed leagues with each other to pursue shared interests and protect their rights.[77] The *Décapole* cities, the Saxon league, and the Swiss Confederacy were originally such leagues of cities, as were other Swiss Imperial estates.[78] These city leagues formed connections with each other for reasons somewhat analogous to today's sister cities arrangements. However, their connections were far more in depth and focused on common protection of the cities' interests, rather than on one particular issue or general amity and cooperation.[79] Originally, Switzerland consisted of an alliance of free cities like Zürich, Bern, and Luzern, which, in order to protect themselves against the claims of surrounding nobles and the Emperor, evolved to become a powerful group within the Empire.[80]

Full sovereigns such as Switzerland evolved out of leagues of cities in the Holy Roman Empire yet continued to maintain Imperial law.[81]

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[73] *Id.* at 500-01.

[74] *Id.* at 228-30. While the Constitution of the Holy Roman Empire has influenced the countries it used to encompass, the Netherlands and particularly Switzerland maintain a constitution with wide autonomy for cities and local governments.

[75] *Id.* at 506.

[76] WILSON, *supra* note 4, at 576-77.

[77] SPRUYT, *supra* note 8, at 121.

[78] WILSON, *supra* note 4, at 585.

[79] SPRUYT, *supra* note 8, at 121.

[80] WILSON, *supra* note 4, at 586.

[81] WILSON, *supra* note 4, at 585; André Holenstein et al., *Introduction*, *in* THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED 18 (André Holenstein et al. eds., 2008). Switzerland is probably the best example of this phenomenon, as the entire sovereign country evolved out of a league of cities.

When the Treaty of Westphalia established the modern principle of state sovereignty in international law, Switzerland gained independence through the plain text of the treaty and was recognized as such by the other great powers despite continued connection to the Holy Roman Empire.[82] With numerous new and tiny independent sovereigns, leagues of shared interests continued, primarily built off of the history and legal precedent of the Holy Roman Empire.[83]

The Netherlands similarly emerged out of a league of shared interests and was not recognized as fully sovereign until after the 1648 Treaty of Westphalia, almost a century after the Union of Utrecht and hundreds of years after the Dutch provinces began to exercise quasi-sovereign functions under the auspices of the Empire.[84] The emergent Republics which the Dutch and Swiss founded out of the Holy Roman Empire in fact retained much of the constitutional legacy of the Empire, including the powers held by estates, cities, and cantons.[85] The Dutch Union of Utrecht maintained the diversity of customs and privileges which had evolved over time. The first article in the Union of Utrecht 1579 maintained that "provinces will form an alliance, confederation, and union among themselves . . . in order to remain joined together for all time in every form and manner, as if they constituted only one province," and that "each province and the individual cities, members and inhabitants thereof shall each retain undiminished its special and particular privileges, franchises, exemptions" without any sense of contradiction.[86]

In reality, mixed sovereignty was never abolished by Westphalia; instead, it receded as the *de facto* arrangement of the sovereign state emerged.[87] Indeed, when Jean-Jacques Rousseau asserted that he was a citizen of Geneva, this implied a relationship to a city that remains foundational to our modern notions of citizenship.[88]

B. Magdeburg and Lübeck Law and the Hanseatic League

While some leagues of cities formed to protect their sovereignty, like Switzerland, others developed to protect their trade interests.[89] The Hanseatic League is the greatest example of this development, and a good

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[82] *The Treaty of Westphalia* § LXIII, YALE LAW SCH. AVALON PROJECT (Oct. 24, 1648), https://perma.cc/4W48-NBRC.

[83] *Id.* at 572.

[84] WILSON, *supra* note 4, at 595.

[85] *See id.* at 585.

[86] Holenstein et al., *supra* note 81, at 16.

[87] *See* WILSON, *supra* note 4, at 585-89.

[88] JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 57-58 (Maurice Cranston trans., Penguin Classics 1985) (1755).

[89] WILSON, *supra* note 4, at 571.

model for how city diplomacy can function in tandem with the power of the sovereign.[90] Between the fourteenth and seventeenth centuries, Hanseatic cities were both part of their respective sovereign nations and also part of an international league of cities with joint agreements with each other. The influence of the League's leading city of Lübeck spread across the Baltic Sea.[91] Trade spanned between far-flung Hanseatic cities, from a core in Northern Germany around Hamburg and Lübeck, north to Bergen and Stockholm in Scandinavia, east to Danzig and Riga across the Baltic, and even to Novgorod in Russia.[92] In some cases, Hanseatic merchants set up German trading quarters within cities, such as the Kontors in London, Bergen, and Novgorod.[93] But in many cases the cities were incorporated as Hanseatic merchant cities, often governed by Lübeck Law in circles of regional cooperation with other Hanseatic cities while simultaneously maintaining varying relationships with other lords or the Holy Roman Emperor.[94]

As development spread further east in Northern Europe in the Late Middle Ages, these cities were able to shape the economic patterns of a whole region. Fueled by the influence of international cities and the common standards they adopted, the Hanseatic cities became a massive trading syndicate in which goods could be traded in accordance with the uniform legal standards across a whole region.[95] With each city founded by Hanseatic merchants, Lübeck rights—which defined a city's self-governance model—spread in different countries and harmonized the laws of the major trading cities.[96] Merchants could travel from Lübeck to Riga to Stockholm and back and expect the same standards of law. Pioneered by cities, this international legal uniformity was an early forerunner of the free movement seen nowadays in the European Union.[97] In many ways, this arrangement created a parallel form of political organization in the Late Middle Ages that functioned as an alternative to the sovereign state.[98]

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[90] Nijman, *supra* note 2, at 215; WILSON, *supra* note 4, at 571, 577-78.

[91] WILSON, *supra* note 4, at 571.

[92] *Id.*

[93] Mike Burkhardt, *Kontors and Outposts*, *in* A COMPANION TO THE HANSEATIC LEAGUE 141 (Donald J. Harreld ed., 2015); *Bryggen*, UNESCO, https://perma.cc/94UM-8G8X (last visited Dec. 17, 2019).

[94] SPRUYT, *supra* note 8, at 124, 128.

[95] *See* Nijman, *supra* note 2, at 215.

[96] *See* WILSON, *supra* note 4, at 507.

[97] *See id.* at 507, 682.

[98] *See* SPRUYT, *supra* note 8, at 126-28. As Spruyt observes, the Hanseatic League concluded treaties with binding effect on the cities that constituted its membership, engaged in war with Denmark, Sweden, England, and the Netherlands, extracted concessions from Denmark at the Peace of Stralsund, conducted blockades, and equipped warships to fight piracy.

Like in the Baltic region, much of the same process happened in Central Europe as the influence of the Empire moved east and as new towns were founded. Many Central European towns adopted Magdeburg Rights—similar to Lübeck Law—as their code of laws.[99] Cities in Central Europe became magnets for new talent and for people fleeing from the oppression of feudal barons in the countryside.[100] Such cities pioneered not only population growth but also the development of uniform legal standards, as well as civil rights, which transcended national boundaries. Serfdom ended at the city gates for many.[101]

The rise of cities in the Late Middle Ages, 1250-1500 C.E., therefore created conditions in which cities could exercise many of the functions that are seen today as exclusively sovereign. Cities played an economic role by drawing people away from the countryside and acted as a sanctuary against the oppression of feudalism. Cities were crucial to the European economy's shift from feudalism, as urban craftspeople and well-to-do peasants shifted their productivity away from a feudalistic mode of production towards the cities, which attracted unfree peasants and created centers for new production and international exchange. This change eventually shifted market power by compelling concessions from the landed class.[102] The cities also pioneered democratic concepts such as freedom and equality before the law and the right to make law through self-government,[103] as well as helping to create the conditions for later parliamentary development.[104]

C. The Holy Roman Empire's Legal System

The Holy Roman Empire developed an extensive and sophisticated legal system to facilitate connections between its quasi-sovereign states and to settle feuds between different lords who otherwise might go to war with each other. The *Reichskammergericht* (the Supreme Court),[105] the *Hofgericht* (the court presided over by the Emperor), and the *Reichshofrat* (the supreme Imperial Judicial tribunal)[106] worked to enforce a system of

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[99] JEAN W. SEDLAR, EAST CENTRAL EUROPE IN THE MIDDLE AGES, 1000-1500, at 328 (1994); WILSON, *supra* note 4, at 571.

[100] HENRY HELLER, THE BIRTH OF CAPITALISM 26-27 (2011).

[101] WILSON, *supra* note 4, at 506-07. Cities functioned to give sanctuary to people rejecting feudal exploitation after the Black Death. Tom James, *Black Death: The Lasting Impact*, BBC (Feb. 17, 2011), https://perma.cc/9J4T-ETHR.

[102] HELLER, *supra* note 100, at 26-27.

[103] *See* SPRUYT, *supra* note 8, at 128.

[104] Blickle, *supra* note 13, at 12.

[105] WILSON, *supra* note 4, at 630-31.

[106] *Id.* at 628-31.

quasi-international law that covered Germany and regulated relations between the different states of the Holy Roman Empire, even after the ratification of the Treaty of Westphalia.[107] Like a Supreme Court or miniature International Court of Justice, the *Reichskammergericht* in particular settled disputes between the many states of the Holy Roman Empire.[108] Analogous to the European Union's institutions today, such late judicial institutions of the Holy Roman Empire functioned to facilitate common norms among the hundreds of cities and principalities of the Empire, at a time when authority was still exercised locally.[109] This legal system facilitating multi-centric sovereignty persisted well into the post-1648 modern era of international relations.

D. Westphalia

The Holy Roman Empire's model of co-sovereignty was diminished, though not abolished, by the Treaty of Westphalia in 1648, then largely deteriorated toward a collapse of imperial authority over the eighteenth century.[110] The Treaty of Westphalia's immediate effect on the Holy Roman Empire was the establishment of what we would now consider to be a state monopoly on violence, precluding nobles and property owners from raising their own army.[111] The dispute over who held sovereignty in Germany led to the Thirty Years War (1618-1648). Seen as a battle between Protestant and Catholic states, the Thirty Years War was about more than religion and implicated hegemony and control of European territory, thus attracting foreign intervention by great powers such as France and Sweden.[112] The Treaty's signatories expressly declared that sovereignty rested solely with the temporal leader of the country.[113]

However, the Treaty of Westphalia did not eradicate the Holy Roman Empire's system of multi-centric sovereignty and constitutional governance, which continued to evolve over time.[114] Despite the common perception that the Holy Roman Empire's multicentric governance was broken by the treaty, such governance continued, even as the common understanding of who held sovereignty in the Empire shifted towards the

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[107] *Id.*

[108] *Id*.

[109] *Id.* at 682.

[110] WILSON, *supra* note 4, at 279-80.

[111] *See id.* at 279; MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77-128 (Hans Heinrich Gerth & Charles Wright Mills eds., trans., 1946).

[112] WILSON, *supra* note 4, at 126-27.

[113] Daud Hassan, *The Rise of the Territorial State and the Treaty of Westphalia*, 9 Y.B. N.Z. JURIS. 62, 64 (2006).

[114] *See* WILSON, *supra* note 4, at 126-27.

independent states, whose localities' position in the Empire remained legally intact.[115]

For instance, Switzerland had its sovereign rights explicitly confirmed by the Treaty of Westphalia and was regarded as a successor state to the Holy Roman Empire, but failed to totally break from the constitutional structure of the Empire.[116] The Swiss Confederation was envisioned as a modern constitutional state only retroactively *after* Westphalia*,* as the cities and rural cantons internalized the notion of the sovereign state from theorists like Bodin.[117] When Johann Rudolf Wettstein, the mayor of the Swiss city of Basel, arrived in Westphalia seeking only to abolish the imperial appeal,[118] the Emperor instead created an exemption for Switzerland which derived from imperial law and which the Swiss did not clearly distinguish from sovereignty.[119] Westphalia confirmed that Switzerland had not paid homage to the Emperor for one hundred and fifty years and instead abided by its own laws, but because Switzerland failed to establish where sovereignty lay, the notion that both the cantons and the Confederation were free, sovereign, and independent was accepted.[120]

Switzerland's sovereignty was later reimagined with the introduction of the Bernese magistrate's functions, which paralleled Bodin's *République*.[121] It was only in the practice of international law and the customs of diplomacy that Switzerland's sovereignty was acknowledged internally in such modern terms as late as 1751 by the Swiss constitutional theorist Isaak Iselin.[122] The only Swiss university of that time, the University of Basel, continued the study of imperial law until late in the seventeenth century.[123] The Dutch and Swiss constitutions continued to maintain their polycentricity of powers even after Westphalia, and Swiss cities abided by constitutions stemming from structures of the Empire.[124] Several Swiss cantons even continued to bear the double headed imperial eagle in their coat of arms in 1684, decades after Westphalia, and according to Johann Caspar Steiner, this in no way contradicted Switzerland's independence as confirmed in Westphalia.[125] The inference we can draw

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[115] *Id.* at 174.

[116] Holenstein et al., *supra* note 81, at 18; Thomas Maissen, *Inventing the Sovereign Republic*, *in* THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED, *supra* note 81, at 128-29.

[117] Maissen, *supra* note 116, at 145.

[118] *Id.* at 134-35.

[119] *Id.*

[120] *Id.* at 135.

[121] *Id.* at 133-34.

[122] Maissen, *supra* note 116, at 136.

[123] Holenstein et al., *supra* note 81, at 18.

[124] *Id.* at 23.

[125] Maissen, *supra* note 116, at 129.

is that, based on historical reality and state practice, the hard boundary between "sovereign" and "not sovereign" is a modern neologism ahistorical to the early era of international law immediately after Westphalia—and that there is no contradiction between systems of mixed sovereignty and the sovereign state in the modern era of international law.

Mixed sovereignty in the Holy Roman Empire persisted after 1648. Subsequent treaties such as the Treaty of Utrecht continued to acknowledge the Holy Roman Empire as a sovereign state and recognize its unique constitutional arrangement despite the fact that it differed sharply from the centralized state systems of France and Britain.[126] Imperial states were considered both sovereign actors and party to the Holy Roman Empire's constitutional system, and practically speaking, sovereignty was always more fluid than states acknowledged.[127]

Sovereignty would remain ambiguous in the Holy Roman Empire while the Empire kept different negotiated rights of various principalities under a unifying ideological, political, and legal framework.[128] These practical arrangements of ambiguous sovereignty continued well after the Treaty of Westphalia, and there were so many different forms of sovereignty in the Empire that did not seem contradictory to most people at the time.[129]

Successor states also adopted this model from the Holy Roman Empire. For instance, the Netherlands emerged as fully sovereign out of the Treaty of Westphalia and retained large amounts of autonomy for both its provinces and cities, which conducted international trade across the world.[130] The city of Amsterdam extensively influenced terms of trade through its stake in the Dutch East India Company,[131] and representatives of Dutch cities banded together to promote their common trade interests,

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[126] WILSON, *supra* note 4, at 127-28, 471-72.

[127] *Id.* at 471-72.

[128] *Id.* at 279. States like Austria and Prussia were both imperial states and also kingdoms outside the empire's rule, with the Hohenzollern King of Prussia (known as the King in Prussia before 1772) and the Habsburg King of Hungary both considered kings of the territories they held outside the bounds of the Empire. *Id.* at 159, 210. Another state, Bohemia, which was continuously held in union with Habsburg Austria after the Battle of White Mountain, was both an independent kingdom and a member and prince elector of the Holy Roman Empire. *Id.* at 118. Similarly, after 1714, the British monarch held a second official title, "the Elector of Hanover." *Id.* at 169, 600.

[129] *Id.* at 159, 176.

[130] *Id.* at 594-99.

[131] Oscar Gelderblom & Joost Jonker, *Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595-1612*, 64 J. ECON. HIST. 641, 651, 654 (2004).

which even extended to affirming treaties.[132] The Netherlands maintained a system of estates in which cities remained immensely powerful and were considered sovereign by international observers.[133]

By granting de jure independence to the states that had already exercised de facto independence, the Treaty of Westphalia also transformed many free imperial cities into more fully sovereign city-states, a status that the most powerful of them kept until the reunification of Germany under Bismarck in the nineteenth century.[134] Some powerful cities like Hamburg became recognized under this system, which is still reflected in the political geography of modern Germany. Hamburg emerged as a powerful city-state after the Westphalian system with a great tradition of international trade deriving from the era of the Hanseatic League.[135] Today, Hamburg maintains its own Bundesland (a subnational state) with its historical title as the Freie und Hanseatische Stadt Hamburg (Free and Hanseatic City of Hamburg).[136]

Examples like the Free City of Danzig, a formerly Hanseatic City established after World War I,[137] and the Free City of Trieste, both port cities formerly part of the Holy Roman Empire, coincidentally or not, reflect a view of cities that closely resembles the historical precedent of free imperial cities, even as they were considered to have characteristics of the sovereign state. This is not merely a historical curiosity: city states with mixed sovereignty continue to persist even today, as in the case of Hong Kong.[138] Protests in Hong Kong that have erupted in 2019 show a dispute over the real nature of self-rule over the city, which formally passed from British to Chinese sovereignty in 1997 but which also formally remained a separate territory—one which maintains its own flag, border controls with mainland China, and a separate constitution which protestors are defending under the banner of universal suffrage. This is the essence of what

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[132] Maarten Prak, *Challenges for the Republic: Coordination and Loyalty in the Dutch Republic*, *in* THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED, *supra* note 81, at 53, 61.

[133] *Id.* at 54.

[134] *Hamburg*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/9AAM-FYF6 (last visited Jan. 23, 2020).

[135] *Id.*; WILSON, *supra* note 4, at 578, 657.

[136] *Hamburg*, *supra* note 134.

[137] Eugene van Cleef, *Danzig and Gdynia*, 23 GEOGRAPHICAL REV. 101, 101 (1933).

[138] China has similar arrangements of mixed sovereignty with Taiwan dating to the time of the Communist Revolution. Taiwan (Republic of China) and China (People's Republic of China) both claim to be the legitimate sovereign government of all of China and recognize officially that China is one country. Taiwan maintains formal embassies only in a few countries despite having one of the twenty largest GDPs in the world and being an independent government. DAMROSCH & MURPHY, *supra* note 2, at 325. Macao is a close constitutional parallel.

China has called "one country two systems," the contours of which are in dispute.[139] Other examples come from the Commonwealth of Nations, where sovereign countries such as Canada and New Zealand share the British monarch as the head of state. Commonwealth countries' diplomatic offices are called "high commissions" and some still share aspects of a judicial system with Britain.[140] Until 2004, New Zealand's final court of appeal was the Privy Council, the formal body of advisors to the sovereign of the United Kingdom,[141] and Jamaica continues to appeal to this body even today.[142] Brunei, although not a Commonwealth member, does so in some limited civil cases.[143] Nevertheless, all of these countries are considered full sovereigns by the international community.

The post-World War II era of international law added individual rights to the international legal framework. The Grotian tradition in international law thus continued after the two World Wars, reappearing as norms in modern international law. Another product of the history of Germany, the Nuremberg trials for Nazi war crimes established the principle of international human rights, the obligation on the individual, and key limits on the state's authority, all while international institutions and multinational governance structures formed.[144] This principle became central to the system of international law after the conclusion of World War II.[145] Customary international law is generally said to be the law of how nations behave.[146] The international role of cities has become increasingly prominent as the world has become more interconnected since the nineteenth century, which is often considered the apex of the absolute sovereign of the territorial nation state.[147] Cities have been acting as global players in the international arena since the conclusion of the Second World War.[148]

The Holy Roman Empire's sovereign development post-Westphalia is a useful paradigm to consider and analyze in light of the modern

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[139] *Id.*

[140] *Embassies*, COMMONWEALTH NETWORK, https://perma.cc/6E5L-2YGV (last visited Jan. 23, 2020).

[141] *History and Role*, COURTS OF NEW ZEALAND, https://perma.cc/QB3X-YYHU (last visited Jan. 23, 2020).

[142] *The Judiciary*, JAMAICA INFO. SERV., https://perma.cc/3P6H-R4N8 (last visited Jan. 23, 2020).

[143] The Brunei (Appeals) Order 1989, SI 1989/2396, arts. 2, 4 (Eng.), https://perma.cc/39Q2-YDF7.

[144] Henkin, *supra* note 24, 37-45.

[145] *See generally id.*

[146] DAMROSCH & MURPHY, *supra* note 2, ch. 2.

[147] *Id.* at 36 (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8-11 (1995)).

[148] *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L. L. 821, 821-22 (1989).

world's predominant rigid airtight conceptions of sovereignty. The significance was clear post-World War II, as states once again accepted some limits on their capacity for violence and shared governance in the form of the United Nations, multi-lateral institutions, and the transnational European Union.[149] What we can draw from the Holy Roman Empire's constitution both before and after Westphalia is that sovereignty can be fluid and shared with cities without negating the modern state system—and in fact, this was a reality well into the modern era of international law and has been accepted as such. A strong national state is not the only form of sovereignty available to the modern global community: modern cities can tackle joint problems and harmonize their municipal laws to reflect international standards across borders for the greater good of their citizens. They have done it before.

III. CITIES AS SUBJECTS IN CUSTOMARY INTERNATIONAL LAW

Cities should be considered entities that are becoming emergent international actors and subjects of international law. The United Nations' adoption of the Sustainable Development Goals, which followed the Millennium Development Goals, emphasizes this fact. Specifically, Sustainable Development Goal 11 reflects cities' emerging role in international relations, as do Goals 16 and 17.[150] In particular, Goal 11 sets an international policy for good urban governance.[151] Increasingly, cities are "required to take international normative expectations into account when they plan and make decisions."[152] Cities ought to be considered international subjects in Sustainable Development Goal 11, which was generally accepted by the member states that were present, even as heated debates surrounded the broader adoption of the other Goals.[153]

In international practice, relations between cities and international institutions have progressed especially far. For instance, in 2010, the City of Rio de Janeiro received a loan directly from the World Bank.[154] Increasingly, the reality of the world challenges the traditional dualism of

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[149] Henkin, *supra* note 24.

[150] Helmut Philipp Aust & Anél du Plessis, *Introduction*, *in* THE GLOBALIZATION OF URBAN GOVERNANCE 4 (Helmut Philipp Aust & Anél du Plessis eds., 2019).

[151] *Id*.

[152] *Id.* at 5; *Sustainable Development Goal 11*, UNITED NATIONS SUSTAINABLE DEV. GOALS KNOWLEDGE PLATFORM, https://perma.cc/4EHZ-XS7C (last visited Dec. 17, 2019).

[153] Noora Arajärvi, *Including Cities in the 2030 Agenda*, *in* THE GLOBALIZATION OF URBAN GOVERNANCE, *supra* note 150, at 31.

[154] Michael Riegner, *International Institutions and the City*, *in* THE GLOBALIZATION OF URBAN GOVERNANCE, *supra* note 150, at 38.

state and non-state, and the law of custom reflects this pattern.[155] The universality of human rights law already binds cities with their residents in international law,[156] and, over time, secondary law developed by the United Nations and the World Bank has become "a voluminous body of general rules applicable to cooperation with cities,"[157] which includes quasi-judicial functions.[158] In international custom, cities are returning to a place they have previously held.

Arguably, agreements between international organizations and cities have already taken on some characteristics of treaties, functioning as custom outside the Vienna Convention.[159] This international custom is "common practice" in Brazil, where cities' para-diplomatic activities have been supported by the Brazilian Foreign Ministry.[160] Similarly, international norms of local law have been recognized constitutionally in South Africa.[161]

Individuals and organizations at the very least hold quasi-sovereign characteristics under the increasingly accepted and expanded purview of what it means to be an international actor.[162] Cities should be seen as quasi-sovereign as well. As described above, cities' international role justifies the view that "a rich history of foreign relations between urban political communities" has always existed, continues to exist, and thus should be recognized as such in customary international law.[163]

As cities grapple with international issues that cross borders and affect all humanity, such as climate change and immigration, joint city agreements should also be recognized as sources of customary international law. It is in the interest of achieving a minimal world order that as many participants as possible are included in the world's international system. Having multiple layers of acceptance of international norms also only serves to strengthen states' adherence to these norms. The increased weight and influence of cities in areas central to international law suggests that they are a critical piece of the puzzle in solving global issues. The top twenty-five metropolitan areas combined constitute over half of the

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155 *Id*. at 39.

156 *Id*. at 42; *see* DAMROSCH & MURPHY, supra note 2, at 437.

157 Riegner, *supra* note 154, at 42.

158 *Id.* at 43.

159 *Id.*

160 *Id.* at 54.

161 *Id.* at 56; *Abahlali BaseMjondolo Movement v. Premier of KwaZulu-Natal* 2009 (2) BCLR 99 (CC) at 67-68 paras. 127-29 (S. Afr.).

162 *See generally* Henkin, *supra* note 24; DAMROSCH & MURPHY, *supra* note 2, at 429.

163 Nijman, *supra* note 2, at 213.

United States' gross domestic product (GDP)[164] and the C40, a network of the world's megacities committed to address climate change, purports to represent twenty-five percent of global GDP, which is on par with the United States, the European Union, and China.[165] This shows that, with the extensive powers held by local governments, cities' action is becoming essential in addressing global issues, particularly in combating climate change in the face of nations' intransigence and gridlock.

In practice, international agreements are intrinsically multicentric. They are *de facto* anarchic: there is no international so-called super sovereign enforcing the norms of international law, and joint international agreements require only the signatories' voluntary compliance.[166] Cities' role in this system can be symbiotic with the already voluntary nature of international law. If one nation places a particular reservation on an international treaty, why not recognize cities' ability to fully commit to upholding international law to the extent of their competent powers? This would create multiple avenues for adherence to international norms other than just the tollbooth of the centralized state.[167] While not covered as sovereigns in the Vienna Convention on treaties, "other subjects of international law" are explicitly recognized as having legal treaty capacity under some other source, such as customary international law.[168] Thus, cities should receive the support of customary international law as competent subjects and their capacity to create agreements should be recognized by the international community.

The inclusion of cities into the international arena follows the precedents which have been set in the historic development of sovereignty and which have continued with the transformation of other non-state actors, such as international organizations and NGOs, into international legal subjects.[169] Indeed, international organizations have exercised international legal capacity in a variety of ways which have traditionally been

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[164] Kim Hart, *The Age of Winner-Take-All Cities*, AXIOS (July 10, 2019), https://perma.cc/S6SE-VHGF (discussing how, today, modern cities wield more power on the global stage than ever before.).

[165] *About C40*, *supra* note 28.

[166] MARTIN DIXON ET AL., CASES & MATERIALS ON INTERNATIONAL LAW 55 (6th ed. 2016).

[167] *See* BENJAMIN R. BARBER, IF MAYORS RULED THE WORLD 6-12 (2013). This is particularly true because states often represent narrow interests on a particular issue, rather than the will of the people to oppose an international norm.

[168] Vienna Convention on the Law of Treaties art 3., May 23, 1969, 1155 U.N.T.S. 331; DAMROSCH & MURPHY, *supra* note 2, at 126. This may include international organizations and other non-state actors that can be recognized as having legal force and that may operate based on rules comparable to those in the Vienna Convention.

[169] DAMROSCH & MURPHY, *supra* note 2, at 401.

considered reserved for sovereigns, including concluding treaties, sending and receiving ambassadors, and even occupying territory.[170]

The United Nations Economic and Social Council Article 71 provides that it may "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence."[171] NGOs have participated in that framework, seeking to set standards on the use of landmines through an inter-state treaty regime.[172] This shows that non-state sovereigns can be recognized by the global community as sovereign or quasi-sovereign subjects of international law. The framework for cities in international law should follow this precedent. Para-diplomatic activities should be recognized as an international custom, and cities recognized as subjects of international law—and as limited sovereigns—subject to limitations placed on this role by relevant constitutional law. Opening up the arena of international law to cities would contribute to the philosophical goal of attaining a minimal world order for international cooperation and the global good.

A. Preemption and National Government Supremacy

The most obvious problem with cities forming international agreements with other foreign cities is the exclusivity which sovereign states claim for foreign policy. As this article contends, this is largely an avoidable problem because the agreements which cities make with each other fall outside of the scope of sovereign foreign policy, and cities thus have freedom to adhere to both international norms and sovereign policies.[173]

The existence of different layers of governance is intrinsic to many federal systems. In United States jurisprudence, for example, there are different levels of competence which the federal, state, and local governments claim for themselves. This could serve as a model for how cities could interact with different sources of law. Notably, there is an important distinction between domestic constitutional law and international law. Agreements made between cities may have an international character, as long as they are not barred by domestic constitutional law—although the precise boundaries between domestic constitutional law and international law may at times be blurred in mixed sovereignty systems like the European Union. There are various areas of policy with varying levels of con-

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[170] *Id.*

[171] U.N. Charter art. 71.

[172] DAMROSCH & MURPHY, *supra* note 2, at 431.

[173] In the domestic context, see Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 143, 146 (1963) for a discussion of how federal and state regulations may operate simultaneously without impairing the federal superintendence of the relevant field.

flict that naturally dictate how most sovereign states will react to autonomous agreements made by cities.[174] Sophisticated mixed sovereignty systems, such as the European Union, analogously may limit a sovereign state's power in certain areas like trade while simultaneously not abrogating the state's sovereignty. For example, following the *Van Gend en Loos* decision, the European legal concept of "direct effect" did not implicate any abrogation of the Netherlands' status as a sovereign state.[175] Mixed sovereignty implies no internal contradiction here.[176]

National governments reserve some traditional areas of competence to themselves. Preemption in the United States is one example of this. The United States' preemption doctrine has mostly dealt with states' actions but is applicable to cities as well, since they are considered incorporated under state law. The Supremacy Clause of the United States Constitution states that the Constitution is the "supreme law of the land," and that federal laws have precedence.[177] This is the basis of the preemption doctrine, which has been extensively litigated by American courts. However, federal preemption intends to only preempt state and local laws which intrude on powers reserved solely for the federal government, or where there is a direct conflict with federal law. The preemption doctrine does not apply to instances where local regulation derives power from a source not barred by the U.S. Constitution or the federal government.[178] Outside of an conflict between federal and state laws in an area in which the federal government has authority to legislate, the text of the Supremacy Clause does not explicitly prevent local authorities from being in charge of decision-making. If anything, it recognizes the multiplicity of laws which exist in a federal system and encourages adherence to federal, state, and local laws.[179]

There is the least potential for conflict in a city-made agreement that reflects state-endorsed policies and which relates to issues that the sovereign does not traditionally claim monopoly over.[180] In contrast, an agreement that conflicts with the sovereign state's national policies and deals

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[174] *See id.* at 141.

[175] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1; *see The Direct Effect of European Law*, EUR-LEX, https://perma.cc/H53E-AWND (last visited Jan. 23, 2020).

[176] This has been expressed in the literature of the European Union as multi-level governance. IAN BACHE ET AL., POLITICS IN THE EUROPEAN UNION 33 (3d ed. 2011).

[177] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

[178] *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 213 (1983); *id.* at 225 (Blackmun, J., concurring).

[179] *See generally* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[180] *See Pac. Gas & Elec. Co.*, 461 U.S. at 213, 225.

with a category of decision-making over which the national government traditionally claims a monopoly, such as immigration law, may result in opposition.[181] Many of the issues most likely to result in city agreements across international borders concern economic and environmental protections, which the U.S. national government may have been silent on.[182] Today, cities and regional governments have taken action on these issues on an international level. For example, in light of President Trump's decision to pull the United States out of the Paris Agreement, California has recently signed a deal with China to cooperate on climate change.[183]

Germany, Canada, the United States, and India constitute prime examples of states whose national and local powers are constitutionally separated. While the United States often claims hard sovereignist positions in international law, it is probably the best example of a country whose national constitution can facilitate extensive international city agreements. Implicit in the United States Constitution is the continuation of limited state sovereignty deriving from the British colonial period.[184] The branches of the U.S. federal government operate from a set of enumerated powers delegated to them by the Constitution, and various forms of sovereignty have always remained with state and local governments.[185] U.S. cities have long exercised sovereign powers—even during the British colonial period. For example, Massachusetts preserved New England townships' powers.[186] Furthermore, the Tenth Amendment specifically reserves powers not enumerated in the Constitution as delegated to the federal government for the states and the people, and the Ninth Amendment explicitly states that the enumeration of certain rights in the Constitution should not be construed to exclude other rights not mentioned.[187] As a result, since the inception of the Constitution in 1789, cities have not

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[181] *See* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

[182] *See About C40*, *supra* note 28. C40 Cities is a global network of ninety-four cities coordinating a municipal response to climate change.

[183] Matthew Brown, *California, China Sign Climate Deal After Trump's Paris Exit*, ASSOCIATED PRESS (June 6, 2017), https://perma.cc/YV7G-PCC3.

[184] For a discussion of the history of the development of state sovereignty in the United States, see Claude H. Van Tyne, *Sovereignty in the American Revolution: A Historical Study*, 12 AM. HIST. REV. 529 (1907). *See generally* AARON N. COLEMAN, THE AMERICAN REVOLUTION, STATE SOVEREIGNTY, AND THE AMERICAN CONSTITUTIONAL SETTLEMENT, 1765-1800, at 17-38, 127-46 (2016).

[185] U.S. CONST. amend. IX; *see* Printz v. United States, 521 U.S. 898, 918-21 (1997).

[186] *See* Kenneth A. Lockridge & Alan Kreider, *The Evolution of Massachusetts Town Government, 1640 to 1740*, 23 WM. & MARY Q. 549 (1966).

[187] U.S. CONST. amends. IX, X.

been impeded from acting in areas where they have always had sovereign power in the U.S. constitutional system.[188]

While the end of the American Civil War conclusively established the unity of the United States and the primacy of the federal government,[189] powerful state governments have remained part of the American constitutional framework.[190] "It is incontestible that the Constitution established a system of 'dual sovereignty,'"[191] and states in this system retained a "residuary and inviolable sovereignty."[192] The Framers established a constitutional authority in which multiple sovereigns would therefore "exercise concurrent authority over the people."[193] While the Constitution's idea of mixed sovereignty always conceived of state governments as the primary sub-national unit endowed with sovereign rights before the Constitution's adoption,[194] the United States' constitutional structure is just as amenable to reflect cities' independence as limited sovereigns. Cities' rights were not abrogated by the Constitution. They continue to exist, and they continue to be widely exercised.

Tenth Amendment jurisprudence has conclusively held that the federal government cannot commandeer state legislatures or state administrative resources.[195] The place of cities within this framework is unclear; however, they ought to receive the same protection that municipal corporations do under state law. The Founders clearly envisioned that mixed sovereignty extended to city governments. As stated by James Madison:

> Among communities united for particular purposes, [supremacy] is vested partly in the general and partly in the municipal legislatures . . . . [and] the local or municipal authorities form distinct and independent portions of the supremacy, no more subject,

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[188] U.S. CONST. amend. IX; *Printz*, 521 U.S. at 919-21; New York v. United States, 505 U.S. 144, 156 (1992); *see* THE FEDERALIST NO. 39 (James Madison); *Cities 101 – Delegation of Power*, NATL. LEAGUE OF CITIES, https://perma.cc/7FS9-9V9F (last visited Jan. 23, 2020). Many cities in the United States are subject to Dillon's Rule, which affirms a "narrow interpretation of a local government's authority, in which a substate government may engage in an activity only if it is specifically sanctioned by the state government." *Cities 101 – Delegation of Power*, *supra*. While cities in states that follow the Dillon's Rule are subject to *state* power, this power must be asserted and does not apply in the significant minority of "home rule" states, where the state delegates a significant amount of power to sub-units of government like cities. *Id.*; *see* Clay L. Writ, *Dillon's Rule*, VA. TOWN & CITY, Aug. 1989, https://perma.cc/3LYF-TXAY.

[189] Lisa Rein, *Civil War Gave Birth to Much of Modern Federal Government*, WASH. POST (Oct. 7, 2011), https://perma.cc/L6JW-US32.

[190] U.S. CONST. amend. X.

[191] *See Printz*, 521 U.S. at 918 (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).

[192] *Id*. at 919 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)).

[193] *Id.* at 920.

[194] *Id.*

[195] *See id.* at 919-21; New York v. United States, 505 U.S. 144, 188 (1992).

> within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.[196]

To reiterate, there is a distinction between constitutional and international law, both of which cities are subject to, and while it is necessary in practice for cities to have a constitutional right to form international agreements, they often do constitutionally form these agreements, which should be considered subject to international law.

While the U.S. Constitution prohibits sub-national governments from creating treaties with other countries,[197] nothing prevents them from making agreements with other non-sovereigns or agreements without the characteristics of treaties. For example, agreements between cities may avoid the exclusivity of the national state's international diplomacy with foreign sovereigns, since cities do not legally have the status of full sovereign states under international law. But if city agreements do not contravene another law, they can receive international and local recognition as part of customary international law and can even form regional norms and customs. The inference that can thus be drawn from the American federalist structure is that the relationship between sub-national and federal law is coextensive and adherence to both systems of law is welcomed. Only the federal government's interdict through constitutionally enumerated powers can limit the competence of other governments, which are otherwise free and sovereign.

Historical precedent for such city agreements also shows the boundaries of what cities can do without being preempted by national law. For example, the 1980s era campaigns calling for divestment from South Africa in protest of the country's apartheid system were an international movement that was often implemented by cities and, in some instances, even by levels of governance like universities and agencies.[198] This all happened in spite of the fact that divestment touched on sensitive areas of diplomatic relations with a foreign sovereign, a field traditionally claimed by the sovereign state. The divestment campaign had the potential to embarrass sovereign states, thwart official diplomatic relations, and contravene the stance taken by a foreign ministry, and though all these considerations weighed against cities' authority to conduct policy, the apartheid

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[196] THE FEDERALIST NO. 39 (James Madison).

[197] U.S. CONST. art. I, § 10.

[198] Brentin Mock, *When Cities Fought the Feds over Apartheid*, CITYLAB (May 24, 2017), https://perma.cc/VDK8-MNAV; *see, e.g.*, Richard Knight, *Sanctions, Disinvestment, and U.S. Corporations in South Africa*, *in* SANCTIONING APARTHEID 67-90 (Robert E. Edgar ed., 1990); David Rosenberg, *Trustees Vote for Divestiture from Backers of S. African Government*, COLUM. DAILY SPECTATOR (June 8, 1978), https://perma.cc/9SB4-ZMPT.

divestment campaign was widely successful.[199] This suggests an emergent principle of customary international law: cities' ability to enforce norms vis-à-vis the state.[200]

A set of general principles of international law can be derived from these patterns of local government behavior. The most important principle that we can derive is that independent action by city governments should be recognized as legitimate as under customary international law to the extent that city governments act within their constitutional power and their actions are not preempted by legislation of the state.

B. Cities' Unique Abilities

More than a region, a state, or any other subnational unit, cities are able to achieve the supposed goals of local political control: decisions that are closer to the ground and sensitive to local conditions. Cities represent a true community of interests in which people can come together and exercise civic virtue to further important community interests; they are defined by their communitarian interests, like economy and housing, as opposed to a nation state's commonality of religion or ethnicity. Regions, on the other hand, often function as miniature versions of national states.[201]

European regions like Scotland, Catalonia, and Flanders are defined more by separate nationality than any collective interest in local government. Cities, on the other hand, are uniquely able to piece together local political interests, while their cosmopolitan character separates them from the parochialism of regions.[202] Regions also often feature stark differences between industrialized areas and their rural hinterlands, which cities do not face. This makes cities the most efficient mechanisms for directing specific improvements critical to the betterment of human civilization, and is also largely the reason why functions like education, land use planning, transportation, energy, and waste management are managed mostly

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[199] *See* sources cited *supra* note 198.

[200] The international Boycott Divest Sanctions ("BDS") movement seeks to boycott economic products from the Occupied West Bank and has sought to use international economic pressure to push for change in the occupation of the West Bank. It has attracted massive criticism from both the Israeli government and politicians in the United States. Despite opposition from Israeli diplomats, the BDS movement has been very successful in achieving many of its goals and was endorsed by and proceeded in cities all over the world without preemption by national governments. Many U.S. states have pushed to ban BDS and, if anything, the constitutional question has been whether bans on BDS should be allowed. Dalal Hillou, *Criminalizing Nonviolent Dissent: New York's Unconstitutional Repression of the Boycott, Divestment, Sanctions (BDS) Movement*, 25 J. GENDER SOC. POL'Y & L. 527, 528-29 (2017).

[201] *See, e.g.*, *Catalonia Crisis in 300 Words*, BBC NEWS (Oct. 14, 2019), https://perma.cc/HED3-M8D6.

[202] Aust, *supra* note 2, at 269.

by cities.[203] These functions make cities particularly effective at managing the effects of a global tragedy of the commons, such as climate change, adaptation for which often requires extensive experimentation.[204] In fighting climate change, cities will be critical to devising and implementing rational policies against polluters.[205] At the same time, concerted activity by cities on the international level promises to deliver the sort of economy of scale capable of putting pressure on major industries, if the combined GDP of the world's cities is brought to bear.[206]

Most importantly, cities working in cooperation with each other can, more than any other unit of government, unite to deal with common global problems that challenge the parochial interests of a nation or a region, and which require people to act together around the world.[207] As cities' interests gradually converge and the problem of climate change is universally recognized by science and the international community, the threat to cities like New York, Amsterdam, Jakarta, Miami, Kolkata, Venice, Alexandria, and Mombasa is universal, and action by these cities becomes necessary to prevent harms affecting them all.

While national interests in a particular industry might preclude all nations from acting together,[208] by relying on a diversity of different levels of sovereignty, an agreement which encompasses a patchwork of the world's cities with the world's highest GDP may be able to drag even the greatest geo-political troglodytes kicking and screaming into the twenty-first century. Of course, cities are also often bastions of wealth and privilege, particularly in the current economy where powerful global cities are magnets for finance and technology.[209] In fact, cities exemplify much of the modern problems of economic and social inequality.[210] However, through the use of public spaces and communal living, cities are also some of the greatest incubators for solutions to inequality.[211]

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[203] *See id.* at 266.

[204] The tragedy of the commons is implicated by climate change in that no one actor has ownership over the common harm of carbon emissions, yet they can privatize the profits from CO2 pollution. Local rules can often best address these issues in a nuanced way. *See* OSTROM, *supra* note 31, at 70, 78, 81.

[205] Aust, *supra* note 2, at 263.

[206] Nijman, *supra* note 2, at 218.

[207] Aust, *supra* note 2, at 263.

[208] *See, e.g.*, Robinson Meyer, *The Indoor Man in the White House*, ATLANTIC (Jan. 13, 2019), https://perma.cc/4VVD-ATXH.

[209] For example, tech firms have clustered in cities, intensifying the pressures of gentrification. *E.g.*, Sam Raskin, *Amazon's HQ2 Deal With New York, Explained*, CURBED N.Y.C. (Feb. 14, 2019, 12:12 PM), https://perma.cc/Q9S8-TNLK.

[210] Nijman, *supra* note 2, at 217-18.

[211] *Id.* at 218-19.

IV. CITY RIGHTS TODAY

Federal constitutions like that of the United States prevent cities from forming truly independent foreign policies with other countries. Nevertheless, cities retain wide constitutional latitude to act and municipal independence remains. Cities have continued to form treaties of friendship across the world and have also shown a unique ability to learn from each other.[212] Mayors frequently visit other countries' major cities to glean insight into similar problems facing their own cities.[213] In a global world, cities often have more in common with other cities in faraway countries in terms of culture, politics, and economy than they do with their own hinterlands.[214] Still, these kinds of agreements have increasingly blurred the distinction between city and state policy. In one poignant recent example, the City of Prague and the City of Beijing's sister city agreement failed after the newly elected mayor of Prague objected to the agreement's mention of the One China policy, to which China responded strongly.[215] The President of the Czech Republic responded by noting that Prague's policies are not the same as those of the Czech Republic, and the Czech Foreign Ministry, which recognizes the One China policy, simply declined to get involved.[216]

To formulate a truly independent policy of cities that can maximize cities' ability to effect change through the use of constitutional powers is the challenge cities have to navigate. In the United States, federalism gives states the ability to craft their own policies in many different areas.[217] For instance, states and cities have very different policies concerning the legalization of marijuana,[218] and there has been discussion among legislators about creating interstate compacts on climate change and even election reform.[219] However, unlike states, which often function as smaller versions of the federal government, cities often maintain an inter-

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[212] Aust, *supra* note 2, at 258-59.

[213] *See, e.g.*, *The 2019 C40 World Mayors Summit in Copenhagen*, C40 CITIES, https://perma.cc/44XK-LUZB (last visited Dec. 17, 2019); Nijman, *supra* note 2, at 210.

[214] *See* Nijman, *supra* note 2, at 218.

[215] Lenka Ponikelska, *Beijing Takes Aim at Prague After 'One-China' Dispute Deepens*, BLOOMBERG (Oct. 9, 2019, 6:54 AM), https://perma.cc/UR5N-RFQM.

[216] *Id.*

[217] Printz v. United States, 521 U.S. 898, 918-19 (1997).

[218] *See, e.g.*, Joseph Misulonas, *15 Largest Cities That Have Decriminalized Marijuana*, CIVILIZED, https://perma.cc/VQQ6-9WVG (last visited Dec. 19, 2019). Local district attorneys have also adopted policies allowing people to avoid marijuana prosecution, like in Brooklyn, New York. Mary Frost, *Brooklyn DA: Prosecution of Low-Level Marijuana Cases Down 98 Percent*, BROOKLYN DAILY EAGLE (Feb. 20, 2019), https://perma.cc/8HFP-HZEY.

[219] *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://perma.cc/4SVH-T8T3 (last visited Dec. 3, 2019).

national character: they have their own residents, regardless of those residents' place of origin, and provide a means of furthering their residents' common goals independently of the national government. The growth of sanctuary cities in the United States is a good example of this phenomenon.[220] Other similar arrangements exist around the world.[221]

However, the true test of a city's ability to develop its own policy is the area of climate change. The vast majority of the world's GDP, which fuels consumption and therefore affects climate change, takes place in cities and metropolitan areas.[222] Cities can work together to develop better climate tactics than those introduced by their national governments, and they can do it with their own local knowledge. Furthermore, the problem of climate change presents a true global moral challenge the likes of which has not yet been seen. The value of the international legal and ethical framework, which has been widely accepted to protect the climate, is itself an imperative for the future of humanity.[223] To this, all levels of government should answer the call to change the world for the future of our planet.

A. Cities as Agents Against Climate Change

Cities have zoning and land use management capabilities that allow them to deal with the problems of climate change on a local level where national governments have failed to deal with this issue themselves.[224] Cities can do so in two ways. First, cities can make agreements with each other across international borders that should be considered quasi-sovereign acts and accepted and enforced as part of customary international law.[225] Second, cities can act to enforce agreements to comply with international norms that their national governments have not been willing to enforce or fully comply with.[226]

Mechanisms for intercity cooperation exist. Stemming from the original twinning arrangements borne out of World War II,[227] cities continue to cooperate within cultural, economic, and environmental realms to har-

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[220] *See* Amelia Thomson-DeVeaux, *Trump Is Losing the Legal Fight Against Sanctuary Cities, but It May Still Pay Off Politically*, FIVETHIRTYEIGHT (Feb. 20, 2019, 11:03 AM), https://perma.cc/GQ8G-GAR5.

[221] *See generally* Oomen & Baumgärtel, *supra* note 14.

[222] Nijman, *supra* note 2, at 216-18.

[223] *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8) (Shahabuddeen, J., dissenting).

[224] Aust, *supra* note 2, at 261-65.

[225] *See* Nijman, *supra* note 2, at 228-29, 232.

[226] Aust, *supra* note 2, at 265-70.

[227] *Id.* at 258.

monize their policies, generate new ideas, and promote cultural awareness.[228] The cities of Dresden and Coventry, for example, have a shared heritage of destruction during World War II and have cooperated as twin cities: the bombed Cathedral in Dresden was partially rebuilt with British aid.[229] New York has adopted London's solution to traffic congestion by legislating and enforcing congestion restrictions and developing bike infrastructure programs.[230]

Likewise, cities across the world can agree on and commit to international climate targets, such as those agreed to in the Paris Accords, in order to tackle emissions in the most densely populated cities, cities like Mumbai, New York, Mexico City, and Manila which face similar challenges. Similarly, California's former governor Jerry Brown committed to uphold the Paris Agreement—despite the Trump Administration's abandonment of the global compact—by working both with China's national government and with the regional government of the Province of Jiangsu.[231] Finally, the Global Parliament of Mayors creates a structure of international governance which mayors can use to achieve common goals. Leagues, not unlike the historical Hanseatic League, could conceivably develop to promote the economic, ecological, and social interests of cities and their citizens around the world as an evolution of this movement.

B. Sanctuary Cities

Cities have a critical role to play in the realm of immigrants' rights as well. Specifically, in the United States, but also in other countries such as the Netherlands, the sanctuary movement plays an increasingly important role.[232] Sanctuary cities in the United States are cities which have refused to allow city resources to be used for the purposes of federal immigration enforcement. This trend is not limited to the United States; in Europe, local authorities have refused to allow their resources to be used for nationally-directed immigration enforcement that seeks to deprive immigrants of their residence in countries where they have often lived their

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[228] *Id.* at 258-65.

[229] *Landmark Dresden Church Completes Rise from the Ashes*, DEUTSCHE WELLE (Oct. 29, 2005), https://perma.cc/PS2F-K5Y3.

[230] Bobby Cuza, *Congestion Pricing: What NYC Can Learn from London's Traffic Experiment*, NY1 (May 22, 2019, 6:51 PM), https://perma.cc/KS9U-N8VE.

[231] Matthew Brown, *California, China Sign Climate Deal After Trump's Paris Exit*, ASSOCIATED PRESS (June 6, 2017), https://perma.cc/JHZ5-MVSX.

[232] *See* Decision on the Merits, Conference of European Churches v. Netherlands, Eur. Comm. of Soc. Rights, No. 90/2013 (2014).

entire lives.[233] In congruence with international legal norms,[234] many cities give protection to refugees and asylum seekers.[235] This is a particularly relevant issue in Europe given the aftermath of the refugee crisis, which has left many asylum seekers in legal limbo,[236] and European cities have acted to protect refugees' rights contrary to the objectives of their respective national governments.[237]

Sanctuary cities in the United States largely take advantage of the country's federalist framework. It is well-understood legal precedent that the federal government cannot commandeer state and local legislatures.[238] While national immigration law is considered a matter for federal legislation,[239] the national government's relationship with the local enforcement of these federal laws remains in question, and sanctuary cities often refuse to use local law enforcement or city agencies to track and report people with outstanding deportation or removal orders to federal agencies that can execute those orders. The conflict between such local practices and federal immigration policy has led to the development—and litigation over—federal policies that seek to coerce sanctuary cities to comply with federal standards by withholding federal funding.[240]

In recent years, constitutional analysis in the United States has clearly trended toward affirming the doctrine barring federal commandeering. In *Murphy v. National Collegiate Athletic Association*, the Supreme Court struck down the Professional and Amateur Sports Protection Act on anti-commandeering grounds.[241] Notably, in *City of Los Angeles v. Barr*, the Ninth Circuit ruled that the Community Oriented Policing Services grant, which Los Angeles did not score highly enough to receive, did not constitute a violation of the Tenth Amendment.[242] In this case, a federal grant system allotted additional points to city applicants which showed that they were furthering federal immigration goals.[243] However, the case involved a federal grant where immigration enforcement was

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[233] *Id.*; Jascha Galaski, *Sanctuary Cities Challenge Restrictive Migration Policies*, LIBERTIES EU (Feb. 13, 2019), https://perma.cc/N8XF-X7AF.

[234] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 14 (Dec. 10, 1948).

[235] Galaski, *supra* note 233.

[236] *Id.*

[237] *Conference of European Churches*, No. 90/2013.

[238] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476-77 (2018); New York v. United States, 505 U.S. 144, 188 (1992).

[239] Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

[240] *See* City of Philadelphia v. Attorney Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019).

[241] *Murphy*, 138 S. Ct. at 1476. One district court has relied on *Murphy* in reaching a similar conclusion regarding executive orders targeting sanctuary cities. City of Philadelphia v. Sessions, 280 F. Supp. 3d 579 (E.D. Pa. 2017).

[242] City of Los Angeles v. Barr, 929 F.3d 1163, 1177 (9th Cir. 2019).

[243] *Id.* at 1170-71.

merely a factor in deciding which cities received the grant and how executive agencies allocated their own funds.[244] This is a far cry from the federal government enjoining a city from independent action.

Another issue which has arisen is whether cities' reliance on federal law can shield them from a Fourth Amendment constitutional violation, specifically where a local government wishes to detain a criminal defendant pursuant to a federal immigration order. The Second Circuit recently ruled that, where the city detained a defendant for four days relying on a federal immigration order, "the City could not blindly rely on the federal detainer in the circumstances."[245] Similarly, the Third Circuit has ruled that a city's suspicion that a criminal defendant has violated an immigration law is not enough to create probable cause to detain that defendant where probable cause is otherwise lacking.[246] These rulings suggest that, in the federalist framework of the United States, cities have an independent responsibility to uphold the Constitution, and that constitutional tort liability cannot be avoided because of a federal immigration order.

Overall, recent case law suggests that there is extensive room constitutionally that may allow U.S. cities to maneuver to defend immigrants' rights. In addition, cities could also be liable for violations of international human rights law, and cities should expand this federalist argument to assert their right to act in accordance with customary international law, particularly with regards to international standards on asylum. Through the use of local powers, cities can protect immigrants and adhere to a different framework than that demanded by national law.

CONCLUSION

Cities have acted as international subjects throughout history. The historical record is clear that cities have existed as sovereigns in a system of multi-centric sovereignty, particularly in Early Modern Germany and the Holy Roman Empire, up to and even after the Treaty of Westphalia. Far from abolishing mixed sovereignty, Westphalia kept it in place, and cities have not only experienced a renaissance in political power since World War II but have continued to perform functions of international subjects to the present day. Nowadays, cities are more important than ever before. Cities are able to tackle the most urgent problems humanity is facing today, such as climate change and migration. Cities' unique proximity to their citizens and communities allows cities to create better solutions that can serve an entire community, not the lucky few—and to operate at a level of governance that can uphold international norms. Thus,

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[244] *Id.*

[245] Hernandez v. United States, 939 F.3d 191, 208 (2d Cir. 2019).

[246] Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014).

cities' role as sovereign players in the international arena is crucial for confronting the interconnected global crises humanity faces today, ranging from natural disasters to famine, migration, and climate change. Sovereign in history and in customary law, cities should be recognized as such by the global community and be finally welcomed to the arena of the international law.

GENERATING TRAUMA: HOW THE UNITED STATES VIOLATES THE HUMAN RIGHTS OF INCARCERATED MOTHERS AND THEIR CHILDREN

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INTRODUCTION

> "You must live life with the full knowledge that your actions will remain. We are creatures of consequence."[1]

The United States has long championed the value of family, but its actions reflect a much different reality in which U.S. policies disregard incarcerated mothers' rights as parents, their children's rights to continue to have meaningful contact with their primary caregiver, and the overall worth of the mother-child relationship.[2] Today, the number of women in prison is unprecedented, with data confirming an estimated 750% increase in women in prisons and jails over nearly four decades.[3] The majority of these women are mothers, most of whom were also the primary caregivers of their child or children prior to incarceration.[4] Yet the country that has historically proclaimed itself as one centered on the integrity of the family fails to adequately take this fact into account, despite the historical role women have played in raising children.[5] Similarly, the United States also overlooks both the internationally recognized human

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[1] ZADIE SMITH, WHITE TEETH 102 (2000).

[2] *See, e.g.*, THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (2019), https://perma.cc/JW2G-Q5BG; Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013), https://perma.cc/JV8G-GXD8; *Facts About the Over-Incarceration of Women in the United States,* ACLU, https://perma.cc/3VRH-5SHL. This article's focus on the ways in which the United States violates the human rights of incarcerated mothers and their children is in no way meant to sublimate or minimize the egregious violations that occur against other incarcerated women, transgender incarcerated people, or incarcerated men in the U.S. correctional system; nor is it an attempt to suggest that the human rights of incarcerated mothers are any more deserving to be recognized. It is also salient to emphasis that while the article directs its attention to incarcerated mothers in particular, the majority of whom overwhelmingly served as primary caregivers of their children prior to incarceration, the human rights of transgender incarcerated people who served as primary caregivers and incarcerated fathers who had served as primary caregivers and the rights of their children are equally being violated.

[3] THE SENTENCING PROJECT, *supra* note 2, at 1.

[4] LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 3, 5 (2008), https://perma.cc/3KCD-2S2H; ALEKS KAJSTURA, PRISON POLICY INITIATIVE, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2019 (2019), https://perma.cc/M7CF-K9R6; ELIZABETH SWAVOLA ET AL., VERA INST. OF JUSTICE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016), https://perma.cc/MK8P-ARTP; ACLU, STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 5 (2019), https://perma.cc/Q5JF-Q7LS. Estimates from the most recent Bureau of Justice Statistics ("BJS") report on parents in prison indicate that while eighty-eight percent of children with incarcerated fathers in state prison reside with their mothers, only thirty-seven percent of children reside with their fathers if their mother is incarcerated. (It is more likely that the child would reside with a grandparent.) GLAZE & MARUSCHAK, *supra*, at 5.

[5] Sarah Stillman, *America's Other Family-Separation Crisis*, NEW YORKER (Oct. 29, 2018), https://perma.cc/N3ZC-24NM; Angier, *supra* note 2.

rights standards that are in place to protect these principles and the neuroscience research that reveals the pernicious effects of such a separation.[6] This behavior by the United States has led to deep and bitter reverberations that extend far beyond the direct human rights violations.[7]

While a leader in the creation of the United Nations and the drafting of the Universal Declaration of Human Rights (UDHR), the United States' commitment to these common standards and principles has proved egregiously incongruous from the beginning, which W.E.B. Du Bois pointed out in a ninety-six-page petition to the newly established United Nations in 1947.[8] Nevertheless, instead of acknowledging its own pervasive human rights violations, the United States has subverted its respon-

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[6] Louis Henkin, *The Age of Rights*, *in* HUMAN RIGHTS 3, 3-4 (2008); Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the United States,* 3 N.Y. CITY L. REV. 59, 60-61 (1998); *see generally* BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND AND BODY IN THE HEALING OF TRAUMA, 51-124 (2015).

[7] VAN DER KOLK, *supra* note 6, at 119-20; Olga Khazan, *Inherited Trauma Shapes Your Health*, ATLANTIC (Oct. 16, 2018), https://perma.cc/JX4Q-6QDD; *see generally* Bessel A. van der Kolk, *The Compulsion to Repeat the Trauma*, 12 PSYCHIATRIC CLINICS N. AM. 389 (1989). "The truth about our childhood is stored up in our bodies, and lives in the depths of our souls. Our intellect can be deceived, our feelings can be numbed and manipulated, our perceptions can be shamed and confused, or our bodies tricked with medication. But our soul never forgets. And because we are one, one whole soul in one body, some day, our body will present its bill." Kathy Brous, *The Greatest Study Never Told*, ATTACHMENT DISORDER HEALING BLOG (Oct. 2, 2013) (quoting Alice Miller), https://perma.cc/2H3F-AXKZ.

[8] HENKIN ET AL., HUMAN RIGHTS 274-275 (1999); *see* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. The Universal Declaration of Human Rights, created in the wake of the Holocaust and burgeoning tensions between the capitalist world and the Soviet Union, is generally agreed to be the foundation on which international human rights law rests. It was built on a theory that certain indispensable rights should not be in the hands of sovereign States alone because of their fundamental nature. However, during the time of the signing of the UDHR, which proclaims in Article 1 that "all human beings are born free and equal in dignity and rights," human rights violations continued to be pervasive in the United States, including the segregation and disenfranchisement laws known as Jim Crow. These laws represented a "formal, codified system of racial apartheid," which had dominated the American South since the 1890s. *Jim Crow Laws*, PBS: AM. EXPERIENCE, https://perma.cc/9D28-ASY8. On October 23, 1947, the year prior to the UDHR's creation, W.E.B. Du Bois and the NAACP submitted a ninety-six-page petition to the newly established United Nations demanding accountability for the human rights violations occurring against black people in the United States entitled "An Appeal to the World." The UN replied to the petition citing a lack of authority in domestic matters. W.E. BURGHARDT DU BOIS, NAACP, AN APPEAL TO THE WORLD 1-14 (Oct. 23, 1947), https://perma.cc/D5DJ-7H9V; Jamil Dakwar, *W.E.B. Du Bois's Historic U.N. Petition Continues to Inspire Human Rights Advocacy*, ACLU: HUM. RTS. PROGRAM BLOG (Oct. 25, 2017), https://perma.cc/3NJ7-PV93; JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 521-719, 778 (2018); s*ee generally* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955, at 101-09 (2003).

sibilities to the international community by generating a false and dangerous narrative that not only is the U.S. Constitution alone an effective and just guarantor of human rights but that the most flagrant human rights violations occur abroad.[9]

Furthermore, given the formalities often associated with law and the non-binding nature of much of human rights law, implementation can sometimes seem abstract or fragile.[10] This is especially true in the United States, which has constructed a uniquely American distinction by requiring that all international human rights treaties signed and ratified by the United States also have corresponding domestic legislation in place before there can be a basis for a legal claim in a U.S. courtroom.[11] Still, the absence of domestic enforcement mechanisms does not negate human rights as legal norms.[12] Instead, the substance and potential of these human rights exist not only in the power of the collective but in sources of international legal obligations, in addition to domestic case law and human rights decisions from other international courts and tribunals.[13]

The principle that each person has a claim to an "irreducible core of integrity and dignity,"[14] is not novel in the United States, at least in theory: it can be traced back, well before the UDHR, to documents such as the American Declaration of Independence, which holds "these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights."[15]

Today, there is a profound necessity to call attention to the United States' lack of commitment to indispensable rights that are fundamental

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[9] Copelon, *supra* note 6, at 63, 69.

[10] *Id*. at 78-79; Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 372 (1990). Aside from a brief period in the 1970s, the U.S. human rights policy has been an "unqualified rejection of economic, social and cultural 'rights' as rights," which means an unqualified rejection of two-thirds of the UDHR. Noam Chomsky, Human Rights in the New Millennium, Lecture at the London School of Economics and Political Science (Oct. 29, 2009), https://perma.cc/SX3R-85RT.

[11] Louis Henkin, *International Human Rights and Rights in the United States*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 53-55 (Theodor Meron ed., 1984).

[12] *Id*. at 53-55.

[13] Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect, in* REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 3, 12-13, 18-21 (Samantha Power & Graham Allison eds., 2000); Alan Boyle, *Soft Law in International Law-Making*, *in* INTERNATIONAL LAW 120-22 (Malcolm D. Evans ed., 4th ed. 2014); *see* Convention on the Rights of the Child, arts. II, III, VII, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; *see also* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[14] LOUIS HENKIN, THE AGE OF RIGHTS 193 (1990).

[15] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amends. I-X.

in nature and that belong to all human beings. This is seen vividly in the ways mothers and children are unduly harmed without attentive consideration of their rights and how these violations often have ramifications that echo far beyond the cries of children being separated from their primary caregiver and the person on whom they have relied most.[16]

Part I briefly examines the influx of women into U.S. prisons and jails and how the U.S. correctional system, designed primarily for men, does not reflect the specific needs of women or adequately address their circumstances, including recognizing their role as mothers.[17] This male standard of incarceration creates additional punitive implications for incarcerated mothers and has long-lasting effects on their children, including a far greater likelihood that they will be involved in the correctional system themselves.[18]

Part II further explores the ways in which this separation from a primary caregiver can have irreversible impacts, illustrated by breakthrough findings in neuroscience that demonstrate how trauma can greatly alter a child's brain development and can lead to devastating long-term health outcomes.[19] Despite the serious ramifications associated with the severing of these critical relationships, the behavior by the United States continues.

Part III looks at the ways in which federal and state government practices harm incarcerated mothers: they range from the routine treatment of incarcerated pregnant women pre- and post-birth, to the Bureau of Prisons not following its own visitation policies, to the rare use of "downward

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[16] *See* JOYCE A. ARDITTI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS 62-66 (2012); John Bowlby et al., *The Effects of Mother-Child Separation: A Follow-Up Study*, 29 PSYCHOL. & PSYCHOTHERAPY 211, 211 (1956); Jamie Ducharme, '*What This Amounts to is Child Abuse.' Psychologists Warn Against Separating Kids from Their Parents*, TIME (June 19, 2018), https://perma.cc/DB92-T55W; HUMAN RIGHTS WATCH & ACLU, "YOU MISS SO MUCH WHEN YOU'RE GONE": THE LASTING HARM OF JAILING MOTHERS BEFORE TRIAL IN OKLAHOMA 30-31 (2018), https://perma.cc/6384-8VJY.

[17] *Developments in the Law—Alternative Sanctions for Female Offenders*, 111 HARV. L. REV. 1921, 1922 (1998).

[18] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. J., Mar. 2017, at 1-3, https://perma.cc/2FFH-Q6KT; HUMAN RIGHTS WATCH & ACLU, *supra* note 16, at 34. Ignoring the basic needs of children with incarcerated mothers has, unsurprisingly, made little sense from a criminal justice perspective; one statistic indicates that children of incarcerated parents are, on average, six times more likely to become incarcerated themselves. Martin, *supra,* at 1-2.

[19] Ducharme, *supra* note 16; Press Release, Colleen Kraft, President, American Academy of Pediatrics, AAP Statement Opposing the Border Security and Immigration Reform Act (June 15, 2018), https://perma.cc/6623-VSXT. More than 8.3 million children have a parent under correctional supervision, 1.5 million children have a parent in prison, and more than one in five of these children is under five years old. *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2.

departures" under Federal Sentencing Guidelines, to legislation that can terminate a mother's parental rights.

Part IV introduces international human rights law and the obligations and duties that the United States has assumed under international law, which is not currently reflected in domestic measures or legislation. This includes provisions in the International Covenant on Civil and Political Rights, which the United States has both signed and ratified, and provisions in the Convention on the Rights of the Child, which has been signed by all 193 member countries of the United Nations, including the United States, and ratified by all members but the United States.[20] The article then considers recent U.S. legislation and initiatives and the impacts, if any, on the rights of incarcerated mothers and their children; it also puts forward a set of rules developed by the United Nations that recognize the ways in which the world's prison systems design incarceration specifically for men, with harmful outcomes for incarcerated women, including incarcerated mothers and their children.[21]

There is a critical need to align existing domestic law with international laws and standards and the United States' own articulated policy goals. The United States puts mothers and their children at risk of irreparable harm. By applying human rights principles and employing well-supported discoveries in trauma research, the United States could begin to alleviate the avoidable anguish that is being imposed on the children of incarcerated mothers and on the mothers themselves.[22]

I. AN OVERVIEW: INCARCERATION IN THE UNITED STATES

> "Pity the nation oh pity the people, who allow their rights to erode, and their freedoms to be washed away."[23]

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[20] CRC, *supra* note 13; ICCPR, *supra* note 13; UDHR, *supra* note 8; THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT'L WOMEN'S LAW CTR., MOTHERS BEHIND BARS 46 n.134 (2010), https://perma.cc/HG3Z-PBER.

[21] G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Dec. 21, 2010) [hereinafter Bangkok Rules].

[22] PENAL REFORM INT'L, *UN Bangkok Rules on Women Offenders and Prisoners* 4 (2013), https://perma.cc/47K3-U2CE; PENAL REFORM INT'L & QUAKER UNITED NATIONS OFFICE, BRIEFING ON THE UN RULES FOR THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS ('BANGKOK RULES') 4 (2011), https://perma.cc/C2KS-KQBR.

[23] LAWRENCE FERLINGHETTI, *Pity the Nation*, *in* FERLINGHETTI'S GREATEST POEMS (Nancy Peters ed., 2017).

Today, the United States is the world's leader in incarceration with 2.2 million people—most of whom face economic insecurity—in the nation's prisons and jails.[24] The rate of growth in incarcerated women is likewise unmatched, yet the group itself makes up a small proportion of the overall prison system. This has resulted in a male standard of incarceration,[25] with incarcerated men accounting for approximately ninety-three percent of the total federal prison population.[26] This approach does not reflect an understanding that women commit different crimes than men, most of which are non-violent offenses, for different reasons, and that current incarceration policies do not have the same impact on them.[27] Such inadequate attention to women's gender-specific characteristics, circumstances, and needs has resulted in violations of their human rights and the rights of their children, and a disregard for international law.[28]

A. The Surge of Female Incarceration in the United States and How It Differs from Male Incarceration

> "Prisons thus perform a feat of magic . . . . But prisons do not disappear problems, they disappear human beings."[29]

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[24] *Criminal Justice Facts*, THE SENTENCING PROJECT, https://perma.cc/TG4Q-JYNX; *see* BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED (2015), https://perma.cc/CS4A-Z9ZF.

[25] *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922 (citing MEDA CHESNEY-LIND & JOYCELYN M. POLLOCK, WOMEN'S PRISONS: EQUALITY WITH A VENGEANCE, IN WOMEN, LAW, AND SOCIAL CONTROL 155, 167 (Alida V. Merlo & Joycelyn M. Pollock eds., 1995)).

[26] *Inmate Gender*, FEDERAL BUREAU OF PRISONS, https://perma.cc/V4A8-N89R.

[27] BARBARA BLOOM ET AL., NAT'L INST. OF CORRECTIONS, GENDER RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, & GUIDING PRINCIPLES FOR FEMALE OFFENDERS 4-8 (2003); *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2. It is noteworthy that information cited here from a United States-sponsored report written *seventeen years ago* explicitly acknowledges the differing situations women and men face while incarcerated and recommends a gender-responsive approach. *See generally* BLOOM ET AL., *supra*, at 4-8.

[28] Brenda J. van den Bergh et al., *Imprisonment and Women's Health: Concerns About Gender Sensitivity, Human Rights and Public Health,* 89 BULL. WORLD HEALTH ORG. 689, 691 (2011); Valentina Zayra, *This Is Why Women Are the Fastest-Growing Prison Population*, FORTUNE (Dec. 10, 2015), http://fortune.com/2015/12/10/prison-reform-women/; *Criminal Justice Facts*, *supra* note 24.

[29] Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sep. 10, 1998), https://perma.cc/PQ4G-MJ9Z.

The United States has only four percent of the world's female population but accounts for roughly thirty percent of incarcerated women globally.[30] Women continue to be the fastest-growing segment within the country's prison population.[31] Since 1980, the number of women in prison has increased by more than 750%, about twice the rate of men.[32] The latest data show that, as of 2019, there are 231,000 women incarcerated in total in the United States and over a million under correctional supervision.[33] More than sixty percent of women in state prison and eighty percent of women in jails are mothers with at least one child under the age of eighteen.[34]

Much of the increase in arrests and incarceration of women is due to the United States' renewed focus on the War on Drugs in the 1980s when, with help from Congress, President Ronald Reagan began the federal government's full-on assault on the drug trade.[35] Legislation like the Anti-Drug Abuse Act of 1986, which, among other things, created mandatory minimum sentencing for simple drug possession, has had calamitous effects on women.[36] These statutes eliminated judges' ability to consider mitigating factors for these low-level crimes, beginning an explosion in women's incarceration.[37] Aside from these drug-related offenses, women are most likely to be involved in property offenses such as burglary or fraud, all of which are generally deemed to be non-violent.[38] In fact, out of the 231,000 women currently incarcerated, only 43,700 have been convicted of a violent crime.[39]

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[30] ALEKS KAJSTURA, PRISON POLICY INITIATIVE, STATES OF WOMEN'S INCARCERATION: THE GLOBAL CONTEXT 2018 (2018), https://perma.cc/YP8K-UA2F.

[31] *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2.

[32] THE SENTENCING PROJECT, *supra* note 2.

[33] KAJSTURA, *supra* note 4. As of 2019, there are over one million women on probation and parole in the United States. *Id.*; *see also* THE SENTENCING PROJECT, *supra* note 2.

[34] KAJSTURA, *supra* note 4; WENDY SAWYER, PRISON POLICY INITIATIVE, THE GENDER DIVIDE: TRACKING WOMEN'S STATE PRISON GROWTH (2018), https://perma.cc/A7TG-KPQ7.

[35] ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 24-26 (2005), https://perma.cc/8D8Z-EGRU.

[36] *Id*. at 40 n.192; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

[37] *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922; ACLU ET AL., *supra* note 35, at 38-40. One caveat to these drug laws that has had disastrous effects on women is that often, based on their peripheral or unknowing role in drug activity, they rarely have information to provide to prosecutors; as a result, women can be subject to harsher sentences under mandatory minimum sentences than men, who are generally more active and powerful participants in the drug trade. *See Developments in the Law—Alternative Sanctions for Female Offenders, supra* note 17, at 1922; David Dagan, *Women Aren't Always Sentenced by the Book*, FIVETHIRTYEIGHT (Mar. 30, 2018), https://perma.cc/A7G6-JNQY.

[38] KAJSTURA, *supra* note 4.

[39] *Id.*

Instead, many of the offenses that women commit can be characterized as crimes of survival motivated often, if not always, by socioeconomic factors.[40] Data demonstrate that women in prison are overwhelmingly poor, with most living well below the poverty line.[41] Sixty percent of incarcerated women were not employed full-time when they were arrested and nearly one-third have received government assistance prior to arrest.[42] Moreover, close to half of women in state prisons have not completed high school, and a third of women in state prisons or jails reported being physically or sexually abused before the age of eighteen.[43]

The rate of imprisonment for black women is nearly twice the rate of incarceration for white women, and Hispanic women are incarcerated at 1.3 times the rate of white women.[44] In total, data show that incarcerated women are: 53% White; 29% Black; 14% Hispanic; 2.5% American Indian and Alaskan Native; 0.9% Asian; and 0.4% Native Hawaiian and Pacific Islander.[45] Incarceration disproportionately affects black women, who represent thirty percent of all incarcerated women in the United States but only an estimated thirteen percent of the total female population.[46]

Research comparing the experiences of incarcerated women with those of incarcerated men illustrates some of the critical distinctions between the two groups. Women's economic situations, for example, are worse than those of their male counterparts, which can make it even more difficult for women to afford cash bail.[47] An astounding sixty percent of women in jail have not yet been convicted of a crime but are involuntarily

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[40] *Id.*; ALEKS KAJSTURA, PRISON POLICY INITIATIVE, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2017 (2017), https://perma.cc/Z2BH-6HYR; *see also* Gregg Barak, *Introduction: A Comparative Perspective on Crime and Crime Control*, *in* CRIME AND CRIME CONTROL: A GLOBAL VIEW, at xvi (Gregg Barak ed., 2000) (crimes of survival include offenses such as property crimes, drug sales, or prostitution); Gina Fedock, *Number of Women in Jails and Prisons Soars,* U. CHI. SCH. OF SOC. SERV. ADMIN. MAG., Spring 2018, at 2, https://perma.cc/3D5P-RFX8.

[41] THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 4 (2007), https://perma.cc/CE47-MZUV; *see also* MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION 9 (2013), https://perma.cc/KU3K-G7JY; Phillip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights, Statement on Visit to the USA (Dec. 15, 2017), https://perma.cc/BH3U-EWJJ. The number of children living in extreme poverty in single-mother households went from fewer than 100,000 in 1995 to 704,000 in 2012. Alston, *supra,* para. 36.

[42] THE SENTENCING PROJECT, *supra* note 41, at 3.

[43] *Id.* at 3; CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), https://perma.cc/NJA5-X9E7.

[44] THE SENTENCING PROJECT, *supra* note 2, at 1.

[45] KAJSTURA, *supra* note 4.

[46] *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2.

[47] RABUY & KOPF, *supra* note 24.

held in pretrial detention.[48] Women who cannot make bail have an annual median income of $11,071, and among those women, black women have a median annual income of $9,083; a typical bail amount is $10,000, more than a full year's income for many women.[49] Unsurprisingly, research finds that formerly incarcerated women are more likely to be homeless than formerly incarcerated men, which then makes reentry and compliance with probation or parole even more challenging.[50]

Reports also show that women can experience traumatizing events like sexual victimization at much higher rates than men: between 2009 and 2011, women represented approximately thirteen percent of people held in local jails but sixty-seven percent of victims of sexual victimization by staff.[51]

Women are less likely than men to be incarcerated for a violent offense.[52] As mentioned, most offenses women commit are non-violent and as a result, the Federal Bureau of Prisons (BOP) classifies nearly all incarcerated females as minimum or low security.[53] BOP data also find that, while the majority of women in federal prison are incarcerated for drug offenses, women are most often accessories to a male partner's broader criminal activity rather than being the instigators of a crime.[54]

Incarcerated women report past physical or sexual abuse at higher rates than their male counterparts.[55] In state prisons, 57.6% of women reported past abuse, compared with 16.1% of men; in federal prisons, 39.9% of women reported past abuse, compared with 7.2% of men; and in jails, 47.6% of women reported past abuse, compared with 12.9% of men.[56] Understanding the impact of those traumas is particularly critical, especially in a prison setting where common practices such as searches and restraints often only serve to re-traumatize victims.[57]

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[48] KAJSTURA, *supra* note 4. Jails have become "massive warehouses primarily for those too poor to post even low amounts of bail," with a nearly five-fold increase in the number of people in U.S. jails in the last four decades. *See* SWAVOLA ET AL., *supra* note 4, at 6.

[49] BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 2 (2016), https://perma.cc/JP9C-YDLK.

[50] KAJSTURA, *supra* note 4.

[51] *See* SWAVOLA ET AL., *supra* note 4, at 14.

[52] MAUER, *supra* note 41, at 1.

[53] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 2 n.5 (2018), https://perma.cc/ZB7K-K29V.

[54] *Id*. at 2.

[55] ACLU, WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 3 (2014), https://perma.cc/C2AK-UYGE.

[56] *Id*. at 14 n.10 (citing HARLOW, *supra* note 43, at 1).

[57] BARBARA E. BLOOM, CALIFORNIANS FOR SAFETY AND JUSTICE, MEETING THE NEEDS OF WOMEN IN CALIFORNIA'S COUNTY JUSTICE SYSTEMS 9 (2015), https://perma.cc/BY27-Z3HN.

Mental health disorders, including depression, bipolar disorder, and post-traumatic stress disorder, are also more likely among incarcerated women.[58] Among those incarcerated, major depressive disorder is the most widespread, followed by bipolar disorder and post-traumatic stress disorder.[59]

These findings lead to a more holistic understanding of the experiences of women, including how they often have different underlying reasons for being involved in the correctional system and how the nature of most of their offenses is also distinct.[60] Still, while research has affirmed that there should be distinctions in the treatment of women, there has not been an adequate response by the United States to change the male standard that dominates U.S. correctional institutions.[61] It comes as no surprise that this has proven to be exceedingly detrimental to incarcerated mothers, who again make up the majority of women in prison. Data show that almost forty-two percent of mothers live alone with their children prior to their imprisonment,[62] and subsequently, are five times more likely than incarcerated fathers to have their children placed in state custody because there is no one else to care for them.[63] The irrevocable harm that results cannot be overstated,[64] which makes it crucial to respond with action to these gender-specific realities.[65]

B. Severing Ties: The Additional Punishments U.S. Mothers Face Behind Bars

"When we lose that sense of the possible, we lose it fast."[66]

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[58] BLOOM ET AL., *supra* note 27, at 7; JENNIFER BRONSON & MARCUS BERZOFSKY, U.S. DEP'T OF JUSTICE, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, at 4 (2017), https://perma.cc/T9MR-PXKE.

[59] BRONSON & BERZOFSKY, *supra* note 58, at 14; DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), https://perma.cc/ZRA7-Q9L6.

[60] Joseph Shapiro & Jessica Pupovac, *In Prison, Discipline Comes Down Hardest on Women*, NPR (Oct. 15, 2018), https://perma.cc/DF52-YQ2U.

[61] *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922, 1929; van den Bergh et al., *supra* note 28, at 690-91.

[62] Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1495-96 (2012); *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922; *see* GLAZE & MARUSCHAK, *supra* note 4, at 4.

[63] *See* Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), https://perma.cc/GF4C-CPW9.

[64] *Id.*; PENAL REFORM INT'L., WORKBOOK ON WOMEN IN DETENTION: PUTTING THE UN BANGKOK RULES ON WOMEN PRISONERS INTO PRACTICE 129 (2017), https://perma.cc/Q8Q2-LV2X.

[65] Ducharme, *supra* note 16. *See generally* VAN DER KOLK, *supra* note 6, at 138-160.

[66] JOAN DIDION, BLUE NIGHTS 183 (2011).

The physical distance between incarcerated mothers and children is often cited as one of the most significant barriers to sustaining a meaningful relationship.[67] Most women's prisons are located in rural areas, far from the cities where the majority of incarcerated women previously lived, making the ability to adequately maintain relationships with their children difficult.[68] It can also be an expensive burden, with costs of visitation and communication driving some families of incarcerated people into debt.[69] Moreover, since there are far fewer women's prisons, the locations tend to be much farther from family than where men's prisons are located, with research indicating that an incarcerated woman's federal prison is approximately 160 miles farther from family than the average incarcerated man's federal prison.[70] In total, there are twenty-six federal correctional facilities spread out over fourteen states that are either female only or mixed-gender.[71] This means that women in federal prison are scattered across the United States, which often results in an inability to have critical face-to-face interactions with their children.[72]

Incarcerated mothers also have less of a support system than incarcerated fathers, which exacerbates the implications of their imprisonment, including their children's possible displacement.[73] While the overwhelming majority of children with fathers in prison live with their mothers, the same is not true when mothers are in prison.[74] Although the father's incarceration often puts an economic strain on the family, it is less likely to take as much of an emotional toll on the child since the mother continues as the primary caregiver, which helps to cushion the overall negative impact.[75] Only approximately twenty-eight percent of incarcerated mothers report that their child's father is the current caregiver.[76] That number is in

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[67] *See* THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT'L WOMEN'S LAW CTR., *supra* note 20, at 12-13.

[68] BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, SEPARATION BY BARS AND MILES: VISITATION IN STATE PRISONS (2015), https://perma.cc/V53R-E8Z7.

[69] *Id.* In state prisons, approximately forty-two percent of the time, it is the child's grandmother who assumes caregiving responsibilities and would therefore likely be the one to bear the costs associated with visitation and communication. *See* GLAZE & MARUSCHAK, *supra* note 4, at 5.

[70] Roberts, *supra* note 62, at 1496.

[71] *Female Locations*, FEDERAL BUREAU OF PRISONS, https://perma.cc/LX93-DG6G.

[72] *Id*.; GLAZE & MARUSCHAK, *supra* note 4, at 6; VAN DER KOLK, *supra* note 6, at 64.

[73] ACLU ET AL., *supra* note 35, at 50; *see* Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers,* 30 J. DRUG ISSUES 919 (2000). Mothers in state prison are more likely than incarcerated fathers to report having had a family member who had been incarcerated prior to their own imprisonment. *See* GLAZE & MARUSCHAK, *supra* note 4, at 7.

[74] GLAZE & MARUSCHAK, *supra* note 4, at 5; ACLU ET AL., *supra* note 35, at 50.

[75] Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 163-64 (2012).

[76] ACLU ET AL., *supra* note 35, at 50.

marked contrast with the finding that about ninety percent of fathers incarcerated in state prison report that their children live with their mother.[77] Thus, the children of incarcerated mothers have a far greater likelihood of entering foster care as a result of their mother's imprisonment.[78]

The lack of support produces an additional difficulty that plagues incarcerated mothers: a higher rate of recidivism.[79] Due to a weak foundation of assistance, mothers often form new support systems while incarcerated, which more acutely ties them to prison as a base of support and, as a result, increases their likelihood of returning.[80] Similar to federal prisons, the number of face-to-face meetings between mothers in state prisons and their children is low: only 14.6% of incarcerated mothers report seeing their children at least once a month and an estimated 58% of mothers have not seen any of their children while incarcerated.[81]

Although visitation is necessary to sustain the vital connection and correlates with a reduction in recidivism, there are often no policies or programs in place that encourage visits.[82] Instead, most facilities fail to offer even basic child-friendly visitation areas or programs, which can profoundly affect the relationship if and when the child is able to visit.[83]

The environment in prisons and jails can be frightening and traumatic for children as a result of the behavior of the staff, the physical

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[77] *Id*.

[78] GLAZE & MARUSCHAK, *supra* note 4, at 5.

[79] *Id*. at 15; *see* SWAVOLA ET AL., *supra* note 4, at 17.

[80] *See* Jessica Y. Kim, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN'S L.J. 221, 234 (2001).

[81] GLAZE & MARUSCHAK, *supra* note 4, at 18. Overall, mothers are more likely than fathers to report having any contact with their children. Studies attribute this difference to mothers' more common role as primary caregivers. LINDSEY CRAMER ET AL., URBAN INST., PARENT-CHILD VISITING PRACTICES IN PRISONS AND JAILS 22 (2017), https://perma.cc/EK87-242Y; *see* GLAZE & MARUSCHAK, *supra* note 4, at 6.

[82] STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 4-5 (2009), https://perma.cc/SGY4-LXE4; Megan Thompson, *For Incarcerated Mothers, Parenting Is a Day-to-Day Struggle*, PBS NEWSHOUR (May 13, 2018), https://perma.cc/M8MU-XFSA; *see* HUMAN RIGHTS WATCH & ACLU, *supra* note 16, at 49-51.

[83] Kennedy, *supra* note 75, at 178. When an incarcerated mother is fortunate enough to have family step in to care for her child, research suggests that two-thirds of those caregivers struggle with poverty and often have difficulty arranging visits. Furthermore, many facilities require that children be accompanied by a legal guardian; if a child is in the care of grandparents, other extended family, or family friends, they may be unable to visit. A child who is in state care may not have a caseworker or foster parent who supports visits to the mother. CRAMER ET AL., *supra* note 81, at 20; *see* NANCY G. LA VIGNE ET AL., URBAN INST., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 4-6 (2008), https://perma.cc/UK3D-ZZX2. Child-friendly visiting areas are discussed in Part IV as a recommendation in UN guidelines.

setting, or both.[84] Long waiting times, limited visitation hours, body frisks, and abrupt treatment are some factors that discourage in-person meetings between incarcerated mothers and their children.[85] Prison visits where children are not allowed to touch their parents and can sometimes only see them through a glass partition can gravely diminish the quality of contact.[86]

The high cost of telephone calls further inhibits mothers from effectively keeping in touch with their children and also often adds an economic burden to an incarcerated mother's family member if one has been able to assume the care of the child.[87] In fact, many families must choose between paying for food and rent or staying in touch with the incarcerated parent.[88] While this is profoundly troubling, it is far from surprising.[89] Phillip Alston, United Nations Special Rapporteur on extreme poverty and human rights, notes in a report on the United States that, in many instances, "the criminal justice system is effectively a system for keeping the poor in poverty while generating revenue to fund not only the justice system but diverse other programs."[90]

Both the United States' actions, such as allowing prisons to charge incarcerated primary caregivers unreasonable fees to speak with their

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[84] CHRISTIAN, *supra* note 82, at 4-5; SWAVOLA ET AL., *supra* note 4, at 18.

[85] CHRISTIAN, *supra* note 82, at 4-5.

[86] SWAVOLA ET AL., *supra* note 4, at 18; Thompson, *supra* note 82.

[87] Komala Ramachandra, *Extortionate Phone Fees Cut Off US Prisoners*, HUMAN RIGHTS WATCH (June 16, 2017), https://perma.cc/5HA5-SHJ8; PETER WAGNER & ALEXI JONES, PRISON POLICY INITIATIVE, STATE OF PHONE JUSTICE: LOCAL JAILS, STATE PRISONS AND PRIVATE PHONE PROVIDERS (2019), https://perma.cc/5VGX-9NR3. In 2018, a fifteen-minute in-state call from a jail in Arkansas was $24.82; in Michigan, it was as much as $22.56; and in California, the cost could be as high as $17.80. WAGNER & JONES, *supra*.

[88] Ramachandra, *supra* note 87.

[89] *Id*. While video visitation is often discussed as a potential solution to maintaining better contact, there is a disturbing trend in jails throughout the United States that use this technology: approximately seventy-four percent of jails banned in-person visits when they implemented video visitation. Moreover, the cost can be up to an estimated $15 for twenty minutes and it does not necessarily benefit the child in the same ways that in-person visitation could in a child-friendly atmosphere. Thus far, no state prison has banned in-person visitations. *See* BERNADETTE RABUY & PETER WAGNER, PRISON POLICY INITIATIVE, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS (2015), https://perma.cc/8QJ4-ML66; *see also* LEAH SAKALA, PRISON POLICY INITIATIVE, RETURN TO SENDER: POSTCARD-ONLY MAIL POLICIES IN JAIL (2013), https://perma.cc/2DZP-5GEU; *see also* Peter Wagner & Alexi Jones, *The Biggest Priorities for Prison and Jail Phone Justice in 40 States*, PRISON POLICY INITIATIVE (Sept. 11, 2019), https://perma.cc/TJ9F-647Z.

[90] Alston, *supra* note 41, para. 33; Laura Pitter, *US Should Address Concerns Raised in UN Poverty Report*, HUMAN RIGHTS WATCH (July 17, 2018), https://perma.cc/2PYU-VHUQ.

children, and its inactions, such as not creating child-friendly visitation facilities, have shattering results that generate and exacerbate trauma.[91]

II. ALTERING THE BRAIN: THE DEEPLY EMBEDDED TOXIC STRESS IN CHILDREN

> "We know that family separation causes irreparable harm to children. This type of highly stressful experience can disrupt the building of children's brain architecture. Prolonged exposure to serious stress—known as toxic stress—can lead to lifelong health consequences."[92]

During a mother's incarceration, the breakdown of the mother-child relationship is largely driven by harmful U.S. policies, which have been sustained despite plentiful research showing the detrimental physical and psychological effects caused by such a separation, especially for the child, whose brain is at a critical stage in its development.[93] Putting the child in such an untenable situation often produces toxic stress, which adversely affects a child's brain and is correlated with an increased risk of developing chronic health conditions.[94] Leading trauma expert Dr. Bessel van der Kolk stresses the simplicity of the child's basic need: a caregiver with

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[91] Davis, *supra* note 29; RABUY & WAGNER, *supra* note 89; *see Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1943.

[92] Kraft, *supra* note 19. Toxic stress response can occur when the child experiences strong or prolonged adversity without adequate adult support. *See Toxic Stress*, HARVARD UNIV. CTR. ON THE DEVELOPING CHILD, https://perma.cc/X2M3-NQHV; Ducharme, *supra* note 16.

[93] VAN DER KOLK, *supra* note 6, at 111-24, 150-51; Ducharme, *supra* note 16. "The relationships children have with their caregivers play critical roles in regulating stress hormone production in the early years of life." *Excessive Stress Disrupts the Architecture of the Developing Brain* 4 (Nat'l Scientific Council on the Developing Child, Working Paper No. 3, 2014), https://perma.cc/Z5MP-AY2R.

[94] Félice Lê-Scherban et al., *Intergenerational Associations of Parent Adverse Childhood Experiences and Child Health Outcomes*, 141 PEDIATRICS, no. 6, 2018, at 1-2; Ducharme, *supra* note 16; Nadine Burke Harris, *How Childhood Trauma Affects Health Across a Lifetime*, TED TALKS (Sept. 2014), https://www.ted.com/talks/nadine_burke_harris_how_childhood_trauma_affects_health_across_a_lifetime. "[Infants] are extremely responsive to the emotions and reactivity and the social interactions that they get from the world around them." UMass Boston, *Still Face Experiment: Dr. Edward Tronick,* YOUTUBE (Nov. 30, 2009), https://www.youtube.com/watch?v=apzXGEbZht0. Research has shown that experiencing trauma in infancy has an enduring biological impact on the brain. The stage at which trauma begins has considerable effects on mental functioning; the earlier the trauma, the worse it often becomes for a person since the brain matures in the context of the environment. *See id.*; *see also* Allan N. Schore, *Attachment Trauma and the Developing Right Brain: Origins of Pathological Dissociation*, *in* DISSOCIATION AND THE DISSOCIATIVE DISORDERS: DSM-V AND BEYOND 107, 109-11 (Paul F. Dell & John A. O'Neil eds., 2009); *see also* Echo, *Changing the Paradigm 2015 Developmental Trauma Panel: Dr. Bessel van der Kolk*, YOUTUBE (Nov. 12, 2015), https://www.youtube.com/watch?v=-pCbbOWKB2I.

whom to feel safe.[95] "Depriving [children] of their caregivers," he says, "has effects on the brain as profound as starving them."[96]

Incarcerated mothers also suffer from the disruption; they also frequently already carry unresolved trauma when a separation occurs.[97] Symptoms such as helplessness, depression, terror, disconnection, and shame often accompany this trapped state of existence, which prohibits the traumatized person from engaging as fully in life as a non-traumatized person.[98]

As Judith Herman explains in *Trauma and Recovery*, the core experience of trauma lies in disempowerment and disconnection from others, and it is only in the context of relationships that recovery can take place.[99] As discussed in Part I, the circumstances imposed on mothers in prison often intensify feelings of disempowerment and disconnection. Yet the United States continues to ignore the root causes of their incarceration, thereby creating an environment where the real problems remain unaddressed, the already existing trauma of the mother is made worse, and additional toxic stress is created for the child, all of which only serves to wreak havoc on future generations.[100]

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[95] Echo, *supra* note 94, at 6:00-7:22. Van der Kolk stresses that when a person lives with an abnormal level of unaddressed trauma, the world that the person lives in is unsafe and unpredictable, which manifests not only in the psychology of a person but also in their body, and "no amount of insight will silence it." *See* VAN DER KOLK, *supra* note 6, at 64.

[96] Ducharme, *supra* note 16; *see* VAN DER KOLK, *supra* note 6, at 64.

[97] GLAZE & MARUSCHAK, *supra* note 4, at 7; *see* Michelle Sleed et al., *New Beginnings for Mothers and Babies in Prison: A Cluster Randomized Controlled Trial*, 15 ATTACHMENT & HUM. DEV. 349, 349-50 (2013).

[98] Gabor Maté, *Foreword* to PETER A. LEVINE, IN AN UNSPOKEN VOICE, at xi-xiii (2010); *see* JUDITH HERMAN, TRAUMA AND RECOVERY 51 (rev. ed. 2015). Levine defines a traumatic event as an occurrence that causes a long-term dysregulation in the nervous system. This can vary from person to person, depending largely on "their ability to handle various kinds of challenging situations due to different genetic makeup, early environmental challenges, and specific trauma and attachment histories." Peter Payne et al., *Somatic Experiencing: Using Interoception and Proprioception as Core Elements of Trauma Therapy*, FRONTIERS IN PSYCHOL., Feb. 4, 2015, at 1, 5.

[99] HERMAN, *supra* note 98, at 51.

[100] Pioneering research on the connection between the body and mind has helped uncover effective somatic (body-based) approaches to treating trauma. VAN DER KOLK, *supra* note 6, at 21; *see generally* SEBERN F. FISHER, NEUROFEEDBACK IN THE TREATMENT OF DEVELOPMENTAL TRAUMA (2014); HERMAN, *supra* note 98; LEVINE, *supra* note 98; PAT OGDEN ET AL., TRAUMA AND THE BODY (2008); STEPHEN W. PORGES, THE POLYVAGAL THEORY (2011).

A. Unspoken Trouble: Childhood Development, Parental Attachment, and the Strange Situation

> "As long as we feel safely held in the hearts and minds of the people who love us, we will climb mountains and cross deserts . . . . But if we feel abandoned, worthless, or invisible, nothing seems to matter."[101]

Data confirm that early separation from a primary caregiver has a significant biological effect on a person's overall capacity to function because a "child and parent's biology are inextricably linked" and thus, when separated, the child's development suffers irrevocable harm.[102] Forcibly separating children from their mothers constitutes an adverse childhood experience, which is defined as a psychosocial stressor and trauma experienced by children that has a significant impact on later health and well-being.[103] These traumatic experiences are linked with disrupted neurodevelopment, creating disturbances in the regulation of the body and resulting in social, emotional, and cognitive impairment.[104]

Children often do not comprehend what is occurring when their caregiver is taken away and their primary attachment bond is disrupted. Frequently filled with intense emotion and a lack of understanding, the trauma of the separation is then stored in the body.[105] This severing of the child's earliest and closest relationship, which had been helping to build the child's map of the world, often shatters the child's most intimate sense of self.[106] The identity of the child is supposed to be formed and sustained through minute-to-minute exchanges with a caregiver, and significant interruption can cause toxic stress.[107] Furthermore, the child's most fundamental sense of trust is broken, which continues to pervade the child's sense of self and the child's relationships with others into adulthood.[108]

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[101] VAN DER KOLK, *supra* note 6, at 350.

[102] Ducharme, *supra* note 16.

[103] Lê-Scherban et al., *supra* note 94, at 2; *see* Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTIVE MED. 245, 248 (1998).

[104] Felitti et al., *supra* note 103, at 251-56; Lê-Scherban, *supra* note 94, at 5-7; *see generally* VAN DER KOLK, *supra* note 6.

[105] Julie Poehlmann, *Representation of Attachment Relationships in Children of Incarcerated Mothers*, 76 CHILD DEV. 679, 687-88 (2005); *see generally* VAN DER KOLK, *supra* note 6; ARDITTI, *supra* note 16, *passim*.

[106] VAN DER KOLK, *supra* note 6, at 64; Kraft, *supra* note 19; *Toxic Stress*, *supra* note 92.

[107] Kraft, *supra* note 19; *Toxic Stress*, *supra* note 92; Payne et al., *supra* note 98, at 5.

[108] HERMAN, *supra* note 98, at 51; *see* VAN DER KOLK, *supra* note 6, at 111-13.

Attachment adversity and childhood trauma are often intertwined.[109] Developmental psychoanalyst John Bowlby has defined attachment as a lasting psychological connectedness between human beings and concluded that attachment is the secure base from which a child moves out into the world.[110] Yet when the primary attachment relationship is disrupted, developmental changes in the child can occur, which is associated with a rise in attachment behaviors.[111] Separating children from their caregivers does not take away their longing to attach; this deeply felt need is not a choice.[112] Children have a biological instinct to do this and will thus develop a coping style based on their attempt to get at least some of their basic needs met.[113]

Studies by Bowlby and psychologist Mary Ainsworth demonstrate the crucial role that secure bases play in normal social and biologic development.[114] Ainsworth conducted pivotal research in an effort to understand how attachment and attunement with a primary caregiver affected a child. Based on thousands of hours of observation, Ainsworth created a research tool called the Strange Situation,[115] which examines how an infant reacts to a temporary separation from the mother—and the results were clear: while a child with a secure attachment does show distress when the mother leaves, when the mother returns and after a short check-in for reassurance, the child is happy and resumes play, exhibiting confident and exploratory behavior. However, the picture is more complex and distressing for children with an insecure attachment pattern.[116] In this scenario, during the mother's absence, the child's exploration immediately becomes depressed and heightened attachment behaviors are activated, such as crying and confusion.[117] Yet when the mother returns, the child does not quickly settle down. Instead, insecurely attached infants often

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[109] JOHN BOWLBY, ATTACHMENT AND LOSS 9-10 (2d ed. 1982); VAN DER KOLK, *supra* note 6, at 115; Christin M. Ogle et al., *The Relation Between Insecure Attachment and Posttraumatic Stress: Early Life Versus Adulthood Traumas*, 7 PSYCHOL. TRAUMA 324, 329-30 (2015).

[110] BOWLBY, *supra* note 109, at 332; VAN DER KOLK, *supra* note 6, at 113-14. Bowlby suggests that a child initially forms one primary attachment and that the attachment figure acts as a secure base for exploring the world. If an attachment has not developed between infancy and early childhood or if it has been disrupted, the child will likely develop an insecure attachment style.

[111] BOWLBY, *supra* note 109, at xii.

[112] VAN DER KOLK, *supra* note 6, at 112-17.

[113] *Id.* at 115. Traumatized children will organize their lives as if the trauma is still going on, with every new encounter or event contaminated by the past. *See id.* at 53.

[114] van der Kolk*, supra* note 7, at 394.

[115] *Id.* at 117-19; Mary D. Salter Ainsworth & Silvia M. Bell, *Attachment, Exploration, and Separation: Illustrated by the Behavior of One-Year-Olds in a Strange Situation*, 41 CHILD DEV. 49 (1970).

[116] *Id.*; VAN DER KOLK, *supra* note 6, at 117-18.

[117] Ainsworth & Bell, *supra* note 115, at 49.

react to the anxiety of the separation in the aftermath by either heightening their desire to maintain contact or exhibiting resistance to contact and comforting from their mothers.[118] Both behaviors result from an often chronic and inconsistent response to some of the child's most basic biological needs.[119] Children who are separated from their mothers, due to an event such as incarceration, are unable to see and speak to their primary caregivers frequently and thus may be at risk of developing such an attachment style.[120]

B. Incarcerated Mothers and Unaddressed Trauma

Mothers also habitually face similar emotional trauma related to separation from their children, experiencing high levels of anxiety, depression, and the potential for post-traumatic stress disorder (PTSD).[121] However, the majority of these mothers, frequently caught at the crossroads of racial, gender, and economic oppression,[122] often exhibit traumatic symptoms even before they are separated from their children, a likely factor underlying the circumstances that led to their incarceration in the first place.[123] Such unaddressed issues can run a person's life, with their energy "focused on suppressing inner chaos, at the expense of spontaneous involvement in their life."[124] Mothers' incarceration and physical separation from their children only serves to be all the more destructive.[125]

Fragmentation of parental bonds has been shown to be more keenly felt by mothers who were the primary caregivers prior to incarceration

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[118] *Id.* at 61-63.

[119] *Id.*; VAN DER KOLK, *supra* note 6, at 119; van der Kolk, *supra* note 7, at 396; *see* Mary D. Ainsworth, *Patterns of Attachment Behavior Shown by the Infant in Interaction with His Mother*, 10 MERRILL-PALMER Q. BEHAV. DEV. 51, 51-58 (1964).

[120] Ainsworth & Bell, *supra* note 115, at 61-63; *see* Ainsworth, *supra* note 119, at 56-58; *see also* PsychAlive, *Dr. Dan Siegel - On Disorganized Attachment*, YOUTUBE (Mar. 3, 2011), https://www.youtube.com/watch?v=iGDqJYEi_Ks.

[121] Kennedy, *supra* note 75, at 192-93; Ducharme, *supra* note 16.

[122] *See, e.g.*, *Kimberlé Crenshaw on Intersectionality, More than Two Decades Later*, COLUMBIA LAW SCHOOL (June 8, 2017), https://perma.cc/H3XU-LXQB. The concept of intersectionality is a "lens through which you can see where power comes and collides, where it interlocks and intersects" and is a crucial framework to employ when considering the experiences of many incarcerated mothers. *Id.*

[123] *See* ARDITTI, *supra* note 16, at 55. An incarcerated mother likely also suffers from an insecure attachment pattern. Unresolved trauma may contribute to the intergenerational transmission of insecure attachment. Udita Iyengar et al., *Unresolved Trauma in Mothers: Intergenerational Effects and the Role of Reorganization*, 5 FRONTIERS IN PSYCHOL. 1, 1 (2014).

[124] VAN DER KOLK, *supra* note 6, at 53.

[125] LEVINE, *supra* note 98, at 108. "Face-to-face, soul-to-soul contact is a buffer against the raging seas of inner turmoil. It is what helps you calm any emotional turbulence . . . . [F]acial recognition meet[s] people's deepest emotional needs and motivate[es] many behaviors, both conscious and unconscious." *Id.*

than by incarcerated fathers who were not.[126] Yet that pain only becomes more profound since the children of incarcerated mothers have a higher likelihood of ending up in the custody of child protective services, which then makes mothers more susceptible to the permanent loss of parental rights.[127]

Moreover, when incarcerated mothers are released and still retain parental rights, they face abounding challenges that are unlike any confronted by those who do not bear the primary responsibility of parenting.[128] Obtaining and sustaining legal employment and meeting any treatment needs[129] are challenging on their own; coupled with caregiving responsibilities and the stigma that women endure when leaving prison, this set of challenges is often an unrealistic burden to shoulder.[130]

C. Predicting the Future: ACEs, Intergenerational Effects, and Devastating Long-Term Health Outcomes

In *The Body Keeps the Score*, Dr. van der Kolk asserts that trauma is a much larger public health issue than people recognize, as most are unwilling to talk about it frankly and are more comfortable marginalizing its effects.[131] Often children caught in this chaos must dismiss powerful and anguished experiences in order to move on, which can result in "serious problems, including 'chronic distrust of other people, inhibition of curiosity [and] distrust of their own senses.'"[132] These traumatic experiences, which cause lasting psychobiologic changes that reduce the capacity to

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[126] ARDITTI, *supra* note 16, at 68.

[127] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7); Kennedy, *supra* note 75, at 163-66.

[128] ARDITTI, *supra* note 16, at 65.

[129] *See generally* BRONSON & BERZOFSKY, *supra* note 58; JAMES & GLAZE, *supra* note 59, at 5.

[130] ARDITTI, *supra* note 16, at 65; Marilyn Brown & Barbara Bloom, *Reentry and Renegotiating Motherhood: Maternal Identity and Success on Parole*, 55 CRIME & DELINQ. 313, 320-21, 327-28 (2009); *see* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 95 (2010). According to a report from the White House, job applicants with a criminal record are fifty percent less likely to receive interview requests or job offers. Press Release, Office of the Press Secretary, the White House, CEA Report: Economic Perspectives on Incarceration and the Criminal Justice System (Apr. 23, 2016), https://perma.cc/3DY7-J48S.

[131] *See generally* VAN DER KOLK, *supra* note 6, at 349-58.

[132] *Id.* at 141.

cope with subsequent social disruption, are also tied to negative intergenerational effects since they often "disturb parenting processes and create similar vulnerability into the next generation."[133]

This exposure to toxic stress on developing brains of children can inhibit their prefrontal cortex, which is necessary for executive functioning and impulse control, and on MRI scans, there are often measurable differences in the amygdala, which is often described as the brain's fear response center.[134] California Surgeon General Nadine Burke Harris explains that, while this stress response system is critical to survival, when it is activated repeatedly and continuously, it goes from being adaptive and lifesaving to maladaptive and health damaging, causing the body to remain in a hyper-alert state.[135] These lifetime implications of unaddressed childhood trauma are so far-reaching that research shows they not only physically change a child's biology but also result in devastating health outcomes.[136] There are dramatic links between adverse childhood experiences—which include parental separation, incarceration and parental mental illness—and risky behavior, psychological issues, serious illness, and other causes of death.[137] The pivotal Adverse Childhood Experiences ("ACE") Study first published these startling results, concluding that people with four or more ACEs are significantly more likely to develop serious illnesses, including heart disease and cancer, and those with six or more ACEs die twenty years earlier on average.[138] Moreover, the potential intergenerational effects of ACEs are supported by research revealing an "increased risk of adverse health outcomes among children of parents who experienced chronic trauma."[139]

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[133] van der Kolk, *supra* note 7, at 408; *see* Felitti et al., *supra* note 103, at 245; Lê-Scherban et al., *supra* note 94, at 5-7; *see also* Rachel Yehuda & Amy Lehrner, *Intergenerational Transmission of Trauma Effects: Putative Role of Epigenetic Mechanisms*, 17 WORLD PSYCHIATRY 243 (2018).

[134] Burke Harris, *supra* note 94 at 6:43-9:22; *see* Felitti et al., *supra* note 103, at 249-56.

[135] Burke Harris, *supra* note 94 at 6:43-9:22.

[136] *Id.*; *see* Felitti et al., *supra* note 103, at 249-56.

[137] *See generally* Burke Harris, *supra* note 94; *see* Felitti et al., *supra* note 103, at 249-56.

[138] Felitti et al., *supra* note 103, at 249-56; Mark A. Bellis et al., *Adverse Childhood Experiences and Associations with Health-Harming Behaviours in Young Adults: Surveys in Eight Eastern European Countries*, 92 BULL. WORLD HEALTH ORG. 641 (2014); *see also* PUB. HEALTH MGMT. CORP., FINDINGS FROM THE PHILADELPHIA URBAN ACE STUDY 24 (2013).

[139] Lê-Scherban et al., *supra* note 94, at 1-2.

III. THE TORMENT OF SEPARATION: HOW THE UNITED STATES KEEPS INCARCERATED MOTHERS AND THEIR DEPENDENT CHILDREN APART AND ITS SHATTERING CONSEQUENCES

> "[I]n America all too few blows are struck into flesh. We kill the spirit here, we are experts at that."[140]

From the Bureau of Prisons disregarding its own visitation policies to the passage of legislation that vastly increases the likelihood incarcerated mothers will have their parental rights terminated, the conduct by the United States has generated catastrophic results for incarcerated mothers and their children.[141] This is not only flagrantly inconsistent with international norms, discussed in Part IV, but is also incongruous with the purported goals of the U.S. correctional system.[142]

A. The Experiences and Treatment of Incarcerated Pregnant Women in the United States

The failure to consider the ways in which female offenders' life circumstances differ from those of male offenders imposes hardship that can begin, in the case of incarcerated mothers, before they even give birth.[143] The starkest example is the practice of shackling incarcerated pregnant women during labor, which the American Medical Association has described as "a barbaric practice that needlessly inflicts excruciating pain

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[140] NORMAN MAILER, THE PRESIDENTIAL PAPERS 69 (Bantam Books 1964) (1963).

[141] Adoption and Safe Families Act of 1997, Pub L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7); FED. BUREAU OF PRISONS, NO. 5267.09, VISITING REGULATIONS 1 (2015), https://perma.cc/HE27-YAXJ; Hager & Flagg, *supra* note 63; Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L. J. 247, 249 (2004).

[142] *See generally* PENAL REFORM INT'L, *supra* note 22; *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1929. While this article focuses on the United States' international obligations to protect human rights, there is also a strong argument that separating incarcerated mothers from their children and creating circumstances whereby they can no longer play a meaningful role in their children's lives violates parents' constitutional right to family integrity. *See* Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent,* 108 J. CRIM. L. & CRIMINOLOGY 539 (2018).

[143] ACLU ET AL., *supra* note 35, at 47-54. The violations of rights for many of these women may also have occurred prior to prison: many poor, pregnant women who are on government assistance have their privacy invaded through a series of highly intrusive and punitive methods and are then ultimately criminalized. Women in general are often targeted in ways inextricably related to race, class, and gender. Alston, *supra* note 41, paras. 36-37, 39; *see* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 1-6 (2017); *see also* Emma S. Kettering-ham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline,"* 20 CUNY L. REV. 77, 96-97 (2016); *see generally* AMNESTY INTERNATIONAL, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA (2017).

and humiliation."[144] Although international human rights law prohibits shackling and many argue that the practice also violates the U.S. Constitution, the United States is one of the few countries that uses restraints on pregnant incarcerated women, who represent an estimated four percent of all women admitted to prison.[145]

While many states have guidelines against shackling in most instances, as of 2020, only twenty-two states and the District of Columbia have laws restricting the shackling of pregnant women in prisons and jails.[146] Utah, Nebraska, Kansas, Indiana, and South Carolina have not implemented any law or policy to restrict shackling while in labor.[147] North Carolina recently enacted a policy against shackling after intense pressure from advocacy groups.[148] Nevertheless, the state's guidelines continue to allow incarcerated pregnant women to be handcuffed while being transported to the hospital for delivery.[149] There are also reports of correctional officers not adhering to guidelines, including an account of a woman in New York being shackled while in labor in 2018, despite the fact that the state passed a law in 2015 barring the use of restraints on women during delivery.[150]

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[144] AM. MED. ASS'N, AN "ACT TO PROHIBIT THE SHACKLING OF PREGNANT PRISONERS" MODEL STATE LEGISLATION 1 (2015); Editorial, *Handcuffed While Pregnant*, N.Y. TIMES (Sept. 23, 2015), https://perma.cc/7KKJ-DUFB; *see also* COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES 1 (2011) (reaffirmed 2019); *see generally* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239 (2012).

[145] Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 223-24, 247-51 (2008); Carolyn Sufrin et al., *Pregnancy Outcomes in US Prisons, 2016-2017*, 109 AM. J. PUB. HEALTH 799, 801 (2019); *see* UNIV. OF CHI. LAW SCH. ET. AL., THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES (2013), https://perma.cc/K85T-TNHH.

[146] Chris DiNardo, *Pregnancy in Confinement, Anti-Shackling Laws and the "Extraordinary Circumstances" Loophole*, 25 DUKE J. GENDER L. & POL'Y 271, 279 n.60 (2018).

[147] Lilian Min, *These Are the States That Still Allow Female Inmates to Be Shackled During Childbirth*, THE CUT (Mar. 28, 2018), https://perma.cc/T6ZW-EMBC. Georgia recently enacted a law prohibiting the shackling of incarcerated pregnant women. *See* Sarah McCammon, *Pregnant, Locked Up, and Alone*, NPR (June 16, 2019, 5:00 AM), https://perma.cc/8BWE-ZQMX.

[148] Press Release, Sistersong, Advocates Demand an End to Shackling of People in Labor (Feb. 5, 2018), https://perma.cc/E56M-JBJM.

[149] Min, *supra* note 147.

[150] Complaint & Jury Demand at 1-2, Doe v. City of New York, No. 18 Civ. 11414 (S.D.N.Y. Dec. 6, 2018); Ashley Southall & Benjamin Weiser, *Police Forced Bronx Woman to Give Birth While Handcuffed, Lawsuit Says*, N.Y. TIMES (Dec. 6. 2018), https://perma.cc/P6YD-4NTR; *see* Audrey Quinn, Opinion, *In Labor, in Chains*, N.Y. TIMES (July 26, 2014), https://perma.cc/8BCK-EVEQ. In July 2019, the New York City government

The practice of shackling pregnant women has also been publicly criticized by the American College of Obstetricians and Gynecologists in an extensive Committee Opinion, which not only calls the practice demeaning but notes that shackled pregnancies are often high-risk because of a lack of adequate prenatal care.[151] Physical restraints interfere with health care providers' ability to treat patients safely, and shackling pregnant women is exceptionally dangerous; the risks range from an increase in blood clots to causing serious delays when there is hemorrhaging or an irregular fetal heartbeat, both of which require emergency intervention, including cesarean delivery.[152]

As the issue of shackling pregnant women continues to garner more public outcry, there has been some change. In December 2018, the First Step Act was signed into law, formally banning federal prison officials from shackling women during the period of pregnancy, labor, and postpartum recovery, defined as approximately twelve weeks after delivery.[153] However, the provision allows correctional officers to use restraints on a pregnant woman if they believe that doing so is necessary to prevent immediate and serious risk of harm to the woman herself or to others.[154] While the Department of Justice did have a policy in place as of 2014 that prohibited the shackling of pregnant women, it is significant that this violative practice gained enough attention to propel federal legislation.[155] Still, while the newly created law remains pertinent to the estimated 16,000 incarcerated women in federal prison, it does not affect the estimated 200,000 women in state prisons and local jails.[156]

In addition to shackling, the Committee Opinion also stresses the importance of allowing the newborn to remain with the mother to facilitate bonding; most federal prisons, state prisons, and jails separate the mother

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agreed to pay the woman $610,000 to settle her claim that her treatment by correctional officers was inhumane and violated state law, but the city denied wrongdoing. Still, the case prompted the New York Police Department to revise its Patrol Guide procedures for handling pregnant women. Ashley Southall, *She Was Forced to Give Birth in Handcuffs. Now Her Case Is Changing Police Rules.*, N.Y. TIMES (July 3, 2019), https://perma.cc/4EJK-4Q5B.

[151] COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *supra* note 144, at 1.

[152] *Id.* at 3-4. The Committee Opinion emphasizes that shackling pregnant women creates danger not only during labor and childbirth but throughout pregnancy, with the practice increasing the risk of falling and also preventing the pregnant woman from being able to break a fall. The Opinion also stresses the need for improvements to prenatal care. *See id.*

[153] First Step Act of 2018, Pub L. No. 115-391, § 301, 132 Stat. 5194, 5217-20. This new federal law is discussed in more detail in Part IV.

[154] *Id.*

[155] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT: ESCORTED TRIPS 12 (2014), https://perma.cc/BGJ9-MNEV.

[156] KAJSTURA, *supra* note 4. No current state law bans the use of shackles outright; rather, at their most restrictive, the anti-shackling laws still allow for "extraordinary circumstances" to exist, which permits the use of restraints. *See* DiNardo, *supra* note 146, at 280.

from her infant within twenty-four to seventy-two hours after delivery.[157] However, in certain instances, new mothers who have committed non-violent offenses may be allowed to remain with their infants in prison nursery programs, giving them an opportunity to develop secure bonds.[158] Thirteen states currently have programs that allow mothers to stay with their infants in a separate section of the prison for a finite amount of time, typically ranging from twelve to eighteen months, while participating in prenatal and parenting classes.[159] In order to be admitted into a nursery program, incarcerated pregnant women typically must be serving shorter sentences and be the primary caregiver to the child upon release.[160] While the benefits of these nursery programs are extensive, including a stronger relationship between mother and child and reduced rates of recidivism, prison nurseries are currently only available to a small fraction of pregnant incarcerated women.[161]

B. Mothers with Nowhere to Turn: Rarely Used Sentencing Alternatives and Prison Conditions That Ignore the Federal Bureau of Prisons Policies

Despite growing national concern, the U.S. federal government continues to give little attention to the cyclical nature of incarceration among women and how it often only serves to further destabilize families.[162]

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[157] Elizabeth Chuck, *Prison Nurseries Give Incarcerated Mothers a Chance to Raise Their Babies – Behind Bars*, NBC NEWS (Aug. 4, 2018), https://perma.cc/U58X-PCHG; COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *supra* note 144, at 2.

[158] Sarah Yager, *Prison Born*, ATLANTIC (July/Aug. 2015), https://perma.cc/P348-CGYY; Megan Thompson & Mori Rothman, *In One Indiana Prison, a Program Allows Incarcerated Moms to Raise Their Newborns*, PBS NEWSHOUR (May 12, 2018), https://perma.cc/32FM-FGMT; *see generally* Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5 (2011). For more on parental attachment, see JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988).

[159] Yager, *supra* note 158; CHANDRA KRING VILLANUEVA ET AL., WOMEN'S PRISONERS ASS'N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 6 (2009), https://perma.cc/ERG8-K9QM; THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT'L WOMEN'S LAW CTR., *supra* note 20, at 7.

[160] *See* Naomi Schaefer Riley, *On Prison Nurseries*, NATIONAL AFFAIRS (Spring 2019). There have also been reports of applicants being rejected because of overly stringent standards. *See* Victoria Law, *Empty Cribs in Prison Nurseries*, TYPE INVESTIGATIONS (May 13, 2018), https://perma.cc/3BU2-L244.

[161] Thompson & Rothman, *supra* note 158; Yager, *supra* note 158.

[162] KAJSTURA, *supra* note 4; Stillman, *supra* note 5.

However, there are tools already in place that could readily change the environment, although they are not often utilized.[163]

Under the Federal Sentencing Guidelines, the U.S. Sentencing Commission (USSC) established that, in very limited circumstances, judges are allowed to sentence people outside of the applicable guideline range; these lesser sentences are referred to as "downward departures."[164] Yet situations where incarcerated mothers have primary caregiving responsibilities have been routinely rejected as deserving of such sentences despite the detrimental repercussions of parental incarceration.[165] In fact, these effects are so commonly known that the USSC has been encouraged to do its own review of the impact of parental incarceration, although there is no indication that this has meaningfully taken place.[166]

In an internal USSC report, more than half of both district and circuit court judges indicated that they "would like to see more emphasis at sentencing placed on . . . the offender's family ties and responsibilities."[167] Results of a 2014 government survey likewise showed the dismay of United States district judges, a majority of whom agreed that the USSC should significantly revise its guidelines to provide more alternatives to incarceration.[168]

While these judges do have some discretion, the BOP ultimately determines where a person convicted of an offense will be designated.[169] This means that even in a case where a federal district court judge requests that an incarcerated mother be assigned to the prison closest to her child, the BOP does not need to comply with the judge's request once the mother is in custody.[170] This is enormously problematic, especially given the BOP's record of failing to strengthen familial ties in other ways, such as in the case of visitation, where the BOP routinely does not provide child-

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[163] *See, e.g.*, OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DEPARTURES AND VARIANCES 5 (2018), https://perma.cc/334Z-48T7; *Determining the Sentence*, U.S. SENTENCING COMMISSION (Nov. 1, 2018), https://perma.cc/GEB9-A3US.

[164] *See generally* OFFICE OF GEN. COUNSEL, *supra* note 163.

[165] ACLU ET AL., *supra* note 35, at 40; Fedock, *supra* note 40.

[166] Memorandum from Pat Nolan et al. to U.S. Sentencing Comm'n, Alleviating the Impact of Parental Incarceration on Children Through Sentencing Reform (July 9, 2017), https://perma.cc/N46W-NJF6.

[167] LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM'N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES 6 (2003), https://perma.cc/PU8F-KGFX.

[168] U.S. SENTENCING COMM'N, RESULTS OF 2014 SURVEY OF UNITED STATES DISTRICT JUDGES: MODIFICATION AND REVOCATION OF PROBATION AND SUPERVISED RELEASE 6, 21 (2015), https://perma.cc/FXH6-28JG. Fifty-nine percent of the judges who filled out the survey said they believed that the Federal Sentencing Guidelines should be amended to allow for more alternatives to incarceration. *Id.* at 6.

[169] *Custody and Care Designations*, FED. BUREAU OF PRISONS, https://perma.cc/D7S4-YR8K.

[170] *Id.*

friendly areas in women's prisons and in some instances allows visitation only two days a week.[171] Such restrictions ignore its own visitation regulations, which state that the BOP "encourages visiting by family . . . to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community." [172]

In September 2018, the U.S. Justice Department's Office of the Inspector General issued a report that criticized the BOP, concluding that it "has not been strategic in its management of female inmates."[173]

C. Permanent Separation: The Alarming and Unjust Consequences of the Adoption and Safe Families Act on Incarcerated Mothers

> "I have had two visits since I signed the adoption papers five years ago. I have spoken to my son only five times on the phone. His family put a block on the phone so it couldn't accept collect calls. I offered to pay for calls, but his adoptive mother wouldn't allow me to do so."[174]

The Adoption and Safe Families Act of 1997 ("ASFA") is a federal law that claims to promote the adoption of children who are in foster care, citing health and safety as paramount and encouraging permanent living arrangements for children in foster care as soon as possible.[175] While seemingly benign on its face, ASFA has produced disproportionate and crippling consequences for incarcerated mothers, who—despite their best efforts to meet the ASFA requirements within the prescribed timetable—are at a considerably higher risk than incarcerated fathers of having their parental rights indefinitely terminated.[176] A parent's incarceration can be considered as a factor in determining whether a termination judgment is in the child's best interest,[177] and since 2006, nearly 5,000 incarcerated parents have had their parental rights terminated expressly because of

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[171] For visiting regulations at each of the BOP's listed facilities, see *Our Locations*, FED. BUREAU OF PRISONS, https://perma.cc/9QRD-P25L.

[172] FED. BUREAU OF PRISONS, NO. 5267.09, VISITING REGULATIONS 1 (2015), https://perma.cc/HE27-YAXJ. The BOP continues to make meaningful visitation between mothers and their children difficult, if not impossible, despite the breadth of research showing contact reduces recidivism and mitigates trauma. *See* CRAMER ET AL., *supra* note 81, at 7-9; LA VIGNE ET AL., *supra* note 83, at 10; RABUY & KOPF, *supra* note 68.

[173] OFFICE OF THE INSPECTOR GEN., *supra* note 53, at i.

[174] Deborah McCabe, *Signing Away My Son*, RISE MAG. (May 19, 2016), https://perma.cc/R8WJ-WPPV.

[175] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2115 (codified as amended at 42 U.S.C. § 671 (2018)); Roberts, *supra* note 62, at 1495, 1498-99; ACLU ET AL., *supra* note 35, at 55-56.

[176] Kennedy, *supra* note 75, at 175-78; Roberts, *supra* note 62, at 1493-96; GLAZE & MARUSCHAK, *supra* note 4, at 54 tbl. 8; ACLU ET AL., *supra* note 35, at 55-56.

[177] Kennedy, *supra* note 75, at 191-93.

their imprisonment.[178] Proponents of ASFA and short deadlines for terminating parental rights contend that doing so is in a child's best interest and that the child's need for permanence is primary.[179] This assertion is problematic considering that many of the children affected do not necessarily find permanent homes and the number of children in foster care continues to rise.[180] Furthermore, as examined in closer detail in Part II, since separation from a mother can have serious short- and long-term impacts on a child, it is often contrary to a child's best interests—and yet, in many instances, these hazardous effects are not properly weighed as part of the best interests analysis within U.S. domestic law.[181] It is also salient to add that none of ASFA's provisions focus on supporting and reuniting families, with one critic of ASFA pointing out that "instead of actually responding to the struggles of poor families . . . we've decided that it's simpler to take their children away."[182]

Despite these damaging consequences, the federal government continues its forceful steps to incentivize states to support ASFA.[183] For example, in order to receive certain federal funds, a state is required under ASFA to apply plans that include filing or joining a petition to terminate parental rights, subject to a few exceptions, when a child has been in foster care for fifteen of the most recent twenty-two months, though there is nothing to ensure that the child moves from foster care to an adoptive home once rights are terminated.[184] As previously discussed, the majority of children with fathers in prison have their mother to care for them, which protects them from becoming wards of the state. However, when mothers are incarcerated, children are more likely to go into foster care if

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[178] Hager & Flagg, *supra* note 63.

[179] *Id.*

[180] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018, at 1 (2018), https://perma.cc/VS2B-KREF; Kennedy, *supra* note 75, at 186.

[181] *See* Kennedy, *supra* note 75, at 186-87; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7). The "best interests of the child" standard and the effects of ASFA are further discussed in relationship to international human rights law in Part IV.

[182] Hager & Flagg, *supra* note 63; ACLU ET AL., *supra* note 35, at 50-51.

[183] Hager & Flagg, *supra* note 63; *see* Adoption and Safe Families Act of 1997 § 201.

[184] During the fifteen-month timeline, the state can concurrently "identify, recruit, process, and approve a qualified family for an adoption." *See* Adoption and Safe Families Act of 1997 § 103(a)(3). The three exceptions are: (1) the child is under a relative's care; (2) a state agency finds a "compelling reason" that terminating parental rights is not in the child's best interest; and (3) the state has failed to make "reasonable efforts" to reunite the child with their parents. *Id.*; *see also* Hager & Flagg, *supra* note 63.

the father or a family member is unavailable to take custody, which happens frequently.[185]

It is significant that these children only enter foster care because of parental incarceration, rather than a separate finding of abuse or neglect, which makes ASFA acutely harmful to incarcerated mothers.[186] The USSC's own report bolsters this finding: the average median prison sentence for women convicted under a federal statute carrying a mandatory minimum sentence, which includes drug offenses, is sixty months; with ASFA's fifteen-month foster care time limit, this leaves incarcerated mothers in jeopardy of losing their parental rights and their children permanently.[187]

Despite the fact that most incarcerated mothers have been convicted of offenses that are non-violent in nature, monetary bonuses for states that facilitate these adoptions continue. The federal government has given an estimated $639 million in rewards through the "adoption incentive payments" provision of ASFA since 1998.[188] Moreover, ASFA discourages foster parents from supporting the child's relationship with his or her birth family.[189]

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[185] GLAZE & MARUSCHAK, *supra* note 4, at 54 tbl. 8.

[186] ACLU ET AL., *supra* note 35, at 55. Parents with child-welfare cases who are not incarcerated can stave off termination of parental rights by doing things that are next to impossible from confinement, such as "spending time with their children regularly, showing up for court hearings, taking parenting classes, being employed, having stable housing, and paying child support to reimburse the government for the costs of foster care." *See* Hager & Flagg, *supra* note 63. Some states have enacted laws to allow for increased flexibility in the ASFA analysis in cases of parental incarceration. *See* Alison Walsh, *States, Help Families Stay Together by Correcting a Consequence of the Adoption and Safe Families Act*, PRISON POL'Y INITIATIVE (May 24, 2016), https://perma.cc/M9FS-GJTP.

[187] U.S. SENTENCING COMM'N, QUICK FACTS: WOMEN IN THE FEDERAL OFFENDER POPULATION 2 (2013), https://perma.cc/STC5-5Z92. One study shows that children are twice as likely to die of abuse in foster care than in the general population. *See* Ketteringham et al., *supra* note 143, at 98.

[188] Adoption and Safe Families Act of 1997 § 201; Hager & Flagg, *supra* note 63. Other countries outside of the United States provide alternatives to having a child separated from the mother to ensure adequate bonding between the mother and child. *See* Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L. J. 65, 75-82 (2015).

[189] MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 209 (2007).

D. The Purported Goals of the U.S. Correctional System and How They Are Not Met

The additional punitive implications for incarcerated mothers do not effectively serve the claimed goals of the U.S. correctional system, including rehabilitation and deterrence.[190] Rehabilitation, aimed at creating positive outcomes by encouraging and supporting people who are incarcerated with treatment services, is not only the logical approach but research shows that it reduces recidivism.[191] However, there are very few programs focused on the specific concerns of incarcerated women, including understanding the impact of separation on incarcerated mothers and their children.[192]

In separating mothers from children, the U.S. also fails to reach its intended goal of deterrence. Instead, its incarceration model results in an increased likelihood of recidivism and intergenerational incarceration in the aftermath of the separation of mother and child.[193] Moreover, not only do women experience a higher rate of recidivism and a higher risk that their children will be imprisoned, but more than seventy percent of those incarcerated are themselves the children of incarcerated people, illustrating the ineffectiveness of the prison system.[194] Still, while the current treatment of incarcerated mothers is in most instances wholly counterproductive to the deterrence rationale, there has been no meaningful response by the U.S. government to enact change.[195]

This is despite the fact that the effects of separating mothers from their children have economic consequences that extend beyond their families. According to a White House report, an estimated $80 billion is spent annually on federal, state, and local correctional institutions, and the estimated cost to taxpayers is an average of $31,000 per incarcerated person.[196] In New York, taxpayers pay the most in the country, estimated at

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[190] *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1938. The four purported goals of the U.S. correctional institution are rehabilitation, deterrence, incapacitation, and retribution. *Id.*

[191] *Id.*

[192] *Id.*; BLOOM ET AL., *supra* note 27, at 29.

[193] *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922, 1929-31; Martin, *supra* note 18, at 2.

[194] Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next,* 70 U. CHICAGO L. REV. 1, 9-10 (2003); Martin, *supra* note 18, at 2; *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1935.

[195] One study suggests that children of incarcerated parents are, on average, six times more likely to become incarcerated themselves. *See* Martin, *supra* note 18, at 2.

[196] CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS 9 (2012), https://perma.cc/CEK9-EYNR; EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 43 (2016),

nearly $70,000 per incarcerated person.[197] Yet rather than achieving correctional goals, the current approach to incarcerating mothers only adds to the population of the U.S. correctional system.

IV. HUMAN RIGHTS: THE LEGAL RIGHTS OF MOTHERS AND THE LEGAL RIGHTS OF THEIR CHILDREN

> "Human rights are rights; they are not merely aspirations, or assertions of the good. To call them rights is not to assert, merely, that the benefits indicated are desirable or necessary; or merely, that it is 'right' that the individual shall enjoy these goods . . . To call them 'rights' implies that they are claims 'as of right,' not by appeal to grace, or charity, or brotherhood, or love: they need not be earned or deserved." [198]

The suffering that incarcerated mothers and their children endure in the United States—including damage to and wholesale destruction of their families—is not only distressing but an unmistakable violation of international legal norms. The fundamental nature of family is protected by the International Covenant on Civil and Political Rights (ICCPR), which the United States is obligated to follow after ratifying the treaty in 1992.[199] The United States' actions also conflict with rights described within the Convention on the Rights of the Child (CRC).[200] While the United States is the only country not to have ratified this international treaty on children, it did become a signatory in 1995, which, according to the Vienna Convention on the Law of Treaties (Vienna Convention), therefore obligates the United States to not take any actions that are incompatible with the object and purpose of the CRC.[201]

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https://perma.cc/3FME-EQ6K; Carimah Townes, *The True Cost of Mass Incarceration Exceeds $1 Trillion,* THINKPROGRESS (Sept. 12, 2016), https://perma.cc/DM6U-FVZN.

[197] CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010-2015, at 8 (2015), https://perma.cc/4DR5-TYXD.

[198] HENKIN, *supra* note 14, at 3.

[199] ICCPR, *supra* note 13.

[200] CRC, *supra* note 13.

[201] *Id.*; Vienna Convention, *supra* note 13. The Vienna Convention governs the interpretation of all international treaties. Many of its provisions are considered customary international law and thus binding on the United States. The United States signed the Vienna Convention in 1970 but has yet to ratify it. *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, https://perma.cc/8Z8G-SUN3. *The Core International Human Rights Instruments and Their Monitoring Bodies*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, https://perma.cc/KA4X-U3XH. There are nine core international human rights treaties. *See UN Human Rights Treaties,* HUMANRIGHTS.CH, https://perma.cc/GP26-EXWX.

A. International Law, Human Rights Law, and U.S. Courts

The foundation of international human rights law was first articulated and recognized by the United Nations and its member countries in the Universal Declaration of Human Rights in 1948.[202] At its core, this body of law recognizes certain irreducible rights based in the fundamental human dignity that each person inherently possesses and legally obligates countries to uphold these rights through treaty law, customary international law, and other types of human rights mechanisms.[203]

Much of international law, which consists mostly of rules and principles that deal with the conduct of countries and international organizations, is most often derived from either customary practice or international agreements.[204] Human rights law, a type of international law, has developed much in the same way, with customary law and international treaties serving as its backbone.[205]

The general understanding throughout the world is that once a country becomes a party to a treaty, it consents to be bound by that treaty, assuming the legal rights and obligations contained in it.[206] However, as mentioned earlier, unlike countries that directly incorporate international law into their domestic law, the United States has declared all of the core human rights treaties it has ratified to be "non-self-executing," which means that these agreements are not regarded as judicially enforceable law unless the United States implements corresponding domestic legislation to give the treaties effect.[207] Still, it is critical to underscore that Article 18 of the Vienna Convention expressly requires a State to refrain from any acts that would defeat the object and purpose of any treaty it has signed.[208]

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[202] *See* LYNN HUNT, INVENTING HUMAN RIGHTS 203-05 (2007); UDHR*, supra* note 8.

[203] UDHR*, supra* note 8; *see* Alston, *supra* note 41, paras. 8-9.

[204] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 1987); STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 2 (2018), https://perma.cc/2GCG-SM8M.

[205] *The Foundation of International Human Rights Law*, UNITED NATIONS, https://perma.cc/67RM-X7MR; *see* Alston, *supra* note 41, paras. 8-9.

[206] *The Foundation of International Human Rights Law*, *supra* note 205.

[207] *See* Carlos Vazquez, *The Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law*, UNIV. OF OXFORD FACULTY OF LAW (May 10, 2018), https://perma.cc/3KVB-7DQE. Henkin contends that it is evident that "[t]he Framers intended that a treaty should become law *ipso facto,* when the treaty is made; [and that] it should not require legislative implementation to convert it into United States law." Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995).

[208] Vienna Convention, *supra* note 13.

International law scholar Louis Henkin believes that the approach by the United States toward human rights treaties is contrary to "the language, and spirit, and history of the Constitution"[209] and highly problematic as a matter of law, given that Article VI of the Constitution states, in part, that "[treaties] should be supreme Law of the Land."[210] Moreover, he argues that, whether a treaty is self-executing or not, it is nonetheless legally binding on the United States, pointing out that while a treaty may not rule the judiciary branch, there is no evidence that it does not govern the executive or legislative branches.[211] Instead, he says that "it is [the executive and legislative branches'] obligation to do what is necessary to make [the treaty] a rule for the courts . . . if making it a rule for the courts is a necessary or proper means for the United States to carry out its obligation."[212]

The commanding and influential legal weight that international human rights carry is evident, even despite the judicial barriers established by the United States.[213] As Judge Rosalyn Higgins observes, the passing of binding law is not the only way in which law develops, since "legal consequences can also flow from acts which are not, in the formal sense, 'binding.'"[214] In addition, the widespread acceptance of this type of law, often referred to as soft or non-binding law, "tend[s] to legitimize conduct and make the legality of opposing positions harder to sustain."[215] Other human rights instruments such as guidelines and declarations adopted at the international level also bear weight, as do regional human rights systems already in place.[216]

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[209] HENKIN ET AL., *supra* note 8, at 781.

[210] U.S. CONST. art. VI.

[211] HENKIN ET AL., *supra* note 8, at 781-82.

[212] *Id.*; *see* Henkin, *supra* note 207, at 343-46, 343 n.11.

[213] Boyle, *supra* note 13, at 120 (citing ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 24 (1995)); Henkin, *supra* note 207, at 343 n.11. Advocates have used the U.S. court system to interpret domestic laws to protect the universal and fundamental rights embodied in international human rights law. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003).

[214] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 24 (1995); Vienna Convention, *supra* note 13. Customary international law can be established by showing: (1) general and consistent State practice, and (2) the State following this practice out of a sense of legal obligation, which is referred to as *opinio juris*. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. vs U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 183-86 (June 27).

[215] Boyle, *supra* note 13, at 121.

[216] *International Human Rights Law*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, https://perma.cc/RN6S-YW3N. There are also regional human rights systems in place to help ensure that agreed-upon human rights standards are implemented. These systems include the Inter-American Court of Human Rights (IACrtHR) and its counterpart, the Inter-American Commission on Human Rights (IACHR), which together provide the regional

Arguably the most vital of the UN human rights instruments is the Universal Declaration of Human Rights, with many of its provisions considered to be customary international law.[217] Within the UDHR, Articles 12 and 16(3) explicitly indicate that the right to family is integral, stating that "[n]o one shall be subjected to arbitrary interference with . . . family," and that family is "the natural and fundamental group unit of society and is entitled to protection by society and the State."[218] In the continuing evolution of international human rights law, core human rights treaties, including the ICCPR and the CRC, and the UN Committee bodies charged with aiding in their implementation, have helped give nuance to the broader international norms first articulated in the UDHR's formidable list of rights.[219]

As a domestic matter, the basic premise of parents' right to care, custody, and control of children without state interference is firmly entrenched in U.S. constitutional law as a fundamental liberty guaranteed by the Fourteenth Amendment and supported by extensive Supreme Court precedent from the 1920s to the present day.[220] The rights of children are less explicit in judicial decisions, though countless cases reference the internationally recognized "best interests of the child" principle set forth in the CRC, with one such case expressly acknowledging the harm of family separation.[221]

U.S. courts have also referenced the CRC despite it not yet being ratified: the Supreme Court looked to international practice to abolish the juvenile death penalty, explicitly stating that "every country in the world [had] ratified [the CRC] save for the United States and Somalia," and other district court cases demonstrate how the treaty is persuasive authority in U.S. courts.[222] This idea of looking beyond the shores of the United

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human rights system for the Americas. In certain instances, this can provide an alternate forum for human rights cases when domestic laws fail. An example of this is the pivotal IACHR case, *Jessica Gonzales v. United States*. *See* Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

[217] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290-91 (1996).

[218] UDHR, *supra* note 8, arts. 12, 16(3).

[219] Hannum, *supra* note 217, at 290-91.

[220] Barbara Bennett Woodhouse, *The Family Supportive Nature of the U.N. Convention on the Rights of the Child*, *in* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 37 (Jonathan Todres et al. eds., 2006); *see* Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[221] Nicholson v. Scoppetta, 3 N.Y.3d 357, 378 (2004).

[222] Roper v. Simmons, 543 U.S. 551, 576 (2005); *see* Nicholson v. Williams, 203 F. Supp. 2d 153, 234-35 (E.D.N.Y. 2002); Beharry v. Reno, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (stating that, due to its vast acceptance "to the extent that it acts to codify longstanding, widely-

States for judicial guidance, while not uncommon, is more critical than ever, according to Justice Stephen Breyer, who wrote of the urgency in which the United States needs to use law as a tool "to build a civilized, humane, and just society," and that it must "construct such a society—a society of laws—together."[223]

B. Applying International Human Rights Law

1. ICCPR: The Fundamental Right to Family

The International Covenant on Civil and Political Rights is a U.S.-ratified treaty with significant legal implications for parents' and children's rights that relate to the protection of the family unit, which is among the most fundamental and basic of rights.[224] Adopted by the UN General Assembly in 1966 and ratified by the United States on June 8, 1992, the ICCPR obligates the United States to respect and ensure all the rights of individuals "within its territory and subject to its jurisdiction" and to provide specific remedies in case of any violations; this grants the ICCPR the full force of treaty law as described earlier by Henkin.[225]

Certain articles of the ICCPR are almost identical to the UDHR, such as Article 17(1), which states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."[226] The UN Human Rights Committee, the expert body established

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accepted principles of law, the CRC should be read as customary international law"), *rev'd on other grounds sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003). Somalia has since ratified the CRC. *UN Committee Hails Somalia's Ratification of Convention on the Rights of the Child*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS (Oct. 2, 2015), https://perma.cc/QW7F-7Q7X.

[223] Stephen Breyer, *America's Courts Can't Ignore the World*, ATLANTIC (Oct. 2018), https://perma.cc/28M7-W5B8. Other U.S. Supreme Court Justices recognize this view, including Justice Ruth Bader Ginsburg and Justice Sandra Day O'Connor, who, citing the *Charming Betsy* doctrine, said that for more than two hundred years the Supreme Court has held that acts of Congress should "be construed to be consistent with international law, absent clear expression to the contrary." Sandra Day O'Connor, *Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); *see* Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), https://perma.cc/FE5H-DMLF. Other Justices ardently reject this notion, opposing citations to international law in constitutional cases. Roper, 543 U.S. at 624. In the 2005 dissent, Justice Antonin Scalia, joined by then Chief Justice William Rehnquist and Justice Clarence Thomas, wrote that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."

[224] ICCPR, *supra* note 13, arts. 17, 23-24.

[225] *Id.* art. 2; *see* HENKIN ET AL., *supra* note 8, at 781-82.

[226] ICCPR, *supra* note 13, art. 17(1). This right is also articulated in the CRC. *See* CRC, *supra* note 13, art. 16.

to monitor implementation of the ICCPR, maintains that "arbitrary interference" can include interference provided for by law and that the concept of arbitrariness is "intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant."[227] Prohibiting incarcerated people from communicating with family, whether overtly or more subtly by creating circumstances whereby the person cannot freely communicate, falls under the ICCPR's definition of arbitrary interference and thus violates the treaty. In its commentary, the Human Rights Committee has been unequivocal that incarceration in and of itself does not allow the State to keep an incarcerated person from their family arbitrarily, stating that "prisoners should be allowed under necessary supervision to communicate with their family . . . at regular intervals, by correspondence as well as by receiving visits."[228]

While Article 17 is a negative right meant to forbid the State from interfering arbitrarily with a person's right to family, Article 23(1) of the ICCPR creates a positive right to protection, restating Article 16 of the UDHR that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[229] The Human Rights Committee expressly acknowledges that, within the scope of the rights discussed in Article 23, States are obligated to provide protection to single parents and their children by actively taking actions to safeguard them; single-parent families include many incarcerated mothers and their children.[230] The Committee asserts that the State must adopt all legislative, administrative, and other measures necessary in order to ensure the protection provided for by Article 23.[231] It also maintains that Article 23

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[227] UN Human Rights Comm., CCPR General Comment No. 16: Article 17, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 8, 1988) [hereinafter CCPR General Comment No. 16]. Human rights treaty bodies publish authoritative interpretations of the legal nature of certain provisions in the form of "general comments" or "general recommendations." *See Human Rights Treaty Bodies – General Comments*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, https://perma.cc/WVP8-DETX.

[228] Miguel Angel Estrella v. Uruguay, Comm. No. 74/1980, U.N. Doc. CCPR/C/OP/2, ¶ 9.2 (Mar. 29, 1983). The Human Rights Committee states that when interferences do abide by ICCPR standards and are not deemed to be arbitrary, there must be relevant legislation that specifies the precise circumstances in which interference will be permitted. *See* CCPR General Comment No. 16, *supra* note 227, ¶¶ 1, 8.

[229] ICCPR, *supra* note 13, ¶ 23.

[230] Alston, *supra* note 41, para. 36.

[231] U.N. Human Rights Comm., CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 2, 3, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Jul. 27, 1990) [hereinafter CCPR General Comment No. 19].

bars any discriminatory treatment pertaining to visiting rights or the loss of parental rights.[232]

Article 24 of the ICCPR specifically addresses "the protection of the rights of the child, as such or as a member of a family."[233] The Committee indicates that the State and society are responsible for guaranteeing children this special protection but adds that the duty is nevertheless primarily incumbent on the family itself, particularly the child's parents.[234]

Yet while the United States is charged with prohibiting interference between family members in Article 17; establishing protection of the family in Article 23; and guaranteeing the right to increased protections for children by the State and by their parents in Article 24, incarcerated mothers and their children continue to endure a harsh and different reality. Children of incarcerated mothers are not afforded the special protections required by their minor status, which creates punitive circumstances for them; nor are these children able to be protected by their primary caregivers, who are often unable to maintain meaningful contact because of the circumstances imposed on them.[235] By not adequately considering the role or responsibilities of mothers, often as single parents, the United States violates incarcerated mothers' rights—keeping them from fulfilling parental responsibilities, inflicting more pain, and leaving them more powerless.[236]

2. CRC: Children of Incarcerated Mothers and Their Right to Be Nurtured

Approximately 2.7 million children under the age of eighteen currently have an incarcerated parent in the United States.[237] As laid out, the United States is failing these children; it is also failing to follow international human rights law, despite knowing how damaging the effects of parental imprisonment are on children and their developing brains.[238] This conduct persists despite treaties like the Convention on the Rights of the Child, which is the most widely and rapidly ratified human rights

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[232] *Id.* ¶ 9.

[233] ICCPR, *supra* note 13, ¶ 24(1); CCPR General Comment No. 19, *supra* note 231, ¶ 1.

[234] U.N. Human Rights Comm., CCPR General Comment No. 17: Article 24 (Rights of the Child), ¶ 6, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 7, 1989) [hereinafter CCPR General Comment No. 17].

[235] Adoption and Safe Families Act of 1997, Pub L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7).

[236] ICCPR, *supra* note 13, ¶¶ 23, 24; CCPR General Comment No. 17, *supra* note 234, ¶¶ 1, 3.

[237] Victoria Law, *Double Punishment: After Prison, Moms Face Legal Battles to Reunite with Kids*, TRUTHOUT (Feb. 26, 2017), https://perma.cc/N8BW-X9Q2.

[238] Law, *supra* note 237; Ducharme, *supra* note 16.

treaty in history and which sets out the individual rights of children worldwide.[239]

As previously mentioned, the CRC has been signed by all 193 UN members, including the United States, which did so on February 16, 1995, and has been ratified by all members except for the United States.[240] Regardless of it not yet ratifying such a critical and symbolic international treaty, the United States is required to fulfill its duty as a signatory of the Convention and refrain in good faith from acts that would defeat the object and purpose of the treaty.[241]

In its Preamble, the CRC grants heightened protections for children, stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[242] It explicitly recognizes a child's right to know and be cared for by parents; to not unduly be separated from parents; to benefit from a parent's guidance; and to have the child's best interests always be primarily considered by governments, private entities, courts of law, and administrative authorities whenever the decision could substantially impact the child.[243] The Convention also observes that the parents' right to raise their children is mirrored by the children's right to be raised and nurtured by their parents, stating that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment."[244]

a. The Best Interests of the Child

The best interests of the child standard, one of the most foundational principles of the CRC, is meant to help interpret and implement all of the

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[239] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19-25 (Jonathan Bennett ed., Early Modern Texts 2017) (1689) (ebook); *25th Anniversary of the Convention on the Rights of the Child*, HUMAN RIGHTS WATCH (Nov. 17, 2014), https://perma.cc/LU7J-M3CX.

[240] *US: Ratify Children's Treaty*, HUMAN RIGHTS WATCH (Nov. 18, 2009), https://perma.cc/9HY9-CSFS; *UN Convention on the Rights of the Child (CRC)*, FAWCO, https://perma.cc/L2C3-FE34; The rights laid out in Articles 5, 7, 8, 9 and 16 of the CRC are particularly relevant to children of incarcerated mothers. *See* CRC, *supra* note 13, ¶¶ 5, 7-9, 16.

[241] Vienna Convention, *supra* note 13, ¶ 18. *Vienna Convention on the Law of Treaties*, *supra* note 201. The United States has ratified the two Optional Protocols to the CRC. *See 11.b Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, UNITED NATIONS TREATY COLLECTION, https://perma.cc/LLS4-RVFE; *11.c Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, UNITED NATIONS TREATY COLLECTION, https://perma.cc/532M-TFBS.

[242] CRC, *supra* note 13, at Preamble.

[243] *Id.* at Preamble, arts. 3, 5, 7, 9.

[244] *Id.* arts. 2, 7, 9. As philosopher John Locke acknowledged in 1690: "[C]hildren are not born in this full state of equality, though they are born to it." LOCKE, *supra* note 239, at 19.

child's rights set out in the treaty.[245] Article 3 states that, "in all actions concerning children . . . the best interests of the child shall be a primary consideration."[246] This concept, which is referenced throughout the CRC, is a standard with deep historical roots in U.S. law.[247] Today, every state in the United States has legislation requiring courts to consider the best interests of the child in custody disputes and in termination proceedings, including those initiated under ASFA.[248]

The best interests of the child standard is intended to ensure the child's holistic development by "embracing the child's physical, mental, spiritual, moral, psychological and social development."[249] While the Committee on the Rights of the Child states that application is not necessary in every situation in which a child is indirectly involved, it underscores that, in any action taken by the State that will have "a major impact on a child or children," a comprehensive process of determining the best interests of the child is critical and the child's interests must be taken into primary consideration.[250] Close scrutiny of the individual characteristics and circumstances of every child helps determine the best interests. Factors can include age and experience, as well as the context in which the child or children find themselves, such as whether the child lives with the parent or parents, the quality of the relationships between the child and caregivers, and the safety of the environment.[251]

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[245] U.N. Comm. on the Rights of the Child, CRC General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6), ¶¶ 44-45, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

[246] CRC, *supra* note 13, art. 3.

[247] Revised Codes of the Territory of Dakota § 127 (1877); Elisabeth A. Mason, *The Best Interests of the Child*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 123-24 (Jonathan Todres et al. eds., 2006).

[248] While there is no standard definition of "best interests of the child" in U.S. law, determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent. In determining the best interests of the child, a U.S. court "must balance that risk [of serious harm] against the harm removal might bring, and it must determine factually which course is in the child's best interests." Nicholson v. Scoppetta, 3 N.Y.3d 357, 378 (2004); Mason, *supra* note 247, at 123; SUBCOMM. ON BEST INTERESTS OF THE INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 12 (2016), https://perma.cc/BEB7-WZQ6.

[249] U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), ¶ 4 n.2, U.N. Doc CRC/C/GC/14 (May 29, 2013) [hereinafter General Comment No. 14, Right of the Child].

[250] *Id.* ¶ 20. The UN Committee on the Rights of the Child is the expert body that monitors implementation of the CRC.

[251] *Id.* ¶¶ 48-49.

The Committee states that this standard applies to children affected by situations where their parents are in conflict with the law.[252] It also highlights that children have greater needs than adults in their physical, psychological, and educational development.[253] Any best interests of the child analysis must therefore examine the inherently destructive nature of separating children from their primary caregivers and prohibiting children from maintaining meaningful contact.[254]

Yet, as illustrated by the effects of the Adoption and Safe Families Act, this type of qualitative best interests analysis does not always occur in the United States.[255] As discussed in Part III, there are several dangers inherent in ASFA's approach toward incarcerated parents, including the assumption that all children put up for adoption because of its strict timetable for terminating parental rights will then be placed in what advocates of ASFA envision will be a more nurturing home.[256] However, many children are not adopted, with studies showing that once placed in foster care, they have a fifty percent chance of remaining in such circumstances for three years or longer.[257] In addition, state care has risks such as multiple placement changes, which hurt children's ability to form attachments or maintain connection to school, community, friends, siblings, and extended family, and carries considerable threat of homelessness and incarceration after leaving foster care.[258] Yet while none of these results can be construed to be in the best interests of the child, they are not being adequately weighed when many incarcerated mothers' rights are terminated.[259] This is acutely discriminatory toward incarcerated mothers, who

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[252] *Id.* ¶ 28.

[253] U.N. Comm. on the Rights of the Child, General Comment No. 10 (2007): Children's Rights in Juvenile Justice, ¶ 10, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

[254] *See* Hager & Flagg, *supra* note 63. An estimated seventy-seven percent of mothers in state prison lived with their children just prior to incarceration and provided most of the children's daily care, compared with twenty-six percent of fathers in state prison. CHRISTIAN, *supra* note 82, at 3.

[255] Hager & Flagg, *supra* note 63.

[256] *Id.*

[257] Kennedy, *supra* note 75, at 165 n.27; *see generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTION 3, 7 (2011); Patrick J. Fowler et al., *Pathways to and from Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453, 1457 (2009); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 59 (2006).

[258] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 257, at 7, 11; Fowler et al., *supra* note 257, at 1456-57; Lawrence et al., *supra* note 257, at 59.

[259] U.S. courts must balance the risk of serious harm against the harm of parental termination. *See* Nicholson v. Scoppetta, 3 N.Y.3d 357, 378 (2004); *see also* Hager & Flagg, *supra* note 63. "The just thing to do as a society would be to better support these families with affordable housing, food assistance, drug treatment and childcare, including in prisons." *Id.*

again are five times more likely than incarcerated fathers to have their child placed in foster care.[260]

Undoubtedly, creating a system that automatically threatens parental rights because the mother is imprisoned, regardless of individual circumstances, is discriminatory and unjust.[261] This behavior by the United States also ignores the more nuanced and individualized critical assessment that the Committee on the Rights of the Child emphasizes is essential in order to thoroughly determine the best interests of the child, as the CRC requires.[262] Yet while the particular situation of an incarcerated mother and her child defy quick analysis and instead call for a more individualized and nuanced approach, the destructive conduct of the United States continues.[263] The alarming rhetoric around ASFA, which claims that severing a relationship with an incarcerated parent can often best serve the child's interests,[264] devalues the parent-child bond and irresponsibly disregards international human rights standards; the fact that it is mostly directed at poor women, a disproportionate number of whom are black, does not seem accidental.[265]

Furthermore, since the vital mother-child relationship is not valued, prison environments are not designed to accommodate visiting children and are thus often so hostile that allowing children to go there would not be in their best interests.[266] The more logical and humane approach, which would align with international human rights principles set out in the CRC and the ICCPR, would be for the United States to demand that all prisons and jails meet a minimum standard such that visitation conditions are clean and child-friendly, with an area designated for families to interact without any physical barriers.[267]

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[260] GLAZE & MARUSCHAK, supra note 4, at 5.

[261] *See generally* Kennedy, *supra* note 75.

[262] CRC, *supra* note 13, art. 3.

[263] Hager & Flagg, *supra* note 63.

[264] One well-known ASFA proponent states that "while some parents turn their lives around when they leave prison, their children should not have to wait for a family." *Id.*; Kennedy, *supra* note 75, at 181-83.

[265] *See generally* Kennedy, *supra* note 75; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS *passim* (2010); Kathryn Joyce, *The Crime of Parenting While Poor,* NEW REPUBLIC (Feb. 25, 2019), https://perma.cc/NH67-QADQ.

[266] ACLU ET AL., *supra* note 35, at 50-53, 59.

[267] Bangkok Rules, *supra* note 21. Other measures that would support maintaining meaningful connection between mother and child include extending the length of visits when families confront difficulties due to the distances involved or a lack of resources or transport; providing overnight accommodation for families traveling a long way, free of charge; and increasing the telephone calls if the child is unable to visit due to the long distance. (These examples are also discussed later in this section.) Bangkok Rules, *supra* note 21, rs. 26, 28.

It is also valuable to mention that incarcerated mothers' role as primary caregivers does not suggest that those who have committed a crime should not face any penalties or that maintaining a relationship is always in the best interests of the child. Rather, the best interests should be determined holistically on a case-by-case basis.[268]

b. The Right to Parental Care

The CRC does not differentiate between the rights of children of incarcerated parents and the rights of all other children, with the principle of non-discrimination fundamentally rooted in the treaty. Article 2(1) provides that a child has the right to be free from discrimination "irrespective of [a] parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status," and Article 2(2) obligates States to ensure that no child is discriminated against on the basis of the actions of their parents.[269]

Many of the CRC provisions are relevant to circumstances often faced by children of incarcerated mothers and, unsurprisingly, these provisions illustrate how intertwined the rights of the child are with the child's right to family. Article 7, an example of that interconnectedness, protects "as far as possible the [child's] right to know and be cared for by his or her parents."[270] The child's right to parental care is further articulated in a General Comment by the Committee, which emphasizes that "young children are best understood as social actors whose survival, well-being and development are dependent on and built around close relationships"[271] and that, unless it is not in the interests of the child, family is the best environment since "[they] are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents."[272] The CRC also recommends that States adopt programs and policies that strengthen the family, suggesting that countries are responsible for ensuring conditions that allow children to exercise their rights and parents to meet their obligations.[273]

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[268] General Comment No. 14, Right of the Child, *supra* note 249, ¶¶ 32-34, 46-50.

[269] CRC, *supra* note 13, art. 2(1)-(2).

[270] *Id.* art. 7.

[271] U.N. Comm. on the Rights of the Child, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, ¶ 8, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

[272] *Id.* ¶ 18.

[273] CRC, *supra* note 13, arts. 5, 8(1), 16, 18; *see also* U.N. Comm. on the Rights of the Child, General Comment No. 7 (2005) ¶ 15; U.N. Comm. on the Rights of the Child; Consideration of Reports Submitted by States Parties under Article 44 of the Convention, ¶ 33(b), U.N. Doc. CRC/C/15/Add.196 (Mar. 17, 2003).

Article 9 most explicitly addresses the children of incarcerated mothers, asserting that "a child shall not be separated from his or her parents against their will" unless it would be contrary to the child's best interests.[274] Because of this recognized right, the UN Guidelines for the Alternative Care of Children, which set out best practices using the CRC's principles, says that when sentencing primary caregivers, non-custodial sentences should be issued whenever possible, on a case-by-case basis; it also instructs States to provide specific protective measures when handling circumstances involving the separation of a child from their parent, noting that "removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration."[275] Moreover, when there is a separation, Article 9(3) obligates States to respect the child's rights "to maintain personal relations and direct contact" with the separated parent on a regular basis.[276]

Yet despite the CRC's persuasive authority, meaningful and individualized consideration of the rights of children with incarcerated parents is frequently ignored in the United States. Among the examples of this are the bleak visiting conditions in U.S. prisons and jails that inhibit positive interactions between mother and child, thus inhibiting the child's right to parental care. The Committee has stated that child-friendly prisons are critical and urges that "due consideration and good faith efforts . . . be made in providing a [prison] visit context that [is] respectful to children's dignity, right to privacy and which is child-friendly and conducive to positive child-parent interaction for children of different ages."[277]

c. The Parents' Right to Fulfill Their Responsibilities

The inverse of children's right to parental care is the parents' right to fulfill their responsibilities to their children.[278] Several provisions within the CRC provide for such rights. Article 5 references parental

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[274] CRC, *supra* note 13, art. 9.

[275] G.A. Res. 64/142, Guidelines for the Alternative Care of Children, ¶ 14, 48, 69 (Feb. 24, 2010) [hereinafter Guidelines for the Alternative Care of Children]. "Presumptive responsibility, unless shown to be otherwise, is with the child's parents or principal caregivers." *Id*.

[276] Comm. on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents," ¶ 35 (Sept. 30, 2011).

[277] *Id.* ¶ 24.

[278] KOFI. A. ANNAN, UNITED NATIONS, WE THE CHILDREN: MEETING THE PROMISES OF THE WORLD SUMMIT FOR CHILDREN 72 (2001), https://perma.cc/3BRH-ZEA4. "The primary responsibility for promoting children's development and well-being [lies with the parents]." U.N. Comm. on the Rights of the Child, *supra* 271 ¶¶ 18.

child-rearing responsibilities, obligating States to respect the right to exercise parental duties.[279] Articles 18 and 27 of the CRC similarly affirm the importance of the responsibility that parents have in the upbringing of their children.[280] Article 18(1) provides that States shall use their best efforts to ensure parents "have the primary responsibility for the upbringing and development of the child."[281]Article 18(2) and Article 27(3) require that States must take appropriate measures to assist parents with these child-rearing responsibilities, including through material assistance and support programs.[282]

The CRC illuminates the striking contrast between what a government fully aligned with international standards on child rights owes its citizens—including actively supporting positive conditions for successful parent-child relationships—and what the United States imposes on incarcerated mothers and their children.

3. *M v. State*: A Valuable Judgment in South Africa

Jurisprudence from other countries illustrates how implementing international principles can substantially alter outcomes. In a groundbreaking ruling in 2007, the Constitutional Court of South Africa expressly considered the defendant's children at sentencing, applying both the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC) in the determination.[283]

In the case, *M v. State*, a mother who served as the primary caregiver of her three children had been convicted of a series of non-violent fraud offenses and was facing imprisonment.[284] Instead of focusing on whether the mother should receive a custodial sentence, the Court instead concentrated on the children's rights, applying a comprehensive analysis of the best interests of the child standard that carefully considered the damaging

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[279] CRC, *supra* note 13, art. 5. This right is aligned with the U.S. Constitution, as discussed in *Stanley v. Illinois*, which states that absent a showing of "powerful countervailing interest," parents have the right to maintain contact with their children. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[280] CRC, *supra* note 13, arts. 18, 27.

[281] *Id.* art. 18(1).

[282] *Id.* arts. 18(2), 27(3).

[283] *See* African Charter on the Rights and Welfare of the Child, arts. 19, 30, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 [hereinafter Children's Charter]; *see generally M v. State* 2008 (3) SA 232 (CC) (S. Afr.); African Comm. of Experts on the Rights and Welfare of the Child, African Union, General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers," ¶¶ 6-9, ACERWC/GC/01 (2013) [hereinafter ACERWC General Comment No. 1].

[284] *M v. State* 2008 (3) SA 232 (CC) at 2 para. 2 (S. Afr.).

nature of separation.[285] Ultimately, the court held that incarceration would have a negative impact on the mother's children and sentenced her to a period of correctional supervision, which included community service and repayment to victims.[286]

Former South Africa Constitutional Court Justice Albie Sachs, one of the judges who decided the case, remarked later that he was pleased with the outcome, which emphasized the critical necessity to look at the child as a person with a distinctive personality whose rights should be, at minimum, a primary consideration during sentencing.[287] Justice Sachs stressed that "[children] cannot be treated as a mere extension of [their] parents," and that the right to parental care, articulated in Article 7 of the CRC and Article 19 of the ACRWC, is often not given enough weight.[288] He expounded on how the rights of the child are commonly viewed either as physical or nutritional, but that the right to nurturing "[and] to have somebody in the home, somebody close to them"[289] is also crucial when applying the best interests standard.[290] Thus, Justice Sachs stated, when circumstances permit, non-custodial sentences must be an essential consideration.[291]

C. The United States' Inadequate Efforts to Implement Human Rights Principles

> "The essential humanity of man can be protected and preserved only where the government must answer—not just to the wealthy, not just to those of a particular religion, not just to those of a particular race, but to all the people."[292]

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[285] *Id.* at 15-16 para. 25; *see* ACERWC General Comment No. 1, *supra* note 283, ¶¶ 22-24.

[286] *M v. State* 2008 (3) SA 232 (CC) at 41-48 paras. 66-77 (S. Afr.).

[287] *Id.* at para. 18; *see generally* Strathclyde Center for Law, Crime and Justice, *Doing Children Justice: What is the Impact of Imprisonment on Dependent Children?*, YOUTUBE (Mar. 15, 2014), https://www.youtube.com/watch?v=DwwjcPoSrFI. Justice Sachs was part of a panel discussion at Strathclyde Centre for Law, Crime and Justice.

[288] Strathclyde Center for Law, Crime and Justice, *supra* note 287; *see* Children's Charter, *supra* note 283, art. 19; CRC, *supra* note 13, art. 7.

[289] Strathclyde Center for Law, Crime and Justice, *supra* note 287, at 34:10-34:40.

[290] *M v. State* 2008 (3) SA 232 (CC) (S. Afr.) at 18, para. 36; *see generally* Strathclyde Center for Law, Crime and Justice, *supra* note 287.

[291] Strathclyde Center for Law, Crime and Justice, *supra* note 287.

[292] Robert F. Kennedy, Day of Affirmation Address at the University of Cape Town (June 6, 1966), https://perma.cc/CU2N-QYPP.

1. The Federal Dignity Act: Why Congress Still Has Not Passed It into Law and How It Is Sparking State Action

There have been some legislative efforts in the United States to develop gender-responsive policies aligned with international human rights principles, including the well-publicized Dignity for Incarcerated Women Act (Dignity Act). First introduced in 2017, the Dignity Act recognizes both the ways in which incarcerated women are overlooked in the U.S. correctional system and their inherent right to human dignity; its implications could greatly affect incarcerated mothers and their children.[293] Among its provisions, the Dignity Act would allow incarcerated women who are pregnant or primary caregivers to be eligible for non-custodial sentencing, including residential substance abuse programs.[294] It would also provide for more substantial visitation hours for family, including children; allow for physical contact during visits; introduce a pilot program for overnight visits by children of incarcerated mothers; ban federal prisons from charging for telephone calls; and require the Bureau of Prisons to implement video conferencing technology free of charge.[295]

Despite these integral and much-needed reforms, Congress has yet to pass the Dignity Act.[296] Nevertheless, there continues to be support for the bill, which was reintroduced in April 2019.[297] Moreover, the Dignity Act has spurred state action: as of February 2020, eleven states have passed legislation modeled after it and three other states have legislation in progress.[298]

Most recently, New Jersey's Dignity for Incarcerated Primary Caretaker Parents Act, which has provisions modeled after the federal legislation and explicitly focuses on the unique challenges of incarcerated primary caregivers, was signed into law.[299] Crucially, it creates one of the

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[293] Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017); Christina Cauterucci, *Inside the Legislative Fight for the Rights of Incarcerated Women*, SLATE (Jul. 19, 2017), https://perma.cc/6X5U-SAQV.

[294] S. 1524 § 2. The bill states that the BOP may not block a primary caregiver or pregnant person from residential substance abuse treatment for failing to disclose that they have a substance abuse problem. *Id.*

[295] *Id.* §§ 2-3.

[296] Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017).

[297] *Id*; Rachel Frazin, *Warren, Booker Reintroduce Dignity for Incarcerated Women Act*, HILL (Apr. 3, 2019) https://perma.cc/NC64-HEUG.

[298] For an interactive map of states that have adopted such legislation, see *Dignity for Incarcerated Women,* DREAM CORPS (2019), https://perma.cc/2FD9-M5AC.

[299] Dignity for Incarcerated Primary Caretaker Parents Act, Assemb. B. 3979, 219th Leg., Reg. Sess. (N.J. 2019). The Dignity for Incarcerated Primary Caretaker Parents Act was signed

"strongest corrections oversight structures in the country by strengthening the Office of the Corrections Ombudsperson, an independent office that reports directly to the governor."[300] Among its provisions: contact visits must be available at least six days a week, including weekends, for at least three hours at a time, with no limit on the number of children who can visit; parenting classes must be offered; and special care must be provided for those who have experienced trauma.[301] As mentioned, the law will substantially increase the scope and powers of the existing Office of the Corrections Ombudsperson, which can conduct inspections of prison facilities, including unannounced visits.[302]

2. The First Step Act and Its Minor Step for Incarcerated Mothers and Their Children

While it is evident that some states have begun to respond to the plight of incarcerated mothers, the federal government has not been as proactive in recognizing the ways in which they are being adversely affected by its incarceration policies. Still, while having only a minimal impact on incarcerated mothers and their children's lives, there has been some modest movement due to bipartisan legislation: in December 2018, the First Step Act, perceived by many to be significant criminal justice reform, was signed into law and, on its merits, does provide some meaningful and hard-fought first steps in federal sentencing reform.[303] One provision that directly applies to incarcerated mothers codifies the BOP's guidelines requiring incarcerated people in federal prisons to be placed within 500 driving miles from their families or homes.[304] Another bars

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into law on January 9, 2020. Press Release, Office of Governor Phil Murphy, Governor Murphy Signs Dignity for Incarcerated Primary Caretaker Parents Act (Jan. 9, 2020), https://perma.cc/TER7-A85L; Press Release, ACLU, NJ Governor Signs Law Establishing Historic Oversight of Prisons and Helping Incarcerated Parents Maintain Bonds (Jan. 9, 2020), https://perma.cc/RD3Q-RM4S; *see* Colleen O'Dea, *Making Life a Little Easier for Women – or Any Parent – Serving Time in Prison*, N.J. SPOTLIGHT (Apr. 24, 2018), https://perma.cc/YM5B-PLS3.

[300] ACLU, *supra* note 299; *see* N.J. Assemb. B. 3979.

[301] N.J. Assemb. B. 3979.

[302] *Id.* "The office will identify systemic issues and ensure compliance with laws and policies governing the treatment of prisoners. The ombudsperson will receive and investigate complaints concerning incarceration from a wide variety of sources: incarcerated people, their families, government agencies, advocates, and anyone with knowledge of what happens inside." ACLU, *supra* note 299.

[303] Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018), https://perma.cc/QC5Q-BHRU; Jasmine L. Tyler, *Why the FIRST STEP Act Shouldn't Be the Last*, HUMAN RIGHTS WATCH (Dec. 20, 2018), https://perma.cc/WUZ4-MS5H.

[304] First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237; *Custody and Care Designations*, *supra* note 169.

the shackling of pregnant women, a ban that was previously a federal policy but often disregarded.[305] More generally, the law also helps improve living conditions for the estimated 16,000 incarcerated women in federal prison by providing basic feminine hygiene items, once exorbitantly priced in prison commissaries, at no charge.[306]

There have also been reports of unintended consequences, including the pending "risk and needs assessment" tool that will be used to determine which incarcerated people are eligible for rehabilitative programs and early release; however, some believe that it could further harm the most marginalized individuals in prison.[307] Another provision within the law could allot millions of dollars to private companies that run post-prison reentry programs, which the American Civil Liberties Union highlighted as a cause for concern before the passage of the First Step Act, stating that it could "result in the further privatization of what should be public functions and would allow private entities to unduly profit from incarceration."[308]

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[305] First Step Act of 2018, Pub L. No. 115-391, § 301, 132 Stat. 5194, 5217-20.

[306] *Id.* § 611. Soon after the 2017 Dignity Act was introduced, the BOP issued a policy mandating prisons to give out free sanitary products; the First Step Act codifies this into federal law. *See* FED. BUREAU OF PRISONS, RSD/FOB 001-2017, PROVISION OF FEMININE HYGIENE PRODUCTS (2017), https://perma.cc/UBH3-EHQZ.

[307] Jamil Smith, *Criminal Justice Legislation Means Nothing Without Follow-Through*, ROLLING STONE (Mar. 21, 2019), https://perma.cc/HW2E-H6BP; Kanya Bennett, *The First Step Act Was Exactly That, a First Step. What Comes Next?*, ACLU (Oct. 25, 2019), https://perma.cc/K6HH-V9VV; Bryan Furst, *Trump's Budget Requests Nothing for the FIRST STEP Act*, BRENNAN CTR. FOR JUSTICE (Mar. 21, 2019), https://perma.cc/2GM5-DGQK. In October 2019, Andrea James of the National Council for Incarcerated and Formerly Incarcerated Women and Girls testified before the U.S. Senate, stating that she was "skeptical that this system can be implemented in a way that fully respects the individual circumstances and background of each incarcerated person," particularly women. Bennett, *supra*.

[308] ACLU & The Leadership Conference, Letter to Majority and Minority Leaders of the U.S. Senate Regarding S. 756, at 4 (Dec. 17, 2018), https://perma.cc/7B5X-63JN; Liliana Segura, *The First Step Act Could Be a Big Gift to CoreCivic and the Private Prison Industry*, INTERCEPT (Dec. 22, 2018), https://perma.cc/9V3U-XHZ9. The *Tampa Bay Times* has reported that the bill authorizes "a $375 million expansion of post-prison services for inmates transitioning back into society," which would benefit private prison companies such as CoreCivic (formerly Corrections Corporation of America). *See* Steve Contorno, *Why is a Florida For-Profit Prison Company Backing Bipartisan Criminal Justice Reform?*, Tampa Bay Times (Dec. 10, 2018), https://perma.cc/RE9H-H5D3. The market for reentry facilities and electronic monitoring is burgeoning. This has troubling implications. *See* AM. FRIENDS SERV. COMM. ET AL., TREATMENT INDUSTRIAL COMPLEX: HOW FOR-PROFIT PRISON CORPORATIONS ARE UNDERMINING EFFORTS TO TREAT AND REHABILITATE PRISONERS FOR CORPORATE GAIN 8-9 (2014), https://perma.cc/6LJB-RQ4W.

D. The United Nations' Bangkok Rules: Concrete Guidelines That Recognize the Role of the Mother and the Gravity of the Parent-Child Bond

Despite the efforts sparked by blatant international human rights violations and rising national concern, both the U.S. federal government and many states continue to give little attention to implementing a gender-sensitive approach that holistically considers each person's circumstances, including the role many women play as primary caregivers.[309] Specific guidelines for such an approach can be seen in the rules developed by the United Nations, which recognize the ways in which the world's prison systems design incarceration specifically for men, with harmful outcomes for incarcerated women, including incarcerated mothers and their children.[310] In accordance with international human rights law, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders were adopted by the UN General Assembly in 2010 to address the particular needs of women in correctional systems and propose alternatives to imprisonment.[311] The Rules are also the first international instrument to specifically consider the needs of children with incarcerated mothers.[312]

These guidelines, commonly referred to as "the Bangkok Rules" in recognition of the city where they were drafted, outline a human-rights-based approach that acknowledges the different characteristics and experiences of women,[313] including consideration of the fact that they are often convicted of non-violent crimes closely linked with poverty.[314]

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[309] Though most incarcerated women are in state facilities, federal legislation has historically been seen as an example to states, which is another reason it is so critical that the federal government passes the Dignity for Incarcerated Women Act. *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 703 (2016); *see also* Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019).

[310] Bangkok Rules, *supra* note 21.

[311] *Id.*; PENAL REFORM INT'L, *supra* note 22, at 4. In addition to the CRC, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has also heavily influenced the Bangkok Rules. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

[312] Bangkok Rules, *supra* note 21; *Laws on Children Residing with Parents in Prison*, LIBRARY OF CONG., https://perma.cc/R4ZJ-738L (last updated June 9, 2015).

[313] *Id.*; PENAL REFORM INT'L, *supra* note 22, at 4-5.

[314] UNITED NATIONS OFFICE ON DRUGS & CRIME, COMMENTARY TO THE UNITED NATIONS RULES FOR THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) 40, 45 (2011); PENAL REFORM INT'L & THAI. INST. OF JUSTICE, GUIDANCE DOCUMENT ON THE UNITED NATIONS RULES ON THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) 14 (2013), https://perma.cc/UC3G-TH8N.

This gender-responsive approach, unanimously voted for by all UN Member States, consists of seventy rules that are meant to guide policy-makers, legislators, sentencing authorities, and prison staff, and to encourage countries to implement such guidelines in an effort to combat the discrimination incarcerated women face in prison.[315]

The Bangkok Rules emphasize in Rule 64, as well as in Rules 2, 57, and 58, that non-custodial sentences should be employed whenever possible.[316] The Rules assert that a considerable number of incarcerated women, many of whom are mothers with dependent children, do not pose "a risk to society."[317] Therefore, the Rules contend, non-custodial alternatives often make more logical sense, especially when considering both the gravity of the offense and the best interests of the child standard articulated in Article 3 of the CRC.[318] The Official Commentary on the Bangkok Rules points out that by keeping mothers out of prison when incarceration is not necessary, children may be saved from "the enduring adverse effects of their mothers' imprisonment, including their possible institutionalization and own future incarceration."[319] It also notes that prisons inherently are not designed for women with minor children or pregnant women.[320]

Another relevant guideline, discussed in Rule 26, emphasizes that in custodial sentences, contact with children should be encouraged and facilitated by all reasonable means.[321] This rule focuses on the particular importance of maintaining familial connections and encourages flexibility in applying visitation rules to "safeguard against the harmful impact of separation."[322] This is in accordance with Rule 4, which taking into account caregiving responsibilities, requires that incarcerated mothers serve their sentences as close to their children as possible.[323]

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315 *See* Bangkok Rules, *supra* note 21; PENAL REFORM INT'L, *supra* note 22, at 3. By voting in favor of the Bangkok Rules, UN member countries agreed to adhere to its guidelines. *See* PENAL REFORM INT'L, *supra* note 22, at 4. Although mainly concerned with the needs of women, some of the rules address issues applicable to both incarcerated men and women, including those related to parental responsibilities. *See* Bangkok Rules, *supra* note 21, annex ¶ 12.

316 Bangkok Rules, *supra* note 21, rs. 2(2), 57-58, 64.

317 UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 43.

318 Bangkok Rules, *supra* note 21, rs. 2(2), 57-58.

319 UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 43.

320 *Id.* at 46-47.

321 Bangkok Rules, *supra* note 21, r. 26.

322 UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 35.

323 Bangkok Rules, *supra* note 21, r. 4; UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 25.

A third guideline stresses that visits involving children must be conducted in an environment that promotes dignity.[324] Rule 28 explicitly considers the emotional need for physical contact by both incarcerated mothers and their children, and requires a child-friendly environment.[325] Creating a comfortable atmosphere where there is an emphasis on quality visitation is also cited as a way to reduce the toxic stress that, as discussed in Part II, children often suffer in these circumstances.[326] Rule 43 provides that prison staff should, when possible, facilitate visitation through measures that include extending the length of visits when families confront difficulties in travel due to distance, resources or lack of transport; offering overnight accommodations for families traveling a long way, free of charge; and increasing the frequency of telephone calls women are allowed if their families are unable to travel due to the far distance.[327] Rule 21 maintains that during searches, prison staff should demonstrate professionalism and sensitivity, preserving children's respect and dignity.[328] The Official Commentary on the Bangkok Rules discusses the importance of this rule, describing how incarcerated mothers can often become so distressed at seeing their children handled without appropriate care that they may decide to forgo future visits in an effort to avoid putting their children through "the humiliating and potentially damaging experience of such practices."[329]

In addition to these recommendations, the Bangkok Rules also provide vital guidelines that support mothers: they include the need for programs that address the underlying causes of an offense; parenting skills; employment training; and access to individualized, gender-specific, and trauma-informed healthcare, such as treatment programs for substance addiction.[330]

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[324] Bangkok Rules, *supra* note 21, r. 28; UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 33-34, 36.

[325] Bangkok Rules, *supra* note 21, r. 28. The Official Commentary stresses that "conditions of visits are of utmost importance, so that visits are experienced as a positive experience, rather than discouraging further contact." UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 36.

[326] UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 39-40; *see* discussion *supra* Part II.

[327] UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 39-40.

[328] *Id.* at 33-34; Bangkok Rules, *supra* note 21, r. 21.

[329] UNITED NATIONS OFFICE ON DRUGS & CRIME, supra note 314, at 33.

[330] Bangkok Rules, *supra* note 21, rs. 12, 15, 63; UNITED NATIONS OFFICE ON DRUGS & CRIME, supra note 314, at 29-30, 30-31, 46.

By helping incarcerated mothers, the United States helps their children; in many instances, no additional resources would be needed to implement these international guidelines in the U.S. correctional system—only a change of consciousness. [331]

CONCLUSION: A CALL FOR THE UNITED STATES TO ADOPT AN APPROACH ROOTED IN HUMAN RIGHTS LAW

> "Every life is a piece of art, put together with all means available."[332]

There are a number of steps that the United States can take to address the human rights violations inherent in the way that U.S. correctional facilities incarcerate mothers and subsequently separate them from their children. Many of these proposed changes have been proven to reduce recidivism rates and save taxpayers money, in addition to better aligning the United States with international human rights laws and principles.[333] While the following suggestions are by no means exhaustive, they pull from recent research and proposals aimed at tackling this immense issue.

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[331] *See* PENAL REFORM INT'L & THAI. INST. OF JUSTICE, *supra* note 314, *passim*.

[332] VAN DER KOLK, *supra* note 6, at 112 (quoting the French psychologist Pierre Janet). In 1889, Janet published *L'Automatisme Psychologique*, which dealt with how the mind processes traumatic experiences. In his crucial work, Janet asserted that failing fully to confront overwhelming experiences can lead to dissociation of the traumatic memories and their return as fragmentary reliving of the trauma, including through both behavioral reenactments and somatic states. Traumas, Janet said, "produce their disintegrating effects in proportion to their intensity, duration and repetition." *See* Bessel A. van der Kolk & Onno van der Hart, *Pierre Janet and the Breakdown of Adaption in Psychological Trauma*, 146 Am. J. Psychiatry 1530, 1535-37 (1990); *see generally* PIERRE JANET, L'AUTOMATISME PSYCHOLOGIQUE (1889).

[333] SANETA DEVUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 10 (2015). Research indicates that incarceration costs approximately $29,000 per person, per year. When the often necessary expense of placing the children of incarcerated mothers in foster care is considered, the costs more than double. In comparison, the cost of drug treatment ranges between $1,800 for regular outpatient services and $6,800 for long-term residential services per client, per year. The United Nations Office on Drugs and Crime ("UNODC") has also noted that investments in rehabilitation programs are one of the best and most cost-effective ways of preventing recidivism, with significant benefits not only to the individual but to society more broadly. Aimee Picchi, *The High Price of Incarceration in America*, CBS NEWS (MAY 8, 2014), https://perma.cc/QMW7-FJWU; ACLU ET AL., *supra* note 35, at 9; *Rehabilitation and Social Reintegration of Prisoners*, UNITED NATIONS OFFICE ON DRUGS & CRIME, https://perma.cc/ZHE8-6QK9; *see also* Caitlin Curley, *The Simpler, Cheaper Alternative to Incarcerating Drug Users,* GENFKD (Mar. 18, 2016), https://perma.cc/TC6F-DX99; Caitlin Curley, *Reclassifying Minor Crimes: An Easy Solution or Dangerous Mistake?,* GENFKD (Feb. 2, 2016), https://perma.cc/2N2V-79MQ.

A. Recommendations

- Employ a Holistic Framework Within the U.S. Correctional System

In order to combat the cyclical nature of incarceration, there must be a greater recognition of the issues that often underlie imprisonment. Women specifically are frequently caught at the crossroads of racial, gender, and economic oppression, factors that are intertwined with the majority of the offenses that they commit.[334] Failure to adequately address these underlying issues has devastating consequences for incarcerated mothers and their children, including the termination of parental rights.[335]

- Focus on Non-Custodial Alternatives to Imprisonment

The United States must aim to increase non-custodial measures for convicted mothers and other primary caregivers, especially those whose crimes are non-violent.[336] As discussed in the Bangkok Rules, focusing on non-custodial sentences for mothers of dependent children often is not only a more effective response but also is imperative to minimize the harmful and long-term effects of parental incarceration on children.[337]

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[334] KAJSTURA, *supra* note 4; *see generally* ALEXANDER, *supra* note 130; Samuel Moyn, *Human Rights Are Not Enough*, NATION (Mar. 16, 2018), https://perma.cc/B6DR-8ZMH; Elise Gould, Senior Economist, Econ. Policy Inst., Testimony before the U.S. House of Representatives Ways and Means Committee: Decades of Rising Economic Inequality in the U.S. (Mar. 27, 2019), https://perma.cc/3488-HMYU; *Kimberlé Crenshaw on Intersectionality, More than Two Decades Later*, *supra* note 122; *UN Faults US on Racism*, HUMAN RIGHTS WATCH (Mar. 6, 2008), https://perma.cc/F79S-VNVX; Alston, *supra* note 41. As necessary background in which to effectively argue for human rights, there must be an acknowledgment of the need for economic and social rights in the United States. While this has not been adequately recognized by U.S. policies, these human rights are articulated in the UDHR, including Article 25, which states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." It also states that "motherhood and childhood are entitled to special care and assistance." *See* UDHR, *supra* note 8, art. 25(1). As Nelson Mandela eloquently stated: "[O]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life." Nelson Mandela, Address for the "Make Poverty History" Campaign (Feb. 3, 2005), https://perma.cc/3E5A-D7J7.

[335] Hager & Flagg, *supra* note 63; Stillman, *supra* note 5; TOMRIS ATABAY, UNITED NATIONS OFFICE ON DRUGS & CRIME, HANDBOOK FOR PRISON MANAGERS AND POLICYMAKERS ON WOMEN AND IMPRISONMENT 7 (2008), https://perma.cc/4YWM-AWPV.

[336] Stillman, *supra* note 5.

[337] As discussed in Part IV, the Official Commentary on Rules 57 and 58 of the Bangkok Rules notes that "a considerable proportion of women offenders do not necessarily pose a risk to society and their imprisonment may not help, but hinder their social reintegration." UNITED NATIONS OFFICE ON DRUGS & CRIME, supra note 314, at 43. "The majority of these women do not need to be in prison at all. Most [women] are charged with minor and non-violent offences." ATABAY, *supra* note 335, at 4. *See generally* PENAL REFORM INT'L, *supra* note 22.

This suggestion aligns with principles articulated in the Convention on the Rights of the Child, the International Convention on Civil and Political Rights, and the Universal Declaration of Human Rights. It is also reflected in a report by the UN Committee on the Rights of the Child on Children of Incarcerated Parents:

> The Committee emphasises that in sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pretrial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).[338]

Alternative penalties for sentencing authorities are referred to in the Bangkok Rules.[339] These UN-recommended measures include: (1) verbal sanctions, such as admonition, reprimand, and warning; (2) restitution to the victim or a compensation order; (3) a suspended or deferred sentence; (4) probation and judicial supervision; (5) a community service order; (6) referral to an attendance center; (7) house arrest; or (8) any other mode of non-institutional treatment.[340]

There is an ever-increasing recognition across the United States that non-custodial alternatives are essential to genuinely helping people change their lives in ways that prisons most certainly do not.[341] What is needed now is for that recognition to be put into practice on a broad scale.

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[338] Comm. on the Rights of the Child, *supra* note 276, ¶ 30.

[339] Bangkok Rules, *supra* note 21, annex, r. 58 "Taking into account the provisions of Rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties." *Id.*

[340] G.A. Res. 45/110, U.N. Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), ¶ 8(2) (Dec. 14, 1990). The Tokyo Rules also list economic sanctions and monetary penalties as alternatives to incarceration, but for mothers who are already facing extreme economic hardships, this would not be effective since it would only add to their already heavy burden. *Id.*

[341] Meredith Derby Berg, *Massachusetts Mobilizes to Treat Addicted Moms,* MARSHALL PROJECT (Jan. 19, 2016), https://perma.cc/M2X6-SL62. The average four-to-six month stay at Edwina Martin House, a residential recovery home in Brockton, Massachusetts, which receives significant state funding, costs between $12,000 and $18,000. Comparatively, according to correction department data, the women's prison in Framingham, Massachusetts, the oldest women's prison in the United States, costs $60,000 per person, per year. *Id.*; *see also* REMERGE, https://perma.cc/7X9T-Y5B7. ReMerge is a comprehensive female diversion program based in Oklahoma, which has the highest female incarceration rate in the United States. *Id*.

- Designate Child-Friendly Areas in All Federal and State Prisons for Children to Visit in Environments That Promote Dignity

In most circumstances, contact between mother and child should be encouraged and facilitated by all reasonable means. Correctional officers should respect the child's right to parental care and should also promote visitation and demonstrate sensitivity in all interactions with children.[342] Visits must be conducted in a child-friendly atmosphere that embraces a child's right to develop and flourish, and a child's inherent right to dignity.[343] Indiana Women's Prison in Indianapolis is one such example of a prison that has made efforts to accommodate visiting children.[344]

- Ban Expensive Telephone Calls and Be Wary of Video Alternatives to Face-to-Face Meetings

Prisons must stop charging mothers inordinately high prices to call their children.[345] This not only inhibits mothers from effectively keeping in touch with their children but adds to the already heavy economic burden they face.[346] Moreover, while video visitation is often discussed as a potential solution to maintaining better contact, there is a disturbing trend in jails throughout the United States that use this technology: approximately seventy-four percent have banned in-person visits after implementing video visitation.[347] Research shows that early childhood experiences become prototypes for later connections with others and that a person's "most intimate sense of self is created in our minute-to-minute exchanges with our caregivers."[348] Thus, while video technology is certainly adjunctive, it is not a substitution for in-person meetings.[349]

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[342] This suggestion is aligned with Bangkok Rules 4, 12, 26, 28, and 43. *See* Bangkok Rules, *supra* note 21; CRC, *supra* note 13, at 7.

[343] Bangkok Rules, *supra* note 21, rs. 12, 28, 43; *see generally* CRC, *supra* note 13; ICCPR, *supra* note 13, at Preamble; UDHR, *supra* note 8, at Preamble.

[344] Indiana Women's Prison designates a large playroom, along with play equipment, books, toys, and a place for mothers to prepare snacks for visiting children. Thompson, *supra* note 82.

[345] Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017); Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019).

[346] Ramachandra, *supra* note 87; WAGNER & JONES, *supra* note 87; *see* discussion *supra* Part I.

[347] RABUY & WAGNER, *supra* note 89; *see* Ramachandra, *supra* note 87; WAGNER & JONES, *supra* note 87; *see generally* SAKALA, supra note 89.

[348] *See* VAN DER KOLK, *supra* note 6, at 109.

[349] For an example of a positive adjunctive use of video technology, *see* Elaine Quijano, *Imprisoned Mothers Read to Their Children Through Storybook Project*, CBS NEWS (Feb. 11, 2016), https://perma.cc/NXG5-PC6C.

- Implement Better Checks on the Bureau of Prisons to Ensure that It Follows Its Own Policies and Modify Federal Sentencing Guidelines

The Bureau of Prisons cannot maintain its current level of discretion without better oversight of its behavior, especially when it is not adhering to its own policies, a fact recently underlined by the Justice Department's criticism of the BOP's "management of female inmates."[350]

While its visitation regulations state that the BOP "encourages visiting by family . . . to maintain the morale of the inmate and to develop closer relationships between the inmate and family members," this is not adequately taking place; similarly, it does not seem that best efforts are being made to place those who are incarcerated as close to home as possible, as is described in the BOP's designation guidelines.[351] So, while the First Step Act did recently codify BOP policies to require that people incarcerated in federal prisons be placed within 500 driving miles from their families or homes, it is not clear whether this is being followed—what is apparent is that the Bureau of Prisons should not have the sole authority in determining prison designations, especially for incarcerated mothers.[352]

Judges should be empowered to better determine prison placements and be encouraged and incentivized to use the downward departure measures available to them.[353] There is also an urgent need for the United States Sentencing Commission to amend the Federal Sentencing Guidelines to allow judges more alternatives to incarceration.[354]

- Align Domestic Correctional Practices with International Human Rights Principles

Employing internationally recognized standards in the U.S. correctional system, including the foundational principle of human dignity, is critical. The vast benefits of subscribing to a human-rights-based approach can be seen in programs like T.R.U.E. and W.O.R.T.H., which are both aimed at reimagining incarceration and which have both received

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[350] OFFICE OF THE INSPECTOR GEN., *supra* note 53, at i.

[351] FED. BUREAU OF PRISONS, *supra* note 172, at 1; WENDY SAWYER, PRISON POLICY INITIATIVE, THE GENDER DIVIDE: TRACKING WOMEN'S PRISON GROWTH (2018), https://perma.cc/AZE3-7W2Q; *Custody and Care Designations*, *supra* note 169.

[352] First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237; FED. BUREAU OF PRISONS, *supra* note 172*; Custody and Care Designations*, *supra* note 169.

[353] U.S. SENTENCING COMM'N, *supra* note 168, at 6. As mentioned previously, downward departures are limited allowances to sentence outside of the federal guideline range. *See generally* OFFICE OF GEN. COUNSEL, *supra* note 163.

[354] U.S. SENTENCING COMM'N, *supra* note 168, at 6.

overwhelmingly positive feedback.[355] Based on a model pioneered in Germany, where the main objective of prison is rehabilitation, the Connecticut Department of Correction first established the T.R.U.E. program in early 2017. Focused on young adults aged fifteen to twenty-five, T.R.U.E., which stands for Truthfulness, Respectfulness, Understanding, and Elevating, is a "therapeutic unit for young men that focuses on developing their sense of self, autonomy, and responsibility, and keeps a clear focus on preparing for life after prison."[356] It also prioritizes personal relationships, taking proactive steps to involve the families of those in the program in order to help build and sustain fundamental connections.[357] After the initial success of T.R.U.E., the program was expanded to a women's prison in Connecticut. Women Overcoming Recidivism Through Hard Work, or W.O.R.T.H., began in June 2018 at the York Correctional Institution.[358] While these efforts are still in their beginnings, they are good examples of how the U.S. prison system can be improved—and the success of countries like Germany, whose recidivism rate is about half that of the United States, shows that a different approach may yield far better results.

According to research, there is a remarkable level of agreement between Americans that the U.S. correctional system needs reform, with a staggering ninety-one percent of people who believe that there are problems with the current system that need to be fixed.[359] Given that recognition, it is urgent that the United States better utilize international human

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[355] *See* Maurice Chammah, Opinion, *To Help Young Women in Prison, Try Dignity*, N.Y. TIMES (Oct. 9, 2018) [hereinafter Chammah, *Try Dignity*], https://perma.cc/AR8C-ACS6; Maurice Chammah, *The Connecticut Experiment*, MARSHALL PROJECT (May 8, 2018, 5:00 AM), https://perma.cc/S8HM-DDLE; Bill Whitaker, *German-Style Program at a Maximum Security Prison Emphasizes Rehab for Inmates*, 60 MINUTES (Mar. 31, 2019), https://perma.cc/RB94-Q4JK; RUTH DELANEY ET AL., VERA INST. OF JUSTICE, REIMAGINING PRISON 77-89 (2018), https://perma.cc/5942-JLNS.

[356] DELANEY ET AL., *supra* note 355, at 83.

[357] *Id.* at 84-85.

[358] *Id.* at 88; Chammah, *Try Dignity*, *supra* note 355.

[359] Press Release, ACLU, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), https://perma.cc/V9GL-EDCR. The research poll also found that 71% agree that incarceration is often counterproductive to public safety since long prison sentences increase the likelihood that the person "will commit another crime when they get out because prison doesn't do a good job of rehabilitating problems like drug addiction and mental illness." Other key findings include: 71% of Americans say that it is important to reduce the prison population in America (including 87% of Democrats, 67% of Independents, and 57% of Republicans); 68% would be more likely to vote for an elected official if the candidate supports reducing the prison population and using the savings to reinvest in drug treatment and mental health programs; 72% would be more likely to vote for an elected official who supports eliminating mandatory minimum laws; 84% believe that people with mental health disabilities belong in mental health programs instead of prison; and the majority of

rights standards in its correctional practices.[360] One concrete move toward this would be for the federal government to pass the Dignity for Incarcerated Women Act and concurrently for states to implement similar legislation.[361]

- Start Adequately Treating Trauma and Stop Disregarding the Science Surrounding It

The United States must begin effectively treating traumatic stress, not just the symptoms people exhibit from trying to cope with underlying trauma, which often lead to incarceration, but the origins of those symptoms.[362] An approach that incorporates trauma-based research and guidelines is integral to all interactions with incarcerated mothers and their children.[363] Guiding principles should include creating safety, empowerment, trustworthiness, and predictability, which are often absent in the original trauma and in subsequent prison settings.[364]

Americans recognize racial bias in the correctional system, with only one in three believing that black people are treated fairly. *Id.*

[360] Noted scholar Noam Chomsky argues that international human rights principles are continually undermined by multinational organizations and other large corporations interested not in genuine human rights but in turning a profit. These institutions, Chomsky emphasizes, have incredible power over governments, including the U.S. government. NOAM CHOMSKY, WORLD ORDERS OLD AND NEW 163, 183 (1996 ed.); *see generally* NOAM CHOMSKY, PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER (1999).

[361] Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019).

[362] Van der Kolk warns that as long as "[we] live in denial and treat only trauma while ignoring its origins, we are bound to fail." VAN DER KOLK, *supra* note 6, at 348; *Toxic Stress*, *supra* note 92. Incorporating the groundbreaking work of trauma experts like Bessel van der Kolk, Judith Herman, Peter Levine, and Stephen Porges is critical; using body-oriented approaches, often referred to as somatic therapies, in addition to more traditional treatments can be advantageous. "For real change to take place, the body needs to learn that the danger has passed and to live in the reality of the present." VAN DER KOLK, *supra* note 6, at 21; *see generally* SEBERN F. FISHER, NEUROFEEDBACK IN THE TREATMENT OF DEVELOPMENTAL TRAUMA (2014); HERMAN, *supra* note 98; LEVINE, *supra* note 98; PAT OGDEN ET AL., TRAUMA AND THE BODY (2008); STEPHEN W. PORGES, THE POLYVAGAL THEORY (2011).

[363] *See* HERMAN, *supra* note 98; Stephanie S. Covington, *Women and Addiction: A Trauma-Informed Approach*, 40 J. PSYCHOACTIVE DRUGS 377 (2008).

[364] "Safety: The number one component in trauma-informed care is providing safety. Unless someone feels safe, all bets are off. They will not hear your well-reasoned words, nor be able to perceive your good intentions because the higher brain will be offline. They will be in survival mode. Choice: Giving options is one way of restoring choice, which was taken away along with control during the trauma. Collaboration: Trauma-informed care is about moving from a 'power over' to a 'power with' paradigm. Our higher brains are wired for cooperation and collaboration. It is the opposite of the domination and oppression inherent in relational trauma. Empowerment: Empowerment increases the degree of autonomy and self-determination. The mistake many well-meaning people make is to advocate so actively on behalf of the person so the person never develops skills to advocate and find safety for themselves. Trustworthiness: Trauma often involves betrayal by an adult who is supposed to love and protect

Simultaneously, the United States must recognize its role in creating and perpetuating toxic stress, which can ultimately lead to a "stunted existence."[365] By continuing to separate children from their primary caregivers, thus altering their brain development and capacity, and failing to adequately address the deep-rooted trauma that is often present in incarcerated mothers, the United States is helping to devastate these families far into future generations.[366]

As discussed in Part II, the core experience of trauma lies in disempowerment and disconnection from others, and it is only in the context of relationships that recovery can genuinely take place.[367] That means the United States must stop carelessly breaking connections critical for both mother and child.

Approaching the treatment of trauma holistically should include adopting simple initiatives, such as the development of a therapeutic yoga program across all state and federal prisons. Numerous studies illustrate yoga's effectiveness in helping people to become calmer and get in touch with their often-disassociated bodies; the combination of mindful movement and breathing exercises has been shown to decrease stress and clear the mind.[368]

By relying on interpersonal rhythms and visceral awareness, yoga helps people to shift out of fight, flight, or freeze responses; reorganize

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you. Being trustworthy is one way to heal this wound. Predictability: Trauma is often unpredictable and leaves the person in an agony of suspense waiting for the next bad thing to happen. We can avoid this by creating predictable environments and schedules, as well as helping the person anticipate transitions." Am. Acad. of Pediatrics, *AAP Trauma and Resilience ECHO Training* (on file with author); *see generally* Roger D. Fallot & Maxine Harris, *Trauma-Informed Services: A Self-Assessment and Planning Protocol*, COMMUNITY CONNECTIONS (Mar. 2006), https://perma.cc/Q5XX-QW4X.

[365] *See* VAN DER KOLK, *supra* note 6, at 27; Felitti et al., *supra* note 103, at 251-56; Burke Harris, *supra* note 94.

[366] Van der Kolk discusses various methods for treating trauma, including neurofeedback, which has been shown to help regulate brain activity, as well as yoga, which can help activate the brain's natural neuroplasticity through movement. *See* VAN DER KOLK, *supra* note 6, at 265-78, 298-310.

[367] HERMAN, *supra* note 98, at 51. Van der Kolk identifies interoception as a catalyst for a person's transformation, writing, "Agency starts with what scientists call interoception, our awareness of our subtle sensory, body-based feelings: the greater that awareness, the greater our potential to control our lives. Knowing *what* we feel is the first step to knowing *why* we feel that way. If we are aware of the constant changes in our inner and outer environment, we can mobilize to manage them." Yoga has been known to cultivate interoception. VAN DER KOLK, *supra* note 6, at 97-98 (emphasis in original).

[368] *See* B.K.S. IYENGAR, YOGA: THE PATH TO HOLISTIC HEALTH 33, 36 (2014); Bessel van der Kolk et al., *Yoga as an Adjunctive Treatment for Posttraumatic Stress Disorder: A Randomized Controlled Trial*, 75 J. CLINICAL PSYCHIATRY 559 (2014); *see also* Anis Sfendla et al*., Yoga Practice Reduces the Psychological Distress Levels of Prison Inmates*, FRONTIERS IN PSYCHIATRY, Sept. 3, 2018.

their perception of danger; and increase their ability to manage relationships—all of which would benefit incarcerated mothers in regaining a sense of agency, efficacy, and control, which is critical in combating trauma.[369]

B. Summation: There Is No Substitute for Action

"Some things you must never stop refusing to bear."[370]

It has been said that the greatest source of our suffering are the lies that we tell ourselves; that people can never get better without knowing what they know and feeling what they feel.[371] This truth is no different for the United States, whose own identity continues to erode in the face of its unacknowledged and destructive actions.

It is difficult to appreciate how truly insidious the situation is for incarcerated mothers and their children, or how much additional hardship they endure beyond the actual sentences. This is because the scope of people affected, most especially children, is so wide, the deep-seated ways in which these primary caregivers and their children are kept apart are so numerous, and the threats of the potential dissolution of their families are so grievous.[372] Yet while it takes the peeling back of many layers to capture the full picture, what becomes clear is that U.S. prison policies are not addressing the needs of incarcerated mothers; that traumatic stress, while maybe invisible to the eye, is alive inside the many mothers and children affected; that domestic courts often perpetuate the very wrongs they proclaim to be against; and that international human rights laws and

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[369] VAN DER KOLK, *supra* note 6, at 88, 95-96, 274; *see* DAVID EMERSON & ELIZABETH HOPPER, OVERCOMING TRAUMA THROUGH YOGA 55-56 (2011) (discussing interpersonal rhythms in yoga). Yoga as a way to cope with traumatic stress would likewise be beneficial to the children of incarcerated parents, who are frequently treated with drugs. Medicaid, the government health program for the poor, spends more on antipsychotics than any other class of drugs. *See* Lucette Lagnado. *US Probes Use of Antipsychotic Drugs on Children*, WALL STREET JOURNAL (Aug. 11, 2013), https://perma.cc/N3YK-HC6T. "Because drugs have become so profitable, major medical journals rarely publish studies on non-drug treatments of mental health problems." VAN DER KOLK, *supra* note 6, at 38. "Immobilization is at the root of most traumas." *Id.* at 84.

[370] WILLIAM FAULKNER, INTRUDER IN THE DUST 200-01 (Second Vintage International 2011) (1948); *see* Strathclyde Center for Law, Crime and Justice, *supra* note 287, at 26:49-26:57 ("Isn't it about time, in matters like this, that we insist that the rights of the child be raised?" (quoting Justice Sachs)). "You live through that little piece of time that is yours, but that piece of time is not only your life, it is the summing-up of all the other lives that are simultaneous with yours . . . . What you are is an expression of history." VAN DER KOLK, *supra* note 6, at 22 (quoting ROBERT PENN WARREN, BAND OF ANGELS 34 (LSU Press 1994) (1955)).

[371] VAN DER KOLK, *supra* note 6, at 127.

[372] *See* Dan Levin, *As More Mothers Fill Prisons, Children Suffer 'a Primal Wound*,*'* N.Y. TIMES (Dec. 28, 2019), https://perma.cc/Z5MB-WXVZ.

standards, meant to protect mothers and children, are being obstinately disregarded.[373]

By needlessly separating children from their mothers and by failing to devise meaningful rehabilitative and holistic approaches to treat these issues, the United States not only violates human rights law but continues quietly to tear apart its own fabric.[374] It is evident that, in times like today, the exceedingly influential court of the people needs to be more effectively mobilized to fight against what so many know and feel is wrong.[375] In order to do this, Americans must put aside some of their differences to stand up for the human rights of these vulnerable children and the primary caregivers on whom they rely.[376] This change is ultimately up to the people.[377] When people come together as a community greater than themselves, they step into power.

"Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them."[378]

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[373] UDHR, *supra* note 8; THE SENTENCING PROJECT, *supra* note 2; Martin, *supra* note 18, at 1-3; *see generally* HUMAN RIGHTS WATCH & ACLU, *supra* note 16.

[374] *See generally* PENAL REFORM INT'L, *supra* note 22. "It is scarcely worthwhile to attempt remembering how many times the sun has looked down on the slaughter of the innocents . . . . It is so simple a fact and one that is so hard, apparently, to grasp: *Whoever debases others is debasing himself.* That is not a mystical statement but a most realistic one." JAMES BALDWIN, THE FIRE NEXT TIME 83 (Vintage Books 1993) (1963) (emphasis in original).

[375] *See* ACLU, *supra* note 359.

[376] "I note the obvious differences between each sort and type, but we are more alike, my friends, than we are unalike." MAYA ANGELOU, *Human Family*, *in* THE COMPLETE COLLECTED POEMS OF MAYA ANGELOU 225 (1994).

[377] "We have two choices: to abandon hope and help ensure that the worst will happen; or to make use of the opportunities that exist and perhaps contribute to a better world. It is not a very difficult choice. There are, of course, sacrifices; time and energy are finite. But there are also the rewards of participating in struggles for peace and justice and the common good." Noam Chomsky with Scott Casleton, *Choosing Hope*, BOSTON REV. (June 4, 2019), https://perma.cc/68WL-BU27.

[378] Frederick Douglass, Address on West India Emancipation (Aug. 3, 1857), https://perma.cc/AQ77-8ERC.

EDUCATION IS LIBERATION: THE POWER OF ALTERNATIVE EDUCATION SPACES

Matthew Amani Glover†

INTRODUCTION

There is a point in *Narrative of the Life of Frederick Douglass* when Douglass—a child, enslaved, and recently brought to Baltimore—receives his first reading lessons.[1] The lessons end almost as soon as they begin, with his master, Mr. Auld, forbidding further learning for the following reason:

> A nigger should know nothing but to obey his master—to do as he is told to do. Learning would *spoil* the best nigger in the world. Now . . . if you teach that nigger (speaking of myself) how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master.[2]

Douglass eventually learned to read and write but was forced to do so in secret for fear of retaliation from his masters.[3] Other enslaved people across the southern United States did not have such luck, beset as they were by racist laws that made it illegal for Black people to learn, to be

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[1] FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 33 (Boston, Anti-Slavery Office 1845).

[2] *Id.*

[3] *Id.* at 36, 38.

taught, and in some cases, even to assemble; the penalties for such acts included fines, corporal punishment, and imprisonment.[4]

Common practice and legal regimes during the era of slavery severely inhibited the education of Black people,[5] establishing a societal precedent for erecting barriers to Black attainment of education. This nation's Black population has since faced (and continues to face) immense obstacles to learning, including a persistent racial achievement gap[6] and the destruction of affirmative action programs in higher education.[7]

When we understand ours to be a society where anti-Black racism is the rule, Mr. Auld's treatment of a young Frederick Douglass is no longer shocking. Instead, it is normal, as is any other instance of racism or discrimination that is perpetrated against a Black person in this country. Discrimination in education is an integral part of this reality, and as Mr. Auld's tirade demonstrated, denying Black people the opportunity to learn is a necessary part of maintaining a status quo that denies them equality and basic human dignity.

I submit that the development of alternative education spaces is a remedy for the racial antagonism that Black students face within the United States' education system. Alternative education spaces are independent of the nation's traditional educational structures—i.e. public, private, and charter schools—and are created by people of color, for people of color. They are a response to this nation's failure to foster a learning environment that respects and values students of color.

In this Note, I discuss the extent to which this nation's traditional education system has failed Black students, using the state of New York

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[4] *See, e.g.*, Act of 1740, 7 Statutes at Large of South Carolina 397 (1840), https://perma.cc/CS5V-6X9W ("[A]ll and every person and persons whatsoever, who shall hereinafter teach or cause any slave or slaves to be taught, to write . . . shall, for every such offense, forfeit the sum of one hundred pounds current money."); Assembling of Negroes. Trading by Free Negroes., VA. CODE ANN. § 54-31 (1849) (subsequently repealed), https://perma.cc/DKG6-5TWZ ("Every assemblage of negroes for the purpose of religious worship . . . and every assemblage of negroes for the purpose of instruction in reading or writing, or in the nighttime for any purpose, shall be an unlawful assembly.").

[5] Data from the U.S. government show that in 1870, nearly eighty percent of the non-white population aged fourteen or older was illiterate, compared to approximately twelve percent of the white population. *National Assessment of Adult Literacy*, NAT'L CTR. FOR EDUC. STAT., https://perma.cc/KD2N-JQ8S (last visited Jan. 5, 2020). In 1870, the Black population accounted for approximately ninety-eight percent of the non-white population. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 19 tbl.1 (U.S. Census Bureau, Working Paper No. 56, 2002), https://perma.cc/4D65-JB49.

[6] *Racial and Ethnic Achievement Gaps*, STANFORD CTR. FOR EDUC. POL'Y ANALYSIS, https://perma.cc/S3CC-B339 (last visited Jan. 5, 2020).

[7] *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

to demonstrate the limitations that state bureaucracy place on traditional education. I then explore historical and contemporary iterations of alternative education spaces—Black Panther liberation schools and 696 Build Queensbridge's Youth Builder initiative, respectively—in order to further develop the conversation surrounding their necessity, viability, and impact.

I. THE UNITED STATES EDUCATIONAL SYSTEM: A RESULT OF OPPRESSION

The earliest renditions of public education in colonial America had among their motives a desire to prevent children from growing up "ignorant and idle."[8] The Massachusetts Act of 1647, recognized as the United States' first compulsory education law,[9] was intended to train individuals to be citizens and public servants in a "civilized state."[10]

Given the relatively noble rationale for the inception of public education in America, how has our system deviated so dramatically from the principles laid out by the Massachusetts Bay colony? The answer lies in the development of racist housing laws and policies at multiple levels of government, the effect of those laws on public education, and the Supreme Court's failure to address the resulting racial inequality in the nation's education system.

During much of the twentieth century, the United States weaponized law across all levels of government to perpetuate myriad forms of racial discrimination in the housing market. At the federal level, President Franklin D. Roosevelt's administration created the Federal Housing Administration ("FHA") in 1934,[11] which made mortgages—and thus, homeownership—exceedingly affordable for white families, but excluded Black families from enjoying the same opportunity.[12] The FHA

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[8] Billy D. Walker, *The Local Property Tax for Public Schools: Some Historical Perspectives*, 9 J. EDUC. FIN. 265, 268 (1984).

[9] *See* Erin Blakemore, *America's First Mandatory Education Law Was Inspired by Satan*, MENTAL FLOSS (Mar. 2, 2017), https://perma.cc/Z98J-FWT5.

[10] Walker, *supra* note 8, at 269.

[11] *The Federal Housing Administration (FHA)*, U.S. DEP'T HOUSING & URB. DEV., https://perma.cc/RCA2-GAC5 (last visited Jan. 5, 2020).

[12] The FHA adopted system of color-coded maps created by the Home Owners' Loan Corporation ("HOLC") that rated neighborhoods according to their perceived "stability." "Safe" neighborhoods were colored green, while the riskiest neighborhoods were colored red; of course, neighborhoods inhabited by any number of Black families were colored red, and the FHA refused to issue mortgages to residents of "redlined" neighborhoods. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63-67 (2017); *see also* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://perma.cc/JW2Z-RRJ2 ("Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding black people from most legitimate means of obtaining a mortgage.").

embraced racism and laid the foundation for an exploitative housing market that benefitted white families and allowed them freedom, while crushing Black families and severely limiting where they could purchase homes.

At the local level, restrictive covenants and racial zoning laws were the racist tools of choice. Used for racist ends beginning in the late nineteenth century, restrictive covenants forbade resale of property to Black Americans and other racial minorities.[13] In *Shelley v. Kraemer*, the Supreme Court held that government enforcement of restrictive covenants was unconstitutional,[14] but the FHA supported their use for years following the decision.[15] The same pattern emerged in the public sector where racial zoning laws, the public sector analog of restrictive covenants, were used as early as 1910 to separate white and Black families, especially cities with large, established Black populations.[16] In 1917, the Supreme Court ruled in *Buchanan v. Warley* that a racial zoning ordinance violated the Fourteenth Amendment,[17] but the practice persisted into the late 1960s.[18]

Decades later in *San Antonio Independent School District v. Rodriguez*, a Texas state law mandating the use of local property taxes to provide forty percent of funding for public education[19] resulted in vastly uneven funding across the property-richest and property-poorest school districts in the state.[20] Appellees claimed that the law interfered with Texas students' fundamental right to an education, but the Court ruled that a fundamental right to education was neither explicitly recognized in the Constitution nor "implicitly so protected" and found the property tax law to be constitutional.[21]

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[13] ROTHSTEIN, *supra* note 12, at 78.

[14] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[15] ROTHSTEIN, *supra* note 12, at 88-90.

[16] *Id.* at 44.

[17] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[18] ROTHSTEIN, *supra* note 12, at 47-48.

[19] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 73 (1973) (Marshall, J., dissenting).

[20] In a sample of 110 Texas school districts at the time, the richest ten districts (each of which had at least $100,000 available in taxable property per pupil) were able to raise an average of $610 per pupil, while the poorest four districts (each with less than $10,000 available in taxable property per pupil) were only able to raise an average of $63 per pupil. This near-tenfold disparity existed despite the poorest districts employing a property tax rate of more than double the rate of the richest districts. *Id.* at 74-76.

[21] *Id*. at 35, 55. Marshall's dissent, which spanned more than sixty pages and included four appendices, was grounded in his assertion that "the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." *Id*. at 111.

As a result of the Court's decision in *Rodriguez*, the United States still lacks a federally recognized right to education.[22] The decision has also consigned students across the country to a reality that inevitably results in massive disparities in available educational resources for students in property-poor and property-rich school districts,[23] reflecting the Black-white wealth divide.[24] These disparities are not a coincidence. Rather, they are a result of the purposeful decisions of federal, state, and local forces to discriminate against people of color in the U.S. housing market, which prevented Black families from building wealth through homeownership for decades.[25]

Let us also consider the socioemotional challenges that Black students face within the walls of a given school, which are as damaging as the structural challenges. No matter the funding a school receives, students of color often must contend with an environment that does not reflect their lives and experiences. Anthropologist John U. Ogbu observed that because of these and other obstacles, all minority students must grapple with educational policies and practices that antagonize them, as well as facing general mistreatment in schools and classrooms.[26] How can Black students be expected to learn at all—let alone at the level of their peers—when they must navigate this gauntlet that rejects their very existence?

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[22] As of January 2020, out of the 200 constitutions posted on the Constitute Project's website, 193 constitutions contain the word "education"; the United States is one of the seven countries whose constitution does not. *See* CONSTITUTE PROJECT, https://perma.cc/GEV4-RGTF (last visited Jan. 24, 2020).

[23] Nearly half of the nation's education revenues come from local property taxes. *See* JOEL MCFARLAND ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2019, at 136 (2019), https://perma.cc/UD2F-CNZ5.

[24] As of 2016, the median income for white families was $61,200, while the median income for Black families was $35,400; the mean income for these groups was $123,400 and $54,000, respectively. Median net worth in 2016 was $171,000 for white families compared to $17,600 for Black families, while mean net worth for each group was $933,700 and $138,200, respectively. Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BOARD GOVERNORS FED. RES. SYS.: FEDS NOTES (Sept. 27, 2017), https://perma.cc/STZ5-Z3X6.

[25] *See generally* Christopher E. Herbert et al., *Is Homeownership Still an Effective Means of Building Wealth for Low Income and Minority Households? (Was it Ever?)*, HARV. U. JOINT CTR. HOUSING STUD. (2013), https://perma.cc/XPR7-RULA. For information on the drastic disparities in value between Black and white-owned homes, see ANDRE PERRY ET AL., BROOKINGS METRO. POLICY PROGRAM, THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY 11 (2018), https://perma.cc/59UD-GMMP.

[26] John U. Ogbu & Herbert D. Simons, *Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education*, 29 ANTHROPOLOGY & EDUC. Q. 155, 161 (1998).

Black students contend with implicit racial bias[27] as early as preschool, when Black preschoolers are more than three times as likely to be suspended as their white classmates and account for nearly half of all preschool suspensions, despite making up only nineteen percent of all preschool enrollment.[28] Across the nation, Black students in K-12 schools are disproportionately disciplined, no matter the type of disciplinary action, level of school poverty, or type of public school attended.[29] And schools are not intentional about creating and sustaining diversity in order to address racial bias, whether in curricula or in teacher and administrative hiring. As of 2016, eighty-two percent of teachers and eighty percent of principals in K-12 public schools in the United States were white,[30] which explains (at least in part) why teacher education programs systematically fail to prepare white teachers to critique their own privilege or to critique systems of colonialism, imperialism, and systemic racism.[31]

Traditional education spaces fail to provide students of color with adequate resources, discipline them harshly and at disproportionate rates compared to their white classmates, subject them to racist treatment and microaggressions, do not provide curricular resources that acknowledge and attack anti-Black racism and other forms of oppression, and routinely fail to provide them with role models who look like them in faculty and administrative positions. For the sake of the well-being and success of students of color, we must explore alternatives to this system.

II. THE POWER OF ALTERNATIVE EDUCATION SPACES

An alternative education space is created by people of color for the purpose of providing students of color with a learning environment that teaches, centers, and nurtures them. While it does fulfill an educational function insofar as it provides students of color with a place to learn and

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[27] Implicit biases are automatic associations that our minds make associated with a social group. They are dangerous in a structurally racist society because they result in the association of negative stereotypes—e.g. criminality—with the disfavored racial group, i.e. the Black population. *See* L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 301-07 (2012).

[28] WALTER S. GILLIAM ET AL., YALE UNIV. CHILD STUDY CTR., DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 2 (2016), https://perma.cc/VGN6-MJY2.

[29] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 12 (2018), https://perma.cc/2325-6HET.

[30] U.S. DEP'T OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE 3 (2016), https://perma.cc/SML9-WLGP.

[31] Ellen Swartz, *Stepping Outside the Master Script: Re-Connecting the History of American Education*, 76 J. NEGRO EDUC. 173, 173 (2007).

grow, an alternative education space is separate from traditional education structures in the United States (e.g. public, private, or charter schools) and exists independent of those structures.[32] An alternative education space is an "alternative" to traditional education for two reasons: (1) unlike traditional educational structures, it centers and nurtures students of color; and (2) it is independent of many of the constraints typically placed on traditional education spaces.

The first reason is crucial—an alternative education space performs a vital role because it provides a learning experience that centers the lived experiences of students of color.

Renowned educator bell hooks attests to the success of this approach when describing her own childhood educational experience. She writes:

> Almost all our teachers at Booker T. Washington were black women . . . Teachers worked with and for us to ensure that we would fulfill our intellectual destiny and by so doing uplift the race. My teachers were on a mission.
>
> To fulfill that mission, my teachers made sure they "knew" us. They knew our parents, our economic status, where we worshipped, what our homes were like, and how we were treated in the family . . .
>
> Attending school then was sheer joy.[33]

Contrast that with hooks' experience in white schools:

> When we entered racist, desegregated, white schools we left a world where teachers believed that to educate black children rightly would require a political commitment . . . For black children, education was no longer about the practice of freedom. Realizing this, I lost my love of school.[34]

hooks' experiences in all-Black and integrated schools speak volumes: the former brought her joy and was invested in her success, while the latter destroyed her love for learning and lacked passion for her academic and personal growth. This disparity was obvious to hooks when she was a student and remains true for many students of color today.

The second reason why alternative education spaces are "alternative" is as important as the first—these spaces are independent of the typical bureaucratic constraints imposed by state actors, meaning that ultimately,

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[32] Alternative education spaces may take any number of forms, including after school programs or summer camps.

[33] BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 2-3 (1994).

[34] *Id.* at 3.

they are accountable to their communities rather than to government. This independence is important, because the constraints imposed on other educational entities that are ostensibly alternatives—e.g. private and charter schools—directly affect learning in those classrooms.

A nonpublic (private or charter) school must satisfy a list of twenty-one items in order to incorporate in New York State,[35] and must also consult the "Manual for New Administrators of Nonpublic Schools" which lays out additional guidelines and state requirements.[36] Nonpublic schools must ensure that their students receive an education that is "substantially equivalent" to the education that public school students receive in that school district.[37]

While substantial equivalence does not require that nonpublic schools be mirror images of public schools, New York encourages nonpublic schools to commit to a number of optional actions, including registering with the State Education Department and administering state standardized tests for fourth and eighth grade students.[38] If the state is encouraging nonpublic schools to follow public school standards in the name of substantial equivalency, and nonpublic schools are incentivized to do so in order to remain operational, this would seem to limit the extent to which a nonpublic school presents a true alternative to public school education.

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[35] *Starting a School*, N.Y. STATE EDUC. DEP'T, https://perma.cc/Q7MK-AALR (last updated Nov. 15, 2019).

[36] *Manual for New Administrators of Nonpublic Schools*, N.Y. STATE EDUC. DEP'T, https://perma.cc/89N3-2UDW (last updated Oct. 25, 2018).

[37] *State Requirements and Programs*, N.Y. STATE EDUC. DEP'T, https://perma.cc/DCK4-ENRF (last updated Feb. 12, 2018) ("If a child attends a nonpublic school or is being educated at home, the board of education of each school district must be assured that the child is receiving instruction which is substantially equivalent to that provided in the public schools of the district of residence."); *see also* Press Release, N.Y. State Educ. Dep't, State Education Department Proposes Regulations for Substantially Equivalent Instruction for Nonpublic School Students (May 31, 2019), https://perma.cc/WTB3-QP8R ("Substantial equivalency means an instructional program is comparable to that offered in the public schools and is designed to facilitate the progression of students from grade to grade.").

[38] Secondary nonpublic schools that do not register with the State Education Department are prohibited from administering the Regents examinations and from awarding diplomas. With respect to standardized testing, New York applies a subtle pressure by stating that seventy-five percent of all nonpublic school fourth and eighth grade students participate in standardized testing. New York also makes its state curricula the basis of its standardized testing, although the state notes that nonpublic schools are not obligated to adopt those curricula. *See State Requirements and Programs*, *supra* note 37. Deciding not to administer standardized tests does not automatically disqualify a nonpublic school from satisfying the substantial equivalency requirement, but that choice "does make it more difficult to judge" whether the substantial equivalency requirement has been met. *Substantial Equivalency of Instruction in Nonpublic Schools*, N.Y. STATE EDUC. DEP'T, https://perma.cc/P6W4-AHVS (last updated Jan. 8, 2020).

The Black Panther liberation schools and 696 Build Queensbridge represent examples of *creating* a better educational option for students of color rather than remaining limited by the unsatisfactory choices provided by the government.

A. Black Panther Liberation Schools

The primary mission of the Black Panther Party, founded in 1966,[39] was to meet the various needs of poor African Americans by combating police brutality, providing food, bolstering healthcare, and educating young people.[40] In their manifesto-like Ten-Point Program, the Panthers emphasized the importance of education for Black Americans. The fifth point in the Program reads:

> We Want Education For Our People That Exposes The True Nature Of This Decadent American Society. We Want Education That Teaches Us Our True History And Our Role In The Present-Day Society.
>
> We believe in an educational system that will give to our people a knowledge of self. If a man does not have knowledge of himself and his position in society and the world, then he has little chance to relate to anything else.[41]

Rather than entrust the minds of Black youth to the American educational system, the Panthers began to create liberation schools in 1969 as part of their "survival programs."[42] The first liberation school, established in Berkeley, California in 1969, provided a wholly political education to its elementary and middle school-aged students, who, through their learning, could soon explain racism, fascism, capitalism, and the history of the Black Panther Party, among other things.[43] The school had a weekly curriculum that ranged from history and culture to field trips and current events; community volunteers and Panthers themselves staffed and taught

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[39] PAUL ALKEBULAN, SURVIVAL PENDING REVOLUTION: THE HISTORY OF THE BLACK PANTHER PARTY, at xi (2007).

[40] Ericka Huggins & Angela D. LeBlanc-Ernest, *Revolutionary Women, Revolutionary Education: The Black Panther Party's Oakland Community School*, *in* WANT TO START A REVOLUTION?: RADICAL WOMEN IN THE BLACK FREEDOM STRUGGLE 161 (Dayo F. Gore et al. eds., 2009).

[41] Huey P. Newton, War Against the Panthers: A Study of Repression in America (June 1, 1980) (Ph.D. dissertation, University of California, Santa Cruz).

[42] These programs also included breakfast programs and medical clinics. ALKEBULAN, *supra* note 39, at 28, 33.

[43] Daniel Perlstein, *Minds Stayed on Freedom: Politics and Pedagogy in the African American Freedom Struggle*, RADICAL TCHR., May 2004, at 23, 26.

in the liberation schools.[44] Thus, the Panthers secured a space for Black youth located firmly outside of traditional public school structures and firmly within the structure of the Black Panther Party itself.

In 1971, the Panthers established the Intercommunal Youth Institute ("IYI") in Oakland.[45] Students received full daily instruction and were grouped according to their performance level as opposed to traditional grade levels.[46] The IYI's nontraditional curriculum included community work, and the students were taught to be politically aware – for instance, they honed their writing skills by writing letters to Panthers who were incarcerated.[47] The IYI was completely independent of the struggling Oakland Unified School District, with its operational expenses fully covered by the Panthers' fundraising efforts and community support.[48] Other liberation schools enjoyed similar levels of independence: they too raised funds and relied on community support, and they also adhered to long-standing rules against applying for or accepting state funding of any sort.[49]

By 1975, the Panthers transformed the IYI into the Oakland Community School ("OCS"),[50] which would become the Panthers' "flagship" alternative education space.[51] Like the IYI, OCS was very different from traditional American schools in form and in function. Its staff was primarily African American; the curriculum was culturally relevant to its Black students and accommodated varying student learning styles and instructor teaching styles; it engaged in minimal standardized testing; and it required instructors to submit academic and social evaluations of students rather than letter grades.[52] The school also provided meals, healthcare referrals, and transportation.[53]

The IYI and OCS were shining examples of the liberation school initiative, which successfully implemented and popularized an alternative education system.[54] They also were an embodiment of the Panthers' commitment to replace American institutions rather than reform them.[55] The fulcrum of the liberation school model never wavered—it was always

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[44] ALKEBULAN, *supra* note 39, at 33-34.

[45] Huggins & LeBlanc-Ernest, *supra* note 40, at 162.

[46] *Id.* at 168.

[47] *Id*. at 168-69.

[48] *Id*. at 169.

[49] ALKEBULAN, *supra* note 39, at 34.

[50] *Id.*; Huggins & LeBlanc-Ernest, *supra* note 40, at 170.

[51] Perlstein, *supra* note 43, at 27.

[52] Huggins & LeBlanc-Ernest, *supra* note 40, at 172-73, 176.

[53] ALKEBULAN, *supra* note 39, at 34.

[54] OCS actually outlasted the Black Panther Party (which folded in 1980), operating independently until 1982, when it graduated its last class of students. *Id.* at 35.

[55] Perlstein, *supra* note 43, at 25.

blackness and Black empowerment, with the intention of providing a safe, alternative educational environment that valued students of color in a way traditional education had not shown itself capable. The liberation schools have inspired other iterations of alternative education spaces in the years since their inception.

B. 696 Build Queensbridge Youth Builder Initiative

696 Build Queensbridge's Youth Builder initiative is a program in the mold of the Black Panther survival programs and liberation schools.[56] Since 2016, 696 has been deeply involved in Queensbridge, which is the largest public housing development in North America.[57] The organization has affected great change in the community through its implementation of the Cure Violence Model, which originated in Chicago and aims to stop the spread of violence by using behavior change and disease control methods.[58] For more than a year immediately following its start in Queensbridge, 696 played a major role in preventing even a single incidence of gun violence from occurring within the Queensbridge community.[59]

696's work encompasses more than just violence prevention; the organization is also intentional about reaching out to young people of color in the community aged fourteen to twenty-four and involving them in the program as Youth Builders.[60] The young people apply for the Youth Builder position, and if they are accepted they are paid to attend the program after school from Tuesday to Friday, and during the day on Saturday. The program's educational offerings include classes on critical thinking, conflict resolution, financial literacy, arts and culture, and health and wellness.[61] Because 696 is a job for the Youth Builders, it incentivizes the Youth Builders to participate fully and take control of their own education.

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[56] I have worked with 696 Build Queensbridge as a facilitator and curriculum developer for the educational component of the program. The name "696 Build Queensbridge" is a reference to the six blocks and ninety-six units per building that comprise Queensbridge Houses. Jim Dwyer, *Six Blocks, 96 Buildings, Zero Shootings: New Recipe at the Queensbridge Houses*, N.Y. TIMES (Jan. 19, 2017), https://perma.cc/UU2U-9YK5.

[57] Press Release, NYC Housing Authority, Mayor de Blasio and NYCHA Announce Completion of Roof Replacements at Queensbridge Houses, North America's Largest Public Housing Development (Dec. 1, 2016), https://perma.cc/QA22-KA3H.

[58] Cure Violence treats violence as a disease and aims to detect and interrupt conflict, identify and treat the highest risk individuals, and change social norms. *Who We Are*, CURE VIOLENCE, https://perma.cc/F6NV-L7NR (last visited Jan. 24, 2020).

[59] Dwyer, *supra* note 56.

[60] *Youth Builders*, 696 BUILD QUEENSBRIDGE, https://perma.cc/6ZCF-VEZC (last visited Jan. 24, 2020).

[61] *Id.*

696 provides an alternative education space for its Youth Builders, and for many of these young people, engaging in learning outside of traditional classrooms is a welcome change of scenery. The daily "classes" are all geared toward the empowerment of students of color and of Queensbridge. In their critical thinking sessions, the Youth Builders have discussed topics such as the historical foundations of racism, applying what they learn to their personal situations and their community; financial literacy fills knowledge gaps about socioeconomic conditions and economic empowerment of the Black community; and arts and culture, rather than focus on dead white males,[62] instead engages in initiatives that encourage Youth Builders to express themselves through mediums such as podcast creation or music recording.[63]

Each day, learning is facilitated by the same 696 staff members who engage in 696's violence prevention and reduction work in Queensbridge and neighboring communities; they are people whom the Youth Builders trust and respect.[64] They facilitate learning through circle discussions that situate all participants on equal footing. Conversations can be loud, and they do not always adhere to the prescribed norms of "educational" discourse; at times, speakers talk over each other, and the voices of the Youth Builders tend to dominate the discussions.

To an outsider, this might be chaos. But for the Youth Builders—routinely silenced in traditional school settings, and who have withstood years of classes that have emphasized an American history, culture, and society that is hostile to their existence—the dynamic at 696 represents freedom and liberation. At 696, these young people are part of a more egalitarian educational system. Their input is solicited with regularity, the subject matter is relatable, and the facilitators are people who they can trust, who look like them, and who come from similar life situations. 696's alternative education could not be further removed from the reality of traditional American education.

Like the Panthers did for the Black youth in their communities, 696 provides vital support for Black youth in Queensbridge. 696 protects the futures of Queensbridge's young people by providing them with an af-

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[62] *See* Alison Flood, *Yale English Students Call for End of Focus on White Male Writers*, GUARDIAN (June 1, 2016, 7:24 AM), https://perma.cc/SM3B-MLK2 (explaining that the Western literary canon is comprised mostly of dead white males).

[63] *Youth Builders*, *supra* note 60.

[64] The Cure Violence Model refers to these staff members as "credible messengers." They are an integral part of the community they serve. Some have been involved with the carceral system and/or the activities they now work to prevent. These qualities help them connect with the Youth Builders and impart wisdom that outsiders cannot. *Cure Violence Glossary*, JOHN JAY RES. & EVALUATION CTR. (Apr. 17, 2015), https://perma.cc/PK7S-2VGJ.

firming educational experience that arms them with the truth about themselves and society. 696 has not only demonstrated its capacity to drastically reduce gun violence in Queensbridge, but through its alternative education program, it has also provided its Youth Builders with the critical thought and self-awareness needed to become difference-makers in their own right.

CONCLUSION: A VISION FOR THE FUTURE

There is a lack of consensus between state governments about what alternative education is and does.[65] The only (vaguely) unifying theory of state-sponsored alternative education is that alternative education is a space that focuses on discipline and "behavioral problems." [66] This is not liberation. While it might be impractical to expect states to agree on the exact same definition of alternative education, focusing on discipline rather than human dignity, anti-racism, and equality cedes an opportunity to create something special. This focus also risks perpetrating and perpetuating the same discrimination present in society at large, discrimination that alternative education spaces should instead be actively naming and combating.

The examples of the Panthers and 696 are instructive. These organizations dared to create their own educational models and to use alternative education spaces as a means for circumventing the pitfalls of the nation's traditional educational apparatus. We have the blueprint—now, we must continue to construct and support alternative education spaces that are committed to young people of color.

Ultimately, an educational revolution may require a critical mass of alternative education spaces that are committed to antiracism and students of color, tailored to their communities, and replicable for others. Popularizing this vision of education could start the process of reversing generations' worth of racial oppression in the educational system. As we look for a way to "solve" this nation's foundational issues with racism and other forms of discrimination, a radical reimagination of the way we educate young people—inspired by the work of radically progressive groups —represents a starting point.

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[65] ALLAN POROWSKI ET AL., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. EVALUATION AND REG'L ASSISTANCE, HOW DO STATES DEFINE ALTERNATIVE EDUCATION? 1 (2014).

[66] *Id.* at i.

MORE "MUNICIPAL" THAN "COURT": USING THE ELEVENTH AMENDMENT TO HOLD MUNICIPAL COURTS LIABLE FOR THEIR MODERN-DAY DEBTORS' PRISONS PRACTICES

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INTRODUCTION

In the fall of 1980, after pleading guilty to burglary and theft by stolen property, Danny Bearden was sentenced to three years' probation and ordered to pay $750 in fines and restitution: $200 within two days and the remaining balance within four months.[1] Mr. Bearden borrowed money from his parents to make the first payment, but a month later, was laid off from his job and could not find other work.[2] Shortly before the remaining balance was due, he was forced to notify his probation officer that he would be late with his payment.[3] In response, the trial court revoked his probation, and Mr. Bearden was ordered to serve the remainder of his probationary period in prison.[4] Two years later, the Supreme Court set him free, holding that where a person on probation makes bona fide efforts to pay the fines they owe but is unable to do so through no fault of their own, it is "fundamentally unfair" to imprison them based on their poverty.[5] The Court thus affirmed the unconstitutionality of debtors' prisons,[6] which had been abolished by federal law in 1833, 150 years earlier, as well as by a number of states shortly thereafter.[7]

The Supreme Court's ruling has seemingly gone unheard: the practice of incarcerating people for their inability to pay endures.[8] Today, local courts continue to send people bills for unpaid debts that they incur merely by being arrested—and then sentence them to jail when they cannot afford to pay the ever-increasing fines and fees that are associated with the criminal legal system.[9] For instance, in 2014, every state except

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[1] Bearden v. Georgia, 461 U.S. 660, 662 (1983).

[2] *Id.* at 662-63.

[3] *Id.* at 663.

[4] *Id.*

[5] *Id.* at 667-69.

[6] This Note refers to debtors' prisons (the historical practice of incarcerating people for private, contractual debts) and debtors' prison schemes and practices such as fines and fees (the modern practice of charging people who enter the criminal legal system fines and fees and then incarcerating them for failing to pay) interchangeably.

[7] Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https://perma.cc/U4UH-VS7M. For an in-depth, historical overview of debtors' prison practices in the United States, see Jill Lepore, *I.O.U.*, *How We Used to Treat Debtors*, NEW YORKER (Apr. 6, 2009), https://perma.cc/PE9Z-J6Q9.

[8] *See* Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 242-45 (2017) (discussing the evolution of debtors' prisons, including the practice of "leasing" Black men convicted of misdemeanors to private companies to pay off their debt, as well as the skyrocketing fines and fees that modern courts charge).

[9] *See, e.g.*, Hager, *supra* note 7; Jessica Pishko, *Locked Up for Being Poor*, ATLANTIC (Feb. 25, 2015), https://perma.cc/KPN4-J8PG; Tina Rosenberg, *Out of Debtors' Prison, with Law as the Key*, N.Y. TIMES (Mar. 27, 2015, 7:00 AM), https://perma.cc/XES9-99VX; Joseph

for Hawaii charged people for electronic monitoring devices, which they wear only because they are ordered to do so.[10] There are countless stories of people being sent to jail for failing to pay private probation fees,[11] medical debt,[12] credit card debt,[13] or for failing to appear in court to pay off traffic violations that they cannot afford.[14] Many of the fines and fees that municipal courts charge are driven by city revenue goals.[15]

Advocates challenging these contemporary debtors' prison practices in federal court have found some success, but municipalities unwilling to dam their revenue streams are now arguing that municipal courts cannot be sued because they are arms of the state and are thus immune from suit under the Eleventh Amendment. Whether municipal courts should receive Eleventh Amendment protection is an open question made all the more complex by the Eleventh Amendment and arm-of-the-state doctrine's muddled history and the circuits' disparate attempts at applying what limited Supreme Court precedent is available.

This Note argues that the rise of litigation against debtors' prisons calls for renewed attention to the arm-of-the-state test's consistency with the Eleventh Amendment's original purpose, and that, because of their local funding and control, municipal courts should not receive sovereign immunity. Part I discusses municipalities' contemporary use of debtors' prisons practices like fines and fees to generate revenue, how litigants have challenged those fines and fees, and how municipalities are contesting their responsibility. Part II examines the Eleventh Amendment's origins and purpose, which are the foundation for the arm-of-the-state doctrine. Part III lays out the Supreme Court's articulation of the arm-of-the-state doctrine and the circuits' incoherent attempts to craft their own arm-of-the-state tests. Finally, Part IV suggests first that, specifically in the

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Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), https://perma.cc/VG2R-JX4Z.

[10] Shapiro, *supra* note 9. In 2018, the non-profit Equal Justice Under Law filed a class-action suit against a private company which provides electronic monitoring services to multiple jurisdictions in California, alleging that the company extorts fees from poor people through threat of incarceration. Complaint at 2, Edwards v. Leaders in Cmty. Alternatives, Inc., No. 4:18-cv-04609, 2018 WL 6591449 (N.D. Cal. Dec. 14, 2018), https://perma.cc/5LWM-DWEU.

[11] Hannah Rappleye & Lisa Riordan Seville, *The Town That Turned Poverty into a Prison Sentence*, NATION (Mar. 14, 2014), https://perma.cc/XNQ9-PVL5.

[12] Susie An, *Unpaid Bills Land Some Debtors Behind Bars*, NPR (Dec. 12, 2011, 12:01 AM), https://perma.cc/G6EQ-524A.

[13] Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STAR TRIBUNE (Mar. 17, 2011, 4:40 PM), https://perma.cc/LS4F-ZHAC.

[14] Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014, 1:30 PM), https://perma.cc/9SM8-YMZ4.

[15] *See* Hager, *supra* note 7; ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 8-9 (2010), https://perma.cc/4Z2B-SHP8.

context of debtors' prison litigation, municipal courts should not receive sovereign immunity, and second that, in order to realign the arm-of-the-state doctrine with the Eleventh Amendment's purpose as described by the Supreme Court, further consideration must be given to focusing the arm-of-the-state test on funding and local control.

I. LITIGATION AGAINST MODERN-DAY DEBTORS' PRISONS AND MUNICIPAL PUSHBACK

A. Debtors' Prisons as Revenue Sources

As both commentators and court administrators themselves have noted, the resurgence of debtors' prisons is closely linked to shrinking municipal budgets and the recent financial crisis.[16] In 2003, the Conference of State Court Administrators ("COSCA") warned that "state governments today are experiencing the worst fiscal crisis in many decades," and that "deep budget cuts . . . are forcing court closures."[17] While COSCA emphasized that state legislatures should fund state courts, it noted that, "[i]n a tight budget environment, increasing fees and fines . . . may be a viable option" and that "enhanced collection of uncollected fines" would generate revenue.[18] In 2012, COSCA released a follow-up policy paper, aptly titled *Courts Are Not Revenue Centers*, cautioning its members that courts should "not impose unreasonable financial obligations assessed to fund other governmental services" and should "strive for a revenue structure that provides access, adequacy, stability, equity, transparency and simplicity"—an implicit rebuke of COSCA's earlier position.[19] Four years later, COSCA released yet another policy paper, this

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[16] Eric Balaban, *Shining a Light into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275, 276 (2014); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1793 n.30 (2010); Jerjian, *supra* note 8, at 248; Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 190, 195-96 (2016).

[17] CONFERENCE OF STATE COURT ADMINISTRATORS, POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS 2 (2003), https://perma.cc/E27L-JQ98. COSCA is an organization consisting of all fifty states' state court administrators that advocates for the improvement of state court systems.

[18] *Id.* at 13-14.

[19] CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADMINISTRATORS, COURTS ARE NOT REVENUE CENTERS 1, 13 (2012), https://perma.cc/A66V-N377.

time calling for courts to put an end to practices that encourage incarceration based on failure to pay fines and fees.[20] COSCA has framed its policy papers as part of the organization's supposedly long-standing commitment to reducing or eliminating court funding through fees,[21] but COSCA called for just the opposite in 2003 when it suggested that increasing court fines and fees was a viable option for generating municipal revenue.[22] It is no wonder that cities and counties concerned about finding revenue streams to shore up their budgets have aggressively charged and collected fines and fees, pulling people into the criminal legal system to bolster municipal bottom lines.[23]

The city of Ferguson, Missouri, illustrates this phenomenon all too well.[24] In its 2015 report on the investigation of the Ferguson Police Department, the United States Department of Justice described the city's municipal courts' priority as "maximizing revenue,"[25] not the "fair administration of justice."[26] Ferguson "[c]ity, police, and court officials . . . worked in concert to maximize revenue at every stage of the enforcement process."[27] In fact, Ferguson city officials lauded then-Municipal Judge Brockmeyer for creating fees that the Department of Justice's report described as "abusive."[28] Correspondence between the Ferguson Court Clerk and Judge Brockmeyer emphasized the importance of meeting the court's targets for fine and fee collection.[29] Defendants who could not pay the fines and fees set by the Ferguson court were jailed.[30]

Unfortunately, Ferguson is not alone: in 2012, thirty-eight American cities received ten percent or more of their revenue from fines and fees,

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[20] *See* ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016), https://perma.cc/JZL8-FGP2.

[21] *Id.* at 2.

[22] CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 17, at 13-14.

[23] Hager, *supra* note 7; ACLU, *supra* note 15, at 8-9.

[24] *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9-15 (2015) [hereinafter "FERGUSON REPORT"], https://perma.cc/PPH4-EXY8 (describing Ferguson city officials' and police officers' revenue-driven practices).

[25] *Id.* at 9.

[26] *Id.* at 15.

[27] *Id.* at 10.

[28] *Id.* at 14. These fines and fees included a $50 fee for every time a person had a pending municipal arrest warrant cleared and a fine for failure to appear that increased every time the defendant failed to appear or pay the fine.

[29] FERGUSON REPORT, *supra* note 24, at 14-15.

[30] First Amended Class Action Complaint at 1, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Apr. 13, 2016), https://perma.cc/TK5G-PZPD.

and many more received at least five percent.[31] More recently, in response to multiple local judges setting fines to generate revenue for their municipalities, the New Jersey Supreme Court issued a memorandum to all municipal judges emphasizing that "[t]he imposition of punishment should in no way be linked to a town's need for revenue."[32] Municipal courts across the country have thus revived debtors' prisons practices through the use of fines and fees, effectively incarcerating people because they are poor.[33]

B. Legal Challenges to Debtors' Prisons Schemes Face Municipal Pushback

In the past decade, class action lawsuits have emerged as an effective strategy for civil rights organizations and advocates to challenge municipalities and counties' practice of using court- or law enforcement-imposed fines and fees to generate revenue, and incarcerating people who cannot pay those fines and fees. The National Center for State Courts, founded at Chief Justice Burger's urging in order to provide authoritative information on local courts,[34] reports fifty-two cases filed in state and federal court between 2012 and 2018 challenging fines and fees.[35] Organizations such as Equal Justice Under Law, the Southern Center for Human Rights, the Southern Poverty Law Center, and the American Civil Liberties Union have filed suits alleging modern-day debtors' prison schemes

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[31] U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 20-22 (2017) (citing Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://perma.cc/T28M-5ZH2), https://perma.cc/DA2V-AD29.

[32] Memorandum on Fines and Penalties in Municipal Court from Stuart Rabner, Chief Justice of the New Jersey Supreme Court, to All Judges of the Municipal and Superior Courts (Apr. 17, 2018), https://perma.cc/2P5G-QCN6.

[33] *See, e.g.*, Atkinson, *supra* note 16, at 194-98 (2016); Mollie Bryant & Jerry Mitchell, *Lawsuit: Jackson Runs What Amounts to Debtors' Prison*, CLARION-LEDGER (Oct. 13, 2015), https://perma.cc/2Q3L-YM9Z; Nicholas K. Geranios & Gene Johnson, *ACLU Lawsuit: Benton County Jailing People Who Can't Pay Court Fines*, SEATTLE TIMES (Oct. 6, 2015, 5:12 PM), https://perma.cc/UHS7-5SXW; Lucas Sullivan & Dylan Tussel, *Convicts Entering Franklin County Jail Must Pay $40*, COLUMBUS DISPATCH (Nov. 30, 2011, 10:38 AM), https://perma.cc/8KCR-FJEY; Tanzina Vega, *Biloxi Accused of Running "Modern-Day Debtors' Prison.,"* CNN MONEY (Oct. 21, 2015, 2:05 PM), https://perma.cc/JVU2-G59A.

[34] *About Us*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/NTT3-FARL (last visited May 10, 2019).

[35] *States That Have Recent Litigation Related to Fines, Fees, or Bail Practices*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/PVY9-CRD4 (last visited May 10, 2019).

against cities in Alabama,[36] Arkansas,[37] Georgia,[38] Louisiana,[39] Mississippi,[40] Missouri,[41] South Carolina,[42] and Texas,[43] among others. Civil rights advocates have targeted multiple cities in Missouri specifically: in 2015, ArchCity Defenders[44] filed twin class action suits against the cities of Jennings and Ferguson, alleging that both cities had maintained brazen debtors' prison schemes for years with the express purpose of generating

[36] *See* First Amended Class Action Complaint, Mitchell v. City of Montgomery, No. 2:14-cv-186-MEF (M.D. Ala. May 23, 2014).

[37] *See* Complaint – Class Action, Dade v. City of Sherwood, No. 4:16-cv-00602-JM (E.D. Ark. Aug. 23, 2016), https://perma.cc/C96L-3L52. The parties reached a settlement in 2017. *See* Stipulation Regarding Settlement, Dade v. City of Sherwood, No. 4:16-cv-00602-JM (E.D. Ark. Nov. 14, 2017), https://perma.cc/Y8LU-HFN4.

[38] Complaint at 1-2, Jones v. Grady Cty., No. 1:13-cv-00156-WLS (M.D. Ga. Sept. 24, 2013). The District Court ultimately approved a settlement agreement. *See* Order Granting Final Approval of Class Action Settlement at 9, 14, Jones v. Grady Cty., No. 1:13-cv-00156-WLS (M.D. Ga. Oct. 14, 2015). *See also* Plaintiffs' Complaint for Declaratory and Injunctive Relief, Brucker v. City of Doraville, No. 1:18-cv-02375-RWS (N.D. Ga. May 23, 2018).

[39] *See* First Amended Class Action Complaint, Cain v. City of New Orleans, No. 2:15-cv-4479-SSV-JCW (E.D. La. Sept. 21, 2015).

[40] *See* Class Action Complaint, Bell v. City of Jackson, No. 3:15-cv-00732-TSL-RHW (S.D. Miss. Oct. 9, 2015); Class Action Complaint, Kennedy v. City of Biloxi, No. 1:15-cv-348 (S.D. Miss. Oct. 21, 2015).

[41] *See* Civil Rights Class Action Complaint, Whitner v. City of Pagedale, No. 4:15-cv-01655-RWS (E.D. Mo. Nov. 4, 2015). In 2018, the presiding judge approved a consent decree providing for steps to reform Pagedale's municipal court practices and city prosecutions. *See* Consent Decree, Whitner v. City of Pagedale, No. 4:15-cv-01655-RWS (E.D. Mo. May 21, 2018).

[42] *See* Class Action Second Amended Complaint, Brown v. Lexington Cty., No. 3:17-cv-1426-MBS-SVH (D.S.C. Oct. 19, 2017).

[43] *See* Class Action Complaint, West v. City of Santa Fe, No. 3:16-cv-00309 (S.D. Tex. Nov. 3, 2016).

[44] ArchCity Defenders is a nonprofit civil rights law firm based in St. Louis, Missouri, dedicated to combating the criminalization of poverty and state violence against poor people and people of color. *Who We Are*, ARCHCITY DEFENDERS, https://perma.cc/ZWE9-F3VL (last visited Dec. 27, 2019). Since its founding in 2009, the firm has filed numerous actions against municipalities in the St. Louis area challenging police misconduct, debtors' prisons, cash bail, and inhumane jail conditions, among other issues. *Civil Rights Litigation*, ARCHCITY DEFENDERS, https://perma.cc/247M-LL3V (last visited Dec. 27, 2019).

revenue.[45] ArchCity Defenders went on to file similar suits against the cities of St. Ann,[46] Maplewood,[47] and Florissant.[48]

While some debtors' prison class actions have ended in settlements or consent degrees,[49] a number of municipalities have objected to being held liable for their courts' actions. The city of Ferguson moved to dismiss ArchCity Defenders' suit in 2016[50] and again in 2017,[51] claiming in both motions that the Ferguson municipal court is immune from suit under the Eleventh Amendment.[52] Both motions were denied,[53] but Ferguson moved so again in 2019, insisting that the city has no control over the municipal court, that the municipal court is part of Missouri's state circuit court system, and that the municipal court is thus entitled to sovereign immunity.[54] The city of Maplewood also moved to dismiss ArchCity Defenders' suit, arguing that the Maplewood Municipal Court is an arm of the state and thus protected from suit by the Eleventh Amendment.[55] The

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[45] Class Action Complaint at 1, 36, Jenkins v. City of Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. Feb. 8, 2015); Class Action Complaint at 33-34, Fant v. Ferguson, No. 4:15-cv-00253-SPM (E.D. Mo. Feb. 8, 2015). The city of Jennings settled in late 2016, agreeing to compensate people who were incarcerated for failing to pay fines and fees. *See* Order Granting Final Approval of Class Action Settlement, Jenkins v. Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. Dec. 14, 2016).

[46] *See* Second Amended Class Action Complaint, Thomas v. City of St. Ann, No. 4:16-cv-01302-RWS (E.D. Mo. July 21, 2017).

[47] *See* Class Action Complaint, Webb v. City of Maplewood, No. 4:16-cv-01703 (E.D. Mo. Nov. 1, 2016).

[48] *See* Class Action Complaint, Baker v. City of Florissant, No. 4:16-cv-01693 (E.D. Mo. Oct. 31, 2016).

[49] *See supra* notes 37-38, 41, 45.

[50] *See* Defendant's Motion to Partially Dismiss Plaintiffs' First Amended Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Apr. 27, 2016).

[51] *See* Defendant City of Ferguson's Corrected Motion to Dismiss Counts I Through III and V Through VII for Lack of Subject Matter Jurisdiction, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Sept. 20, 2017).

[52] Defendant's Memorandum in Support of Its Motion to Partially Dismiss Plaintiffs' First Amended Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Apr. 27, 2016); Memorandum in Support of Defendant the City of Ferguson's Corrected Motion to Dismiss for Lack of Subject Matter Jurisdiction at 12-17, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Sept. 20, 2017).

[53] *See* Fant v. City of Ferguson, No. 4:15-cv-00253-AGF, 2016 WL 6696065 (E.D. Mo. Nov. 15, 2016); Fant v. City of Ferguson, No. 4:15-cv-00253-AGF, 2018 BL 48196 (E.D. Mo. Feb. 13, 2018) (denying Ferguson's 2016 and 2017 motions to dismiss, respectively).

[54] The City of Ferguson's Memorandum in Support of Its Motion to Dismiss Counts I Through III and V Through VII for Failure to Join an Indispensable Party at 2, 25, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Mar. 5, 2019).

[55] Defendant's Memorandum in Support of Its Motion to Dismiss Plaintiffs' Class Action Complaint for Failure to State a Cause of Action at 13, Webb v. City of Maplewood, No. 4:16-cv-01703-CDP (E.D. Mo. Dec. 29, 2016).

District Court for the Eastern District of Missouri denied the city's motion[56] and the Eighth Circuit Court of Appeals denied the city's interlocutory appeal, holding that the city of Maplewood can be held liable for unconstitutional policies or customs even if all individual officials participating in those policies are immune from suit.[57] St. Ann moved to dismiss on identical grounds, arguing that the "alleged wrongs against [the plaintiffs] relate back, not to St. Ann, but to the municipal court division in St. Ann, an arm-of-the-state and the real party in interest" which is protected by Eleventh Amendment immunity.[58]

To date, cities' attempts to sidestep liability for their debtors' prisons by claiming that the local court is an arm of the state and distinct from the city itself have not succeeded,[59] but advocates who seek to challenge debtors' prisons schemes by suing the cities and courts perpetrating them face an open question: whether municipal courts are arms of the state protected from suit by the Eleventh Amendment.[60] The arm-of-the-state doctrine's muddled articulation offers little help in discerning an answer.

II. THE ELEVENTH AMENDMENT'S MURKY ORIGINS AND LIMITATIONS

A. The Amendment's Purpose

An overview of the Eleventh Amendment's purpose is helpful in understanding the origins and disarray of the arm-of-the-state doctrine. However, such discussion must begin with the acknowledgement that "step[ping] through the looking glass of the Eleventh Amendment leads

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[56] Webb v. City of Maplewood, No. 4:16-cv-1703, 2017 WL 2418011 (E.D. Mo. June 5, 2017).

[57] Webb v. City of Maplewood, 889 F.3d 483, 487-88 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 389 (2018). The circuit court noted that, even if the municipal court is a separate and distinct entity over which the city has no control, "the City will have a defense on the merits but not immunity from suit." *Id.* at 486.

[58] Memorandum in Support of Defendant the City of St. Ann's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 5, Thomas v. City of St. Ann, No. 4:16-cv-01302-RWS (E.D. Mo. Sept. 8, 2017). The court denied the motion, rejecting St. Ann's argument that it is immune from suit even if all of the individuals identified as participants in the contested practices are immune from suit. Order at 2, Thomas v. City of St. Ann, No. 4:16-cv-01302-RWS (E.D. Mo. Sept. 14, 2018).

[59] *See supra* notes 53, 57-58.

[60] Balaban, *supra* note 16, at 280-81.

to a wonderland of judicially created and perpetuated fiction and paradox."[61] Ratified in response[62] to *Chisholm v. Georgia*,[63] the Amendment's explicitly stated function is to prevent federal courts from hearing suits against a state brought by citizens of another state or a foreign state.[64] However, despite the Amendment's concise language,[65] the Supreme Court has expanded its meaning to protect states from being sued by their own citizens,[66] by foreign states,[67] and by Native tribes.[68] "As so construed, the Amendment is in substantial tension with the rule-of-law axiom that for every federal right there must be a remedy enforceable in the federal court: [people] . . . cannot enforce their federal rights in federal court suits against the states."[69] The modern conception of state sovereign immunity thus is a "hodgepodge of confusing and intellectually indefensible" judicially developed and maintained creation.[70]

Many have written on[71]—and debated—the underlying purpose and scope of the Eleventh Amendment and of state sovereign immunity. One

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[61] Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980).

[62] *Id.*; *see also* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 515 (1978) ("The one interpretation of the eleventh amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia*.").

[63] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (entering a default judgment against the state of Georgia in a suit by citizens of South Carolina to recover on confiscated bonds).

[64] U.S. CONST. amend. XI.

[65] The Eleventh Amendment states in its entirety that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[66] Hans v. Louisiana, 134 U.S. 1, 10-11, 15 (1890) (holding that a citizen of a state may not sue that state in federal court on a claim arising under federal law unless the state consents).

[67] *See* Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[68] *See* Blatchford v. Native Village of Noatack, 501 U.S. 775, 779-82 (1991).

[69] Carlos Manuel Vásquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1686 (1997).

[70] John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983).

[71] *See, e.g.*, Gibbons, *supra* note 70, at 1892 (placing the Amendment in its historical context to argue that the Amendment is limited to preventing "the judicial power of the United States [from] extend[ing] to an action against a state if the only basis for federal jurisdiction is the presence of a diverse or alien party."); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 974 (2000) (questioning the assumption that nineteenth century remedies define what the Constitution requires and prohibits of remedies against states); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 COLUM. L. REV. 1413, 1422 (1975) (describing the connection between Article III and the Eleventh Amendment as defining the scope of federal court jurisdiction).

predominant theory is that, in deciding *Chisholm v. Georgia*,[72] the Supreme Court abandoned the Constitution's Framers' intent that states be immune from private suit, and that the Amendment was enacted in order to restore that original understanding.[73] The Supreme Court endorsed this notion, noting that "[b]ehind the words of the constitutional provisions are postulates which limit and control. There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"[74]

Two centuries of "tortured reading" of the Eleventh Amendment[75] led to the Supreme Court's articulation of two entwined rationales for state sovereign immunity: the protection of state sovereignty from the offense of a state's being haled into court against its will, and the insulation of the state treasury from the judgments of federal courts.[76] Commentators have argued that state sovereign immunity serves a number of additional interests—allowing government to operate more efficiently,[77] restricting the federal government's ability to create liabilities that bind state governments,[78] and protecting the policy decisions of popularly-elected officials[79]—all of which reflect the Supreme Court's focus on federalism in developing Eleventh Amendment jurisprudence.[80]

B. Bypassing Eleventh Amendment Immunity by Suing Local Entities

Over the past century, the Supreme Court has carved out caveats to the broad protections that Eleventh Amendment sovereign immunity offers to states. There are three major exceptions: Congressional abrogation

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[72] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[73] Field, *supra* note 62, at 515. *See also* Monaco v. Mississippi, 292 U.S. 313, 325 (1934); Hans v. Louisiana, 134 U.S. 1, 12 (1890); Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 7, 9 (1967).

[74] *Monaco*, 292 U.S. at 322–23 (quoting THE FEDERALIST No. 81 (Alexander Hamilton)).

[75] DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 148 (2005).

[76] Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994); Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1245 (1992).

[77] CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 153 (1972).

[78] JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 3–4 (2002).

[79] JACOBS, *supra* note 77, at 152.

[80] For additional in-depth commentary on the passage of the Eleventh Amendment and the ongoing debate over its doctrinal roots, see Field, *supra* note 62; Jackson, *supra* note 71.

of state sovereign immunity,[81] state waiver of sovereign immunity,[82] and suits brought under the doctrine of *Ex parte Young*.[83] However, these exceptions place constraints on Congress' power to abrogate state sovereign immunity[84] and on the remedies available.[85] Their utility is thus limited for plaintiffs who seek to challenge government employees' allegedly unconstitutional actions. As a result, many plaintiffs have chosen to sidestep Eleventh Amendment concerns by bringing legal actions against local municipalities and other political subdivisions instead, which are not rendered immune from suit by the Eleventh Amendment.[86]

As plaintiffs have turned to litigation against local and municipal governments and entities, local and municipal governments have simultaneously evolved and created new boards, authorities, and commissions in the name of expanding state services and emphasizing privatization, revenue-sharing, and decentralization.[87] With ever-expanding and decen-

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[81] Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996).

[82] Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003).

[83] *Ex parte* Young, 209 U.S. 123 (1908) (holding that plaintiffs may sue a state official in their official capacity for prospective injunctive relief in order to end a continuing federal law violation).

[84] *See Seminole Tribe*, 517 U.S. at 59-60 (holding that Congress cannot abrogate states' sovereign immunity pursuant to its powers under Art. I § 8 of the United States Constitution, commonly known as the Interstate Commerce Clause, but can use its powers under § 5 of the Fourteenth Amendment).

[85] *See Ex parte* Young, 209 U.S. 123 (allowing plaintiffs to sue state officials in their official capacity for prospective injunctive relief); *but see Seminole Tribe*, 517 U.S. at 74 (refusing to apply the *Ex parte Young* exception where Congress has "prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right").

[86] *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Lincoln Cty. v. Luning, 133 U.S. 529 (1890). Plaintiffs' ability to sue a municipality for constitutional violations is nevertheless limited because plaintiffs seeking to hold a municipality liable pursuant to 42 U.S.C. § 1983 must clear *Monell*'s heightened threshold of causation. As a result, today's federal dockets are "replete with cases . . . where immunities and the municipal causation requirement conspire to immunize local governments and their officials for conduct that violates the Constitution." Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 464 (2016).

[87] Jameson B. Bilsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 EMORY L.J. 819, 822 (2015); Linda Lobao, *The Rising Importance of Local Government in the United States: Recent Research and Challenges for Sociology*, 10 SOC. COMPASS 893, 897 (2016); Rogers, *supra* note 76, at 1244; *see also* Keon S. Chi et al., Council of State Governments, *Privatization in State Government: Trends and Issues*, SPECTRUM: J. ST. GOV'T, Fall 2003, at 13, https://perma.cc/F968-CKSK; John Joseph Wallis & Wallace E. Oates, Nat'l Bureau of Econ. Research, *Decentralization in the Public Sector: An Empirical Study of State and Local Government*, *in* FISCAL FEDERALISM: QUANTITATIVE STUDIES 5 (Harvey S. Rosen, ed., University of Chicago Press 1988), https://perma.cc/XS22-Y5SU.

tralizing local governments, plaintiffs can sue a "limitless" variety of government entities.[88] Each time they do, the presiding court must determine whether that entity is truly local. If the entity is situated sufficiently closely to the state, the court will consider the entity an "arm of the state" and thus immune from suit under the Eleventh Amendment despite any seemingly local character.[89]

III. THE ARM-OF-THE-STATE DOCTRINE'S HAPHAZARD EVOLUTION

A. The Supreme Court's Articulation

The Supreme Court has never issued a definitive framework for how to conduct the arm-of-the-state inquiry, and three Supreme Court cases represent the doctrine's modern canon.[90] In 1977, the Court recognized in *Mt. Healthy School District Board of Education v. Doyle* that Eleventh Amendment immunity may apply to lesser government entities that have such a close relationship with the state as to be "arm[s] of the state."[91] The Court considered whether a local public board of education in Ohio was entitled to state sovereign immunity in a suit by a district school teacher who had been fired.[92] The Court balanced factors relevant to determining whether the nature of the governmental entity in question makes it more like an arm of the state or more like a municipality or political subdivision.[93] Finding it relevant that Ohio law's definition of "state" did not include local school districts, and that the school board had "extensive" financial powers and freedom, the Court ultimately concluded that the district's status under state law and its ability to generate its own revenue outweighed the state's financial assistance and administrative involvement.[94] The district was "more like a county or city than . . . like an arm of the State" and thus not entitled to immunity.[95] However,

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[88] Bilsborrow, *supra* note 87, at 821-22.

[89] *See Mt. Healthy*, 429 U.S. at 280.

[90] In response to the Court's silence on how to apply the arm-of-the-state analysis consistently, the circuit courts have instead each crafted their own tests, with sometimes contradictory results. *See* discussion *infra* Section III.B.

[91] *Mt. Healthy*, 429 U.S. at 280.

[92] *Id.* at 281-83.

[93] *Id.* at 280.

[94] *Id.*

[95] *Id*. The Court also noted that the district board received a "significant" amount of money from the state of Ohio and some guidance from the state's board of education, but the district board's financial independence and the exclusion of local school districts from Ohio law's definition of "state" outweighed those considerations. *Id.*

the Court did not explain the relative weight of the factors that it considered and did not indicate whether courts should consider other factors.[96]

Mt. Healthy was not the first time the Court had considered dismissing a suit on sovereign immunity grounds without the state's being formally named as a defendant: the Court had long held that, where a state is the "real, substantial party in interest," regardless of the named defendants, the suit should be barred by the Eleventh Amendment.[97] But prior cases where courts had found the state to be the real party in interest were cases in which, if damages were to be awarded, there would be "no doubt" that they would come directly from the state treasury.[98] *Mt. Healthy* was not such a case, and thus suggested that a lesser government entity might share such a close relationship with the state that—so as to protect the state's interests—the entity should be protected from suit by state sovereign immunity regardless, even though the state's treasury may not be responsible for any ultimate payment.[99]

In the 1979 case of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court considered whether the Tahoe Regional Planning Agency ("TRPA"), a bi-state government entity, was entitled to state sovereign immunity.[100] Private landowners sued the TRPA, a bi-state compact between California and Nevada, alleging that the agency had adopted a land-use ordinance and engaged in other conduct that destroyed the petitioners' property values.[101] While the Ninth Circuit Court of Appeals, from which the petitioners appealed, concluded that TRPA received state sovereign immunity because it exercised a "specially aggregated slice of state power,"[102] the Supreme Court rejected the circuit's "expansive reading of the Eleventh Amendment."[103] The Court concluded that the TRPA could not claim sovereign immunity based on six factors: (1) the agency's characterization in the language of the compact; (2) the local government's role in appointing the agency's directors; (3) the local,

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[96] Héctor G. Bladuell, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 838-39 (2007); Rogers, *supra* note 76, at 1263.

[97] Edelman v. Jordan, 415 U.S. 651, 663 (1974) (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945), *overruled on other grounds by* Lapides v. Bd. of Regents, 535 U.S. 613 (2002)).

[98] Jonathan W. Needle, Note, *"Arm of the State" Analysis in Eleventh Amendment Jurisprudence*, 6 REV. LITIG. 193, 207 (1987).

[99] *See Mt. Healthy*, 429 U.S. at 280; Bilsborrow, *supra* note 87, at 826.

[100] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 393 (1979).

[101] *Id.* at 394.

[102] *Id.* at 400 (quoting Jacobson v. Tahoe Reg'l Planning Agency, 566 F.2d 1353, 1359 (9th Cir. 1977), *aff'd in part, rev'd in part sub nom.* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979)).

[103] *Id.* at 400.

non-state source of the agency's funding; (4) the municipal nature of the agency's function; (5) the state government's inability to veto the agency's actions; and (6) the state's lack of financial responsibility for the agency's liabilities and obligations.[104] For the first time, the Court also examined the state's intent in creating the entity and the entity's actual operations.[105]

The Court acknowledged that, even though some agencies exercising state power had previously been allowed to invoke the protections of the Eleventh Amendment, those agencies had been found immune from suit "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."[106] In articulating when state sovereign immunity applies to governmental entities, the *Lake Country Estates* Court cited two prior cases where immunity was at issue specifically because the state was the real party in interest due to the state treasury's ultimate responsibility for any monetary award.[107] The Court thus drew a connection between the arm-of-the-state and real-party-in-interest doctrines and underscored the importance of the state treasury's direct involvement in both.[108]

As parties continued to raise the issue of state sovereign immunity for local governmental entities, lower courts struggled to apply the *Mt. Healthy* and *Lake Country Estates* holdings, and the Second and Third Circuits eventually reached different conclusions about the same bistate entity, the Port Authority of New York and New Jersey. The Third Circuit, which concluded that the Port Authority was an arm of the state for purposes of Eleventh Amendment immunity, stated that *Lake Country Estates* did not set out an "exclusive list of factors to be considered" in an arm-of-the-state inquiry and conducted an inquiry based on the six *Lake Country Estates* factors as well as Port Authority's function, power to sue and be sued, and immunity from state taxation.[109] The Second Circuit, on the other hand, found that the Port Authority was not an arm of the state and thus not immune from suit.[110] While the Second Circuit also used the *Lake Country Estates* factors, the court found that the sixth factor—

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[104] *Id.* at 401-02; Bladuell, *supra* note 96, at 839.

[105] *Lake Country Estates*, 440 U.S. at 401.

[106] *Id.* (citing Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459 (1945)).

[107] *Id.* at 401 n.18.

[108] *Id.*; *see also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Bilsborrow, *supra* note 87, at 826.

[109] Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J., 819 F.2d 413, 417 (3d Cir. 1987), *abrogated by* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

[110] Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 630 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990).

whether the agency's liability would place the state treasury at risk—was "the single most important factor" in determining whether an agency was intended to be an arm of the state for Eleventh Amendment purposes.[111] In holding that the Port Authority was not entitled to sovereign immunity, the Second Circuit emphasized that, in cases where the state is not the defendant, the "exposure of the state treasury" is "critical" to finding Eleventh Amendment immunity, and cited to cases which granted such immunity under the real-party-in-interest doctrine.[112] The Supreme Court resolved the split by concluding that the states had waived any immunity and did not address the differences in the circuits' arm-of-the-state analysis.[113]

Four years later, in *Hess v. Port Authority Trans-Hudson Corporation*, the Court recognized but did not resolve the circuits' confusion.[114] Acknowledging that the various "indicators of immunity" had pointed the Second and Third Circuits in different directions,[115] the Court reemphasized that shielding the state's treasury from liability was the "most salient factor" in Eleventh Amendment determinations.[116] The *Hess* Court went on to incorporate the Eleventh Amendment's "twin reasons for being"—the protection of the state's treasury and dignity interests—explicitly into its arm-of-the-state analysis.[117] Pointing to the Port Authority's financial self-sufficiency, the Court ultimately held that there was no concern as to state solvency or dignity and upheld the Second Circuit's finding that the Port Authority is not immune from suit.[118]

B. Chaos Amongst the Circuits

Although *Hess* provided lower courts with some guidance as to how they might apply the arm-of-the-state analysis, the Supreme Court did not clarify which factors courts should consider, how heavily they should weigh those factors relative to each other, or how the twin reasons are involved in the analysis.[119] The result has proven nothing less than chaotic: every circuit has developed its own version of the arm-of-the-state

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[111] *Id.* at 631.

[112] *Id.*

[113] Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990).

[114] Hess v. Port. Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

[115] *Id.* at 47.

[116] *Id.*

[117] *Id.* at 47-48.

[118] *Id.* at 39-40, 47-48, 52.

[119] *See* Bilsborrow, *supra* note 87, at 827-29 (questioning whether the twin reasons are a second stage of analysis after the reviewing court first considers the various arm-of-the-state factors, or whether the twin reasons function as a "prism" through which the factors should then be "refracted").

test, which in turn has produced scores of inter- and intra-circuit divergence as to which governmental entities are and are not arms of their respective states.[120] Some circuits have attempted to revise their arm-of-the-state analyses in light of *Hess*,[121] while others have maintained that their analyses are consistent with *Hess*' approach.[122]

Each federal circuit uses between two and seven factors to determine whether a governmental entity is an arm of the state that receives Eleventh Amendment immunity.[123] The factors fall into five broad categories: (1) whether the entity performs local or state functions; (2) the degree of state political and administrative control over the entity; (3) the entity's powers and financial autonomy from the state; (4) the entity's characterization by state law; and (5) whether the state treasury would ultimately pay any judgments against the entity.[124] The inquiry is ultimately one into the entity's status under the Eleventh Amendment, but because the criteria are so difficult to define, circuits apply the arm-of-the-state analysis on a fact-intensive, case-by-case basis.[125]

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[120] *See infra* notes 129-48.

[121] *E.g.*, Irizarry-Mora v. Univ. of P.R., 647 F.3d 9, 12 (1st Cir. 2011) (describing the First Circuit's decision to "reformulate [its] analysis as a two-part inquiry whose steps reflect[] the Eleventh Amendment's twin concerns for the States' dignity and their financial solvency" raised in *Hess*). Muddying the waters even further, this revision is in name only; the substance of the court's analysis remains the same. *Id.* ("[T]he 'reshaping' of our law did not represent an actual change in the substance of the analysis.").

[122] *E.g.,* P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 874 (D.C. Cir. 2008) (reading *Hess* as "confirm[ing] that we must apply the three-factor arm-of-the-state test and look to state intent, state control, and overall effects on the state treasury."); Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005) (describing the Sixth Circuit's four-factor based approach as "similar" to that of the Supreme Court).

[123] For an in-depth description of each circuit's arm-of-the-state test and examples of its application, see 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 123.23[4] (3d ed. 2013).

[124] Rogers, *supra* note 76, at 1269.

[125] *Id.* at 1272.

The First Circuit uses a two-part test that requires the analysis of seven additional factors.[126] The Second Circuit has two tests: one considers six factors,[127] the other two,[128] and both emphasize the importance of protecting the state's treasury.[129] The Third Circuit holds that, in some cases, whether an entity is entitled to Eleventh Amendment immunity can be determined summarily from the statutes establishing and governing the entity.[130] On the other hand, where evidence beyond statutory language is required, the Third Circuit uses a three-factor test that gives each factor equal weight,[131] although the Third Circuit has historically ascribed the

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[126] Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 68 (1st Cir. 2003). In administering this test, First Circuit courts ask whether the state has structured the entity to share Eleventh Amendment immunity and whether there is a risk that money damages will be paid from the state treasury should the entity be found liable. To answer those two questions, First Circuit courts consider up to seven factors, including: (1) whether the agency has the financial power to satisfy judgments without involving the state; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) how much control the state exerts over the agency; (5) whether the agency can sue, be sued, and enter contracts; (6) whether the agency's property is subject to state taxes; and (7) whether the state has immunized itself from liability for the agency's acts. *Id.* at 62 n.6 (quoting Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth., 991 F.2d 935, 939-40 (1st Cir. 1993)).

[127] Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996). Under this test, Second Circuit courts first consider six factors: "(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state." *Id.* If those six factors "point in different directions," circuit courts then consider *Hess*' twin rationales for the Eleventh Amendment and ask whether allowing the entity to be sued in federal court will threaten the integrity of the state or expose the state treasury to risk. *Id.*

[128] Clissuras v. City Univ. of N.Y., 359 F.3d 79, 82 (2d Cir. 2004), *supplemented*, 90 F. App'x 566 (2d Cir. 2004). Under this test, Second Circuit courts consider (1) whether a judgment against the entity would render the state responsible for paying the damages, and (2) the extent of the state's control over the entity. *Id.*

[129] *Mansuco*, 86 F.3d at 293; *Clissuras*, 359 F.3d at 82. The Second Circuit's use of two distinct arm-of-the-state tests is perhaps due to *Pikulin v. City University of New York*, 176 F.3d 598 (2d Cir. 1999), which specifically discussed the status of the City University of New York ("CUNY") as an arm of the state. *Pikulin* was based in turn on a series of district court opinions issued before *Mancuso* that had discussed CUNY's arm-of-the-state status. *See, e.g.*, Burrell v. City Univ. of N.Y., 995 F. Supp. 398, 410–11 (S.D.N.Y. 1998); Minetos v. City Univ. of N.Y., 875 F. Supp. 1046, 1053 (S.D.N.Y. 1995); Moche v. City Univ. of N.Y., 781 F. Supp. 160, 165 (E.D.N.Y. 1992), *aff'd without opinion*, 999 F.2d 538 (2d Cir. 1993); Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126, 1137 (S.D.N.Y. 1992); Silver v. City Univ. of N.Y., 767 F. Supp. 494, 499 (S.D.N.Y.), *aff'd on other grounds*, 947 F.2d 1021 (2d Cir. 1991); Ritzie v. City Univ. of N.Y., 703 F. Supp. 271, 276–77 (S.D.N.Y. 1989).

[130] Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 254 (3d Cir. 2010).

[131] Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 239-40 (3d Cir. 2005). The three factors that the Third Circuit considers are: (1) whether any money damages that result from the entity being held liable will come from the state treasury; (2) the agency's status under

most importance to whether the state treasury would pay any damages arising from the entity's liability.[132] The Fourth Circuit considers four non-exclusive factors,[133] the most important one being the state treasury's potential responsibility.[134] The Fifth Circuit's test uses six factors,[135] with the source of an entity's funding being the most important.[136] The Sixth Circuit uses four factors and gives the most weight to the state's potential liability.[137] The Seventh Circuit's test has two factors, one of which has five subparts, with financial autonomy the more important factor.[138] The Eighth Circuit uses a two-factor test, the ultimate question being whether

state law; and (3) the agency's degree of autonomy. Fitchik v. N.J. Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989).

[132] *Fitchik*, 873 F.2d at 659-62.

[133] S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc., 535 F.3d 300, 303 (4th Cir. 2008). The Fourth Circuit considers: (1) whether any judgment against the entity will be paid by or inure to the benefit of the state; (2) the degree of autonomy exercised by the entity; (3) whether the entity is involved with local or state concerns; and (4) how the entity is treated under state law. *Id.*

[134] Hutto v. S.C. Ret. Sys., 773 F.3d 536, 543 (4th Cir. 2014).

[135] Providence Behavioral Health v. Grant Rd. Pub. Util. Dist., 902 F.3d 448, 456 (5th Cir. 2018). The six factors are: (1) whether state statutes and case law view the agency as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned with local or statewide problems; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Id.*

[136] Delahoussaye v. City of New Iberia, 937 F.2d 144, 147-48 (5th Cir. 1991).

[137] Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005). Sixth Circuit courts consider: (1) the state's potential liability for a judgment against the entity; (2) the language that state statutes and state courts use to refer to the entity and the degree of state control over the entity; (3) whether state or local officials appointed the entity's administrative officers; and (4) whether the entity's functions are that of state or local government. *Id.*

[138] Tucker v. Williams, 682 F.3d 654, 659 (7th Cir. 2012) (citing Kashani v. Purdue Univ., 813 F.2d 843, 845–47 (7th Cir.1987)). The Seventh Circuit considers the entity's financial autonomy and its general legal status; in analyzing the entity's financial autonomy, Seventh Circuit courts evaluate "the extent of state funding, the state's oversight and control of the entity's fiscal affairs, the entity's ability to raise funds independently, whether the state taxes the entity, and whether a judgment against the entity would result in the state increasing its appropriations to the entity."

the state is the real party in interest.[139] The Ninth Circuit uses five factors,[140] with the state's potential liability the most important.[141] The Tenth Circuit uses a four-factor test.[142] The Eleventh Circuit analyzes four factors[143] in light of the defendant's function when taking the challenged action.[144] Finally, the D.C. Circuit uses a three-factor test.[145] All of the circuits consider the entity's source of funding or financial independence in some way, but no two circuits use the same test.[146]

In deciding whether to grant Eleventh Amendment immunity to governmental entities, the circuits use nebulous factors that they do not weigh in any consistent manner, which creates unpredictable and occasionally conflicting results.[147] This raises fundamental concerns for litigants who seek to challenge practices, like fines and fees, of what would seem at first blush to be obviously municipal bodies, like municipal courts.

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[139] Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Tr. Co., 640 F.3d 821, 827 (8th Cir. 2011). Eighth Circuit courts examine the degree of an entity's independence from the state and whether a money judgment would implicate the state treasury. *Id. But see* United States *ex rel.* Fields v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist., 872 F.3d 872, 877 (8th Cir. 2017) (applying a six-factor test).

[140] Sato v. Orange Cty. Dep't of Educ., 861 F.3d 923, 928-29 (9th Cir. 2017). Ninth Circuit courts consider (1) whether a money judgment against the entity would be satisfied by state funds; (2) whether the entity performs central government functions; (3) whether the entity may sue or be sued; (4) whether the entity can take property in its own name or only the name of the state; and (5) the entity's corporate status.

[141] Doe v. Lawrence Livermore Nat. Lab., 131 F.3d 836, 839 (9th Cir. 1997).

[142] Steadfast Ins. Co. v. Agric. Ins. Co., 507 F.3d 1250, 1253 (10th Cir. 2007). Tenth Circuit courts analyze: (1) state law's characterization of the entity; (2) the entity's autonomy under state law and the degree of control the state exercises over the entity; (3) the entity's state funding and ability to issue bonds or levy taxes on its own behalf; and (4) whether the entity in question is concerned primarily with local or state affairs. *But see* Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 574-75 (10th Cir. 1996) (describing a two-part arm-of-the-state analysis).

[143] Ross v. Jefferson Cty. Dep't of Health, 701 F.3d 655, 660 (11th Cir. 2012) (quoting Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003)). Eleventh Circuit courts consider: (1) how state law defines the entity; (2) the state's degree of control over the entity; (3) the source of the entity's funds; and (4) who is responsible for judgments against the entity.

[144] Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003).

[145] P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 873 (D.C. Cir. 2008). D.C. Circuit courts consider: (1) the state's intent as to the entity's status, including the functions it performs; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury.

[146] *See supra* notes 126-45.

[147] *See* discussion *supra* Section III.A; Rogers, *supra* note 76, at 1243-44.

IV. MUNICIPAL COURTS, SOVEREIGN IMMUNITY, AND THE NEED FOR AN ARM-OF-THE-STATE TEST CONSISTENT WITH THE ELEVENTH AMENDMENT

A. Municipal Courts Are More "Municipal" Than "Court"

Municipal courts illustrate how the expansion of local governments' and their simultaneous privatization and decentralization can lead to a governmental entity that both makes hyperlocal decisions and is claimed to be an arm of the state by municipalities defending against debtors' prison lawsuits.[148] The National Center for State Courts defines municipal courts as stand-alone trial courts with limited jurisdiction that are funded "largely by a local unit of government."[149] In many states, these courts are created by towns or cities[150] and receive exclusively local funding.[151] As a result, municipal courts are frequently entangled with other municipal branches of government: for instance, in Missouri, municipal court employees often work for both the court and for their city's executive office, and many report to city officials working in the finance department.[152] Court administrators and clerks who report to city finance directors or officials have reported that their "city uses the court for one of their

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[148] *See* sources cited *supra* notes 52, 54-55, 58, 87.

[149] *Municipal Courts Resource Guide*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/8PVV-PC4E (last visited Nov. 21, 2019).

[150] *See, e.g.*, *About the Nevada Judiciary*, SUPREME COURT OF NEV., https://perma.cc/LY69-B6NV (last visited May 10, 2019) ("Each of these [municipal] courts is funded by the city . . . ."); *An Overview of the Utah Justice Courts*, UTAH COURTS, https://perma.cc/8SYD-AF8K (last visited May 10, 2019) ("Justice Courts are established by counties and municipalities . . . ."); *Courts of Limited Jurisdiction*, WASH. COURTS, https://perma.cc/YM56-DJKJ (last visited May 10, 2019) ("Municipal courts are those created by cities and towns."); *Indiana Trial Courts: Types of Courts*, IND. JUDICIAL BRANCH, https://perma.cc/DQF7-UGM9 (last visited May 10, 2019) ("City and town courts may be created by local ordinance (local law)."); *Municipal Court*, S.C. JUDICIAL BRANCH, https://perma.cc/P6ET-DHWQ (last visited May 10, 2019) ("The council of each municipality may establish, by ordinance, a municipal court to hear and determine all cases within its jurisdiction."); *Municipal Courts*, N.D. COURTS, https://perma.cc/LMB7-A9SM (last visited May 10, 2019) ("Each municipality under 5,000 in population has the option of deciding whether or not to have a municipal court."); *Municipal Courts*, WIS. COURT SYSTEM, https://perma.cc/82XJ-PGGW (last visited May 10, 2019) (directing municipalities interested in creating a municipal court towards a set of resources); *The Supreme Court of Georgia History, Municipal Courts*, SUPREME COURT OF GA., https://perma.cc/NB84-27W5 (last visited Nov. 21, 2019) ("Cities and towns in Georgia establish municipal courts . . . .").

[151] *See* sources cited *supra* note 150; *State Court Structure Charts*, COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, https://perma.cc/3T96-YX9E (last visited May 10, 2019) (offering summaries of all fifty states' courts' structure, jurisdiction, and funding sources).

[152] Lawrence G. Myers, *Judicial Independence in the Municipal Court: Preliminary Observations from Missouri*, 41 CT. REV. 26, 27 (2004), https://perma.cc/4R5U-N8FP.

main sources of income."[153] Locally funded, locally established, and locally staffed, municipal courts—which take on tens of millions of cases a year and are the only way that most residents come into contact with the judicial system[154]—are thus quintessentially local entities which in turn are used to raise revenue for their cities and towns.[155]

Where courts have focused their arm-of-the-state inquiry on a municipal court's funding or level of local control—two *Lake Country* factors that circuits tend to emphasize in their arm-of-the-state analyses—municipal courts have not received Eleventh Amendment immunity from suit.[156] Moreover, while municipal courts are technically part of their state's judicial system,[157] they do not share the same jurisdictional or practical characteristics as other state courts.[158] State judicial systems are comprised of trial courts, mid-level appellate courts, and a highest court, typically the Supreme Court or Court of Appeals.[159] Municipal courts sit below all of these courts and are so specific to their town or city that even the National Center for State Courts does not mention them in its summary of state court systems.[160] It is thus disingenuous to paint municipal courts as identical to state trial or appellate courts, which have in the past been held to be arms of the state.[161]

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[153] *Id.* at 28.

[154] *See, e.g.*, Janet G. Cornell, *Limited-Jurisdiction Courts: Challenges, Opportunities, and Strategies for Action*, *in* FUTURE TRENDS IN STATE COURTS 67, 69 (2012) https://perma.cc/G76S-85UY (discussing limited jurisdiction courts' high case volume and interaction with residents); *The Municipal Courts of New Jersey*, N.J. COURTS, https://perma.cc/3R8Z-S9YV (last visited May 10, 2019) ("It is through the Municipal Courts that most citizens in the State come into contact with the judicial system . . . .").

[155] *See* discussion *supra* Section I.A.

[156] Kirkland v. DiLeo, No. 12-cv-1196 (KM), 2013 WL 1651814, at *5-6 (D.N.J. Apr. 15, 2013), *aff'd*, 581 F. App'x 111 (3d Cir. 2014); *In re* Brown, 244 B.R. 62, 69 (Bankr. D.N.J. 2000).

[157] *See Municipal Courts Resource Guide*, *supra* note 149.

[158] *See* sources cited *supra* notes 150-51, 154.

[159] *Comparing Federal & State Courts*, U.S. COURTS, https://perma.cc/JGA2-PR8B (last visited May 10, 2019).

[160] National Center for State Courts, *The Who, What, When, Where and How of State Courts*, VIMEO (Nov. 8, 2018, 10:40 AM), https://vimeo.com/299681452.

[161] *E.g.*, Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987), *superseded by statute on other grounds*, *as recognized in* Alexis v. County of Los Angeles, 698 F. App'x 345, 346 (9th Cir. 2017); Harris v. Mo. Ct. of App., 787 F.2d 427, 429 (8th Cir. 1986); Dolan v. City of Ann Arbor, 666 F. Supp. 2d 754, 764-65 (E.D. Mich. 2009), *aff'd*, 407 F. App'x 45 (6th Cir. 2011); Jones v. Winters, No. 4:09CV00019 BSM, 2009 WL 764539, at *3 (E.D. Ark. Mar. 19, 2009); NAACP v. State of California, 511 F. Supp. 1244, 1257-58 (E.D. Cal. 1981), *aff'd*, 711 F.2d 121 (9th Cir. 1983). Notably, many of these circuit-level opinions, which courts later cite when granting state trial courts sovereign immunity, were decided before *Hess* and thus do not incorporate the Supreme Court's most recent guidance on the arm-of-the-state analysis' overarching intent.

In the context of debtors' prison litigation, municipal courts should not receive Eleventh Amendment immunity not only because they are unlike the rest of their state's judicial system but also because they are not acting on that system's behalf.[162] When court employees like clerks and judges—who frequently report to their city's executive branch—charge defendants fines and fees in order to generate municipal revenue,[163] the municipal court acts not as part of the state judicial system but as part of and on behalf of its municipality.[164] While the Supreme Court has on one occasion suggested in dicta that, where local governments provide judicial services, they are "typically" treated as arms of the state for Eleventh Amendment purposes,[165] the Court has not clarified whether municipal courts are included in that definition.

Given that municipal courts' practice of charging fines and fees is driven by municipal revenue generation, not by the "fair administration of justice,"[166] the court's function seems more municipal than judicial. Thus, municipal courts charging fines and fees act as part of the municipality they sit in—and municipalities are not protected from suit by the Eleventh Amendment.[167] But the confused state of the arm-of-the-state doctrine means that litigants cannot predict when courts will recognize this reality.

B. The Arm-of-the-State Analysis Should Reflect the Eleventh Amendment's Intent

Given the Supreme Court's ambiguous guidance on the arm-of-the-state analysis, federal circuits' divergent approaches, and the ever-expanding role of local government, the arm-of-the-state doctrine should be

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[162] *See* sources cited *supra* notes 150-53.

[163] *See* sources cited *supra* notes 151-53, 154; discussion *supra* Section I.A.

[164] *See supra* notes 16, 24.

[165] Tennessee v. Lane, 541 U.S. 509, 527 n.16 (2004) ("[J]udicial services [are] an area in which local governments are typically treated as 'arm[s] of the State' for Eleventh Amendment purposes . . . .") (citing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977)). Notably, none of the cases that were cited to support the Supreme Court's dictum involved municipally funded municipal courts.

[166] FERGUSON REPORT, *supra* note 24, at 15. When municipal court employees impose fines and fees with the express purpose of increasing municipal revenue—and do so in close concert with non-judicial branches of the local government—they participate in a scheme that has no underlying judicial rationale. "The purpose of courts is to be a forum for the fair and just resolution of disputes, and in doing so to preserve the rule of law and protect individual rights and liberties." NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, NAT'L CTR. FOR STATE COURTS, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 2 (2018), https://perma.cc/H6S3-9E2L. The use of debtors' prison practices thus undermines the court system's judicial function for pecuniary gain. *See also* sources cited *supra* notes 17, 31, 33.

[167] *See* sources cited *supra* note 86.

refocused to more fully embody the Supreme Court's twin rationales for sovereign immunity[168] and the historical basis for the Eleventh Amendment.[169]

One possibility, as suggested in an article which has been cited by the Supreme Court and numerous federal courts,[170] is confining the test to two inquiries that promote structural federalism[171]: (1) how state law defines the governmental entity; and (2) whether the governmental entity is empowered to generate its own revenue.[172] Author Alex E. Rogers describes the threshold question that courts should address as whether the state enabling act that created the entity expresses—in unmistakably clear language—that the state intends to designate the entity as an arm of the state.[173] This approach embodies the Supreme Court's reliance in both *Mt. Healthy* and *Lake Country Estates* on the state law's explicit language concerning the entity in question.[174] If the state statute does not clearly articulate an intent to designate the entity as an arm of the state, the court should consider whether the entity has the independent power to raise its own revenue.[175] Only those entities that are not empowered to generate funds through means such as "the issuance of debt" should be granted Eleventh Amendment immunity.[176] This two-part analysis is consistent

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[168] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994).

[169] *See* Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934).

[170] *E.g.*, *Hess*, 513 U.S. at 59; P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 879 (D.C. Cir. 2008); Beentjes v. Placer Cty. Air Pollution Control Dist., 397 F.3d 775, 780 (9th Cir. 2005); Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 62 n.5 (1st Cir. 2003); Gray v. Laws, 51 F.3d 426, 432 n.3 (4th Cir. 1995).

[171] For an in-depth discussion of structural federalism, a theory fundamental to the relationship between the state and federal governments, see Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014); Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM. L. REV. SIDEBAR 4 (2015); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998).

[172] Rogers, *supra* note 76, at 1296. The author notes that courts have blended multiple facets of the financial relationship between the entity and the state, and that the question of whether the state treasury will ultimately be held liable is frequently unresolvable because enabling statutes do not always mandate that the state satisfy the entity's judgment. *Id.* at 1294-95.

[173] *Id.* at 1288-91. This heightened level of inquiry into the state's law reflects the "clear statement" requirement for congressional abrogation and state waiver of Eleventh Amendment immunity. *See* Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06 (1990); Siegel, *supra* note 82.

[174] *See* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401-02 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

[175] Rogers, *supra* note 76, at 1305.

[176] *Id.*

with the Supreme Court's interpretation of at least part of the Eleventh Amendment's intent as protecting the state treasury from liability for judgments against a non-state governmental entity.[177] If the entity cannot generate its own funding and relies entirely on state funding, any judgment will logically come from the state treasury, and the Eleventh Amendment will protect the entity from suit, but if the entity both generates its own revenue and receives state funding, courts will have to engage in a fact-based inquiry to determine the extent of the entity's ability to generate its own revenue.[178] However, because the proposed analysis focuses solely on the entity's financial autonomy, rather than the speculative impact of a judgment on the state's treasury or future funding for the entity, courts will not be forced to conduct the same kind of intensive analysis that they currently undertake.[179]

Other commentators have proposed: focusing on the state's intent to provide the entity with immunity, the state's legal and practical liability for the judgment, and whether the entity serves a state or local function;[180] reframing the inquiry to be one about political accountability, specifically considering whether the state's interests sufficiently coincide with the entity's affairs;[181] and asking instead only whether the basis of jurisdiction is diversity of citizenship or federal question.[182] While these approaches rightfully attempt to make sense of the arm-of-the-state doctrine's ambiguity, they do not accomplish the necessary task of both simplifying courts' analyses and integrating the rationales for Eleventh Amendment immunity.

Because they do not resolve the arm-of-the-state doctrine's ambiguity and do not explicitly address funding, these proposals will engender either continued inter-circuit divergence or a move away from the original purposes of the Eleventh Amendment—or both. The two-factor approach more accurately addresses the shortcomings of the arm-of-the-state doctrine in its current form.

Based on the twin reasons for the Eleventh Amendment, protecting the state's treasury and "dignity,"[183] a governmental entity's financial independence and status under state law are appropriately paramount con-

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[177] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994).

[178] Rogers, *supra* note 76, at 1308.

[179] *Id.*

[180] Bladuell, *supra* note 96, at 852-53.

[181] Bilsborrow, *supra* note 87, at 849.

[182] Anthony J. Harwood, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 FORDHAM L. REV. 101, 120 (1986).

[183] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994).

siderations in the arm-of-the-state analysis: in the age of local government,[184] it has never been more important that municipalities and municipal courts not be able to hide behind the cloak of state sovereign immunity.

CONCLUSION

The rise of modern-day debtors' prison practices and debtors' prison litigation reveal the need for renewed attention to the arm-of-the-state doctrine's disarray. The Supreme Court's limited precedent has not provided sufficient guidance for the federal circuits, which have in turn produced divergent arm-of-the-state analyses with inconsistent results. Based on the doctrine in its current form, municipal courts should not be immune from debtors' prison suits—but litigants cannot predict that courts will come to that conclusion. There is thus a pronounced need for a more coherent arm-of-the-state test that reflects the Eleventh Amendment's intent. Courts would be wise to center two factors in their analysis: the entity's status under state law and the entity's financial independence. Under this more precise articulation of the arm-of-the-state inquiry, it becomes clear that municipal courts which charge defendants fines and fees in order to generate revenue for themselves and for the municipality in which they sit should not be immune from suit. As locally established, locally staffed, and locally and self-funded entities, municipal courts must be held liable for their debtors' prison schemes.

[184] Lobao, *supra* note 87, at 897.

DISMANTLING THE PILLARS OF WHITE SUPREMACY: OBSTACLES IN ELIMINATING DISPARITIES AND ACHIEVING RACIAL JUSTICE

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INTRODUCTION

Despite the pervasive pronouncements of unity and indivisibility in American culture, this nation has always had a palpable separation that—depending on whom was asked—existed under the surface, out in the open, or solely in the minds of detractors. This dichotomy in American reality, where ostensibly universal benefits have been meted out unequally or wholly denied to some, has been a galvanizing, rallying cry for both activists on the margins and politicians in the mainstream. In 2013, then-mayoral candidate Bill de Blasio used a "Tale of Two Cities" as his campaign slogan and central guiding principle for policy proposals in New York City.[1] On the national stage, John Edwards received significant praise for his "Two Americas" address during the 2004 Democratic National Convention.[2] Both of these political messages focused on persistent

[1] James Cersonsky, *Bill de Blasio: New York's 'Tale of Two Cities*,*'* NATION (May 9, 2013), https://perma.cc/TGV6-5RS7; Hunter Walker, *Bill de Blasio Tells 'A Tale of Two Cities' at His Mayoral Campaign Kickoff*, OBSERVER (Jan. 27, 2013, 4:34 PM), https://perma.cc/258H-X7BB.

[2] Senator John Edwards, Address to the 2004 Democratic National Convention (July 28, 2004) (transcript available at https://perma.cc/9BFW-HXEJ).

inequality through a socioeconomic framework,[3] with only passing allusions to racial injustice.[4]

Of course, race has always played a central role in the American dichotomy, dating back to the nation's inception. In 1968, such a dichotomy was recognized by a federal panel investigating civil uprisings in major cities. Tapped by President Lyndon B. Johnson to determine the cause of this disorder, the National Advisory Commission on Civil Disorders, colloquially known as the "Kerner Commission," concluded: "Our Nation is moving toward two societies, one black, one white—separate and unequal."[5] Though the Kerner Commission spoke of this schism as a future possible reality, people of color have long acknowledged its presence. An early attack on America's hypocritical posturing on matters of equality was Frederick Douglass' 1852 address, "What to the Slave is the Fourth of July?"[6] This speech provided an unforgiving examination of race in America and made plain what was obvious to Black people throughout the country: that the bedrock principles of "political freedom and of natural justice, embodied in that Declaration of Independence" cannot be universal in a country where slavery is legal.[7] Douglass spoke frankly about the immeasurable disparity between Black and white Americans and noted: "The blessings in which you, this day, rejoice, are not enjoyed

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[3] *See Cersonsky, supra* note 1 ("So, let's be honest about where we are today. This is a place that in too many ways has become a tale of two cities, a place where City Hall has too often catered to the interests of the elite rather than the needs of everyday New Yorkers."); Edwards, *supra* note 2 ("We shouldn't have two public school systems in this country: one for the most affluent communities, and one for everybody else. None of us believe that the quality of a child's education should be controlled by where they live or the affluence of the community they live in.").

[4] While campaigning, de Blasio focused mostly on economic inequality but also discussed the disparate effect of stop-and-frisk policing policies on people of color in his ads. *See* NYForDeBlasio *New Yorkers for de Blasio TV Ad: "Dante*," YOUTUBE (Aug. 8, 2013), https://perma.cc/4W6G-R8FJ; *see also* Edwards, *supra* note 2. In describing what role race played in his vision of two Americas, Senator Edwards focused on socioeconomic conditions and noted, "[t]his is not an African-American issue. This is not a Latino issue. This is not an Asian-American issue. This is an American issue . . . The truth is, the truth is that what John [Kerry] and I want, what all of us want [is] for our children and our grandchildren to be the first generations that grow[] up in an America that's no longer divided by race. We must build one America. We must be one America, strong and united for another very important reason: because we are at war."

[5] NAT'L CRIMINAL JUSTICE REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), https://perma.cc/99RL-TXWW.

[6] Frederick Douglass, What to the Slave is the Fourth of July?, Address at the Rochester Ladies' Anti-Slavery Society (July 5, 1852) (transcript available at https://perma.cc/RYS7-S3U5).

[7] *Id.*

in common. — The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me."[8]

Today, social justice campaigns like the Movement for Black Lives ("M4BL") have maintained this framing and have asked Americans to recognize how race still creates two essentially different sets of experiences in society, but in doing so they are in the minority. Many Americans disagree that such a double standard exists.[9] Even when such divergences are acknowledged, there is often a great degree of disagreement about why these different experiences exist. This skepticism has led to destructive narratives and incorrect conclusions that have perpetuated racist beliefs and maintained a racial hierarchy. Perhaps worse, this collective amnesia regarding our nation's past has led to a fundamental mismatch where American institutions exert significantly less effort towards remedying racist policies than these institutions exerted towards creating and maintaining a racial hierarchy.

Part I of this article will describe the racial inequality that persists in the twenty-first century and will explain why these disparities matter. Part II introduces four pillars of white supremacy used to create and maintain racial injustice and briefly illustrates their interweaving usage in the realm of housing policy. Part III explores strategies for how each pillar might be best attacked, and discusses the benefits and limitations of litigation and of colorblind solutions in closing the race gap. Finally, Part IV will discuss recent integration efforts in New York City, explaining how these efforts are a case study and possible model for creating equitable outcomes utilizing many of the strategies raised in Part III.

I. A TALE OF TWO AMERICAS STILL PERSISTS TODAY BETWEEN PEOPLE OF COLOR AND WHITES

American dialogue on the subject of race is older than even the country itself. So too is the ongoing debate about unfair treatment on the basis of race—both regarding its pervasiveness and even its existence. Today, the question is one of fairness, examining the ways in which people of color are disparately exposed to negative treatment while white people disparately benefit within American society due to the privileges they possess. Some flashpoints include the string of police killings of unarmed

[8] *Id.*

[9] A majority of Americans—but a minority of Black respondents—believe Black people in their community are treated as fairly as white people in a variety of settings. *See Race Relations*, GALLUP, https://perma.cc/E7XX-YY98 (last visited Feb. 18, 2020).

men and women of color,[10] the unfounded suspicion and harassment experienced by people of color while they engage in mundane activities,[11] and the lack of representation of people of color in various contexts from government to entertainment.[12]

Ironically, the mere identification of racism is often criticized for fomenting divisiveness and sometimes even scrutinized more than racism

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[10] Police violence against unarmed men and women of color is naturally traumatic and has always damaged so-called race relations in America. The availability of camera footage and the quick dissemination of information through social media and other internet channels provided fertile ground for a new wave of social awareness and activism regarding police violence. *See* Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage,* N.Y. TIMES (Apr. 19, 2018), https://perma.cc/822P-3KRG. A string of high-profile deaths at the hands of police triggered extensive discussion about whether people of color are unfairly targeted by law enforcement and whether officers, many of whom were white, were not being held accountable or were receiving lenient treatment. *See* German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018, 4:12 PM), https://perma.cc/W44X-D69F.

[11] In early 2018, a string of police and security incidents gained national coverage. In each incident, one or more Black individuals had been engaging in nondescript behavior when a white individual reported their activity to the police or private security on the assumption that the Black individual was suspicious or had been violating a rule or law. *See* e.g., Dakin Andone, *Woman Says She Called Police When Black Airbnb Guests Didn't Wave at Her*, CNN (May 11, 2018, 2:32 AM), https://perma.cc/8PAP-GH48 (renting an Airbnb); Jessica Campisi et al., *After Internet Mockery, 'Permit Patty' Resigns As CEO of Cannabis-Products Company*, CNN (June 26, 2018, 10:47 PM), https://perma.cc/TVX2-EWJM (selling water); Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), https://perma.cc/TFA2-BPVM (napping in a dormitory lounge); *Existing While Black: What Does It Feel Like When Every Move You Make Is Policed?*, HUFFPOST, https://perma.cc/DS57-RTAL (last visited Nov. 10, 2019) (various scenarios); Erik Ortiz & Gabe Gutierrez, *Man Who Called Police on Black Woman at North Carolina Pool No Longer Has Job*, NBC NEWS (July 6, 2018, 10:37 PM) (swimming); Otis R. Taylor Jr., *Even in Oakland, Calling the Cops on Black People Just Living Their Lives*, S. F. CHRON. (May 17, 2018, 6:00 AM), https://perma.cc/J5AV-TM5N (barbequing). Notably, there wasn't any discernible reason to believe that this wave represented an uptick in these types of incidents. Rather, it is more likely that 911 calls accusing Black individuals of suspicious behavior because of latent biases have always been commonplace. *See, e.g.*, Rachael Herron, *I Used To Be a 911 Dispatcher. I Had to Respond to Racist Calls Every Day.*, VOX (Oct. 31, 2018, 12:08 PM), https://perma.cc/H7J2-37MJ (describing how emergency calls based on racial profiling have long been routine).

[12] KAREN SHANTON, DEMOS, THE PROBLEM OF AFRICAN AMERICAN UNDERREPRESENTATION ON LOCAL COUNCILS (2014), https://perma.cc/XB4C-N5A8; Anna Brown & Sara Atske, *Blacks Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RES. CENTER (Jan. 18, 2019), https://perma.cc/G7EG-57EJ; Kimberly Lawson, *Why Seeing Yourself Represented on Screen Is So Important*, VICE (Feb. 20, 2018, 10:37 PM), https://perma.cc/E4UQ-3LRC; Marissa G. Muller, *Women and People of Color Still Vastly Underrepresented in Hollywood According to UCLA Study*, W MAG. (Feb. 27, 2018, 1:16 PM), https://perma.cc/VE8Q-WUS9; Mazin Sidahmed, *Paul Ryan's 'White' Selfie with Interns Shows Lack of Diversity in Washington*, GUARDIAN (July 18, 2016, 3:51 PM), https://perma.cc/N8U3-MHN4.

itself.[13] For example, calls for unity exploded from conservative commentators following the street demonstrations organized by Black Lives Matter ("BLM") and other activists in response to police violence.[14] When Colin Kaepernick and other athletes protested the national anthem to raise awareness of police violence and systemic oppression in 2016, they were criticized as being not only divisive, but unpatriotic.[15] Lost in these calls for unity was an acknowledgement that the American experience is inextricably correlated with one's race and that recent incidents merely highlight a persistent feature of American society: the predetermination of opportunity and treatment on the basis of race.

This difference in experience and opportunity is borne out in various contexts, most of which are familiar to activists and public interest practitioners. For example, in schools, students of color continue to be suspended and referred to police officers at higher rates.[16] Students of color are underrepresented in postsecondary schools, are less likely to graduate, and perform worse on standardized tests.[17] Additionally, people of color

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[13] Amy Chua, *How America's Identity Politics Went from Inclusion to Division*, GUARDIAN (Mar. 1, 2018, 6:00 AM), https://perma.cc/PD3T-KWP5; Igor Ogorodnev, *Stop Calling Identity Politics 'Divisive' When It Is Actually 'Destructive*,*'* RT (May 27, 2019, 4:44 PM), https://perma.cc/8SAR-5LRT; *White House: Trump's Critics Are Trying to Divide Americans*, FOX NEWS (Oct. 29, 2018), https://perma.cc/SEK4-YPSN. Using unity as a cudgel against anti-racist efforts is nothing new. As Nikole Hannah-Jones noted in the 1619 Project, "Anti-black racism runs in the very DNA of this country, as does the belief, so well articulated by [President Abraham] Lincoln, that black people are the obstacle to national unity." Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG.: THE 1619 PROJECT (Aug. 14, 2019), https://perma.cc/FD5K-9Y8V.

[14] *See* David French, *Black Lives Matter: Radicals Using Moderates to Help Tear America Apart*, NAT'L REV. (July 11, 2016, 7:23 PM), https://perma.cc/8536-RG5L; Paul Rosenberg, *Think Black Lives Matter Is "Divisive"? The Civil Rights Movement Split the U.S. Far More*, SALON (July 20, 2016, 1:57 PM), https://perma.cc/5NDB-R5UW; *Trump Calls Black Lives Matter 'Divisive,' Criticizes Police Shootings*, FOX NEWS (July 12, 2016), https://perma.cc/Y5PA-RVZK.

[15] *See* Kathy Barnette, *Kneeling NFL Players Should Stand Up and Work with President Trump to Achieve Their Goals*, FOX NEWS (Aug. 12, 2018), https://perma.cc/9YFF-5SVQ; Frank Miniter, Opinion, *NFL Protesters Won't See Change by Kneeling During Anthem--Here's What They Should Do*, FOX NEWS (Aug. 10, 2018), https://perma.cc/C866-6T86.

[16] *See* Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018, 11:41 PM), https://perma.cc/KEF7-FHE6; *see also* Anya Kamenetz, *Suspensions Are Down in U.S. Schools but Large Racial Gaps Remain*, NPR (Dec. 17, 2018, 3:52 PM), https://perma.cc/S9R5-8PK4.

[17] *See* Allie Bidwell, *Racial Gaps in High School Graduation Rates Are Closing*, U.S. NEWS & WORLD REP. (Mar. 16, 2015, 12:47 PM), https://perma.cc/Y2D6-4QGP (high school graduation rates); Ben Casselman, *Race Gap Narrows in College Enrollment, but Not in Graduation*, FIVETHIRTYEIGHT (Apr. 30, 2014, 6:00 AM), https://perma.cc/3PE4-CBJQ (college enrollment and graduation); Christopher Jencks & Meredith Philips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INSTITUTION (Mar. 1, 1998),

are more likely to be denied job interviews, home loans, and other financial opportunities.[18] They own homes at lower rates than their white counterparts and are more likely to encounter housing instability.[19] There are disproportionately low numbers of people of color serving as elected officials[20] and also an underrepresentation of individuals that represent the interests of communities of color in government.[21] In short, when American institutions and markets run their course, people of color disproportionately fare worse.

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https://perma.cc/DZV4-QHZA (testing); Emily Tate, *Graduation Rates and Race*, INSIDE HIGHER ED (Apr. 26, 2017), https://perma.cc/J3A4-7REG (college graduation rates); Kate Taylor, Opinion, *Race and the Standardized Testing Wars*, N.Y. TIMES (Apr. 23, 2016), https://perma.cc/7XM7-EAH2 (testing); Mitchell Wellman, *Report: The Race Gap in Higher Education Is Very Real*, USA TODAY (Mar. 7, 2017, 4:15 PM), https://perma.cc/2ZCU-DT8T (enrollment in higher education).

[18] *See* DEVAH PAGER & BRUCE WESTERN, PRINCETON UNIV., RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET (2005), https://perma.cc/A3C7-T8T2 (job market); Kenneth R. Harney, *Racial Disparities Significant in Mortgage Rejections, Study Shows*, CHI. TRIB. (May 22, 2018, 12:00 PM), https://perma.cc/P32B-Z67Z (mortgages); Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, GUARDIAN (Oct. 13, 2015, 10:14 AM), https://perma.cc/S2G8-QN62 (credit); *New Data Shows Continued Constricted Credit, Racial Disparities in Lending*, NCRC (Sept. 18, 2012), https://perma.cc/XW48-PEB2 (credit inequality); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937 (2003) (job interview); Jennifer Streaks, *Black Families Have 10 Times Less Wealth Than Whites and the Gap Is Widening--Here's Why*, CNBC (May 18, 2018, 1:04 PM), https://perma.cc/RM67-TDVV (credit inequality).

[19] *See* JEFFREY OLIVET ET AL., CTR. FOR SOC. INNOVATION, SUPPORTING PARTNERSHIPS FOR ANTI-RACIST COMMUNITIES (2018), https://perma.cc/7ZUH-5J8X (homelessness); Laurie Goodman et al., *A Closer Look at the Fifteen-Year Drop in Black Homeownership*, URB. INST.: URB. WIRE (Feb. 13, 2018), https://perma.cc/76DM-B9EE.

[20] *See* REFLECTIVE DEMOCRACY CAMPAIGN, THE ELECTABILITY MYTH: THE SHIFTING DEMOGRAPHICS OF POLITICAL POWER IN AMERICA (2019), https://perma.cc/YY95-64FE; Reid Wilson, *Racial Imbalance Exists All Across Local Governments, Not Just in Police Departments*, WASH. POST (Aug. 14, 2014, 2:24 PM), https://perma.cc/A442-P2ZX.

[21] People of color have had their interests undermined through gerrymandering schemes such as "cracking" and "packing." Cracking involves drawing district lines in an area with a dense concentration of minority voters such that the communities of color are divided and do not carry a majority in any one district. Packing is the practice of concentrating communities of minority voters in fewer districts to deny them as many districts as they would have with less deliberate design. Both schemes qualify as voter discrimination. *See 'Cracking and Packing:' Tame the Gerrymander*, BALT. SUN (Oct. 3, 2017, 12:45 PM), https://perma.cc/WV5T-L2UM. Recently, evidence emerged suggesting that Republican operatives wanted the citizenship question on the census to give white people a political advantage when new voting districts are drawn after the 2020 census. *See* Tara Bahrampour, *GOP Strategist and Census Official Discussed Citizenship Question, New Documents Filed by Lawyers Suggest*, WASH. POST (June 16, 2019, 8:33 AM), https://perma.cc/DZU5-YJVV. All of these schemes represent the hoarding of voting power among whites.

Skeptics of white privilege and systemic racism often chalk these disparities up to poor decision-making among individuals and cultural defects that are perceived to exist within communities of color.[22] Such skeptics may also subscribe to notions of rugged individualism and lifting oneself by their bootstrap—theories that assume robust social mobility and equality of opportunity are available to all in America.[23] In this view, financial and educational failures are consequences of poor work ethic or lesser intellect. To these critics, entanglement with the criminal justice system and detachment from civic society result from moral failings. In essence, meritocracy and accountability carry the day. But this is incorrect. Equal effort does not necessarily create equal opportunity. Race matters tremendously. However, even when it is conceded that discrimination on the basis of race exists, there is an overemphasis on overt types of racism. There is often little to no consideration that historical wrongs continue to reverberate today in less apparent, colorblind ways.

Indeed, when one examines disparate outcomes without examining racial history and attributes racial disparities to merit and accountability, the reasoning can trend toward the tautological. If one accepts the basic premise that different circumstances can motivate different individual decisions, then individual decisions cannot solely explain different circumstances. Viewing circumstances as immaterial would require believing that people of color, and Black people in particular, historically had less potential or possessed other individual defects which explain why they perform worse than whites across various statistics. This belief would not account for the fact that strong work ethic and high moral character are not enough to create equal opportunity between racial groups in today's America. The surrounding racial structure has been reinforced in a way to promote wildly different results despite similar effort from individuals of different backgrounds. The same amount of effort from an individual

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[22] *See* Wesley Lowery, *Paul Ryan, Poverty, Dog Whistles, and Electoral Politics*, WASH. POST (Mar. 18, 2014, 11:36 AM), https://perma.cc/2R2E-UYBL (describing former-Representative Paul Ryan's comments on the work ethic deficit among Black men in "inner cities"). Ta-Nehisi Coates has referred to cultural arguments describing the racial disparities in America as a "tangle of pathologies," and he criticizes the liberal argument that racial oppression forms a cultural residue that is itself an impediment to success. He notes that these expectations are saturated with white supremacist notions of Blackness. *See* Ta-Nehisi Coates, *Black Pathology and the Closing of the Progressive Mind*, ATLANTIC (Mar. 21, 2014), https://perma.cc/8EV5-VK96.

[23] *See* Ron Haskins, Opinion, *To Tackle Poverty, We Need to Focus on Personal Responsibility*, N.Y. TIMES (Jan. 5, 2014, 6:30 PM), https://perma.cc/7DWY-2Z8Y. For a discussion of how upward social mobility for those "born at the bottom" of American society is nearly impossible, *see* Noliwe M. Rooks, *The Myth of Bootstrapping*, TIME (Sept. 7, 2012), https://perma.cc/4NCX-JGYQ.

in a wealthier environment will see greater dividends than the same individual in a more impoverished scenario. Similarly, the same amount of malfeasance in a wealthier environment results in far more leniency. Ignoring this phenomenon and failing to confront America's discriminatory past entrenches the status quo and denies communities of color, particularly Black Americans, the power and opportunities held by the average white American.

This conclusion is perhaps most clearly demonstrated through economic inequality and racial-wealth gap statistics. Overall, Americans of different races have drastically different levels of net worth.[24] According to data compiled by the Federal Reserve and analyzed by the Institute for Policy Studies in 2018, there has been a decline in wealth for the median Black family in America from 1983 to 2016.[25] Whereas the median Black family owned $7,323 in wealth in 1983, the median Black family now owns much less wealth, with only $3,557 in 2016.[26] The median Latinx family has fared slightly better with a modest increase of wealth over time. The median Latinx family owned less wealth than the median Black family in 1983, with $4,289; by 2016, the median Latinx family surpassed the median Black family and owned $6,591.[27]

Notably, median white family wealth did not decline, nor did it increase only modestly in these years. Instead, what was already an enormous gap in wealth between racial groups in 1983 has managed to grow disproportionately. The median white family had a net worth of $110,160 in 1983 and $146,984 in 2016.[28] Put differently, the median white family went from having fifteen times more wealth than the median Black family in 1983 to having forty-one times more wealth in 2016.

Interestingly, there are still inequitable outcomes when considering the median Latinx family, whose wealth grew at a significantly higher rate over this period than the median white family's wealth (54% compared to 33%).[29] In comparing the median white and Latinx families, the significant rate of increase in wealth for the Latinx cohort over time is overshadowed by initial differences in wealth—i.e., despite the higher growth rate for the median Latinx family, the wealth gap between these two demographics managed to expand in this period (from $105,871 in

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[24] Net worth and net wealth are used as identical concepts here. Either one refers to the measure of total assets minus total debts and liabilities. *See* CHUCK COLLINS ET AL., INST. FOR POLICY STUDIES, TEN SOLUTIONS TO BRIDGE THE RACIAL WEALTH DIVIDE 6 (2019), https://perma.cc/DW4L-GPEY.

[25] *Id.* at 8.

[26] *Id.* at 7. All dollar figures are adjusted to 2018 levels.

[27] *Id.*

[28] *Id.*

[29] COLLINS ET AL., s*upra* note 24, at 7.

1983 to $140,393 in 2016).[30] This means that increased inequality is not merely explained by the loss of wealth by disadvantaged groups (e.g., Black families in the past thirty years). Instead, early advantages and privileges compound success such that the racial wealth gap grows even if later generations of minorities outperform later generations of whites.

II. THE FOUR PILLARS OF WHITE SUPREMACY: A PROPOSED FRAMEWORK AND ILLUSTRATION THROUGH HOUSING POLICIES

A. Recognizing the Four Pillars of White Supremacy

Racism has existed throughout our government's history, both in explicit government policies and in actions that, although private, were government-sanctioned. In order to understand the development of these racial disparities described above, one must maintain a holistic view of racial injustice and acknowledge that this injustice is implemented in various ways. Policies perpetuating racism vary in who they target, in whether they are harmful or amiable, and whether they are explicitly race motivated. To assist in better understanding these drivers of disparities, I propose sorting government involvement in the creation of the racial gap into four categories of policies, each one a pillar supporting white supremacy.

The first category, called "race-motivated impairments," involves harmful actions that are explicitly based on race and are designed to subjugate people of color. The second category, called "race-motivated benefits," include government policies—most of which were enacted in the past—that were tinged with racial animus and white supremacy, such that benefits and opportunities were conferred to white people and denied to Black people under white supremacist tenets. The third category, called "colorblind impairments," is comprised of harmful actions and policies that reflect an intrusion on an individual's life for a broader societal purpose, but are almost exclusively experienced by communities of color. The final category, called "colorblind benefits," is comprised of policies that confer benefits to all people but, due to existing gaps in wealth and opportunity, create a disparate impact leaving people of color behind.

The clearest example of a race-motivated impairment, the first and most impactful pillar of white supremacy, is the American institution of slavery. Slavery's persistence over 400 years has reverberated in indescribably vast ways, including numerous policies that survived the end of slavery and continued through the twenty-first century. Transforming into

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[30] *Id.*

Black Codes and Jim Crow laws, these particular policies were transparent tools of antiblackness.[31] Following the civil rights era, policies of this sort and tolerance of overt racism[32] has become socially unacceptable in mainstream American society. Though there are some notable exceptions like President Donald J. Trump's Muslim Ban, these policies are less common now. The damage continues since these policies stifled progress and growth in target communities in truly meaningful ways.

Practices and policies represented by the second pillar—race-motivated benefits—created racial injustice in two related ways. First and foremost, government officials devised these policies to confer resources to white Americans or create barriers for those who were not white. By any good-faith analysis, that outcome was indefensible. Second, these policies were enacted in a specific moment in time. The moment was shaped by the Supreme Court's tolerance of discriminatory policies and practices,[33] and massive political will for ambitious domestic programs in

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[31] Black people experienced discrimination in various contexts under Jim Crow, including restaurants, lunch counters, soda fountains, and buses. *See generally* Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660 (1965). Jim Crow ultimately contributed to the current wage gap through the deprivation of resources and public funding. *See* Gillian B. White, *Searching for the Origins of the Racial Wage Disparity in Jim Crow America*, ATLANTIC (Feb. 9, 2016), https://perma.cc/K6R9-6AZF.

[32] Equal Justice Initiative has recorded more than 4,384 lynchings of people of color who were the victims of white terror between 1877 and 1950. *See* Ed Pilkington, *The Sadism of White Men: Why America Must Atone for Its Lynchings*, GUARDIAN (Apr. 26, 2018), https://perma.cc/TZN4-QYAV. Individuals were lynched for organizing voters or raising objections to the lynching of another. *Id.* The Greenwood District in Tulsa, known as Black Wall Street, and Rosewood, Florida, are perhaps the two most famous incidents where an entire Black community was destroyed in acts of racial violence. *See* DeNeen L. Brown, *'They Was Killing Black People*,*'* WASH. POST (Sept. 28, 2018), https://perma.cc/4UA9-JCKT; *Jessica* Glenza, *Rosewood Massacre a Harrowing Tale of Racism and the Road Toward Reparations*, GUARDIAN (Jan. 3, 2016, 8:00 AM), https://perma.cc/EUT2-RSCD.

[33] The Supreme Court's denouncement of "separate but equal" did not occur until 1954. Brown v. Bd. of Educ., 347 U.S. 483 (1954). Before this, and in the housing context, the Court endorsed racially restrictive covenants. *See* Corrigan v. Buckley, 271 U.S. 323 (1926). The court reversed their position twenty-two years later, holding that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 20 (1948). But much like the subsequent *Brown* decision, massive resistance followed the Court's holding, and meaningful reform was delayed. The Court's initial endorsement of racially restrictive covenants and the subsequent intransigence in upholding the law had major effects. *See* Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://perma.cc/6GZQ-XCVR (noting that eighty-five percent of the large subdivisions built in the New York City metropolitan area in the 1930s and 1940s had FHA-required restrictive covenants on them). *Shelley* was circumvented for years afterward, and while the decision forbade courts from ordering injunctive relief in the form of evictions, individuals continued to use racially restrictive covenants to seek damages. Not until 1953 did the Supreme Court rule that the Fourteenth Amendment precluded these damage awards. A federal appeals court did not find that the covenants themselves were

the employment,[34] housing,[35] and education[36] contexts. Since then, the Supreme Court has rightfully concluded that policies on the basis of race are inherently suspect and in tension with constitutional tenets,[37] but has also undermined the remedial principles of the Fourteenth Amendment.[38] Further, the political success of American fiscal and social conservatism means there is significantly less willingness in the government to subsidize individuals, encourage mobility, and pursue progressive policies.[39]

As to the third pillar, colorblind impairments are policies that exist as intrusions or harms on an individual. These are the policies that—when one is caught in the crosshairs—limit freedom, hinder opportunity, or physically injure an individual. The policies are proposed as necessary to society, under lofty principles like national security and public safety.[40] The policies are facially race neutral and do not require any racist individual to promote racially unequal outcomes. As one component of systemic racism, these policies can run their course without any racial animus

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a violation of the Fair Housing Act until 1972. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 89-90 (2017) (discussing Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972)).

[34] *See, e.g.*, *National Labor Relations Act*, NAT'L LABOR RELATIONS BD., https://perma.cc/ZJ6V-QBSL (last visited Nov. 8, 2019); *Works Progress Administration,* UNIV. OF KY. LIBRARIES*,* https://perma.cc/BU6M-W3TL (last visited Nov. 8, 2019).

[35] *See, e.g.*, *About GI Bill*: *History and Timeline*, U.S. DEP'T OF VETERANS AFFAIRS, https://perma.cc/438U-EFM5 (last updated Nov. 21, 2013); *The Federal Housing Administration (FHA)*, U.S. DEP'T OF HOUS. AND URBAN DEV., https://perma.cc/BS9F-RJUL (last visited Oct. 18, 2019).

[36] *See About GI Bill: History and Timeline*, supra note 35.

[37] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining that classifications based on race are "seldom relevant to the achievement of any legitimate state interest"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (requiring that racial classifications be subject to the most rigid scrutiny); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); *Brown*, 347 U.S. 483; *Shelley*, 334 U.S. 1.

[38] *See infra* Section III.B.I.

[39] Fiscal conservatism has called for repeated attacks on government welfare programs. *See, e.g.*, Jonathan Weisman, *House Republicans Propose Budget with Deep Cuts*, N.Y. TIMES (Mar. 17, 2015), https://perma.cc/J7WP-QA82 (describing how the first budget issued by the House after the GOP gained control over the Senate proposed more than $1 trillion in unspecified cuts to programs like food stamps and welfare); Nathaniel Weixel, *Ryan Eyes Push for 'Entitlement Reform' in 2018*, HILL (Dec. 6, 2017, 5:24 PM), https://perma.cc/E72R-STTW. Social conservatism and racial prejudices have also played a significant role in this regard. *See* Dylan Matthews, *Study: Telling White People They'll Be Outnumbered Makes Them Hate Welfare More*, VOX (June 7, 2018, 9:00 AM), https://perma.cc/CW47-3GFU.

[40] *See, e.g.*, George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, CITY J. (2015), https://perma.cc/U3XF-LRJU (arguing that Broken Windows policing is necessary for public safety); *see also* Patrick Dunleavy, *Ditch Political Correctness and Wise Up. Empower Cops to Fight Radical Islamic Terrorists Here at Home*, FOX NEWS (Nov. 7, 2017), https://perma.cc/RDD8-JJHJ (arguing that monitoring mosques is necessary for public safety and national security).

within any of the individual decisions therein and still manage to target communities of color disproportionately. Having said that, government actors executing these policies often possess implicit and/or explicit biases and such bias may factor in how the policy is implemented. Examples of colorblind impairments include mass surveillance and monitoring of Muslims,[41] invasive and over-expansive intrusions of parental rights,[42] and of course, nearly every facet of the criminal justice system.[43] Though the goals of colorblind impairments are generally uncontroversial, there is rarely any accounting of the fact that the privileged segments of society are largely inoculated from these policies and that communities of color are almost exclusively bearing the burdens of these societal goals.

The final pillar, colorblind benefits, is the counterpart to colorblind impairments above. Generally, communities of color do not receive enough resources or benefits and should receive more assistance. However, giving these communities more resources does not always work to close racial disparities. Colorblind benefits include solutions that involve the sometimes equal, but always inequitable, allocation of resources and opportunities. They include policies and rules that ostensibly benefit all races, but maintain the gap between nonwhites and whites or even benefit white recipients more than recipients of color. Examples include regressive tax policies and funding schemes that manage to confer additional gains to already privileged individuals.[44] Colorblind benefits largely work along financial and economic lines—one's starting position is critical to determining how one will fare. Whites will generally benefit more because they have more wealth. Notably, this category of policies does not

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[41] *See* Colin Moynihan, *Last Suit Accusing N.Y.P.D. of Spying on Muslims Is Settled*, N.Y. TIMES (Apr. 5, 2018), https://perma.cc/69DV-7NQZ.

[42] *See generally* Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124 (2019); *see also* Anna Arons, *Jenny Mollen, Jason Biggs, and How Race and Class Shape the Aftermath of Childhood Accidents*, PASTE MAG. (May 3, 2019, 1:32 PM), https://perma.cc/5QWG-8WUS.

[43] Andrew Khan & Chris Kirk, *What It's Like to be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), https://perma.cc/UD6D-MC9L.

[44] MEG WIEHE ET AL., ITEP & PROSPERITY NOW, RACE, WEALTH AND TAXES: HOW THE TAX CUTS AND JOBS ACT SUPERCHARGES THE RACIAL WEALTH DIVIDE (2018), https://perma.cc/AS2U-SNBW. This group includes any tax scheme or device that does not ensure that benefits are allocated based on financial need such that the wealthiest benefit the least and the poor benefit the most. For example, the 2017 tax law included tax cuts across all income levels. However, it was not designed to make the poorest individuals benefit the most. Instead, the majority of the tax benefits went to the wealthiest Americans and a recent report found that nearly eighty percent of the $275 billion in tax cuts to individual households will go to white families—even though whites make up just two-thirds of taxpayers. *Id.* at 5. *See also* Alexis Gravely, *How Trump's Tax Cuts Favor Whites over Minorities*, CTR. FOR PUB. INTEGRITY (Nov. 17, 2018, 8:08 AM), https://perma.cc/3WLW-V9NJ.

include all race neutral benefits. Existing separately are race neutral policies that improve racial performance gaps by incorporating socioeconomic factors or other correlates to race. Rather, colorblind benefits are policies that do not improve communities of color in relative terms, instead only improving their lot through quantity increases.

B. The Four Pillars at Work in Government-Led and Government-Sanctioned Housing Policies

Though policies represented by the four pillars have created racial inequity from the nation's inception, recent history, and the mid-twentieth century in particular, is rich with specific examples. Perhaps most illustrative of these is the federal government's involvement in homeownership—a goal lauded for decades as the "American Dream." [45] The government not only planted the seed for home ownership as the "American Dream,"[46] but it also launched a decades-long campaign ensuring that only white Americans had the resources necessary to reap the benefits of its policies. Housing in America is a story of overwhelming and pervasive intrusions on the prosperity of Black communities, which, in turn, created opportunities for whites to develop greater advantages in other areas of life.

In fact, mid-twentieth century housing policies explain much of the wealth disparities present today, as home equity is often a major component of household wealth or serves as a springboard for additional wealth for future generations.[47] Black homeownership has always lagged behind

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[45] *See, e.g.*, Anthony Depalma, *Why Owning a Home Is the American Dream*, N.Y. TIMES: IN THE NATION (Sept. 11, 1988), https://perma.cc/4U2W-8KHN ("More than just a symbol of having arrived in the middle class, living in your own home has become part of the American psyche."); *Homeownership: The American Dream*, PD&R EDGE, https://perma.cc/J2PK-QXCJ (last visited Oct. 26, 2019) (noting that the government and society have a goal of increasing homeownership so that Americans can seize this part of the American Dream); Frederick Peters, *The American Dream of Homeownership Is Still Very Much Alive*, FORBES (Apr. 8, 2019, 2:18 PM), https://perma.cc/75ZB-K5Z7 ("The idea of a place of one's own drives the American story."); Jenny Schuetz, *Renting the American Dream: Why Homeownership Shouldn't Be a Prerequisite for Middle-Class Financial Security*, BROOKINGS INSTITUTION (Feb. 13, 2019), https://perma.cc/BH8S-B2G5 (discussing the perception that homeownership is a cornerstone of middle class life in America).

[46] ROTHSTEIN, *supra* note 33, at 60–61 (noting that 1917 also marked the year of the Bolshevik revolution, and that government officials believed that white Americans would become more invested in the capitalist system through owning property); *Urges Saving for Homes. Founder of Thrift Week Says Economy Is Chief Factor for Ownership*, N.Y. TIMES (Jan. 20, 1927), https://perma.cc/7YD5-UDCV (encouraging Americans to save money for their "dream home" and discussing the "important place [home ownership] has always held in the minds of the American people").

[47] *See* Tanvi Misra, *Why America's Racial Wealth Gap Is Really a Homeownership Gap*, CITYLAB (Mar. 12, 2015), https://perma.cc/8U58-4CQZ (noting that homeownership is the

white homeownership. In 2004, Black homeownership reached a peak when the ownership rate was nearly fifty percent, but even then, this rate was one-third less than ownership rates for white homeowners.[48] Since then, the Black homeownership rate has steadily declined,[49] hovering around 42% for the last four years.[50] Notably, white Americans have consistently maintained a 30-point gap in homeownership rate over the same period of time.[51] The homes of white Americans are also considered more valuable. In 2016, the median value of the home for a white family was $200,000, whereas the median value of the home for a Black family was $124,000.[52] These differences in values flow from a web of racist policies, guiding the homeownership surge of the early to mid-twentieth century.

1. How Early Housing Policies Utilized Both Race-Motivated Impairments and Race-Motivated Benefits to Create Wealth in White Communities

In 1933, the Roosevelt administration created the Home Owners' Loan Corporation ("HOLC") to handle a number of obstacles that impeded the progress of the homeownership campaign.[53] Prior to this point, most plans required full repayment of home loans in five to seven years, included interest-only payments, and required a down-payment totaling fifty percent of the home's purchase price.[54] To alleviate the burdens of these plans, the HOLC was authorized to purchase existing mortgages that were subject to imminent foreclosure and then issue new repayment schedules of up to fifteen years at lower rates.[55] The HOLC provided amortized mortgages, allowing borrowers to pay parts of the principal with interest and, for the first time, allowing working- and middle-class

primary way Americans accumulate wealth); *see also* Tanvi Mirsa, *Instead of the Income Gap We Should Be Talking About the Wealth Gap*, CITYLAB (Feb. 19, 2015), https://perma.cc/F32K-CDBF (finding that wealth is an overlooked indicator of economic opportunity).

[48] Troy McMullen, *The 'Heartbreaking' Decrease in Black Homeownership*, WASH. POST (Feb. 28, 2019), https://perma.cc/X3BB-SRXY.

[49] *Id.*

[50] Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019 (Jan. 30, 2020), https://perma.cc/W92D-V4ME.

[51] *Id.*

[52] *See* Eshe Nelson, *Greater Homeownership Isn't the Answer to Ending Wealth Inequality*, QUARTZ (Apr. 19, 2018), https://perma.cc/CQQ7-9N8E.

[53] *See* ROTHSTEIN, *supra* note 33, at 63; *see also* Alan S. Blinder, *From the New Deal, a Way Out of a Mess*, N.Y. TIMES (Feb. 24, 2008), https://perma.cc/WRJ6-4ZSK ("The HOLC was established in June 1933 to help distressed families avert foreclosures by replacing mortgages that were in or near default with new ones that homeowners could afford.").

[54] ROTHSTEIN, *supra* note 33, at 63.

[55] *Id*.

homeowners to gain equity while their properties were still mortgaged.[56] Within its first two years, the HOLC had granted just over a million new mortgages,[57] and within three years had refinanced roughly ten percent of non-farm mortgages.[58]

In assessing these loans, the HOLC also undertook another major enterprise—the redlining of neighborhoods. The HOLC enacted race-motivated impairments by drawing color-coded maps documenting the so-called riskiness of lending across neighborhoods in over 200 cities.[59] Risk factors included housing age, quality, occupancy, and prices, and also included non-housing attributes like race, ethnicity, and immigration status.[60] Red symbolized riskiness on these maps, and neighborhoods with Black residents were denoted as risky even if they were solid middle-class neighborhoods with single-family homes.[61]

This policy did not only deny insurance to Black neighborhoods, it also siphoned wealth from these areas. This practice explicitly treated Black residents as less valuable than white homeowners and imposed a harm on these communities. Given that redlining caused property values to plummet[62] and lowered homeownership rates for communities of color,[63] it is not a stretch to say that the government's involvement in housing impeded the progress of Black families.[64]

In 1934, Congress and the President created the Federal Housing Administration ("FHA") to insure bank mortgages and to assist middle-class renters in purchasing single-family homes.[65] Similar to the HOLC, the

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[56] *Id*. at 63-64.

[57] *See* Blinder, *supra* note 53.

[58] *See* Daniel Aaronson et al., The Effects of the 1930s HOLC "Redlining" Maps 6 (Fed. Reserve Bank of Chi., Working Paper No. 2017-12, 2019), https://perma.cc/CY8N-PCGP.

[59] *Id*. at 1.

[60] *Id*.

[61] ROTHSTEIN, *supra* note 33, at 64.

[62] Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018, 6:00 AM), https://perma.cc/ZG2Z-W76E.

[63] *See* Aaronson et al., *supra* note 58, at 29; U.S. CONFERENCE OF MAYORS, AMERICA'S HOMEOWNERSHIP GAP: HOW URBAN REDLINING AND MORTGAGE LENDING DISCRIMINATION PENALIZE CITY RESIDENTS (1998) (suggesting that redlining has had lingering effects and decreased the availability of mortgage credit to Blacks and Latinx individuals); Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting The Door to Homeownership*, REVEAL NEWS (Feb. 15, 2018), https://perma.cc/8K27-SP4A (finding that even today, people of color are denied mortgages more often than whites with similar credit and income).

[64] Even tax schemes were tools of racial oppression. In determining property tax levels, local governments have surreptitiously overassessed properties in Black neighborhoods and under assessed those in white neighborhoods, effectively shifting the financial burden of homeownership away from whites. *See* ROTHSTEIN, *supra* note 33, at 169–71 (explaining that areas with higher tax burdens for Blacks include Albany, Boston, Buffalo, Chicago, Fort Worth, and Norfolk).

[65] *Id.*

FHA created a map system based on demographic data; however, this time it conferred race-motivated benefits with policies that incorporated white supremacist notions.[66] The FHA manuals explicitly emphasized "undesirable racial or nationality groups" as one of the underwriting standards,[67] and found intolerable risk where a property existed in racially mixed neighborhoods or even in neighborhoods with the potential to integrate.[68] The program was ultimately very effective for spurring purchases, and FHA insurance practically became a requirement for most home transactions at the time.[69] The FHA, in turn, wielded influence on the market. It discouraged bank loans in urban neighborhoods and favored mortgages in newly built suburbs and areas where boulevards or highways separated Black families from white families.[70] All in all, racial segregation became an official requirement of the federal mortgage insurance program, and a whites-only requirement was foundational.[71]

While HOLC and FHA policies were major examples of race-motivated benefits, they were not the only ones that provided white Americans additional benefits on the basis of their skin color. Another major federal

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[66] *Id.* at 65–66 ("The FHA was particularly concerned with preventing school desegregation. Its manual warned that if children 'are compelled to attend school where the majority or a considerable number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist,' and mortgage lending in such neighborhoods would be risky."). *See also* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://perma.cc/2NGH-46XT (quoting Charles Abrams, a co-creator of the New York City Housing Authority who noted in 1955 that "[a] government offering such bounty to builders and lenders could have required compliance with a nondiscrimination policy," and "[i]nstead, the FHA adopted a racial policy that could well have been culled from the Nuremberg laws.").

[67] Aaronson et al., *supra* note 58, at 9.

[68] *See* ROTHSTEIN, *supra* note 33, at 65 ("If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values") (quoting the FHA Underwriting Manual).

[69] *See* ROTHSTEIN, *supra* note 33, at 70 (noting that by 1950, the federal government was insuring and imposing segregative policies on half of all new mortgages nationwide).

[70] ROTHSTEIN, *supra* note 33, at 65.

[71] Even when developing public housing for Black citizens in the 1930s, the federal government incorporated segregationist principles to ensure white supremacy. Federal agencies reinforced, or even created, segregation in various localities, and Black families living in integrated communities were displaced to make room for segregated sites. *Id.* at 20–24. Within these cities, housing projects for Black families were concentrated in low-income and less desirable neighborhoods. *Id.* at 23. The white-occupied projects almost always had superior facilities, amenities, services, and maintenance. *Id*. at 30. As white families began to leave for the suburbs and Black families faced housing shortages, segregationist policies maintained vacancies in white facilities. *Id*. at 27. Eventually, local and federal officials responded to the housing shortage with increased public housing, but again, only on a segregated basis. *Id*. at 27, 32–34.

intervention that almost exclusively benefited whites was the Servicemen's Readjustment Act of 1944, commonly known as the GI Bill.[72] This bill represented "the most wide-ranging set of social benefits ever offered by the federal government in a single, comprehensive initiative."[73] Fifteen percent of the total federal budget was devoted to the bill by 1948, and in its first twenty-seven years, the system constructed under the bill allocated $95 billion in federal spending to former soldiers.[74] From 1944 to 1952, the Veterans Administration ("VA") backed nearly 2.4 million home loans for World War II veterans.[75] Adding on to the perks of the HOLC, GI Bill-related loans were capped at modest interest rates, and down payments were waived for loans up to thirty years.[76] In order to specifically accommodate white supremacists in Congress, the VA was only authorized to guarantee these loans; actual distribution of these federal loans was intentionally placed in the hands of local officials.[77] This model of administrative decentralization was a tool for advancing racist policies since local government officials were more reliable than federal officials in their support for the agenda of the Jim Crow South.[78] Due to racist officials and the redlining described above, Black veterans received little to no benefit from this expansive program. In 1947, only two of the more than 3,200 VA-guaranteed home loans in thirteen Mississippi cities went to Black borrowers.[79] In the North, of the 67,000 mortgages insured by

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[72] Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.). For information on how the GI Bill almost exclusively benefited white veterans, see IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 114 (2005) ("[T]he GI Bill did create a more middle-class society, but almost exclusively for whites.").

[73] KATZNELSON, *supra* note 72, at 113.

[74] *Id.*

[75] *See About GI Bill: History and Timeline*, supra note 35; *see also* KATZNELSON, *supra* note 72, at 115 (noting that VA mortgages have paid for nearly five million new homes since the GI Bill was enacted).

[76] *See* KATZNELSON, *supra* note 72, at 115.

[77] Representative John Rankin of Mississippi drafted the bill as chair of the Committee on World War Legislation in the House of Representatives. He required that the VA have sole authority over the bulk of the GI Bill budget and required that locally appointed VA officials control the dispensation of benefits. *See* KATZNELSON, *supra* note 72, at 139; Edward Humes, *How the GI Bill Shunted Blacks into Vocational Training*, J. BLACKS HIGHER EDUC., Autumn 2006, 92, 96.

[78] Decentralization supported the white supremacist agenda because it provided an official means to deny benefits to legally qualified Blacks. *See* KATZNELSON, *supra* note 72, at 38–39, 123. The VA further supported segregation by providing virtually no administrative control over how local GI Bill counselors treated Black servicemen, and by hiring very few Black counselors. *See* Humes, *supra* note 77, at 96.

[79] *See* Ira Katznelson & Suzanne Mettler, *On Race and Policy History: A Dialogue about the G.I. Bill*, 6 PERSP. ON POL. 519, 523 (2008).

the GI Bill in New York and in northern New Jersey suburbs, fewer than one hundred supported non-white homeowners.[80] Overall, the GI Bill has been described as the "great[est] instrument for widening an already huge racial gap in postwar America."[81]

2. How Colorblind Impairments and Colorblind Benefits Continued to Widen the Housing Gap Between Whites and Blacks

The policies and practices above were ultimately outlawed by the Fair Housing Act of 1968[82] and the Community Reinvestment Act of 1977,[83] but their effects in the intervening period were significant. By 1949, the FHA had insured one-third of all newly constructed homes.[84] In an analysis of housing patterns from the 1910 census to the 2010 census, economists calculated significant differences in home valuations between races and noted increased segregation in the years that federal maps played a role.[85] Interestingly, these studies also show significant disinvestment from Black neighborhoods, which was damaging to Black homeowners during this period.[86] Overall, the study estimates that forty percent of the gap in home values between Blacks and whites are attributable to HOLC maps alone.[87]

Though the legislation in 1968 and 1977 curbed federally backed housing discrimination, the results were longstanding and irreversible. For example, in Levittown, New York, Blacks were denied access to the neighborhood through redlining and other color-coded maps (as described above), in addition to other methods such as racial covenants and outright discrimination.[88] In 1948, the homes in this suburb, located outside of

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[80] KATZNELSON, *supra* note 72, at 140.

[81] *Id.* at 121.

[82] Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)).

[83] Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (codified as amended at 12 U.S.C. §§ 2901-2908 (2018)).

[84] Aaronson et al., *supra* note 58, at 10.

[85] *Id*. at 21-22.

[86] Specifically, there was HOLC-related decline in homeownership, housing values, and rents in Black neighborhoods and other low graded sects. *Id*. at 28-29. In addition to being denied FHA mortgage insurance, Blacks predictably received fewer private lending options too. *Id*. at 34.

[87] *Id*. at 33.

[88] ROTHSTEIN, *supra* note 33, at 70-71. *See also* Bruce Lambert, *At 50, Levittown Contends with Its Legacy of Bias*, N.Y. TIMES (Dec. 28, 1997), https://perma.cc/9KNN-7HE8 ("The whites-only policy was not some unspoken gentlemen's agreement. It was cast in bold capital letters in clause 25 of the standard lease for the first Levitt houses . . . . It stated that the home could not 'be used or occupied by any person other than members of the Caucasian race.'").

New York City, sold for about $75,000 in today's currency.[89] Properties in Levittown now sell for upwards of $350,000.[90] This means that white working-class families who bought those homes in 1948 with significant government assistance have gained over $200,000 in wealth over three generations.[91] Houses that were similarly valued in 1948—but existed in redlined areas nearby—currently sell for $90,000 to $120,000.[92]

Concentration of poverty was a natural result of redlining and the ensuing residential segregation. With concentrated poverty came especially potent colorblind impairments. Low land value, on account of discriminatory housing policies, has made communities of color targets for demolition in the name of "urban renewal" and various major infrastructure projects.[93] With "blight" as a justification, officials did not need to articulate any race-specific reasons for selecting these sights for major infrastructure projects like highways, boulevards, and even parks.[94] Low land value has also justified the siting of industrial and polluting hazards such as landfills, incinerators, and power plants in proximity to nonwhite residents.[95] All in all, these colorblind impairments have been the costs for a thriving infrastructure, a societal benefit. However, communities of color have nearly always borne the burdens required.

Simultaneously, communities of color have received relatively fewer gains from colorblind benefits that favor homeownership. Due to disparities in homeownership,[96] white households are most eligible for home-

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[89] ROTHSTEIN, *supra* note 33, at 182.

[90] *Id*.

[91] *Id.* And there is no question that the properties in Levittown were practically reserved for whites even after the Supreme Court deemed racial covenants unconstitutional in 1948. In the 1990 census, Levittown was 97% White, 4% Hispanic and 0.26% Black. *See* Lambert, *supra* note 88. In the 2010 census, Levittown was 84% White, 14.6% Hispanic, and 1.4% Black. *QuickFacts: Levittown CDP, New York*, U.S. CENSUS BUREAU, https://perma.cc/35KG-H2AU (last visited Oct. 25, 2019).

[92] ROTHSTEIN, *supra* note 33, at 182.

[93] ROTHSTEIN, *supra* note 33, at 127.

[94] *See* Alan Pyke, *Top Infrastructure Official Explains How America Used Highways to Destroy Black Neighborhoods*, THINKPROGRESS (Mar. 31, 2016, 12:47 PM), https://perma.cc/WNM5-NEHQ (explaining that in the first twenty years of highway construction for the federal interstate system, governments displaced over 475,000 families, most of whom were low-income people of color in urban cores); *Seneca Village*, CENTRALPARK.COM (last visited Feb. 1, 2020), https://perma.cc/SEY2-AR8V (noting that in New York City in the mid-nineteenth Century, Seneca Village, a predominantly African American community, was razed to create Central Park).

[95] NEW SCHOOL, TISHMAN ENV'T AND DESIGN CTR., LOCAL POLICIES FOR ENVIRONMENTAL JUSTICE: A NATIONAL SCAN 8–9 (2019), https://perma.cc/Q8RA-HUH3.

[96] *See Racial Disparities and the Income Tax System*, TAX POLICY CENTER (Jan. 30, 2020), https://perma.cc/4MKJ-U88Z (showing average homeownership rates to be 73% for white households, 41% for Black households, 47% for "Hispanic" households, and 57.6% for Asian households).

related tax policies. These colorblind benefits widen the racial wealth gap even though they are facially race neutral. The mortgage interest deduction is one example. This deduction rose in popularity with the rise in homeownership during the Roosevelt administration.[97] Stemming from the racially discriminatory housing policies described above, the mortgage interest deduction is generally less available to Black households.[98] Further, among deduction recipients, Black homeowners receive a disproportionately smaller benefit from the deduction than whites.[99] Another example is the tax code's treatment of home-related capital gains. White households are the primary beneficiaries of deductions for capital gains from the sale of a principal residence.[100] Both tax benefits lack any racially animated factor. Nonetheless, both benefits exacerbate racial disparities and perpetuate racial injustice.

III. PROPOSALS FOR AND OBSTACLES TO DISMANTLING THE PILLARS OF WHITE SUPREMACY

Nearly every aspect of society has been affected by government-imposed or sanctioned racism in the antebellum period, the Jim Crow era, and the last eighty years. The four pillars provide a structure for understanding and categorizing these different manifestations of racial injustice. In fact, when white supremacy is viewed in this manner, it is also apparent that some pillars have received significantly more attention than others. The government's primary response to racism was the enactment of laws prohibiting explicit racial discrimination—laws that only focused on race-motivated impairments and race-motivated benefits. Prospective in nature, these laws are not only insufficient for addressing the harms created by the race-motivated pillars, but they basically leave the colorblind pillars untouched. In order to close the racial disparities in negative and positive socioeconomic situations—a useful measure for analyzing the lingering effects of racial oppression—more needs to be done. Unfortunately, courts, and the Supreme Court specifically, have erected significant barriers to the necessary solutions.

In this Part, I first discuss how each pillar invites a tailored solution and detail the type of solution necessary. I then describe how the current

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[97] Emma Fernandez et al., *Mortgage Interest Deduction and the Racial Wealth Gap*, BERKELEY PUB. POL'Y J. (Aug. 23, 2018), https://perma.cc/S59P-M8TM.

[98] *Id.*

[99] *Id.* (noting that "even though black households comprise about 13 percent of the population, they are able to access just 6 percent of the total benefits from the [mortgage interest deduction].").

[100] Michelle Singletary, *Tax Code Isn't Neutral on Race, Researchers Find*, WASH. POST (Feb. 1, 2020), https://perma.cc/YF47-LSU7.

legal landscape accommodates or does not accommodate that type of solution through litigation. In examining solutions for the first two pillars, race-motivated impairments and benefits, I discuss the consideration of race in the affirmative action and integration contexts. I then shift to the colorblind pillars, beginning with colorblind impairments and stop-and-frisk litigation in New York City and ending with colorblind benefits and school funding litigation in New York State. Each point illustrates the legal difficulties of undoing the effects of white supremacist policies through litigation.

A. Remedying Racial Injustice Pillar by Pillar: A Practical and Philosophical Endeavor

The varied nature of racial injustice has created disparities in opportunities, wealth, property, and privileges. Reforms targeted at addressing racial gaps should also vary to reflect the means by which such gaps were perpetuated.

Policies within the race-motivated pillars directed benefits to white Americans and imposed inferior positions and institutions on Black communities. Ultimately, these policies allowed opportunities in America to be allocated on an unfair basis. This matters significantly because modern-day American society is more competitive than ever. Outlawing explicit discrimination means that desirable institutions attract more individuals than ever before, creating unprecedented competition for each seat.[101] Educational programs, even in the K-12 setting and in taxpayer supported institutions, rely on increasingly competitive admissions to select students.[102] This intense competition starts early and with lasting effects: it is not uncommon for numerous families to vie for a select number of middle school seats so that their children may be well-placed to attend

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[101] *See* Delano R. Franklin et al., *Admissions Rates at Record Low Across Ivy League, Stanford, MIT,* HARVARD CRIMSON (Apr. 24, 2018, 6:45 PM), https://perma.cc/9FYA-WZY9 (showing downward trend for acceptance rates among top-ranked universities as more applicants apply).

[102] For example, New York City's Department of Education administers an admissions test for gifted and talented programs for students as young as four. *See Gifted and Talented Testing*, NYC DEP'T OF EDUC., https://perma.cc/MAU6-SEYG (last visited Oct. 29, 2019). Further, eight out of nine of the city's "specialized high schools" admit students solely on the basis of an admissions exam, the Specialized High School Admissions Test ("SHSAT"). *See About the SHSAT*, PRINCETON REVIEW, https://perma.cc/2H9N-HTTK (last visited Oct. 29, 2019). These selective schools each require a minimum score that a student must get on the SHSAT to be offered a seat and will then admit as many eligible students as there are available seats. *See* Tyler Blint-Welsh, *What Is the SHSAT Exam? And Why Does it Matter?*, N.Y. TIMES (June 21, 2018), https://perma.cc/4JJ4-LYYU. Even though it applies to public high school with barely teen-aged applicants, this process is essentially competitive admissions boiled down to its essence.

a selective high school program and then prestigious college, all so that they may achieve the ultimate goal of securing a selective job.[103] In order to justify the concentration of opportunity in this competitive environment with limited resources, schools label students as gifted or construct test-based barriers of entry for specialized programs.[104] Recognizing the stakes involved with obtaining a good education, white parents in high-performing districts or school zones feel entitled to their specific local public school, even if it means a less fortunate student is afforded a lower quality education.[105]

Reversing the disparities created by race-motivated benefits would require reexamining how our institutions function and revisiting underlying American principles in order to make these institutions more democratic. In particular, the concept of merit and the role it serves in allocating opportunity should be challenged. Racial disparities in admission and hiring decisions are accepted because there is a general notion that the outcomes reflect truly meritocratic principles. However, while individual merit can exist within grades and performance, research has shown that grades and performance also capture other socioeconomic factors, such as wealth and race.[106] These other factors tend to drive outcomes more than an individual's potential or ability.[107] Addressing the racial injustice borne from these pillars would also mean examining how systemic drivers of inequality influence behavior and performance—i.e., how do the lingering effects of oppression encumber an individual and mask their potential. Finally, undoing the effects of race-motivated pillars would naturally require race-based solutions that take into account the historical

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[103] This example begins with middle school, but it is also not uncommon for New Yorkers to vie for preschool spots. *See* Anna Bahr, *When the College Admissions Battle Starts at Age 3*, N.Y. TIMES: THE UPSHOT (July 29, 2014), https://perma.cc/QMT5-HFSE; Elana Lyn Gross, *Inside the Insanely Competitive World of Elite New York City Preschools,* BUS. INSIDER (June 14, 2018, 5:17 PM), https://perma.cc/M4EH-3N9F.

[104] New York City's K-12 programs are a prime example. *See* Letter from Philip Desgranges & Laura D. Barbieri, Chairs, N.Y.C. Bar Comm. on Civil Rights & Comm. on Educ. and the Law, to The Hon. Richard A. Carranza, Chancellor, N.Y.C. Dep't of Educ., and Members of the Sch. Diversity Advisory Grp. (May 1, 2019), https://perma.cc/865T-NNEK.

[105] This sense of entitlement has been recognized as a justification for slow-rolling integration efforts in New York City by Mayor Bill de Blasio. *See infra* note 249 and accompanying text.

[106] *See, e.g.*, Zachary A. Goldfarb, *These Four Charts Show How the SAT Favors Rich, Educated Families*, WASH. POST (Mar. 5, 2014, 4:28 PM), https://perma.cc/2KBD-KERE (explaining that wealthier students from more educated families tend to do better on the SAT); Christopher Tienken, *Students' Test Scores Tell Us More About the Community They Live in Than What They Know*, CONVERSATION (July 5, 2017, 6:54 PM), https://perma.cc/N3ZU-RQFY ("It's already well-established that out-of-school, community demographic and family-level variables strongly influence student achievement on large-scale standardized tests.").

[107] *Id.*

monopolization of wealth and opportunity among whites. Otherwise, access will continue to be unequal.

Colorblind impairments are defined by the disproportionate burden borne by communities of color, and Black communities in particular. Today, these wrongs largely take the form of state-backed punishment or policing to counteract an undesired action by an individual. In my experience, I have typically seen advocates identify the racial disparities associated with a particular colorblind impairment and then call for the practice's elimination. What is less common, however, is an attempt to address the discriminatory elements of the practice, should it still exist after reform. In other words, efforts should be made to ensure that race cannot predict who is subject to these policies and practices.

Responses to colorblind impairments should also try to shift the paradigm surrounding the practice since the practice is often justified with populist notions. These justifications appeal to influential pockets of society—mostly white, wealthy, and unlikely to bear the costs of the practice. For instance, nearly every criminal justice practice disproportionately affects people of color, but elimination is made difficult because of public safety concerns. Therefore, reform efforts should also challenge the underlying justifications and reject the premise that the practice is needed. A prime example is how the prison abolitionist movement reconceptualizes the criminal law system. These reformers are not aspiring to stem carceral sentences nor make their lengths fairer, rather they seek to challenge prevailing notions of public safety by replacing harmful interventions with affirming and productive programs.[108]

For colorblind benefits, the issue is that pre-existing gaps in wealth, opportunity, and privilege mean that equal allocations widen the gap. Therefore, when addressing the dearth of resources available to historically oppressed communities, the solutions ought to be targeted at these communities specifically since universal proposals may expend precious political capital without creating equitable outcomes. Blanket allocations or universal subsidies do not account for competitive characteristics of our society and cannot close the gaps created by unjust practices.

Fiscal principles may be helpful to illustrate this point. In economics, the notion of "progressivism" requires acknowledging the different economic states of individuals in a capitalist market and creating policies that encourage more equitable outcomes.[109] A progressive characteristic of

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[108] *See* Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019) (discussing through personal narrative how relationship-building and individual intervention can overcome reliance on punitive and carceral systems).

[109] *See* Francisca Alba, *Estimating the Economic Impact of a Wealth Tax*, BROOKINGS INSTITUTION (Sept. 5, 2019), https://perma.cc/7CNG-K7CP.

America's tax code is that the wealthy pay more in federal personal income taxes than the poor.[110] The flip side of a progressive scheme, however, is a regressive scheme. Regressive policies do not necessarily burden the poor in the same manner that progressive policies target the more-resourced. Rather, regressive taxes can take the shape of a flat fee—i.e. one applied uniformly without accounting for context. In taxes, a flat fee is considered regressive because it will always take a larger percentage of income from low-income individuals than from high-income individuals.[111] Such policies do not close wealth gaps, and may actually widen them.[112] By failing to account for the different historical circumstances of white people and people of color, colorblind benefits are a type of "regressive policy." These types of benefits must be recognized for their limitations and their role in exacerbating racial injustice. Thus, solutions to resource inadequacies in communities of color must have fiscally progressive principles attached to reflect how opportunity has been historically allocated in this country. It cannot simply be a case of providing under-resourced individuals with more to utilize; there must also be a consideration of overlooked individuals' capacity to compete against those already possessing resources. Solutions related to this pillar must also overcome abstract obstacles, namely beliefs that institutions ought to be fragmented to maintain tight control of resources and resentments of redistributive policies.

B. Litigation Efforts and the Obstacles to Undoing Racial Injustice

The solutions above describe responses to the four pillars in liberal conditions with few restraints. However, racial justice advocates do not

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[110] *See* CITIZENS FOR TAX JUSTICE, WHO PAYS TAXES IN AMERICA IN 2013? (2013), https://perma.cc/8H6J-YWRP; *For Richer, for Poorer: American Taxes Are Unusually Progressive. Government Spending Is Not*, ECONOMIST (Nov. 23, 2017), https://perma.cc/U2HL-PXMS.

[111] For example, consider excise taxes. "An excise tax increases the price of the taxed good or service relative to the prices of other goods and services. So households that consume more of the taxed good or service as a share of their total consumption face more of the tax burden from this change in relative prices. The regressivity of excise taxes is primarily the result of this relative price effect, because, on average, alcohol and tobacco represent a declining share of consumption as household income rises." TAX POLICY CTR., BRIEFING BOOK (2016), https://perma.cc/K9J6-B4RQ.

[112] Most recently, the Tax Cuts and Jobs Act of 2017 has been singled out as a scheme that is particularly inequitable. Even when comparing wealthy households with similar incomes, it is apparent that white households have benefited more from the bill and that the racial wealth gap is worsened because the law "rewards wealth over work." Among the top one percent of all households, white households have received an average tax cut of over $52,000. In comparison, Black and Latinx households in this same group received an average tax cut of $19,290 and $19,850 respectively. *See* WIEHE ET AL., *supra* note 44, at 8.

have this type of luxury. In practice, there are several obstacles to dismantling the four pillars, especially when reform is pursued through the courts.

1. Difficulties in Undoing Race-Motivated Impairments and Race-Motivated Benefits Through Affirmative Action and Voluntary Integration Policies

The first two pillars discussed above, those focusing on race-motivated impairments and benefits, demonstrate how white Americans received substantial assistance in a time when Black individuals and other people of color were actively hindered on the basis of their skin. Remedying these injustices presents unique challenges. Repayment for the injuries imposed on Black communities during slavery and the subsequent years of discrimination is an important matter that has undeniable complications. Given the renewed focus on cash reparations and the number of excellent resources available, this Article does not focus on that type of solution. Rather, I focus on what I believe to be the less-discussed consequence of these two pillars: inequity in opportunity and access. Unlike cash compensation which, while complicated, can theoretically be done through redistributive policies, opportunity and access are more difficult spoils to reclaim.

Specifically, race-motivated policies gave white Americans greater access to safer, more stable neighborhoods, highly desirable public schools, public and private institutions of higher learning and employment, and networks of individuals with social capital and access to power. A monopoly on government assistance greatly influenced this outcome. In addition to the mortgage-related provisions discussed in Part II, the GI Bill, which "was deliberately designed to accommodate Jim Crow,"[113] also facilitated business loans and funded college educations for millions of white veterans.[114] Early twentieth century labor laws that created labor protections, higher wages, and bargaining rights were also designed to accommodate Jim Crow.[115] These statutes included specific exemptions

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[113] KATZNELSON, *supra* note 72, at 114.

[114] By 1947, student veterans made up more than fifty percent of the college student population in America. *See* Eliza Berman, *How the G.I. Bill Changed the Face of Higher Education in America*, TIME: LIFE (July 13, 2015, 9:43 AM), https://perma.cc/7JFW-WF5K. Black veterans, however, were more often denied opportunities to attend four-year schools and were instead diverted to training programs for low-level positions, and only twelve percent of Black veterans went to college on the GI Bill as opposed to twenty-eight percent of white veterans. *See* Humes, *supra* note 77, at 97.

[115] *See generally* KATZNELSON, *supra* note 72, at 67–79.

for predominantly Black positions like farmworkers and domestic servants.[116] Within federal agencies and the military, the federal government maintained segregationist policies that gave greater opportunities to white individuals and relegated Black individuals to undesirable stations.[117] These policies within the race-motivated pillars gave white communities a massive advantage and prohibited Black individuals from reaching their potential.

Given the significant role of race-motivated benefits and impairments in developing this nation's race gap, race-conscious solutions are a natural starting point for closing this gap. Affirmative action policies, for example, serve to remedy the imbalance of opportunity and access created from these two pillars. Historically, affirmative action has been implemented through the consideration of race as a factor in admissions or hiring decisions—where membership in an underrepresented or oppressed group weighs in favor of admission. In earlier versions, affirmative action has also taken the form of a "set-aside" where a specific number of slots are reserved for members of an underrepresented or oppressed group.[118] In addition to affirmative action, integration plans have also been identified as a race-specific solution with the purpose of undoing the effects of white supremacy. Integration policies consider the race of individuals in the assembly of schools or neighborhoods for the purpose of achieving desegregation.[119]

Indeed, both affirmative action and integration are potent tools for addressing the effects of racial injustice. School integration has been shown to cut the achievement gap between Black and white students by

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[116] *Id.* at 54-61.

[117] *Id.* at 111–12 (describing segregationist policies in the military); ROTHSTEIN, *supra* note 33, at 43 (describing segregationist policies within federal government offices).

[118] *See generally* Steven K. DiLiberto, *Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry*, 42 VILL. L. REV. 2039 (1997); Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What It Got Wrong*, N.Y. TIMES (Mar. 30, 2019), https://perma.cc/R6M9-FKYE.

[119] For this Part, I use the terms integration and desegregation interchangeably because they are used interchangeably by the judges and academics in the case law and literature that is discussed below. Nonetheless, there is an important and growing discussion about the ways in which integration differs from desegregation. *See Critical Definitions*, NYC'S INAUGURAL ALLIANCE FOR SCH. INTEGRATION & DESEGREGATION, https://perma.cc/V8D9-L52L (last visited Nov. 3, 2019). According to the New York City Alliance for School Integration and Desegregation ("NYCASID"), desegregation is "[t]he dismantling of the beliefs, policies, and practices that physically separate students into racially and economically isolated schools, tracks, classes, and/or programs," and integration pertains to "pedagogical, curricular, and cultural mechanism(s) inside of schools that support racially integrated student bodies" and is therefore defined as "decentering whiteness–creating educational opportunities and spaces that are affirming and empowering to all students." *Id.* Integration, as defined by NYCASID, is consistent with the solutions proposed in this Article.

half.[120] In fact, the racial achievement gap was at its narrowest at the height of school integration and increased when integration efforts were stifled.[121] In particular, reading scores among Black and white seventeen-year-olds narrowed to a 20-point gap in 1988 after existing as a 53-point gap in the early 1970s.[122] In 2012, this gap increased to 26 points, perhaps reflecting the increased segregation that has occurred in this time. Studies have shown racially diverse education settings to be a critical factor for improving performance across the curriculum, increasing test scores and school grades, increasing graduation rates, and increasing the likelihood of college attendance and completion.[123] Remarkably, there is evidence that integration policies have progressive qualities—students benefit across racial and socioeconomic backgrounds, but disadvantaged minority youth benefit the most. Thus, the performance gap closes without any harm to already high-performing students.[124]

Notwithstanding these benefits, the Supreme Court has expressed considerable skepticism about the merits of affirmative action or integration programs. On the one hand, the Court has frequently argued that any race-based policy, even remedial ones, create a new form of state-sponsored discrimination that echoes racist practices predating the civil rights movement.[125] Of course, affirmative action and integration programs are neither white supremacist nor anti-Black and are therefore distinguishable from such Jim Crow practices. Nonetheless, to the conservative branch of the Court, this remedial process relies on discriminating against whites and creating a new victim.[126]

On the other hand, the Court has questioned whether people of color truly benefit from these programs. To this, the justices point to the possible second-guessing that comes from benefiting from an affirmative action program, and they challenge whether such racial considerations

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[120] *This American Life: The Problem We All Live With - Part One*, CHI. PUB. MEDIA (July 31, 2015), https://perma.cc/JC8X-TU59.

[121] *See* George Theoharis, *'Forced Busing' Didn't Fail. Desegregation is the Best Way to Improve Our Schools*, WASH. POST (Oct. 23, 2015, 11:03 AM), https://perma.cc/QJ4N-22VC.

[122] *Id*. (citing NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2013-456, TRENDS IN ACADEMIC PROGRESS: THE NATION'S REPORT CARD 18 fig.11 (2012), https://perma.cc/WBA7-KKX3).

[123] *See* ROSLYN ARLIN MICKELSON, THE NAT'L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K-12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE 1-4 (2016), https://perma.cc/GU39-M66Z.

[124] *See id.; see also* AMY STUART WELLS ET AL., THE CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 12-15 (2016), https://perma.cc/J2WG-PTAY.

[125] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729-33 (2007) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995).

[126] *See Adarand*, 515 U.S. at 240.

simply trap society at a point of divisiveness.[127] Wrapped within this criticism is an inherent distrust of any race-based policy and a belief that race is solely a social construct.[128] This second type of skepticism calls for America to end its preoccupation with race and move on.

Acting on these misgivings, the Court severely limited the ability to address nebulous consequences of race-motivated impairments and race-motivated benefits in 1978. In *Regents of the University of California v. Bakke*, the Court ruled against a racial quota program for medical school. In focusing on the merits of diversity, the *Bakke* Court unnecessarily rejected systemic racism, or what it called "societal discrimination," as a compelling interest for the consideration of race in admission decisions.[129] In the controlling opinion, Justice Powell noted, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[130] Justice Powell also characterized racial remedies under the Fourteenth Amendment as a two-class theory where Black beneficiaries are recognized as "special wards entitled to a greater degree of protection greater than that accorded others."[131]

Importantly, this viewpoint failed to properly grapple with the sequence of historical events that brought America to affirmative action—namely the government's interference in Black communities' efforts to prosper and the government's race-based assistance to white Americans. In a dissenting opinion, Justice Marshall rebutted Justice Powell's criticisms of racial remedies, noting that given the "sorry history of discrimination and its devasting impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."[132]

Later, the Court continued to impede racial justice efforts and signaled the Court's reluctance in sanctioning the types of policies necessary to squarely address the aftershocks of the two race-motivated pillars. For

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[127] *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); *see also* Corey Robin, *Clarence Thomas's Radical Vision of Race*, NEW YORKER (Sept. 10, 2019), https://perma.cc/ZA64-Z2QJ.

[128] *See Parents Involved*, 551 U.S. at 730; Grutter v. Bollinger, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part).

[129] Regents of Univ. of California v. Bakke, 438 U.S. 265, 310 (1978).

[130] *Id.* at 289-90.

[131] *Id.* at 295.

[132] *Id.* at 396 (Marshall, J., concurring in judgment).

example, in 1989, Justice O'Connor opined that there was no way to distinguish between "benign" and "remedial" classifications[133] and found that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.[134] She was eager to cabin any use of racial classification and found the government's interest uncompelling where it sought to remedy "the effects of societal discrimination, an amorphous concept of injury that may be ageless in its reach into the past."[135] Similarly, in a 2003 opinion regarding affirmative action in law school admissions, Justice O'Connor minimized the scope and damage of American racism by suggesting unrealistic time limits for remedial efforts. In affirming that the consideration of race for diversity—and not remedial purposes—was a compelling state interest in higher education,[136] Justice O'Connor noted, without sufficient evidence for her unbridled optimism, that she "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[137]

In *Parents Involved in Community Schools v. Seattle School District No. 1* ("*Parents Involved*"), the Court doubled down on these principles, holding that *de facto* segregation is not a compelling interest for the consideration of race on an individualized basis for *voluntary* integration plans.[138] While Justice Kennedy's concurrence recognized the value of race-conscious plans and suggested that such policies may not require heightened scrutiny in order to accomplish diversity,[139] Chief Justice Roberts' plurality opinion expressed hostility to the most obvious solutions to the race-motivated policies represented by the first two pillars. Chief Justice Roberts reduced voluntary integration efforts on the individual level to "racial balancing."[140] He then wrote of such solutions as a looming threat that would "effectively assur[e] that race will always be relevant in American life" and will stand in the way of a colorblind constitution.[141] In what has become a perfect summary of the Court's growing unwillingness to remedy or even comprehend America's history of

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[133] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[134] *Id.* at 494.

[135] *Id.* at 497 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

[136] Grutter v. Bollinger, 539 U.S. 306, 333 (2003); *see Bakke* discussion *supra* Section III.B.1.

[137] *Grutter*, 539 U.S. at 343.

[138] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-21 (2007).

[139] *Id.* at 798 (Kennedy, J., concurring in part).

[140] *Id.* at 726-732. Serving as an alternative to voluntary integration at the individual level are integration policies that take the racial characteristics of a group or community into account. *See, e.g.*, *id.* at 798 (Kennedy, J., concurring in part).

[141] *Id.* at 730.

racism, the Court noted that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[142]

Although the cases discussed above do not cover every type of policy that incorporates race for the purpose of creating a more just society, it is worth noting how the Court subtly shifted its view of the Fourteenth Amendment. Specifically, the Fourteenth Amendment, enacted to combat white supremacy and defang antiblackness—has been repurposed to primarily prohibit race-based considerations, even if such prohibitions reinforce the pillars of white supremacy.[143] In doing so, the Court has blunted a useful tool for remedying the most complicated and intertwined effects of racism. It has also made equality the primary consideration without any thought to how such equality can be achieved. This is most noticeable in Justice O'Connor's stated belief that race would no longer be a necessary consideration in admissions for achieving diversity in a top-tier law school in 2028. Trends in educational performances make obvious that such an outcome was never realistic.

For those hoping to expand the use of affirmative action and integration plans beyond institutions of higher learning and scenarios where there has been a finding of intentional discrimination, the Supreme Court's jurisprudence has proven to be a major obstacle. Recent cases regarding the consideration of race reveal an ahistorical, if not obtuse, perspective from the Court. By trying to cabin race-conscious solutions to intentionally discriminatory policies enacted by identifiable parties imposing discrete harms,[144] the conservative wing of the court signals that race-conscious policies will not be available to address the amorphous, but still significant, consequences of race-motivated policies represented by the first two pillars. Given Justice Kennedy's retirement and the likelihood that Chief Justice Roberts will continue to serve as the swing vote

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[142] *Id.* at 748. For an interesting discussion of this quote and Justice Sotomayor's retort years later, see Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race . . . ,"* 11 STAN. J. C.R. & C.L. 45 (2015).

[143] For further discussion of the Court's shifting view of the Fourteenth Amendment, see generally Turner, *supra* note 142.

[144] *See Adarand*, 515 U.S. at 223-24; *see also Parents Involved* at 756 (Thomas, J, concurring in part) ("Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. Unlike *de jure segregation*, there is no ultimate remedy for racial imbalance.").

on cases touching on social justice issues,[145] there is understandable pessimism regarding the viability of the next race-conscious policy examined by the Court.[146]

The Court's approach also makes clear that the Court has little interest in closing the race gap, or at the very least, does not see it as a primary goal. This is seen in Justice Roberts' reduction of integration as racial balancing and in his ungrounded views of how racial progress may occur. In a perfect world, the courts would not need to make complicated determinations regarding race, because race would be as determinative in outcomes as an individual's height or hair color. Of course, we do not live in such a world—the four pillars above make that clear. Such a world would necessarily be without centuries of enslavement and a subsequent century of discrimination, benefits denial, and government intrusion along racial lines. Under Chief Justice Roberts' formulation, where the government only incorporates race into its remedies in the handful of instances where plaintiffs can prove allegations of current, discrete, and obvious forms of discrimination, Black and Latinx individuals will forever lag behind white Americans as a demographic.[147]

2. Stop and Frisk in New York City: An Attempt to Remedy Colorblind Impairments Through Litigation

Due to recent advocacy by countless community members, activists, and scholars, mass incarceration—and the inherent racism of the criminal

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[145] *See* Adam Liptak, *After 14 Years, Chief Justice Roberts Takes Charge*, N.Y. TIMES (June 27, 2019), https://perma.cc/U6SM-JXR3. In providing the decisive votes and writing the majority opinions in cases on the census and partisan gerrymandering, he demonstrated that he has unquestionably become the court's ideological fulcrum after the departure last year of Justice Anthony M. Kennedy.").

[146] *See* Emily Badger, *Can the Racial Wealth Gap Be Closed Without Speaking of Race?*, N.Y. TIMES (May 10, 2019), https://perma.cc/9CY2-V5BE (discussing possible legal obstacles to progressive solutions for addressing the Black-white wealth gap). Indeed, it is much more likely that jurisdictions feel disempowered to attempt ways of diversifying schools because of possible litigation. I have encountered this type of obstacle where the NYC DOE has been sued for introducing a diversity initiative based on socioeconomic factors and not race. In this litigation, I represent a number of students and organizations interested in racial integration in New York City schools. *See* Press Release, N.Y. Civil Liberties Union, Multi-Racial Student and Community Organizations Ask to Join Suit to Defend Expanded Access to Elite New York City Public Schools (Mar. 28, 2019), https://perma.cc/4WFL-ZSSA.

[147] *See* WIEHE ET AL., *supra* note 44, at 3 (noting that under current trends it will take Latinx families over 2,000 years to match white households and that Black families will *never* catch up, rather reaching a point of zero wealth at some point during the second half of this century); *see also Parents Involved*, 551 U.S. at 787–88 (Kennedy, J. concurring in part) ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of race.").

justice system—has finally been recognized as a civil rights crisis.[148] Michelle Alexander's *The New Jim Crow* and organizers for the Movement for Black Lives have given individuals a framework and vocabulary for articulating how our criminal justice system damages communities of color in America even when policies are facially race neutral.[149]

Mere contact with the criminal justice system risks severe consequences, but not everyone in America is equally exposed to this risk.[150] In the various jurisdictions throughout the United States, the criminal code has expanded to the point where it would be impossible to enforce every law, intervene for every crime committed, or even prosecute every arrest through to a jury verdict.[151] This gives law enforcement actors significant discretion at nearly every step of the process from arrest to conviction.[152] In the abstract, discretion can be a powerful mechanism for

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[148] *See* JULIANA MENASCE HOROWITZ ET AL., PEW RESEARCH CTR., RACE IN AMERICA 2019, at 33–35, https://perma.cc/86K2-9C3H (noting that the majority of Americans believe that Black individuals are treated less fairly than whites by the police and the criminal justice system).

[149] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (July 13, 2018, 3:45 PM), https://perma.cc/VEX4-TB9D.

[150] *See* discussion of disparities *infra* notes 153-59. When surveyed, New Yorkers reported significant differences in how they experience the police; New Yorkers who live in heavily policed neighborhoods reported feeling surveilled and unsafe around police. JOHANNA MILLER & SIMON MCCORMACK, N.Y. CIVIL LIBERTIES UNION, SHATTERED: THE CONTINUING, DAMAGING, AND DISPARATE LEGACY OF BROKEN WINDOWS POLICING IN NEW YORK CITY 10, 15 (2018), https://perma.cc/E2KU-WJ3K. New York City neighborhoods that are predominantly inhabited by people of color often feature giant police watchtowers, floodlights, and other surveillance equipment. *Id* at 14-15. Notably, the police stop more Black and Latinx New Yorkers regardless of the neighborhood. *See* CHRISTOPHER DUNN & MICHELLE SHAMES, N.Y. CIVIL LIBERTIES UNION, STOP AND FRISK IN THE DE BLASIO ERA 11 (2019), https://perma.cc/ZL8M-A5RQ (discussing NYPD data that reveal large percentages of Black and Latinx people being stopped in precincts that have substantial percentages of white residents). Racially biased intrusions will continue into the future as more decisions become automated. Police are increasingly relying on predictive algorithms that analyze existing crime data. Since this data reflects racial disparities created from years of racist law enforcement practices, the algorithms replicate racially biased outcomes in tools that are designed to be "objective." *See* Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. 192, 198 (2019).

[151] *See generally* A Crime a Day (@ACrimeaDay), TWITTER, https://perma.cc/BXG6-WFA3 (last visited Oct. 25, 2019). This humorous Twitter account highlights the sheer expansiveness of criminal law and regulations by posting a different provision of the United States Code and the Code of Federal Regulations daily since July 2014.

[152] Less humorously, the Supreme Court has recognized the exceedingly broad discretion possessed by police officers and prosecutors. *See* Whren v. U.S., 517 U.S. 806, 810 (1996) (affirming that officers may stop a vehicle as long as they have a reasonable cause to believe that a traffic violation occurred); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o

achieving justice. After all, mercy is perhaps the system's most powerful value.[153] Fairness, however, is another foundational value, and this value is undermined by discretion in the current implementation of criminal law.

When the criminal justice system runs its course, law enforcement actors exercise their discretion against people of color at alarming rates.[154] As the front line of law enforcement, police officers have extraordinary power to shape the individual makeup of the criminal justice system. Within this system, racial disparities exist for charges,[155] pretrial detention,[156] convictions,[157] lengths of confinement,[158] and parole decisions.[159] These racial disparities also reverberate throughout the areas of citizenry

long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[153] When exercised robustly, discretion also ensures efficiency. Though efficiency is obviously a less lofty concept than mercy, efficiency is critical for preserving resources in the system for complex cases.

[154] *See* Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 7:00 AM), https://perma.cc/3A4P-6HQD (compiling dozens of studies demonstrating racial disparities in the criminal justice system, even after accounting for differences in crime rates).

[155] *See* Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191, 1215 (2018) (explaining that white defendants are more than twenty-five percent more likely than Black defendants to have their most serious charge dismissed in a plea bargain); Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing: A Multilevel Analysis of Individual and Contextual Threat*, 19 CRIM. JUST. POL'Y. REV. 63, 72-73 (2008) (noting that Black defendants with multiple prior convictions are twenty-eight percent more likely to be charged as "habitual offenders" than white defendants with similar criminal records).

[156] *See* NICK PETERSEN ET AL., ACLU, UNEQUAL TREATMENT: RACIAL AND ETHNIC DISPARITIES IN MIAMI-DADE CRIMINAL JUSTICE 20–25 (2018), https://perma.cc/WN7R-7NLE (noting that Black defendants in Miami-Dade County are more likely to be detained pretrial and will spend more time in pretrial detention than white defendants); Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County* 85 (Vera Inst. of Justice, Technical Report No. 247227, 2014), https://perma.cc/D8ND-TRMY (describing how Black and Latinx defendants in Manhattan are more likely than white defendants to be detained before trial for comparable crimes).

[157] *See* SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), https://perma.cc/2MEE-5VRP (explaining that the majority of exonerated criminal defendants in the United States are Black); PETERSEN ET AL., *supra* note 156, at 5.

[158] *See* Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017 1:33 PM) https://perma.cc/HYN4-SU4B; *see generally* Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395 (2015).

[159] Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), https://perma.cc/GW3R-3TS4.

affected as collateral consequences of arrests or convictions: employment,[160] housing,[161] access to government resources,[162] and one's ability to vote.[163] Given the life-altering consequences that may follow from interaction with the criminal justice system, many advocates properly focus on challenging racially unjust practices at the front end of the criminal justice system: street encounters with police.

Stop-and-frisk is a colorblind impairment that became a commonly understood term because of the advocacy and litigation efforts of civil rights groups and community members. Sometimes called "Terry stops,"[164] this police tactic involves stopping a person and patting them down to determine if they have a weapon.[165] The Supreme Court articulated specific conditions for the use of this tactic.[166] Despite these constitutional limitations, NYPD officers applied this tactic inappropriately and at unjustifiable rates to Black and Latinx New Yorkers for over a decade.[167] In 2011, the NYPD conducted 685,724 stops and 381,704 frisks.[168] Young Black and Latinx males were the primary targets. Though they accounted for only 4.7% of the city's population, individuals with these specific characteristics accounted for 41.6% of stops.[169] In 2011, the number of stops of young Black and Latinx males surpassed the number of

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[160] *See* Pager, *supra* note 18.

[161] *See* Camila Domonoske, *Denying Housing Over Criminal Record May Be Discrimination, Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), https://perma.cc/238M-JSV8.

[162] *See* Eli Hager, *Six States Where Felons Can't Get Food Stamps*, MARSHALL PROJECT (Feb. 4, 2016, 7:15 AM), https://perma.cc/3UB8-4RX5 (discussing prohibitions on government aid based on prior convictions); *Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID, https://perma.cc/99UG-PNA5 (last visited Feb. 1, 2020) (explaining that a drug conviction can make someone ineligible for federal student aid for college tuition).

[163] *See* ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY (2017), https://perma.cc/43D2-GRQM (last visited Dec. 12, 2019).

[164] Terry v. Ohio, 392 U.S. 1 (1968).

[165] *Id.* at 29-30.

[166] *Id.* at 29 ("The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

[167] *See* Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), https://perma.cc/KQ2V-MZWP; *see generally* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding that the city of New York was liable for violations of the predominantly Black and Latinx plaintiffs' Fourth and Fourteenth Amendment rights through its deliberate indifference toward the NYPD's practice of conducting unconstitutional stop-and-frisks).

[168] N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011, at 8 (2012), https://perma.cc/223Z-UK3H.

[169] *Id.* at 7.

individuals with these characteristics in New York.[170] Ninety percent of these men were innocent and a gun was found only 1.9% of the time.[171] In contrast, guns were recovered at a higher rate among white individuals who were frisked.[172]

By 2012, civil rights attorneys had brought three separate class actions challenging the use of stop-and-frisk by the NYPD.[173] Overall, the legal challenges to this practice accounted for both the overuse of stop-and-frisk *and* the tactic's discriminatory nature.[174] In tackling these two aspects of the practice, the ideal outcome would involve significantly reducing the number of stops by cabining them to situations where a stop was constitutionally permissible and eliminating the racial disparities within the remaining stops. Both components of this outcome would greatly benefit New Yorkers of color.

In 2013, Judge Shira A. Sheindlin oversaw a nine-week trial and ultimately found that the city systematically violated the Fourth and Fourteenth Amendments with its stop-and-frisk policy.[175] Importantly, she found that there was a sufficient basis to infer discriminatory intent by the city, and that city officials were deliberately indifferent to equal protection violations.[176] This finding was atypical in that courts rarely acknowledge such systemic bias. As a remedy, the Court appointed an independent monitor and ordered a string of reforms including non-discriminatory policies, improved training protocols on racial profiling, mandatory body-worn cameras, and increased supervision and discipline.[177] These changes have been underway for over five years now.

The stop-and-frisk litigation represents a landmark victory, but the outcome also reflects the challenges in addressing colorblind impairments

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[170] *Id.* at 2.

[171] *Id.*

[172] *Id.*

[173] *See* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); Davis v. City of New York, 959 F. Supp. 2d 324 (S.D.N.Y. 2013). I have served as counsel on *Ligon v. City of New York*, and I am currently counsel on *Davis v. City of New York*.

[174] The Fourth Amendment claims of the three lawsuits addressed the NYPD's overuse of the practice. *Davis* 959 F. Supp. 2d at 339-40; *Floyd*, 959 F. Supp. 2d at 658-60; *Ligon*, 925 F. Supp. 2d at 542-43. The Fourteenth Amendment claims in *Floyd* and *Davis* addressed the discriminatory nature of the practice and its impact on Black and Latinx New Yorkers. *Davis* 959 F. Supp. 2d at 359; *Floyd*, 959 F. Supp. 2d at 660. There were also statutory claims in each case that addressed these components. 959 F. Supp. 2d at 366-73; Complaint at 48-50, *Floyd*, 959 F. Supp. 2d 540 (No. 08 Civ. 1034 (SAS)); Complaint at 48-50, *Ligon*, 925 F. Supp. 2d 478 (No. 12 Civ. 2274 (SAS)).

[175] *Floyd*, 959 F. Supp. 2d 540; *see generally* Goldstein, s*upra* note 167.

[176] *Floyd*, 959 F. Supp. 2d at 662–67.

[177] *See generally* Floyd v. City of New York, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (determining appropriate remedies for NYPD's constitutional violations).

through litigation. In the period immediately following changes in NYPD policy and practices, stops drastically plummeted. From 2014 to 2017, the NYPD reported 92,383 stops for the entire four-year period—a fraction of the nearly 700,000 stops reported in 2011 alone, and less than half the number of stops reported in 2013 when the practice of stop-and-frisk was waning.[178] While the recent numbers likely reflect significant underreporting by the NYPD,[179] it is still true that litigation decreased an unacceptable practice experienced by New Yorkers of color.[180]

Unfortunately, despite the efforts of the plaintiffs and plaintiffs' counsel, litigation and subsequent institutional reforms have had no effect on the racial disparities of the stops. Recent statistics show that Black and Latinx New Yorkers are still overrepresented among those stopped-and-frisked.[181] Though residential patterns play a key role in where police choose to target their resources, recent NYPD data also show that NYPD officers disproportionately stop Black and Latinx individuals in neighborhoods with substantial percentages of white residents.[182] In other words, this disparity is unlikely to be explained by "high-crime areas"—a common excuse for exercising undue scrutiny of communities of color.[183]

These disparities do not reflect an omission by the parties involved in the litigation. Pursuant to the court's order, the NYPD has had, since 2015, special policies and procedures for complaints related to racial profiling and bias-based policing.[184] Specialized training on racial bias was also envisioned within the package of reforms overseen by the monitor. Yet, what should have been a forceful moment for addressing racial disparities and the institutional forces that create racist outcomes has, so far,

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[178] *See* DUNN & SHAMES, *supra* note 150, at 4 fig.1. Undermining the justification for stop and frisk, crime reached a record low in New York City even as the number of stops plummeted. *See id*. at 1; Blake Zeff, *America's Over-Policing Bombshell: How New Data Proves "Stop & Frisk" Critics Were Right All Along,* SALON (Jan. 10, 2015, 4:30 PM), https://perma.cc/QAC7-MEZP (showing crime fell by 4.6% in 2014 and reached a record low in modern New York City history).

[179] *See* Ninth Report of the Independent Monitor at 5, Floyd v. City of New York, No. 08-CV-1034 (AT) (S.D.N.Y. Jan. 11, 2019), https://perma.cc/48S5-FDC9.

[180] *See* DUNN & SHAMES, *supra* note 150, at 1 (explaining that even if stops are underreported, it is unlikely that underreporting fully explains the difference in stops between the height of stop-and-frisk and now).

[181] *Id.* at 9 fig.5 (showing that 81% of reported stops in the four years following Judge Scheindlin's order involved Black and Latinx individuals).

[182] *Id.* at 11.

[183] *Id.* at 8, 11.

[184] *See Floyd*, 959 F. Supp. 2d at 684 ("Finally, the Office of the Chief of Department must begin tracking and investigating complaints it receives related to racial profiling."); *see also* Recommendation Regarding IAB Guide and Training on Profiling Investigations at 1, *Floyd*, No. 08-CV-1034 (AT) (S.D.N.Y. Dec. 20, 2018) (noting that the policies have been in place since 2015), https://perma.cc/D69L-68P3.

fallen short. For example, from November 2014 to December 2018, the NYPD received, investigated, and closed nearly 2,000 complaints of biased policing.[185] Shockingly, the NYPD failed to substantiate a single one of these citizen complaints and has not found racial profiling in any one of them.[186] The NYPD's failure to acknowledge racial profiling in these complaints is particularly unexplainable given the increasingly available evidence that selective enforcement remains a massive problem within New York City. In the last two years alone, there have been numerous reports revealing striking racial disparities regarding the policing of extremely mundane violations. Even though New Yorkers of every race violate these laws, reports reveal that overwhelming majorities of those ticketed or arrested for jaywalking,[187] transit fare evasion,[188] and marijuana possession[189] are Black or Latinx.

A major obstacle here is that equal protection jurisprudence does not encourage holistic examinations of the criminal justice system. The sole focus is on whether individuals were subjected to a particular practice because of intentional discrimination.[190] This approach is incapable of addressing the root causes of racially disparate experiences and the pervasive nature of white supremacist policies. In other words, the jurisprudence leaves no room for demanding that a Black or Latinx individual fundamentally receives the same opportunities and likelihood of outcomes within the criminal justice system as a white individual. Admittedly, it would be difficult to disentangle unconscious bias or the lingering effects of systemic racism from the criminal legal system. But, given the

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[185] N.Y.C. DEP'T OF INVESTIGATION, COMPLAINTS OF BIASED POLICING IN NEW YORK CITY: AN ASSESSMENT OF NYPD'S INVESTIGATIONS, POLICIES, AND TRAINING 17 (2019), https://perma.cc/GU8Q-H5Q7.

[186] *Id.* at 18.

[187] Martin Samoylov & Gersh Kuntzman, *NYPD Targets Blacks and Latinos for 'Jaywalking' Tickets*, STREETSBLOG NYC (Jan. 8, 2020), https://perma.cc/739X-LHBP (analyzing city data revealing that 89.5% of jaywalking tickets in 2019 were given to Black and Latinx residents, despite these demographics comprising only 55% of the city population).

[188] Ashley Southall, *Subway Arrests Investigated Over Claims People of Color Are Targeted*, N.Y. TIMES (Jan. 13, 2020), https://perma.cc/5FCH-UNT8 (explaining that in New York City "[f]rom October 2017 to June 2019, during stops when race was recorded, 73 percent of the people who received a ticket for fare evasion and 90 percent of those who were arrested on that charge were black and Hispanic").

[189] Benjamin Mueller et al., *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), https://perma.cc/FU7Z-8JPC (noting that approximately 87 percent of those arrested for marijuana possession in New York City are Black or Latinx, and that Black and Latinx New Yorkers "are the main targets of arrests even in mostly white neighborhoods.").

[190] Floyd v. City of New York, 959 F. Supp. 2d 540, 571 (S.D.N.Y. 2013) ("[P]laintiffs must show that those who carried out the challenged action 'selected or reaffirmed a particular course of action at least in part "because of," not merely in "spite of," its adverse effects upon an identifiable group.'") (quoting Hayden v. Paterson, 594 F.3d 150, 163 (2d Cir. 2010)).

long history of racial injustice, mere difficulty is no excuse. Unfortunately, the Supreme Court has not shown an ability to rise to the challenge. By failing to exercise vigilance over the lingering effects of racism where racial disparities are apparent but intent is not, the Court has revealed a tolerance for systemic racism.

In 1987, the Supreme Court made this tolerance clear in *McCleskey v. Kemp*.[191] Warren McCleskey, who was on death row in Georgia, used statistical analysis to mount a constitutional challenge to his death sentence. The analysis showed disparate patterns indicating that a defendant was more likely to receive a death sentence if the victim of the crime was white.[192] Despite the overwhelming statistical evidence demonstrating this victim-centered version of white supremacy, the Court's majority failed to find that race had unconstitutionally influenced the imposition of the death sentence.[193] The Court rejected McCleskey's claim under the Fourteenth and Eighth Amendments. In finding an insufficient claim under the former, the Court noted that the central role of discretion in criminal justice required exceptionally clear proof that the state of Georgia had abused its discretion in adopting and maintaining the death penalty as it had.[194] The Court essentially rejected a pathway for demonstrating that implicit (or well-concealed explicit) racism creates a constitutional harm, finding that statistical evidence of disparate treatment will not, by itself, demonstrate a constitutional injury.[195]

Following *McCleskey*, it has been incredibly difficult to create equitable outcomes to redress colorblind impairments. Without evidence of racial animus, advocates must rely on challenging the harmful practice outright. Given that these colorblind impairments are framed as unavoidable byproducts of socially acceptable efforts,[196] these harmful practices are rarely eliminated completely. Instead, they continue to exist in a more limited form; racial disparities remain even after victory. Unless the necessity of the practice is completely reimagined or unless the unconscious bias existing in its implementation is excised, communities of color will continue to bear the burden of colorblind impairments.

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[191] 481 U.S. 279 (1987).

[192] *Id.* at 286 ("The raw numbers . . . indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases.").

[193] *Id.* at 298-99.

[194] *Id.*

[195] *See id.* at 293-94.

[196] For example, practices like stop-and-frisk and pretrial detention are not considered irredeemable practices and are largely challenged for how they are meted out. Both are recognized as legitimate strategies that can work toward ensuring safety and order. Despite the racial disparities, post-conviction incarceration and the principles of incapacitation and retribution therein are often considered absolutely essential to most Americans.

3. Colorblind Benefits and School Funding Litigation: How Winning the Fight for Resources Can Leave Communities of Color Lagging Behind

School funding litigation has emerged as a popular tool for securing more resources for underserved students, many of whom are Black and Latinx. Current efforts in this type of litigation typically involve members of all races seeking additional support from the state or federal government. However, increasing assistance without the fulsome incorporation of economically progressive principles ensures that the race gap will endure.

In American public education, neighborhood schooling and local governance have combined with government-influenced residential segregation to produce wildly different student experiences by race, largely on account of funding.[197] The current schemes for funding in most school districts seemingly ignore the role of housing policies and how they create wealth and then funnel it and its surrounding privilege into racialized residential pockets.[198] These funding schemes create a situation where wealth that has been created and fostered through government assistance is now hoarded and made exclusive to specific beneficiaries—wealthy, mostly white families, who feel entitled to cabin the bounty.[199] Put differently, though the government plays a crucial role in centralizing society's winners and keeping out those who can most benefit, it has apparently seen very little need to balance the scales of school funding and create equity—or even equality—within educational opportunity.[200] Funding is

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[197] *See* Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), https://perma.cc/T9Z6-9QA6; Tanvi Misra, *The Stark Inequality of U.S. Public Schools, Mapped*, CITYLAB (May 14, 2015), https://perma.cc/HZ2F-SQAM.

[198] *See generally* Aniruma Bhargava, *The Interdependence of Housing and School Segregation*, *in* A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 388 (Christopher Herbert et al. eds, 2018), https://perma.cc/6KDQ-HT6D (describing the various links between housing and school segregation, including school financing and housing).

[199] *See* EDBUILD, FRACTURED: THE ACCELERATING BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS 3 (2019), https://perma.cc/S2CR-8Y86.

[200] Here, the difference between equality and equity in educational opportunity is significant. Equality would require creating equal educational experiences in public school for every student regardless of wealth or race. Equity in educational opportunity may require even greater educational experiences for those who are poor or nonwhite at the K-12 level. Due to a number of historical advantages, including benefits from some of the explicitly racist policies described above, whites are still statistically more likely to outperform their nonwhite peers when they receive an identical education experience. Students of color are overrepresented in a number of scenarios that pose additional barriers to learning and require greater educational resources. *See* Kristin Turney, *Understanding the Needs of Children with Incarcerated Parents*, AM. EDUCATOR (Summer 2019), https://perma.cc/C9SW-L5R7 (discussing

unnecessarily determined at the district level for the majority of school districts in the country. As such, these school districts have boundaries and those boundaries, often jagged and unnaturally shaped, are primarily pegged to income and race.[201] With significant funding at stake and controversial decisions to be made, there are numerous instances of school districts experiencing gerrymandering and even secessions.[202]

In New York State, students are spread out across over 700 school districts.[203] In these districts, geographic boundaries and attendance zones align with residential patterns, creating segregated schools.[204] Public schools are primarily funded by local and state resources; on average, the federal government pays for less than ten percent of K-12 education.[205] Having many school districts in New York means smaller school districts, and this, in turn, creates increased inequality.[206] Specifically, smaller districts mean that districts can be more homogenous and wealthy; there are

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parental incarceration's increased impact on children of color relative to white children); INST. FOR CHILDREN, POVERTY & HOMELESSNESS, INTERGENERATIONAL DISPARITIES EXPERIENCED BY HOMELESS BLACK FAMILIES (2012), https://perma.cc/AXZ8-LVL2 (discussing Black Americans' disproportionate homelessness compared to whites). Racial minorities also have less access to the social networks and infrastructure (like credit access) that maintain inertia and momentum among society's "winners" even after major shocks. *See* Philipp Ager et al., *Do the Sons of Rich Families Recover After a Large Wealth Shock? Evidence From the US Civil War*, CHI. BOOTH SCH. BUS.: PROMARKET (May 23, 2019), https://perma.cc/XK25-GF3M (discussing how slave-owning families in the South emerged from the Civil War wealthy despite the emancipation of slaves and the loss of land largely on the basis of having been previously wealthy); Brentin Mock, *White Americans' Hold on Wealth Is Old, Deep, and Nearly Unshakeable*, CITYLAB (Sep. 3, 2019), https://perma.cc/9JMM-K3U2 (discussing white families' quick financial recuperation after the Civil War and the subsequent creation of a Jim Crow credit system).

[201] *See* Alvin Chang, *We Can Draw Schools Zones to Make Classrooms Less Segregated. This Is How Well Your District Does*, VOX (Aug. 27, 2018, 8:46 AM), https://perma.cc/BKJ4-MEUB.

[202] *Id*.; P.R. Lockhart, *Smaller Communities Are "Seceding" from Larger School Districts. It's Accelerating School Segregation*, VOX (Sep. 6, 2019, 5:30 PM), https://perma.cc/XQ2F-XA7V.

[203] *See New York State Education at a Glance*, N.Y. STATE EDUC. DEP'T, https://perma.cc/LK7L-TDY5 (last visited Nov. 24, 2019).

[204] *See* JOHN KUSCERA & GARY ORFIELD, THE CIVIL RIGHTS PROJECT AT UCLA, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION, at vii-x (2014), https://perma.cc/K3ZP-UH48.

[205] *See* STEPHEN Q. CORNMAN ET AL., NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2018-301, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2014-15, at 2 (2018), https://perma.cc/7MFV-YFFA.

[206] As a point of comparison, Florida, which has a similar statewide population to New York, has about one-tenth as many school districts, with only seventy-five. *See Florida School Districts*, GREATSCHOOLS, https://perma.cc/G2D7-LU85 (last visited Feb. 18, 2020). Aside from a few specialty districts (e.g., ones catering to students with special needs), Florida's districts have boundaries contiguous with their respective counties. *See Florida School Districts*, STUDENT SUPPORT SERVS. PROJECT, https://perma.cc/96HH-8ZC2 (last visited Feb. 18,

fewer opportunities to pool resources to ensure less-resourced communities of color benefit from proximity to wealthy white communities.[207] In comparing revenue receipts, it is apparent that without massive reform or intervention, the race gap in funding will continue. On average, predominantly nonwhite districts in New York receive $2,222 less per pupil than predominantly white districts.[208] Though wealth inequality is a big factor here, correlations between race and poverty do not explain this difference entirely. Indeed, poor nonwhite districts in New York receive over $4,000 less per pupil than predominantly poor white districts.[209]

One notable, and perhaps surprising, detail is that in New York, this disappointing status quo follows major litigation efforts beginning in the 1970s and a major legal and legislative victory for school funding in 2006. As such, school funding reform exemplifies a scenario where a rising tide lifts all boats, but still perpetuates the racial gap.

Doctrinally, the limitations in achieving racial justice through school funding litigation flow from a handful of decisions from the state and federal high courts. In 1982, the New York Court of Appeals issued a decision in *Board of Education, Levittown Union Free School District v. Nyquist*.[210] Initiated in 1974, this case alleged violations of the equal protection clauses of both the New York and federal Constitutions, and of the Education Article of the New York State Constitution.[211] In particular, the plaintiffs alleged that the state had unconstitutionally perpetuated a funding system that created grossly disparate financial support—and, thus, grossly disparate educational opportunities—in New York's school districts.[212] Interestingly, the case was not framed along racial lines. Rather, the plaintiffs contrasted districts with low real property wealth with districts with high property wealth, and intervenor-plaintiffs raised the

2020). This allows for more diverse student bodies and a more equitable allocation of tax dollars therein.

[207] An extreme version of this phenomenon occurs in states where wealthy communities have voted to remove themselves and their tax dollars from major metropolitan school systems. *See, e.g.*, EDBUILD, *supra* note 199, at 9-10 (discussing how the Shelby County School Board created new, smaller school districts through secession to undo a countywide financial scheme that saw suburban tax revenue shared with the City of Memphis).

[208] *See* EDBUILD, $23 BILLION, at app. A (2019), https://perma.cc/2KTA-HPP5.

[209] *Id.* at app. B.

[210] Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27 (1982).

[211] N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated").

[212] *Nyquist*, 57 N.Y. 2d at 35-36.

unique issues facing urban school systems.[213] Though the trial and intermediate courts found violations of the equal protection clause of the state constitution, the court modified the judgment and held that the state constitution does not require equitable outcomes in school funding.[214] Working under the assumption that educational expenditures were correlated with the "quantity of educational opportunity provided" and recognizing wealth disparities between districts,[215] the court was unbothered by significant inequalities in the availability of financial support among New York school districts.[216] The court then found that any judicial remedy working to provide substantially equivalent education among school districts would "inevitably work the demise of the local control of education available to students in individual districts."[217] In concluding the opinion, the Court interpreted the Education Article of the state constitution and held that the provision was intended to address the adequacy of education—it did not recognize a constitutional mandate for ensuring an equitable system.[218]

Following *Nyquist*, school funding activists prepared an action principally relying on the court's interpretation of the state constitution's Education Article.[219] Specifically, this meant abandoning an allegation of

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[213] *See* Brian J. Nickerson & Gernard M. Deenihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 FORDHAM URB. L.J. 1341, 1356 (2003). The demographics of low wealth and urban districts give this case a racial dimension even if there had not been an explicit racial challenge brought.

[214] *Id.* at 1364; *see Nyquist*, 57 N.Y.2d 27, 48-49, 49 n.9. In rejecting the federal equal protection claim, New York's intermediate and highest courts relied on a seminal 1973 Supreme Court decision, *San Antonio Independent School District v. Rodriguez. Nyquist*, 57 N.Y.2d at 41, 45 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). *Rodriguez* principally held that education is not a fundamental right entitled to heightened scrutiny, but also held that a financing system based on local property taxes was not an unconstitutional violation of the Equal Protection Clause. *Rodriguez*, 411 U.S. at 37, 55.

[215] *Nyquist*, 57 N.Y.2d at 38 n.3.

[216] *Id.* at 38-39, 39 n.4.

[217] *Id.* at 46. Whether or not "local control" warrants ignoring inequality has been a source of debate. *See* Meaghan E. Brennan, *Whiter and Wealthier: "Local Control" Hinders Desegregation by Permitting School District Secessions*, 52 COLUM. J.L. & SOC. PROBS. 39, 67-75 (2018); *see also* Milliken v. Bradley, 418 U.S. 717, 741-43 (1974) (discussing local control as a "deeply rooted" tradition in public education and spurring the use of local control as a legal barrier to school integration efforts); Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 161-63 (2016).

[218] *See Nyquist*, 57 N.Y.2d at 48-49.

[219] *See* Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 906-07, 918-19 (2003) (holding that the inadequate levels of funding for NYC schools were in violation of the state constitution). Advocates also pursued a theory under Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal funds from engaging in practices that have a racially disparate impact. *See* 42 U.S.C. §§ 2000d to 2000d-7 (2018); *see also* Paynter v. State, 100 N.Y.2d 434 (2003) (demonstrating that advocates explicitly challenged the racial aspects of residential districting by which plaintiffs argued that racial isolation denied students a "sound

unfair funding between districts. Instead, the challenge alleged that inadequate funding precluded schools from providing an "opportunity to a sound basic education." In 2003, in the landmark decision *Campaign for Fiscal Equity v. State* ("*CFE*"), the Court of Appeals ruled in these plaintiffs' favor.[220] *CFE* served as the first major victory in a New York adequacy-of-funding case and it defined "sound basic education" as the capacity to serve as a juror and a voter.[221] Functionally, the Court found this to be a "meaningful high school education" at the time of its ruling—a thoroughly unambitious bar for our increasingly competitive world where college readiness has increased significance.[222] Through a subsequent ruling and legislation, in 2007, the state implemented an expansive funding scheme called Foundation Aid.[223] Though this scheme reflected a significant boost in funding for districts serving under-resourced students of color, the legal theory behind the victory and the politics on the ground guaranteed that this change would not balance the playing field among New York school districts.

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basic education" and argued that the disadvantages concentrated among Black and Latinx students violated Title VI); *id*. at 439 (explaining that the trial court had rejected the arguments under the state constitution but refused to dismiss the Title VI claim). Unfortunately, the Supreme Court decided *Alexander v. Sandoval* while *Paynter* was pending appeal, issuing a brutal holding that individuals do not possess a private right of action under Title VI to bring disparate impact claims. *See* 532 U.S. 275, 285-86 (2001); s*ee also* Ceaser v. Pataki, No. 98 CIV.8532(LMM), 2002 WL 472271, at *1-3 (S.D.N.Y. Mar. 26, 2002) (dismissing Title VI action after *Sandoval* where state deviated from regulatory requirements creating racially disparate impact on class of students in 150 high minority schools in New York).

[220] *See Campaign for Fiscal Equity*, 100 N.Y.2d at 931-32.

[221] *Id.* at 906-07.

[222] *Id*. Though the Court of Appeals highlighted a "meaningful high school education," it was careful to note that this was the level advanced by the plaintiffs' expert at trial, and also noted that the Education Article should not be pegged to any particular grade level. *Id.* at 906. In stating this, and in discussing the role of competitiveness in an "urban society," the Court may have left the door open for a higher minimum level of instruction under the "sound basic education" formulation. After all, Georgetown's Center for Education and the Workplace found that more than fifty percent of "good jobs" require a four-year college degree. *See* ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, THREE EDUCATIONAL PATHWAYS TO GOOD JOBS: HIGH SCHOOL, MIDDLE SKILLS, AND BACHELOR'S DEGREE 11 (2018), https://perma.cc/RX2J-4GAN. A "good job" is defined in the report as one paying a minimum of $35,000 for workers between the ages of 25 and 44, and at least $45,000 for workers between the ages of 45 and 64. *Id.* at 1. This means that "a meaningful high school education" is no longer competitive. Though the door is theoretically open for an updated standard, the Court of Appeals has not made such a determination. New York State has thus not been working under the assumption that the Education Article requires enough funding to provide an education sufficient for a "good job."

[223] Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14 (2006); OFFICE OF THE N.Y. STATE COMPTROLLER, NEW YORK STATE SCHOOL AID: TWO PERSPECTIVES 4 (2016), https://perma.cc/LR96-EHBT.

As a legal matter, *CFE* is not a panacea because New York school funding jurisprudence still remains largely unsuited for delivering systemic reform, and because the remedy has inherent limits for promoting fairness. First, through the several school funding cases to reach the high court, the Court of Appeals has interpreted the Education Article to require allegations of district-wide failures[224] and facts specific to each and every district where a deficiency is alleged.[225] Next, and for the reasons described above, the New York Court of Appeals has cabined the legal remedy to adequate funding—which again, does not necessarily require college readiness. Significantly, this interpretation of the Education Article and the equal protection clauses means that courts will not order a remedy specifically targeted at addressing disparate allocations of resources or inequitable outcomes in schools.

The funding scheme that emerged from *CFE*, Foundation Aid, lacked meaningful tools for equity and effectively failed to treat statewide reform as an opportunity to close performance gaps.[226] As a technical matter, although Foundation Aid has progressive elements, it has failed to create an equitable scheme that meaningfully closes the gaps between rich and poor districts. This failure can be largely traced to three problems with the funding overhaul. First, Foundation Aid was never designed to disturb the role of local taxes in funding education—rather, it was only supposed to account for the availability of local resources in its distribution of state aid.[227] This is significant because more than half of public education funding in New York comes from revenues raised locally.[228]

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[224] *See, e.g.*, N.Y. Civil Liberties Union v. State, 4 N.Y.3d 175, 182 (2005) ("Thus, because school districts, not individual schools, are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient funding to school districts, a claim under the Education Article requires that a district-wide failure be pleaded.").

[225] *See, e.g.*, Aristy-Farer v. State, 29 N.Y.3d 501, 511-12 (2017) (rejecting the call for a declaration of a statewide failure where plaintiffs failed to allege facts for each of the nearly 700 school districts in the state).

[226] *See* DAVID FRIEDFEL, CITIZENS BUDGET COMM'N, A BETTER FOUNDATION AID FORMULA: FUNDING SOUND BASIC EDUCATION WITH ONLY MODEST ADDED COST 9 (2016), https://perma.cc/GD6Q-VLWY.

[227] *See* OFFICE OF THE N.Y. STATE COMPTROLLER, *supra* note 223, at 4; *2007-08 State Aid Handbook: State Formula Aids and Entitlements for Schools in New York State* § I.A.2, N.Y. STATE EDUC. DEP'T, https://perma.cc/4ULQ-7JJV (last updated Oct. 4, 2017). According to the New York State Education Department, reliance on local funding has created massive disparities in fiscal resources. *See* N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS: A PRIMER 3-4 (2018) [hereinafter N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS], https://perma.cc/LS35-TY4L ("In 2015-16, the average actual value of property per pupil among the lowest spending ten percent of districts was $331,646, while the average actual value per pupil among the highest spending ten percent of districts was $1,989,800, a difference of 500 percent.").

[228] N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS, *supra* note 227, at 2 ("In New York State, estimated 2016-17 public education funding comes from three sources: approximately

Second, the formula was modified with several features that distort the gaps between richer and poorer districts—making the execution of progressive features much more difficult.[229] Finally, provisions were included to ensure that virtually all districts, regardless of need, would share in any increases in aggregate Foundation Aid funding.[230] Given the massive differences in local funding available to districts, a truly equitable and progressive system would require withholding additional state aid from wealthy districts. Instead, it would reserve state aid for poorer districts in an attempt to offset property tax revenue disparities.[231] In total, these three issues have combined to maintain the gaps between rich and poor districts, and they even ensure wealthy districts benefit despite preexisting advantages over competing districts. This all creates a regressive quality for what is intended to be a progressive policy.

All in all, school funding represents another area where communities of color have benefitted from the work of advocates. However, like stop and frisk and other colorblind impairments, the litigation remedies con-

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four percent from federal sources, 42 percent from State formula aids and grants, and 54 percent from revenues raised locally. Local property taxes constitute about 91 percent of local revenues.").

[229] FRIEDFEL, *supra* note 226, at 3-4 (noting that, in calculating the local contribution—the amount deducted from aid on account of local resources—there are arbitrary floors and ceilings on the Income Wealth Index (IWI), meaning that the neediest districts seem less needy and the wealthiest districts seem less wealthy); *see id.* at 4 (noting that school districts are also afforded significant discretion in calculating their local contribution such that they can choose to benefit more than how they would under IWI calculations); STATEWIDE SCH. FIN. CONSORTIUM, PROBLEMS WITH THE FOUNDATION AID FORMULA – CHANGES MUST BE MADE TO CREATE GREATER EQUITY 1 (2012), https://perma.cc/KA2J-AFUB (finding that in 2012–13, 304 districts had an IWI below the floor, meaning that these extremely needy districts were seen as less deserving of aid according to the formula). In 2016–17, all but 30 of the nearly 700 districts used an alternative local contribution method. FRIEDFEL, *supra* note 226, at 4. Finally, Foundation Aid included a hold-harmless provision that guaranteed that no district would receive less school aid as a result of the reforms. Districts with increasing wealth or decreasing enrollment continue to receive the same level of Foundation Aid or even receive increases in years where minimum increases are specified. *Id.* The notion of hold harmless was reportedly first introduced in the 1970s by politicians with suburban constituents. Without these provisions, the formula at the time would have guaranteed decreases in state funding for schools within these politicians' jurisdictions. *See* Susan Arbetter, *How the School Aid Formula Became Unrecognizable*, CITY & STATE N.Y. (Apr. 15, 2018), https://perma.cc/5JJ4-E6Y3.

[230] *See* Michael Cooper, *Albany Divided on Calculation of School Aid*, N.Y. TIMES (Mar. 18, 2007), https://perma.cc/J88L-37Y7.

[231] Ironically, through the School Tax Relief ("STAR") program, the State has involved itself in local property taxes but has likely exacerbated wealth disparity. N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS, *supra* note 227, at 4 ("[T]he STAR program that was intended to reduce the property tax burden on local taxpayers, particularly the elderly, has provided significantly more revenue per pupil to wealthier districts.").

nected to colorblind benefits are currently incapable of addressing the inequitable features of the system and, in their design, these judicial remedies ignore the historical legacies of systemic racism.

IV. THE NEW YORK CITY STUDENT INTEGRATION MOVEMENT AND A POSSIBLE PATH FORWARD

The pillars supporting white supremacy will remain in place so long as the history of white supremacy remains overlooked and so long as ambitious, holistic solutions are denied or unexplored. The remedies discussed in Section III.A appear nearly quixotic, especially when advanced through the courts. Given the unavailability of impact litigation, a strategy that has historically been relied upon to drive institutional reform, what remains as a solution? Remarkably, one answer may lie in a youth-led movement that is trying to tackle entrenched racial disparities and *de facto* segregation in New York City, the largest school district in the country.

This campaign is worth examining for several reasons. First, the students leading the efforts have proposed holistic solutions, drafting platforms that correspond to each of the four pillars discussed in this Article. Second, it is a community-based grassroots effort that is not limited to the remedies created through litigation. Finally, and perhaps most significantly, this movement's leaders explicitly call out the racism underlying the status quo, and they substantiate their proposed reforms to the public by identifying past discriminatory practices. As one of the student leaders, Julisa Perez, poignantly noted:

> This country has such a history with racism . . . . People don't like to name it and that's how things go under the radar and [remain] unsaid and then they still linger. Those practices, even if they're not explicit are still there . . . so it's really important to name it what it is, to say "this is what's happening, but these are the solutions that can actually help us."[232]

The following section will examine school segregation in New York City and see how solutions corresponding to the four pillars can apply to a contemporary issue outside of litigation.

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[232] Interview with Julisa Perez, IntegrateNYC Executive College Director and Founding Member (Feb. 15, 2020) (on file with author). Perez has been involved in the student activism regarding segregation since 2016, when she was a high school student. She and the other students that participated in these early discussions and efforts eventually adopted the name IntegrateNYC. She is now in her junior year of college and is still very active in the movement.

A. School Segregation in New York City: An Overview of the Battleground

In 2014, UCLA researchers identified New York State as possessing the most segregated schools in the country and labeled New York City as one of the most segregated districts in the nation.[233] Despite having 1.1 million students,[234] New York City represents a single district among the more than 700 districts in the state.[235] The entire district is run through a centralized Department of Education ("DOE") rather than a school board.[236] DOE employees, including the Chancellor, report to the Mayor.[237] The entire district is divided into thirty-two Community School Districts ("CSDs"), each with a local advisory body called a Community Education Council.[238] Despite the unique features that could facilitate ambitious administrative changes that other districts in the state or nation cannot achieve, the DOE and Mayor's office have consistently been reluctant to address the issue of school segregation.

Under the administration of Michael Bloomberg, the DOE held an overly restrictive and incorrect interpretation of *Parents Involved* and decided that voluntary integration plans were completely unviable.[239] Further, Bloomberg exacerbated segregation under the auspices of "school choice,"[240] a dubious principle that gained popularity following desegregation orders in the South.[241] In this administration, schools employed more "screens"—colorblind admissions tools that weeded out applicants and are known to have racially disparate effects.[242] Bloomberg-era poli-

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[233] KUSCERA & ORFIELD, *supra* note 204, at vi.

[234] *DOE Data at a Glance*, NYC DEP'T OF EDUC., https://perma.cc/3H6G-TQV6 (last visited Feb. 18, 2020).

[235] *See generally* N.Y. EDUC. LAW § 2590 (McKinney 2019); *see also New York State Education at a Glance*, N.Y. ST. EDUC. DEP'T, https://perma.cc/EL3A-GK85 (last visited Feb. 18, 2020).

[236] N.Y. EDUC. LAW § 2590-b (McKinney 2019); *see also* Leslie Brody, *Albany Extends Mayor's Control of New York City Schools by Three Years*, WALL STREET J. (Apr. 1, 2019), https://perma.cc/X62Y-JWGS.

[237] *See* Brody, *supra* note 236.

[238] N.Y. EDUC. LAW § 2590-e (McKinney 2019); *Community Education Councils (CEC)*, RAISE YOUR HAND FOR OUR KIDS, https://perma.cc/HT3B-GMS8 (last visited Oct. 31, 2019).

[239] *See, e.g.*, N.Y. APPLESEED, SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: SCHOOL-TO-SCHOOL DIVERSITY 14 (2013), https://perma.cc/PV6T-PPJ6 (highlighting that the DOE represented in a footnote to the Chancellor's Regulations that race can only be considered pursuant to a court order).

[240] *See* Winnie Hu & Elizabeth A. Harris, *A Shadow System Feeds Segregation in New York City Schools*, N.Y. TIMES (June 17, 2018), https://perma.cc/BY6Y-ZHLP.

[241] Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, SOUTHERN SPACES (June 4, 2019), https://perma.cc/57JT-8FAH.

[242] *See* Hu & Harris, *supra* note 240.

cies were also responsible for making Gifted and Talented ("G&T") programs more segregated and generally less available to Black and Latinx students.[243]

After the UCLA report[244] and several stories highlighting New York City's ignominious status of having highly segregated public schools,[245] certain CSDs tried to develop integration solutions, including restructuring attendance zones for certain schools to create racially mixed student bodies.[246] These plans faced incredibly vocal resistance.[247] Notably, many of the loudest critics were white, wealthy individuals who espoused concerns of public safety and unfairness.[248] There was little pressure from de Blasio to shift the narrative. Rather, in explaining the obstacles to school integration, he reinforced the protestors' talking points; he emphasized the connection between the residency decisions of those with the resources to choose a specific New York City neighborhood to live in and their expectations regarding public education. Specifically, he noted that he must "respect families who have made a decision to live in a certain area oftentimes because of a specific school" and that such families "made massive life decisions and investments because of which school their kid

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[243] *See* Allison Roda & Judith Kafka, *Gifted and Talented Programs Are Not the Path to Equity*, CENTURY FOUND. (June 19, 2019), https://perma.cc/AX35-D4ED (noting how Black and Latinx enrollment in G&T programs declined by over fifty percent following changes during the Bloomberg administration); s*ee also* Dawn X. Henderson, *When "Giftedness" Is a Guise for Exclusion*, PSYCHOL. TODAY (June 2, 2017), https://perma.cc/CEW4-66P3; Anna M. Phillips, *After Number of Gifted Soars, a Fight for Kindergarten Slots*, N.Y. TIMES (Apr. 13, 2012), https://perma.cc/Y3N4-UMG5.

[244] KUSCERA & ORFIELD, *supra* note 204.

[245] *See* Christopher Mathias, *These Maps Show Just How Segregated New York City Really Is*, HUFFPOST (Dec. 6, 2017), https://perma.cc/YA8X-8DH5; *see also* Aaron Short, *NYC Has the Country's Most Segregated Public Schools: Report*, N.Y. POST (Mar. 25, 2014, 2:53 PM), https://perma.cc/N6AR-DSHC; Kyla Calvert Mason, *New York State Singled Out for Most Segregated Schools*, PBS NEWSHOUR (Mar 27, 2014, 2:11 PM), https://perma.cc/6KUC-FUP9.

[246] *See* Ethan Geringer-Sameth, *New York City Is Waist-Deep in a School Desegregation Conversation - How Did We Get Here?*, GOTHAM GAZETTE (Sept. 3, 2019), https://perma.cc/D4LK-8CS9 ("In 2014 and 2015, grassroots advocates, parents, and educators in Community School Districts 1, 3, 13, and 15 became more active organizing around school-by-school, as well as district-level, integration plans.").

[247] *See* Emma Whitford, *UWS Parents Push Back Against Rezoning That Would Integrate Schools*, GOTHAMIST (Oct. 29, 2015, 12:20 PM), https://perma.cc/BK99-NJER.

[248] Kate Taylor, *Rezoning Plan for Schools on Upper West Side Is Approved After Bitter Fight*, N.Y. TIMES (Nov. 22, 2016), https://perma.cc/9Q9Q-839R; Kate Taylor, *Manhattan Rezoning Fight Involves a School Called 'Persistently Dangerous*,*'* N.Y. TIMES (Oct. 27, 2015), https://perma.cc/R895-GPT4.

would go to."[249] At no point did he speak about the wishes and expectations of those unable to select their child's district, nor did he speak to the differences in experience among students within the same school system.

The response to segregation from the Mayor and the DOE (collectively "the City") remained weak for years. Mayor de Blasio and his then-Chancellor, Carmen Fariña, failed to grapple with the racial injustice of the issue. They would notably avoid using the words "segregation" and "integration" in their responses.[250] Chancellor Fariña expressed skepticism about the need for "diversity" within schools, let alone classrooms,[251] and she often demurred on DOE-led initiatives due to heightened concerns about forcing integration policies "down people's throats."[252] In response to agitation from grassroot advocates, the City issued a "diversity plan" in June 2017 that was remarkably unambitious.[253]

Under the plan's primary goal, the DOE sought to increase the number of students enrolled in racially representative schools by 50,000 over five years.[254] This goal had multiple issues. First, the DOE defined a school as racially representative even if Black and Latinx students made

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[249] Patrick Wall, *De Blasio: City Must Respect Families' Investments Amid School Diversity Debates*, CHALKBEAT (Nov. 6, 2015), https://perma.cc/PRX5-MEQ7.

[250] *See* Alex Zimmerman, *A Month into the Job, It's Clear Chancellor Carranza Isn't Carmen Fariña Version 2.0*, CHALKBEAT (May 4, 2018), https://perma.cc/V8GE-YP4F (explaining that unlike Fariña and the Mayor, Carranza routinely uses the words "segregation" and "integration" and appears comfortable criticizing a constituency the administration has been careful not to alienate: affluent white parents); Alex Zimmerman, *De Blasio Decries 'Segregation' amid Specialized High School Debate – a Term He Has Avoided*, CHALKBEAT (Mar. 22, 2019), https://perma.cc/URT4-55GY.

[251] Amy Zimmer & Noah Hurowitz, *Schools Boss Touts Pen Pal System As Substitute for Racial Integration*, DNAINFO (Oct. 29, 2015, 11:59 AM), https://perma.cc/KD39-TGJA. In an effort to promote diversity, Chancellor Fariña pitched a "sister schools" model where affluent schools would collaborate with low-income schools, share resources from wealthy PTAs, and, controversially, become acquainted with other students through school visitations and a pen pal program. Fariña was quoted as saying that "[d]iversity for its own sake . . . is not going to be what takes us where we need to go," and that "you don't need to have diversity within one building." *Id.*

[252] Patrick Wall, *Searching for Answers to Segregation, Fariña Enlists Top Deputy and Solicits Local Ideas*, CHALKBEAT (Feb. 10, 2016), https://perma.cc/SH62-73WS.

[253] Significantly, this plan was chided by many for failing to identify the issue or to include the words "integration" or "segregation." *See* Elizabeth A. Harris, *De Blasio Won't Call New York Schools 'Segregated' but Defends His Diversity Plan*, N.Y. TIMES (June 8, 2017), https://perma.cc/3CLE-4D2E; Kate Taylor, *Long-Awaited Plan for Integrating Schools Proves Mostly Small-Bore*, N.Y. TIMES (June 6, 2017), https://perma.cc/2QUY-J48Z; Amy Zimmer, *City's Sweeping Plan to Integrate Schools Includes Few Concrete Details*, DNAINFO (June 6, 2017, 4:13 PM), https://perma.cc/VV42-QB6C.

[254] *See* Zimmer, *supra* note 253.

up ninety percent of the school population.[255] Given that Black and Latinx students constituted seventy percent of students citywide, the ninety percent figure still represented an extreme case of racial isolation by most acceptable desegregation measures.[256] Second, measuring success with the number of students in a specific school setting was odd given the risk that a small number of large schools could skew the results of what was meant to be a systemwide solution.[257] Finally, the DOE's benchmark for success–a 50,000 student increase to those attending a "racially representative" school–could not represent victory in any substantive sense when taking into account the other one million students enrolled within the system. In fact, shortly after the plan's release, a statistical report revealed that the City's diversity goals for enrollment would be met simply through demographic trends already underway at the time.[258]

B. Equitable Solutions from an Unlikely Source

One bright spot in the City's 2017 plan was the creation of a School Diversity Advisory Group ("SDAG"), chaired by civil rights experts and comprised of an array of perspectives regarding school segregation.[259]

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[255] NICOLE MADER & ANA CARLA SANT'ANNA COSTA, THE NEW SCH. CTR. FOR N.Y.C. AFFAIRS, NO HEAVY LIFTING REQUIRED: NEW YORK CITY'S UNAMBITIOUS SCHOOL 'DIVERSITY' PLAN (2018), https://perma.cc/8V4F-Y2QA.

[256] "By most measures accepted in the extensive academic literature on school segregation, many of the schools within the DOE's racially representative range would still count as intensely segregated." *Id.*; *see* KUSCERA & ORFIELD, *supra* note 204, at 32 (defining "segregated schools" as schools where 50-100% of the student body are students of color and "intensely segregated schools" as schools where 90-100% of the student body are students of color).

[257] For example, the largest middle school in the 2016-17 school year was I.S. 61 Leonardo Da Vinci in Queens. This school had 2,175 students and was 88.7% Latinx and 2.9% Black. Assuming that the total number of enrolled students remained constant, the City's plan gave this school five years to swap out only thirty-four black and Latinx students for students of another race. If the school succeeded in this modest endeavor, all 2,175 students would count towards "success," representing 4.35% of the citywide goal. N.Y.C. DEP'T OF EDUC., DEMOGRAPHIC SNAPSHOT - CITYWIDE, BOROUGH, DISTRICT, AND SCHOOL (2019), https://infohub.nyced.org/docs/default-source/default-document-library/demographic-snapshot-2014-15-to-2018-19-(public).xlsx (listing demographic figures which form the basis for the numbers calculated above). As shown by the example above, relying on an inflection point presents additional problems for measuring true progress. At the time, 105 schools in NYC enrolled between 90.1 and 92% Black and Latinx students. These schools could count as "racially representative" under the City plan by enrolling an average of 10 non-Black and non-Latinx students in their respective student bodies. *See* MADER & SANT'ANNA COSTA, *supra* note 255.

[258] *See* MADER & SANT'ANNA COSTA, *supra* note 255 (demonstrating that the number of white and Asian students is growing in NYC while the number of Black students is decreasing).

[259] N.Y.C. DEP'T OF EDUC., EQUITY AND EXCELLENCE FOR ALL: DIVERSITY IN NEW YORK CITY PUBLIC SCHOOLS 4 (2017), https://perma.cc/5KHM-6VXW ("The School Diversity Advisory Group will be chaired by José Calderón, President, Hispanic Federation; Maya Wiley,

Among the most influential activists in the community were two youth-led groups, IntegrateNYC[260] and Teens Take Charge ("TTC").[261] Both groups gave students a platform, helped them develop as organizers, and used the students' unique and on-the-ground perspectives to solicit policy proposals and concrete tools.[262] Students from both groups were invited to participate in the SDAG, which was tasked with issuing recommendations to the DOE and the Mayor.[263] Impressively, IntegrateNYC's policy platform has been adopted as the baseline structure for the SDAG's recommendations to the Mayor and Department of Education.[264]

The SDAG's adoption of IntegrateNYC's platform was significant because both IntegrateNYC and Teens Take Charge center equity in their messaging and highlight the role that white supremacy, racism, and classism have played in New York City school admission policies, both historically and to this day.[265] For IntegrateNYC, the perspective is not limited to the demographic makeup of the students in a school. Rather, it has gone beyond to include the makeup of staff and teachers, the cultural competencies of these employees, and the cultural relevance of the curriculum.[266] Their platform also demands the use of restorative justice practices in lieu of suspensions and funding reforms in the form of increased funds and equitable distribution of resources across every New York City high school program.[267] This framework has been colloquially called the "5 Rs of Real Integration" ("5 Rs" hereinafter) and is divided

chair of Civilian Complaint Review Board and Professor of Urban Policy and Management at the New School; and Hazel Dukes, President of the NAACP New York State Conference. The Advisory Group will include city government stakeholders, local and national experts on school diversity, parents, advocates, students, and other community leaders.").

[260] INTEGRATENYC, https://perma.cc/JF9F-CHY2 (last visited Oct. 25, 2019).

[261] TEENS TAKE CHARGE, https://perma.cc/YDH5-DK7R (last visited Oct. 25, 2019).

[262] *See generally id.*; INTEGRATENYC, *supra* note 260.

[263] *See* Christina Veiga, *Who's Who on New York City's School Diversity Advisory Group*, CHALKBEAT (Jan. 30, 2018), https://perma.cc/N6BB-SXY4.

[264] *See generally* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE: THE PATH TO REAL INTEGRATION AND EQUITY FOR NYC PUBLIC SCHOOL STUDENTS 7 (2019) [hereinafter SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE], https://perma.cc/GSX6-8ZKD ("Inspired by students, we adopted IntegrateNYC's 5Rs of Real Integration."); SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II: NEW PROGRAMS FOR BETTER SCHOOLS (2019) [hereinafter SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II], https://perma.cc/X8DR-CE6J.

[265] *Enrollment Equity Plan*, TEENS TAKE CHARGE, https://perma.cc/88VW-FML7 (last visited Feb. 1, 2020) (discussing the need for culturally responsive curricula, anti-bias training and continuing professional development, and programs and curricula that promote tolerance and inclusion).

[266] *Real Integration*, INTEGRATENYC, https://perma.cc/P89T-ZEV5 (last visited Feb. 1, 2020).

[267] *Id.*

into five categories: race and enrollment, resources, relationships across identities, restorative justice, and representation of school faculty.[268]

Both organizations' platforms, and the 5 Rs in particular, manage to confront aspects of the educational system that exist within all four pillars of racial injustice: race-motivated impairments, race-motivated benefits, colorblind impairments, and colorblind benefits.

As discussed earlier, disparities in access—while difficult to address—are a necessary target for solutions corresponding to race-motivated impairments and race-motivated benefits. The platforms of IntegrateNYC and Teens Take Charge seek to democratize schools through hiring and enrollment reforms. Through the latter, both platforms also seek to break up the concentrations of white families in specific schools and specific programs and challenge the premise that these popular destinations belong to those who merit them.

Both platforms also challenge access disparities directly. First, both platforms call for increased teacher diversity and request inclusive hiring and diversity campaigns.[269] Next, both plans take on the central issue of racially inequitable enrollment. IntegrateNYC's plan calls for replacing the DOE's algorithm used for the high school matching process with a "student and community-designed" version that would prioritize socioeconomic and racial diversity in the admissions process.[270] The proposal from Teens Take Charge would utilize racial disparities in school performance to desegregate high school enrollment practices. Establishing academic thresholds in the same algorithm targeted by IntegrateNYC, TTC's Enrollment Equity Plan would also require that each high school's incoming freshman class admit at least 25% of students that passed middle school state tests and no more than 75% that did not.[271] This plan would also target the New York City specialized high schools, which have been a symbol for the racial issues of the City system.[272] These schools rely on

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[268] *Id.*

[269] *See Policy Platform,* TEENS TAKE CHARGE, https://perma.cc/9NVC-KT7D (last visited Feb. 18, 2020); *Real Integration,* supra note 266 (calling for more diversity among teachers, faculty, staff, and administration in DOE schools and supporting NYC Men Teach, an existing diversity program in the DOE); *#StillNotEqual*, INTEGRATENYC, https://perma.cc/X8KX-MV3M (last visited Oct. 25, 2019).

[270] Due to *Parents Involved*, this wouldn't be done with consideration of an individual's race. Rather, several race-neutral proxies would be used to achieve racial diversity in accordance with Justice Kennedy's concurrence.

[271] *Enrollment Equity Plan*, *supra* note 265.

[272] Although the New York City school system is nearly 70% Black and Latinx, in 2019 just over 10% of students admitted into the city's seven specialized high schools relying on the SHSAT were Black and Latinx. *See supra* note 102. In Stuyvesant High School, the most competitive school, only 7 Black students and 33 Latinx students were admitted into the class

a single multiple-choice test to determine admission;[273] the plan would require these schools to offer seats to the top 7% of students from every middle school in the city.[274] TTC's policy platform also calls for the elimination of admissions screening at all levels, including elementary school G&T programs, middle schools, and high schools.[275] All of these have been identified as perpetuators of racial disparities in the system. Abandoning academic screens and test-based admission also decentralizes merit in access to desirable programs and lays the groundwork for questioning whether ability and potential mirror the current metrics for merit overall.

Within the education context, school suspensions are the primary type of colorblind impairment yielding similar outcomes to the disparities found in criminal justice.[276] Indeed, selective enforcement of wide-ranging rules is an issue in the classroom as well; IntegrateNYC's Julisa Perez noted that, for IntegrateNYC, this policy prong was created in response to an instance where students unjustifiably and inexplicably received different punishments for their involvement in the same incident.[277] The students' platforms address disparities in school suspensions on several

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of 895. Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), https://perma.cc/84P6-4XT5.

[273] *Id*.

[274] *Enrollment Equity Plan*, *supra* note 265. A similarly designed plan has famously been used by the University of Texas at Austin. *See Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2204 (2016) ("As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.").

[275] *Policy Platform*, *supra* note 269.

[276] Black, Latinx, and Native American students are suspended at far higher rates than their enrollment. Defenders of these disparities point to the behaviors of students of color, suggesting personal culpability. However, this narrative is severely blunted by the fact that these disparities hold constant even for preschool students. Among these mostly four-year-old students, Black children make up eighteen percent of the classroom but account for nearly half of all out-of-school suspensions. Melinda D. Anderson, *Why Are So Many Preschoolers Getting Suspended?*, ATLANTIC (Dec. 7, 2015), https://perma.cc/K39Z-363G; *see* Rasheed Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, CTR. FOR AM. PROGRESS (Nov. 6, 2017, 9:01 AM), https://perma.cc/HL7Q-2NDV ("[B]lack children are 2.2 times more likely to be suspended or expelled than other children."). Studies have shown that Black children attract more attention than white children and receive more suspensions despite similar behavior. This is yet another parallel to criminal justice, where Blacks are overrepresented in marijuana arrests even though they use marijuana at similar rates as whites. One explanation is that Blacks are under heightened surveillance and policing, much like Black students are under heightened attention in the classroom. *See Policy Platform*, TEENS TAKE CHARGE, https://perma.cc/5AZ3-7Q9H (last visited Oct. 25, 2019) ("School discipline systems modeled on the criminal justice system are dangerous, discriminatory, and do not work.").

[277] Interview with Julisa Perez, *supra* note 232.

fronts. The proposed approach calls for increasing cross-cultural understanding from staff[278] and shifting away from a punitive paradigm. The latter is accomplished by exchanging school-assigned police officers for guidance counselors and requiring restorative justice practices to be the primary tool for maintaining order.[279] Cultural competency among staff and instructors can work to reduce tendencies borne of implicit bias and can prevent scenarios where students of color are singled out for behavior that is not atypical. By confronting race directly, this type of solution should reduce disparities.

Restorative justice and other divestments from punitive practices are also critical for racial equity. For one, like most proposed solutions to colorblind impairments, both types of proposals would reduce the use of the problematic practice. What places these requests above typical solutions, however, is the creation of productive alternatives that impose fewer harms, if any. In this regard, restorative justice in the school setting bears a striking resemblance to prison abolition in the criminal justice setting—where advocates seek to reimagine how to respond to so-called bad behavior. Like prison abolition, restorative justice seeks to provide productive solutions and resources in spaces where such tools may be lacking and where the current practices disproportionately harm people of color.[280]

The students' platforms also seek to address the final pillar, colorblind benefits. Like past advocates, IntegrateNYC and TTC seek to bring more funding into the school system overall. Both IntegrateNYC and TTC have specifically requested full payment of the Foundation Aid funding designated for New York City schools in the wake of the *CFE* litigation.[281] However, they also desire progressive distribution to close the gaps between individual schools.[282] In this area, TTC has singled out

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[278] *Real Integration*, *supra* note 266 (demanding culturally responsive training for all teachers, PTA, and staff); *Policy Platform*, *supra* note 275 ("Ensure all teachers receive anti-bias training and follow-up professional development.").

[279] *See* sources cited *supra* note 278.

[280] *See generally* Cullors, *supra* note 108, at 1686 ("Abolition calls on us not only to destabilize, deconstruct, and demolish oppressive systems, institutions, and practices, but also to repair histories of harm across the board.").

[281] *See Policy Platform*, *supra* note 275 ("Despite attempts to create an equitable funding formula, deep resource inequities persist across our schools. These inequities are rooted in the racial and socioeconomic segregation across the system. [The state government must] deliver the $1.2 billion in Foundation Aid New York City is owed from the Campaign for Fiscal Equity lawsuit."); *Real Integration, supra* note 266 (aligning policy plan with Alliance for Quality Education and the Fair Play Coalition demanding the pursuit of "$1.6 billion owed to NYC Public Schools from the CFE v. State of NY" litigation).

[282] IntegrateNYC's platform calls for an annual "equity check" and accountability report to ensure equitable equipment, programming, sports teams, and AP course offerings. They also call for DOE recognition of inequalities in sports access across race and a redesigned

the disparities in parent teacher association ("PTA") funding—a major source of resource inequity in New York City.[283] As part of their policy platform, they called for the redistribution of PTA-generated funds from the wealthiest schools to those "schools in need."[284]

While discussing school funding, Julisa Perez described ways she sees inequity across different schools.[285] She noted that IntegrateNYC "[does not] think it's just at all to ask students to perform in the same way when they're given completely different resources."[286] She explained that, to IntegrateNYC, funding is not solved by providing the same level of support across the board.[287] Rather:

> Some people are so far forgotten that they need a little bit more resources to be able to achieve . . . [S]ome students will need extra support because of their family situation, their home situation . . . [E]verybody should really be able to succeed and nobody should be failing in school.[288]

Overall, though it is unlikely that these students have ever had racial justice issues framed as the four pillars, it is remarkable that they have contemplated solutions across each one. Further, it is notable that these solutions address the principles necessary for dismantling white supremacy. Their messaging identifies the racist past and grapples with the complicated legacies of racial injustice: merit, punishment, and unjustified entitlement.

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system to make all sports programs accessible to all students. *Real Integration, supra* note 266.

[283] Though NYC is a single district, individual schools can have varying levels of funding through parent-teacher organizations. Kyle Spencer, *Way Beyond Bake Sales: The $1 Million PTA*, N.Y. TIMES (June 1, 2012), https://perma.cc/H9C7-VZE2. In 2017, New York City had nineteen of the top fifty richest PTAs in the country. CATHERINE BROWN ET AL., CTR. FOR AM. PROGRESS, HIDDEN MONEY: THE OUTSIZED ROLE OF PARENT CONTRIBUTIONS IN SCHOOL FINANCE 21-23 (2017), https://perma.cc/PVQ3-5QEA.

[284] *Policy Platform*, *supra* note 275. This type of plan is not unprecedented. It has been carried out in the Santa Monica-Malibu school district in California, where most donations are pooled across the district and then distributed equally to all schools. *See* Dana Goldstein, *PTA Gift for Someone Else's Child? A Touchy Subject in California*, N.Y. TIMES (Apr. 8, 2017), https://perma.cc/H7CT-ZYQH.

[285] Interview with Julisa Perez, *supra* note 232.

[286] *Id.*

[287] *Id.*

[288] *Id.*

C. Where Is This Movement Now and What to Look for Next

The students leading the charge achieved a major accomplishment in having a formal governmental advisory group adopt their ambitious framing—especially since most think of segregation as an issue of enrollment only. Their vision of reform and change is equity-focused and designed to create equal opportunities regardless of background. However, there are still obstacles ahead. Racial justice advocates should monitor this movement to see what lessons can be learned and what issues may be uncovered.

In February 2019, the SDAG issued its first of two reports. This report included 67 recommendations to the DOE.[289] Organized along and addressed each of the 5 Rs, the recommendations varied in content and specificity. Overall, they reflected significant improvement over the City's initial diversity plan in 2017.[290] In June 2019, Mayor de Blasio declared that he would formally adopt the overwhelming majority of these recommendations and only explicitly rejected two.[291]

There are positive signs among the recommendations that were adopted, but here, implementation will be the central question.[292] Further,

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[289] *See* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE, *supra* note 264.

[290] *Id.* at 62-65 (recommending that the DOE "be more ambitious and more realistic" in regard to the original goals laid out in the City's 2017 plan and that the City set short-term racial and socio-economic goals using local opportunities, set goals based on borough-wide averages for medium-term goals, and aspire toward long-term citywide goals).

[291] Press Release, Office of the Mayor, Mayor de Blasio, Schools Chancellor Carranza Announce Adoption of School Diversity Advisory Group Recommendations (June 10, 2019), https://perma.cc/BY9Q-VNNU; SCH. DIVERSITY ADVISORY GRP., FINAL SDAG RECOMMENDATION RESPONSES 2, 6 (2019), https://perma.cc/Q6SM-86YT. These two recommendations called for the DOE to create a Chief Integration Officer and for the City to analyze the benefits of moving NYPD school safety officers to DOE supervision. Outright rejection of both is very disconcerting for racial justice purposes. From a basic organizational standpoint, it is critical to have a designated official with significant decision-making power assigned to facilitate reforms, community-based or otherwise. As noted above, decentralized power has been a historical obstacle to racial equity pursuits. The strong denial of the mildly worded police-related recommendation indicates that the City may not seriously view this reform as an opportunity to address discipline. The presence of officers on school campuses exacerbates the racial disparities in school discipline and incorporates some of the most damaging aspects of the criminal justice system into an educational setting. In rejecting a recommendation to examine whether officers should be supervised by the DOE, rather than the NYPD, public safety appears to outweigh considerations of racial equity in a process about integration. From my experience, a fulsome effort to undo racial disparities in various contexts would require reimagining the role of police in schools.

[292] Notably, the DOE adopted recommendations regarding culturally responsive curricula, restorative discipline practices, and staff diversity. SCH. DIVERSITY ADVISORY GRP., *supra* note 264. Since these recommendations lacked specific details or milestones, the City can claim success in various situations.

some policies were "adopted" but were slightly altered or made less specific. In one extremely relevant example, the SDAG called for "[l]aunch[ing] a Task Force to recommend equitable PTA fundraising strategies."[293] Because New York City is a single district under New York State funding formulas, funding disparities between city schools are primarily caused by differences in PTA funding.[294] In adopting this policy, the City adjusted the language, removed the word "equitable" and agreed to "[l]aunch a Task Force to examine PA and PTA capacity – including with resources/fundraising and structure/organizing – to make recommendations to *increase capacity for PTAs overall*."[295] This revision strongly suggests that the City is not interested in any redistributive policy, nor even a progressive city-funded subsidy to address disparities. Rather, it appears that the City is encouraging funding increases across the board and is replicating past mistakes with colorblind benefits.

In August 2019, the SDAG released a final set of recommendations focused on G&T programs, admission screens, and district boundaries. The report containing these recommendations spoke at length about the segregative role of G&T programs and exclusionary admissions policies. For G&T programs, the report highlighted that admissions programs for these programs have discriminated against low-income students[296] and have increased the racial segregation within and across schools.[297] For admission screens, the report identified the ways in which admission policies have shaped school demographics.[298] In identifying the damaging effects of both G&T programs and exclusionary admissions, the SDAG recommended that the DOE replace segregated G&T programs with inclusionary enrichment programs that include individualized study plans and recommended eliminating exclusionary admission programs that create segregation.[299] These recommendations have proven to be extremely

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293 SCH. DIVERSITY ADVISORY GRP., *supra* note 264, at 4.

294 *See* sources cited *supra* note 282.

295 SCH. DIVERSITY ADVISORY GRP., *supra* note 264, at 4 (emphasis added).

296 SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 24.

297 *Id.* at 28-29.

298 *Id.* at 22.

299 SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 9.

controversial.[300] Though the New York City Council passed a bill codifying the SDAG and extending the body's tenure,[301] the DOE and the Mayor have not yet announced whether they will adopt the second set of recommendations.

Overall the SDAG recommendations and DOE response indicate the benefits and shortcomings of pursuing reform in this manner. Litigation-based remedies provide less opportunity to attack the colorblind principles underlying discriminatory policies. It is also extraordinary that the SDAG and DOE have adopted a student-conceived and equity-centered model for reform that extends beyond the initial presentation of the issue: disparities in enrollment. But, even with these successes, this particular reform could benefit from the authority that comes with a court order. The City's response to the SDAG's first set of recommendations—rejections and material alterations—and to the second set—inaction and silence—reveal some trepidation with this reform effort. Without a finding of illegality or unconstitutionality, the DOE is mostly motivated by political considerations.[302] This is particularly difficult given the various communities involved, the sensitivity surrounding racial issues, and the particular concerns parents feel about school policies. As such, the DOE has made adjustments to potentially divisive proposals and has been vague about the policies it has committed to adopting. Therefore, as with any reform, the true test will be in the implementation of the policies. This will be difficult given the size of the DOE and the task at hand, and this will be significantly more difficult without a designated officer.[303] Overall, the City's response indicates that it recognizes the need for change, but that it is not fully aligned with the principles pushed by the impacted communities.

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[300] *See* Selim Algar, *Gifted-and-Talented Purge Will Spark Asian Exodus: Activist*, N.Y. POST (Aug. 28, 2019, 6:49 PM), https://perma.cc/4HJX-R58T; Richard Chen, Opinion, *Eliminating Gifted Programs Further Segregates NYC*, KINGS COUNTY POL. (Aug. 29, 2019), https://perma.cc/YZ98-WYGX; Max Eden, *Killing Gifted & Talented Programs Is de Blasio's Next Step in War on Excellence in Education*, N.Y. POST (Aug. 28, 2019, 7:13 PM), https://perma.cc/LLR9-CLYM; Julia Marsh, *Corey Johnson Opposes Cutting Gifted School Programs*, N.Y. POST (Aug. 27, 2019, 1:37 PM), https://perma.cc/NY53-TJPQ; Bob McManus, *How to Destroy a School System*, CITY J. (Aug. 28, 2019), https://perma.cc/CHE3-QQVY.

[301] Meaghan McGoldrick, *Council Passes New Measures to Increase School Diversity*, BROOKLYN DAILY EAGLE (Nov. 18, 2019), https://perma.cc/87WX-DYV7.

[302] Though IntegrateNYC is primarily a community-based grassroots movement, litigation is also part of its strategy. In discussing the significance of this moment, Julisa Perez recognizes the importance of the City adopting the bulk of the SDAG's recommendations. However, she notes that integration has not been a priority for New York City decisionmakers. To this she added, "as a community we're going to stand strong and show them that is has to be one of their priorities." Interview with Julisa Perez, *supra* note 232.

[303] *See supra* note 290.

Crucially, much remains to be seen regarding the aspects of the public system that correspond to race-motivated impairments and race-motivated benefits: admissions to both highly desirable schools and programs. These components of the system have not only separated privileged students from underserved students. They have also reserved some of the most elite programs, middle schools, and high schools for privileged New Yorkers and have reliably excluded Black and Latinx students. These policies reflect the greatest opportunity to narrow the race gap in New York schools and therefore will be the most contentious battleground. Though much will depend on whether the DOE eliminates exclusionary admissions and replaces G&T programs, it is telling that the SDAG did not do everything possible to tackle these pillars. In particular, the SDAG did not suggest eliminating district lines,[304] adopting the student groups' algorithmic admission policies that have been viewed as a possible alternative following *Parents Involved*,[305] nor reforming admissions policies to the specialized high schools.[306] These limitations are likely the result of a consensus-based process involving over forty individuals. It is also possible that the SDAG focused solely on eliminating the barriers of entry because they believe reallocating benefits or advantages to students of color could run afoul of the Equal Protection Clause. It is unclear if this was a motivation because the Supreme Court's jurisprudence has historically had a chilling effect when it comes to New York City integration efforts. Regardless, at this point, additional changes to admissions will have to occur outside of the initial SDAG process and will have to involve pressure on city officials. If successful, and if opportunity is finally democratized in a district of 1.1 million students, then this movement can serve as a model for other cities in the country and will represent a small step toward bridging the Two Americas.

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[304] Instead, they called for redrafting lines. *See* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 12.

[305] *See* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 33 (explaining that the SDAG directed the DOE to examine this particular plan, but did not formally include its adoption within its recommendations); Micheal J. Alves, Fulfilling the Promise of *Brown* and Diversity Conscious Choice-Based Assignments, Address at the National Conference on Magnet Schools 2, 4 (May 17, 2014), https://perma.cc/3TL3-G646; Ciara McCarthy, *NYC to Roll Out School Integration in the Lower East Side*, PATCH (Oct. 27, 2017, 3:51 PM), https://perma.cc/R3Y4-ZJSH (describing how controlled choice is another form of an algorithmic process that allows for increased integration without an individualized assessment of race—the type of assessment outlawed in *Parents Involved*—and explaining that this model, which takes into account factors like income, temporary housing, and English learners, has been adopted by a New York school district—District 1—which encompasses the Lower East Side); *Enrollment Equity Plan*, *supra* note 265 (proposing a high school matching process).

[306] *See School Diversity Group: NYC Should Phase out Gifted Programs, Curb Selective Screening in Admissions*, BKLYNER (Aug. 27, 2019, 2:05 PM), https://perma.cc/R452-HKC2.

CONCLUSION

Through the four pillars, I have attempted to propose a framework for understanding racial injustice and for understanding why solutions have historically fallen short. I have also suggested a case study for additional research and examination. Naturally, there are limitations to this Article. Namely, racial injustice in America was omnipresent and it is hard to capture something so nebulous into a neat schema. Moreover, I note that the New York-focused examples may indicate unique characteristics and features missing in other contexts. I encourage others to expand on this framework with examples of their own to analyze whether racial grievances fall into these categories in other regions of the nation.

In discussing this framework and this case study, however, the central question is whether reform efforts are well suited for addressing a type of racial harm and if they create a solution that can close a racial disparity. I hope that this Article helps racial justice advocates in their pursuit of solutions and in the framing of their reforms. I also hope that this Article adds to the ongoing conversations about what is necessary and what can work to improve the outcomes and opportunities for people of color, following centuries of oppression.

CIVIL *GIDEON* AND NYC'S UNIVERSAL ACCESS: WHY COMPREHENSIVE PUBLIC BENEFITS ADVOCACY IS ESSENTIAL TO PREVENTING EVICTIONS AND CREATING STABILITY

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INTRODUCTION

Advocates who work in direct civil legal services agencies, like Legal Services NYC, understand that we work in the law firm equivalent of an emergency room. People seek our services to maintain or obtain essential services, to stop their foreclosures, to prevent eviction from their homes, to end their deportations, or to obtain orders of protection, among other time- and safety-sensitive issues. At the same time that we are providing critical interventions for our clients' most pressing legal needs, we have to juggle our different responsibilities, such as ensuring we meet our grant deliverables, and applying (or reapplying) for critical funding we need to maintain a consistent level of services. We, of course, have front row seats to the lack of access to justice that low-income and marginalized communities face when they don't have adequate counsel, and many of us had given up on the promise or hope of a "Civil *Gideon*."[1] But then something remarkable happened.

In 2017, our City Council, in partnership with the tenant organizer-led Right to Counsel NYC Coalition, a progressive mayor, and a revitalized local Department of Social Services that was committed to providing meaningful assistance to low-income communities, worked together to

[1] Named after the landmark U.S. Supreme Court case that found defendants had a constitutional right to counsel in criminal cases, Civil *Gideon* is a movement and idea that the right to counsel must extend to certain civil cases that protect or preserve basic needs, including eviction proceedings. *See infra* notes 127-30 and accompanying text.

pass a law guaranteeing a right to counsel to people facing eviction for households at or below 200% of the federal poverty level.[2] This legislation, which the city commonly refers to as "Universal Access to Counsel," or "UAC," is being phased in across our city as we reach the mandate of covering the entire city by the end of July 2022.[3] The city is contracting the anti-eviction defense work out to different legal services agencies, including Legal Services NYC ("LSNYC"). The New York City Department of Social Services ("DSS") has established an Office of Civil Justice ("OCJ"), which administers the UAC grant and oversees its implementation. Over two years into the UAC phase-in, we have learned a great deal about how to structure, staff, and fund a successful program, but we are also more than two years away from the final implementation of the program when, presumably, the New York City Council will finalize and baseline the UAC funding.[4]

We are trying to take a step back from our usual day jobs juggling in the emergency room to recommend a thoughtful way to staff and fund a successful UAC program. Thus far, the UAC funding has been insufficient to cover the personnel costs for the public benefits paralegals who play a central role in preventing evictions as well as in stabilizing families and individuals facing eviction. Without adequate funding, UAC will have problems with sustainability and advocate burnout. Even worse, without a sufficient ratio of housing attorneys to public benefits paralegals, UAC may fail to meet the needs of low-income communities facing eviction.

In this article, we explain the critical role that public benefits advocates already play in the immediate anti-eviction work and highlight the role that such advocates can and *should* play in promoting longer-term stability for the clients we serve—if we have sufficient funding to hire them. We will demonstrate that "winning" an eviction case may not be the equivalent of providing stability. We look at the current homelessness crisis in New York City ("NYC") and identify some of its leading causes. By examining some of the underlying drivers of homelessness, we see

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[2] N.Y.C. ADMIN. CODE §§ 26-1301 to -1302 (2019). As the editors of the N.Y.C. Administrative Code have noted, two sections of the Code are designated as Section 26-1301. This citation refers to the two sections titled *Definitions* and *Provision of Legal Services*.

[3] *Id.* § 26-1302.

[4] *Id.* § 26-1302(c) ("Beginning October 1, 2022 and no later than each October 1 thereafter, the coordinator shall publish a summary of any changes to such estimates for expenditures."). Some of the funding has been baselined already to some degree, but we are still in a period of expansion and growth. The final baselined budget will not occur until 2022. We believe that one of the key elements of funding that must be increased is the UAC per-case reimbursement rate.

how UAC can interrupt the cycle of housing instability if funding is adequate to allow legal providers to hire enough paralegals to provide comprehensive public benefits assistance. In particular, we take a look at four different subpopulations that are disproportionately homeless and affected by recursive episodes of housing instability: (1) people with disabilities or serious illnesses, (2) survivors of domestic violence or intimate partner violence ("DV"), (3) noncitizens, and (4) people aged sixty and over. We identify the different ways that public benefits paralegals can intervene in ways that go beyond the critical function of just stopping the eviction and address some of the underlying stressors. By decreasing out-of-pocket expenses, maximizing benefits, and ensuring better access to benefits, our UAC model will reduce Housing Court and shelter entry recidivism.

We want to be clear that we have much to celebrate: our City Council, Mayor, and DSS have taken the extraordinary step of providing counsel to low-income New Yorkers to stop their evictions and keep them in their homes. Having legal counsel in eviction proceedings is absolutely the key to UAC. But we know we can do better—and we know that doing better involves minimal cost, costs that the UAC funding already should be covering no matter what may happen.

I. UNDERSTANDING THE HOMELESSNESS EPIDEMIC IN NYC

A. Homelessness Crisis in NYC

With some 60,000 people in shelter every night,[5] NYC is in the midst of a homelessness crisis. There is no single reason for homelessness; it is a complicated social problem with many underlying and proximate causes. Nevertheless, UAC can unquestionably play a significant role in reversing or reducing homelessness, but a program that minimally funds one aspect of eviction prevention (housing attorneys representing people in eviction cases) will ultimately be insufficient to erode the epidemic of housing instability and homelessness among low-income NYC residents.

Nonprofit direct legal services work is primarily crisis-driven. The same is true of the anti-eviction housing work that this article will primarily discuss: the clients we see are already in Housing Court and facing eviction. Providing expert emergency assistance and intervention remains our primary goal, which is why we are focusing on people who are homeless or are on the brink of homelessness. However, this article will also refer to people who are experiencing "housing instability," which we de-

[5] *DHS Homeless Shelter Census*, NYC OPEN DATA, https://perma.cc/4ZEX-NVNA (last visited Dec. 30, 2019).

fine as individuals or families with a rent burden that exceeds thirty percent of their household income after expenses[6] and/or people who are "doubled up" or otherwise overcrowded.[7] Housing *instability* is not necessarily cured by stopping the eviction because obtaining benefits to cover the arrears may not address other underlying issues that contribute to housing instability.

1. Massive Scope of Homelessness and Housing Instability in NYC

Statistics paint a cold picture, but one that we must examine to understand the breadth and underlying causes of the epidemic of homelessness and housing instability faced by low-income people in NYC. In 2018, the U.S Department of Housing and Urban Development estimated that fourteen percent of the entire nation's homeless population lived in NYC.[8]

The number of people living in NYC shelters[9] has hovered around 60,000 each night since late 2014, and more than 20,000 of the people staying in our shelters every night are children.[10] The Coalition for the Homeless, an advocacy group in Manhattan that compiles and analyzes data from DSS, estimates that 133,284 different individuals spent at least one night in the NYC shelter system from July 1, 2017, through June 30, 2018.[11] As of June 2019, the average number of days people stay in the NYC shelter system is 447, or just shy of fifteen months.[12]

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[6] Using a similar definition, New York State Assemblyman Andrew Hevesi and State Senator Liz Krueger have introduced legislation to provide more robust shelter subsidies. The two representatives claim that 80,000 families are on the brink of homelessness across New York State. LIZ KRUEGER, INTRODUCER'S MEMORANDUM IN SUPPORT, S. 242-2375, 1st Sess., at 1 (N.Y. 2019). The four subpopulations we focus on frequently spend more than fifty percent of their incomes on rent.

[7] "Doubled-up" refers to individuals or families residing in the dwelling of another person or family, especially when the doubled-up family is not the leaseholder. The number of doubled-up people in NYC has reached epidemic levels, particularly for school-aged children. *See* INST. FOR CHILDREN, POVERTY & HOMELESSNESS, THE INVISIBLE MAJORITY: DOUBLED-UP STUDENTS IN NEW YORK CITY PUBLIC SCHOOLS (2015), https://perma.cc/5QLW-PX65.

[8] *See* U.S. DEP'T OF HOUS. & URBAN DEV., THE 2018 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 10, 18 (2018), https://perma.cc/2KPG-QFSA.

[9] We are only referring to adults and families with children in NYC's Department of Homeless Services ("DHS") and Human Resources Administration ("HRA") shelters. None of these statistics include runaway and homeless youth shelters, nor do they include people who are homeless and live on the street.

[10] COAL. FOR THE HOMELESS, NEW YORK CITY HOMELESS MUNICIPAL SHELTER POPULATION, 1983-PRESENT 12-14 (2019), https://perma.cc/RTF9-ZXKV.

[11] *Basic Facts About Homelessness: New York City*, COAL. FOR THE HOMELESS, https://perma.cc/JB7U-V36C (last visited Dec. 30, 2019).

[12] COAL. FOR THE HOMELESS, *supra* note 10, at 14.

NYC's Independent Budget Office examined homelessness data over a ten-year period from 2002 to 2012. During that time, over twenty percent of people who entered shelter cited domestic violence as the reason for seeking shelter, and around thirty percent of people entered shelter because they were evicted.[13] By early 2016, Crain's New York Business examined raw data from NYC and concluded that domestic violence had surpassed eviction as the leading cause and reason cited for shelter entry.[14] In October 2019, NYC Comptroller Scott Stringer released a report highlighting that domestic violence is now the most commonly cited reason for shelter entry, accounting for more than forty percent of all shelter entries in the fiscal year that ended June 30, 2018.[15]

Although the Bronx is the fourth most populous of the five boroughs of NYC,[16] it consistently has the highest number of people entering shelter.[17] Indeed, five of the top ten community districts in NYC with the highest rates of entry into shelter are located in the Bronx, and these ten community districts account for almost fifty percent of all families entering shelter.[18]

The Vera Institute reviewed homelessness data for families with children entering the shelter system and concluded that certain factors made shelter entry more likely. Specifically, Vera identified that seventy-seven percent of people in shelter included families who rely "heavily" on public assistance benefits in addition to work income.[19] Vera also highlighted DV and eviction as among the most prevalent proximate causes of shelter entry.[20] According to Steven Banks, the commissioner of DSS, twenty-

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[13] N.Y.C. INDEP. BUDGET OFFICE, THE RISING NUMBER OF HOMELESS FAMILIES IN NYC, 2002-2012: A LOOK AT WHY FAMILIES WERE GRANTED SHELTER, THE HOUSING THEY HAD LIVED IN & WHERE THEY CAME FROM 8-10 (2014), https://perma.cc/Z72M-S76H.

[14] Gerald Schifman & Rosa Goldensohn, *Domestic Violence Emerges as Economic Scourge and Primary Driver of Homelessness*, CRAIN'S N.Y. BUS. (Oct. 26, 2016, 12:00 AM), https://perma.cc/KR7C-S3NH.

[15] OFFICE OF THE N.Y.C. COMPTROLLER, HOUSING SURVIVORS 4 (2019), https://perma.cc/S4GG-F598.

[16] *QuickFacts,* U.S. CENSUS BUREAU, https://perma.cc/53P5-ZALS (last updated July 1, 2019).

[17] N.Y.C. INDEP. BUDGET OFFICE, *supra* note 13, at 1.

[18] NANCY SMITH ET AL., VERA INST. OF JUSTICE, UNDERSTANDING FAMILY HOMELESSNESS IN NEW YORK CITY § I, at 3 (2005), https://perma.cc/9XK9-RAYL.

[19] *Id.* at iv.

[20] *Id.*; *see* OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR ONE OF IMPLEMENTATION IN NEW YORK CITY 17 (2018), https://perma.cc/JH78-MQTP (finding that 11,424—or fifty percent—of the households who obtained counsel via UAC were in receipt of ongoing public benefits at the time when legal services were rendered).

three percent of shelter applicants in a six-month time period in 2013 reported that their public assistance case had closed or been reduced in the prior twelve months.[21]

Homelessness and housing instability[22] cause long-term injuries,[23] affecting education, health outcomes, and employment.[24] One out of ten students in NYC public schools lived in temporary housing in the 2016-2017 school year, which means that there were "more homeless students in New York City than the population of Albany."[25] Over twelve percent of NYC public school students will experience homelessness before their

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[21] Steven Banks, Comm'r of the N.Y.C. Human Res. Admin., Testimony at the New York State Senate Hearing Task Force on Social Service Delivery in New York City 9 (Oct. 7, 2015), https://perma.cc/M52C-YFBA.

[22] We do not discuss the financial costs of homelessness, nor do we highlight how rent subsidies and affordable housing result in cost savings to the taxpayer compared to housing families and individuals in our shelter system. The data unmistakably, unequivocally point to these conclusions. For example, in 2018, the average daily cost was $117.43 (or $3,522 per month) for adult-only shelters and $187.46 (or $5,623 per month) for family shelters. *See New York City (NYC) Department of Homeless Services (DHS) Financial & Service Indicators*, BARUCH COLL., https://perma.cc/L4FY-USE8 (last visited Dec. 30, 2019). Instead, we focus on the life consequences for people who are housing unstable or homeless.

[23] Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296-97, 316-19 (2015); Benard P. Dreyer, *A Shelter Is Not a Home: The Crisis of Family Homelessness in the United States*, PEDIATRICS, Nov. 2018, at 1-2.

[24] *See, e.g.*, John W. Ayers et al., *Novel Surveillance of Psychological Distress During the Great Recession*, 142 J. AFFECTIVE DISORDERS, Dec. 15, 2012, at 1 (mental health); Sarah Burgard et al., *Housing Instability and Health: Findings from the Michigan Recession and Recovery Study*, 75 SOC. SCI. & MED. 2215 (2012) (mental health); Thomas B. Cook & Mark S. Davis, *Assessing Legal Strains and Risk of Suicide Using Archived Court Data*, 42 SUICIDE & LIFE-THREATENING BEHAV. 495 (2012) (mental health); Margot B. Kushel et al., *Housing Instability and Food Insecurity as Barriers to Health Care Among Low-Income Americans*., 21 J. GEN. INTERNAL MED. 71 (2006) (health); Christine Ma et al., *Associations Between Housing Instability and Food Insecurity with Health Care Access in Low-Income Children*, 8 AMBULATORY PEDIATRICS 50 (2008) (health); Kristen W. Reid et al., *Association Between the Level of Housing Instability, Economic Standing and Health Care Access: A Meta-Regression*, 19 J. HEALTH CARE FOR POOR & UNDERSERVED 1212 (2008) (health); Sharon A. Salit et al., *Hospitalization Costs Associated with Homelessness in New York City*, 338 NEW ENGLAND J. MED. 1734 (1998) (health); Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, PEDIATRICS, Feb. 2018, at 1 (health); DANIEL FLAMING ET AL., ECON. ROUNDTABLE, WHERE WE SLEEP: COSTS OF HOUSING AND HOMELESSNESS IN LOS ANGELES (2009), https://perma.cc/G932-WEST (health and employment); INST. FOR CHILDREN, POVERTY & HOMELESSNESS, THE HIGH STAKES OF LOW WAGES: EMPLOYMENT AMONG NEW YORK CITY'S HOMELESS PARENTS (2013), https://perma.cc/3G8L-5Z78 (employment); *see also* Zachary Glendening & Marybeth Shinn, *Risk Models for Returns to Housing Instability Among Families Experiencing Homelessness*, 19 CITYSCAPE 309 (2017) (education and health); DW Gibson, *New York Spends $1.2 Billion a Year on Homelessness*, N.Y. MAG. (Mar. 20, 2017), https://perma.cc/T84S-TAPK (employment).

[25] Eliza Shapiro, *Homelessness in New York Public Schools Is at a Record High: 114,659 Students*, N.Y. TIMES (Oct. 15, 2018), https://perma.cc/VN7U-ZPMM.

fifth grade school year—and more than ten percent of these students started kindergarten in District 10 in the Bronx.[26] Young people who have been or are homeless are at increased risk for social and behavioral problems.[27]

2. Leading Drivers of Homelessness and Housing Instability in NYC

Various factors contribute to the high and rising rates of homelessness and housing instability in New York City. The National Law Center on Homelessness and Poverty reports that the leading causes of homelessness[28] in America are extremely low incomes and a lack of affordable housing.[29] In New York City, these factors, along with surges in population, lead to crowding.[30]

The Office of the New York City Comptroller has identified crowding trends as a precursor to rising homelessness.[31] Crowding is often identified within low-income families, and seventy percent of households that experience it are occupied by an immigrant head of household.[32] The U.S. Census Bureau has estimated that New York City's population increased by 2.7% since April 2010, which is an estimated increase of 223,615 residents,[33] and New York City's crowding rate is more than two-and-a-half times the national average.[34] Crowding may reflect an upward trend in local housing market rates.[35] The crowding phenomenon is usually attributed to displaced residents who find temporary housing among their

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[26] KATHRYN HILL & ZITSI MIRAKHUR, THE RESEARCH ALL. FOR N.Y.C. SCH., HOMELESSNESS IN NEW YORK CITY ELEMENTARY SCHOOLS: STUDENT EXPERIENCES & EDUCATOR PERSPECTIVES 5 (2019), https://perma.cc/BG3C-57WE.

[27] *See* Janette E. Herbers et al., *Trauma, Adversity, and Parent-Child Relationships Among Young Children Experiencing Homelessness*, 42 J. ABNORMAL CHILD PSYCHOL. 1167 (2014); INST. FOR CHILDREN, POVERTY & HOMELESSNESS, HOUSED WITHOUT STABILITY: THE CONTINUING CHALLENGES FACED BY FORMERLY HOMELESS STUDENTS (2019), https://perma.cc/AE5Z-CMN6.

[28] Homelessness here includes people that are street homeless or reside in homeless shelters.

[29] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES 3 (2015), https://perma.cc/ZA2J-4FG4.

[30] Severe crowding is defined as housing units with more than 1.5 persons per room. OFFICE OF THE N.Y.C. COMPTROLLER, HIDDEN HOUSEHOLDS 2 (2015), https://perma.cc/8GW7-ZY78.

[31] *Id.* at 3, 11.

[32] *Id.* at 10.

[33] *Current Estimates of New York City's Population for July 2018*, N.Y.C. DEP'T OF CITY PLANNING, https://perma.cc/3RE6-UL9R (last visited Dec. 30, 2019).

[34] OFFICE OF THE N.Y.C. COMPTROLLER, *supra* note 30, at 5.

[35] *Id.* at 3; *see* LUCY BLOCK & BENJAMIN DULCHIN, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., HOW IS AFFORDABLE HOUSING THREATENED IN YOUR NEIGHBORHOOD? 2019 (2019),

collateral contacts until they exhaust their support networks and enter the shelter system.[36]

As overcrowding climbed, the number of homeless residents increased in lockstep.[37] Between 1994 and 2014, the NYC shelter populations increased by 115%.[38] Before 2005, New York City's leading efforts to combat homelessness relied on federally-funded subsidy programs such as Section 8 to move the homeless into stable, permanent housing, and between 1999 and 2005, one third of all available Section 8 vouchers assisted homeless families to move out of shelter.[39]

At the same time, between 2000 and 2012, NYC median rents rose by 75%, well ahead of the national median rent increase of 44%.[40] This period included a loss of 400,000 affordable housing units that rented for less than $1,000 monthly.[41] While rents continued to rise at approximately 3.9% annually, wages increased only 1.8% per annum between 2010 and 2017.[42]

Against this backdrop, in June 2004, Mayor Michael Bloomberg announced a plan to go into effect the following year that aimed to reduce New York City's homeless population by two-thirds over the next five years.[43] In 2005, Bloomberg removed homeless families from priority consideration to receive federally-funded vouchers through Section 8, eroding housing stability by eliminating the option of having a subsidy pegged to their actual incomes. Deputy Mayor Linda Gibbs, who served during the Bloomberg Administration, explained the reasoning behind the decision in a 2013 interview with the *New Yorker*. According to Gibbs, NYC "discontinued Section 8 priority because of its dwindling availability, and because we discovered that the chance of getting Section 8 was

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https://perma.cc/Q9S6-EASZ; *see generally* Jamie L. Davenport, *The Effect of Supply and Demand Factors on the Affordability of Rental Housing*, 11 PARK PLACE ECONOMIST 44 (2003).

[36] Rachel Holliday Smith, *Overcrowding, a Precursor to Homelessness, Is Increasing Citywide: Report*, DNAINFO (June 1, 2017, 8:29 AM), https://perma.cc/C8WL-K7RH.

[37] N.Y.C. DEP'T OF HOMELESS SERVS., TURNING THE TIDE ON HOMELESSNESS IN NEW YORK CITY 7-8 (2019), https://perma.cc/5A6A-K33L.

[38] *Id.* at v.

[39] GISELLE ROUTHIER, COAL. FOR THE HOMELESS, RECOVERING FROM THE LOST DECADE: PERMANENT RENT SUPPLEMENTS A POTENT TOOL FOR REDUCING HOMELESSNESS 2 (2017), https://perma.cc/78VQ-8FQF.

[40] OFFICE OF THE N.Y.C. COMPTROLLER, THE GROWING GAP: NEW YORK CITY'S HOUSING AFFORDABILITY CHALLENGE 1, 4-5 (2014), https://perma.cc/N7DF-WHV3.

[41] *Id.* at 1.

[42] STREETEASY, THE WIDENING GAP: RENTS AND WAGES IN NEW YORK CITY 1 (2017), https://perma.cc/S3ZU-R6AN.

[43] Press Release, Office of the Mayor of New York City, Mayor Michael R. Bloomberg Announces Citywide Campaign To End Chronic Homelessness (June 23, 2004), https://perma.cc/7LUD-FGZL.

operating as a perverse incentive, drawing people to seek shelter who otherwise would not have done so."[44]

Instead of prioritizing placement of homeless families in permanent housing or using Section 8, Bloomberg instituted the Housing Stability Plus program ("HSP"), which was usually tied to the receipt of cash public assistance benefits. Unlike Section 8, it was a temporary subsidy that would cease payments after five years.[45] When HSP was first introduced, the subsidy decreased year over year while the household's share increased year over year.[46] The program dissolved within three years, and a new subsidy called Advantage[47] replaced it.[48]

In changing course, the Bloomberg administration ignored the data: shelter-entry recidivism within five years of exiting shelter with a Section 8 voucher was only 12.5%.[49] Comparatively, 63.3% of Advantage program recipients who were formerly homeless returned to shelters.[50] By 2009, the number of NYC homeless families was 9% higher than in June 2004 and was 229% higher than the plan's intended outcome.[51]

Bloomberg's nearly ten-year-long plan to reduce homelessness has become known as the "Lost Decade."[52] Between 2004 and 2014, NYC administrators made policy decisions amidst economic changes that hurt housing stability for low-income New Yorkers.[53] Consequently, the period between 2005 and 2014 saw a nearly seventy percent increase in people residing in homeless shelters.[54]

A household is considered "rent burdened" if they pay more than thirty percent of their household income toward rent and "severely rent

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[44] Ian Frazer, *Hidden City*, NEW YORKER (Oct. 28, 2013), https://perma.cc/7P2W-PW9G.

[45] *See* FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY BULLETIN 05-24-ELI, INTRODUCTION OF THE HOUSING STABILITY PLUS PROGRAM (2005); FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE 05-43-ELI, HOUSING STABILITY PLUS PROGRAM (2005); FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE 07-04-ELI, HOUSING STABILITY PLUS PROGRAM (2007).

[46] *See* sources cited *supra* note 45.

[47] FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE 07-28-ELI, NEW RENTAL ASSISTANCE PROGRAMS FOR SHELTER RESIDENTS (2007).

[48] Kenny Schaeffer, *Bloomberg's Housing Policies a Failure*, METRO. COUNCIL ON HOUSING (Mar. 2012), https://perma.cc/GH9L-CNHN.

[49] ROUTHIER, *supra* note 39, at 4.

[50] *Id.*

[51] PATRICK MARKEE, COAL. FOR THE HOMELESS, FIVE YEARS LATER: THE FAILURE OF MAYOR BLOOMBERG'S FIVE-YEAR HOMELESS PLAN AND THE NEED TO REFORM NEW YORK CITY'S APPROACH TO HOMELESSNESS (2009), https://perma.cc/L4RZ-5X2P.

[52] See executive summary in ROUTHIER, *supra* note 39.

[53] N.Y.C. DEP'T OF HOMELESS SERVS., *supra* note 37, at iii-v.

[54] See executive summary in ROUTHIER, *supra* note 39.

burdened" if they pay more than fifty percent.[55] By 2016, households with income between $10,000 and $20,000 per year paid seventy-four percent of their income towards rent.[56] Put another way, the NYC minimum wage would need to be $35.21 for a wage earner to avoid spending more than thirty percent of their income on rent for a two-bedroom apartment at market rate.[57] Currently, New York State minimum wage is $11.80 an hour and NYC minimum wage is $15 per hour.[58]

3. Lack of Housing Stability Among Different Sub-Populations: A Closer Look

The fundamental drivers of homelessness and housing instability are, of course, having inadequate income and resources to pay rent coupled with a lack of affordable housing.[59] No amount of funding for UAC would address these issues. What we can do, however, is provide comprehensive public benefits assistance to the subpopulations we have identified that have greater housing instability. The populations, many of which overlap, are households who have one or more people: (a) with a serious illness or disability, (b) who are survivors of intimate partner or domestic violence, (c) who are noncitizens, and/or (d) who have people aged sixty and over. Research and studies, along with the lived experience of legal services advocates, highlight how these four groups grapple with housing instability at higher rates. Fortunately, as we discuss later in this article, public benefits advocates have considerable tools at our disposal to arrest and correct many of these underlying issues, but only if the City Council appropriates enough funding so that legal providers can hire an adequate number of public benefits advocates.

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[55] OFFICE OF THE N.Y.C. COMPTROLLER, NYC FOR ALL: THE HOUSING WE NEED 7 (2018), https://perma.cc/UG8P-V93Z.

[56] *Id.* at 2.

[57] NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 172 (2019), https://perma.cc/H59N-AXHZ.

[58] *New York State's Minimum Wage,* N.Y. STATE GOV'T, https://perma.cc/2W7M-VNRE (last visited Dec. 31, 2019).

[59] *See, e.g.*, MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY *passim* (2016); Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227 (2015); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS (2018), https://perma.cc/C8SU-83CK; NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2017), https://perma.cc/X3RN-Z9RK; *see also* JEAN CALTERONE WILLIAMS, A ROOF OVER MY HEAD *passim* (2d ed. 2016); OFFICE OF THE N.Y.C. COMPTROLLER, *supra* note 55.

a. Disability/Serious Illness

A 2009 study of chronically homeless adults in NYC revealed what advocates have known for years: eighty-four percent report mental health, substance use, or serious medical issues, only a small percentage receive public assistance, and less than half have health insurance.[60] The National Coalition for the Homeless goes even further, concluding that "[p]oor health is closely associated with homelessness" and that "serious illness or disability can start a downward spiral into homelessness, beginning with a lost job, depletion of savings to pay for care, and eventual eviction."[61]

From a practitioner's perspective, easily over thirty-three percent of our eviction cases include households containing someone who is disabled or has a serious illness.[62] Some of these households may receive benefits from the Social Security Administration, but most of our clients subsist on other public assistance benefits[63] and have unstable, low-paying jobs.[64] The 2018 report issued by DSS's Office of Civil Justice provides additional evidence: of the 7,924 households in the Bronx who received assistance from UAC in fiscal year 2018, almost half had household incomes below fifty percent of the federal poverty level.[65]

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[60] Aaron J. Levitt et al., *Health and Social Characteristics of Homeless Adults in Manhattan Who Were Chronically or Not Chronically Unsheltered*, 60 PSYCHIATRIC SERVS. 978, 980 (2009).

[61] NAT'L COAL. FOR THE HOMELESS, HEALTH CARE AND HOMELESSNESS (2006), https://perma.cc/JVA9-WQZP.

[62] From January 2018 through December 2019, Bronx Legal Services provided assistance on over 5,600 housing cases and over 3,600 public benefits cases (excluding unemployment insurance benefits ("UIB") and any ongoing financial benefit from the Social Security Administration, such as supplemental security income ("SSI"), social security disability insurance ("SSDI"), or social security retirement income ("SSRI")). Among the public benefits cases, over one-third of the cases included someone in the household who identifies as disabled or seriously ill and/or has income that comes from one or more of the following sources: SSI, SSDI, worker's compensation, or state disability insurance.

[63] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 17 (showing that 11,424 households that received legal assistance through the Universal Access program also received ongoing public benefits).

[64] *See* OFFICE OF THE N.Y.C. COMPTROLLER *supra* note 55, at 6 (listing the top fifteen occupations of NYC's low- and very low-income workers).

[65] OFFICE OF CIVIL JUSTICE, *supra* note 20, at 16.

b. Domestic/Intimate Partner Violence

The direct connection between DV and housing instability is fairly apparent and thoroughly documented: DV survivors leave abusive partners and seek alternate forms of shelter.[66] Leaving a violent household for shelter is an extraordinarily difficult choice to make, particularly when you have children, but what about the people who stay?

In a 2016 report, fifty-five percent of Bronx DV survivors cited an inability to pay rent as among their greatest barriers to leaving their abusive partners.[67] For survivors who flee abuse, the resulting housing instability that they face after leaving goes largely unrecorded. Unable to access resources, DV survivors return to their abusive partners because living in the actual or perceived substandard conditions of the NYC shelter system, especially with children, seems worse than the abuse they left.

Most of our clients who report DV continue to live with their abusive partners or otherwise do not vacate their apartments. These families and individuals end up in Housing Court multiple times. Abusive partners limit survivors from attending necessary public assistance appointments to keep their cases open, forbid the survivor from receiving public assistance at all, or compel the survivor to receive assistance but forbid the survivor from revealing the identity or presence of the abusive partner in the household.

c. Noncitizens

With over one-third of our residents born outside of the United States,[68] NYC has thrived over the decades because of our diverse population. Unfortunately, noncitizens in our city are also disproportionately affected by housing instability. The Pratt Center for Community Development reports that eighty-two percent of noncitizens who earn less than half of the area median income pay more than thirty percent of their income to rent, and a stunning fifty percent must spend over half of their income each month just on rent.[69]

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[66] *See, e.g.*, Charlene K. Baker et al., *Domestic Violence, Housing Instability, and Homelessness: A Review of Housing Policies and Program Practices for Meeting the Needs of Survivors*, 15 AGGRESSION & VIOLENT BEHAV. 430 (2010).

[67] BRONX DOMESTIC VIOLENCE ROUNDTABLE & BRONX LEGAL SERVS., "MORE PEOPLE TO LISTEN": LEGAL AND SOCIAL SERVICE NEEDS OF BRONX COMMUNITIES AFFECTED BY INTIMATE PARTNER VIOLENCE 38 (2016), https://perma.cc/GA88-5D87.

[68] *See, e.g.*, N.Y.C. DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS: CHARACTERISTICS OF THE CITY'S FOREIGN-BORN POPULATION 2 (2013), https://perma.cc/25L5-69EU.

[69] PRATT CTR. FOR CMTY. DEV., CONFRONTING THE HOUSING SQUEEZE: CHALLENGES FACING IMMIGRANT TENANTS, AND WHAT NEW YORK CAN DO 2-3 (2008), https://perma.cc/4GMR-KMZP.

In today's political climate, xenophobic rhetoric and policies hostile to noncitizens are driving people into the shadows, causing financial strains that exacerbate housing instability.[70] The policy change that has the most direct connection to harming housing stability for noncitizens are the changes to the so-called "public charge" rule that the Trump administration proposed in October 2018.[71] The U.S. Department of Homeland Security ("DHS") published the final public charge rules changes in August 2019, and those new rules were scheduled to go into effect on October 15, 2019. As this article went to publication, many lawsuits are pending in federal courts challenging the legality of the new public charge rule.[72] Regardless, the mere proposal of the rule itself has affected noncitizens.[73]

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[70] *See, e.g.*, Anthony Advincula, *Immigrants Avoiding Medical, Other Benefits in Fear of New Public Charge Rule*, INQUIRER (Aug. 29, 2019, 12:21 AM), https://perma.cc/B2AS-EM3V; Helena Bottemiller Evich, *Immigrants, Fearing Trump Crackdown, Drop out of Nutrition Programs*, POLITICO (Sept. 3, 2018, 8:17 AM), https://perma.cc/EMT3-EFCM; Chloe Reichel, *The Potential Health Effects of the 'Public Charge' Immigration Rule*, JOURNALIST'S RESOURCE (Aug. 26, 2019), https://perma.cc/34QQ-L6BK; CLASP, PUBLIC CHARGE: A THREAT TO CHILDREN'S HEALTH & WELL-BEING (2018), https://perma.cc/D4JB-36PM; NAT'L HOUS. LAW PROJECT & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, TRUMP ADMINISTRATION'S PROPOSED "PUBLIC CHARGE" RULE (2018), https://perma.cc/V5VY-VMTS; *Impact of Public Charge on New York State Health Centers and Patients*, CMTY. HEALTH CARE ASS'N OF N.Y. STATE, https://perma.cc/R7U6-XGP7 (last visited Dec. 31, 2019).

[71] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248).

[72] *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248). The U.S. Supreme Court recently lifted the nationwide injunction issued by the Southern District of New York, which leaves only Illinois with a current stay in effect to delay DHS's implementation of the new public charge rules. Cook Cty. v. McAleenan, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019), *appeal docketed*, No. 19-3169 (7th Cir. 2019) (granting preliminary injunction preventing DHS from implementing new public charge rules in Illinois), *stay granted sub nom.* Wolf v. Cook Cty., 589 U.S. ___ (2020) (lifting the Illinois injunction); New York v. Dep't of Homeland Sec., 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019), *aff'd*, New York v. U.S. Dep't of Homeland Sec., No. 19 Civ. 7777 (GBD), 2019 WL 6498250 (2d Cir. Dec. 2, 2019), *rev'd sub nom.* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (lifting the nationwide injunction pending final resolution of case); Make the Rd. N.Y. v. Cuccinelli, No. 19 Civ. 7993 (GBD), 2019 WL 5589072 (S.D.N.Y. Oct. 11, 2019), *aff'd*, 2019 WL 6498283 (2d Cir. Dec. 2, 2019), *rev'd sub nom.* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (same); *see* Casa De Maryland, Inc. v. Trump, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs., No. 19-CV-04717-PJH, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019), *modified*, 944 F.3d 773 (9th Cir. 2019); *see also Final Rule on Public Charge Ground of Inadmissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://perma.cc/5BAB-5VZX (last updated Oct. 16, 2019).

[73] *See* sources cited *supra* note 70.

The public charge doctrine,[74] which has existed since the late 1800s, disfavors the receipt of public assistance benefits as the primary source of support for noncitizens.[75] The Trump administration proposed significant changes to the doctrine that would sweep hundreds of thousands of people potentially into the crosshairs of our immigration system if they receive public benefits.[76] While the rule has not yet gone into effect, we are already seeing the consequences: our clients are terrified to apply for or receive public benefits to subsist, much less to stop an eviction.[77]

DSS agrees, explaining that noncitizen NYC residents are being forced "to choose between public benefits support and potential future immigration consequences."[78] Attributing the decline to the news surrounding public charge rule changes, DSS reports that in just a few months' time and still *before* the rule changes have gone into effect, about 25,000 noncitizens have stopped receiving SNAP (food stamp) benefits.[79]

We can also look to history to see what may lie ahead for low-income noncitizens. The so-called welfare reform of the 1990s dramatically

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[74] *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2018).

[75] The application and interpretation of the public charge doctrine has largely been based on long-standing guidance published in 1999, referred to as the "1999 Field Guidance." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

[76] The exact number of noncitizens who would be affected is a matter of speculation. However, in its initial proposed rule from October 2017, DHS does explain that "approximately 20 percent of noncitizens who were lawful permanent residents at admission to the U.S., as well as noncitizens who were not lawful permanent residents at admission, received non-cash benefits, and approximately 2 percent of these populations receive cash benefits." Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,162. Additionally, DHS believes that the number of applicants subject to the public charge rules changes for adjustment of status in the 2016 fiscal year would have been 382,769 people. *Id.* at 51240 & n.708.

[77] Recognizing that the effect of public charge extends beyond just the noncitizen individuals, NYC estimates that 304,000 NYC residents "could be discouraged from participation in crucial public benefits programs simply because they are non-citizens or live with a noncitizen." N.Y.C. DEP'T OF SOC. SERVS., EXPANDING PUBLIC CHARGE INADMISSIBILITY: THE IMPACT ON IMMIGRANTS, HOUSEHOLDS, AND THE CITY OF NEW YORK 2 (2018), https://perma.cc/FQN7-SP5C. Another 75,000 NYC residents, including young people granted Deferred Action for Childhood Arrival, might forego public benefits out of fear, and as many as 400,000 NYC residents could be found inadmissible or unable to adjust their status due to other changes in the public charge doctrine, even when they do not and cannot receive public benefits. *Id.*; *see* Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Service*s, N.Y. TIMES (Mar. 6, 2018), https://perma.cc/XM38-4W3X.

[78] N.Y.C. DEP'T OF SOC. SERVS., *supra* note 77, at 3.

[79] N.Y.C. DEP'T OF SOC. SERVS., FACT SHEET: SNAP ENROLLMENT TRENDS IN NEW YORK CITY 2 (2019), https://perma.cc/4XBC-PZWW; *see also* FISCAL POLICY INST., "ONLY WEALTHY IMMIGRANTS NEED APPLY": HOW A TRUMP RULE'S CHILLING EFFECT WILL HARM NEW YORK (2018), https://perma.cc/FYE9-T87U.

changed eligibility rules for noncitizens seeking federal public benefits.[80] When those changes were announced, noncitizen participation rates in subsistence public benefits plummeted—even in households that included both citizens and noncitizens—and housing, health, and nutrition outcomes declined.[81]

d. People Aged Sixty and Over

Older adults are experiencing housing instability in record numbers, leading to homelessness and forced entry into institutions.[82] Unfortunately, although seniors have experienced declines in poverty nationally, the poverty rate among older adults increased in NYC from 1990 to 2016.[83]

Over sixty-three percent of Bronx residents over the age of sixty are foreign-born,[84] and almost sixty percent of Bronx households speak a language other than English at home.[85] Of the 1.4 million people who live in the Bronx, fifteen percent are over age sixty and more than thirty percent live alone.[86] Their financial situation is dire: 29.94% of Bronx seniors live below 125% of the federal poverty level, and a staggering 46.76% live below 200% of the federal poverty level.[87] Some 34% of seniors in the

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[80] Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") in 1996. Pub. L. No. 104-193, 110 Stat. 2105 (1996). PRWORA grafted immigration status requirements onto eligibility rules for federally funded public benefits. Eligibility for certain public benefits is limited to U.S. citizens and certain other "qualified aliens," some of whom have to have "qualified alien" status for a minimum period of five years. *See*, *e.g.*, 8 U.S.C. §§ 1611-15.

[81] *See* MICHAEL E. FIX & WENDY ZIMMERMANN, URBAN INST., ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 4-7 (1999), https://perma.cc/D7ZH-9HJV; MICHAEL E. FIX & JEFFREY S. PASSEL, URBAN INST., TRENDS IN NONCITIZENS' AND CITIZENS' USE OF PUBLIC BENEFITS FOLLOWING WELFARE REFORM 1994–97, at 1-3 (1999), https://perma.cc/9G26-EPPE; RANDY CAPPS ET AL., URBAN INST., THE HEALTH AND WELL-BEING OF YOUNG CHILDREN OF IMMIGRANTS, at ix (2014) https://perma.cc/LNQ9-5PPJ.

[82] JENNIFER GOLDBERG ET AL., JUSTICE IN AGING, HOW TO PREVENT AND END HOMELESSNESS AMONG OLDER ADULTS 1-4 (2016), https://perma.cc/QC5Y-W9TD; *see* Toni Kamins, *The Distressing Math of NYC's Future Senior-Housing Need*, CITY LIMITS (Apr. 24, 2019), https://perma.cc/MGL8-7UVC.

[83] N.Y.C. DEP'T FOR THE AGING, ANNUAL PLAN SUMMARY 8 (2018), https://perma.cc/Y6ZQ-BWYQ.

[84] N.Y.C. DEP'T FOR THE AGING, PROFILE OF OLDER NEW YORKERS 15 (2017), https://perma.cc/FJ2W-BL38.

[85] U.S. CENSUS BUREAU, *supra* note 16.

[86] N.Y.C. DEP'T FOR THE AGING, *supra* note 84, at 15.

[87] *Id.* at 19.

Bronx receive SNAP benefits,[88] and 31% have self-care and mobility impairments—the highest percentage of any borough in NYC.[89] Older Americans who do not own their residence face even higher levels of housing instability, and the Bronx has the lowest rate of home ownership of any borough.[90] The average Medicare recipient paid $5,503 out-of-pocket in 2013.[91] For Medicare beneficiaries with incomes at or below the federal poverty level, four in ten spend more than twenty percent of their income on premiums and out-of-pocket medical expenses.[92]

B. Current Funding for Public Benefits Work

Public benefits teams at legal services agencies rarely receive any dedicated funding.[93] The minimal funding that public benefits teams do

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[88] *Id.* at 15. The Trump administration has announced changes in determining eligibility for SNAP benefits. *See* Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35,570 (Jul. 24, 2019) (to be codified at 7 C.F.R. pt. 273). These changes threaten subsistence nutrition benefits for hundreds of thousands of people and are likely to disproportionately affect SNAP benefits for older Americans. *Id.* at 35,576 ("[I]t has been determined that there is a potential for civil rights impact to result if the proposed action is implemented because more elderly individuals may not otherwise meet the SNAP eligibility requirements.").

[89] N.Y.C. DEP'T FOR THE AGING, *supra* note 84, at 15, 31, 47, 63, 79; *see* N.Y.C. DEP'T FOR THE AGING, SERVICES SNAPSHOT (2018), https://perma.cc/83QG-T9TZ.

[90] Twenty-two percent of Bronx residences are owner-occupied, compared to forty-four percent in Queens, thirty percent in Brooklyn, and seventy percent in Staten Island. U.S. CENSUS BUREAU, *supra* note 16; *see* NYU FURMAN CENTER, STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, at 48 (2015), https://perma.cc/Q4U6-T8GK.

[91] Louise Norris, *How Much Does the Average Medicare Recipient Pay Out of Pocket for Medical Expenses?*, MEDICARERESOURCES.ORG (May 2, 2019), https://perma.cc/C873-G5GY; *see* Jennifer Molinsky & Whitney Airgood-Obrycki, *Older Adults Increasingly Face Housing Affordability Challenges*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIVERSITY (Sept. 21, 2018), https://perma.cc/GG3S-249Y.

[92] CATHY SCHOEN ET AL., THE COMMONWEALTH FUND, MEDICARE BENEFICIARIES' HIGH OUT-OF-POCKET COSTS: COST BURDENS BY INCOME AND HEALTH STATUS 4 (2017), https://perma.cc/46ZD-CKJH.

[93] For example, LSNYC is the largest provider of free civil legal services in the nation, with an annual budget of $100 million. Less than one percent of our grants are specifically tied to assisting clients increase, retain, or obtain cash public assistance, SNAP, and other subsistence benefits run by DSS. NYC's budget also underscores the lack of funding that is specifically for legal services organizations to advocate for state or city welfare benefits. With a budget now in excess of $92 billion, NYC gave grants to legal services organizations last year to help on a wide variety of critical civil legal issues: immigration, employment, family/domestic violence, foreclosure, homelessness prevention, prisoners' rights, child welfare, elder law, and other needs. *See* CITY COUNCIL OF THE CITY OF NEW YORK, FISCAL YEAR 2020 ADOPTED EXPENSE BUDGET ADJUSTMENT SUMMARY/SCHEDULE C (2019), https://perma.cc/HR6R-RPR8; OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., ANNUAL REPORT (2018), https://perma.cc/A2KG-4DYY; *see also* ALAN W. HOUSEMAN & ELISA MINOFF, PUBLIC WELFARE FOUND., THE ANTI-POVERTY EFFECTS OF CIVIL LEGAL AID

receive is invariably from a foundation or private donor for a specific reason, such as helping seniors with health benefits, and is not from government grants, which tend to be more stable and fund projects over multiple years.

Why isn't there funding for public benefits work? It isn't due to lack of need. The overwhelming percentage of our clients rely in whole or in part on public benefits at some point in their lives, and it's also a common thread between and among the different work that civil legal services agencies provide—from foreclosure to family law to immigration.[94] We have reached the conclusion that the lack of dedicated funding for public benefits work is for two main reasons: (1) welfare benefits are demonized and so are the people who receive them[95] and (2) government funders do not want to fund legal services agencies who will use the funding to appeal and challenge their systems.[96]

Bronx Legal Services has the largest single Public Benefits Unit in the state. Our work is generously supported, in part, by the New York Bar Foundation and the Venable Foundation. Without this funding, we would doubtlessly face shortfalls in our budget. However, like most legal services organizations, the majority of the funding for our public benefits works comes from flexible funding streams that are general programmatic grants that are in short supply. These funding sources include New York State's Interest on Lawyers' Account (IOLA),[97] NYS Civil Legal Services funding,[98] and Legal Services Corporation funding.[99]

28-31 (2014), https://perma.cc/2TV9-QSED (describing the importance of public benefits advocacy in civil legal services work, despite the lack of recognition and grants).

[94] For the 2017-2018 state fiscal year, LSNYC handled over 24,000 individual cases, including 5,618 "income maintenance" cases, which include cash welfare, SNAP, WIC, and different Social Security Administration benefits like SSI. *See* LEGAL SERVICES NYC, OVERVIEW OF ACHIEVEMENTS, 2017-2018, at 2 (2018), https://perma.cc/V8SK-DJ7W. Over ninety percent of our clients receive public benefits of some kind in the household.

[95] To get some perspective, the average amount of monthly cash welfare benefits received in NYC in May 2019 was a paltry $382.08. N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, TEMPORARY AND DISABILITY ASSISTANCE STATISTICS 23 (2019), https://perma.cc/YF7G-WJ8L. Additionally, sixty-three percent of people who receive cash welfare benefits only receive assistance for twelve months or less. *Time Spent in Government Programs*, U.S. CENSUS BUREAU, https://perma.cc/84PJ-L962 (last visited Jan. 1, 2020).

[96] We are not suggesting that DSS shares this view, but OCJ administers the UAC grants, among many other grants, for legal services providers. *Legal Assistance*, N.Y.C. HUMAN RES. ADMIN., https://perma.cc/U5PJ-XJDF (last visited Jan. 1, 2020).

[97] *IOLA Fund*, N.Y. STATE GOV'T, https://perma.cc/W6VJ-FPC5 (last visited Jan. 1, 2020).

[98] *Justice for All - Strategic Action Plan*, N.Y. STATE UNIFIED COURT SYS., https://perma.cc/SGG4-R85T (last visited Jan. 1, 2020).

[99] *LSC Funding*, LEGAL SERVS. CORP., https://perma.cc/T4CK-DLRM (last visited Jan. 1, 2020).

II. UNIVERSAL ACCESS TO COUNSEL IN HOUSING COURT: HISTORY & IMPLEMENTATION

A. Organizers Unite: Legislation Behind UAC

In March 2014, a piece of local legislation called Intro 214 was introduced to the NYC Council that intended to guarantee legal representation to all low-income tenants in NYC facing eviction in Housing Court and New York City Housing Authority ("NYCHA") administrative proceedings.[100] This landmark legislation did not happen in a vacuum.

For decades, tenant organizers built movements around tenant power and access to justice.[101] Community Action for Safe Apartments ("CASA"), an organizer-driven agency in the Bronx, spent years shining a light on the injustices faced by tenants in Housing Court. In 2014, when NYC Council Members Mark Levine and Vanessa Gibson pushed Intro 214 ahead, tenant organizers galvanized.[102] Recognizing that this legislation needed to be grounded in a movement, a group of veteran tenant organizers created the Right to Counsel NYC Coalition ("RTC Coalition").[103]

Two years later, the RTC Coalition had laid the groundwork[104] to build support for a right to counsel in eviction cases, creating "a veto-proof majority of the City Council, as well as the support of key stakeholders that included the City Bar, Chief Judge of the New York Courts, City Comptroller, and Borough Presidents."[105] The RTC Coalition had done extensive outreach and education, collected signatures, and used all kinds of media to build tenant power and rally around a right to counsel.[106] After more than three years of hearings and negotiations, on August 11,

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[100] New York, N.Y., Ordinance 0214-2014 (Aug. 11, 2017) (codified at N.Y.C. ADMIN. CODE §§ 26-1301 to -1305).

[101] *See generally* Michael McKee, *A History of Tenant Organizing*, *in* TENANTS & LANDLORDS: NOT A LOVE STORY, loc. 56-149 (Emily Jane Goodman & Edward Acton, eds., 2019) (ebook).

[102] *See, e.g.*, Luca Marzorati, *Council Members Push for Housing Counsel, Citing Garner*, POLITICO (Dec. 5, 2014), https://perma.cc/SP2Q-C7T7; RIGHT TO COUNSEL NYC COALITION, HOUSING JUSTICE: WHAT THE EXPERTS ARE SAYING (2014), https://perma.cc/V3WY-E3SY.

[103] RIGHT TO COUNSEL NYC, LESSONS LEARNED FROM NYC'S RIGHT TO COUNSEL CAMPAIGN (2017), https://perma.cc/PA2F-7CRR.

[104] *See, e.g.*, David Cruz, *Comptroller Stringer, Outside Bronx Housing Court, Backs Right to Counsel Bill*, NORWOOD NEWS (Feb. 4, 2015), https://perma.cc/G8LE-2D72.

[105] RIGHT TO COUNSEL NYC, *supra* note 103, at 2.

[106] *See*, *e.g.*, Steven Wishnia, *NYC Council Kicks Off Hearings on Free Counsel for Poor Tenants*, GOTHAMIST (Sep. 27, 2016, 1:01 PM), https://perma.cc/7CHH-R22B.

2017, this bill was signed into law by Mayor Bill de Blasio, adding Chapter 13 to Title 26 of the Administrative Code of the City of New York, commonly known as Universal Access to Counsel.[107]

The new law requires that the Office of Civil Justice ("OCJ"), which was created in June 2015 as part of DSS with the objective of overseeing and monitoring city-supported civil legal services,[108] establish a program that provides full representation to all tenants in housing court who have a gross household income below 200% of the federal poverty guidelines. Tenants with gross household income above the 200% limit are not guaranteed full representation, but the law establishes that they do qualify for a one-time, individualized legal consultation in connection with their eviction proceedings. The law establishes a deadline of July 2022 for OCJ to fully implement the program.[109]

The poverty levels for the forty-eight contiguous states and the District of Columbia in 2020 are as follows:[110]

Family Size	100%	200%
1	$12,760	$25,520
2	$17,240	$34,480
3	$21,720	$43,440
4	$26,200	$52,400
5	$30,680	$61,360
6	$35,160	$70,320

[107] Press Release, Office of the Mayor of New York City, Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions (Aug. 11, 2017), https://perma.cc/NA3H-DT4G; *see* Amanda Tukaj, *City Council Passes 'Right to Counsel' for Low-Income Tenants in Housing Court*, GOTHAM GAZETTE (July 21, 2017), https://perma.cc/A2RW-969Z. The organizers who led the movement and worked tirelessly for change call this legislation "right to counsel," to stress that tenants' having counsel in an eviction case is a fundamental need that should not face erosion or elimination when the political winds change. We know how critical it is to have counsel in eviction proceedings so that tenants have an equal voice in those cases. However, OCJ and the City Council usually refer to it as UAC and the name of the grant is also UAC, which is why we primarily use "UAC" in this article.

[108] OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., 2017 ANNUAL REPORT AND STRATEGIC PLAN 1 (2017), https://perma.cc/VKL2-AZF9.

[109] N.Y.C. ADMIN. CODE § 26-1302 (2019).

[110] The 2019 poverty guidelines are in effect as of January 15, 2020. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. FEDERAL POVERTY GUIDELINES USED TO DETERMINE FINANCIAL ELIGIBILITY FOR CERTAIN FEDERAL PROGRAMS (2020), https://perma.cc/9C47-KD2W; Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 3060 (Jan. 17, 2020).

7	$39,640	$79,280
8	$44,120	$88,240
Each Additional Family Member	+$4,480	+$8,960

B. Implementation

In order to meet its obligation under the new law, OCJ has contracted with twenty non-profit civil legal services providers throughout the five boroughs of NYC.[111] Through these organizations, OCJ has been phasing in Universal Access by designating particular ZIP codes in which tenants will be guaranteed access to counsel in eviction proceedings. Currently in its second year of implementation, Universal Access applies to twenty-five ZIP codes throughout New York City:[112]

Bronx	Brooklyn	Manhattan	Queens	Staten Island
10457[113]	11216	10025	11373	10302
10462	11221	10026	11385	10303
10467	11225	10027	11433	10310
10468	11226	10029	11434	10314
10453	11207	10031 & 10034	11691	

These ZIP codes were selected based on shelter entry rates, volume of eviction proceedings, the existence of rent-regulated housing, and existing service areas of legal services organizations.[114]

To fund the first phase of the implementation, OCJ increased its budget by $15 million, pushing its total investment in tenant legal services to $77 million in fiscal year ("FY") 2018.[115] That number will grow to an

[111] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 8.

[112] *See Universal Access to Legal Services*, N.Y.C. HUMAN RES. ADMIN., https://perma.cc/6ZTW-2NDC (last visited Feb. 11, 2020).

[113] ZIP code 10457 in the Bronx had the largest number of households and individuals served of any other ZIP code in NYC. *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 28-36.

[114] *See* OFFICE OF CIVIL JUSTICE, *supra* note 108, at 52.

[115] *See* OFFICE OF CIVIL JUSTICE, *supra* note 108, at 1, 53.

estimated $93 million in FY[116] 2019 before reaching an estimated $155 million by the end of the rollout in FY 2022.[117]

C. UAC as Implemented Is a Partial Solution

UAC has produced real change for low-income tenants facing eviction. While around one percent of tenants were represented in New York City Housing Courts in 2013,[118] almost fifty-six percent of tenants living in the target ZIP codes received representation during their eviction proceedings from April 1, 2018, to June 30, 2018.[119] OCJ reports that in FY 2018, eighty-four percent of households represented by one of the OCJ legal services providers were able to remain in their homes.[120] Evictions dropped by twenty-seven percent from 2013 to 2017,[121] and ninety percent of Bronx tenants represented by a UAC provider stayed in their homes at the conclusion of the case.[122]

D. What Eviction Prevention Work Looks Like

The number of Housing Court cases in New York City each year is staggering. There were 234,423 Notices of Petition filed in NYC Housing Courts in 2018 and another 101,041 filed in the first six months of 2019.[123]

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[116] NYC's fiscal year runs from July 1 to June 30. *New York City Budget Cycle*, N.Y.C. MAYOR'S OFFICE OF MGMT. & BUDGET, https://perma.cc/4SM5-Y33W (last visited Jan. 1, 2020).

[117] *See* OFFICE OF CIVIL JUSTICE, *supra* note 108, at 53.

[118] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 4.

[119] *Id.* Furthermore, from April to June 2018, thirty percent of tenants in Housing Court had counsel, and an additional four percent of tenants received legal advice or assistance via OCJ's legal programs. *Id.*

[120] *Id.* at 2.

[121] *See id.* at 7-8.

[122] *See id.* at 20.

[123] There are thirteen terms per year. In 2019, terms one through six cover January 2, 2019, through June 16, 2019. *See generally* CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 1-3 (2018), https://perma.cc/UM5M-Z4AF; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 4-6 (2018), https://perma.cc/E9EZ-WAGF; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 7-9 (2018), https://perma.cc/9P3Z-B8VA; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 10-13 (2018), https://perma.cc/EW67-VAJH; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 1-3 (2019), https://perma.cc/46NZ-QKUB; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 4-6 (2019), https://perma.cc/NA9V-F4WB (total number of Notices of Petition Filed in NYC for 2018 established by adding together total number of Notices of Petition Filed for NYC from 2018 Caseload Activity Reports for terms 1-13; total number of Notices of Petition Filed in first six months of 2019 established by adding together total number of Notices of Petition Filed for NYC from 2019 Caseload Activity Reports for terms 1-6).

In an effort to efficiently capture eligible tenants during the rollout, all covered eviction proceedings are assigned to a specific courtroom and judge in each Housing Court.[124] Attorneys from contracted organizations and sometimes DSS staff are on site, prepared to meet with tenants on the day of their first court appearance and evaluate them for eligibility. With only minutes to meet with a new client and evaluate the merits of their case, it is standard practice to adjourn Housing Court cases to the next available court date, which can be days to weeks away.[125] Cases may be adjourned multiple times to allow the landlord and tenant to reach a settlement through their attorneys. When the parties cannot settle the matter, the case is sent to a trial before a different Housing Court judge than the one who was hearing the matter for purposes of settling the case.[126]

What happens between these court dates may vary widely between organizations and even between each individual attorney. Assuming the case is based on nonpayment of rent,[127] there is a very high likelihood that this time is spent evaluating the client for an emergency rental assistance grant, which is intended to satisfy the outstanding arrears at issue in a particular eviction proceeding and thus end the eviction case. The extent to which a tenant receives assistance in this process will also vary between organizations and attorneys.

E. UAC as a Civil Gideon*?*

For years, advocates, bar associations, academics, jurists and others have fought for the right to counsel that exists for people in criminal proceedings to be extended to people in certain essential civil proceedings.[128]

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[124] *See Universal Access to Legal Services*, *supra* note 112; NYU FURMAN CTR., IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS 7-8 (2018), https://perma.cc/5CWD-CG3U.

[125] *See* NYU FURMAN CTR., *supra* note 124, at 13-16; *see also* Shuai Hao, *In the Bronx, the City's Busiest Housing Court Struggles to Serve Tenants and Landlords*, INK.NYC (Oct. 20, 2018), https://perma.cc/5GC7-RSUT.

[126] *See* N.Y.C. BAR ASS'N & N.Y.C. CIVIL COURT, A TENANT'S GUIDE TO THE NEW YORK CITY HOUSING COURT 11 (2006), https://perma.cc/VP9K-WC55; *see generally New York City Housing Court*: *Resolution Part,* N.Y. STATE UNIFIED COURT SYS., https://perma.cc/SC7X-A8S3 (last visited Jan. 1, 2020).

[127] In 2017, 87.6% of the eviction cases filed in the Housing Court in New York City were based on nonpayment of rent and 12.4% were holdover proceedings. OFFICE OF CIVIL JUSTICE, *supra* note 108, at 18-19. Holdover proceedings are eviction proceedings based on something other than outstanding rent, such as violation of the terms of the lease or remaining in possession of the apartment after the end of the landlord tenant relationship.

[128] *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 38-44 (2010); *see also* Tonya L. Brito et al., *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223 (2016); Earl Johnson Jr., *50 Years of* Gideon*, 47 Years Working Toward a "Civil* Gideon*,"* 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 47 (2013); Robert J. Derocher,

The movement has largely become known as "Civil *Gideon*."[129] The fundamental difficulties that lower income people face in accessing justice without counsel may only be remediated by providing adequate, free representation. We have highlighted the inequity when the proceedings involve litigants that usually have their own counsel (such as landlords) or a government actor that has institutional processes in place to represent the government's interests. We have even done the gum-shoe detective work to prove that an investment in adequate counsel for low-income people ends up saving the government money.[130]

In 2017, on the shoulders of countless advocates who have demanded Civil *Gideon* over decades and at the peak of NYC's homelessness crisis, organizers seized the moment and achieved what had seemed like an unattainable pipe dream: the NYC Council passed legislation creating a right to counsel for all low-income people facing eviction in NYC.[131]

Bronx Legal Services is part of Legal Services NYC ("LSNYC"), one of only two legal providers in NYC that has UAC contracts in every NYC borough. With our reach into all five boroughs, we have a unique perspective on lessons learned thus far about how to implement a successful UAC program for low-income people facing eviction.

To date, UAC funding has not been adequate to cover the actual costs of providing representation to low-income people facing eviction. With the limited funding given, providers have (rightfully) prioritized hiring housing attorneys, leaving no funds available to cover the personnel costs

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Access to Justice: Is Civil Gideon *a Piece of the Puzzle?*, B. LEADER MAG., July-Aug. 2008, https://perma.cc/87CD-CQY3; Douglas Grant, *Liberals Abandoned Civil Legal Aid. Now They Need to Bring it Back.*, SLATE (Oct. 12, 2018, 4:33 PM), https://perma.cc/KXM2-F5ZS; Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of* Gideon*: Immigration, Deportation, and the Right to Counsel*, HUM. RTS. MAG., Oct. 1, 2013, https://perma.cc/R5MD-2JA5; Nina Schuyler, *The Civil* Gideon *Movement: Justice for All?*, S.F. ATT'Y, Summer 2008, at 14; Editorial, *Better Access to Legal Representation is Crucial – Even in Civil Cases*, L.A. TIMES (Apr. 20, 2019, 3:05 AM), https://perma.cc/4KZN-4FHK.

[129] While *Gideon* only applied to criminal cases, *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that defendants in criminal state court proceedings have a right to counsel grounded in our federal constitution), the Supreme Court expanded *Gideon* in very limited circumstances to other quasi-criminal proceedings, *see, e.g.*, *In re* Gault, 387 U.S. 1 (1967) (holding that juveniles in delinquency cases have a right to counsel because they have a "liberty interest" at stake). *See also* sources cited *supra* notes 100-109 and accompanying text.

[130] *See, e.g.*, Darryl Bloodworth, *Civil Legal Aid Breaks the Cycle of Poverty, Benefits Taxpayers*, ORLANDO SENTINEL (Sep. 18, 2015), https://perma.cc/JZ3F-XXM7; *see also* PERMANENT COMM'N ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 7-8 (2018), https://perma.cc/7TSN-KWPF.

[131] The legislation defines "income-eligible" as households with gross incomes that are equal to or less than 200% of the federal poverty level. N.Y.C. ADMIN. CODE § 26-1301 (2019); *see also supra* note 1 and accompanying text.

of the paralegal advocates,[132] whose work both directly prevents the evictions and helps create longer-term stability. LSNYC and other providers have largely shouldered those additional costs, but in order for UAC to be a sustainable model, the funding needs to include adequate monies to staff UAC with benefits paralegals. This is analogous to the funding provided to comply with *Gideon*'s right-to-counsel promise in criminal cases: the government can't provide just enough funding to cover the personnel costs of the defense attorneys; it must also cover other costs, such as paralegals, investigators, process servers, training/trainers, office managers, paper clips, staplers, copy machines, rent, etc.[133] The same should be true of any successful "civil *Gideon*" UAC model.

We should already have learned these lessons. We have seen public defenders across the country work under impossible conditions, with extraordinary caseloads and inadequate staffing.[134] When New York recognized that the promise of *Gideon* could not be meaningfully kept when public defenders are overworked and under-supported, the state took the extraordinary step of creating case caps for public defenders in NYC. Steven Banks, who is now the Commissioner of NYC DSS but at the time was the Attorney-in-Chief of The Legal Aid Society, praised the case caps because defendants would now "be represented by a lawyer with an ap-

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[132] *See* Transcript of Public Hearing Before Office of Civil Justice on OCJ's Universal Access to Legal Counsel Program 35 (Nov. 15, 2018), https://perma.cc/Y2JN-PC7W (statement of Jeanette Cepeda, union member with Legal Services Staff Association and housing staff attorney at Brooklyn Legal Services); *see generally* Joint Testimony of Unionized Legal Services Workers on the NYC Office of Civil Justice's Programs to Provide Universal Access to Legal Services for Tenants Facing Eviction (Nov. 15, 2018), https://perma.cc/FYE8-AVHA.

[133] *See, e.g., Model Contract for Public Defense Services (Black Letter)*, National Legal Aid & Defender Association, https://perma.cc/QMN8-6TDF (last visited Jan. 1, 2020) (discussing the need for adequate support staff at Section VII.F); *see also* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L.J. 2150, 2160-71 (2013); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 10-11 (2004), https://perma.cc/7FJS-C22C; U.S. DEP'T. OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES 16-18 (2000), https://perma.cc/G3RK-EJEL.

[134] *See* John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2141-44 (2013); Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2680-85 (2013); Margaret A. Costello, *Fulfilling the Unfulfilled Promise of* Gideon*: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1956-57 (2014); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 133, at 10-11; *see generally* Eyal Press, *Keeping* Gideon*'s Promise*, NATION (Mar. 16, 2006), https://perma.cc/RTQ3-TWVB; Nikita Mary Singareddy, *Failing* Gideon*: An Indigent Defense System in Crisis*, GENERATION PROGRESS (Aug. 11, 2015), https://perma.cc/FT4G-8EVD.

propriate caseload who can provide the highest quality of representation."[135] Public defenders have lauded the implementation of case caps while also pointing out that funding must be increased to help with other costs of public defense, such as investigators.[136]

Civil legal service providers have seen public defenders stretched too thin, with burgeoning caseloads and inadequate support. We should understand that these same issues will plague any version of Civil *Gideon*, including UAC, that myopically discounts the minimum staffing providers require. We need OCJ, which is part of DSS and under now-Commissioner Banks, to recognize that funding for the ground-breaking UAC legislation needs to be sufficient to, in Commissioner Banks' words, "provide the highest quality of representation" that our clients deserve. That necessarily includes funding for public benefits advocates.[137]

F. Public Benefits Resolve Most Nonpayment Cases in Housing Court

Around eighty-five percent of residential NYC Housing Court eviction cases are nonpayment of rent cases.[138] The Bronx, with the fourth-highest population[139] among the five NYC boroughs, consistently has the most eviction cases filed as well as the highest number of evictions.[140] Of the residential eviction cases borough in the Bronx, over ninety percent are nonpayment cases.[141]

The attorneys from LSNYC and other providers who represent tenants facing eviction are the lynchpin of UAC's success. These attorneys represent tenants in Housing Court, raise defenses, ensure repairs, vacate judgments, challenge illegal rents, fight illegal evictions, and more. Without UAC funding for adequate numbers of housing attorneys, there can be no justice and no mention of Civil *Gideon*.

However, in most cases, a public benefits paralegal obtains the monies that end the nonpayment case. Among other things, public benefits paralegals obtain rent arrears grants[142] ("one-shot deals") and obtain or

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[135] John Eligon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES (Apr. 5, 2009), https://perma.cc/Y44X-6BPM.

[136] *See*, *e.g.*, MELISSA LABRIOLA ET AL., CTR. FOR COURT INNOVATION, INDIGENT REFORMS IN BROOKLYN, NEW YORK: AN ANALYSIS OF MANDATORY CASE CAPS AND ATTORNEY WORKLOAD, at v, ix (2015), https://perma.cc/D7CV-3BDW.

[137] *See* Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 88 (2017) (discussing different roles paralegals and other advocates could and should play in improving access to justice).

[138] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 6.

[139] *See QuickFacts*, *supra* note 16.

[140] *See* OFFICE OF CIVIL JUSTICE, *supra* note 93, at 21.

[141] *See* OFFICE OF CIVIL JUSTICE, *supra* note 93, at 21-22.

[142] *See*, *e.g.*, N.Y. SOC. SERV. LAW §§ 106, 303, 350-j (McKinney 2019), N.Y. COMP. CODES R. & REGS. tit. 18 §§ 352.3, 352.7, 370.3, 372, 397, 423.2 (2019).

apply for rent subsidies such as the Family Homelessness and Eviction Prevention Supplement from HRA.[143] Despite never stepping foot in Housing Court, public benefits paralegals play a direct, measurable role in resolving the eviction cases by obtaining public assistance grants to pay the arrears from DSS.

But what if we did more than end the housing case? What if we had enough funding to provide comprehensive benefits assistance and representation to families and individuals struggling with underlying housing stability issues? We can and we must, and it will cost only as much as the additional funding we already need and already should be receiving to hire public benefits paralegals or advocates to do the bread-and-butter anti-eviction work.

G. Our Proposed Model

Our model looks at anti-eviction work within the context of larger trends facing low-income Bronx residents: punitive and complex safety net systems, stagnant wages, lack of affordable housing, and displacement through gentrification. We know that integrated models of service delivery like medical-legal partnerships[144] provide opportunities for legal service providers to think holistically about the multitude of civil legal issues that low income clients face.

Eviction is one of these civil legal issues, but it is often a symptom of other issues just below the surface, such as unemployment or inability to access benefits due to immigration status, medical costs, or domestic violence. Quality, comprehensive public benefits advocacy can stabilize people over a longer period of time when the advocate has the opportunity and training to assess and intervene on the full spectrum of public benefits issues: food insecurity, issues with public health insurance coverage, obtaining personal care services at home for disabled household members, waivers of public assistance rules for survivors of DV, eliminating Medicare premiums, ensuring all members of the household are receiving maximum benefits, and more. Housing attorneys do not have the time or training to address these different public benefits issues, and the UAC grants have not been sufficient to date to cover the personnel costs of public benefits paralegals—whether "comprehensive" or otherwise. Our proposed model is simple: UAC must include sufficient funding to hire an adequate number of public benefits paralegals so that we can provide the

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[143] *See generally* N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE NO. 17-26-ELI, INTRODUCTION TO THE FAMILY HOMELESSNESS AND EVICTION PREVENTION SUPPLEMENT (FHEPS) (2017), https://perma.cc/76FL-KU9R.

[144] *The Need*, NAT'L CTR. FOR MED.-LEGAL P'SHIP, https://perma.cc/A4MG-LPL6 (last visited Jan. 2, 2020).

comprehensive, holistic public benefits advocacy that both meets the immediate need of obtaining arrears to stop the eviction and addresses a wide array of economic and health issues that cause housing instability.

This comprehensive public benefits anti-eviction model grows out of our Public Benefits Unit, where we have typically partnered with our Housing Unit to resolve the immediate housing crisis faced by low-income Bronx residents. While anti-eviction cases allow our clients to remain housed, they do not address the systemic benefits and health-related challenges that continue to leave some of the most vulnerable households at risk of future homelessness. Specifically, we provide enhanced intervention and assessment to the four subpopulations outlined earlier in this article who are disproportionately homeless and have higher levels of housing instability, households which include (1) someone with a disability or serious illness; (2) survivors of DV; (3) noncitizens; and/or (4) someone aged sixty or over. Having identified these vulnerable populations, our model allows us to interrupt the cycle of housing insecurity by providing targeted interventions designed to maximize their public benefits, minimize their out-of-pocket expenses, including health care, and ensure access to benefits by, for example, obtaining reasonable accommodations for clients with disabilities. And the great news, from a fiscal standpoint, is that our model is cost-efficient and does not require a significant increase in the number of paralegal advocates that UAC should already be funding.

In addition to preventing recidivism and reducing the risk of homelessness, our model also increases access to legal representation for low-income and vulnerable people, some of whom would not otherwise seek legal assistance.[145] The number of people in our four subgroups seeking our assistance through UAC has skyrocketed, leading us to conclude that these four sub-populations may not seek legal assistance unless or until they are faced with eviction.[146]

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[145] *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (discussing how, despite facing more legal issues than higher-income people, low-income people are generally less likely to obtain legal assistance for their problems).

[146] *See, e.g.*, Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLINICAL L. REV. 201 (2014) (examining barriers DV survivors face in seeking help); Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315 (2009) (studying the lack of access to legal and social services that seniors can face, from the lens of seniors who end up in guardianship proceedings); DENNY CHAN & VANESSA BARRINGTON, JUSTICE IN AGING, HOW CAN LEGAL SERVICES BETTER MEET THE NEEDS OF LOW-INCOME LGBT SENIORS? (2016), https://perma.cc/YZ7N-B7VP (discussing unmet legal needs and reluctance to obtain legal help among LGBT seniors); DAYNA BOWEN MATTHEW, CTR. FOR HEALTH POLICY AT BROOKINGS, THE LAW AS HEALER: HOW PAYING FOR MEDICAL-LEGAL

H. Looking at Current Measures of Success

The current UAC model primarily measures success by evaluating the number of evictions prevented.[147] Some preliminary findings show that tenants are less likely to be evicted if they have access to an attorney and there are significant declines in evictions in UAC ZIP codes when compared to non-UAC ZIP codes.[148] We agree that the number of people who are able to stay in their homes at the conclusion of their Housing Court cases is the most critical metric, but only examining success through this lens ignores other impacts and achievements that potentially lessen housing instability. If one family faces three separate non-payment housing court proceedings within a year, under the current UAC model, we have been successful three different times if we prevent the eviction even though it's the same family. We should be counting each service as success, but we need to *reframe* success in eviction prevention to include additional legal interventions. We can quantify or track public benefits-related assistance that increase access to housing stability for our most vulnerable populations to keep them out of Housing Court, reduce the likelihood that DV survivors will return to unsafe situations, and improve health outcomes, among other things.[149] Examples of our model's intervention are probably the best demonstration of how we can redefine success.[150]

PARTNERSHIPS SAVES LIVES AND MONEY (2017) (underscoring that people with physical and mental disabilities seek civil legal services help even less often than low-income people generally); N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, THE HEALTH OF IMMIGRANTS IN NEW YORK CITY (2006), https://perma.cc/D9WZ-KLEB (highlighting the worse health outcomes among noncitizens due to reticence to obtain help or have Medicaid); *see generally* Greene, *supra* note 145, at 1267, 1295 (examining barriers to civil legal services based on race and past experiences, including "past interactions . . . [with] public benefits hearings that were not actually criminal in nature, but felt criminal and punitive"); AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016) (highlighting the vast unmet need of people who need civil legal services, identifying that "[i]ndividuals of all income levels often do not recognize when they have a legal need."); LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017) (overviewing different gaps in justice facing low-income people across the nation).

147 N.Y.C. ADMIN. CODE § 26-1304(a)(3)(i)-(iii) (2019).

148 OKSANA MIRONOVA, CMTY. SERV. SOC'Y, NYC RIGHT TO COUNSEL: FIRST YEAR RESULTS AND POTENTIAL FOR EXPANSION (2019), https://perma.cc/L94Q-GWXA.

149 Requiring UAC providers to submit even more data for each case we handle under this grant would pose serious hardships. UAC funding must increase so that we can afford to hire the concomitant increase in staffing we would need to track, enter, and report on various data points.

150 We have slightly altered some facts and details to preserve our clients' identities.

1. Case Study: Ms. R

During the early rollout of UAC, Bronx Legal Services represented Ms. R, a disabled tenant in her late forties facing eviction due to non-payment of rent. The client had stage four breast cancer, was undergoing chemotherapy, and had severe mobility impairments. During the course of our representation, Ms. R faced several other legal issues that required expert intervention and collaboration between her housing attorney and public benefits paralegal, in addition to preventing her eviction.

The utility company shut off the client's electricity without warning, which left her unable to use medical equipment to alleviate her breathing difficulties and impaired access to life-saving medications that required refrigeration. The housing attorney and public benefits paralegal used a multi-prong approach to intervene with the utility company and the landlord to restore services as quickly as possible.

The public benefits advocate also requested a reasonable accommodation with DSS because the client was homebound and could not travel to an office to apply or renew vital public benefits such as SNAP and Medicaid. When she faced a delay in getting an expedited SNAP approval, we advocated with DSS and she received $192 of SNAP benefits shortly thereafter. We also requested an administrative hearing and pursued informal advocacy to challenge the illegal termination of her participation in a program that pays her Medicare Part B premium of $134 per month. The client's only source of income was Social Security Disability Insurance benefits of $822 a month, so to have an additional $134 deducted from her check every month was a financial hardship and exacerbated her overall situation. Lastly, we helped her apply for and obtain a rental subsidy that paid her rental arrears and seventy percent of her monthly rental share on an ongoing basis. This subsidy allowed her to remain in her apartment and resolved her non-payment Housing Court case.

Under the UAC model, Ms. R's case is a success because she was not evicted. Under our comprehensive public benefits anti-eviction model, our intervention in a variety of legal areas allowed Ms. R to increase household income through SNAP, reduce health care expenses through the Medicare Part B premium payment programs, and reestablish access to life-saving medication and equipment by restoring utility service, in addition to obtaining a rental subsidy that allows her to afford her rent and remain housed.[151] UAC as an entry point was critical for this

[151] Ms. R has not been to Housing Court since this case was resolved, and she reports that recent medical care she has received has greatly improved her health.

client. Despite the numerous civil legal needs she was facing, she did not seek legal services until she was served with eviction papers.

2. Case Study: Ms. S

As part of UAC, Bronx Legal Services represented Ms. S in a nonpayment proceeding. A public benefits paralegal evaluated her case and identified that Ms. S's household was within the income limit to qualify for cash public assistance benefits. Our benefits advocate also identified that, having already met other eligibility requirements, once a public assistance case was active, Ms. S would also be eligible for a rent subsidy,[152] which would pay her arrears and a portion of her rent going forward. Ms. S was advised to apply for public assistance at her local job center.

Ms. S is a noncitizen and a survivor of domestic violence. She lives with her three U.S. citizen children, each of whom was entitled to receive cash public assistance benefits, although Ms. S herself was not eligible. Ms. S does not have a Social Security number, but she has the right to apply for cash public assistance on behalf of her children since she is their legally responsible relative. Despite her right to apply for public assistance for her children, Ms. S was fearful of applying for benefits because of her immigration status and was worried she would be deported if she applied for benefits.

Ms. S had applied for benefits in the past, but she stopped the process when DSS told her that she must cooperate with DSS to sue the father of her children for child support. She had been abused by him for years and did not want to invite him back into her life. As a result, she had walked away from the public benefits application process months ago, which contributed to her housing instability as the rent arrears mounted. Fortunately, the public benefits paralegal who was working with Ms. S was able to advise her that she would not be subject to the public charge doctrine and that she was eligible for a DV waiver,[153] which would prevent DSS from suing her abuser for child support due to the potential for harm to her.

Ms. S then applied for a cash public assistance case, which she needed to qualify for the rent subsidy. DSS turned Ms. S away from the welfare center, telling Ms. S that she could not apply for benefits because she did not have a Social Security number.

Our Public Benefits Unit has worked on several cases similar to Ms. S's, which has allowed our advocates to identify systemic issues. The paralegal advocate immediately recognized the erroneous information given to Ms. S and intervened by referring our client to our in-house social

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[152] The rent subsidy is the Family Homelessness Eviction Prevention Supplement, or "FHEPS." *See* N.Y.C. HUMAN RES. ADMIN., *supra* note 143.

[153] *See* sources cited *infra* note 167.

worker. Our social worker accompanied Ms. S to the welfare center. During this second visit made by our client to DSS, the agency processed Ms. S's public assistance application; however, a center worker incorrectly denied our client the right to apply for a DV waiver, saying that "DV waivers don't exist." The DV waiver was critical to exempting Ms. S from the child support enforcement requirement that would subject Ms. S to contact with her abuser.

After various communications to HRA's legal team and a successful Fair Hearing win, Ms. S's public assistance case became active, allowing her to obtain the rental subsidy to stop the eviction. Ms. S was also granted a DV waiver that allowed her to safely apply for public assistance without involving her abuser in the process to do so.

By the time the housing attorney appeared in Housing Court to discontinue the eviction case against our client, Ms. S's monthly income had increased by 850% and the majority of her rent going forward would be covered by the subsidy. Additionally, her SNAP benefits increased and her children started to receive WIC benefits.[154] Ms. S's case demonstrates that non-attorney advocates, specifically those well-versed in public benefits rules and eligibility, contribute to significant improvements that can stabilize clients in their home well after a housing attorney discontinues a court case.

III. RECOMMENDATIONS

We need to invest in housing stability, not just eviction prevention, especially for populations that are the most vulnerable to repeat episodes of housing instability and homelessness. Ms. R and Ms. S are just two of the many clients we encounter with complex public benefit needs who require both anti-eviction defense work and extensive legal advocacy across different issues. Through UAC, legal service providers like Bronx Legal Services are helping more people every year, and we need to marshal our limited resources to provide comprehensive assistance to our clients—especially given the complex nature of our public benefits systems and the legal systems generally. Unrepresented clients in civil matters suffer much worse outcomes than those with legal representation.[155] "[Eighty-six percent] of the civil legal problems reported by low income Americans in the past year received inadequate or no legal help"; "[seventy-one percent] of low-income households experienced at least one

[154] *See* 42 U.S.C. § 1786 (2018) (seeking to assist Women, Infants, & Children ("WIC") via a federally-funded nutrition assistance program for children, pregnant women, and new mothers, which covers certain foods that may be lacking in the diets of the affected populations).

[155] Engler, *supra* note 128, at 48-66.

civil legal problem, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care."[156] We have taken the first step by enacting UAC legislation, but without adequate funding and a shift in service delivery, we will not be able to disrupt housing instability and prevent homelessness.

Funding for UAC must keep pace with the actual costs that organizations bear to implement and expand this program. The failure to provide adequate funding threatens the sustainability of UAC in both the short and long term, and places an enormous amount of financial strain on legal services organizations that must prioritize hiring housing attorneys over any other personnel with our limited funding in order to meet the grant requirements and ZIP code expansions. LSNYC has almost entirely covered the cost of non-attorney staff such as paralegals, who play a critical role in obtaining arrears grants and subsidies, provide valuable interventions with government agencies, and engage in effective legal advocacy that extends beyond the housing crisis.[157] Public benefits can help stabilize families and individuals, especially our four most vulnerable populations: older adults, individuals with disabilities or a chronic health condition, noncitizens, and survivors of domestic or intimate partner violence.

A. A Critical Moment to Support Low-Income Noncitizens

Rhetoric against immigrants from our federal government has created a climate of fear. Low-income noncitizens are even further marginalized, afraid to access public benefits.[158] Legal service providers must seize this moment and improve noncitizen access to comprehensive legal services. Incorporating non-attorneys and paralegals into the UAC initiative is critical to assist households with noncitizens in accessing public benefits.

If limits to public benefits are enforced on noncitizens, the income deficits that already exist will reach unprecedented levels and inevitably increase homelessness rates for noncitizens. Both citizens and noncitizens will be displaced as a result from terminating benefits as many noncitizen households are mixed with members that are citizens.[159]

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[156] LEGAL SERVS. CORP., *supra* note 146, at 6.

[157] Joint Testimony of Unionized Legal Services Workers on the NYC Office of Civil Justice's Programs to Provide Universal Access to Legal Services for Tenants Facing Eviction, *supra* note 132.

[158] *See* sources cited *supra* note 70.

[159] Rebekah Entralgo, *HUD Admits New Rule on Undocumented Immigrants Could Displace Thousands of Kids Who Are Citizens*, THINKPROGRESS (May 10, 2019, 11:06 AM), https://perma.cc/5KT2-PACL.

B. Expanding the Definition of Success

Public benefits advocates can assist clients with legal issues in legal settings despite not being attorneys.[160] They are trained as problem solvers, often provide representation in administrative hearings to our most vulnerable clients, and can do so in a more cost-effective manner.[161] In our model, public benefits paralegal advocates play a vital role in promoting housing stability for individuals who face eviction because the model relies on a comprehensive screening of clients to meet unidentified and unmet legal needs and screen them for eligibility for other public benefits. Our model focuses on building paralegal advocates' capacity to assess and identify the barriers and legal problems that clients face which jeopardize their housing stability. In partnership with housing attorneys and other public benefits experts, public benefits advocates are able to engage both in informal advocacy and representation through administrative hearings in order to achieve greater outcomes for their clients that extend beyond the anti-eviction benefits work that has traditionally defined intervention.

We recognize that typical government funding for legal services programs requires the collection and reporting of different data that is usually designed to prove that the services provided are not just for the public good but also offer tax savings, reduce recidivism, and/or help to reduce strain on our court systems. Our model is particularly well-suited to measure success by tracking and quantifying outcomes for all households across a variety of benefits programs and by measuring our impact differently.[162] As explained in more detail below, we can quantify the increase in household income and the decrease in household expenses; we can look at the number of administrative appeals filed and won; we can document the number of DV-related waivers of public assistance rules we have obtained; we can track the public benefits we have helped obtain for noncitizens; and we can count the number of times we have provided advice about the public charge rules to noncitizen clients, among other things. By looking at more than just "this eviction averted," we can see the broader impact UAC can and should have on low-income communities.

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[160] Peter Chapman, *The Legal Empowerment Movement and Its Implications*, 87 FORDHAM L. REV. ONLINE 183, 183-85 (2018).

[161] LEGAL SERVS. STAFF ASS'N FOR LOCAL 2320 & LEGAL SERVS. NYC, COLLECTIVE BARGAINING AGREEMENT 115, 126, 130 (2018), https://perma.cc/8TZA-DKLG. While both are grossly underpaid, paralegal salaries are considerably lower than attorneys' salaries at legal services agencies. For example, at LSNYC, a paralegal with 35 years of experience earns the same salary as an attorney with three years of experience.

[162] Again, having additional reporting requirements necessitates more funding to hire the staff required for data entry, collection, and analysis.

1. Examine Existing Data Through Different Lenses

Rather than just measuring whether clients "win" their eviction case, we can identify and measure the amount of benefits that we helped clients receive to prevent the eviction in the first place, such as the amount of a rent arrears grant or rent subsidy we obtained. Furthermore, we can quantify the number of evictions that our benefits assistance has prevented, and we can identify the number of Housing Court cases that we have avoided (i.e. before the landlord files for eviction) through early interventions.

2. Fair Hearings to Appeal Reductions or Cessation of Benefits

Paralegals may represent appellants at welfare Fair Hearings, which are formal administrative hearings to challenge denials and reductions. Fair Hearings are critical for benefits recipients because they are essentially the only accessible forum to challenge welfare decisions, as very few cases are appealed to the court system.[163] *Pro se* appellants face many challenges before an administrative law judge ("ALJ") that make it difficult to obtain a full and fair hearing.[164] ALJs do not receive much training or guidance on how to elicit narratives from *pro se* appellants, making it more challenging for benefits recipients to have their case fully heard.[165] However, appellants who are represented at Fair Hearings have more favorable outcomes than those that attend *pro se*.[166] Favorable Fair Hearing trends may offer more of a predictor of housing stability, and can be more specifically reviewed for the increase or continuation of individual benefits.

Current UAC funding is not sufficient to cover the personnel costs of public benefits advocates generally, much less advocates who handle welfare Fair Hearings as part of their work. Having advocates who represent people at welfare Fair Hearings requires additional funding for a variety of different reasons, including the additional time and supervision needed to train and hire benefits advocates who can conduct Fair Hearings. Furthermore, all Fair Hearings in NYC take place in Brooklyn.[167] Thus, whenever someone in our Bronx Legal Services Public Benefits

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[163] Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 601, 618 (2010).

[164] Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447, 449-57 (2007).

[165] *Id.* at 454, 478.

[166] Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885, 942 (2016).

[167] *Request a Fair Hearing*, N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, https://perma.cc/4TFM-JPP4 (last visited Jan. 2, 2020).

Unit represents someone at one of these hearings, it takes several hours of time away from the office.

3. Measuring Our Impact for Survivors of Domestic Violence Who Face Eviction

New York State's Office of Temporary and Disability Assistance ("OTDA") recognizes that as many as fifty percent of cisgender women who receive public assistance benefits may be survivors of DV.[168] In 2016, 9,987 people[169] were granted DV waivers under the "Family Violence Option."[170] But in December 2015, there were almost 300,000 people in receipt of public assistance.[171] Survivors of domestic violence need advocates and information so that they can access public assistance benefits and waivers.[172]

These waivers grant DV survivors a reprieve from welfare rules, such as suing abusive partners for child support or requiring DV survivors to work, which can increase the likelihood of danger to the survivor or survivor's children.[173] We can quantify how many DV waivers our UAC clients receive.

4. Measuring Our Impact on Enhancing Stability for People Living with Disabilities/Serious Illness

For households with a member who is disabled or has a serious illness, we can calculate reductions in out-of-pocket costs for health-related

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[168] N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, ADMINISTRATIVE DIRECTIVE 03 ADM 2, DESK REFERENCE FOR DV SCREENING UNDER THE FAMILY VIOLENCE OPTION 2 (2003) ("[U]p to 80% of women receiving [temporary cash assistance] may be survivors of or attempting to escape violent relationships."); *see* Stephanie Holcomb et al., *Implementation of the Family Violence Option 20 Years Later: A Review of State Welfare Rules for Domestic Violence Survivors*, 16 J. POL'Y PRAC. 415 (2017); Taryn Lindhorst et al., *Screening for Domestic Violence in Public Welfare Offices: An Analysis of Case Manager and Client Interactions*, 14 VIOLENCE AGAINST WOMEN 5 (2008); DON FRIEDMAN, EMPIRE JUSTICE CTR., POVERTY AND VIOLENCE: DOES NEW YORK'S FAMILY VIOLENCE OPTION MAKE A DIFFERENCE? 1 (2019), https://perma.cc/74MN-RHP8.

[169] N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, NEW YORK STATE DOMESTIC VIOLENCE DASHBOARD 2016, at 4 (2017), https://perma.cc/6VWZ-UXHG.

[170] N.Y. SOC. SERV. LAW §§ 349-a, 459-a (McKinney 2019); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 347.5, 351.2, 357, 369.2 (2019). N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE #19-08-ELI, DOMESTIC VIOLENCE PROGRAM (2019).

[171] N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, TEMPORARY AND DISABILITY ASSISTANCE STATISTICS 5 (2015), https://perma.cc/TL69-LCKR.

[172] *See* FRIEDMAN, *supra* note 168, at 23-26.

[173] *See generally* Jack Newton et al., *Public Assistance and Housing: Navigating Difficult Benefits Systems*, *in* LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 343-68 (Mary Rothwell Davis et al. eds., 6th ed. 2015).

expenses, including copays, insurance premiums and more, which can reduce housing instability by increasing available income in the household.[174] A study by the Center for Outcomes Research and Education indicates that affordable housing reduces health care expenses.[175] If public benefits advocates assist tenants in keeping more money in their pockets through access to Medicare Savings Program, Medicaid, Medicare or other health-related benefits, then tenants can use more of their income for their rent. Additionally, we can review the numbers of annual requests for reasonable accommodations that households with a disabled member make for assistance accessing public benefits through DSS, community-based organizations, and other possible social services providers.

We can also measure the increased income in households where we help enroll eligible members of the household as consumer directed personal assistance program ("CDPAP")[176] aides. Finally, we can calculate the savings to households that we enroll in the City's Disability Rent Increase Exemption (DRIE) program,[177] which freezes households' rent-regulated rents so that the household no longer has to pay the annual rent increases. Instead, rent increases are covered as tax credits to the landlords but do not come out of clients' pockets.

5. Looking at Successful Interventions to Improve Housing Stability for Noncitizens

For noncitizens, we can measure the number of noncitizen clients we helped obtain Medicaid, SNAP, cash public assistance, and WIC benefits, and we can determine the amount of increased household benefits we obtained by getting HRA to include eligible noncitizens in the household.

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[174] *See, e.g.*, Heidi L. Allen et al., *Can Medicaid Expansion Prevent Housing Evictions?*, 38 HEALTH AFF. 1451 (2019); Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RES. 362, 364 (2016); NAT'L COAL. FOR THE HOMELESS, HEALTH CARE AND HOMELESSNESS (2009), https://perma.cc/FBV6-35UX ("Homelessness and health care are intimately interwoven."). The converse is also true, that housing instability and food insecurity are associated with increased acute care. Kushel et al., *supra* note 24; Ruthanne Marcus et al., *Longitudinal Determinants of Housing Stability Among People Living with HIV/AIDS Experiencing Homelessness*, 108 AM. J. PUB. HEALTH 552 (2018).

[175] *Study Finds Affordable Housing Reduces Health Care Costs*, NAT'L LOW INCOME HOUS. COAL. (Mar. 7, 2016), https://perma.cc/VS9J-RK3S.

[176] N.Y. COMP. CODES R. & REGS. tit. 18 § 505.28 (2019). CDPAP offers individuals the option of choosing who can provide them with personal care services, allowing people to hire certain trusted family members or friends as aides. The aides receive an hourly wage.

[177] Rules of the City of New York tit. 19 § 52-01 (2019) (relating to the senior citizen and disability rent increase exemption programs).

6. Examining Data to Measure Improved Housing Stability for Older Adults

For older adults aged sixty and over, we can measure and quantify all of the outcomes described above—all of which can happen to people of any age. In addition, we can calculate the savings to households we helped enroll in the City's Senior Citizen Rent Increase Exemption program, which operates the same way as DRIE mentioned earlier.

CONCLUSION: KEEPING *GIDEON*'S PROMISE

Legal service providers in NYC are at an extraordinary time: experiencing unprecedented growth that allows us to expand our services to tens of thousands more people each year. We applaud our City Council, Mayor, DSS, and the tireless work of organizers like the Right to Counsel NYC Coalition for pioneering first-in-nation legislation creating a right to counsel in eviction cases.

Paralegals who handle cases are the unsung heroes of the civil legal services world. These fearless advocates represent clients at administrative hearings on city, state, and local levels. They obtain arrears to stop evictions, and they assess every client for a variety of different legal and social needs. As we have outlined in this article, public benefits advocates can play a critical role in reducing household expenses, maximizing household income, and improving access to benefits. Paralegals are also cost-effective compared to attorneys, although we do not contend that anyone who works in civil legal services has a salary that comes anywhere near approximating the value of our work.

The UAC-funded housing attorneys representing tenants in Housing Court have already dramatically lowered evictions, saving thousands of people from entering our shelter system. To create a longer-term, successful anti-eviction model, we need to be sure that funding is sufficient to meet the needs of the communities we are serving. Under any iteration of UAC, we must have the funding necessary to cover, at minimum, both housing attorneys and public benefits paralegals. We have come so far, and we cannot afford to be penny-wise and pound-foolish.